No. 07-689

IN THE
Supreme Court of the United States

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

Petitioners,

v.

DWIGHT STRICKLAND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF ON BEHALF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL AND THE LAWYERS DEMOCRACY FUND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does section 2 of the Voting Rights Act require the creation of a "crossover minority" district when to do so would be contrary to race-neutral state constitutional mandates?

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INTERESTS OF *AMICI CURIAE*

***Amicus* ALEC** – The American Legislative Exchange Council ("ALEC") is the nation's largest nonpartisan individual membership association of state legislators. ALEC has more than 2,000 members, comprising approximately one-third of all state legislators in the United States. Its mission is to discuss, develop, and disseminate public policies that expand free markets, promote economic growth, limit government, and preserve economic liberty. It is also generally concerned with matters of legislative accountability and governmental structure. ALEC serves as a "think tank" on many specific legislative issues and provides for its members a variety of resources, including a number of publications, a website (www.alec.org), and affiliation with more than 300 corporate and private foundation members. ALEC's interest in this proceeding is the protection of state legislatures' authority over the redistricting phase of the apportionment process, thereby promoting the vital principles of federalism (ALEC represents *state* legislators) and separation of powers (ALEC represents state *legislators*) in the areas of redistricting and elections – domains traditionally entrusted to the collective judgment of the state legislatures. U.S. Const. art. 1, § 4.[1] It believes in the importance of preserving political subdivisions and other objective means of limiting unconstitutional

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

gerrymandering. ALEC also promotes the development and adoption of clear legal rules that can be plainly understood and straightforwardly applied by those responsible for the districting phase of the apportionment process for Congress and the state legislatures.

***Amicus* LDF** – The Lawyers Democracy Fund ("LDF") is a non-profit organization created to engage in activities to promote the role of ethics and legal professionalism in the electoral process. Its mission is to promote fair elections, ensure that all citizens are able to exercise their right to vote, and encourage election methods that prevent dilution of any citizen's vote.

SUMMARY OF ARGUMENT

This Court should not overrule *Thornburg v. Gingles* by eliminating the majority-minority precondition in favor of the requirement, advanced by Petitioners, that redistricting bodies must form crossover minority districts wherever there exists a minority population large enough to control a party primary and that party's candidate likely will win the general election. Petitioners have extended an invitation for the courts to enter a partisan and political thicket that this Court should decline.

The Voting Rights Act ("the Act") is a remedial statute intended to enforce the constitutional guarantees of the Fourteenth and Fifteenth Amendments. By virtually all accounts, the Act, as interpreted by this Court, has been successful in increasing the equality of opportunity for minority

citizens to elect candidates of their choice. Petitioners ask this Court to turn its back on these twenty-plus years of success and on its interpretation of section 2—an interpretation with clear guidance to political bodies assigned the difficult task of drafting representational plans.

The majority-minority precondition is rational and workable, in large part because it is consistent with this country's electoral system. A majority of votes wins an election. In order for an electoral procedure, here a representative district, to provide a minority community with less opportunity to elect its candidate of choice, the minority community must, in an alternative district, have the ability to elect—*i.e.*, must have the ability to cast the majority of votes necessary to elect its candidate of choice. This is, quite appropriately, what is demanded by the first of the *Gingles* preconditions, the majority-minority requirement.

Petitioners argue that the majority-minority precondition should be rejected on the ground that a minority community can still elect its candidate of choice even when it constitutes less than a majority of a particular district with crossover White voter support. This concept is inconsistent with the third of the *Gingles* preconditions, the existence of racially polarized voting sufficient to deny the minority community the ability to elect its candidate of choice. Crossover districts are simply another expression of traditional coalition politics. While they may be entirely appropriate as long as they are created in compliance with federal and state legal requirements, crossover minority districts are not mandated by the Voting Rights Act. The crossover

nature of these districts creates the very real risk that the result would be a decrease in the number of minority members in Congress and our state legislatures, replacing these members with candidates preferred by the non-minority crossover voters.

Instead of the clear, workable standard provided by the majority-minority requirement, Petitioners would have drafting bodies operate under an amorphous, flexible standard that potentially requires the creation of crossover districts in any and every geographical area in which a population of minority voters may be found. Under Petitioners' standard, drafting bodies must create "minority" representational districts guaranteed to elect the candidate likely to receive a majority of a minority group's votes regardless of whether the minority group alone would be sufficiently large to elect the candidate. Despite the fact that this Court has expressly rejected the notion that the Voting Rights Act requires maximization of minority voting strength, Petitioners would transform section 2 into a statutory requirement that drafting bodies maximize the influence of minority voters.

Moreover, the only way for a state legislature or city council to effectuate such a statutory requirement would be to make race the paramount consideration in virtually every districting decision. In this case, North Carolina would be compelled to ignore a state constitutional requirement to preserve county boundaries and create a crossover district guaranteed to elect a specific incumbent member. This would be a design driven not by traditionally accepted redistricting criteria such as geography and preservation of political subdivisions, but

by race and the use of race as a proxy for partisan objectives. It is impossible to reconcile Petitioners' approach with this Court's racial gerrymandering decisions. The Court has repeatedly recognized that political subdivisions serve as the single most effective barrier to gerrymandering. Casting aside state requirements such as North Carolina's "Whole County" provisions in the name of racial maximization would transform the Voting Rights Act from a shield for minority voting rights into a sword for partisan gerrymandering. This is not what Congress intended.

