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 STATES OF ILLINOIS, ARIZONA, CALIFORNIA, CONNECTICUT, GEORGIA, KANSAS, KENTUCKY, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MISSOURI, NEW JERSEY, NEW MEXICO, AND OHIO, AS *AMICI CURIAE* IN SUPPORT OF 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 § 2 of the Voting Rights Act, 42 U.S.C. § 1973.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

iv

TABLE OF AUTHORITIES

Page

Cases:

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

INTEREST OF THE *AMICI CURIAE*

This case asks whether a minority group must constitute an arithmetic majority in a single-member district to state a claim under § 2 of the Voting Rights Act ("Act"), or whether it is sufficient that the minority group—although comprising less than 50% of the district's population—is effectively the majority because it has a realistic opportunity to elect its preferred candidates as a result of reliable white crossover voting.

Amici States have a critical interest in this matter. Every ten years, based on the results of the decennial census, state and local legislatures redraw district lines to comply with the Equal Protection Clause and § 2's prohibition against vote dilution. Whether § 2 permits, or requires, less-than-50% minority, coalition districts has a significant impact on how legislatures draw district lines.

If, as the North Carolina Supreme Court concluded below, § 2 protections are limited by a rigid numerical majority requirement, state legislatures will need to adopt a formalistic approach to redistricting that ignores political realities. *Amici* States believe that application of this so-called "50% rule" is contrary to the text and history of § 2 and this Court's precedents, and, moreover, will serve neither legislative bodies nor the voters they represent, for the rule perpetuates racial balkanization and prevents historically disempowered groups from exercising their fair share of political power.

STATEMENT

1. Members of the North Carolina House of Representatives ("House") are elected from single-member districts and serve two-year terms. Pet. App. 58a. In 1982, using the results of the 1980 census, the North Carolina General Assembly ("General Assembly") enacted a redistricting plan that divided Pender County between two districts. *Id.* at 60a. This plan was in effect for all House elections from 1982 through 1990. *Ibid.*

2. In 1992, the General Assembly undertook redistricting based on the results of the 1990 census. The resulting plan, which was in effect from 1992 through 2000, divided Pender County among three districts. *Id.* at 61a. One of the districts (District 98) was drawn on the insistence of the United States Department of Justice ("USDOJ") that minority voting strength was not being sufficiently recognized in southeastern North Carolina. *Id.* at 64a-65a.[1]

3. At the time of the 1990 census, District 98 had an African-American population of 59.26% and an African-American voting-age population of 55.72%. *Id.* at 61a. By the 2000 census, however, these figures had declined to 50.70% and 47.07%, respectively. *Ibid.* At the same time, 62.53% of the district's registered voters were Democrats, 53.37% of whom were African-American. *Ibid.* Because a majority of registered

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[1] North Carolina must submit its redistricting plans to the USDOJ for approval because certain of its counties are subject to the federal "preclearance" requirement in § 5 of the Act. Pet. App. 63a; see also *infra* p. 24 n.6.

voters were Democrats and a majority of Democrats were African-Americans, the candidate preferred by African-American voters had the best chance of winning the House seat in District 98—by prevailing in the Democratic primary and then, as a result of crossover votes from white Democrats, by winning the general election. *Id.* at 61a-62a. Indeed, Representative Thomas Wright, a Democrat and an African-American, was elected to represent District 98 from 1992 through 2000. *Id.* at 61a.

4. Using the results of the 2000 census, the General Assembly again undertook redistricting, resulting in the "2003 plan," which divided Pender County between two districts, District 16 and District 18. *Id.* at 69a.[2] District 18, home to Representative Wright, has an African-American population of 42.89% and an African-American voting-age population of 39.36% but a Democratic population of 59.01% (of registered voters), 53.72% of whom are African-American. *Id.* at 69a-70a. In the 2004 elections, Representative Wright won re-election. *Id.* at 70a.

5. In 2004, respondents brought this lawsuit, alleging that the division of Pender County into two

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[2] Because the General Assembly's initial redistricting plan failed to garner judicial approval, the 2002 elections were held pursuant to a judicially crafted interim plan. Pet. App. 60a. Representative Wright was elected to represent interim District 18, which had an African-American population of 46.99% and an African-American voting-age population of 43.44% but a Democratic population of 64.31% (of registered voters), 52.58% of whom were African-American. *Id.* at 68a.

districts violated the "Whole County Provisions" ("WCP") of the North Carolina Constitution, *id.* at 6a, which provide that "[n]o county shall be divided" in the formation of legislative districts, N.C. Const. art. II, §§ 3(3), 5(3). Previously, the North Carolina Supreme Court had applied the WCP to hold that county lines may be cut to comply with federal law, so long as they are cut no more than federal law requires. Pet. App. 3a. In the current litigation, a three-judge panel of North Carolina's Superior Court unanimously rejected respondents' claims, holding that § 2 of the Act mandated District 18 and that the WCP therefore did not preclude the division of Pender County. *Id.* at 116a-117a.

6. The panel acknowledged that the General Assembly drew District 18 as a "preemptive strike" against the likelihood that, if an effective minority district is not maintained in southeastern North Carolina, a lawsuit would allege impermissible vote dilution. *Id.* at 90a. Without dividing Pender County, the maximum African-American voting-age population achievable within a single district would not have been enough to ensure African-American voters a realistic opportunity to elect their preferred candidate. J.A. 73.

The panel then addressed the three preconditions to a § 2 claim set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986)—that (1) the minority group is "'sufficiently large and geographically compact to constitute a majority in a single member district,'" (2) the minority group is "'politically cohesive,'" and (3) "'the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate.'" Pet. App. 77a (quoting *Gingles*, 478 U.S. at 50-51).

