No. 07-689

In the

Supreme Court of the United States

GARY BARTLETT, Executive Director of the North Carolina State Board of Elections, et al.,

Petitioners,

v.

DWIGHT STRICKLAND, et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, HANS A. VON SPAKOVSKY, PROJECT 21, ABIGAIL THERNSTROM, AND KARL S. BOWERS, JR., IN SUPPORT OF RESPONDENTS

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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.

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), Center for Equal Opportunity (CEO), Hans A. von Spakovsky, Project 21, Abigail Thernstrom and Karl S. Bowers, Jr., submit this brief amicus curiae in support of Respondents.[1]

Pacific Legal Foundation was founded 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has extensive litigation experience in the area of group-based preferences and civil rights. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by the United States Supreme Court in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). PLF submits this brief because it believes its public policy perspective and litigation

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

experience in the area of voting rights will provide an additional viewpoint with respect to the issues presented. PLF participated as amicus curiae in past Voting Rights Act cases such as *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Chisom v. Roemer*, 501 U.S. 380 (1991); *League of United Latin Am. Citizens v. Attorney Gen. of Texas*, 501 U.S. 419 (1991), and *City of Rome v. United States*, 446 U.S. 156 (1980).

The Center for Equal Opportunity is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. CEO supports color blind public policies and seeks to block the expansion of racial preferences and to prevent their use in, for instance, employment, education, and voting. CEO has participated as amicus curiae in past Voting Rights Act cases, such as *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). In addition, officials from CEO testified before Congress several times during the recent reauthorization of the Voting Rights Act.

Project 21, the National Leadership Network of Black Conservatives, is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility has not traditionally been echoed by the nation's civil rights establishment. Project 21 participants seek to make America a better place for African-Americans, and all Americans, to live and work.

Hans A. von Spakovsky is a former member of the Federal Election Commission. He served for three

years as the Counsel to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice where he provided advice and legal counsel on enforcement of federal voting statutes including the Voting Rights Act. He is also a former member of the Fulton County Registration and Election Board, which was responsible for administering elections in the largest county in Georgia.

Abigail Thernstrom is a senior fellow at the Manhattan Institute in New York, vice-chair of the U.S. Commission on Civil Rights, and former member of the Massachusetts State Board of Education. She also serves on the board of advisors of the U.S. Election Assistance Commission. She testified twice at the 2006 Senate Hearings for the reauthorization of the Voting Rights Act. She is a recipient of the prestigious 2007 Bradley Prize for Outstanding Intellectual Achievement. Her 1987 book, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (Harvard University Press, 1987), won four awards, including the American Bar Association's Certificate of Merit and the Anisfield-Wolf prize for the best book on race and ethnicity. It was named the best policy studies book of that year by the Policy Studies Organization (an affiliate of the American Political Science Association), and won the Benchmark Book Award from the Center for Judicial Studies. She is completing a forthcoming book: *Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Representation* (American Enterprise Institute Press, 2009).

Karl S. Bowers, Jr., served as Special Counsel for Voting Matters with the U.S. Department of Justice. As Voting Counsel, Mr. Bowers oversaw the activities

of the Voting Section of the Civil Rights Division, and he provided legal and policy counsel on federal election law matters to senior officials in the Justice Department. He is also a former Chairman of the South Carolina State Election Commission. Mr. Bowers is currently a partner in the law firm of Nelson Mullins Riley & Scarborough, and focuses on public policy matters, including election and voting law, campaign finance law, governmental relations, and legislative and regulatory matters.

Amici Curiae have a substantial interest in limiting or eliminating the use of race as a factor in redistricting, and contend that Section 2 of the Voting Rights Act does not authorize redistricting in cases where the racial minority does not constitute more than 50% of a proposed district's population.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case requires the Court to consider whether the current race-conscious configuration of North Carolina House District 18 is required by Section 2 of the Voting Rights Act of 1965 (the Act), or whether this racial gerrymandering violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Based upon data from the 2000 census, North Carolina determined that an ideal single-member state House district holds 67,078 citizens. *Pender County v. Bartlett*, 361 N.C. 491, 494, 649 S.E.2d 364, 366 (2007). According to that census, Pender County had 41,082 residents, and neighboring New Hanover County had 160,307 residents. *Id.* Combining these two counties provided the population for approximately three House

districts. But rather than creating congressional district lines in compliance with state law to ensure cohesive communities, the General Assembly split Pender County along racial lines. One new district, House District 18, was created to have an African-American voting age population of 39.36%. *Id.* at 494-95, 649 S.E.2d at 366-67.

On May 14, 2004, five Pender County commissioners, in their official capacity and as individuals, sued several North Carolina state officials,[2] alleging that the House redistricting plan violated the Whole County Provision of the state constitution.[3] The state officials answered that this race-conscious redistricting was required by Section 2 of the Act. *Id.* at 495, 649 S.E.2d at 367. A three-judge panel of the North Carolina Superior Court entered summary judgment against Pender County, and the County appealed.

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[2] The defendants are the Executive Director and members of the North Carolina Board of Elections, the then co-Speakers of the North Carolina House of Representatives, the President Pro Tempore of the North Carolina Senate, the Attorney General, and the Governor of the State of North Carolina. *Pender County*, 361 N.C. at 495, 649 S.E.2d at 367.

