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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
Supreme Court of North Carolina

BRIEF FOR THE RESPONDENTS

CARL W. THURMAN III
Counsel of Record
3169 Wrightsville Avenue
Wilmington, NC 28403
(910) 620-3979

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond Virginia 23219 (800) 847-0477

QUESTION PRESENTED

Does Section 2 of the Voting Rights Act, 42 U.S.C. 1973, require the creation of an electoral district designed to elect a racial minority group's candidate of choice when the minority group does not comprise a majority of the citizen voting age population of the district and the district drawn otherwise would not be permissible under a State's neutral redistricting criterion?

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STATEMENT

A. Factual Background

Respondents are residents of Pender County, North Carolina, an historically rural area which experienced population growth of 42.4% during the decade of the 1990s.[1] Entering the legislative redistricting cycle after the 2000 census, a Pender County resident had not served in either the North Carolina House or Senate in over thirty years. JA 20. As with most areas in the United States, North Carolina counties have divergent concerns based upon their local circumstances, but unlike many areas counties in North Carolina, have only the powers and authority granted to them by the General Assembly.[2] Given the constraints on county

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[1] Pender County grew from 28855 in the 1990 census to 41,082 in 2000. *http://quickfacts.census.gov/qfd/states/37/37141.html*. The growth pattern has continued as its population has increased by 21% as the July 1, 2007 census estimate. *Id.* (Follow "Browse data sets for Pender County" hyperlink)

[2] *County of Hoke v. Byrd*, 421 S.E.2d 800, 806 (N.C. Ct. App. 1992)(legislative authority of County limited to that expressly granted or by necessary implication of expressly granted powers.)

power, having a responsive legislative delegation is necessary in order to formulate solutions to local concerns.

In the redistricting plan adopted after the 1990 census, Pender County had been split among five North Carolina House Districts.[3] After a decade of explosive growth, Pender County residents sought a consolidation permitting a more unified voice. In the redistricting plan proposed by the General Assembly in 2001, Pender County was to be split among five House and three Senate districts, sharing House representation with ten other counties. JA 137. This splintering of the county resulted in the Pender County Commissioners unanimously voting to submit an *amicus* brief in *Stephenson v. Bartlett,* 562 S.E.2d 377 (N.C. 2002) (*Stephenson I*). The issue in *Stephenson I* was whether the North Carolina General Assembly was required to follow the "Whole County" provisions of

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[3] Petitioners reference Department of Justice (DOJ) Review as part of the basis for the creation of a Section 2 VRA District, but DOJ review is limited to Section 5 jurisdictions, and neither Pender nor New Hanover County are subject to Section 5. Petitioner's Brief at 3.

the North Carolina Constitution. N.C. Const. art. II §§ 3(3), 5(3)(Whole County Provisions). The North Carolina Supreme Court held that the legislature did have to abide by the North Carolina Constitution and the opinion set forth detailed criteria to be followed. The majority opinion in *Stephenson I* expressly recognized the plight in which Pender County was placed because it was "balkanized" by its citizens being divided into multiple legislative districts. *Id.* at 383. After the decision in *Stephenson I*, alternative districts were proposed by the State, but those districts were found to be invalid under the *Stephenson I* criteria and districts crafted by the trial court were used for the 2002 election. The 2002 interim plan imposed by the trial court kept Pender County within a single House district (as did the 2002 plan proposed by the State). In the 2002 election, a Pender County resident was elected to the General Assembly.

The North Carolina Supreme Court reviewed both the second redistricting proposal from the State and the plan imposed by the trial court, finding that neither complied with the State Constitution and the

redistricting criteria set forth in *Stephenson I*. *Stephenson v. Bartlett*, 582 S.E.2d 247 (N.C. 2003) (*Stephenson II*). The Court set forth in detail the procedures to be followed by the N.C. General Assembly in drawing subsequent districts and emphasized that Counties were to be grouped together for the purpose of minimizing the splitting of Counties.[4] Following *Stephenson II*, the current

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[4] The Court provided the guidelines to be used by the General Assembly in formulating constitutional redistricting plans in *Stephenson II* as follows:

> [1.] ... [T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. . . . In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters. *To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established* . . .
>
> [2.] In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements.
>
> [3.] In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district . . ., the WCP requires that the physical boundaries of any such non-VRA legislative

district not cross or traverse the exterior geographic line of any such county.

[4.] When two or more non-VRA legislative districts may be created within a single county, . . . single-member non-VRA districts shall be formed within said county. *Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.*

[5.] In counties having a non-VRA population pool which cannot support at least one legislative district . . . or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the . . . "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the *minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one- person, one-vote" standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping;* provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. [6.] The intent underlying the WCP must be enforced to the maximum extent possible; thus, *only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined* . . . [7.] *[C]ommunities of interest should be considered in the formation of compact and contiguous electoral districts.*

House redistricting plan, which was adopted on November 25, 2003, split Pender County between House Districts 16 and 18.

B. PROCEDURAL HISTORY

In May 2004, this action was brought alleging that the split of Pender County into two legislative districts violated the North Carolina Constitution and the redistricting criteria set forth in *Stephenson I*. Pender County's 2000 census population of 41,082 is approximately 61.25% of the population needed for an ideal House district. JA 23. Pender County and New Hanover County combined have sufficient population to support three house districts and were "clustered" in the 2003 House plan. JA 24. Of the three house districts formed in the Pender-New Hanover cluster, only the 19th lies solely in New

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> [8.] . . . [M]ulti-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest.
>
> [9.] Finally, we direct that any new redistricting plans, including any proposed on remand in this case, *shall depart from strict compliance with the legal requirements set forth herein only* to the extent necessary to comply with federal law.
> *Stephenson II* at 250-52 (emphasis added) (quoting *Stephenson I* at 396-98).