Focusing on the first precondition, the panel rejected respondents' proposed, "bright-line" rule, which would require a minority group to form an absolute numerical majority to state a § 2 claim. Pet. App. 90a-93a. Instead, "[a]s a matter of practical common sense," the court held that the "inquiry must focus on the *potential of black voters to elect representatives of their own choosing* not merely on sheer numbers alone." *Id.* at 93a (emphasis in original). Thus, satisfaction of the first *Gingles* precondition depends on "whether or not the political realities of the district, such as the political affiliation and number of black registered voters when combined with other related, relevant factors present within the single-member district operate to make the black voters a *de facto* majority that can elect candidates of their own choosing." *Ibid.*

Applying this approach, the panel concluded that African-Americans did constitute a *de facto* majority in District 18. *Id.* at 97a-99a. As the panel explained, "[i]n North Carolina, a *more important indicator of effective black voting strength* [than sheer numbers of African-Americans, or African-Americans of voting age] *is the percentage of registered Democrats who are black.*" *Id.* at 97a (emphasis in original). Moreover, relying on an analysis of past election results, the court determined that districts with an African-American voting-age population of 37.81% or greater—like District 18—will provide an effective opportunity for the election of candidates preferred by African-American voters. *Ibid.* Based on these findings, the panel concluded that District 18 satisfied the first two *Gingles* preconditions as a matter of law. *Id.* at 99a-100a. After the parties stipulated to the satisfaction of the third *Gingles* factor, the panel granted summary

judgment for petitioners on its finding that, based on the totality of the circumstances, the creation of District 18 was required by § 2. *Id.* at 112a-116a.

7. In a divided opinion, the North Carolina Supreme Court reversed. Although the majority recognized that, as a result of support from white voters who reliably cross over racial lines, African-Americans in District 18 had the effective ability to elect their preferred candidates, *id.* at 5a, the court nevertheless held that § 2 did not require District 18 because African-Americans did not comprise 50% of the district's eligible voters, *id.* at 19a-27a. In reaching this conclusion, the majority reasoned that *Gingles* requires an actual numerical majority, and that such a rule would be "logical" and "readily applicable in practice." *Id.* at 19a-20a. The majority acknowledged that its holding could "foreclose" "meritorious claim[s]," but asserted that such "sacrifice[]" was necessary to avoid "open[ing] a Pandora's box of marginal Voting Rights Act claims by minority groups of all sizes" and to obtain the benefits of a "bright line rule," including a "safe harbor" for legislatures in the redistricting process. *Id.* at 24a (internal punctuation and quotation omitted).

By contrast, the dissenting justices relied on the plain language of § 2, specifically its requirement that courts consider "'the totality of the circumstances.'" *Id.* at 48a (quoting 42 U.S.C. § 1973). According to the dissent, this language favors a "flexible standard based on political realities" rather than a rigid numerical majority requirement. *Ibid.* The dissent also noted that this Court had "repeatedly declined to close the door" to § 2 relief under the circumstances of this case

and, moreover, "caution[ed] lower courts against applying *Gingles* to impose a rigid numerical majority requirement." *Id.* at 41a-42a. Finally, the dissent questioned the majority's view that a strict, 50% rule was necessary for administrative ease. Past election results in North Carolina demonstrate that African-American Democratic voter registration is "the most relevant indicator of black voting strength," and, indeed, "districts where such registration exceeds fifty percent consistently elect black representatives." *Id.* at 46a. Justice Timmons-Goodson wrote separately to note the majority's "insufficient deference to the legislature's considered judgment." *Id.* at 50a.

SUMMARY OF THE ARGUMENT

The North Carolina Supreme Court adopted a rigid "50% rule," which appears nowhere in § 2, based on its belief that, although its approach to vote dilution might "foreclose" "meritorious claim[s]," this Court's ruling in *Gingles* compelled it, and it would be "logical" and "readily applicable in practice." Pet. App. 19a-20a, 24a. The court's decision fails on numerous grounds.

First, the court ignored the plain language and legislative history of § 2, which require courts to adopt a functional view of the political process and consider the totality of the circumstances when evaluating vote dilution claims. Had the court considered existing political realities as it was required to do, it would have recognized that minority voters are able to elect their preferred candidates from districts in which they constitute less than a majority as a result of reliable white crossover voting, and the court would have held that such "coalition" districts are entitled to § 2 protections.

The North Carolina Supreme Court also either misapplied or ignored controlling decisions from this Court. Far from requiring an arithmetic majority in all cases, *Gingles* and its progeny expressly reserved the question whether § 2 protections are limited to majority-minority districts, and (like the language and legislative history of § 2) made clear that the purpose of the preconditions are served by a flexible, fact-specific approach to vote dilution claims. And the court below failed even to mention *Georgia v. Ashcroft*, 539 U.S. 461 (2003), which compels the conclusion that coalition districts qualify for § 2 protections.

In addition, the court erred in speculating about the possibility of marginal § 2 litigation as grounds to deny relief that Congress intended. In any event, there are effective means to weed out unsubstantiated vote dilution claims without relying on a formalistic cutoff, and allowing coalition district claims therefore need not open the floodgates to unwarranted litigation.

Finally, the recognition of coalition district claims will discourage legislatures from unnecessarily drawing majority-minority districts, and thereby bring this Court's § 2 cases in line with the equal protection prohibition on the use of race as the dominant consideration in redistricting decisions. And by favoring integrated coalition districts over majority-minority districts, the rejection of the 50% rule will further the Act's overarching goal of hastening our transformation to a race-neutral political system.

ARGUMENT

The North Carolina Supreme Court made multiple, fundamental errors when it limited § 2 protections to districts where minorities make up 50% or more of the voting-age population. The court's ruling is at odds with the language and purposes of the Act, with *Gingles* and more recent decisions—including *Georgia v. Ashcroft*—and with equal protection guarantees and well-recognized policy. For each of these reasons, this Court should reverse the judgment below and hold that § 2 protects all districts in which minority populations reliably select their candidates of choice.

