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

REPLY BRIEF FOR THE PETITIONERS

WALTER DELLINGER
SRI SRINIVASAN
IRVING L. GORNSTEIN
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
Attorney General
CHRISTOPHER G. BROWNING, JR.*
GRAYSON G. KELLEY
TIARE B. SMILEY
ALEXANDER MCC. PETERS
SUSAN K. NICHOLS
NORTH CAROLINA DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900

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*Counsel of Record

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ARGUMENT

Respondents argue that Section 2 categorically bars minority voters from proving a Section 2 claim unless the minority group can show that they could constitute a numerical majority in a district. In support of that argument, respondents rely on the text of Section 2, the need for a rule that minimizes the use of race, the principle that Section 2 does not require maximization of minority voting strength, and the need for an administrable standard.

Respondents' arguments are unpersuasive. The text of Section 2 establishes an "opportunity-to-elect" precondition, and that standard can be satisfied by proof that minority voters would have an opportunity to elect representatives of their choice in a coalition district through sufficient crossover voting. Such coalition districts minimize, rather than exacerbate, the use of race in districting and politics. The opportunity-to-elect standard also aligns Section 2 with Section 5; it does not require maximization; and it is fully capable of judicial administration. And, unlike the numerical-majority requirement, the opportunity-to-elect standard prevents blatant efforts to dilute minority voting strength in circumstances in which minority voters could not constitute a majority in a district.[1]

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[1] The State urges adoption of an "opportunity-to-elect" precondition – a test that would protect minority groups from vote dilution when a minority group has the opportunity to elect candidates of choice in a "coalition district" as a result of limited crossover voting. The State uses the term "coalition district" because the Court in *Georgia v. Ashcroft*, 539 U.S. 461,

I. The text of Section 2 imposes an opportunity-to-elect precondition, not a numerical-majority requirement.

Respondents argue that the text of Section 2 requires minority voters to establish that they could constitute a numerical majority in a hypothetical district in order to challenge a jurisdiction's redistricting plan. Resp. Br. 10. The text of Section 2, however, "says nothing about majority-minority districts." *Voinovich v. Quilter,* 507 U.S. 146, 155 (1993). Instead, in order to prove that the challenged plan is the cause of their inability to elect, the text of Section 2 requires minority voters to establish that they would have an "opportunity . . . to elect" candidates of their choice in a proposed district. 42 U.S.C. § 1973(b).

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482 (2003) ("coalitional districts"), and other cases has referred to such districts as ones where minority voters have an opportunity to elect candidates of choice by forming coalitions with other voters. *See, e.g., League of United Latin American Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 485 (2006) (Souter, J., concurring in part and dissenting in part). Respondents and amici have sometimes used other terms to describe the State's position, such as "crossover district" and "functional majority," terms that, at this point, only obscure the analysis to the extent that they suggest that the State's proposed standard is something other than the one expressed here.

Respondents insist that only a majority can have the opportunity "to elect" candidates of their choice. Resp. Br. 10. That, however, is simply not true. Minority voters who do not constitute a majority in a district may nonetheless have an opportunity "to elect" candidates of their choice by forming coalitions with other voters. For example, if minority voters who vote cohesively constitute 48% of the electorate in a district, and 10% of the other voters in the district regularly vote for the minority's preferred candidates, minority voters would have an "opportunity . . . to elect" candidates of their choice in that district. That such an opportunity exists because of sufficient crossover voting – rather than because minority voters can independently determine the outcome of the election – is irrelevant under the text of Section 2.[2]

Indeed, this Court has repeatedly recognized that minority voters who do not constitute a majority in a district can have the opportunity to elect their

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[2] Additionally, a 50% numerical requirement is not tied to how elections are run in North Carolina or most other States. Under North Carolina law, a candidate can prevail in a party primary with only 40% of the vote. N.C. Gen. Stat. § 163-111. In the general election, there is no minimum percentage – the individual with the highest number of votes is elected to office. N.C. Gen. Stat. § 163-182.15(d). Thus, when more than two candidates are running in the general election (as is frequently the case in state senate and house races in North Carolina), the prevailing candidate needs less than 50% of the vote to win the election.

preferred candidates by forming coalitions with other voters. In *Johnson v. De Grandy*, 512 U.S. 997 (1994), the Court explained 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.*" *Id.* at 1020 (emphasis added).