ARGUMENT

I. This Court Should Not Overrule *Thornburg v. Gingles* By Eliminating The Majority-Minority Precondition.

Petitioners would have this Court disregard the long-established judicial practice of *stare decisis* by overturning its decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986). For over twenty years, the standard enunciated by the Court in *Gingles* has stood the test of time.[2] In *Gingles* and subsequent decisions, this Court has provided understandable guidance to those drafting representational plans across the nation, from plans for Congress to plans for local governing boards.[3] "Our

2. *Gingles* was "the first post-amendment decision on section 2 by the Court and [is] still the leading authority." *Metts v. Murphy*, 363 F.3d 8, 10 (1st Cir. 2004).

3. "In reality, this [circuit] court has interpreted the *Gingles* factors as a bright line test." *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852 (5th Cir. 1999).

legitimacy requires, above all, that we adhere to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds." *Bush v. Vera*, 517 U.S. 952, 985 (1996). There is no area where partisan controversy is greater than in the area of redistricting.

In *Gingles*, this Court enunciated a three-prong threshold test for establishing a claim of vote dilution under section 2 of the Voting Rights Act, the first of which is that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. While the districting plan at issue in *Gingles* included multimember districts, the three preconditions have since been held to apply to the creation of single-member districts. *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993); *Growe v. Emison*, 507 U.S. 25, 40 (1993).

When a majority-minority representational district can be created under neutral criteria, such as compactness, and racial bloc voting by the majority community regularly frustrates the will of a politically cohesive minority community to elect its candidate of choice, section 2 may require the creation of a particular minority representational district. But the creation of such a district can only be required if all three *Gingles* preconditions are met, and then only after a review of the totality of the circumstances results in a determination that the minority community has "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); *Johnson v. De Grandy*, 512 U.S. 997, 1007-08 (1994).

Petitioners refer to the effective voting majority language of the courts as if it refers merely to the ability to elect. (Petrs.' Br. 17.) The principal inquiry under *Gingles*, however, is whether the minority voters, by themselves, have the potential to be a majority of the appropriate electoral base and, if so, whether the redistricting infrastructure frustrates this potential, nullifying it. *Gingles*, 478 U.S. at 51 n.17 ("Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.") (emphasis in original). Section 2 is not a guarantee of election victory for whatever coalition might be assembled, even if that coalition includes some minority voters.

Section 2 actuates the prohibitions of the Fifteenth Amendment by forbidding practices that result in "the denial or abridgement of the right of any citizen to vote on account of race or color." U.S. Const. amend. XV; *Voinovich*, 507 U.S. at 152. The Act is violated if members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). It is not a violation simply if an alternative district plan may result in the election of more candidates who might receive a majority of the votes cast by minority voters. *See De Grandy*, 512 U.S. at 1016-17; *Metts v. Murphy*, 363 F.3d 8, 11-12 (1st Cir. 2004).

The Petitioners strike at the North Carolina Supreme Court for "seizing on the literal language" of *Gingles*. (*See* Petrs.' Br. 24.) Surely state courts are

required to follow the literal language of this Court's interpretation of federal statutory requirements. What is striking is the Petitioners "seizing" on this Court having left open the "possibility" that less than a majority of minority voters may be able to prove a section 2 violation, and stating that this reservation moots the Court's explicit "majority" language. (Petrs.' Br. 25-27.)

Various *Amici* supporting Petitioners argue that there is disagreement amongst the circuit courts over the 50% requirement of the first prong of *Gingles*. (*See*, *e.g.*, *Amici Curiae* Br. of League of Women Voters 11-12.) But the North Carolina Supreme Court was correct when it stated: "No circuit has agreed with defendants and affirmatively held that Section 2 can be satisfied by the creation of coalition, crossover, or influence districts." *Pender County v. Bartlett*, 649 S.E.2d 364, 372 (N.C. 2007). In reality, this observation of circuit conflict with respect to *Gingles*, to the extent that it exists, is not about the existence of a 50% majority precondition, but about how this majority status should be calculated.[4]

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4. The majority of federal circuit courts have determined that a minority group claiming a violation of section 2 must establish that the minority constitutes a "majority" of the population—be it total population, voting age population, or citizen voting age population—of the challenged district. *Pender County*, 649 S.E.2d at 372. Most circuit courts that have confronted this issue have determined that voting age population is the proper measure of "majority" for the purposes of establishing the first *Gingles* precondition. *See*, *e.g.*, *Hall v. Virginia*, 385 F.3d 421, 423, 430 (4th Cir. 2004) (holding that in

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order "to establish a vote dilution claim under section 2, minorities must prove that they have been unlawfully denied the political opportunity they would have enjoyed as a *voting-age majority*" in the district) (emphasis added); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 945 (7th Cir. 1988) (stating that the first *Gingles* precondition requires the minority to be a "*voting age majority*" of the population in a district) (emphasis added); *Romero v. City of Pomona*, 883 F.2d 1418, 1424 n.7 (9th Cir. 1989) (noting that "[w]e 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 district, and noting that "the trial court in *Gingles* recognized that 'no aggregation of less than 50% of an area's *voting age population* can possibly constitute an effective voting majority'") (emphasis added), *overruled in part on other grounds*, *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990). Some circuits have determined that citizen voting age population is the proper measure. *See*, *e.g.*, *Valdespino*, 168 F.3d at 850 (holding that, in order to make a successful claim under section 2, minorities "may [not] be less than 50% of the *citizen voting age population*" in a district) (emphasis added); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1571 (11th Cir. 1997) (holding that plaintiffs failed to establish a section 2 vote dilution claim because they were unable to show that they were a "majority of potential voters" when "citizenship information" was considered). Still other circuits have yet to weigh in on the specific issue of how to calculate a minority group's majority status. *See*, *e.g.*, *Sanchez v. Colorado*, 97 F.3d 1303, 1314 (10th Cir. 1996) (noting that the first *Gingles* precondition is only satisfied if "plaintiffs show a majority-[minority] district is feasible"), *cert. denied sub nom.*, *Colorado v. Sanchez*, 520 U.S. 1229 (1997); *Metts*, 363 F.3d at 11-12 (stating that the first *Gingles* precondition requires plaintiffs to establish that they are "a majority" in a compact district, and that "plaintiffs cannot prevail merely by showing that an alternative plan give them a greater opportunity to win the election").