I. ON ITS FACE, § 2 PRECLUDES AN ABSOLUTE NUMERICAL MAJORITY REQUIREMENT.

This case presents a question of statutory interpretation: whether § 2 bars vote dilution claims in single-member districts where a minority group does not constitute more than 50% of the population. The Court's "task is to construe what Congress has enacted," *Duncan v. Walker*, 533 U.S. 167, 172 (2001), an analysis that "begins with the language of the statute," *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citations and internal quotation marks omitted). "And where the statutory language is clear," the analysis "ends there as well." *Ibid.* (citations and internal quotation marks omitted); accord, *e.g.*, *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) ("The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (citations and internal quotation marks omitted). Critically, as to the question presented here, the language of § 2 demonstrates that Congress did not

intend to erect strict numerical limits on its protections.

Section 2(a) prohibits any electoral practice or procedure that "results in the denial or abridgement of the right * * * to vote on account of race or color * * * ." 42 U.S.C. § 1973(a). Section 2(b), in relevant part, specifies that § 2(a) is violated if "based on the totality of the circumstances," it is shown that "the political processes leading to the nomination or election" of candidates are not "equally open to participation by" minority voters, such that minority voters "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. § 1972(b).

Thus, § 2 requires courts to consider the "totality of the circumstances" when evaluating vote dilution claims. This requirement alone forecloses the North Carolina Supreme Court's rigid, single-factor limitation on § 2 coverage. In addition, § 2 protects minorities' opportunity not only to vote, but more broadly to participate in "the political processes leading to the nomination and election of candidates." This language demonstrates Congress' intent to protect conduct beyond voting, such as the building of coalitions that will determine the outcome of elections. Finally, § 2 condemns practices that impair minority voters' "opportunity * * * to elect" their candidates of choice. The use of the word "elect" precludes any 50% rule, for as election results of the past two decades demonstrate, minority voters in coalition districts can elect their preferred candidates.

Indeed, "the most current social-scientific data" indicates that "black candidates can be elected to office,

despite the presence of significantly polarized voting patterns, in at least some districts * * * where the black voting-age population is 33% to 39% * * *." Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517, 1537-1538 (2002); accord Sam Hirsch, *Unpacking* Page v. Bartels: *A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 Election L.J. 7, 12 (2002) (after 2000, most African-American and Hispanic members of the New Jersey Legislature were elected from districts that are not majority-minority, and some were elected from districts that are less than 30% minority); Bernard Grofman, Lisa Handley, & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1397-1398 (2001) (during the 1990s, African-American congressional candidates in Florida, Georgia, North Carolina, Texas, and Virginia prevailed in districts that were not majority African-American); J. Morgan Kousser, *Beyond* Gingles: *Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. Rev. 551, 566-568 (1993) (in 1990, African-Americans and Hispanics elected to state and national office from California were elected from districts that were not majority-minority and in some cases were less than 34% minority).

That minority-preferred candidates are elected from districts in which minority voters fall short of a numerical majority reflects the established fact that minority electoral success is a function of more than

raw population percentages. Election results also hinge, for example, on

> the relative weight at which minorities and whites participate in the electoral process, the degree to which minority and white voters support minority-preferred candidates, and the fact that the United States has a multi-stage electoral process that includes a primary election, a general election, and sometimes a run-off election as well.

Grofman, Handley, & Lublin, *supra*, at 1403-1404; accord Allan J. Lichtman & J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 La Raza L.J. 1, 18 (1993).

Minority electoral success also depends largely on the cohesiveness of majority and minority group voters. This is because "[a]s minority group cohesiveness increases and majority group cohesiveness declines, the level of minority group concentration necessary to elect the choice of that group declines, and vice versa." Kousser, *supra*, at 563; accord Lichtman & Herbert, *supra*, at 10-11. Thus, where minority voters are highly cohesive and white voters are not, minority groups may elect their preferred candidates with less than 50% of the population.[3] This is especially so in

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[3] The impact of minority- and majority-group cohesiveness on election results is illustrated by the following examples, which assume (for simplicity's sake) that the electorate is divided between two groups, the "majority" and the "minority." If the majority votes wholly as a bloc (that is, is

districts where minority voters command a majority of the dominant political party, and therefore determine who prevails in the primary and, in combination with white voters who vote according to party affiliation, decide who wins the general election. In fact, studies conducted since 1990 indicate that minority voters do tend to vote highly cohesively, and that a reliable bloc of white voters—as much as one-third of the white population—votes consistently on the basis of party affiliation, rather than race, in general elections. See, *e.g.*, Pildes, *supra*, at 1529-1535.

Consider a recent example from Illinois. During redistricting following the 2000 census, the Illinois General Assembly enacted a plan designed to offer African-American voters a realistic opportunity to elect their preferred candidates in 19 districts. In one of these districts (District 78), however, African-Americans made up only 39% of the voting-age population. But as state planners anticipated, African-Americans have been able to elect their preferred candidate from District 78, for African-Americans constitute a majority of Democratic voters in that highly Democratic district. Under the plain language of § 2, federal law both permits and protects districts like this one in future redistricting efforts.

100% cohesive), the minority must constitute at least 50% of the population and be 100% cohesive to have any chance of electing its preferred candidate. See Kousser, *supra*, at 563. If the majority is only 60% cohesive, however, the minority need constitute only 30% of the population and be only 90% cohesive for the minority-preferred candidate to prevail. See *ibid.*

In sum, the North Carolina Supreme Court's decision is impossible to reconcile with § 2's plain language requiring consideration of the totality of the circumstances and ensuring minority populations a full opportunity to participate in the political process and elect their candidates of choice. A single-factor, bright-line rule that narrows minorities' political influence to districts where they constitute an arithmetic majority cannot be squared with this intent. By contrast, the protection of coalition districts effectuates Congress' mandate, because it accounts for existing political realities to authorize the creation of more districts in which minority voters have the opportunity to elect a candidate of choice.