[3] In carving out the new district, the North Carolina General Assembly split the voters of Pender County to form two new districts with voters from neighboring Hanover County. *Pender County*, 361 N.C. at 494, 649 S.E.2d at 366. Fracturing Pender County in this way violates the Whole County Provision (WCP) of the North Carolina Constitution, which provides "[n]o county shall be divided in the formation of a senate district," N.C. Const. art. II, § 3(3), and "[n]o county shall be divided in the formation of a representative district," N.C. Const. art. II, § 5(3). *See Pender County*, 361 N.C. at 510, 649 S.E.2d at 376 ("House District 18 fails to comply with the WCP.").

The North Carolina Supreme Court, relying on *Thornburg v. Gingles*, 478 U.S. 30 (1986), reversed the three-judge panel. *Gingles* set forth three preconditions a plaintiff must demonstrate in order to establish that a legislative district is required to be drawn to comply with Section 2. The first precondition requires a showing that the minority population is "sufficiently large and geographically compact to *constitute a majority* in a single-member district." *Id.* at 50 (emphasis added). The North Carolina Supreme Court, and almost every other court to rule on this issue, holds that the minority group must comprise a majority of voting age citizens in the proposed district to make out a Section 2 claim. Because the African-American voting age population in House District 18 is not in the majority, the redistricting does not meet the first *Gingles* precondition.

Amici Curiae urge this Court to affirm the holding of the North Carolina Supreme Court as it interprets *Gingles*. Neither the plain language of Section 2, nor its legislative history, provides authority for granting to a bi-racial coalition a statutory right to have its preferred candidate win district elections. Interpreting Section 2 as mandating redistricting in this manner requires the elimination of the first *Gingles* precondition. The result is the granting of racial preferences—not to remedy past or present discrimination, but only to ensure that one political party prevails over another. Such an interpretation is at odds with the language and historical meaning of the Act, creates severe practical problems, and exponentially expands the use of racial considerations in redistricting, thereby also increasing exponentially the constitutional problems raised by Section 2.

ARGUMENT

I

SECTION 2 OF THE ACT PROVIDES NO AUTHORITY FOR VOTE DILUTION CLAIMS BASED UPON COALITION, CROSSOVER, OR INFLUENCE DISTRICTS

The fundamental issue in this case is determining when a new voting district must be drawn to satisfy Section 2 of the Act. Subsection 2(a) prohibits all states and political subdivisions from imposing any voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of racial and language minorities. 42 U.S.C. § 1973(a); *Gingles*, 478 U.S. at 43. Subsection 2(b) establishes that a violation occurs where the "totality of the circumstances" reveals that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . 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." 42 U.S.C. § 1973(b); *Gingles*, 478 U.S. at 43.

Courts recognize at least four distinct types of legislative districts: (1) "majority-minority" districts, (2) "coalition" districts, (3) "crossover" districts, and (4) "influence" districts. *Pender County*, 361 N.C. at 502, 649 S.E. 2d at 371. A majority-minority district is one "in which a majority of the population is a member of a specific minority group." *Voinovich v.*

Quilter, 507 U.S. 146, 149 (1993). Majority-minority districts are often called "safe" districts for the minority, because the minority group voters can vote as a bloc to elect the candidates of their choice without relying on voters of other races. In the three other types of legislative districts, however, the predominant minority group cannot consistently elect its candidate of choice without the assistance of other racial groups.

A coalition district is one in which a minority group joins with voters from at least one other minority group to elect a candidate. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994). In a crossover district, a minority group has support from a limited but reliable number of white crossover voters. *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 376 (S.D.N.Y.) (per curiam), *aff'd mem.*, 543 U.S. 997 (2004). Finally, an influence district is one in which a minority group is large enough to influence the election of candidates, but too small to determine the outcome. *Georgia v. Ashcroft*, 539 U.S. 461, 470 (2003).

When a voting district must be created pursuant to Section 2, the Act's plain language and legislative history conclusively establish that such a district can only be a majority-minority district. Congress recently clarified that Section 5 of the Voting Rights Act requires majority-minority districts, and Section 2 should be interpreted consistently with Section 5 in this respect. *See* Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 Geo. J.L. & Pub. Pol'y 41, 71 (2007) ("Influence districts . . . no longer count in assessing retrogression.).

A. The Plain Language and Legislative History of Section 2 Provide No Support for Vote Dilution Claims Based Upon Coalition, Crossover, or Influence Districts

Minority voters must constitute a numerical majority in a district before they can claim that a challenged practice deprives minority voters of the ability to elect the candidates of their choice, *Gingles*, 478 U.S. at 50, because "black voters in . . . influence districts" cannot "dictate electoral outcomes independently." *Voinovich*, 507 U.S. at 154.

