No. 07-689

In the

# Supreme Court of the United States

GARY BARTLETT, ET AL.,

*Petitioners,*

v.

DWIGHT STRICKLAND, ET AL.,

*Respondents.*

## On Writ of Certiorari to the North Carolina Supreme Court

## BRIEF FOR THE PETITIONERS

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# QUESTION PRESENTED

Whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

## LIST OF PARTIES TO THE
## PROCEEDINGS BELOW

The petitioners are Gary Bartlett in his official capacity as Executive Director of the North Carolina State Board of Elections; Larry Leake, Robert Cordle, Genevieve C. Sims, Lorraine G. Shinn and Charles Winfree, in their official capacities as members of the State Board of Elections; Joe Hackney in his official capacity as Speaker of the North Carolina House of Representatives; Marc Basnight, in his official capacity as President Pro Tempore of the North Carolina Senate; Michael Easley, in his official capacity as Governor of the State of North Carolina; and Roy Cooper, in his official capacity as Attorney General of the State of North Carolina.

The respondents are Dwight Strickland, David Williams and Stephen Holland.

Pender County, F.D. Rivenbark and Eugene Meadows were among the plaintiffs in the action below and originally appealed to the North Carolina Supreme Court from the entry of summary judgment against them. These three plaintiffs later withdrew their Notice of Appeal.

Joe Hackney, as the current Speaker of the North Carolina House of Representatives, is the successor in office to James B. Black and Richard T. Morgan who were sued in their official capacities.

# TABLE OF CONTENTS

iv

# TABLE OF AUTHORITIES

## CASES

## CONSTITUTIONS

## STATUTES

## MISCELLANEOUS

## OPINIONS BELOW

The opinion of the North Carolina Supreme Court (Pet. App. 1a-50a) is reported at *Pender County v. Bartlett*, 649 S.E.2d 364 (N.C. 2007). The partial summary judgment order (Pet. App. 51a-105a) and final judgment (Pet. App. 106a-120a) of the three-judge panel of the Superior Court are unreported.

## JURISDICTION

The judgment of the North Carolina Supreme Court was entered on August 24, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

## STATUTORY PROVISIONS INVOLVED

Section 2 of the Voting Rights Act ("VRA"), Pub. L. No. 89-110, Title I, § 2, 79 Stat. 437 (1965), as amended, provides as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 U.S.C. § 1973b(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances,

it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

## STATEMENT

### A. Factual Background

1. The North Carolina General Assembly consists of a House of Representatives and a Senate. The House of Representatives has 120 members elected to two-year terms. N.C. Const. art. II, §§ 1, 4; Pet. App. 58a. Although 22.1% of the voting-age population of

North Carolina is African-American,[1] the House historically has included few African-American members. At the time of the 1980 census, only 3 representatives (2.5% of the total) were African-American. During the 1980s, the number of black representatives grew to 14 (11.7% of the total). As a result of redistricting in the 1990s, that number rose as high as 18 (15.0% of the total).[2] Pet. App. 59a-60a.

In 1991, the United States Department of Justice faulted the General Assembly for its failure to draw any single-member districts in the southeastern part of the State with a sufficient concentration of black voters to enable them to elect candidates of their choice.[3] J.A. 68 (Wright Aff. ¶ 3). In response, the

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[1]   Voting-age population figures are derived from the 2000 census. The State of North Carolina maintains a statistical database called Log Into North Carolina (LINC), at www.linc.state.nc.us.

[2]   Currently, the House has 20 black representatives (16.7% of the total).

[3]   The eight counties that comprise southeastern North Carolina have a total population of approximately 600,000 based on the 2000 census. Thus, the area has enough population for nine House Districts and four Senate districts. Although blacks comprise 22% of the population of this eight county area, the only district in which blacks have the ability to elect their candidate of choice is House District 18 – the current version of the district that was

General Assembly adopted a redistricting plan that created a majority-minority House district in southeastern North Carolina. The district covered portions of four counties, including Pender and New Hanover Counties, and had an African-American voting-age population of 55.7%. Pet. App. 61a. In 1992, voters in the new district elected Thomas E. Wright as the first and only African-American representative in southeastern North Carolina since Reconstruction. Representative Wright won re-election in that district in 1994, 1996, 1998, and 2000. *Id.* at 61a, 114a; J.A. 41-42 (Alexander Aff. ¶ 9).

2. Following the 2000 census, the General Assembly adopted two initial redistricting plans that were struck down by the North Carolina Supreme Court on state constitutional grounds. *Stephenson v. Bartlett (Stephenson I)*, 562 S.E.2d 377 (N.C. 2002); *Stephenson v. Bartlett (Stephenson II)*, 582 S.E.2d 247 (N.C. 2003). The North Carolina Constitution provides that "no county shall be divided" in the formation of state House and Senate districts. N.C. Const. art. II, §§ 3(3), 5(3).[4] The court acknowledged that strict

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originally formed in response to the concerns of the United States Department of Justice.

[4] In 1968, in response to *Drum v. Seawell*, 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd*, 383 U.S. 831 (1966), the North Carolina Constitution was amended to add the Whole County Provisions. These amendments were not submitted

compliance with the Whole County Provisions was "impossible" in light of the VRA and the "one-person, one-vote" requirement. *Stephenson I*, 562 S.E.2d at 396. But it concluded that "[t]he intent underlying the [provisions] must be enforced to the maximum extent possible," and held that the legislature could draw district lines that traverse county boundaries "only to the extent necessary" to comply with federal law. *Id.* at 397. The court rejected the initial redistricting plans as constitutionally deficient under that framework. *Stephenson II*, 582 S.E.2d at 314. The 2002 elections were conducted using an interim map devised by the trial court. The interim plan maintained this district (District 18) as a Section 2 district with an African-American population of less than 50%. Pet. App. 68a; J.A. 68-70 (Wright Aff. ¶¶ 4, 5).

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for preclearance under the Voting Rights Act until 1981. On November 30, 1981, the United States Department of Justice interposed an objection to the Whole County Provisions pursuant to Section 5. These provisions were therefore deemed to have no force or effect. *Cavanagh v. Brock*, 577 F. Supp. 176 (E.D.N.C. 1983). Following a review of the North Carolina Supreme Court's opinion in *Stephenson I*, the Department of Justice withdrew its objection to the Whole County Provisions on July 12, 2002. *See* U.S. Dep't of Justice, *Section 5 Objection Determinations* (available at www.usdoj.gov/crt/voting/sec_5/nc_obj2.htm).