II. SECTION 2's LEGISLATIVE HISTORY SUPPORTS A FUNCTIONAL, FACT-SPECIFIC APPROACH TO VOTE DILUTION CLAIMS.

Even if § 2's language were ambiguous on the question presented and therefore not alone dispositive, its legislative history shows that Congress did not intend to impose a rigid, 50% rule. See, *e.g.*, *Patterson v. Shumate*, 504 U.S. 753, 761 (1992) ("courts 'appropriately may refer to a statute's legislative history to resolve statutory ambiguity'") (quoting *Toibb v. Radloff*, 501 U.S. 157, 162 (1991)); see also *Gingles*, 478 U.S. at 43-46 (using legislative history to interpret § 2).

The Senate Report ("Report") accompanying the Act's 1982 amendments is Congress' "statement for the record of the intended meaning and operation of" the amended Act and its definitive legislative history. S. Rep. No. 97-417, at 1 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 178; see also *Gingles*, 478 U.S. at 43

(the Report "elaborates on the nature of § 2 violations and on the proof required to establish these violations"). The Report confirms that Congress intended courts to undertake a functional review of § 2 claims, and to focus their analysis on the totality of the circumstances rather than the presence or absence of a single factor.

In the Report, Congress eschews "formalistic" standards and "mechanistic rules." S. Rep. No. 97-417, at 30 n.120, 31, reprinted in 1982 U.S.C.C.A.N., at 208. Instead, to "formulat[e] remedies in cases which necessarily depend upon widely varied proof and local circumstances," the Report requires § 2 claims to be "carefully and meticulously scrutinized" and decided in light of "all the circumstances in the jurisdiction in question." *Id.* at 19, 27, 31, reprinted in 1982 U.S.C.C.A.N., at 196, 205, 208 (internal quotation marks omitted). This analysis must involve "a searching practical evaluation of the past and present reality" and "a functional view of [the] political process." *Id.* at 30 & n.120, reprinted in 1982 U.S.C.C.A.N., at 208 (internal quotation marks omitted). The Report's flexible, fact-specific approach to § 2 claims is impossible to square with a 50% rule, or with any single-factor, numerical cutoff for that matter.

Equally telling, while the Report noted a number of "[t]ypical factors" that might be probative of a § 2 violation, S. Rep. No. 97-417, at 28, reprinted in 1982 U.S.C.C.A.N., at 206, the presence or absence of an arithmetic majority is not among them. True to the Report's all-in, case-by-case approach, moreover, not even the *listed* factors are dispositive, for "there is no

requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.* at 29, reprinted in 1982 U.S.C.C.A.N., at 207.

In short, the legislative history only reinforces what the language of § 2 already makes plain—that courts must evaluate § 2 claims practically and in light of surrounding circumstances. Once again, § 2 is simply incompatible with the North Carolina Supreme Court's rigid deference to a single criterion that (by the court's own admission) "foreclose[s]" "meritorious claim[s]." Pet. App. 24a.

III. A RIGID, 50% RULE IS IRRECONCILABLE WITH THIS COURT'S VOTING RIGHTS DECISIONS.

The North Carolina Supreme Court did not purport to follow the language of § 2 or its legislative history, but instead grounded its 50% rule on the three "preconditions" for proving vote dilution this Court set forth in *Thornburg v. Gingles*—specifically, that the minority group demonstrate "that it is sufficiently large and geographically compact to constitute a majority in a single-member district;" "that it is politically cohesive;" and "that the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." 478 U.S. at 50.[4]

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[4] Vote dilution challenges can arise in "single-member" or "multimember" legislative districts. In a single-member district, which "is the smallest political unit from which representatives are elected," one legislator is elected to represent voters in the district. *Gingles*, 478 U.S. at 50 n.17. By contrast, in multimember districts, "two or more legislators [are] elected at large by the voters of the

In particular, the North Carolina Supreme Court latched onto the word "majority" in the first precondition—which it took as a command to require "a numerical majority"—as well as a perceived tension between the first and third preconditions absent a 50% rule. Pet. App. 20a, 25a-26a. The court's approach to *Gingles* fails for at least three reasons: (1) on its face, *Gingles* does not require an arithmetic majority; (2) the reasons the Court gave for the *Gingles* factors are incompatible with a 50% rule; and (3) this Court's subsequent decision in *Georgia v. Ashcroft* counsels powerfully against the state court's reading of *Gingles*.

A.   *Gingles* Does Not Require An Arithmetic Majority.

Contrary to the North Carolina Supreme Court's ruling, *Gingles* does not limit application of § 2 to districts with an arithmetic majority of minority voters. In fact, in *Gingles*, the Court expressly declined to address "whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district." 478 U.S. at 46 n.12. Since *Gingles*, moreover, the Court has presumed that § 2 does permit such claims. See *League of United Latin American Citizens ("LULAC") v. Perry*, 126 S. Ct. 2594, 2624 (2006)

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district." *Whitcomb v. Chavis*, 403 U.S. 124, 127-128 (1971). Although *Gingles* arose in the context of a multi-member district, the Court subsequently made clear that the *Gingles* analysis applies equally to single-member districts. See, *e.g.*, *Growe v. Emison*, 507 U.S. 25, 40-41 (1993).