The issue is not whether a particular group of minority voters needs to prove that they are a majority—that is, 50% or more of a district—but whether they need to be 50% or more of the total population, of the voting age population, or of the citizen voting age population. In *Reynolds v. Sims*, this Court provided a glimpse into the meaning for the short-hand theme of "one-person, one-vote": "the overriding objective must be substantial equality of population among the various districts, *so that* the vote of any citizen is approximately equal in weight to that of any other citizen in the State." 377 U.S. 533, 579 (1964) (emphasis added). Thus, if equipopulous districting is merely a means to an end, the relevant population for any districting, let alone a section 2 claim, should be the most relevant objective population base, citizen voting age population (CVAP). While operational considerations relating to the collection, processing and availability of the CVAP information are clear impediments to its use in everyday districting, there can be no doubt that CVAP is the relevant characteristic data for a section 2 claim.[5]

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5. There can be substantial deviations from an equal distribution of persons across districts depending upon the population base used for apportionment. In Pender County alone, there is a substantial difference just between House District 16 (at 68,294 persons) and the House District 18 (at 63,772 persons). A review of the 120 districts for the North Carolina House illustrates the wide range of population deviations for alternative population bases. Based upon total population, the range of deviations is from 4.99% to +5.00%, a range of 9.99%. This translates into 1 person, 1 vote in District 14, and 1 person, 1.10 votes in District 52. Similarly unequal

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As Petitioners point out, the Act itself includes no express majority-minority threshold precondition. (Petrs.' Br. 27.) However, in our two-party "first past the post" electoral system, there is generally just such a majority threshold for any electoral victory. A majority requirement is therefore a logical precondition for stating a claim of denial of an equal opportunity to "elect representatives." If our system was the West European model of party lists or proportional representation, a

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distributions are evident when using total voting age population (TVAP) or registration (TREG). For TVAP, the range of deviations is from -15.37% to +13.03%, a range of 28.39%. This translates into 1 person, 1 vote in District 59, and 1 person, 1.33 votes in District 42. For TREG, the range of deviations is from -39.55% to +31.63%, a range of 71.18%. This translates into 1 person, 1 vote in District 82 and 1 person, 2.18 votes in District 14. North Carolina General Assembly, Interim House Redistricting Plan for NC 2002 Elections (2003 Statistics), http://www.ncleg.net/GIS/Archives/ASP/2003_proposed_plans.asp?PlanName=Interim_House_Redistricting_Plan_for_NC_2002_Elections*House (last visited July 31, 2008) (the information from this state website does not include any citizen voting age population (CVAP) numbers). *See Chen v. City of Houston*, 532 U.S. 1046, 2021 (2001) (Thomas, J., dissenting) (stating that whether "population" for purposes of apportionment means "total population" or "citizen voting age population" may "be dispositive of whether" the Equal Protection Clause has been violated); *Garza v. County of Los Angeles*, 918 F.2d 763, 781 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) (recognizing the potential substantive difference between striving for "equality of population" and "equality of voting strength" in the apportionment process, and stating that "[a]pportionment by population can result in unequally weighted votes, while assuring equality in voting power might well call for districts of unequal population.").

majority-minority threshold would be an illogical precondition, but our elections are not marked by party lists or proportional representation. In fact, proportional representation is specifically rejected by the Voting Rights Act's express statutory language. 42 U.S.C. § 1973(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

As the Court reflected in *Voinovich* and amplified in *De Grandy*, "the *Gingles* factors cannot be applied mechanically, and without regard to the nature of the claim." 507 U.S. at 158; 512 U.S. at 1007. It is possible to postulate factual situations in which the majority requirement may be a problem due to unusual demographics. For example, areas with large universities or military bases raise an unusual case because the census total population base includes numerous persons unlikely or ineligible to vote in a district in that area. Reaching a majority of minority population on a census-derived population base in such cases might be impossible, and should not be determinative. This Court has left the door open in such unique and isolated circumstances for non-majority-minority section 2 claims. Absent such a circumstance, however, the majority-minority threshold is, and should remain, the key "bright line" for any entity charged with the difficult responsibility of creating district boundaries.

Retaining the precondition of an alternative majority-minority district for a section 2 claim does not eliminate the ability of a minority group to prevent the intentional division of geographically compact and cohesive minority communities where such division is

discriminatory under the Fourteenth Amendment. Nor does this majority-minority precondition to a section 2 claim require the dismantling of near majority-minority districts unless those districts violate state law. The Petitioners argue that the 50% precondition "creates disharmony between Section 2 and Section 5." (Petrs.' Br. 34-36.) In so arguing, Petitioners rely exclusively on *Georgia v. Ashcroft*, 539 U.S. 461 (2003), which is surprising since Congress, in its recent renewal of section 5 of the Voting Rights Act, expressly stated its intent to overrule *Georgia v. Ashcroft* and return the section 5 retrogression inquiry to what it was under *Beer v. United States*, 425 U.S. 130 (1976).[6] S. Rep. No. 109-295, at 19 (2006). Any disharmony could only be with the prior section 5, and a crossover and influence district analysis that Congress has rejected.