In 2003, the General Assembly undertook a third effort to redraw the boundaries of state House Districts, including the district which had elected Representative Wright. By the time of the 2000 census, the black voting-age population in that district had fallen below 50%, and this Court's decision in *Shaw v. Hunt*, 517 U.S. 899 (1996), had prompted concerns about the district's shape. Pet. App. 61a, 65a. Unable to maintain a geographically compact majority-minority district, the General Assembly nonetheless was obligated under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, to afford African-American voters an equal opportunity to elect representatives of their choice. It therefore adopted a plan that made this District more compact, while maintaining an adequate concentration of black voters to comply with Section 2 of the VRA. J.A. 38-40 (Alexander Aff. ¶¶ 3,4); J.A. 71 (Wright Aff. ¶ 7). Under the plan, District 18 has a total black population of 42.9%, a black voting-age population of 39.4%, and a population in which 53.7% of registered Democratic voters are black. Pet. App. 69a.

3. Because the border of District 18 crosses the boundary between Pender and New Hanover Counties, the district can only comply with the state constitution, as construed in *Stephenson*, if crossing county lines is necessary to comply with federal law or one-person, one-vote requirements. The General Assembly concluded that the revised configuration of

District 18 was necessary to comply with Section 2 of the VRA. J.A. 40, 43-44 (Alexander Aff. ¶¶ 6, 13-14).

Several considerations supported that judgment. First, historical election results in North Carolina show that House districts with a black voting-age population that is comparable to House District 18 "can provide an effective opportunity for the election of black candidates." J.A. 40-41 (Alexander Aff. ¶ 7). Districts with lower concentrations of black voters have generally not elected black candidates. For example, in 2004, House District 32, a district with a black voting-age population slightly less than House District 18, elected a white candidate, despite a strong challenge by an African-American candidate in the Democratic primary. See J.A. 109 (Second Wright Aff. Attach. A).[5] District 18 has a total black population of 42.9% and a black voting-age population of 39.4% – percentages that are above the historical levels necessary to give black voters an opportunity to elect their candidate of choice. The General Assembly determined that the best single-county alternative district would have had a "significantly lower" concentration of black voters. Id. at 73 (Wright Aff. ¶ 11); accord J.A. 42-43 (Alexander Aff. ¶ 11).

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[5] North Carolina election results are available at http://www.sboe.state.nc.us/content.aspx?id=69 ("Election Results"). The race of individual candidates can, in most cases, be determined from voter registration records.

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Second, taking into account party primary results, districts with black Democratic registration as low as 52.6% had previously elected black representatives. J.A. 40-41 (Alexander Aff. ¶ 7). In numerous districts, black candidates who win the Democratic primary consistently prevail in the general election because of a small but predictable level of cross-over voting by members of the racial majority. *See* Pet. App. 70a; J.A. 123-26 (Engstrom Rept. Tbls. 1-2). In District 18, registered Democrats outnumber Republicans by a 2-to-1 margin, and 53.7% of registered Democrats are black, a level that had proven sufficient for blacks to elect candidates of their choice. Pet. App. 70a. The General Assembly found that the best single-county alternative district, by contrast, would have reduced black Democratic registration "below the levels that have in the past successfully provided black citizens in North Carolina an opportunity to elect their candidate of choice." J.A. 42-43 (Alexander Aff. ¶ 11); *see* J.A. 73 (Wright Aff. ¶ 11).

Third, District 18 has in fact consistently elected the candidate of choice of African-American voters. In 2004, Representative Wright defeated another black Democrat to secure his party's nomination, and went on to defeat a Republican challenger in the general election with 64% of the vote.[6] In 2006, Representative

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[6] The three-judge panel below incorrectly stated that Representative Wright ran unopposed in 2004. Pet. App. 98a.

Wright defeated a white Democrat in the primary, and again won the general election with 64% of the vote. In the 2008 primary, *all three* Democrats running in the party primary were African-American.[7] It is undisputed that District 18 as presently constituted has consistently elected the candidate of choice of black voters. Pet. App. 70a.

## B. Procedural Background

1. In 2004, respondents brought an action in state court alleging that District 18 violated the North Carolina Constitution, as construed in *Stephenson I*.[8] Petitioners answered that it was necessary to cross county lines when drawing District 18 to comply with Section 2 of the VRA. Pursuant to state law, the redistricting challenge was referred to a three-judge panel. Pet. App. 6a; N.C. Gen. Stat. § 1-267.1(b).

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[7] Representative Wright was expelled from the House on March 20, 2008. Following his expulsion, an African-American (Sandra Spaulding Hughes), favored by African-American voters, prevailed in the Democratic primary for House District 18. Hughes has been appointed to fill the unexpired term for this office.

[8] Pender County and its commissioners, in their official capacity, originally were among the plaintiffs. The three-judge panel determined that the county lacked standing to sue state officials, and the county did not appeal that determination. Pet. App. 7a.

The panel recognized that a vote dilution claim under Section 2 must satisfy the three preconditions identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Under *Gingles,* a plaintiff must show: (1) that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority group is "politically cohesive"; and (3) that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 50-51. The parties filed cross-motions for summary judgment, focusing on the first *Gingles* precondition. Respondents took the position that Section 2 of the VRA has no application in this case because African-Americans do not constitute a numerical majority in District 18.

The three-judge panel unanimously rejected the contention that a vote dilution claim under Section 2 depends on a concentration of minority voters above 50%. The panel held that the first *Gingles* precondition "depends on the political realities extant in the particular district in question, not just the raw numbers of black voters present in the general population of the district." Pet. App. 93a. Based on the text of Section 2, the panel determined that the critical question is whether minority voters form "a *de facto* majority that can elect candidates of their own choosing," considering the totality of circumstances and not "sheer numbers alone." *Id.*

Based on the undisputed evidence, the three-judge panel granted petitioners' motion for partial summary judgment on the first and second *Gingles* preconditions. It described District 18 as an "ability to elect" or "coalition" district in which African-American voters "'are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their own choice.'"[9] Pet. App. 90a (quoting *Georgia v. Ashcroft*, 539 U.S. 461, 481 (2003)). The panel accepted petitioners' uncontradicted evidence that past election results demonstrate that districts with a black voting-age population comparable to House District 18 "can provide an effective opportunity for the election of black candidates." *Id.* at 97a. It also agreed that "a more