Hanover County, while both the 16th and 18th are composed of parts of Pender County and New Hanover County. JA 25. Pender County was divided almost in half, with 19,607 citizens in District 16 and 21,475 in District 18. It would have been possible to draw three districts in the Pender-New Hanover cluster and only have one district which crossed county lines by creating two within New Hanover County and one comprising all of Pender County and a portion of New Hanover County. JA 24.

A three judge panel was appointed and a hearing was conducted on Respondents' request for preliminary injunction that Pender County be kept whole for the 2004 legislative election cycle. In support of their motion for preliminary injunction, Respondents submitted alternative districts which complied with the Whole County provision of the North Carolina Constitution. JA 34. The districts were drawn using the General Assembly's "District Builder" software program. As part of the software package, voting results for selected statewide races involving African American candidates for State Auditor and seats on the North Carolina Supreme

Court in a potential district are available. JA 35. In both the alternative districts drawn by Respondents, the Black candidates won a significant majority of the votes, despite losing two of the three races statewide.[5] The vote percentages for the Black candidates were: for State Auditor 62.55% and 61.33% versus 51% statewide, for Chief Justice of the N.C. Supreme Court 59.33% and 59.05% versus 49% statewide; and for Justice of the N.C. Supreme Court 59.25% and 58.82% versus 46.12% statewide. JA 81-83. In the first alternative district, the Black percentage of total population was 38.77% and the Black percentage of voting age total population was 35.55%. JA 80. The second alternative district had Black total population of 35.65% and Black voting age total population of 31.27%. JA 82. District 18

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[5] Statewide election results are from the State Board of elections with the 2002 results available at http://www.app.sboe.state.nc.us/NCSBE/Elec/Results/results by_contest_single1.asp?ED=11xx05xx2002GENERAL2002A SUPREME%2520COURT%2520%28BUTTERFIELD%29&B 1=Submite and the 2000 results available at http://www.app.sboe.state.nc.us/NCSBE/Elec/Results/y2000e lect/stateresults.htm.

had total black population of 42.89% and Black voting age population of 39.36%. JA 139. JA 78-83.

After the preliminary injunction was denied, the parties engaged in discovery and briefed and argued cross motions for summary judgment. The three Judge panel found with Respondents that the districts as drawn violated the North Carolina Constitution unless the Constitution was preempted by Section 2 of the VRA, noting that if they were to interpret "the first prong of *Gingles* as a 'bright line' requirement that the minority group seeking Section 2 VRA relief must be a numerical majority, then this case is over and District 18 as presently drawn is 'toast.'" Pet. App. 91A. (*Thornburg v. Gingles* (Gingles), 478 U.S. 30 (1986)) Finding that Section 2 of the VRA did not impose a bright line test, the three judge panel upheld the districts.

The North Carolina Supreme Court agreed with all the Federal Circuit Courts who reviewed the issue, including the 4th Circuit, in which North Carolina is located, holding that this Court meant an actual majority was required for a majority-minority district under the first prong of the *Gingles* test. *Pender County v. Bartlett*, 649 S.E.2d 364 (N.C.

2007). In its August 2007 opinion, the North Carolina Supreme Court directed that District 18 be redrawn for the 2010 election cycle, but left to the General Assembly, the question of whether to draw it as a non-VRA district which complied with the Whole County provision or whether to redraw it as a VRA district with an actual majority-minority population. *Id.* at 376.

SUMMARY OF ARGUMENT

Continuing to require that a minority group which is seeking to make a claim under Section 2 of the Voting Rights Act constitute a majority of the proposed district follows the actual language of the Act and provides a workable framework for those drawing district lines as well as the courts which must evaluate compliance with the Act. Section 2 protects the right of minority voters "to elect representatives of their choice." 42 U.S.C. 1973(b). The Act does not purport to protect the right "to help elect" or "to form a coalition to help elect" a representative. In simplest terms the minority group must constitute a majority of the district in order "to elect" a representative. *Id.*

This reading of Section 2 also is consistent with the purpose of the Act to protect minority voters. There is no indication that the purpose of the Act is protect coalitions. Nor is there any basis for concluding that the purpose is to promote candidates of a particular political party which minority voters may support. The 50% rule provides protection to minority voters when they otherwise would be denied an equal opportunity, but avoids creating a district designed to give them an unequal opportunity to which their population numbers would not entitle them.

Petitioners are correct that the North Carolina Supreme Court did indeed follow the literal language of the three prong test established by this Court in *Gingles.* Their argument lacks any citation of authority or logical basis to support their contention that lower courts should not to follow the actual language used by this Court in its opinions. The first condition for a viable Section 2 claim set out by this Court was that "[a] minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority

in a single-member district." *Gingles* at 50. In accord with every Federal Circuit Court of Appeals to have decided the issue, the North Carolina Supreme Court applied the test as written by this Court. In doing so, the word "majority" is given its ordinary and traditional meaning. If the easily understood 50% rule established by *Gingles* is to be overruled, it certainly is not the place of the North Carolina Supreme Court to do so.

The 50% rule provides a comparatively easy to apply standard for electoral districts of all types. This is consistent with Congressional intent that objective factors be utilized. *See* S.REP. NO. 97-417, at 120-21 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 292-93 (Report of the Subcommittee on the Constitution). Given that Section 2 applies to all jurisdictions for all levels of elected office, readily determined objective criteria are crucial to permit implementation of the Act. The 50% rule is such a rule which can be applied to the wide variety of electoral districts to which it applies.