(Kennedy, J., writing for the plurality) (assuming without deciding that minority group may state a § 2 claim if its members "constitute a sufficiently large minority to elect their candidate of choice with the assistance of crossover votes") (citation and internal quotations omitted); *Johnson v. De Grandy,* 512 U.S. 997, 1009 (1994) ("assum[ing] without deciding that even if Hispanics are not an absolute majority of the relevant population in the additional districts, the first *Gingles* condition has been satisfied in these cases"); *Voinovich v. Quilter,* 507 U.S. 146, 158 (1993) (assuming without deciding that a § 2 claim may be based on allegations "not that black voters have been deprived of the ability to constitute a *majority,* but of the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority") (emphasis in original).[5]

Not only has this Court consistently acknowledged that § 2 may permit coalition district claims, but individual members of the Court have made clear that § 2 does permit such claims. In *Gingles* itself, four members of the Court would have held that § 2 may

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[5] In *Growe,* the Court reserved judgment on whether dilution of a minority group's "ability to influence, rather than alter, election results" could violate § 2. 507 U.S. at 41 n.5. That question is not at issue in this case. However, since "influence" district claims are easier to establish than coalition district claims, *Growe* necessarily left open the possibility that coalition district claims are cognizable.

afford relief under such circumstances, on the ground that if a minority group

> can show that white support would probably be forthcoming in some such district 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.

478 U.S. at 89 n.1 (O'Connor, J., joined by Burger, C.J., and Powell and Rehnquist, JJ., concurring in the judgment). More recently, in *LULAC*, three members of the Court agreed that a minority group might satisfy the *Gingles* preconditions in ways other than with a numerical majority. See 126 S. Ct. at 2647-2650 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part); *id.* at 2645 n.16 (Stevens, J., concurring in part and dissenting in part).

B. A Flexible, Fact-Specific Approach To Vote Dilution Claims Furthers The Purpose Of The *Gingles* Preconditions.

The rejection of the 50% rule already endorsed by several members of the Court is consistent with *Gingles*, wherein the Court relied on § 2 and the Report to conclude that Congress intended the vote dilution inquiry to be "a flexible, fact-intensive test." 478 U.S. at 46. Accordingly, *Gingles* admonished lower courts to engage in "an intensely local appraisal" and a "searching practical evaluation of the past and present reality," *id.* at 79, as they undertake a "functional

analysis" of vote dilution claims, *id.* at 62 (internal quotation marks and citation omitted).

To be sure, as the North Carolina Supreme Court noted, *Gingles* used the word "majority" in the first precondition, which out of context might suggest that it is impossible to violate § 2 unless a majority-minority district can be created. But *Gingles* immediately explained the purely functional meaning behind its "majority" requirement: because minority voters "cannot claim to have been injured by [a challenged] practice or structure" if their preferred candidate cannot prevail even in its absence, the first precondition is necessary to determine whether "minority voters possess the *potential* to elect representatives in the absence of the challenged practice or structure." 478 U.S. at 59 n.17 (emphasis in original). Thus, the purpose of the first precondition is simply to assure that there is a causal relationship between the challenged redistricting decision and harm to minority voters. As the Court has recognized, "'the first *Gingles* condition 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,'" that is, an effective but not necessarily an arithmetic majority of minority voters. *LULAC*, 126 S. Ct. at 2616 (Kennedy, J., writing for the plurality) (quoting *De Grandy*, 512 U.S. at 1008).

The North Carolina Supreme Court also believed that its interpretation of the first *Gingles* precondition was compelled by the language of the third precondition—that is, the required showing that the majority votes "'sufficiently as a bloc to enable it * * *

usually to defeat the minority's preferred candidate'"—which the state court described as being in "tension" with any recognition of protected status for coalition districts. Pet. App. 25a-26a (quoting *Gingles*, 478 U.S. at 51). To the contrary, in *Gingles*, the Court warned that "there is no simple doctrinal test for the existence of legally significant racial bloc voting," and, after specifically considering crossover voting, found prong three satisfied as long as "a white block vote * * * normally will defeat the combined strength of minority support *plus* white 'crossover' votes." 478 U.S. at 56, 58 (emphasis added); see also *Sanchez v. Colorado*, 97 F.3d 1303, 1319 (10th Cir. 1996) ("*Gingles* doesn't require an absolute monolith in the Anglo * * * vote and recognizes the existence and role of white crossover voting."); *Jenkins v. Red Clay Consolidated Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1123 (3d Cir. 1993) ("*Gingles* does not require a showing that white voters vote as an unbending monolithic block against whomever happens to be the minority's preferred candidate" to state a claim under § 2). In other words, under *Gingles*, it is possible for there to be white crossover voting that is insufficiently substantial to defeat an assertion of white bloc voting but is nevertheless significant enough to establish a minority group's potential to elect its preferred candidates under the first precondition.

In any event, even if *Gingles* did intend to establish an arithmetic majority requirement under the circumstances at issue, "*Gingles* was directed to a particular practice—multi-member districts," and, accordingly, its preconditions may not be strictly applicable to challenges to single-member districts. *Metts v. Murphy*, 363 F.3d 8, 10 (1st Cir. 2004) (*en*

banc); see also *ibid.* (*Gingles* "did not purport to offer a general or exclusive gloss on section 2 for all situations"). This Court has emphasized that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim," *De Grandy*, 512 U.S. at 1007; *Voinovich*, 507 U.S. at 158, and, tellingly, has consistently avoided applying an inflexible 50% requirement to challenges to single-member districts, see *LULAC*, 126 S. Ct. at 2624 (Kennedy, J., writing for the plurality) (assuming the preconditions are satisfied where minority group did not comprise an arithmetic majority); *De Grandy*, 512 U.S. at 1009 (same); *Voinovich*, 507 U.S. at 158 (same); *Growe*, 507 U.S. at 41 (same). Indeed, in *Voinovich*, the Court openly anticipated the possibility that the preconditions might be altered in certain cases, including where the failure to draw a coalition district is alleged. There, the Court assumed without deciding that § 2 contemplates claims premised on allegations "not that black voters have been deprived of the ability to constitute a *majority*, but of the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority," and acknowledged that the first *Gingles* precondition could be "modified or eliminated when analyzing [such a claim]." 507 U.S. at 158 (emphasis in original); see also *LULAC*, 126 S. Ct. at 2651 n.8 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part) ("All aspects of our established analysis for majority-minority districts in *Gingles* and its progeny may have to be rethought in analyzing ostensible coalition districts.").