In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Court reaffirmed that conclusion. In explaining why a jurisdiction covered by Section 5 should have flexibility to create coalition districts, the Court emphasized that "spreading out minority voters" into coalition districts, rather than assigning them to majority-minority districts, "creates more districts *in which minority voters may have the opportunity to elect a candidate of their choice.*" *Id.* at 481 (emphasis added).

As far back as *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court expressed its understanding that minority voters need not constitute a majority in order to have the opportunity to elect their preferred candidates. There, the Court held that the proportional representation achieved by minority voters in a multimember district in which they constituted 36.3% of the voters "reflect[ed] the minority group's *ability to elect its preferred representatives.*" *Id.* at 77. Justice O'Connor, joined by three other Justices, agreed, stating that "when the candidates preferred by a minority group are elected in a multimember district, the minority group has *elected* those candidates, even if white support was indispensable to these victories." *Id.* at 90 n.1 (O'Connor, J., concurring). She further explained that

"[o]n the same reasoning, if a minority group that is not large enough to constitute a voting majority in a single-member district 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, . . . *it would be able to elect some candidates of its choice.*" *Id.* (emphasis added).

Thus, the text of Section 2 imposes an "opportunity-to-elect" precondition, not a numerical-majority requirement. Respondents' effort to equate the two is unpersuasive.[3]

Unlike respondents, the Solicitor General does not argue that the text of Section 2 imposes a numerical-majority requirement in all cases. Instead,

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[3] The legislative history confirms that conclusion. The Senate Report's list of "typical factors" for proving a claim does not include a requirement that minority voters constitute 50% of the voters in a district. S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. That Report also endorses "a searching practical evaluation of the past and present reality," as well as a "functional view of [the] political process." *Id.* at 30 & n.120. And Congress' understanding that an opportunity-to-elect might sometimes require a 65% minority district, *see* U.S. Br. 21 n.7, reflects the application of a functional "opportunity-to-elect" standard rather than a 50% rule.

he argues that the text generally requires a numerical majority, but that the text does not preclude an under-50% claim in two cases: when minority voters could constitute a "near majority" in a district and when district lines reflect intentional discrimination. U.S. Br. 8-17. That position has no firmer grounding in the text than respondents' categorical rule. The precondition created by the statutory text does not ask whether minority voters could constitute a near-majority, or whether district lines reflect intentional discrimination, but whether minority voters would have an "opportunity . . . to elect" in a proposed district.

If, for example, minority voters could constitute 45% of the electorate in a district, and would have the opportunity to elect candidates of choice in that district because of sufficient likely crossover, they have satisfied the statutory opportunity-to-elect precondition. *See* U.S. Brief In Opposition at 21-22, *County of Los Angeles v. Garza*, Nos. 90-849 & A-422 (9th Cir. Sept. 14, 1990). Similarly, if a jurisdiction's districting plan fragments those minority voters into two districts in which they have no opportunity to elect, minority voters have suffered a denial of the opportunity to elect, regardless of whether the fragmentation reflects intentional discrimination or an effort to protect an incumbent. *See LULAC*, 548 U.S. at 439-42. The Solicitor General's strained effort to extrapolate from the text a general rule with two exceptions does not withstand scrutiny.

Similarly unpersuasive is the Solicitor General's contention (U.S. Br. 11) that the text of Section 2 rules out a coalition district claim because it protects "a class

of [minority] citizens," not coalitions. 42 U.S.C. § 1973. When minority voters can elect candidates of their choice in a coalition district, but a jurisdiction instead places them into districts in which they have no such opportunity, the Section 2 rights of *minority voters* are affected. For example, if minority voters constitute less than 50% of the voters in a district, and they have repeatedly elected candidates of their choice from that district, splitting the minority voters into two districts in which they lack any electoral opportunity deprives *minority voters* of the opportunity to elect candidates of their choice. Because coalition district claims seek to prove that *minority voters* have been deprived of an equal opportunity to elect candidates of their choice, such claims fall squarely within the text of Section 2.