II. Crossover Voting Is Incompatible With Racial Polarization And Bloc Voting.

The ability of a minority community to elect its candidate of choice in a district that is not a majority-minority district is not proof of a Voting Rights Act violation. Rather, it is proof of a lack of polarization and racial bloc voting. *See Voinovich*, 507 U.S. at 158. The express language of the first precondition in *Gingles*

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6. *See* H.R. Rep. No. 109-478, at 94 (2006) (pointing out that the new law partly overrules *Georgia v. Ashcroft*, 539 U.S. 461 (2003)); 152 Cong. Rec. H5143, H5163 (daily ed. July 13, 2006) (statements of Rep. Sensenbrenner and Rep. Watt) (demonstrating Representatives Sensenbrenner's and Watt's agreement that the new retrogression standard reenacts *Beer* into law).

forecloses a requirement of districts such as House District 18. *See Gingles*, 478 U.S. at 49. Furthermore, the interrelationship of the first, second, and third preconditions illustrates why the first precondition should remain applicable.

At some point, the ability of minority voters to elect a candidate of choice in a majority-White district must show a lack of racial polarization. *Voinovich* recognized that this corollary creates a conundrum for those who seek to prove a violation of section 2 at less than a majority of minority population: the very proof that a minority candidate could be elected at lower minority percentages in turn proves that the degree and impact of polarization is legally insufficient to prove vote dilution. *See* 507 U.S. at 158. This conclusion is consistent with this Court's earlier ruling in *Thornburg v. Gingles*, where the Court overturned the three-judge district panel and determined that a state legislative district in Durham County, North Carolina - a district similar to that at issue in Pender County in the instant case - was not sufficiently polarized so as to prove a section 2 violation. *See Gingles*, 478 U.S. at 77.

III. Racial Maximization In Districting Has Been Rejected By This Court.

Shorn of legal rhetoric, Petitioners argue for the proposition that a state must do whatever is possible to maximize the ability of a protected class, here African-American voters, to elect their candidates of choice. Section 2 requires an electoral process "equally open"

to all, not a process that favors one group over another.[7] 42 U.S.C. § 1973(b). Neither the language of section 2 nor this Court's jurisprudence requires the maximization of influence of any racial or ethnic group. Just as this Court has disapproved of the proposed "max Black" theory of districting, there also is no "max crossover" theory that can be condoned by the Court. *See Miller v. Johnson*, 515 U.S. 900, 924-25 (1995). As Justice Souter stated in *Johnson v. De Grandy*:

> If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

512 U.S. at 1020.

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7. This Court emphasized in *League of United Latin American Citizens (LULAC) v. Perry*, its most recent redistricting case, that the Voting Rights Act protects the rights of individual voters, not the rights of groups. 126 S.Ct. 2594, 2620 (2006); *see Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 917 (1996); *Gonzalez v. City of Aurora*, No. 06-4175, 2008 WL 2841119, at *2 (7th Cir. July 24, 2008) (Easterbrook, J.).

Yet Petitioners would have this Court conclude that without a requirement of a crossover district, where the Black candidate is the "drafted" winner, minority voters will be denied an equal opportunity. This position is unsupportable. "Failure to maximize cannot be the measure of section 2." *Id.* at 1017. One cannot maximize African-American "influence without minimizing some other group's influence." *See Gonzalez v. City of Aurora*, No. 06-4175, 2008 WL 2841119, at *2 (7th Cir. Jan. 22, 2008) (Easterbrook, J.). A map drafted ignoring neutral criteria and valid state policy to the advantage of African-American candidates and at the expense of White or Latino candidates violates the Equal Protection Clause and section 2 "as surely as a map drawn to maximize the influence of those groups at the expense of [African-Americans]." *See id.* Petitioners' theory that section 2 must be interpreted to require maximization of the influence of the protected class is contrary to logic, contrary to this Court's jurisprudence, and contrary to the United States Constitution, and it must be rejected.

IV. Mandating Crossover Minority Districts Would Require Unconstitutional Predominantly Race-Based Districting

Petitioners' construction of section 2 is impermissible under this Court's racial gerrymandering jurisprudence and the canon of constitutional avoidance. Where a statute may be "susceptible of" more than one construction, but one construction presents a constitutional problem, the Court must reject the constitutionally problematic construction and construe the statute so as to "avoid constitutional problems." *Boumediene v. Bush*, 128 S. Ct. 2229, 2271 (2008) (citing

I.N.S. v. St. Cyr, 533 U.S. 289, 299-300 (2001)). Assuming, *arguendo*, that section 2 is "susceptible of" two possible constructions—(1) that advanced by Petitioner, that section 2 requires the formation of a minority district when a coalition of minority voters and some quantity of "crossover" voters could possibly be formed, and (2) that section 2 requires formation of a minority district only where a minority constitutes a numerical majority in the district—the Court must reject Petitioners' construction in order to avoid running afoul of the Fourteenth Amendment and this Court's Equal Protection Clause jurisprudence.

It is well-established that "race cannot be the predominant factor in redistricting." *Georgia v. Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring); *see Vera*, 517 U.S. at 959, 976; *Miller*, 515 U.S. at 919; *Hunt v. Cromartie* (*Shaw III*), 526 U.S. 541, 547 (1999); *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899 (1996); *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 642, 649 (1993). While it is permissible for state legislatures to be cognizant of race during the redistricting process, it is presumptively unconstitutional for a state legislature to consider racial objectives to the exclusion of traditional, race-neutral districting criteria—such as compactness and "respect for political subdivisions"—or to subordinate traditional, race-neutral districting criteria to racial objectives. *Vera*, 517 U.S. at 958, 976; *Shaw II*, 517 U.S. at 905-07; *Shaw I*, 509 U.S. at 646.