The goal of Section 2, to protect equal opportunity, is furthered by the continued use of the

majority-minority requirement. Unlike Section 5, which applies only to covered jurisdictions with particular evidence of voting discrimination, Section 2 is designed to prevent the denial of equal opportunity in all areas of the United States. An attempt to convert Section 2 into a tool for promoting electoral success for members of one race by ignoring race neutral redistricting criteria is inconsistent with both the text of the Act and the purpose of minimizing the role of race in politics. Instead of protecting minorities from discrimination which would prevent them from achieving the representation to which they are entitled, Section 2 would be used to guarantee racial minorities election victories to which they are not entitled under neutral criteria. Such an approach is of questionable constitutional validity and will increase, not decrease, the role of race in politics.

ARGUMENT

I. The Voting Rights Act Requires that Vote Dilution Claimants Comprise a Majority of the Pertinent District

The Voting Rights Act is an exceptional federal statute which protects an important constitutional right – the right to vote. At the same time, it places state and local voting regimes under the microscope of a complex federal jurisprudence on election procedures. As a result, this Court has been careful to ensure that the Act both has the necessary scope to achieve its purpose and, at the same time, has the appropriate limits to ensure that it does not become more intrusive and disruptive than its language and purpose warrant.

This Court has found a claim of dilution to arise under the Voting Rights Act on the view that dilution may be a "standard, practice, or procedure" that results in members of a protected class of citizens having "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); *see, e.g.*, *Gingles* at 36.[6]

In the dilution context, the most appropriate reading of the Act is that in order to state a dilution claim, it must be shown that minorities have been denied a district justified by geography or another factor in which the minority group would be an actual numerical majority. Any other reading of the test for vote dilution would give rise to endless conjecture and speculation about possible combinations and coalitions in the political process. Moreover, vote dilution is a distinctive claim. Rather than being based on, for example, an obstacle to voting, it is based on a claim of unjustified dispersal of voting power. In order for such a claim to be cognizable and coherent, it must be based on a claim of dispersal from what would have been a majority district for a minority.

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[6] Justices Thomas and Scalia, however, have made clear their view in their dissents in *Holder v. Hall*, 512 U.S. 874, 945 (1994) and *League of United Latin Amer. Citizens v. Perry*, 548 U.S. 399, 511 (2006), that Section 2 cannot "be construed to cover potentially dilutive electoral mechanisms."

The majority-minority district requirement is the most sound reading of Section 2 and is consistent with Congress' contemporaneous understanding of vote dilution claims. In tracing the expansion of the 1965 Voting Rights Act to include vote dilution claims, the legislative history of the 1982 amendments to the Voting Rights Act discussed vote dilution claims where the minority population was diminished from over 50% to under 50% of a community. S.REP. NO. 97-417 at 120-21 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 292-93 (Report of the Subcommittee on the Constitution). The majority-minority district requirement is also consistent with Congress' preference for readily ascertainable and predictable standards in Voting Rights Act litigation. In setting forth the Voting Rights Act standards in Section 2(b), Congress stated that "[t]he courts are to conduct this analysis on the basis of a variety of objective factors concerning the impact of the challenged practice and the social and political context in which it occurs." *Id.* at 67; *Gingles*, 478 U.S. at 44 (in order to answer the question of whether plaintiffs have "'an equal opportunity to participate in the political processes

and to elect candidates of their choice,' ... a court must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors.'") (quoting S.REP. NO. 97-417 at 27-28 (1982)).

A. This Court's Cases Establish a Majority-Minority Requirement

This Court's application of amended Section 2 to the vote dilution claim in *Gingles* established necessary preconditions for a vote dilution claim. The three "necessary preconditions" to state a vote dilution claim include a requirement that "[a] minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. The plain meaning of "majority" is a numerical majority, i.e. above 50%, which is how the term was used in the *Gingles* case itself. *Id.* at 38; *Gingles v. Edmisten*, 590 F. Supp. 345, 380 (E.D.N.C. 1984) ("[E]ffective voting majorities" of minority voters were all numerical majorities in hypothetical single-member districts.). The Court in *Gingles* was certainly aware of the

District Court's finding that a minority population of 46.2% of the registered voters did not "constitute . . . an effective voting majority" in one of the challenged districts. 590 F. Supp. at 358. The Court defined "majority" in *Gingles* with reference to this understanding of the numerical population distribution at issue and used "majority" to mean a numerical majority.

This Court has never found a Voting Rights Act violation based on a vote dilution claim where the pertinent district would include less than a majority of minority voters. *See, e.g., Growe v. Emison*, 507 U.S. 25 (1993) (finding no vote dilution on other grounds); *Johnson v. De Grandy*, 512 U.S. 997 (1994) (finding no vote dilution on other grounds); *League of United Latin Amer. Citizens v. Perry*, 548 U.S. 399 (2006) (*LULAC)* (finding no vote dilution on other grounds with respect to the district in which the minority population was not a majority). It would be breaking significant new ground for the Court to hold in this case for the first time that a vote dilution claim could be based on a minority group comprising less than a majority of the pertinent district.

None of the above mentioned cases – or any other cases decided by this Court – has allowed a protected class with a population less than a numerical majority of the relevant total population in a single-member district (hypothetical or actual) to state a claim for vote dilution under Section 2. As Judge Kozinski emphasized in *Romero v. City of Pomona*, "We are aware of no successful section 2 voting rights claim *ever* made without a showing that the minority group was capable of a majority vote in a designated single district." 883 F.2d 1418, 1424 n.7 (9th Cir. 1989)(emphasis added), *overruled in part on other grounds by Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1990). Contrary to Petitioners' assertion, Justice O'Connor did not "endorse … a claim in circumstances in which minority voters can elect their candidates of choice with limited crossover voting," Pet. Br. at 24, but specifically warned against measuring undiluted minority voting power in such a way as to approach requiring proportional representation. *Gingles*, 478 U.S. at 94 (O'Connor, J., concurring). In any event,

moreover, it is clear that the Court has never adopted an interpretation of the Voting Rights Act that enforced a vote dilution claim under the Act based on a *minority*-minority district.