Thus, under the statutory text, minority voters can satisfy a precondition for a Section 2 claim by showing that they would have the opportunity to elect candidates of their choice through a coalition with other voters. Neither the categorical 50% rule offered by respondents nor the version of that rule offered by the Solicitor General can be reconciled with the statutory text.[4]

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[4] The North Carolina Supreme Court's judgment embodies a directive that the state legislature may not maintain in the current plan or create in a future plan any Section 2 district that crosses county boundaries unless minority voters constitute 50% of the proposed district. Pet. App. 33a. Acceptance of the Solicitor General's position (i.e., less than 50% may be appropriate in some circumstances) would require reversal of the judgment of the North Carolina

II. The 50% rule heightens the role of race in districting and politics, while the opportunity-to-elect standard limits the use of race to circumstances in which it is necessary to prevent minority vote dilution.

Respondents contend that the opportunity-to-elect standard heightens the role of race in districting, raising constitutional concerns, while the numerical-majority requirement has the opposite effect. Resp. Br. 42-51; *see* U.S. Br. 20-22. In fact, however, the 50% rule injects race into districting and politics in troubling ways, while the opportunity-to-elect standard requires resort to race only when necessary to prevent minority vote dilution.

The 50% rule requires minority voters to satisfy a racial quota as a necessary precondition for receiving

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Supreme Court. Similarly, under the Solicitor General's standard, the North Carolina Supreme Court's ruling that House District 18 is not required by Section 2 would have to be reversed and remanded for consideration of, *inter alia*, racial discrimination in the drawing of Pender County's lines and the maintenance of those discriminatory lines through the Whole County Provision. The county line at issue was created to segregate blacks residing in the Wilmington area (the southern portion of New Hanover County) from whites living in the northern portion of New Hanover County (in what is now Pender County). J.A. 143-44. Respondents have stipulated to this undisputed fact. *Id.*

protection under Section 2. Rather than asking whether, in light of the political realities of a district, minority voters have a realistic opportunity to elect candidates of choice in a proposed district, the 50% rule ignores political realities and requires a simple headcount of minority voters. If the headcount establishes that minority voters exceed 50% of the eligible voters, Section 2 affords protection; if the headcount falls below that minimum, no protection exists.

Moreover, when, as will often be the case, a jurisdiction has a choice between drawing a district that exceeds the 50% minimum and a coalition district that affords the same opportunity to elect, the 50% rule induces jurisdictions to do the former, even though it may require a far more extensive use of race. Under the 50% rule, if the jurisdiction fails to draw a district that exceeds the 50% minimum, it may be subject to Section 2 liability, but if it fails to draw a coalition district, no such liability is possible. That legal regime puts a significant measure of pressure on jurisdictions to avoid liability by packing minority voters into districts that exceed the 50% minimum, rather than drawing coalition districts that use race far less, but still afford an opportunity to elect.

The pressure to draw districts that exceed the 50% minimum can also induce jurisdictions to stray from the use of traditional race-neutral districting principles. The maps included in the League of Women Voters amicus brief provide visible evidence that jurisdictions that have sought to draw districts that exceed a 50% minimum have sometimes made extensive use of race, while failing to follow traditional

districting criteria. League of Women Voters Br. 31-38, 1a-3a. In contrast, when those very same jurisdictions sought to establish coalition districts that would afford minority voters an equal opportunity to elect representatives of their choice, they were able to do so while complying with other traditional redistricting criteria. *Id.* Those maps confirm that districts drawn to afford an opportunity to elect, rather than to exceed a 50% minimum, can make far less extensive use of race.

Coalition districts also tend to foster political alliances across racial lines, hastening the time when race will not be a factor in politics at all. *De Grandy*, 512 U.S. at 1020. By contrast, districts that are packed to exceed a 50% quota can promote and entrench racial politics.

In arguing that the opportunity-to-elect standard will magnify the role of race in redistricting, respondents simply ignore the troubling ways in which the 50% rule heightens the role of race in districting decisions and politics, as well as how coalition districts minimize them. Instead, they argue that the opportunity-to-elect standard will heighten the use of race, because it will increase the absolute number of districts that must be drawn to comply with Section 2, and that, in turn, will increase both the occasions on which jurisdictions will have to consider that issue and the amount of Section 2 litigation. Resp. Br. 28-29; *see* U.S. Br. 21-22, 25.

Because there are circumstances in which a jurisdiction could draw a reasonably compact coalition district, but not a reasonably compact majority-

minority district, the opportunity-to-elect standard would increase to some extent the number of Section 2-required districts. Respondents' argument based on that increase, however, misses an essential difference between this use of race and others. Jurisdictions will be obligated to use race to draw coalition districts only when it is necessary to achieve Congress' compelling objective of affording minority voters an equal opportunity to elect representatives of their choice.