In short, state legislatures cannot draw district lines based solely, or even primarily, on race. Yet this is precisely what Petitioners' interpretation of section 2 would require of state legislatures across the country.

Under Petitioners' theory, the first step of redistricting would be to determine whether a district could be constructed, unrestrained by state law or constitutional provision, in which the African-American electorate could control the Democratic primary followed by the Democratic nominee winning the general election.[8] (Petrs.' Br. 31.) If such a district could be formed, Petitioners' argument goes, the African-American voters in the district have a section 2 right that must be protected by forming a crossover district. (Petrs.' Br. 31.)

Since African-American voters presently support Democratic candidates overwhelmingly, the logic of Petitioners' argument would require a heightened focus not only on the voting patterns of minority populations in the Democratic Party primary, but on the juxtaposition of census blocks in *every* neighborhood and community with a cognizable minority population. Race would become the paramount consideration in the districting process because legislators would have to

8. In addition to its inherent constitutional problems, Petitioners' approach creates a difficult question of practical application for state legislators: what level of minority electoral success does the line drawer determine is sufficient? Does section 2 require that every census block with minority voters be placed in a crossover district if the minority population can regularly or usually elect a Democratic candidate to a legislative body? Or only if the minority population is always able to elect a Democratic candidate? Petitioners do not provide an answer and, even if they did, the analysis under Petitioners' approach would nonetheless require state legislators to make difficult judgment calls based upon complex information itself subject to different interpretations. This would subject redistricting decisions to constant judicial challenge.

form crossover districts wherever there is a cognizable minority population that could elect a Democratic candidate by virtue of its control over the Democratic Party primary. "If section 2 were interpreted to protect this kind of influence . . . it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *League of United Latin Am. Citizens (LULAC) v. Perry*, 126 S. Ct. 2594, 2625 (2006) (citing *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring)).

Because Petitioners' interpretation of section 2 would require state legislatures to engage in unconstitutional conduct—namely, drawing each district line with an eye predominantly toward race—Petitioners' interpretation must be rejected in favor of an interpretation that does not present constitutional problems. As Justice Kennedy observed in his concurring opinion in *Georgia v. Ashcroft*, "[t]here is a fundamental flaw . . . in any scheme in which [a state legislature] is permitted or directed to [engage in] a course of unconstitutional conduct in order to find compliance with a statutory directive." 539 U.S. at 491. Certainly there is such a fundamental flaw in requiring state legislatures to violate the United States Constitution by giving paramount consideration to the race of voters in order to comply with Petitioners' interpretation of section 2.

Another fundamental flaw in Petitioners' interpretation of section 2 is that it allows state legislatures to use race as a proxy to accomplish partisan objectives. Using race as a proxy to obtain partisan

objectives is no less unconstitutional than the predominant use of race to obtain racial objectives. *See Vera*, 517 U.S. at 972 (concluding that the challenged district was "unexplainable in terms other than race" even though the legislature had used racial data "for multiple objectives" because the "record disclose[d] intensive and pervasive use of race . . . as a proxy to protect . . . incumbents . . . .").

As discussed, *supra*, the question under Petitioners' construction of section 2 is whether North Carolina voters in minority neighborhoods and communities are a majority of voters in the Democratic primary such that the minority voters must be placed into crossover districts. Petitioners apparently conclude that in order for a legislative district in North Carolina to "perform" for minorities who tend to vote Democrat, the district must elect a Democrat to the state legislature. The inevitable, and likely intended, consequence in this case of Petitioners' approach is that race becomes a proxy for accomplishing the partisan objective of increasing the number of Democrats in the North Carolina state legislature. Case law, together with the language and legislative history of the Voting Rights Act, leave Petitioners' interpretation of section 2 without support. If this interpretation of section 2 is endorsed, the Act's role in protecting and increasing minority participation and access would be seriously undermined.

The theory of partisan-blind racial bloc voting was expressly rejected by Justice White's and Justice O'Connor's concurring opinions in *Thornburg v.*

Gingles. 478 U.S. 30, 83 (1986) (White, J., concurring); *id.* at 100-02 (O'Connor, J., concurring in judgment). The hypothetical set forth in Justice White's concurrence is particularly relevant:

> I take it that there would also be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters. This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did . . . .[9]

Id. at 83 (White, J., concurring*); see also Uno v. City of Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995) ("[W]hen racial antagonism is not the cause of an electoral defeat suffered by a minority candidate, the defeat does not prove a lack of electoral opportunity but a lack of whatever else it takes to be successful in politics"). Petitioners' argument, that in every area where there is a cognizable minority population section 2 requires that districts be drawn so that the minority-preferred Democrat usually wins, has also been recognized—and consistently rejected—by lower courts with the same

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9. Justice White's opinion is the controlling opinion on this issue. *See Gingles*, 478 U.S. at 83 (White, J., concurring); *id.* at 100-02 (O'Connor, J., concurring in judgment). Given the Court's ruling on what constituted a cohesive voting group in *Quilter v. Voinovich*, 981 F. Supp. 1032 (N.D. Ohio 1997), *aff'd*, 523 U.S. 1043 (1998), it is questionable whether racially polarized voting even exists in District 18.

justification.[10] The Voting Rights Act does not protect interest-group politics or guarantee electoral success to a candidate of any party on the grounds that the candidate is likely to be supported by minority voters.