The Sixth Circuit conducted the following analysis in regard to coalition districts:

> If Congress had intended to sanction coalition suits, the statute would read "participation by members of *the classes* of citizens protected by subsection (a)" or more simply, "participation by citizens protected by subsection (a)." Moreover, the central element necessary to establish a violation is a showing that "*its* members have less opportunity than other members of the electorate," 42 U.S.C. § 1973(b) (emphasis added), not that "*their* members have less opportunity." Finally, Congress declared in subsection (b) that "[t]he extent to which members of a *protected class* have been elected" is one circumstance which may be considered. *Id.* (emphasis added). As in prior instances, if Congress had intended to authorize coalition suits, the phrase would more naturally read: "[t]he extent to which

> members of the *protected classes* have been elected." (Citation omitted.)

Nixon v. Kent County, 76 F.3d 1381, 1386-87 (6th Cir. 1996). A similar textual analysis would reveal no word or phrase which reasonably supports claims on the basis of crossover or influence districts. Neither does analysis of the Act's legislative history.

As stated in its preamble, the Act was intended "[t]o enforce the fifteenth amendment to the Constitution of the United States." *See Allen v. State Bd. of Elections*, 393 U.S. 544, 588 (1969) (Harlan, J., concurring in part and dissenting in part). In 1965, Section 2 of the Act was an uncontroversial preamble which was nothing more than a restatement of this Civil War Amendment. *Chisom*, 501 U.S. at 392; *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 60-62 (1980). Pursuant to this constitutional power, the entire statute was aimed at discriminatory voting procedures which continued to deprive African-Americans of access to the ballot, such as literacy tests and other similar devices. *Holder v. Hall*, 512 U.S. 874, 894 (1994) (Thomas, J., concurring in the judgment) (citing Thernstrom, *Whose Votes Count?*, at 17-27). At the time, Attorney General Katzenbach repeatedly emphasized that the sole ambition of the Act was getting people registered. *United States v. Bd. of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 145 (1978) (Powell, J., concurring in part and concurring in the judgment). Although the Act constituted an "uncommon exercise of congressional power," *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), and a "substantial departure . . . from ordinary concepts of our federal system," Hearings on S. 407, et al., Before the Subcommittee on Constitutional Rights of the

Senate Committee on the Judiciary, 94th Cong., 1st Sess. 536 (1975) (testimony of J. Stanley Pottinger), its limited scope made it proper legislation pursuant to the Fifteenth Amendment. *See, e.g.*, *Bolden*, 446 U.S. at 60-61.

The Act proved immediately successful in ensuring racial minorities access to the voting booth. By the early 1970's, the spread between black and white registration in several of the targeted Southern States had fallen to well below 10%. Thernstrom, *Section 5*, at 44. Since the Act's enactment, there has also been a "growing receptiveness of a predominantly white electorate to minority candidates." Timothy G. O'Rourke, *The Voting Rights Paradox in Controversies in Minority Voting* 109 (1992); *see also Holder*, 512 U.S. at 895 (Thomas, J., concurring in the judgment).

In response to racist efforts in Mississippi and elsewhere to curtail the political impact of black enfranchisement, this Court recognized that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Allen*, 393 U.S. at 569. Switches from single-member districts to at-large and other schemes to weaken black electoral power violate both the statute and the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength. *See, e.g.*, *Rogers v. Lodge*, 458 U.S. 613, 616-17 (1982); *White v. Regester*, 412 U.S. 755, 765-66 (1973). In 1982, Congress amended Section 2 of the Act to prohibit legislation in jurisdictions nationwide that results in the dilution of a minority group's voting strength, regardless of the legislature's intent. 42 U.S.C. § 1973. "Congress intended that the Voting Rights Act

eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination." *Gingles*, 478 U.S. at 69 (citing S. Rep. No. 417, 97th Cong., 2nd Sess. 5 (1982), 1982 U.S.C.C.A.N. 177; H.R. Rep. No. 97-227, p. 31 (1981)).

The extensive legislative history of the Act contains absolutely no evidence that Congress even contemplated, let alone intended, the requirement of coalition, crossover, or influence districts. *See* Katharine I. Butler & Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act?*, 21 Pac. L.J. 619, 642 (1990) ("The voluminous legislative history surrounding the [1982] amendment to Section 2 contains no reference to a 'coalition' suit."); Rick G. Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups—When Is the Whole Greater Than the Sum of the Parts?*, 20 Tex. Tech L. Rev. 95, 111-12 n.99 (1989) ("Congress provided no answer in either the Act's wording or in accompanying committee reports," concerning coalition suits.).

The committee report for the 1975 amendments does not make any reference, implicit or explicit, to an "aggregation" or coalition of different groups.[4] *See* S. Rep. No. 295, 94th Cong., 1st Sess. 1 (1975), *reprinted*

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[4] As noted by *Nixon*, 76 F.3d at 1387 n.7, Congress only addressed the "aggregation of separately protected groups" in the Act on one occasion, and then in the negative. *See* 42 U.S.C. § 1973(b)(f)(3) (language minorities may not aggregate their numbers for purposes of meeting the threshold numeric requirements for foreign-language ballots of 42 U.S.C. § 1973(b).

in 1975 U.S.C.C.A.N. 774. Neither do the subsequent reports for the 1982 amendments. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 28 (1982), *reprinted* in 1982 U.S.C.C.A.N. 177, 205.