Moreover, the consequence of adopting the 50% rule in order to reduce the number of districts that must be drawn to comply with Section 2 is to allow practices that blatantly dilute minority voting strength to go unremedied. Under the 50% rule, a jurisdiction could demolish a district in which minority voters had repeatedly elected their preferred candidates in order to achieve partisan ends or to protect an incumbent, as long as minority voters could not constitute a majority in a district. The opportunity-to-elect standard prevents these vote dilution practices from occurring.

Respondents also vastly overstate the extent to which the opportunity-to-elect standard would increase the number of Section 2-required districts. The requirements for such a coalition district claim are demanding. Minority voters would not only have to meet the difficult burden of showing that they could elect candidates of their choice in a proposed district, they would also have to show that the district is reasonably compact, that they are politically cohesive, that whites usually vote sufficiently as a bloc to defeat their preferred candidates in the challenged district, and, in most circumstances, that minority voters are not already electing candidates in proportion to the

percentage in the population. *De Grandy*, 512 U.S. at 1013-1016. Other factors may also preclude minority voters from establishing that, under the totality of circumstances, a violation of Section 2 has occurred. *Id.* at 1011 (noting that the totality of circumstances includes "the extent of the opportunities minority voters enjoy to participate in the political processes"); *id.* at 1010 n.9 (setting forth a list of factors that are relevant to the totality of circumstances).

This Court's cases that have reserved the question whether minority voters can bring a coalition district claim attest to the difficulty of proving such a claim. In those cases, this Court rejected coalition district claims on four different grounds: that minority voters failed to establish white bloc voting, *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993), that minority voters failed to establish minority political cohesion, *Growe v. Emison,* 507 U.S. 25, 41-42 (1993), that, in light of proportionality, minority voters failed to show that they were deprived of an equal opportunity to elect, *De Grandy*, 512 U.S. at 1013-1014, and that minority voters failed to prove that the district at issue afforded an opportunity to elect. *LULAC*, 548 U.S. at 443-446.

Because a coalition district claim would be difficult to prove in so many cases, there is no basis for respondents' prediction that adopting the opportunity-to-elect precondition will provoke a "morass of litigation." Resp. Br. 28. Certainly, the current experience in jurisdictions operating under that standard provides no support for respondents' prediction. Although the New Jersey Supreme Court adopted the opportunity-to-elect standard five years

ago, there is no evidence of a rash of litigation in that State. *See McNeil v. Legislative Apportionment Comm'n,* 828 A.2d 840 (N.J. 2003), *cert. denied,* 540 U.S. 1107 (2004). Similarly, although the First Circuit opened up the possibility of an under-50% claim four years ago, *see Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc), there is no evidence of a morass of litigation in that circuit.

Moreover, while States are the parties that are most likely to be concerned about an increase in Section 2 litigation, no State has filed an amicus brief in this case arguing that the Court should adopt the 50% rule. Indeed, numerous States with significant minority populations have joined an amicus brief urging the Court to reject the 50% rule. States Br. 27-30. The only State entity taking a contrary view is the Florida House of Representatives, and its amicus brief was not even joined by the Florida Senate.

Whatever the exact number of additional Section 2-required districts, however, the critical points are these: Where it is possible to draw either a coalition district or a majority-minority district, drawing a coalition district significantly reduces the role of race in districting and politics. And the limited increase in the number of Section 2-required districts caused by the opportunity-to-elect standard is necessary to realize Congress' compelling goal of preventing jurisdictions from depriving minority voters of an equal opportunity to elect representatives of their choice.

III. The opportunity-to-elect precondition does not require maximization of minority voting strength.

Respondents argue that the opportunity-to-elect standard requires jurisdictions to maximize minority voting strength. Resp. Br. 32; *see* U.S. Br. 6, 18. That argument reflects a fundamental misunderstanding of that standard.

The statutory opportunity-to-elect standard does not require jurisdictions to draw as many opportunity-to-elect districts as possible. Instead, it affects only one precondition for establishing a Section 2 claim. Rather than having to show in every case that minority voters could constitute a numerical majority in a district, the opportunity-to-elect standard allows minority voters to satisfy a Section 2 precondition by showing that they would have an opportunity to elect representatives of their choice because of sufficient crossover. To prevail on a coalition district claim, minority voters would still have to prove the remaining preconditions of compactness, minority cohesion, and non-minority bloc voting; in most cases they would have to prove the absence of proportionality; and in all cases they would have to prove that the totality of circumstances establishes a Section 2 violation.