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[9] Consistently throughout this litigation, the State has contended that District 18 constitutes a "coalition" district (also referred to as a "crossover" district or "ability to elect" district) in which the minority group may elect its candidate of choice as a result of being joined by predictably supportive voters from outside the minority group. In contrast to a "coalition" district, an "influence" district arises when a minority group has "the ability to influence the outcome between some candidates, none of whom is their candidate of choice." *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2625 (2006) (plurality opinion). The State has not asserted and does not assert that District 18 is protected under Section 2 of the Voting Rights Act as an "influence" district.

important indicator of effective black voting strength
is the percentage of registered Democrats who are
black." *Id.* Noting that District 18 has a black voting-
age population of 39.4% and that 53.7% of registered
Democrats are black in a district where Democrats
comprise "an overwhelming majority," the panel
concluded that "it is not rocket science" to see how
black voters can elect their candidate of choice. *Id.*
The panel pointed to actual election results in District
18 as proof that a black Democrat stood the best
chance of winning election. *Id.* at 97a-98a.

Noting that respondents had not challenged any of
petitioners' evidence,[10] *id.* at 98a, the panel held that
the first *Gingles* precondition was satisfied as a matter
of law, *id.* at 99a. The court further held that the
second *Gingles* precondition was also satisfied, *id.*, but
concluded that there may exist genuine issues of
material fact concerning the third *Gingles*
precondition, *id.* at 100a.

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[10] The parties had provided the court with extensive
stipulations and exhibits regarding the history of race
discrimination in Pender and New Hanover Counties and
its lingering effects. J.A. 131-50. In fact, Pender County,
which was originally part of New Hanover County, was
formed in 1875 as a result of Reconstruction politics in
order to isolate Republicans and African-Americans within
the southern portion of New Hanover County from the
remainder of the county. J.A. 143-44. Pender County is
named after Confederate General William D. Pender. *Id.*

2. Following the panel's ruling, respondents agreed to detailed factual stipulations, and further agreed that there remained no genuine issue as to any material fact. *Id.* at 128a-131a. Among other things, respondents stipulated that petitioners had presented evidence "sufficient to support a finding of fact that the African-American populations in Pender and New Hanover counties are politically cohesive" and that "racially polarized voting exists in Pender and New Hanover counties so that African-American candidates usually are overwhelmingly the choice of African-American voters, but are not the choice of non-African-American voters." Pet. App. 129a-30a. They further stipulated "that the evidence presented by [petitioners] is sufficient to support a finding of fact that the racial difference in the preference of voters results in the white majority voting sufficiently as a block to usually enable it to defeat the minority's preferred candidate." *Id.* at 130a. Respondents informed the panel that they did "not wish to be heard further or to present evidence" on any remaining issue. *Id.*

Based on those stipulations, the three-judge panel held that petitioners had satisfied all three *Gingles* preconditions, and that "House District 18 was required to be drawn as it was in order to provide the African-American minority in Pender and New Hanover Counties . . . [with] an equal opportunity to elect a representative . . . of their choice as required by Section 2 of the VRA." Pet. App. 116a. The court concluded that District 18 "complies, to the maximum

extent practicable, with the legal requirements of the [Whole County Provisions] as established in *Stephenson I.*" *Id.* at 117a.

3.    The North Carolina Supreme Court, in a divided opinion, reversed the three-judge panel. The court emphasized that "[o]nly the first *Gingles* precondition is at issue in this appeal." Pet. App. 14a. The court explained that it faced only the "narrow question" whether the first *Gingles* precondition "requires that the minority group constitute a numerical majority of the relevant population, or whether a numerous minority can satisfy the precondition." *Id.* Respondents raised no challenge concerning the remaining *Gingles* preconditions, and the court accepted the undisputed evidence—not challenged on appeal—that past election results in North Carolina had shown that a House district, with a black voting-age population of 38.4%, "creates an opportunity to elect African-American candidates." *Id.* at 5a. Accordingly, the sole issue before the North Carolina Supreme Court was "whether the United States Supreme Court in *Gingles* meant a quantitative majority of the minority population (i.e., greater than 50 percent)." *Id.* at 14a.

Citing the need for a "bright line rule," the court held that the first *Gingles* precondition requires a strict 50% numerical majority. Pet. App. 23a-24a. The court emphasized that, for ease of administration and to ensure that the rule serves as a "safe harbor" for the

legislature, no circumstances can justify deviation from the 50% rule, even at the risk of foreclosing meritorious claims. *Id.* at 24a. The court acknowledged that a strict 50% requirement raises its own set of questions. *Id.* at 15a (asking, "a 'majority' or 'minority' of *what?*"). But it held that the "proper statistic" for deciding whether a minority group forms a majority of a district is the population of voting-age citizens. *Id.* at 17a. The court proceeded to "direct" that all current legislative districts "and any future [redistricting] plans" must satisfy the 50% rule or "be redrawn in compliance with the Whole County Provision of the Constitution of North Carolina." *Id.* at 33a. Thus, under the decision below, a district could not be drawn with a minority citizen voting-age population of 49.5% if the district crossed county lines in violation of the Whole County Provisions. Because petitioners had not shown that at least 50% of voting-age citizens in District 18 are African-American, the court held that the configuration of District 18 was not mandated by Section 2 of the VRA, and that the 2003 redistricting plan thus violated the state constitution. *Id.* at 27a.

Chief Justice Parker, in a dissent in which Justice Timmons-Goodson joined, opined that the majority had misconstrued both Section 2 of the Voting Rights Act and this Court's decision in *Gingles.* Chief Justice Parker noted that "the United States Supreme Court has not endorsed a bright line requirement that a minority group seeking Section 2 VRA relief constitute

a numerical majority." Pet. App. 41a (Parker, C.J., dissenting). Chief Justice Parker concluded that such a "rigid numerical majority requirement" is inconsistent with both this Court's precedent and the intent of the Voting Rights Act. *Id.* at 42a.

## SUMMARY OF ARGUMENT

The North Carolina Supreme Court construed Section 2 of the VRA to impose a bright-line rule that a minority group constituting less than a numerical majority of voting-age citizens in a proposed district can never bring a Section 2 vote dilution claim. The court erred in adopting that unbending 50% rule. A minority group that is sufficiently large to elect candidates of its choice by forming a coalition with a limited number of other voters, but that would be deprived of that opportunity by a State's districting plan, is not categorically barred from bringing a Section 2 vote dilution claim.