The Senate Report which accompanied the 1982 amendments to the Act states that the purpose of the Voting Rights Act was "'not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination.'" *Gingles*, 478 U.S. at 44 n.9 (citing S. Rep. No. 417, 97th Cong., 2nd Sess. 5 (1982), 1982 U.S.C.C.A.N. 182). Mandating coalition, crossover, or influence voting districts so that certain minority voters can elect the candidate of their choice goes beyond ensuring equal access to the political process; it effectively requires districts that will always guarantee the election of the minority-preferred candidate by the sheer numbers of a multi-racial coalition wherever such a coalition exists. "Granting minorities a right to rearrange districts so that their political coalition will usually win has nothing to do with equal opportunity, but is preferential treatment afforded to no others." Michael A. Carvin & Louis K. Fisher, *"A Legislative Task": Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 Election L.J. 2, 17 (2005) (citing *De Grandy*, 512 U.S. at 1020).

In addition, the Act was clearly meant to address matters of race, not political party affiliation. President Lyndon Johnson was focused solely on ending practical barriers to minority voting, which he identified and divided into three categories: (1) technical, (e.g., poll taxes), (2) noncooperation, and (3) subjective (e.g., literacy tests). *See* Message from

the President of the United States Related to the Right to Vote, 89th Cong., 1st Sess. (1965). President Johnson's speech to a special joint-session of Congress concerning the Act emphasizes his singular focus:

> The issue of equal rights of American Negroes is [a challenge to the values and purposes of America]. And should we defeat every enemy, and should we double our wealth and conquer the stars and still be unequal to this issue, then we will have failed as a nation. And we meet here tonight as Americans—*not as Democrats or Republicans*—we are met here as Americans to solve that problem.

Id. The Act's legislative history shows an intent to end barriers to minority voting, but is virtually absent of any reference to political party representation.

B. The Purpose of Section 2 Is Not to Protect Bi-Racial Political Coalitions

The objective of Section 2 is not to ensure that a candidate supported by minority voters can be elected in a district. Nor to require the drawing of districts in such a way just to "give a minority group more voting power." *Latino Political Action Comm., Inc. v. City of Boston*, 784 F.2d 409, 412 (1st Cir. 1986). Rather, it is to guarantee that a minority group will not be denied, on account of race, color, or language minority status, the ability "to elect its candidate of choice on an equal basis with other voters." *Voinovich*, 507 U.S. at 153. Thus the Act protects a singular group of minority voters, not bi-racial coalitions. In holding that a group too small to be a district majority "cannot maintain that they would have been able to elect representative

of their choice," *Gingles*, 478 U.S. at 50 n.17, the *Gingles* Court concluded that the opportunity "to elect" protected by Section 2 is the ability of a protected class to elect a representative of its choice, by "dictat[ing] outcomes independently." *Voinovich*, 507 U.S. at 154; *see also Gingles*, 478 U.S. at 67-68 ("Section 2(b) states that a violation is established if it can be shown that members of a protected minority group 'have less opportunity than other members of the electorate to . . . elect representative of their choice.'" (quoting 42 U.S.C. § 1973) (emphasis added in *Gingles*)).

The state officials argue that the minority group in House District 18, comprising an African-American voting age population of only 39.36%, is able to "elect representatives of their choice." 42 U.S.C. § 1973(b). In actuality, the minority group can only claim an ability to "influence" elections by joining multi-racial political coalitions. *Gingles*, 478 U.S. at 46 n.12; *accord De Grandy*, 512 U.S. at 1009 (where "members of a minority group are a minority of the voters," they allege that their group is "potentially influential"); *Voinovich*, 507 U.S. at 154 (voters allege "influence-dilution" where they "do not allege that [electoral structure] prevented black voters from constituting a *majority* in additional districts"); *Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993) ("[A] minority group not sufficiently large to constitute a majority" claims an "ability to influence, rather than alter, election results.").

The Court previously explained in *Growe* that a minority group claiming vote dilution must establish that it "has the potential to elect a representative of its own choice in some single-member district." *Growe*, 507 U.S. at 40. And "[u]nless minority voters possess

the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 50 n.17. As a result, to establish a vote dilution claim under Section 2, minorities must prove that they have been unlawfully denied the political opportunity they would have enjoyed as a voting-age majority in a single-member district, which is the opportunity to "dictate electoral outcomes independently" of other voters in the jurisdiction. *Voinovich*, 507 U.S. at 154. When a districting plan denies African-American voters the numbers they need to form a winning coalition with white voters, the plan deprives the entire coalition, not just the African-Americans. Because even the white voters in such a coalition were denied the ability to elect the candidate of their choice, the challenged plan does not result in vote dilution "on account of race" and does not cause African-American voters to have "less opportunity than other members of the electorate . . . to elect representatives of their choice." 42 U.S.C. § 1973(a) & (b).

The Court recently affirmed a district court decision that struck down a Section 2 claim based upon a crossover/influence district that was similar in many respects to House District 18. *LULAC*, 548 U.S. 399. In *LULAC*, the citizen voting-age population in District 24 was composed of 49.8% white, 25.7% African-American, and 20.8% Hispanic. *Id.* at 443. Appellants claimed that the African-American voters had effective control of District 24, because of the white and Hispanic crossover votes. *Id.* at 444. However, "[t]hat African-Americans had influence in the district . . . does not suffice to state a § 2 claim in these cases." *Id.* at 445 (citations omitted).