The end result is that a jurisdiction would not be required to maximize the number of coalition districts. Instead, it would be required to draw such a district only when its failure to do so would, under the totality of circumstances, deprive minority voters of an equal opportunity to elect representatives of their choice.

Rather than recognizing that proof of an opportunity to elect would simply establish one necessary element of a claim, respondents' maximization argument treats satisfaction of that one precondition as if it were sufficient by itself to prove a Section 2 violation. Under that mode of analysis, the 50% rule requires jurisdictions to maximize the number of districts in which minority voters constitute a majority in a district. Neither, in fact, is true. Both the opportunity-to-elect standard and the 50% rule affect one precondition of a Section 2 claim. Neither requires maximization of minority voting strength.

IV. The opportunity-to-elect precondition is administrable.

Respondents argue that an opportunity-to-elect precondition is not judicially manageable and that a numerical-majority requirement therefore must be adopted instead. Resp. Br. 28-31; *see* U.S. Br. 22-25. As discussed *infra* pp. 20-22, in *Georgia v. Ashcroft*, the Court held that a court resolving a retrogression inquiry under Section 5 is required to consider whether a State has created coalition districts in which minority voters "may have the opportunity to elect a candidate of their choice." 539 U.S. at 481. The Court would not have required that inquiry if it were not judicially manageable.

Moreover, that standard is, in fact, judicially manageable. Of critical importance, the inquiry into whether minority voters would have the opportunity to elect in a coalition district is similar to the inquiry that is required by the third *Gingles* precondition. That precondition requires a court to assess whether, in the

absence of special circumstances, such as incumbency, non-minority voters usually "vote[] sufficiently as a bloc . . . to defeat the minority's preferred candidate." 478 U.S. at 51.

To satisfy that precondition, plaintiffs typically perform an analysis of past election results to estimate the percentage of minority voters and the percentage of non-minority voters who voted for the minority's preferred candidate. *See* 478 U.S. at 81 (e.g., estimating that 89% of blacks and 10% of whites voted for a particular minority candidate). Those two numbers are then used as a basis for estimating whether non-minority voters would usually defeat the minority-preferred candidate in the challenged district given the percentage of minority and non-minority voters in that district. (In a 35% minority district, the minority-preferred candidate in the above example would have lost with 38% of the vote (89% of 35% = 31.2%, and 10% of 65% = 6.5%; resulting in 31.2% + 6.5% = 37.7%)).

That same kind of analysis can be used to determine whether minority voters would have an opportunity to elect a representative of choice in a proposed coalition district. If, for example, past election results show that the minority-preferred candidate would have lost in the proposed district in all the elections analyzed, minority voters would likely not have an opportunity to elect in the proposed district. If, by contrast, the minority-preferred candidate would have won in all the elections analyzed, minority voters likely would have an opportunity to elect in that district. Of course, other factors, such as incumbency, can significantly affect the analysis. And some

previous elections may be far more probative than others. But that is equally true for the inquiry into the third *Gingles* precondition. *See Gingles*, 478 U.S. at 57.

The Solicitor General contends that the two inquiries are different, because the inquiry into the third *Gingles* precondition is backward-looking, while the inquiry into the opportunity-to-elect precondition is predictive. U.S. Br. 22-23. When a plaintiff is challenging a new district, however, that is not true. In order to prove the third precondition in such cases, the plaintiff must show that, in light of past election results, it is predictable that whites in the future will usually defeat the minority-preferred candidate in the new district. Proving the opportunity-to-elect precondition is no different.

Of course, in some cases, plaintiffs' evidence may be too speculative to reach a conclusion that minority voters would have an opportunity to elect. As the party bearing the burden of proof, plaintiffs could not prevail in those cases, just as they could not prevail if their evidence on the third precondition is too speculative. In other cases, however, the evidence may supply a firm basis for concluding that minority voters would have an opportunity to elect candidates in a proposed district. In such cases, plaintiffs will have satisfied the opportunity-to-elect precondition.

The Solicitor General worries that the States will not be able to determine their Section 2 responsibilities under an opportunity-to-elect standard. U.S. Br. 24-25. But the State legislature in this case was able to make that judgment. Similarly, other

States have had no trouble determining when a coalition district will afford minority voters an opportunity to elect. *See* League of Women Voters Br. 32-38; Bishop Br. 4-5. And the State amici, who are in a position to know whether compliance would be a problem, have raised no such concern.