This Court's cases do not impose a 50% rule. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court established three preconditions for a Section 2 claim, the first of which requires minority voters to show that they could constitute a majority in a proposed district. *Id.* at 50. *Gingles*, however, reserved the question whether a minority group could establish a Section 2 vote dilution claim when it is sufficiently large to elect candidates of its choice in a proposed district with the aid of some crossover votes.

The Court has since repeatedly reserved that question. Moreover, the Court in *Johnson v. De Grandy*, 512 U.S. 997 (1994), reformulated the first *Gingles* precondition to require a minority group challenging a districting plan to show that it is "sufficiently large . . . to elect candidates of its choice." *Id.* at 1008. That formulation readily accommodates a claim by minority voters that they can elect candidates of their choice with limited crossover voting when a State's districting plan deprives them of that opportunity.

The text of Section 2 imposes an opportunity-to-elect precondition, not a 50% precondition. Specifically, the language of Section 2 prohibits a voting practice that deprives minority voters of the "opportunity . . . to elect representatives of their choice." 42 U.S.C. § 1973(b). That statutory language requires minority voters to show that the minority group is sufficiently large and compact "to elect representatives of their choice" in an additional opportunity-to-elect district. Otherwise, minority voters would be unable to show that the districting plan is the cause of their inability to elect. Once a minority group shows that it is sufficiently large to elect representatives of its choice in an additional opportunity-to-elect district, however, the text of the statute imposes no further requirement that they also constitute a numerical majority of voting-age citizens in the proposed district.

In certain highly polarized communities, minority voters would be unable to show that they would have an opportunity to elect unless they can also show that they would constitute a numerical majority in the district. But as the Court recognized in *De Grandy*, there are other communities in which, despite racially polarized voting, a minority group can establish that it is sufficiently large to elect its preferred candidates with the aid of limited crossover voting. In such cases, the statute's first precondition is satisfied.

House District 18 is an example of such a district. Indeed, in the two elections held in that district, minority voters have elected their candidate of choice. Rejecting a Section 2 claim in such circumstances on the sole ground that minority voters fail to constitute a numerical majority in the district would replace the opportunity-to-elect precondition established by the language of the statute with an extra-textual, policy-based screening device.

The 50% rule is also at odds with the totality-of-circumstances test prescribed by the statutory terms. To attribute dispositive significance to a single factor, such as the minority population in a district, while ignoring all other evidence bearing on whether minority voters have been deprived of equal electoral opportunity, is the very antithesis of a totality-of-circumstances test.

The 50% rule also creates disharmony between Section 2 and Section 5. In *Georgia v. Ashcroft*, 539

U.S. 461 (2003), all nine Justices agreed that a court should consider both safe majority-minority districts and coalition districts in deciding whether a new plan diminishes the preexisting ability of minority voters to elect candidates of their choice. The 2006 amendment to Section 5 codifies that consensus by prohibiting any retrogression in the "ability" of minority voters "to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b).

While Section 2 and Section 5 differ in important respects, they share a common purpose of protecting minority voters against practices that dilute their opportunity to elect representatives of their choice. In light of that common purpose, there is no reason that the Section 5 ability-to-elect inquiry should consider the effect of both majority-minority districts and coalition districts, while the Section 2 opportunity-to-elect standard should focus exclusively on the former.

The 50% rule stands at odds with the ultimate objective of the Voting Rights Act of minimizing the role of race in politics. That rule puts indirect pressure on States to create majority-minority districts even when they are not necessary to provide minority voters with an opportunity to elect representatives of their choice. The result is to inject race into redistricting more than is necessary to achieve Section 2's remedial objectives, and also to diminish a State's discretion to pursue other legitimate redistricting objectives.

Creating majority-minority districts when they are not necessary to provide minority voters with an opportunity to elect candidates of choice can also entrench the very polarized voting patterns Section 2 seeks to ameliorate. Coalition districts, by contrast, can promote a hastening of the end of polarized voting patterns. *See De Grandy*, 512 U.S. at 1020.

The 50% rule also leaves a significant gap in Section 2's protection against districting plans that dilute minority voting strength. Under that rule, a jurisdiction could pack as many minority voters as possible into a district that is already a safe majority-minority district in order to prevent minority voters from electing their candidates of choice in surrounding coalition districts. Or if minority voters are electing candidates of their choice in a coalition district, a jurisdiction could respond by fragmenting minority voters into multiple districts in which they lack the opportunity to elect candidates of their choice. As long as the minority voters could not constitute a numerical majority in a district, a jurisdiction would have carte blanche to dilute their opportunity to elect candidates of their choice. Because the 50% rule conflicts with the text, history, and purposes of Section 2, the Court should reject that rule.

## ARGUMENT

**A Minority Group That Constitutes Less Than A Numerical Majority Of Voting-Age Citizens In A Proposed District, But That Can Elect Its Candidates Of Choice In That District, Is Not Categorically Barred From Bringing A Section 2 Vote Dilution Claim**

The North Carolina Supreme Court held that a minority group that constitutes less than a numerical majority of voting-age citizens in a proposed district can *never* establish a Section 2 vote dilution claim. Based on this unbending 50% rule, a showing by an under-50% minority group that it is sufficiently large to elect candidates of its choice in a proposed district is always irrelevant. It makes no difference how close to a numerical majority the minority group would be, how little crossover voting the minority group would need to elect candidates of choice, or how overwhelming the evidence is that the minority group could elect its preferred candidates. The single fact that the minority group could not constitute a numerical majority in a district would be fatal to its Section 2 vote dilution claim.

The North Carolina Supreme Court's ruling constitutes a blanket directive that the 50% rule shall be applied to the current and all future redistricting plans: "Any legislative district designated as a Section 2 district under the current redistricting plans, and any future plans, must either satisfy the [50%]

numerical majority requirement . . . , or be redrawn in compliance with the Whole County Provision of the Constitution of North Carolina . . . ." Pet. App. 33a. Under the court's decision, the state legislature is foreclosed from maintaining or creating a single under-50% opportunity district in order to comply with Section 2, unless it can do so without crossing county lines.

The court's decision has far-reaching consequences for both the state legislature and for minority voters. Under the court's 50% rule, if African-Americans constituted 49.5% of the citizen voting-age population in a district that crossed county boundaries and had consistently elected the candidates of their choice from that district, the state legislature would be required to dismantle the district. The legislature would be forced to take that action even if there were no way to reconfigure the district to afford African-Americans an opportunity to elect their preferred candidates, and even if that district were the only one in a particular region of the State in which African-Americans had an opportunity to elect candidates of their choice.