Finally, assuming *Gingles* intended a 50% rule, that requirement would have been based on a specific,

time-bound view of minority electoral opportunity that is no longer relevant. See *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 944 (7th Cir. 1988) (a majority-minority requirement would have been "based * * * on a plausible scenario under which courts can estimate approximately the ability of minorities in single-member districts to elect their candidates of choice"). In particular, during the 1970s and 1980s, minority voters were not only rarely able to elect representatives of their choice without constituting at least a majority in an electoral district, but the conventional wisdom was that to overcome then-prevalent voting patterns, the total minority population needed to be at least 65%. See *Ketchum v. Byrne*, 740 F.2d 1398, 1415-1416 (7th Cir. 1984) (collecting sources); see also Luke P. McLoughlin, Note, Gingles *in Limbo: Coalitional Districts, Party Primaries, and Manageable Vote Dilution Claims*, 80 N.Y.U. L. Rev. 312, 324 (2005) ("In voting rights cases following *Gingles*, a supermajority was often necessary to ensure an equal chance of electing a candidate due to differing levels of voter registration, citizenship, age, and turnout amongst minority and white populations."). Due in part to increased white crossover voting, however, the percentage of minority population necessary to elect a candidate has been steadily declining and is well below 50%. See *supra* pp. 11-13. Thus, "the specific contextual reasons the Court gave for requiring safe districts in the typical case in the 1980s" no longer apply. Pildes, *supra*, at 1554.

C. The Court's Rejection Of The 50% Rule In The § 5 Context Counsels Against Applying The Rule To § 2 Claims.

Not only did the North Carolina Supreme Court erroneously rely on *Gingles* as support for its arithmetic majority requirement, but the court failed even to consider *Georgia v. Ashcroft*, 539 U.S. 461 (2003), which members of this Court have called "[c]hief among the reasons" for rejecting the 50% rule. *LULAC*, 126 S. Ct. at 2648 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part).[6] In *Ashcroft*, this Court observed that "various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts," and, accordingly, held that, when assessing retrogression for § 5 purposes, courts must consider not only majority-minority districts but also districts in which minority voters comprise a substantial minority. 539 U.S. at 482-483. Notably, the Court was unanimous that coalition districts should be considered in the § 5 analysis; the dissent objected only to the use of influence districts in which it was not clear that minority voters would have the ability to elect even

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[6] *Ashcroft* addressed § 5 of the Act, which requires jurisdictions with a history of racially discriminatory voting practices to preclear redistricting plans with the USDOJ (or the federal district court in Washington, D.C.). Pet. App. 123a-125a. Proposed changes will receive federal preclearance only if they will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

with crossover support. See *id.* at 492-494 (Souter, J., dissenting).[7]

Although the Court in *Ashcroft* cautioned that § 2 and § 5 "'combat different evils'" and "'impose very different duties upon the States,'" the Court also recognized that "some parts of the § 2 analysis may overlap with the § 5 inquiry." 539 U.S. at 478 (quoting *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997)); see also *Chisom v. Roemer*, 501 U.S. 380, 401 (1991) (noting "close connection" between §§ 2 and 5). Thus, the Court's rejection of the 50% rule in the § 5 context also has significance in the § 2 context. See *McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840, 853 (N.J. 2003) (*"Georgia v. Ashcroft* supports our conclusion that [ability-to-elect] claims are permitted" under § 2).

In particular, the Court acknowledged that minority voters can elect their chosen candidates even if they do not comprise an arithmetic majority within a single district. See *Ashcroft*, 539 U.S. at 480 ("'[T]here 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

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[7] In 2006, Congress amended the Act to overrule *Ashcroft* insofar as it made consideration of influence districts a proper part of the retrogression inquiry. See 42 U.S.C. § 1973c(b) (§5 inquiry shall consider whether a redistricting plan will diminish minority voters "ability" not merely to influence an election, but actually "to elect their preferred candidates of choice"). Notably, the 2006 amendments do not alter—and, in fact, they endorse—*Ashcroft*'s unanimous recognition of coalition districts in the § 5 context. See *ibid.*

within a single district in order to elect candidates of their choice.'") (quoting *De Grandy*, 512 U.S. at 1020) (brackets in original). The dissent agreed. See *id.* at 492 (Souter, J., dissenting). The Court also emphasized the fact-bound nature of claims under the Act, holding that the retrogression inquiry under § 5, like the dilution inquiry under § 2, requires an assessment of the "totality of the circumstances," including "the ability of minority voters to elect their candidate of choice" and "the extent of the minority group's opportunity to participate in the political process." *Id.* at 479. Finally, the Court held that courts are capable of engaging in the fact-intensive analysis required to determine whether a minority group comprises an effective majority—without resort to a "'single statistic'" as an arbitrary numerical cutoff. *Id.* at 480 (quoting *De Grandy*, 512 U.S. at 1020-1021). Here, again, the dissent was in agreement. See *id.* at 492 (Souter, J., dissenting).