B. The Overwhelming Consensus in Lower Courts is to Apply the Majority-Minority Requirement as Part of the First *Gingles* Precondition

As the North Carolina Supreme Court noted in *Pender County*, the majority-minority district requirement has been found to be an element of the first *Gingles* precondition in the overwhelming majority of courts that have addressed the issue. *Pender County*, 649 S.E.2d at 372. To redefine the majority-minority district requirement in the first *Gingles* prong as Petitioners urge to include combinations of minority and crossover voters would disturb how the *Gingles* preconditions are, and have been, applied in nearly every Circuit. As Judge Duncan stated in *Hall v. Virginia*, "*Gingles* establishes a numerical majority requirement for all section 2 claims …" 385 F.3d 421, 423 (4th Cir.

2004). In *Hall*, the Fourth Circuit affirmed the district court's ruling that vote dilution had not occurred in single-member districts at issue in Virginia. The court explained that when a minority group could be a majority in a district, only by combining with white crossover voters, the minority group could not state a vote dilution claim. *Id.* at 430. "Under these circumstances, minorities cannot claim that their voting strength – that is, the potential to independently decide the outcome of an election – has been diluted in violation of Section 2." *Id.* at 429.

Similarly, the Fifth Circuit in *Valdespino v. Alamo Heights Indep. Sch. Dist.* stated that "this court has required vote dilution claimants to prove that their minority group exceeds 50% of the relevant population." 168 F.3d 848, 852 (5th Cir. 1999). The court in *Valdespino* held that the minority population at issue could not state a vote dilution claim because it constituted less than a majority of the voters in the pertinent district. *Id.* At 852-53. The Seventh Circuit in *McNeil v. Springfield Park Dist.* also applied the "50 percent

rule" as part of the first *Gingles* condition. 851 F.2d 937 (7th Cir. 1988). As Judge Cudahy stated in his opinion for the court:

> Movement away from the *Gingles* standard invites courts to build castles in the air, based on quite speculative foundations. In our view, the Court based its brightline 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. Other scenarios are, of course, possible, but that possibility alone is not a good reason to destroy the interests in clarity and uniformity furthered by a brightline test.

Id. at 944.

The Sixth Circuit in *Nixon v. Kent County* similarly applied the majority-minority district requirement in holding that two different minority groups forming a numerical majority in a single-member district were barred from bringing a vote

dilution claim where no one minority group was numerous enough to form a majority of a single-member district. 76 F.3d 1381 (6th Cir. 1996). The Eighth Circuit, Tenth Circuit, and Eleventh Circuit also apply the majority-minority district requirement.[7] *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006) (affirming finding of vote dilution as minority group satisfied first *Gingles* precondition, which "[R]equires only a simple

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[7] The First Circuit has left the issue open. In *Metts v. Murphy*, the court indicated its decision was based on the early stage of the proceeding; it was "unwilling at the complaint stage to foreclose the *possibility* that a section 2 claim can ever be made out where the African-American population of a single member district is reduced . . . from 26 to 21 percent." 363 F.3d 8, 11 (1st Cir. 2004) (emphasis in original). Notably, even at the preliminary stage, Judge Selya disapproved of plaintiffs' position "treating crossover voters as if they constitute part of a protected minority within the purview of section 2." *Id.* at 14 (Selya, J., dissenting). He added that:

> Allowing a vote dilution claim [under the circumstances in *Metts*] to go forward would make sense only if the end game were to ensure the success of candidates favored by minority groups. That is plainly not the proper object of section 2 of the VRA, which is a law aimed at ensuring equality of opportunity rather than at guaranteeing the electoral success of a particular candidates."

Id.

majority of eligible voters in the single-member district.") (citation omitted); *Sanchez v. Colorado*, 97 F.3d 1303, 1314 (10th Cir. 1996) (quoted in *Pender County v. Bartlett*, 649 S.E.2d 364, 372 (N.C. 2007) ("[S]atisfaction of the [*Gingles*] first precondition requires plaintiffs show [that] a majority-Hispanic district is feasible"); *Negron v. City of Miami Beach,* 113 F.3d 1563, 1566 (11th Cir. 1997) (affirming trial court's finding of no Section 2 violation, holding the *Gingles* factors as necessary preconditions to vote dilution claim)[8]. Additionally, as noted above, the Ninth Circuit in *Romero v. City of Pomona* was emphatic in its view that no Voting Rights Act Claim could be "made without a showing that the minority group was capable of a majority vote in a designated single district." 883 F.2d at 1424 n.7.[9] Judge

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[8] The North Carolina Supreme Court in *Pender County* noted that "a later Eleventh Circuit case purports in a footnote to 'leave open the question of whether a section 2 plaintiff can pursue a coalition or crossover dilution claim.'" 649 S.E.2d at 372 n.2 (quoting *Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260, 1269 n.7 (11th Cir. 2004)).

[9] The court in *Romero* declined to address whether two different minority groups could combine to form a numerical majority-minority in a single member district to satisfy the first *Gingles* precondition. 883 F.2d at 1427 n.15.