That interpretation of Section 2 is incorrect. A minority group that is sufficiently large to elect candidates of its choice through a coalition with a limited number of other voters, but would be deprived of that opportunity in the state's districting plan, is not categorically barred from bringing a Section 2 vote dilution claim. Section 2 does not require a court to

blind itself to the reality of vote dilution simply because a minority group does not constitute a numerical majority in a district.

## I. This Court's decisions do not impose a 50% rule

Section 2 prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). A violation of Section 2 is established "if, based on the totality of circumstances, it is shown that . . . [members of a protected] class of citizens . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

Section 2's prohibition against voting practices that deny minority voters an "opportunity . . . to elect representatives of their choice" protects minority groups against districting plans that dilute their voting strength. A districting plan can dilute minority voting strength in two ways: by fragmenting minority voters among several districts where a bloc-voting majority can usually defeat them, or by packing minority voters into one or a small number of districts to minimize their opportunity to elect candidates in other districts. *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994).

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court set out three preconditions for bringing a Section 2 vote dilution claim: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group must be "politically cohesive," and (3) the white majority must vote "sufficiently as a bloc . . . usually to defeat the minority's preferred candidate." *Id.* at 50-51. While *Gingles* involved a challenge to multimember districts, those three preconditions also apply to claims concerning single-member districts. *De Grandy*, 512 U.S. at 1006.

Seizing on the literal language of the first precondition, the North Carolina Supreme Court held that *Gingles* forecloses any claim in which the minority group is unable to show that it would constitute a numerical majority of the citizen voting-age population in a proposed district. Pet. App. 33a. *Gingles*, however, expressly reserved the question whether a Section 2 claim can be brought when the minority group "is not sufficiently large and compact to constitute a majority in a single-member district." 478 U.S. at 46 n.12.

In a concurring opinion, Justice O'Connor, joined by three other Justices, endorsed such a claim in circumstances in which minority voters can elect their candidates of choice with limited crossover voting. She explained that when a minority group is not sufficiently large to constitute a numerical majority,

but the group can establish that limited white crossover voting would occur "to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice." *Id.* at 90 n.1 (O'Connor, J., concurring).

Since the decision in *Gingles*, the Court has repeatedly left open the question whether a minority group can bring a coalition district claim when it is sufficiently large to elect candidates of its choice with limited crossover votes, but a State's districting plan, through fragmentation or packing, deprives them of that opportunity. *Voinovich v. Quilter*, 507 U.S. 146, 154, 158 (1993); *De Grandy*, 512 U.S. at 1008-09; *League of United Latin American Citizens v. Perry* ("*LULAC*"), 126 S. Ct. 2594, 2624 (2006).

In *Voinovich*, the Court explained that *Gingles* had addressed the requirements for a claim in which minority voters allege that they "have been deprived of the ability to constitute a *majority*," and had not resolved whether the first precondition should be "modified or eliminated" when minority voters claim that they have been deprived of the opportunity to be a "sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority." 507 U.S. at 158. The Court declined to decide that issue in *Voinovich* because the plaintiffs

failed to satisfy *Gingles*' third precondition of white bloc voting.

In *De Grandy*, the Court once again reserved that issue, this time because the plaintiffs failed to establish a Section 2 violation under the totality of circumstances. 512 U.S. at 1009. Significantly, however, the Court reformulated the first *Gingles* precondition in a way that readily accommodates a coalition district claim. Instead of describing the first *Gingles* precondition as requiring proof that minority voters could constitute a majority in a district, the Court in *De Grandy* stated that "[w]hen applied to a claim that single-member districts dilute minority votes, the first *Gingles* precondition requires the possibility of creating more than the existing number of reasonably compact districts with *a sufficiently large minority population to elect candidates of its choice*." 512 U.S. at 1008 (emphasis added). The *De Grandy* Court also recognized that minority voters could elect candidates of their choice in coalition districts without constituting a numerical majority in the district, explaining that "there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of choice." *Id.* at 1020.

In *LULAC*, a plurality of the Court concluded that Section 2 does not protect the right of minority voters to influence elections between candidates who are not

their candidates of choice. The plurality stated that "the opportunity to elect representatives of their choice . . . requires more than the ability to influence the outcome between some candidates, none of whom is the candidate of choice." 126 S. Ct. at 2625. The plurality distinguished that claim, however, from a coalition district claim in which the plaintiffs show that "they constitute a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes." *Id.* at 2624. Assuming without deciding that Section 2 can "accommodate this claim," the plurality concluded that plaintiffs had failed to prove that they could elect the candidate of their choice in the district at issue. *Id.*

This Court's cases thus leave open the question whether plaintiffs who do not constitute a numerical majority in a district are categorically barred from bringing a Section 2 claim. For the reasons that follow, the Court should now hold that a numerical majority in a district is not an invariable requirement for a Section 2 vote dilution claim.

## II. The text of Section 2 imposes an opportunity-to-elect precondition, not a 50% rule

The text of Section 2 prohibits a districting plan that gives minority voters "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). That statutory language "says nothing about majority-minority districts." *Voinovich,*

507 U.S. at 155. Instead, it asks whether a minority group, of whatever size, has been deprived of an opportunity to elect candidates of choice.

That statutory standard necessarily requires minority voters challenging a districting plan to establish that they would have an "opportunity . . . to elect" candidates of their choice in at least one additional district. *De Grandy*, 512 U.S. at 1008; *LULAC*, 126 S. Ct. at 2654-55 (Roberts, C.J., concurring in part and dissenting in part). Absent such a showing, plaintiffs cannot establish that the districting plan is responsible for their inability to elect representatives of their choice. *See Gingles*, 478 U.S. at 50 n.17. Once minority voters show that they would have the opportunity to elect representatives of their choice in an additional district, however, the first precondition for a vote dilution claim has been satisfied. Nothing in the language of Section 2 supports a further requirement that minority voters also establish that they would constitute a numerical majority in the district.

There are some communities in which racial polarization is so severe that minority voters can establish that they would have an opportunity to elect candidates of their choice only by showing that they could constitute a numerical majority in a proposed district. But as the Court recognized in *De Grandy*, there are other communities in which, despite polarized voting, minority voters can elect candidates

of their choice by forming coalitions with a limited number of other voters. In such cases, the first precondition for a vote dilution claim would be satisfied, and invoking the 50% rule to foreclose a plaintiff's claim would lack any textual justification.