Rather, the goal of the Voting Rights Act is to eliminate longstanding discrimination against minority persons in the context of voting. When renewed in 1982, it was championed in the United States Senate by Republican Bob Dole and signed by President Reagan. In 2006, sections of the Act were again renewed by a Republican-controlled Congress and signed by President Bush. No Republicans would have supported the Act had they believed that it mandates nationwide districting plans that favor Democratic candidates.[11]

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10. *See*, *e.g.*, *Hall v. Virginia*, 276 F. Supp. 2d 528, 530 (E.D. Va. 2003), *aff'd*, 385 F.3d 421 (4th Cir. 2004); *Lewis v. Alamance County*, 99 F.3d 600, 617 (4th Cir. 1996); *Rodriguez v. Pataki*, 308 F. Supp. 3d 346, 382, 386, 403, 427 n.134 (S.D.N.Y. 2004) ("The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates."); *Nixon v. Kent County*, 76 F.3d 1381, 1392 (6th Cir. 1996) (A "group that is too small to be expected to win a seat, were it purely a political group, cannot legitimately have heightened expectations because the basis for the group's existence is tied to the race of its members."); *Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992); s*ee also* Michael A. Carvin and Louis K. Fisher, *A Legislative Task: Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 Election L.J. 2, 12-27 (2005).

11. *See* 152 Cong. Rec. S7987 (daily ed. July 20, 2006) (statement of Sen. Sessions) ("We must remember that we are reauthorizing the Voting Rights Act, not creating a 'gerrymandering rights act.' The bipartisan support for this bill indicates that both Republicans and Democrats do not expect or intend it to be interpreted to advantage one party or the other.").

Petitioners' approach is one that guarantees the formation of districts that will elect candidates of one party at the expense of the other. Practically speaking, in North Carolina, this means that the Democratic Party will be favored because most minority voters currently favor Democratic over Republican legislative candidates. In the case of some minority voters, however, such as Cuban-Americans, the favored candidate could be a Republican. In either case, surely the Voting Rights Act should not be interpreted by this Court so as to transform it into a political party rights act. The purpose of the Act is to avoid discrimination against individual voters based upon race or ethnicity, not to boost the chances of electoral success for a particular political party. Justice Stevens has written:

> In my view, districting plans violate the Equal Protection Clause when they 'serve no purpose other than to favor one segment – whether racial, ethnic, religious, economic, or political – that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community.' In contrast, I do not see how a districting plan that favors a politically weak group can violate equal protection.

Miller, 515 U.S. at 932 (Stevens, J., dissenting) (quoting *Karcher v. Daggett*, 462 U.S. 725, 748, 103 S. Ct. 2653, 2668-2669 (1983) (Stevens, J., concurring) (internal citations omitted)).

The district that is the focus of this case, House District 18, does not favor a politically weak group. Rather, the district was designed to reelect a specific incumbent member. *See* J.A. 41, 43 (Alexander Aff. ¶¶ 9, 13); J.A. 69, 73-74 (Wright Aff. ¶¶ 4, 11-12). Petitioners now endeavor to use the fact that a cognizable number of minority voters reside in House District 18 to protect the district under section 2 of the Voting Rights Act. Indeed, since the district violates the North Carolina state constitution's "Whole County" provisions, N.C. Const. art. II, §§ 3(3), 5(3), the only way Petitioners can retain the district is to bring it within the purview of a federal statute like the Voting Rights Act. But the statute is the "Voting Rights Act," not the Members' Rights Act. The only group's interest being protected by ignoring political subdivision lines is that of the Democratic majority in the North Carolina state legislature.[12] The voting rights of all of Pender County citizens are served by following the mandates of the state's constitution and electing an individual on an equal basis, be that individual a Democrat, Republican, or Independent, or White, African-American, or Latino. Petitioners' interpretation of section 2 of the Voting Rights Act is impermissible under this Court's Equal Protection Clause jurisprudence, House District 18 is neither required nor protected by section 2, and Pender County should elect its North Carolina House members as provided for in the North Carolina constitution.

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12. Even though party candidates did not win a majority of the legislative votes under the current plan in either the 2004 or the 2006 elections, the Democratic Party has won a majority of seats in both elections. *See* North Carolina State Board of Elections, Election Results, http://www.sboe.state.nc.us/content.aspx?id=69 (last visited Aug. 13, 2008).

V. A State Constitutional Requirement To Preserve Political Subdivision Boundaries Provides One Of The Only Effective Limitations On The Most Common Types Of Gerrymanders – Partisan And Incumbent.

The simple issue before this Court is whether a federal statute, the Voting Rights Act, will override any race-neutral state requirement for districting—in this case, the North Carolina's constitutional provision for the preservation of its political subdivisions, state counties. Federal statutory provisions should be interpreted to avoid conflict with state laws,[13] especially those, like North Carolina's "Whole County" provisions, that are supported by sound public policy.

Preservation of political subdivisions is undoubtedly one of the most effective means of deterring gerrymandering. *See*, *e.g.*, *Mahan v. Howell*, 410 U.S. 315, 322 (1973) (stating that it is legitimate for states to "desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering . . . ."); *Shaw I*, 509 U.S. at 647 (emphasizing the importance of "objective factors," such as "compactness, contiguity, and respect for political subdivisions," because such factors may show that a state has not engaged in racial

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13. *See Digital Equip. Co. v. Desktop Direct*, *Inc.*, 511 U.S. 863, 879 (1994) (noting the "familiar principle of statutory construction that, when possible, courts should construe statutes . . . to foster harmony with other statutory and constitutional law") (internal citations omitted); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984).

gerrymandering).[14] More than forty years ago, this Court recognized that "[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." *Reynolds*, 377 U.S. at 578-79.