Kozinski added that even "cases prior to *Thornburg* held that no section 2 claim could be brought unless plaintiffs demonstrated that the minority group was capable of forming a majority of voters in a single district." *Id.* at 1424. The majority-minority district requirement is, and has been, the dominant law of the land, and Petitioners' position would represent a radical change in the existing Voting Rights Act landscape.

C. The Majority-Minority Requirement Applies to the Threshold Necessary to State a Vote Dilution Claim Before Evaluating that Claim Based on the Totality of the Circumstances

This Court and other courts have consistently held that the *Gingles* factors –including the numerical majority test – are the proper threshold inquiry *prior* to evaluating a vote dilution claim based on the totality of the circumstances. Petitioners, however, claim that the totality of the circumstances test requires watering down the first *Gingles* precondition. Quite to the contrary, the *Gingles* Court stated that a "necessary precondition" to a vote dilution claim is whether a minority group

could "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. Petitioners' reliance on *De Grandy* to support their argument is misplaced. Pet. Br. at 33. The Court in *De Grandy* described the three *Gingles* factors as "'necessary preconditions' for establishing vote dilution" and "clearly identified" the three factors as "generally necessary to prove a § 2 claim." 512 U.S. at 1011 (quoting *Gingles*, 478 U.S. at 50). The Court also explained that the *Gingles* factors are not "sufficient in combination, either in the sense that a court's examination of relevant circumstances was complete once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution." *De Grandy,* 512 U.S. at 1011. "[I]t is worth remembering that ...proof of the *Gingles* factors has not always portended liability under § 2." *Id.* at 1012, n.10.

Also contrary to Petitioners' argument that the first threshold *Gingles* precondition is "the very antithesis" of the totality of the circumstances test,

Pet. Br at 32 – 33, this Court's cases demonstrate that the Court applies the *Gingles* factors as preconditions for *raising* a claim and not as part of the totality of the circumstances test for *evaluating* that claim. The Court in *LULAC* reiterated that the *Gingles* preconditions are "threshold conditions for establishing a § 2 violation," adding that "if all three *Gingles* requirements are established, the statutory text directs us to consider the 'totality of the circumstances' to determine whether members of a racial group have less opportunity than do other members of the electorate." 548 U.S. at 425; *see also Negron*, 113 F.3d at 1566. ("Proving the three preconditions is not the end of the story . . . As § 2 mandates, a court must look to the totality of the circumstances to determine whether there is impermissible vote dilution."). Petitioners' argument is simply at odds with the well-established application of the *Gingles* criteria.

D. The Majority-Minority Requirement Creates a Judicially Manageable Standard for Vote Dilution Claims

Without the majority-minority district requirement's clearly understandable measure of undiluted voting strength in vote dilution claims, the courts could be in an endless morass of litigation in an attempt to determine the threshold population ratio at which the minority population has the ability to participate and elect. *See Pender County v. Bartlett*, 649 S.E.2d 364, 373 (N.C. 2007) (warning against a "Pandora's box" of Voting Rights Act claims by numerically modest minority groups) (internal citations omitted). The threat of Voting Rights Act litigation would hang precariously over the states when any population of minorities – regardless of size – alleges that it is unable to elect its candidate of choice. *See id.* Accordingly, in vote dilution claims that allege inequality in the opportunity to elect – not an inequality in the opportunity to participate in the political process – it is critical to have a sound and reliable basis for determining whether members of a protected class

are experiencing discrimination in how their votes count or, conversely, their preferred candidates lose for any one of the many reasons candidates lose elections. That sound and reliable basis is the majority-minority district requirement, which is closely tied to the statutory language that is the basis for permitting vote dilution claims.

Petitioners' interpretation of the majority-minority district requirement, on the other hand, would enable any size minority population to state a vote dilution claim if that population were able to demonstrate the *possibility* of securing enough crossover voters for their preferred candidate to win. This interpretation would entail a speculative exercise at best, without a manageable objective basis for measuring when a minority group is large enough to be able to claim that its voting strength had been diluted. This interpretation – not the well-settled interpretation that Respondents urge the Court to leave undisturbed – would create an unmanageable standard for vote dilution inquiries that would involve conjecture about political behavior and voting patterns of endless

permutations of racial and political groups within districts.

Allowing vote dilution claims by members of a protected class who can achieve majority status only by combining their votes with those of crossover voters would require the courts to delve deeply into speculative political questions. This type of vote dilution claim would require courts to examine claims of past and future voting patterns across and among different racial groups, and their intersection with states' and parties' rules for nominating candidates and voting in primaries. *See* Luke P. McLoughlin, *Gingles in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims*, 80 N.Y.U. L. REV. 312 (2005). Indeed, resting Voting Rights Acts claims on speculative crossover districts will require "determining the extent of minority clout in a political party," which is "far more difficult to quantify than merely counting voting age population (or citizen voting age population) in a party." *Id.* at 336. This type of inquiry will require not just an examination into the voting practices of a minority group but also into the predictability of crossover voting for minority

preferred candidates. The latter inquiry requires an examination into the reasons for white crossover voting and whether those reasons will exist in future elections such that minority preferred candidates would continue to be elected. Evaluating these issues would turn judges into political pundits making predictions about future political changes and the reliability and nature of political coalitions and voting behavior.