For example, as the United States has explained, Section 2's opportunity-to-elect precondition can be satisfied when minority voters show that they would constitute slightly less than 50% of the voters in a proposed district, but can nonetheless elect candidates of their choice with the assistance of a small amount of crossover voting. Br. for U.S. as *Amicus Curiae* at 11, 13, *Valdespino v. Alamo Heights Indep. Sch. Dist.,* 528 U.S. 1114 (No. 98-1987). Such a showing can be made, the United States observed, when minority voters introduce evidence that they would have constituted 48% of the voters in a proposed district and that they had elected candidates of their choice in a district having a comparable minority percentage. *Id.* at 13-14.

Similarly, as the United States has recognized, the first precondition can also be satisfied where minority voters would constitute a somewhat lower percentage of the voting-age population. Section 2, after all, no more contains a near-50% rule than it contains a 50% rule. For example, in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991), while minority voters could have constituted 44%-46% of the voters in a district, the

county deliberately divided minority voters between two districts in which they constituted 23% of the voters. As the United States explained, by deliberately depriving minority voters of the opportunity to elect representatives of their choice with the assistance of the limited crossover voting that could be expected, the county violated the plain language of Section 2. *See* Br. for U.S. in Opp. at 21-22, *County of Los Angeles v. Garza* (Nos. 90-849 & A-422).

House District 18 is another example of a district in which minority voters, although constituting less than a majority of the voting-age population, can elect representatives of their choice. The clearest evidence of that is the results of the two elections held in that district since its creation. In both elections, African-Americans elected their candidate of choice. *See* Pet. App. 70a.

Experience in other House Districts in North Carolina provides further evidence of the opportunity of African-Americans to elect candidates of their choice in House District 18. In ten districts having comparable population characteristics (more than 38.4% in African-American voting-age population), African-American voters have elected candidates of their choice. Pet. App. 5a, 97a; J.A. 40-41 (Alexander Aff. ¶ 7). That is consistent with experience in other States, where minority voters often are able to elect representatives of their choice when they are close to 40% of the voting-age population in the district. *See* J.

Morgan Kousser, *Beyond* Gingles: *Influence Districts & the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. Rev. 551, 566-68 (Spring 1993).

Other objective characteristics of the district strengthen the conclusion that House District 18 is a coalition district in which African-Americans have an opportunity to elect candidates of their choice. In particular, African-Americans constitute 53.7% of the voters who are registered as Democrats in that district, and more than 59% of the voters in the district are registered as Democrats. Pet. App. 70a. Those figures support the reasonable inference that African-Americans can control the party nomination and can then obtain sufficient crossover voting in the general election to elect the candidate of their choice. *See LULAC*, 126 S. Ct. at 2648 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part) (first *Gingles* precondition can be satisfied when "minority voters in a reconstituted or putative district constitute a majority of those voting in the primary of the dominant party, that is, the party tending to win in the general election").

Moreover, African-Americans constitute more than 39% of the voting-age population in the district. Pet. App. 97a. At that percentage, African-Americans are more than three times the size of the 11% crossover group that is necessary for a coalition between African-Americans and crossover voters to constitute more than 50% of the voters in the district. That evidence

is a further objective indicator that African-Americans can elect their candidates of choice rather than merely assist another larger group in electing candidates who are preferred by that group, but not by African-Americans. *See LULAC*, 126 S. Ct. at 2624-25 (plurality opinion) (African-Americans constituting 25.7% of the citizen voting-age population could not elect candidates of their choice but could only assist in electing the candidates preferred by others).

Evidence that so plainly establishes that minority voters can elect candidates of their choice in a district where they are less than 50% of the voting-age population satisfies the first precondition for a Section 2 claim. To reject such a claim based on a failure to satisfy a mechanical 50% rule would substitute an extra-textual, policy-based screening device for the opportunity-to-elect precondition that is established by the language of the statute.

### III. The 50% rule is inconsistent with other relevant indicators of congressional intent, including the statute's totality-of-circumstances test

The 50% rule cannot be reconciled with the remainder of Section 2's text or its legislative history. Most prominently, Section 2 provides that the judicial inquiry into whether an election practice dilutes minority voting strength must be based on the "totality of circumstances." 42 U.S.C. § 1973(b). To attribute dispositive significance to a single factor, such as the

minority voting-age population in a district, while ignoring all other evidence bearing on whether minority voters have been deprived of equal electoral opportunity, is the very antithesis of a totality-of-circumstances test.

The Court made that very point in *De Grandy* when it rejected the argument that proportional representation always defeats a Section 2 vote dilution claim. The Court explained that such "an inflexible rule would run counter to the textual command of Section 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.'" 512 U.S. at 1018 (quoting 42 U.S.C. § 1973(b)). The Court added that, under the totality-of-circumstances test, "[n]o single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength." *Id.* at 1020-21. That reasoning is directly applicable here.

In addition, the text of Section 2 asks whether a voting practice "results" in denying minority voters equal electoral opportunity. 42 U.S.C. § 1973(a). That statutory language directs a court to focus on the actual consequences of an election practice, not on whether a formalistic rule has been satisfied.

The 50% rule also finds no support in Section 2's detailed Senate Report. That Report sets out a list of "typical" factors that are relevant in proving a Section 2 vote dilution claim. S. Rep. No. 97-417, at 4 (1982),

*reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. Conspicuously absent from that list is any requirement that minority group members prove that they could constitute a numerical majority in a proposed district. Furthermore, while the Senate Report endorses an inquiry that depends on "a searching practical evaluation of the past and present reality," *id.* at 30, and on a "functional view of the political process," *id.* at 30 n.120, a rigid 50% rule ignores practical reality and mandates a formal rather than a functional approach.

Consistent with the text of Section 2 and the Senate Report, the other two *Gingles* preconditions – minority group cohesion and white bloc voting – involve functional inquiries that depend on an investigation into the actual voting behavior of the electorate. *Gingles*, 478 U.S. at 58-59. There is no sound reason why a similar functional approach should not be followed in deciding whether minority voters can elect candidates of their choice in a proposed district.