The Seventh Circuit rejected Section 2 claims where the single-member districts were composed of African-American voting age populations of 43.7% and 43.2 %. *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 939 n.2 (7th Cir. 1988). The court recognized that African-Americans comprising less than a majority in a district would not have the requisite potential to elect their candidates of choice. "[E]ven if all eligible black voters supported a single candidate in the proposed single-member district, that candidate would not be assured of electoral success. A sole challenger, supported by a bloc of white voters, would win." *Id.* at 944. Members of a racial group are not provided with "less opportunity than other members of the electorate" if they are unable to form a winning coalition or count on crossover votes, because no racial group (or group defined by any other characteristic) has that constitutional right. If a plan impairs votes not "on account of race" but on account of membership in a political coalition, the plan does not violate Section 2. *See, e.g.*, *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971) (no vote-dilution claim when a minority group, "along with all other Democrats, suffers the disaster of losing too many elections"); *Bolden*, 446 U.S. at 109 (Marshall, J., dissenting) (Section 2 claim where minorities' "lack of success at the polls was the result of partisan politics, not racial vote dilution"). Depriving minorities of the ability to form a winning coalition does not result in vote dilution on account of race, and does not mean that minorities have less opportunity than other members of the electorate to elect representatives of their choice. Carvin & Fisher, *supra*, at 17.

In actuality, the North Carolina's redistricting here is an attempt to use race as a proxy for political

party affiliation in an effort to have courts mandate political gerrymandering. *See* J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 Geo. Mason L. Rev. 431, 455 (2000) ("[T]he Democratic Party will seek to work closely with minority officeholders and civil rights advocates to create districts that" are "less than 50% minority."). Experience in the lower courts confirms that coalition, crossover, and influence claims merely seek advantage for a political party to which minority voters belong. *See, e.g., Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 643 n.22 (D.S.C. 2002) (claim seeks 25% to 40% African-American districts so that a Democratic candidate can use the African-American vote to defeat any Republican); *Smith v. Clark*, 189 F. Supp. 2d 529, 537 (S.D. Miss. 2002) ("[M]ore minorities are required in [a district] to make the congressional race more competitive for democratic candidates.").

The argument "that a coalition of black and white voters may claim that a redistricting plan dilutes their *combined* ability to elect candidates confuses the purpose of Section 2." *Hall v. Virginia*, 385 F.3d 421, 430 (4th Cir. 2004). The objective of Section 2 is not to ensure that a candidate supported by minority voters can be elected in a district. Rather, it is to guarantee that a minority group will not be denied, on account of race, color, or language minority status, the ability "to elect its candidate of choice on an equal basis with other voters." *Voinovich*, 507 U.S. at 153. Section 2 is not violated unless minorities "have less opportunity than other members of the electorate to . . . elect representatives of their choice." 42 U.S.C. § 1973(b).

II

THE FIRST *GINGLES* PRECONDITION PROVIDES LOWER COURTS WITH AN ESSENTIAL OBJECTIVE RULE

In *Gingles*, this Court set forth three preconditions a plaintiff must demonstrate in order to establish that a legislative district is required to be drawn to comply with Section 2. These preconditions require a plaintiff to show that (1) a minority population is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority population is "politically cohesive" and thus votes as a bloc; and (3) the majority population "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50-51.

Plaintiffs trying to make out a Section 2 claim must prove that, but for the challenged plan, minority voters would have been able to elect representatives of their choice. *Gingles*, 478 U.S. at 50 n.17. Otherwise, the plan "cannot be responsible for minority voters' inability to elect its candidates." *Id.* at 50; *accord Cano v. Davis*, 211 F. Supp. 2d 1208, 1231 (C.D. Cal. 2002) (claim of minority vote dilution not possible if "there is no minority voting power to dilute"). The reason for the first *Gingles* precondition is clear: "Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 50 n.17; *see also Growe*, 507 U.S. at 40 (The first precondition is "needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district.").

The North Carolina Supreme Court understood the importance of the first *Gingles* precondition when it held that House District 18 was not required by Section 2:

> Thus, after taking into account the language of *Gingles*, the weight of persuasive authority from the federal circuits, the importance of imposing a practicable rule, the necessity for judicial economy, the redistricting responsibility of the General Assembly, and the inherent tension lurking in the third *Gingles* prong, *we conclude that a bright line rule is appropriate. Accordingly, if a minority group is geographically compact but nevertheless lacks a numerical majority of citizens of voting age, the minority group lacks the power to decide independently the outcome of an election, and its voting power has not been diluted by the lack of a legislative district.* In such a case, the first *Gingles* precondition has not been satisfied and the General Assembly is not required to create a Section 2 legislative district.