Gerrymandering is "a pathology of democracy."[15] This Court has repeatedly been petitioned, but has declined, to address the problems of the political gerrymander,[16] largely because serious questions remain on how any court could fashion a "manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution . . . ." *LULAC*, 126 S. Ct. at 548. But no matter what one's view is of the justiciability of partisan gerrymandering, surely this Court should not truncate one of the few effective barriers to the practice.[17]

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14. Robert G. Dixon, *Democratic Representation* 457 (Oxford Univ. Press 1968) (". . . requiring abandonment of many district lines based on traditional political subdivision boundaries [] enhances opportunity for gerrymandering.").

15. Martin Shapiro, *Gerrymandering Fairness in the Supreme Court*, 33 UCLA L. Rev. 227, 239 (1985).

16. *Davis v. Bandemer*, 478 U.S. 109 (1986); *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Badham v. Eu*, 488 U.S. 1024 (1989), *aff'g* 694 F. Supp. 664 (N.D. Cal. 1988); *LULAC*, 126 S. Ct. 2594 (2006).

17. *See* Gordon E. Baker, *Unfinished Reapportionment Revolution*, *in* Political Gerrymandering and the Courts 24 (Bernard Grofman ed., 1990).

The term "district" encompasses explicit views of the Founding Fathers and early legislators that effective representation can best be accomplished by dividing a state into geographic units encompassing relatively recognizable regions. Such "districts" give effect to political subdivisions, allow representatives to gain "intimate familiarity" with local interests necessary to represent communities of interest, and are "convenient" for constituents.[18] In contrast, the tortured and sprawling amalgamations of census geography that appear in some district plans largely fail to follow any political boundaries or evince any geographical reasoning, preventing representatives from becoming intimately familiar with issues important to their constituents. Such meandering districts often require the representative to represent communities of diverse interests, are inconvenient for voters, and make it far more difficult for candidates and members to become familiar with the issues. Thus, requirements that preserve political subdivisions serve independent values, including facilitation of political organization, electoral campaigning, and constituent representation. *See Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (Stevens, J., concurring); *see also Prosser v. Election Bd.*, 793 F. Supp. 859, 863 (W.D. Wis. 1992) (three-judge court *per curiam*).

Members of a State House cannot easily represent their constituents, nor can voters for a district exercise the franchise intelligently, when a district is nothing more

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18. James Madison, *The Federalist*, *No. 56* (Hallowell ed., 1842).

than a fragmented unit divorced from, and indeed possibly in conflict with, the various other political communities established by the state. Members of the legislature are less likely to be visible and identifiable to their constituents if legislative boundaries are completely independent of other traditional geographic or political boundaries. The simple inability of the elector to understand who their elective representative is or which citizens their member represents can contribute to increasing voter apathy. Districts should present manageable and understandable constituencies for legislators to seek electoral support and effectively represent those who elected them.

Legislators are elected to "represent people" and "not trees or acres," *Reynolds*, 377 U.S. at 562, but people participate in our political process through group action.[19] Legislators represent not only individuals, but also the interests of organized and unorganized associations of individuals. If members of a legislature become uncoupled from specific political subdivisions, their bonds to identifiable interests are lessened. Legislative members cast free of the responsibility for specific communities of interest become more vulnerable to the influence of special, or single, interest groups. Petitioners' approach would make one of the most divisive of issues in American society, race and ethnicity, become the predominant factor in the creation of North Carolina's House districts. One simple definition of gerrymandering is "districting by political faith or race,

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19. Jay Hamilton & James Madison, *The Federalist*, *No. 55* (NY Modern Library 1937) ("Factions are . . . sown in the nature of man.").

not geography."[20] This would be the end product of the Petitioners' arguments to this Court.

VI. Two Decades Of *Gingles* Jurisprudence Indicate That It Works.

It is Petitioners' so-called flexible approach that has the potential to do the utmost damage to the interests of minority voters. For two decades, this Court's *Gingles* jurisprudence, including the majority-minority requirement, has effectively protected the rights of minority voters under section 2 of the Voting Rights Act and increased minority representation while at the same time providing understandable guidance to those drafting plans. Petitioners' approach, on the other hand, injects an untold number of uncertainties into the analysis drafting parties must perform, thus failing to provide essential understandable guidance. Petitioners' overly flexible approach also has the potential to do significant damage to the interests of minority voters. By requiring a 50% majority for the first prong of the *Gingles* test, most minority voters are assured the ability to elect a candidate of their choice, not the candidate forced upon them by a coalition of voters aside from themselves: preferred candidates are not necessarily candidates of choice. As Justice Kennedy stated recently in the Texas congressional case:

> There is no doubt African-Americans preferred Frost [a white Democrat congressman] to the

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20. Robert C. Brooks, *Political Parties and Electoral Problems* 437 (Harper Brothers 1923); *see* William Safire, *Safire's Political Dictionary* 255 (Random House 1978) (defining gerrymander as the "drawing of political lines by the party in power so as to perpetuate its power . . . .")

> Republicans who opposed him. The fact that African-Americans preferred Frost to some others does not, however, make him their candidate of choice. 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, 126 S. Ct. at 2625. The key to the increase in the voices of African-Americans being heard in Congress and our state legislatures has been the creation of majority-minority districts.

Before the passage of the Voting Rights Act, there were fewer than a hundred Black elected officials in the entire eleven states of the old Confederacy.[21] Throughout the 1970s and 1980s, only about one percent of majority White districts in the South elected a Black to a state legislature. Blacks who were elected were overwhelmingly from majority Black districts.[22] As late as 1988, no Black had been elected from a majority White district in Alabama, Arkansas, Louisiana, Mississippi, or South Carolina. The number of African-

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21. U.S. Comm'n on Civil Rights, *Political Participation* 15 (1968).

22. Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, *in* Quiet Revolution in the South 336-37 (C. Davidson & B. Grofman eds., 1994).