II. The Majority-Minority Requirement is Consistent with the Voting Rights Act and Congressional Intent

Petitioners claim that any diminution in the ability of a group of a protected class of citizens – regardless of size – to elect its preferred candidate is vote dilution. *See* Pet. Br. at 28. There are two concepts implicit in Petitioners' argument that are at odds with the Voting Rights Act. First, Petitioners' argument would have the effect of requiring maximization of the voting strength of a minority group regardless of its size. This maximization concept is a distortion of the Voting Rights Act and

creates a policy that has been endorsed by neither Congress nor the courts. Second, although the Voting Rights Act guarantees equal opportunities for a protected class of citizens, *i.e.*, racial and language minorities, *see Gingles*, 478 U.S. at 43, it does not, as Petitioners argue, protect the aggregated voting strength of minority and crossover voters who vote for the same candidate for any number of reasons.

A. Minority Vote Maximization is Inconsistent with the Voting Rights Act

Petitioners' argument that any size minority population could state a vote dilution claim based on its inability to elect its candidate of choice is tantamount to requiring minority voting strength maximization. Such maximization comes close to requiring proportional minority representation, which is explicitly rejected in the text of Section 2. 42 U.S.C. § 1973(b). As Senator Grassley explained in the Senate Report accompanying the 1982 amendment to the Voting Rights Act, "In working on this proposal, I acted on the basic assumption that selected minority groups should not be subjected in invidious exclusion from effective political

participation; *neither should they be entitled to constitutional protection from defeat at the polls.*" S.REP. NO. 97-417 at 197 (1982) (Supplemental View of Charles E. Grassley) (emphasis added).

Similarly, this Court in *Johnson v. De Grandy* explicitly rejected the idea that minority voting maximization is a proper goal or test under Section 2 stating:

> [R]eading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast.

512 U.S. at 1016-17 (1994). Notably, this Court disapproved of the District Court apparently adopting a "rule of thumb … that anything short of the maximum number of majority-minority districts consistent with the *Gingles* conditions would violate § 2 …" *Id.* at 1016. "[R]eading the first Gingles

condition in effect to define dilution as a failure to maximize ... causes its own dangers, and they are not to be courted." *Id.* Subsequently in *LULAC,* the Court again rejected the idea that minority voting maximization could be read in Section 2 and reiterated its stance in *De Grandy*. 548 U.S. at 428.

The Circuit Courts have likewise rejected the idea that minority voting strength maximization comports with the Voting Rights Act's protections. For example, the Tenth Circuit stated that "As enacted, Section 2(b) [of the Voting Rights Act] promises protected minorities an even playing field, not a certain victory." *Sanchez v. Colorado*, 97 F.3d 1303, 1309. (10th Cir. 1996). As Judge Duncan stated in the Fourth Circuit's decision in *Hall v. Virginia*, "Section 2 does not create an *entitlement* for minorities to form an alliance with other voters in a district who do not share the same statutory disability as the protected class." 385 F.3d at 431, n.13 (emphasis in original). Judge Duncan added:

> 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."

Id. at 430 (quoting *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993)). Accordingly, Petitioners' implicit argument for minority voting strength maximization is at odds with the Voting Rights Act, Congressional intent, and judicial interpretation of the statute.

B. A Combination of Minority and Majority Voters Is Not Protected Under the Voting Rights Act

A combination of minority and majority voters who share political views is not a protected class that can claim vote dilution protection under the Voting Rights Act based upon its failure to elect its candidates of choice, even though the combined group includes some minority members. The Fourth Circuit in *Hall* explained that "[i]f a minority group lacks a common race or ethnicity, cohesion must rely

principally on shared values, socio-economic factors and coalition formation, making the group almost indistinguishable from political minorities as opposed to racial minorities." 385 F.3d at 431 (internal citations omitted). Similarly, the Sixth Circuit noted that "[a] group tied by overlapping political agendas but not tied by the same statutory disability is no more than a political alliance or coalition." *Nixon*, 76 F.3d at 1392 (internal quotation marks omitted). Such a political coalition "is a group of citizens about which Congress has not made a specific finding of discrimination ..." and that cannot claim vote dilution protection under Section 2. *Id.* at 1391.

It would be an extraordinary expansion of the Voting Rights Act to hold now that a political coalition of minority and white voters could state a vote dilution claim. "Permitting such political coalitions the advantage of Voting Rights Act protection . . . risks wrenching the Act from its ideological and constitutional foundations, as well as 'dilut[ing] its effectiveness as a measure of the causal relationship among statutory disability,

election structures or processes, and election outcomes.'" *Nixon*, 76 F.3d at 1392. (internal citations omitted). Even Judge Keith in his dissent in one of the leading Court of Appeals cases recognized that "the Voting Rights Act prohibits formation of separate 'minority' districts when a protected ethnic group and the white majority vote together. . . " *Id.* at 1399. Allowing combinations of minority and white voters to bring vote dilution suits would call for a dramatic, unjustified expansion of the reach of the Voting Rights Act.

Such a pronounced departure from how vote dilution claims are evaluated cannot be imputed to the text of Section 2 or its legislative history absent an indication from Congress that it intended this departure. *See, e.g.*, *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice [vis-à-vis enforcement of the Emergency Price Control Act of 1942], an unequivocal statement of its purpose would have been made."); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F.

Supp.2d 76, 100-01 (D.D.C. 1998) ("It is a cardinal principle of statutory interpretation that dramatic departures from past practices should not be read into statutes without a definitive signal from Congress.") Petitioners' construction of the text of Section 2 would turn on its head the well-settled application of the majority-minority district requirement for vote dilution claims, which courts have repeatedly applied since Congress adopted the Voting Rights Act.