Pender County, 361 N.C. at 506, 649 S.E.2d at 374 (emphasis added). The North Carolina Supreme Court's acceptance of a bright-line rule is consistent with other courts that have emphasized the need for such a rule to act as a gatekeeper. *See Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 654 (N.D. Ill. 1991) (three-judge court) (Once the *Gingles* majority "threshold is breached, there appears to be no logical or objective measure for establishing a threshold minority group size necessary for bringing an influence claim under § 2."). The *Gingles* majority-in-a-district

requirement provides "a choice of clear rules over muddy efforts to discern equity," and it "reins in the almost unbridled discretion that section 2 gives the courts." *McNeil*, 851 F.2d at 942. Movement away from the *Gingles* standard "invites courts to build castles in the air," based on quite "speculative" foundations. *Id.* at 944. The *Gingles* Court "based its bright-line requirement on a plausible scenario under which courts can estimate approximately the ability of minorities in a single-member district to elect candidates of their choice." *Id.*

The bright-line rule effectuates the judicial duty to enforce voting rights while at the same time recognizing, as the Court instructed, that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe*, 507 U.S. at 34. Without a majority-minority threshold, any redistricting scheme could be challenged whenever disparate minority communities could be pooled together in sufficient numbers to create some potential to elect. *See Parker v. Ohio*, 263 F. Supp. 2d 1100, 1108 (S.D. Ohio 2003) (Graham, J., concurring) ("If influence claims are permitted, then any system of districting, no matter how fair and impartial in its conception, is subject to attack unless it pools minority voters in sufficiently large enclaves so that they can 'influence' the result of elections.").

Without the first *Gingles* precondition, members of any protected minority group could always launch a lawsuit to increase their presence in a district and argue that this increase will cause their candidate to prevail. As the Seventh Circuit cautioned, "[c]ourts might be flooded by the most marginal section 2 claims

if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections." *McNeil*, 851 F.2d at 947; *see also McGhee v. Granville County, N.C.*, 860 F.2d 110, 116 (4th Cir. 1988) (the first *Gingles* precondition is necessary to prevent vote dilution concept from being "an open-ended one subject to no principled means of application"); *Burton v. Sheheen*, 793 F. Supp. 1329, 1350 (D.S.C. 1992) (The *Gingles* preconditions shield "the courts from meritless claims."); *Hastert*, 777 F. Supp. at 654 ("[A]n unrestricted breach of the *Gingles* single-district majority precondition will likely open a Pandora's box of marginal Voting Rights Act claims. ").

> Nothing but raw intuition could be drawn upon by courts to determine in the first place the size of those smaller aggregations having sufficient group voting strength to be capable of [vote] dilution in any legally meaningful sense and, beyond that, to give some substantive content other than raw-power-to-elect to the concept as applied to such aggregations.

Gingles v. Edmisten, 590 F. Supp. 345, 381 (E.D.N.C. 1984), *aff'd in part, rev'd in part, Gingles*, 478 U.S. 30.

Interpreting Section 2 as mandating redistricting in order to establish a crossover voting district requires the dismantling of the *Gingles* preconditions. A crossover district, like the one at issue here, is "premised upon a minority group gaining support from voters in the typically Caucasian majority to elect the candidate of the minority group's choice." *Pender County*, 361 N.C. at 506, 649 S.E. 2d at 373-74. But in contradiction, the third *Gingles* precondition requires

that the majority population vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.*, 649 S.E. 2d at 374 (citing *Gingles*, 478 U.S. at 51). But if the majority group does not vote sufficiently as a bloc, the third *Gingles* prong cannot be met. When a minority group is able to accumulate sufficient crossover white votes that the minority candidate is successful, the *Gingles* premise that the white majority votes as a bloc to defeat the minority group's candidate is undermined. *See Metts v. Murphy*, 363 F.3d 8, 12 (1st Cir. 2004) (recognizing the "tension" in "any effort to satisfy both the first and third prong of *Gingles*," and observing that "[t]o the extent that African-American voters have to rely on cross-over voting to prove they have the 'ability to elect' a candidate of their choosing, their argument that the majority votes as a bloc against their preferred candidate is undercut"); *see also Voinovich*, 507 U.S. at 158 ("Here, as in *Gingles*, 'in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters.'").

Thus, the North Carolina Supreme Court recognized, consistent with this Court's precedents, that a high level of crossover voting is inconsistent with the majority bloc voting defined in the third *Gingles* precondition and weakens the possibility of vote dilution. *Pender County*, 361 N.C. at 506, 649 S.E.2d at 374. In a coalition, crossover, or influence district, absent help from voters of other races, even if every eligible member of the minority group voted for a single candidate, that candidate would not be assured of electoral success.