If there were distinct concerns of administrability raised by coalition district claims, the appropriate response would not be to foreclose all meritorious claims. Instead, it would be to require some further objective indicator that confirms that minority voters have an opportunity to elect in the proposed district. The presence of such a further objective factor would serve both to increase the level of confidence that minority voters truly have an opportunity to elect in the proposed district and simultaneously establish objective limits for a coalition district claim.

For example, one such objective factor would be that a minority preferred candidate has already been elected in the proposed district. If the minority-preferred candidate has already won in the district, it is difficult to reject as speculative the claim that minority voters have an opportunity to elect in the district.

A second confirming factor would be that minority voters constitute a majority of voters in a party primary, and that party is the dominant party in the district. When minority voters constitute a majority in a party primary, it is likely that they have an opportunity to nominate the candidate of their choice. And when that party is the dominant party in

the district, there is ordinarily a realistic chance that the party's nominee will receive sufficient crossover votes to be elected.

A third confirming factor would be that the minority group is significantly larger in size than the crossover group that would be necessary for a coalition between the two to constitute a majority in the district. If the minority group is significantly larger in size than the crossover group, it is reasonably likely that it can exercise control over the selection of the coalition candidate. By contrast, if the minority group is smaller in size than the asserted crossover group, it is more likely that minority voters may have only the power to influence the election of the candidate preferred by that group.

The point is not that any one of these factors is necessary or sufficient to prove a coalition district claim. Rather the point is that when a statistical analysis based on past election results is combined with one or more of these factors, it can provide a firm basis for concluding that minority voters have an opportunity to elect in the proposed district. At the very least, when such evidence is present, the inquiry into whether plaintiffs have satisfied the opportunity-to-elect precondition is judicially manageable and objectively limited. There is therefore no basis for supplanting that standard with an extra-textual numerical-majority requirement that forecloses clearly meritorious claims.

V. The opportunity-to-elect standard aligns Section 2 with Section 5.

In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), nine Justices concluded that coalition districts can afford minority voters the opportunity to elect candidates of their choice and that the existence of those districts should therefore be considered in deciding whether a jurisdiction's districting plan has caused a retrogression in minority voting strength in violation of Section 5. *Id.* at 480-82 (majority opinion); *id.* at 492-93 (Souter, J., concurring in part and dissenting in part). The Court equated an "opportunity to elect" with an "ability to elect." *Id.* at 480 (majority opinion) (referring to "ability to elect"); *id.* at 481 (referring to "opportunity to elect"). Congress subsequently codified the Court's unanimous conclusion by providing that the retrogression inquiry should focus exclusively on whether a plan has the effect of diminishing a minority group's "ability . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b).[5]

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[5] Relying on a Senate Report that was filed a week after the Senate adopted the 2006 Amendments, and that was not available to Senators at the time of floor debate, amicus Florida House of Representatives argues that as a result of the 2006 Amendments, coalition districts are not protected in the redistricting process. Because that Report contradicts the text of the Amendments, particularly when read in light of *Georgia v. Ashcroft*, it is irrelevant to the statutory analysis. In any event, coming at the time that it did, such a report is the very antithesis of the kind of legislative history that could be relevant in

Respondents contend that *Georgia v. Ashcroft* is irrelevant to the analysis here because it involved an interpretation of Section 5, rather than Section 2. Resp. Br. 39-42; *see* U.S. Br. 26. But while Section 5 and Section 2 differ in certain respects, they also overlap in significant respects. For example, the extent of minority cohesion and white bloc voting are obviously relevant to both the Section 2 and Section 5 inquiries. The same is true of proof that minority voters would have the opportunity to elect candidates of their choice in a coalition district.