Furthermore, Petitioners cannot find support for vote dilution claims by a coalition of minority and majority voters through the absence of an explicit prohibition on such claims in the text of Section 2 and the legislative history of the 1982 amendments. *See* Pet. Br. at 34. As the Sixth Circuit explained, "The question is not whether Congress in the Voting Rights Act intended to *prohibit* such coalitions [of two different minority groups]; instead, the proper question is whether Congress intended to *protect* those coalitions. A statutory claim cannot find its support in the absence of prohibitions." *Nixon*, 76 F.3d at 1388 (internal citation omitted) (emphasis in

original). Moreover, Petitioners are inconsistent in, on the one hand, arguing that because the majority-minority district requirement is not mentioned in the text or legislative history of Section 2, it is invalid, and, on the other hand, intimating that their claim is not impaired by the absence of any intent to permit crossover or coalition vote dilution claims in the text or legislative history. Petitioners' attempt to expand the Voting Rights Act to include vote dilution claims by a combination of minority and white voters for the first time since its enactment in 1965 would be a radical departure from how the statute is interpreted and should not be permitted.

III. The Majority-Minority Requirement under Section 2 Creates No Conflict with Section 5 of the Act Because the Two Sections Have Different Purposes, Processes and Functions

As Petitioners acknowledge, "Section 5 and Section 2 differ in certain important respects" and they note the "distinct language [and] purposes of the two. . .. " Pet. Br. at 36. Pet. Br. at 36. Indeed, as one commentator pointed out:

> The difference between the two sections of the VRA is significant. As set out above, section 5 is an administrative mechanism designed to lock in place the status quo ante, unless the legislature demonstrates that any proposed changes do not have a retrogressive effect. By contrast, section 2, as amended in 1982, provides for a plenary adjudication of whether a particular electoral practice, such as the use of multimember election districts, is actually discriminatory and should be struck down.

Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of its Own Success?*, 104 COLUM. L. REV. 1710, 1718 (2004). The Court's decisions recognize this distinction and emphasize that "[w]hile some parts of the § 2 analysis may overlap with the § 5 inquiry, the two sections differ in structure, purpose, and application." *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003) (internal quotations omitted).

Furthermore, this Court has explained that "recognizing § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent upon compliance with § 2. Doing so would, for all intents and purposes, replace the standards for § 5 with those for § 2." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997).

Petitioners attempt to conflate the standards for Section 5 pre-clearance and Section 2 vote dilution inquiries by asserting that these two distinct provisions serve the same "purpose" (despite acknowledging – in the same paragraph – the "distinct language [and] purpose[]" of the two sections) and are in "disharmony" because the jurisprudence that has developed around the two sections has been divergent. Pet. Br. at 36. As their sole support for this proposition, Petitioners rely on this Court's acceptance of "coalition districts" as permissible for retrogression analysis under Section 5 of the Voting Rights Act in *Georgia v. Ashcroft*, at 492. Petitioner's argument, however, disregards this Court's jurisprudence and the different purposes, structure, and application of Sections 2 and 5 and

would create a hybrid Section 2 and Section 5 vote dilution inquiry which would be an entirely new interpretation of the Voting Rights Act that finds no basis in the statute or this Court's cases.

IV. Abandoning the Majority-Minority Requirement Will Enable Gerrymandering in the Guise of Protecting Minority Rights

Abandoning the 50% rule opens the door for increased gerrymandering by providing a means to ignore traditional redistricting criteria. Preservation of political subdivisions provides one of the most effective means to limit various forms of gerrymandering without any reasonable dispute. *See, e.g., Mahan v. Howell*, 410 U.S. 315, 322 (1973) (stating that it is legitimate for states to "[D]esire to construct districts along political subdivision lines to deter the possibilities of gerrymandering.")(internal citation omitted); *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 647 (1993) (emphasizing the importance of "[O]bjective factors," such as "[C]ompactness, contiguity, and respect for political subdivisions" because they may show that a state has not

gerrymandered along racial lines). Requirements for the preservation of political subdivisions serve independent values; they facilitate political organization, electoral campaigning and constituent representation. *See Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (Stevens, J., concurring). In North Carolina, the voters have adopted a constitutional provision which limits the ability of legislators to gerrymander districts by requiring that County lines be respected in the redistricting process. *See, Stephenson I.* Petitioners are correct that the current language in the North Carolina Constitution regarding keeping counties whole was adopted in 1968 as a response to this Court's one person one vote jurisprudence. Pet. Br. 4-5. As the North Carolina Supreme Court observed in *Stephenson I*, however, use of county lines for redistricting dates to the original 1776 North Carolina Constitution, and in amendments to the State constitution in 1835 splitting of counties among senate districts was forbidden. *Stephenson I* at 366. Such a limitation forces a community of interest to be kept together and is a neutral criterion on which to base the drawing of district lines.

Replacing the clear 50% rule with uncertainty will invite those who are so inclined to engage in gerrymandering by permitting a basis to ignore traditional redistricting criteria. The only Circuit Court opinion to which Petitioners could point for claiming a split among the circuits establishes the point. In *Metts v. Murphy*, the First Circuit reversed the grant of a 12(b)(6) dismissal where the contention was that the reduction of the black population from 26% to 21% in a state senate district constituted a violation of Section 2. *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004). While a settlement was reached in *Metts* so that the First Circuit never reached a ruling on the merits, allowing claims that 26% of the population constitutes a majority would be the logical conclusion of abandoning the 50% rule by permitting ever smaller "majorities" to control a district. North Carolina voters now have the protection of the *Stephenson* decisions in preventing voters being aligned in ways designed to benefit politicians instead of voters. If the 50% rule is abandoned, that protection will be undermined and voters again will

be at the mercy of incumbents who realize that years may pass before a Court resolution can occur.