The elimination of the first *Gingles* precondition means that Section 2 would require the creation of districts where minorities' preferred representatives are usually elected. If minority groups in the same district preferred different candidates, the court would have to determine which minority group should prevail. This is illustrated in *Metts*, where the district challenged had a 21.4% black population and a 46.7% Hispanic population. This had altered the preexisting district from 25.7% black and 41% Hispanic. A Hispanic challenger then defeated the African-American incumbent and went on to win the election in the new district. *Metts*, 363 F.3d at 9. The *Metts* majority refused to affirm a Rule 12(b)(6) dismissal based on the plaintiffs' inability to satisfy the first necessary *Gingles* precondition. "The net result of . . . *Metts* . . . was to authorize the lower court to deprive Hispanic voters, who constituted the bulk of the district, of their new electoral opportunity and return power to the smaller African-American group that had enjoyed representation during the prior decade." Carvin & Fisher, *supra*, at 26. "[R]acial harmony is hardly enhanced when the interests of one minority group are subverted to further those of another minority group." *Id.*

Courts could easily face similar difficulty in a crossover district composed of white voters and one minority group, like House District 18. For example, assume that 55% of the voters in a given district are white and 45% of the remaining voters are African-American. Next assume that 25% of the African-American voters prefer Candidate A, and the other 20% of African-American voters prefer Candidate B. In the election, 20% of the white voters join with 25% of the African-American voters and vote for candidate A,

but the other 35% of white voters join with the other 20% of African-American voters to elect Candidate B. The end result is that the candidate preferred by the majority of African-American voters lost the election. This leads to several possibilities. First, without the first *Gingles* precondition, the 20% of African-American voters who preferred Candidate B could claim that disturbing this status quo would violate Section 2—even though their choice is not even that of the majority of African-Americans. Second, without the first *Gingles* precondition, the 25% of African-American voters who preferred Candidate A could claim that they were denied the opportunity to elect their preferred candidate and bring a voter dilution claim under Section 2. The result would be to deprive the other group of African-Americans the opportunity to elect their preferred candidate.

To further illustrate the first point, imagine an election where there are three candidates. As before, assume that 55% of the voters in the district are white and 45% of the remaining voters are African-American. In the election, 20% of voters who are white vote for Candidate A, 25% of voters who are African-American vote for Candidate B, and 20% of the other voters who are African-American join with 35% of the other white voters to form a majority and elect Candidate C. Next assume that after the election, Candidate A's supporters attempt to redraw the district (along with neighboring districts, where Candidate A won by more votes than he needed) in such a way as to help Candidate A win in the next election. If Section 2 is interpreted in such a way as to require coalition, crossover, or influence districts, then the following vote dilution claim could arise: In response to the redistricting, voters who supported Candidate C may

claim a Section 2 violation, since the African-American voters preferring Candidate C lost in a coalition district. The end result would be to deny the wishes of the African-Americans who preferred Candidate B.

The absurdity of these outcomes is surpassed by the actual claim in *Metts*. By alleging that their multi-racial political coalition had the potential to elect its preferred representatives, the African-American plaintiffs in *Metts* were in essence contending that more *non*-African-American voters than African-American voters were voting for African-American-preferred candidates. *Metts*, 363 F.3d at 13 (Selya, J., dissenting). When the political candidate preferred by a racial minority is elected by a majority of non-minority voters, there is no discrimination in voting. Application of the Act to this situation cannot be justified when its purpose is to "eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination." *Gingles*, 478 U.S. at 69. Should *Gingles* be undermined by the elimination of the first precondition, the above results would be repeated across the country.

Race-conscious redistricting to form coalition, crossover, and influence voting districts ensures that we will never have a color blind society. This is because legislators will be required to constantly adjust racial percentages in districts where minority voters are present in sufficient numbers to "influence" electoral outcomes. If Legislatures must constantly manipulate the percentages of minority voters to avoid liability, then virtually no redistricting decision will be made where race is not the predominant factor in violation of the color blind command of *Shaw v. Reno*, 509 U.S. 630 (1993). Furthermore, courts are ill-

equipped to decide which districting plans will elect more minority-preferred candidates. It was recognized as early as *Gingles* that shifting African-American voters between districts has an inherently unpredictable effect on the number of African-American-preferred candidates elected. *See Gingles*, 478 U.S. at 87-89 (O'Connor, J., concurring in judgment); *accord Ashcroft*, 539 U.S. at 480-82. As then-Judge Breyer observed, entertaining claims like appellants "would require courts to make the very finest of political judgments about possibilities and effects—judgments well beyond their capacities." *Latino Political Action Comm.*, 784 F.2d at 412.

The state supreme court's holding below is thus consistent with an understanding that if "the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the" challenged electoral structure. *Gingles*, 478 U.S. at 50 n.17.

III

INTERPRETING SECTION 2 TO REQUIRE COALITION, CROSSOVER, AND INFLUENCE DISTRICTS RAISES SERIOUS CONSTITUTIONAL CONCERNS

In addition to the plain language, legislative history, and practical arguments that have already been made, an interpretation of Section 2 that results in more districts being drawn on the basis of race would create grave constitutional problems for the

underlying statute. Any government action that divides us by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," *Croson*, 488 U.S. at 494 (plurality opinion), "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw*, 509 U.S. at 657, and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting). As the Court explained in *Rice v. Cayetano*, 528 U.S. 495, 517 (2000), "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."