## IV. The 50% rule creates disharmony between Section 2 and Section 5

In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Court held that the question whether a practice or procedure with respect to voting is retrogressive under Section 5 is not limited to deciding whether the plan reduces the number of safe majority-minority districts. The Court explained that a reduction in safe majority-

minority districts could be offset by an increase in coalition districts in which minority voters could elect candidates of their choice with limited crossover votes. *Id.* at 480-82. The Court also held that a reduction in safe minority-majority districts might be offset by an increase in influence districts where minority voters cannot elect candidates of choice but can nonetheless play a substantial role in the election process. *Id.* at 482. The dissent in *Georgia v. Ashcroft* agreed with the majority that the replacement of safe majority-minority districts with coalition districts was not necessarily retrogressive, *id.* at 492-93 (Souter, J., concurring in part and dissenting in part), but it rejected the majority's conclusion that ability-to-elect districts could be replaced by influence districts. *Id.* at 494-95. Thus, all nine Justices in *Georgia v. Ashcroft* viewed coalition districts as relevant in deciding whether a plan is retrogressive under Section 5, and none of the Justices would have limited the Section 5 retrogression inquiry to a consideration of whether the plan reduced the number of safe majority-minority districts.

With the 2006 amendment to Section 5, Congress provided that the Section 5 retrogression inquiry should focus exclusively on whether a districting plan will have the effect of diminishing a minority group's "ability . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). That amendment overrules the holding in *Georgia v. Ashcroft* allowing replacement of districts that afford minority voters the

ability to elect their preferred representatives with districts that merely afford minority voters an opportunity to influence elections. At the same time, however, the amendment's "ability . . . to elect" standard codifies the consensus of all nine Justices in *Georgia v. Ashcroft* that both safe majority-minority districts and coalition districts should be considered in deciding whether a redistricting plan diminishes a minority group's ability to elect representatives of its choice.

Section 5 and Section 2 differ in certain important respects. *See Georgia v. Ashcroft*, 539 U.S. at 478. Both statutes, however, share a common purpose of protecting minority voters against practices that dilute their ability to elect representatives of choice. *See* 42 U.S.C. § 1973c(b); 42 U.S.C. § 1973(b). In light of that common purpose, there is no reason that the Section 5 ability-to-elect inquiry should consider the effect of both majority-minority districts and coalition districts, while the Section 2 opportunity-to-elect standard should focus exclusively on whether minority voters constitute a numerical majority in a district. Nothing in the distinct language or purposes of the two provisions justifies that kind of disharmony between Section 2 and Section 5. *See LULAC*, 126 S. Ct. at 2648 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part).

## V. The 50% rule threatens the ultimate goal of the Voting Rights Act of minimizing the role of race in politics

The ultimate goal of the Voting Rights Act is to minimize the role of race in American politics. *Georgia v. Ashcroft*, 539 U.S. at 490-91; *De Grandy*, 512 U.S. at 1020. Adoption of a 50% rule would threaten to retard progress in achieving that goal.

The 50% rule inevitably tends to exert a measure of pressure on States to devise districts in which minority voters constitute a numerical majority even when that is not necessary to ensure that minority voters have an opportunity to elect representatives of their choice. If districts in which minority voters constitute a numerical majority are sometimes required by Section 2, while coalition districts in which minority voters have the opportunity to elect their preferred candidates are never required by Section 2, States would face a strong inducement to create the former rather than the latter. Thus, the 50% rule encourages the packing of minorities into a district when such packing is not necessary for that minority group to have an ability to elect its candidate of choice. The 50% rule therefore runs the risk of injecting race into the redistricting process more than is necessary to fulfill Section 2's remedial objective of guaranteeing equal electoral opportunity.

The Court in *De Grandy* made a similar point in rejecting the proposal to make proportionality a

complete defense to a Section 2 claim. The Court explained that such a defense would "promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity." 512 U.S. at 1019-20. That concern is equally applicable here.

The pressure to create majority-minority districts, even when they are not necessary to provide minority voters an opportunity to elect representatives of their choice, also tends to limit the flexibility of States to pursue other racially neutral redistricting objectives. If a State that would create a majority-minority district to comply with Section 2 could also comply by devising a coalition district, the State would have significantly more freedom to pursue those other neutral objectives.

In addition, when majority-minority districts are not necessary to ensure that minority voters enjoy an equal opportunity to elect their preferred candidates, but are created solely to satisfy the 50% rule, it can reduce the incentive for minority voters to form coalitions with non-minority voters. When minority voters can easily determine the outcome of elections independently, there is little incentive to form coalitions with non-minority voters. The 50% rule therefore runs the risk of promoting the entrenchment of the very polarized voting patterns that Section 2 is designed to ameliorate. By contrast, as the Court

observed in *De Grandy*, coalition districts that require minority voters to "pull, haul, and trade to find common political ground" have the potential to "hasten the waning of racism in American politics." 512 U.S. at 1020.

The 50% rule also allows blatant efforts to dilute minority voting strength to go unremedied. Under the 50% rule, a jurisdiction would be free to pack as many minority voters as possible into a district that is already a safe majority-minority district in order to prevent minority voters from electing candidates of their choice in surrounding coalition districts. Similarly, if a compact minority population is electing candidates of its choice in a coalition district, a jurisdiction could respond by fragmenting that minority population into multiple districts in which minority voters would have no opportunity to elect their preferred candidates. In *De Grandy*, the Court rejected proportionality as a complete defense to a Section 2 vote dilution claim in part because it would allow jurisdictions to engage in "blatant racial gerrymandering" to dilute minority voting strength. *Id.* at 1019-20. The Court should reject the 50% rule for the same reason.

## VI. The North Carolina Supreme Court's reasons for adopting the 50% rule are unpersuasive

The North Carolina Supreme Court offered three reasons for adopting the 50% rule. None is persuasive.

First, the North Carolina Supreme Court concluded that the 50% rule would be easy to administer, while the opportunity-to-elect standard would prove difficult to administer. Pet. App. 23a, 25a. Ease of administration, however, provides no basis for adding a requirement to a statute that is inconsistent with the text and purposes of the statute. In any event, the statutory opportunity-to-elect standard can be fairly administered, while application of the 50% rule is not without its own difficulties.

Making a determination that minority voters have an opportunity to elect candidates of their choice in a proposed district is well within the capacity of courts. The third *Gingles* precondition already requires a court to determine whether whites usually vote sufficiently as a bloc to defeat "the combined strength of minority support plus white crossover votes." 478 U.S. at 56. The opportunity-to-elect precondition simply requires a court to conduct the parallel inquiry into whether the combination of minority votes plus crossover votes is likely to give minority voters an opportunity to elect their preferred candidates. Thus, the same kind of evidence that is used to prove the third *Gingles* precondition, *see* 478 U.S. at 58-59, 80-82, can be used to prove the opportunity-to-elect precondition.