V. The Majority -Requirement Helps Minimize the Role of Race in Politics

"Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of ridding the country of racial discrimination in voting. . . . Congress amended the Act in 1982 in order to relieve plaintiffs of the burden of proving discriminatory intent …" *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (internal quotations and citation omitted); *see also Georgia v. Ashcroft*, 539 at 490 ("The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race.") The majority-minority district requirement in *Gingles* is a reliable and manageable way to measure whether Section 2 has been violated and does not require undue focus on race in politics.

The mere existence of divisions based upon race move us away from a color blind society as this Court recognized in *Shaw I*. "('If our society is to

continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury'). By perpetuating such notions a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract." *Shaw I*, at 648 (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-631 (1991)). The special dangers of racial divisions in connection with voting have received particular attention from the Court "Racial classifications with respect to voting 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." *Shaw I* at 657. In *Stephenson I* the North Carolina Supreme Court found that the Whole County provision prevented Pender County citizens from being "balkanized" by a political gerrymander. *Stephenson I* at 383. Section

2 should not be used to balkanize them on the basis of race.

While not dispositive, the failure of Congress to make any change to Section 2 in the 22 years since *Gingles* ,while every Circuit Court deciding the issue on the merits adopted the "bright line" 50% rule, is persuasive evidence that this Court, and the Circuit Courts, correctly interpreted Section 2. As the amendments to Section 5 of the VRA within three years of *Georgia v. Ashcroft* show, Congress quickly can amend the VRA when it disagrees with the construction provided by this Court.[10] The failure to do so strongly suggests that the current rule is both consistent with Congressional intent and actually working in practice. To abandon a functional and workable rule for complete uncertainty would require far more compelling reasons than any offered by Petitioners.

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[10] *See* H.R. Rep.No. 109-478, at 94 (2006) (noting that the new Section 5 partly overrules *Georgia v. Ashcroft*, 539 U.S. 461 (2003)).

VI. The Majority-Minority Requirement Avoids Conflict Between Section 2 and The Court's Equal Protection Jurisprudence

Continued adherence to the 50% rule reduces the potential of conflict between Section 2 claims and this Court's equal protection jurisprudence under *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995). Without the 50% rule, districts would be drawn not to protect minority citizens from having their votes diluted, but instead would be drawn for the purpose of ensuring members of one race will win an election. This would be done even where, as here, traditional redistricting must be ignored. In rejecting the ability of a minority population of 25.7% of a district to state a claim for a Section 2, district Justice Kennedy observed, "Accordingly, the ability to aid in Frost's election does not make the old District 24 an African-American opportunity district for purposes of § 2. 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. By adhering to the 50% rule, the role of race in politics is diminished and the Court avoids a conflict between Section 2 and its equal protection jurisprudence.

This case illustrates the inevitable collision between Section 2 claims and equal protection jurisprudence. Respondents demonstrated that districts which complied with the Whole County provision provided Black candidates with an opportunity to elect because Black candidates in statewide races carried those districts with between 62.55% and 58.82 % of the vote.[11] "As we suggested

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[11] *See* Page 8, *supra.* On a countywide basis the Black candidate for Supreme Court Justice in 2002 received 49.57% of the vote in Pender County and 44.42% of the vote in New Hanover County, while receiving 46.12% of the statewide vote versus 59.25% and 58.82% in the alternative districts. http://www.sboe.state.nc.us/content.aspx?id=69 The Black candidate for Auditor in 2000 received 52.04% of the vote in Pender County, 47.99% in New Hanover, and 50.51% statewide versus 62.55% and 61.33% in the alternative districts. The Black candidate for Chief Justice received 47.76% of the vote in Pender County, 44.94% in New Hanover and 48.64% statewide versus 59.33% and 59.05% in the alternative districts. http://www.app.sboe.state.nc.us/NCSBE/Elec/Results/y2000elect/stateresults.htm

in *Shaw,* compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." *Miller v. Johnston*, 515 U.S. at 921. Here the evidence shows that a district drawn using traditional redistricting criteria produces a district which provides an opportunity to elect.[12] Petitioners instead appear to seek a district designed to ensure the election of a candidate favored by citizens of one race which is contrary to the purpose of § 2. *Voinovich*, at 153 ("The objective of § 2 is not to ensure that a candidate supported by minority voters can be elected in a district.").

Section 2 is designed to prevent minority citizens from being denied the fundamental right to

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[12] Petitioners presented evidence showing that there was racially polarized voting, and Respondents stipulated to the adequacy of that evidence in regard to countywide elections. Pet. App. 129a-130a. Petitioner's expert witness expressed no opinion as to whether the alternative districts were sufficient to overcome the level of polarization present. JA 114-22. Whether the degree of polarization is sufficient to sustain a Section 2 claim, as opposed to whether the polarization exists, may be in question given the Court's holding in *Voinovich*. *Voinovich*, at 155 (Evidence that Black candidates could be elected in districts with 35% Black population insufficient to show polarized voting.).

participate in the political process and to ensure that they have the equal right to elect representatives of their own choosing. Adherence to the 50% rule furthers *that* objective in a constitutional manner by protecting minority citizens from having their votes unfairly diluted. If the 50% rule is abandoned as Petitioners urge, Section 2 will no longer be a shield to protect minority citizens from unequal treatment, it instead will be a tool which permits minority citizens to benefit from special treatment denied to citizens of other races. Adopting the Petitioners' position will result in a race neutral provision of a state constitution which is universally recognized as a valid redistricting criteria being abandoned in order to permit a biracial coalition to elect a candidate of a particular political party. Such a result is not required by Section 2 nor does it further the purposes of the Act.

CONCLUSION

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

Respectfully submitted,

CARL W. THURMAN III
Counsel of Record
3169 Wrightsville Avenue
Wilmington, NC 28403
(910) 620-3979

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