Moreover, it would be illogical to allow courts to consider coalition districts as a defense to § 5 liability but to preclude the use of coalition districts as a remedy for § 2 violations. Both provisions aim to ensure that minority voters with the potential "to participate in the political process and to elect representatives of their choice," 42 U.S.C. § 1973(b), have an equal opportunity to do so. It would be an odd legal scheme that considered coalition districts critical to minority voting power for purposes of retrogression, but *per se* immaterial under § 2. Put differently, "it would make little sense" for courts to preclear a redistricting plan that divides one majority-minority district into two coalition districts in a § 5 jurisdiction, but then, in a noncovered jurisdiction, reject a

redistricting plan that creates two coalition districts rather than one majority-minority district. Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 Harv. L. Rev. 2598, 2602 (2004).

IV. RECOGNIZING COALITION DISTRICT CLAIMS WILL NOT OPEN THE FLOODGATES TO MARGINAL § 2 LITIGATION.

The North Carolina Supreme Court also supposed that the 50% rule is "straightforward and easily administered" and thus "more readily applicable in practice." Pet. App. 19a-20a, 24a. The court suggested that recognition of coalition districts would "open a Pandora's box of marginal Voting Rights Act claims by minority groups of all sizes," and, although the court acknowledged that adoption of the 50% rule "might conceivably foreclose * * * meritorious claim[s]," it nevertheless deemed this a "justifiabl[e] sacrifice[] * * * to protect stronger claims and promote judicial economy" and to provide legislatures with the benefits of a "safe harbor in the redistricting process." *Id.* at 24a (internal quotation marks and citation omitted). This reasoning fails for multiple reasons.

First, given the fundamental nature of the right to vote, even a legitimate need for judicial ease and economy does not justify denying relief where there is real injury. See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); see also Kousser, *supra*, at 568. This is particularly true given the absurd and harsh results the 50% rule produces. The rule relies

wholly on "census results that are but a snapshot in time (invariably outdated by the time litigation is completed) and are infected by the now well-established undercounting of minority peoples," Lichtman & Hebert, *supra*, at 18-19, as well as other inaccuracies. In particular, the 2000 census counted college students, military personnel, and nursing home patients as being residents of where they were living on April 1, 2000, even though they were registered to vote in another district. This creates discrepancies between the census results and the districts' actual minority and majority populations.[8] In addition, the rule has the effect of foreclosing § 2 claims merely because minority voters, although plainly constituting an effective majority, are marginally less than a numerical majority—such as 49.9%—of the relevant

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[8] For example, the inclusion of military personnel—who generally are not registered to vote (or even eligible to vote) in the district in which they are counted for census purposes—has a substantial effect on the calculation of a district's minority population as a percentage of its total population. Using the results of the 2000 census, the African-American voting-age population in Georgia's Senate District 15 is 49.6%; that percentage increases to 51.6% when the population of Fort Benning is removed from the district. Similarly, the Latino voting-age population in Arizona Senate District 24 is 49% based on the census results but 50.1% when Yuma Marine Corp Air Station is excluded. Finally, in North Carolina, the African-American voting-age population of House District 12 is 47% based on the census but 52% without Cherry Point Air Station, while the African-American voting-age population of House District 43 is 47% based on the census but 59% without Fort Bragg.

district. See McLoughlin, *supra*, at 325 (collecting cases).

It was for this very reason that the Court in *De Grandy* refused to adopt a bright-line rule even though it would have provided certainty and administrative ease. The Court rejected a proposal that, as a matter of law, no § 2 violation may be found in cases where the number of single-member districts in which minority voters form an effective majority mirrors the minority's share of the relevant population. See 512 U.S. at 1017-1020. The Court acknowledged that such a rule would provide the benefits of a "safe harbor" for States and other redistricting bodies, but nevertheless held that "[t]he safety would be in derogation of the statutory text and its considered purposes," specifically, "the textual command of § 2[] that the presence or absence of a violation be assessed based on the totality of the circumstances." *Id.* at 1018 (internal quotation marks and citation omitted). Thus, the Court emphasized,"[n]o single statistic provides courts with a shortcut to determine whether" § 2 has been violated. *Id.* at 1020-1021.

Second, contrary to the North Carolina Supreme Court's unsupported presumption, allowing minority voters to assert coalition district claims will not inundate the courts with marginal § 2 filings. Plaintiffs still must plead and prove facts establishing a minority population's ability to elect candidates of its choice with the help of reliable crossover votes, not to mention plaintiffs' need to satisfy the second and third *Gingles* preconditions and the totality of the circumstances factors. See McLoughlin, *supra*, at 344 ("the best way to permit coalitional district section 2

claims and retain *Gingles*'s triage function is for courts to rely on the latter two *Gingles* prongs to filter vote dilution claims for the bulk of section 2 cases"). Unsubstantiated vote dilution claims may easily be rejected on any of these grounds, without reliance on a formalistic numerical cutoff.

Finally, to the extent the court below was legitimately concerned about obtaining a workable standard for vote dilution claims, a 50% rule is not the best—much less the only—way to achieve this goal. Members of this Court have proposed an alternate, equally "clear-edged" rule: a requirement "that minority voters in a reconstituted or putative district constitute a majority of those voting in the primary of the dominant party." *LULAC*, 126 S. Ct. at 2648 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part). This limiting principle flows from the settled proposition that "a dominant party's primary can determine the representative ultimately elected." *Id.* at 2649 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part); see also *supra* pp. 12-13. Other limiting principles also are available. See *LULAC*, 126 S. Ct. at 2648 n.3 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part) (declining to "rule out other circumstances in which a coalition district might be required by § 2"). For example, courts concerned about marginal vote dilution claims might ask whether the number of majority-minority districts, in combination with any coalition districts, meets the "rough proportionality" standard this Court has identified as an indicator of § 2 compliance. *De Grandy*, 512 U.S. at 1023; see also Note, *supra*, at 2609-2610.