Americans elected to state legislatures increased after the 1990 redistricting, but again the gain resulted from an increase in the number of majority Black districts.[23] The most comprehensive and systematic study to date of the impact of the Voting Rights Act from 1965 to 1990, *Quiet Revolution in the South*, concluded that "the increase in the number of Black elected officials is a product of the increase in the number of majority-Black districts and not of Blacks winning in majority-white districts."[24] It is only the creation of such majority-minority districts under the Voting Rights Act that has succeeded in blunting the effects of systematic White bloc voting.

VII. Districting Unmoored To A Majority-Minority Population Threshold For A Section 2 Claim Opens A Pandora's Box Of New Litigation.

The Petitioners' argument that "[t]he 50% rule threatens the ultimate goal of the Voting Rights Act of minimizing the role of race in politics" is simply false. (Petrs.' Br. 37.) Anyone with even a cursory understanding of the actual redistricting process knows that the exact opposite is true. If this Court eviscerates the *Gingles* majority precondition, every legislative body drafting representational districts will be compelled to consider race in many more line-drawing/districting decisions. Race will move to the front of the process,

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23. David A. Bositis, *Redistricting and Representation: The Creation of Majority-Minority Districts and the Evolving Party System in the South* 46 (Joint Center for Political and Economic Studies, 1995).

24. Handley & Grofman, *supra* note 22, at 335.

displacing traditional redistricting criteria and state requirements, and become the predominant concern in most jurisdictions.

Petitioners argue for a more flexible[25] approach to determining the "effective" number of minority voters for statutorily required districts. (Petrs.'Br. 34.) It is precisely this flexible, case-by-case approach that would be noxious for all drafters, be they state legislatures, commissioners, county supervisors, or local town and city councils. As this Court is keenly aware, litigation surrounding representational plans is already frequent and costly. If jurisdictions have to draw districts with a flexible approach rather than a "bright line" standard of 50%, they will be subject to more litigation to defend plans. The practical ramifications of overturning *Gingles* are many and have been ignored by the Petitioners.

With such a mutable threshold, resources for the line-drawing process would have to be multiplied in most jurisdictions. The political scientists who are now the key witnesses in all Voting Rights Act litigation would have to become employees of state legislatures and city councils before these bodies begin drawing any districts. Political scientists will be required to analyze election results for racial cohesiveness and racial bloc voting. And if political subdivisions are immaterial, what geographic area will require this analysis is ill-defined. Each possible district in proposed plans with any level

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25. Synonyms: adaptable, adjustable, alterable, changeable, elastic, fluid, malleable, modifiable, variable. (www.m-w.com)

of minority population will need to be analyzed for bloc voting, race cohesion, and partisan trends.

Petitioners argue not for more flexibility for state legislatures but less. Petitioners require the creation of "near" majority-minority districts wherever they can be created. Actual flexibility is the North Carolina state legislature deciding whether such districts are appropriate for North Carolina under the state constitution. Just what is near enough to a majority and how many White voters will regularly support "any" minority candidate or a particular minority candidate is unclear and will be endlessly disputed. A totality of the circumstances approach would be required for many more districts and line drawers would no longer focus solely on the areas in which a majority-minority district may exist. This is not flexibility for a state legislature but confusion.

CONCLUSION

Under the paradigm created by two decades of application of the three *Gingles* preconditions, line-drafters have learned to function with the majority-minority requirement.[26] It has been instrumental in

26. The increase in black representatives to House District 18 was a direct result of the creation of majority-minority districts under the Voting Rights Act. Pender County was not part of the majority-minority district in the 1990s redistricting scheme. The Justice Department's objection to North Carolina's 1991 redistricting plan for its failure to create a majority-minority district in the southeastern part of the state referred to section 5 counties and not to Pender County, which is not covered by section 5 of the Act.

showing line drafters a path for recognizing the interests of minority voters while still completing the difficult task of creating new boundaries, peacefully transitioning political power.

Using Petitioners' flexible approach would substantially alter this process. Under the *Gingles* thresholds, drafting entities already review racial and ethnic demographic factors, results from previous general elections, and other information relating to other communities of interest. Under Petitioners' proposed approach, these entities would be required to collect and analyze even more information, including the results of partisan primaries, the race or ethnicity of every candidate,[27] and the degree to which polarized voting is evident.

Collecting and processing this information is not a trivial task. Moreover, this Court need go no further than the brief offered by the political scientists (*see Amici Curiae* Br. of Nathaniel Persily, *et al.*) to understand both the complexity of the data development and the degree to which subjective factors are at the core of such efforts. These types of analytics have been addressed by the courts in prior litigation, but to inculcate this type of analysis into the districting phase of apportionment for every districted representational body would make the process many times more difficult and costly. The numerous competing interests brought to the fore during districting make it a complex process

27. This is amongst the more difficult items to collect after the fact as there is no requirement for this on candidacy forms and only a few states even track this on registration lists.

without changing federal statutory standards. Clarity is essential to providing for fair representation not subject to adjustable standards that are easily influenced by partisan objectives.

The majority-minority precondition effectively provides a bright line that, although not a "safe harbor" for state legislatures, provides a workable "line in the sand," alerting the line-drawing body to areas with potential issues that require attention and care in order to ensure equal electoral opportunity for minority citizens. Petitioners' position does away with this workable bright line in favor of a nebulous standard that will significantly increase the role of courts in redistricting. An increased role for courts cannot be reconciled with the fact that redistricting is and should remain primarily the responsibility of the political branch of each state. Petitioners' position will also lead to impermissible results: race will trump valid, sound state policies, and partisan gerrymandering will be masqueraded as compliance with the Voting Rights Act. The decision of the North Carolina Supreme Court should be upheld.

Respectfully submitted,

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