This Court's decisions have established that all laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized. *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (citing *Shaw*, 517 U.S. at 904); *Miller v. Johnson*, 515 U.S. 900, 904-05 (1995); and *Adarand*, 515 U.S. at 227). In *Reno*, 509 U.S. 630, this Court articulated the equal protection principles that govern a state's drawing of congressional districts, noting that laws that explicitly distinguish between individuals on racial grounds fall within the core of the Equal Protection Clause's prohibition against race-based decisionmaking. Reapportionment legislation that classifies and separates voters by race reinforces racial stereotypes and threatens to undermine our system of representative democracy. Such redistricting signals to "elected officials that they represent a particular

racial group rather than their constituency as a whole." *Reno*, 509 U.S. at 650.

Opening the door to vote dilution claims to require the formation of coalition, crossover and influence voting districts will result in an increase of race-conscious redistricting across the county. Section 2 requires more than the ability to influence the outcome of an election. "If § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, *raising serious constitutional questions*." *LULAC*, 548 U.S. at 446 (citing *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring)) (emphasis added).

Congress clearly intended that some consideration of race be given in very limited cases in order to eradicate vestiges of discrimination in voting. For instance, as *Gingles* discussed, where a large minority population is divided by voting districts and is consistently outvoted, Section 2 of the Act requires the redrawing of district lines with race as a consideration. But if the first *Gingles* precondition is eliminated, and Section 2 is interpreted to allow coalition, crossover, and influence districts, race will become the primary factor in the majority of redistricting across the country.

Section 2 of the Act should not be construed in a manner that calls into question its constitutionality. As this Court has long adhered to the policy stated in *Hooper v. California*, 155 U.S. 648, 657 (1895): "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." This approach also recognizes "that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will

therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *Bd. of Supervisors of Grenada County v. Brown*, 112 U.S. 261, 269 (1884)); *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749-50 (1961); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *Lucas v. Alexander*, 279 U.S. 573, 577 (1929); *Panama R. Co. v. Johnson*, 264 U.S. 375, 390 (1924).

In a racial gerrymandering claim, "[r]ace must not simply have been a motivation for the drawing of a majority-minority district, but the predominant factor motivating the legislature's districting decision." *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (citation and internal quotation marks omitted). The race of voters was undisputedly the primary factor considered by North Carolina's General Assembly when it created the House District 18 crossover district. Ostensibly, that district was intended to meet the requirements of Section 2 of the Act. Specifically, the new district was formed by packing African-American voters from two counties into one district so that the new district would have a total African-American population of 42.89%, and an African-American voting age population of 39.36%. *Pender County*, 361 N.C. at 494-95, 649 S.E. 2d at 366-67. If Section 2 is interpreted as requiring coalition, crossover, or influence districts, then the race of voters will always be the primary factor in redistricting, and district lines will repeatedly be drawn along racial lines.

The Sixth Circuit warns that the "language of the Voting Rights Act does not support a conclusion that coalition suits are part of Congress' remedial purpose and . . . there are compelling reasons to believe that they are not." *Nixon*, 76 F.3d at 1393. First, racial gerrymandering "is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense." *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting).

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than political issues are generated; communities seek not the best representative but the best racial or religious partisan . . . . [T]hat system is at war with the democratic ideal.

Id. at 67. "Racially defined wards" accentuating "race-based allegiances and divisions," Hearings on S. 53, et al., Bills to Amend the Voting Rights Act of 1965, Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess. 1449 (Senate Hearings) (statement of Professor William Van Alstyne), obviate the need to form coalitions and seek compromise—two of the most heralded features of American government. As Chief Justice Roberts stated, "I do not believe it is our role to make judgments about which mixes of minority voters should count for purposes of forming a majority in an electoral district . . . . It is a sordid business, this

divvying us up by race." *LULAC*, 548 U.S. at 511 (Roberts, C.J., dissenting).

Second, a necessary corollary of this racial divisiveness is ambivalence by white politicians toward minority citizens and minority politicians toward white citizens. It is "unnecessary, and probably unwise, for an elected official from a white majority district to be responsive at all to the wishes of black citizens; similarly, it is politically unwise for a black official from a black majority district to be responsive at all to white citizens." *United States v. Dallas County Comm'n*, 850 F.2d 1433, 1444 (11th Cir. 1988) (Hill, J., concurring), *cert. denied*, 490 U.S. 1030 (1989). "[A]ssured minority representation encourages local white politicians to say to the minority communities: 'You have your own representatives. Don't come to us with your problems; speak to them.'" Hearings on S. 53, *supra*, at 1327-28 (testimony of Professor Horowitz).

Finally, and most importantly, racial redistricting makes the patently false and pernicious assumption that all minorities think alike and that only a member of a given minority can properly represent minority interests. This Court has held that racial gerrymandering "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Reno*, 509 U.S. at 647. Justice Thomas reiterated and expanded on these sentiments: "The clear premise of the system is that geographic districts are merely a device to be manipulated to establish 'black representatives' whose real constituencies are

defined, not in terms of the voters who populate their districts, but in terms of race. The 'black representative's' function, in other words, is to represent the 'black interest.'" *Holder*, 512 U.S. at 907 (Thomas, J., concurring).

CONCLUSION

"Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Reno*, 509 U.S. at 657. With respect to voting, racial classifications carry particular dangers. "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Id.*

For the foregoing reasons, the Court should affirm the decision of the North Carolina Supreme Court that dutifully followed both the reasoning and holding of *Gingles*.

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