Moreover, there are certain forms of objective evidence concerning the specific district at issue that can confirm that minority voters have an opportunity

to elect their preferred candidates. As previously discussed, such confirming evidence may include evidence that (1) minority-preferred candidates have already been elected in the proposed district, (2) minority voters constitute a majority of the voters in a party primary, and that party is the dominant party in the district, and (3) the minority group is significantly larger in size than the crossover group that would be necessary for a coalition between the two to constitute a majority in the district.

The statutory opportunity-to-elect standard is therefore judicially manageable. Indeed, in *Georgia v. Ashcroft*, this Court held that Section 5 requires courts to determine whether coalition districts afford minority voters the ability to elect candidates of their choice. 539 U.S. at 480-82. The Court would hardly have adopted that interpretation of Section 5 if it viewed the inquiry as judicially unmanageable.

At the same time, the 50% rule can raise difficult factual issues. To the extent that the 50% rule incorporates citizen voting-age population (CVAP) as a measure, there are practical difficulties in making that determination. For example, the citizenship data from the decennial census that is necessary to determine the CVAP of a proposed district is generally not available until after most redistricting is completed. *See, e.g.,* U.S. Census Bureau, *About the ACS: Data Dissemination* (Apr. 29, 2008) (available at www.census.gov/acs/www/SBasics/DataDiss/DataDis

s1.htm) (for governmental units fewer than 65,000 people, it will take three to five years to produce estimates). A court entertaining an early challenge to a plan may therefore have to make a CVAP determination without the relevant census information. In addition, CVAP census information is drawn from census block group data, rather than the more detailed data that is available for voting-age population, and that less refined information can lead to inaccurate estimates of the CVAP in a proposed district. *See* Br. for U.S. as *Amicus Curiae* in *Valdespino*, at 17.

The Census has also undercounted minorities and overcounted whites in the past. Mary Mulry, Statistical Research Division, U.S. Census Bureau, *Summary of Accuracy and Coverage Evaluation for 2000 Census* 13, 15 (Feb. 28 , 2006). And because the Census records college students as living at their college address and military personnel as living at their military base, even if they are registered to vote elsewhere, the Census figures will not accurately represent eligible voters in districts that include colleges or military bases, of which North Carolina has an abundance. *See, e.g.,* U.S. Census Bureau, *Plans and Rules for Taking the Census* (Aug. 9, 1999) (available at www.census.gov/population/ www/censusdata/resid_rules.html#Students). Thus, contrary to the North Carolina Supreme Court's apparent assumption, the 50% rule does not remove all

difficulties in deciding whether a minority group can satisfy the first *Gingles* precondition.

In the end, however, what matters is not that it may be difficult in some cases to administer the extra-textual 50% rule, but that the statutory opportunity-to-elect standard can be administered. And because the opportunity-to-elect standard is both administrable and embodied in the text of the statute, there is no basis for departing from it.

The North Carolina Supreme Court also concluded that the 50% rule should be adopted to provide the state legislature with a "safe harbor" for the redistricting process. Pet. App. 24a. As discussed above, however, all the reasons the Court in *De Grandy* gave for rejecting proportionality as a safe harbor apply here.

In particular, the Court rejected proportionality as a safe harbor because it would (1) run counter to the statute's totality-of-circumstances test; (2) have a tendency to induce state legislatures to draw majority-minority districts even when that was not necessary to ensure that minority voters would have an equal opportunity to elect representatives of their choice; and (3) allow jurisdictions to engage in blatant racial gerrymanders to dilute minority voting strength. 512 U.S. at 1018-20. As previously discussed, a 50% safe harbor likewise conflicts with the totality-of-circumstances test, induces a greater use of race than is necessary, and allows jurisdictions to engage in

blatant efforts to dilute minority voting strength. The 50% rule therefore cannot be justified on the ground that it furnishes the legislature with a safe harbor.

Finally, the North Carolina Supreme Court concluded that because a coalition district claim necessarily depends on proof of some level of white crossover voting, satisfying the first *Gingles* precondition undermines proof of the third *Gingles* precondition of white bloc voting. Pet. App. 26a. That reasoning is unpersuasive.

In some circumstances, the percentage of minority voters in a district may be so low, and the dependency on white crossover so high, that proof that minority voters have an opportunity to elect their preferred representatives with the addition of a large crossover vote by white voters will simultaneously refute the possibility that there is racially polarized voting on the part of white voters. But that is simply not true of all coalition district claims.

For example, when minority voters constitute 40% of the voters in a district, they would have the potential to elect their candidates of choice even when only 20% of the white voters cast crossover votes (20% of 60% = 12%, and 40% + 12% = 52%). At the same time, if the State's plan reduced the minority percentage in the district to 35%, that same degree of white bloc voting may usually defeat the minority-preferred candidate (20% of 65% = 13% and 35% + 13% = 48%). Thus, when minority voters could constitute

approximately 40% of the voters in a district, but they constitute only 35% of the voters in the State's plan, minority voters may be able to show both that they would have an opportunity to elect candidates of their choice in a proposed district and that the State's plan deprives them of that opportunity.

In cases in which minority voters could constitute a higher percentage of the voters in a proposed district, the possibility of making both showings may be even greater. And, as the percentage of minority voters goes down, it may prove more difficult to make both showings. The crucial point therefore is that there is no basis for making a categorical judgment that all coalition district claims depend on a level of white crossover that would undermine a claim of white bloc voting.

Thus, all three reasons given by the North Carolina Supreme Court for adopting a 50% rule are without merit. Consistent with the text, history, and purposes of Section 2, the Court should reject that categorical rule.

The Voting Rights Act was designed to address past discrimination at the polls and help our society move to the point where race no longer matters. *See Georgia v. Ashcroft*, 539 U.S. at 490. Unquestionably, progress has been made in ensuring that minority groups have a voice in the political process. Our country, however, has not reached the point where race is no longer determinative in elections and the

Voting Rights Act is no longer needed. The 50% rule should not be placed as a roadblock that will impede the progress that has been made under the Voting Rights Act. The 50% rule adopted by the North Carolina Supreme Court frustrates congressional intent to move towards a time when the race of a candidate no longer matters.

## CONCLUSION

The decision of the North Carolina Supreme Court should be reversed.

Respectfully submitted.

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