After all, both statutes are concerned with the dilution of minority voting strength. And while the sections use different measures of dilution – Section 5 uses retrogression, while Section 2 uses an equal-opportunity-to-elect analysis – nothing about that difference suggests that coalition districts should be relevant to Section 5 but not to Section 2. That is particularly true in light of the Court's holding in *Georgia v. Ashcroft* that coalition districts can afford

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interpreting the meaning of a statute. *See* S. Rep. No. 109-295 (2006) (additional comments of Senator Leahy, *et al.*). By contrast, the contemporaneous legislative history is consistent with the text of the statute. *See* H.R. Rep. No. 109-478 (2006) ("Voting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or when coalesced with other voters, cannot be precleared under Section 5."); *see also* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act,* 117 Yale L.J. 174, 216-51 (2007) (discussing 2006 Amendments).

minority voters "an opportunity to elect candidates of their choice," 539 U.S. at 481, language that tracks important language in Section 2. And it is also true in light of Congress' use of the phrase "ability to elect," a phrase that the Court in *Georgia v. Ashcroft* equated with "opportunity to elect."

Moreover, drawing a distinction between Section 2 and Section 5 in this respect simply makes no sense. If a jurisdiction covered by Section 5 abolishes a coalition district and replaces it with two districts in which minority voters have no "ability to elect" candidates of choice, it would constitute a violation of Section 5. Under the 50% rule, however, a jurisdiction not covered by Section 5 could take precisely the same action, and minority voters could not even attempt to prove that, under the totality of circumstances, the jurisdiction denied minority voters an equal opportunity to elect representatives of their choice. Nothing in the text or purposes of the two sections justifies that anomalous result.

VI. Adopting the opportunity-to-elect precondition would resolve a question the Court has reserved; it would not reverse existing law.

Respondents contend that adopting the opportunity-to-elect standard would constitute a radical change in established Section 2 jurisprudence. Resp. Br. 39. Adopting that standard, however, would simply resolve a question that the Court has long reserved; it would not reverse established law.

Indeed, since the decision in *Gingles,* the Court has repeatedly reserved the question whether minority voters could satisfy the first precondition by showing that they would have the opportunity to elect candidates of their choice in a coalition district through sufficient crossover voting. *Voinovich*, 507 U.S. at 146, 154, 158; *Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993); *De Grandy*, 512 U.S. at 1008-09; *LULAC*, 548 U.S. at 443. Not one of those cases suggested in any way that such a claim falls outside the scope of Section 2. Moreover, in *De Grandy*, the Court reformulated the first *Gingles* precondition in a way that readily accommodates a coalition district claim, stating that "[w]hen applied to a claim that single-member districts dilute minority votes, 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.*" 512 U.S. at 1008 (emphasis added). And in *Georgia v. Ashcroft*, the Court expressly held that coalition districts are relevant to the Section 5 vote dilution inquiry because they afford an "opportunity to elect," distinctly raising the possibility that the Court would reach the same conclusion with respect to Section 2. That line of decisions has given jurisdictions fair warning that the question presented in this case is an open one and that this Court might ultimately hold that Section 2 encompasses a coalition district claim.

Respondents argue that permitting a coalition district claim would constitute a radical change in the law because a number of circuits have held that Section 2 incorporates a numerical-majority requirement. Resp. Br. 20-25. Not all lower courts

that have examined the question, however, have reached that conclusion. *Metts v. Murphy*, 363 F.3d 8, 11-12 (1st Cir. 2004) (en banc); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1321-22 & n.56 (S.D. Fla. 2002) (three-judge court); *Puerto Rican Legal Def. & Educ. Fund v. Gantt*, 796 F. Supp. 681, 694 (E.D.N.Y. 1992) (three-judge court); *West v. Clinton*, 786 F. Supp. 803, 807 (W.D. Ark. 1992) (three-judge court); *Armour v. Ohio*, 775 F. Supp. 1044, 1059-60 (N.D. Ohio 1991) (three judge court); *McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840, 853, 857 (N.J. 2003). The Department of Justice, which has responsibility for enforcing Section 2, has also repeatedly made clear that it does not believe that Section 2 creates an absolute 50% rule. *See* U.S. Br. 13-16. More fundamentally, it is this Court, rather than the lower courts, that determines the state of the law, and this Court has repeatedly chosen to leave the issue open.

Respondents also err in relying on Congress' silence as evidence that Congress approves of the 50% rule. *See* Resp. Br. 47. The silence of a subsequent Congress has no bearing on the meaning of an earlier statute. *Kimbrough v. United States,* 128 S. Ct. 558, 573 (2007) (congressional inaction is a poor indicator of congressional intent); *United States v. Price*, 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). And even if such congressional silence were relevant, it could not constitute approval of the 50% rule when there is no consensus in the lower courts on that issue, and, more importantly, this Court has repeatedly reserved the question.