V. RECOGNIZING COALITION DISTRICT CLAIMS ACCORDS WITH THE COURT'S EQUAL PROTECTION JURISPRUDENCE AND PUBLIC POLICY.

In a series of decisions beginning with *Shaw v. Reno*, 509 U.S. 630 (1993), this Court held that voters in the majority group may challenge a redistricting plan as a violation of the Equal Protection Clause if "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). If race is the dominant and controlling consideration, the redistricting decision will survive only if it is narrowly tailored to achieve a compelling governmental interest. See, *e.g.*, *Miller*, 515 U.S. at 920; *Shaw*, 509 U.S. at 658.

There is a clear tension between the equal protection line of cases and the approach to § 2 adopted by the North Carolina Supreme Court. This is because disallowing coalition districts encourages legislatures to draw majority-minority districts whenever possible, in which case equal protection principles will be violated unless the redistricting decisions can survive strict scrutiny. Indeed, "[a] number of the majority-minority districts that elected African Americans to Congress in 1992 and 1994 were later dismantled" under *Shaw* and its progeny, upon findings that they had been "drawn predominantly on the basis of race." Grofman, Handley, & Lublin, *supra*, at 1397. By contrast, if legislatures are permitted to draw coalition districts instead of majority-minority districts, race cannot be said to be the dominant and controlling

consideration in the redistricting decisions. Coalition districts depend heavily on non-racial factors, such as allegiances to a particular political party and the overall strength of that party in the district. Thus, the availability of such districts will lessen, if not wholly alleviate, the tension between equal protection and vote dilution principles.

Moreover, the concerns that guided the *Shaw* Court—that race-based redistricting, "even for remedial purposes, may balkanize us into competing racial factions," 509 U.S. at 657—are not implicated by coalition districts. First, *Shaw* noted that when district lines are contorted to bring together individuals who "may have little in common with one another but the color of their skin," it "reinforces the perception that members of the same racial group * * * think alike, share the same political interests, and will prefer the same candidates at the polls," and, accordingly, "may exacerbate the very patterns of racial block voting that majority-minority districting is sometimes said to counteract." 509 U.S. at 647-648. By contrast, with coalition districts, political affinity rather than skin color is the basis for district lines. Thus, there is little risk that coalition districts will "'convey the message that political identity is, or should be, predominantly racial.'" Pildes, *supra*, at 1547 (quoting *Bush v. Vera*, 517 U.S. 952, 980 (1996)).

Second, *Shaw* condemned race-based redistricting for sending a "pernicious" message to elected representatives that "their primary obligation is to represent only the members of [the racial group that controls the district], rather than their constituency as a whole." 509 U.S. at 648. Coalition districts implicate

no equivalent concerns. On the contrary, coalition districts necessarily require successful candidates to attract interracial support. This forces minority and majority populations to find common political ground, and forces elected officials to represent their entire constituency, rather than a particular racial group. See *De Grandy*, 512 U.S. at 1020. In this way, coalition districts "intrinsically counter" *Shaw*'s second concern. Pildes, *supra*, at 1543.

Thus, a holding that § 2 applies to coalition districts will bring this Court's cases under the Act into alignment with its equal protection cases.[9] Such a holding also makes sense in light of the overarching goals of the Act. The Act is intended "to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Ashcroft*, 539 U.S. at 490; see also *De Grandy*, 512 U.S. at 1020 (the Act is "meant to hasten the waning of racism in American politics"). Thus, "properly interpreted," the Act "should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." *Ashcroft*, 539 U.S. at 490.

The Court has recognized, however, that majority-minority districts may no longer be the most effective way to make this transition because "they rely on a quintessentially race-conscious calculus aptly described as the 'politics of second best.'" *De Grandy*, 512 U.S. at

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[9] Perhaps not surprisingly, this Court has only applied *Shaw* to invalidate majority-minority districts. See Pildes, *supra*, at 1547.

1020. Thus, "for all the virtues of majority-minority districts as remedial devices," their availability

> should not obscure the fact 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 their choice. Those candidates might not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

Ibid.; see also *Ashcroft*, 539 U.S. at 481 (the concentration of minority voters into majority-minority districts "risks isolating minority voters from the rest of the State, and risks narrowing political influence to only a fraction of political districts").

But for the pressure to draw majority-minority districts even where unnecessary to provide minority voters with the opportunity to elect their preferred candidates, the States would have significantly greater freedom to use other, race-neutral districting practices. District lines could "be drawn, for example, to provide for compact districts out of contiguous territory, or to maintain the integrity of political subdivisions." *Shaw*, 509 U.S. at 646; accord *Miller*, 515 U.S. at 916 (describing "traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests").

These and other neutral approaches would be more freely available if States that would have drawn majority-minority districts to comply with § 2 could draw coalition districts instead.

Ironically, therefore, under the approach taken by the North Carolina Supreme Court, "voting-rights law itself might stand in the way" of society's transformation toward colorblindedness. Pildes, *supra*, at 1572. A holding by this Court that there is no remedy for vote dilution unless a majority-minority district may be drawn or that one or more coalition districts are not permitted when a majority-minority district is available—two inevitable results of a 50% rule—will lock majority-minority districts into place, despite evidence that such districts are no longer necessary in all cases. This would result in bypassing effective, integrated, coalition districts for majority-minority districts no longer tied to the substantive purposes of § 2 or this Court's precedents.

In sum, coalition districts encourage interracial political cooperation and reduce racial balkanization, while at the same time permitting minority groups to exercise their fair share of political power. As a result, § 2 protections for coalition districts advance the purposes of the Act by hastening our transition "to a society where race no longer matters." *Ashcroft*, 539 U.S. at 490; see also *Shaw*, 509 U.S. at 657.

CONCLUSION

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

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