VII. Respondents waived their claim that an alternative district would afford an opportunity to elect.

Respondents do not challenge the three-judge panel's finding that minority voters have an opportunity to elect candidates of their choice in House District 18. That is not surprising. The evidence overwhelmingly supports the state legislature's judgment that minority voters have an opportunity to elect candidates of their choice from that district. *See* Pet. Br. 30-32. Indeed, the legislature's foresight has been confirmed, as House District 18 has now repeatedly nominated and elected African-American candidates preferred by African-American voters.

Respondents assert, however, that an alternative to House District 18 could have been drawn that would have provided African-Americans with an opportunity to elect candidates of choice, while cutting fewer county lines. Resp. Br. 7-9, 49 n.11, 50. The existence of such a district, respondents claim, establishes that House District 18 is not required by Section 2.

Respondents waived that claim, and this Court therefore should not consider it. The three-judge panel found that the State had established each of the three *Gingles* preconditions, and that the totality of circumstances established that House District 18 was required by Section 2. Pet. App. 9a, 115a. Respondents could have attempted to challenge that finding on the ground that their proposed alternative afforded minority voters an opportunity to elect. Respondents, however, chose not to appeal on that

ground. Indeed, respondents' brief to the North Carolina Supreme Court failed to make any reference whatsoever to a proposed alternative district. Instead, respondents challenged the panel's judgment on a single ground – that a Section 2 claim invariably requires proof that minority voters could constitute a numerical majority in a district, and that House District 18 did not contain such a majority. The North Carolina Supreme Court agreed with respondents and reversed the three-judge panel on that basis without passing on any other aspect of the panel's ruling. Pet. App. 27a.

Under North Carolina law, an issue that is not preserved in the appellate courts by a specific assignment of error and by briefing to the appellate court is deemed abandoned. *See, e.g., Forbis v. Neal*, 649 S.E.2d 382, 387 (N.C. 2007); *State v. Wiley*, 565 S.E.2d 22, 32 (N.C. 2002), *cert. denied*, 537 U.S. 1117 (2003). That rule is directly applicable here.

Because respondents' alternative district argument was neither pressed nor passed on below, the Court should not consider it. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). This is particularly true given that respondents failed to raise the issue in the opposition to the petition for writ of certiorari. Sup. Ct. R. 15.2; *Knowles v. Iowa*, 525 U.S. 113, 116 n.2 (1998).

In any event, respondents' argument ignores the record. That alternative has an appreciably lower percentage of minority voters, and the State offered evidence that such a district would not provide African-Americans with an opportunity to elect their

candidates of choice. *See, e.g.*, J.A. 42-43, 73. Respondents point to certain election results as support for their claim. But the State's expert concluded that those election results had limited probative value, Engstrom Depo. 6-9, and respondents offered no contrary expert evidence. Respondents also stipulated that "the evidence presented by the defendants is sufficient to support a finding of fact that the racial difference in the preference of voters results in the white majority voting sufficiently as a block to usually enable it to defeat the minority's preferred candidate." Pet. App. 130. Finally, respondents' alternative plan would have resulted in an incumbent minority-preferred candidate being placed in the same district as a non-minority incumbent. *See* N.C. S. Ct. Record on Appeal 30. That aspect of respondents' alternative plan would adversely affect the opportunity of minority voters to elect their candidate of choice. In light of these factors and others, it is hardly surprising that respondents chose not to challenge the three-judge panel's ruling based on their alternative district. While respondents seek to resurrect that claim, that effort is both too late and without merit.

* * * * *

Coalition districts are sometimes necessary to fulfill Section 2's compelling objective of ensuring that minority voters are not deprived of an equal opportunity to elect representatives of their choice. At the same time, they offer the promise of helping to facilitate a transition to a time when race will no longer matter in elections. The 50% rule adopted by the North Carolina Supreme Court places a serious obstacle in the way of that progress. That rule has no

basis in the statutory text and is inconsistent with this Court's decisions construing the Voting Rights Act.

CONCLUSION

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

Respectfully submitted.

WALTER DELLINGER
SRI SRINIVASAN
IRVING L. GORNSTEIN
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
Attorney General
CHRISTOPHER G. BROWNING, JR.*
GRAYSON G. KELLEY
TIARE B. SMILEY
ALEXANDER MCC. PETERS
SUSAN K. NICHOLS
NORTH CAROLINA DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900

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*Counsel of Record