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 OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amicus curiae Campaign Legal Center, Inc. (CLC) is a nonpartisan, nonprofit organization that works in the area of election law, generally, and voting rights law, specifically, generating public policy proposals and participating in state and federal court litigation throughout the nation regarding voting rights. Recently, the CLC served as counsel to *amici curiae* "Historians and Other Scholars" in support of petitioners in *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008). The CLC has a demonstrated interest in voting rights law and this case directly implicates the CLC's interest.

SUMMARY OF ARGUMENT

The fundamental principles of the Voting Rights Act (VRA), as explained by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and its progeny, support a general theory of vote dilution based on the "opportunity to elect" standard required by Section 2 of the VRA, 42 U.S.C. § 1973 – not on the ineffective and

[1] No counsel for a party authored any part of this brief. No person or other entity other than *amicus* Campaign Legal Center contributed monetarily to the preparation and submission of this brief. Correspondence from counsel of record for Petitioners and Respondents consenting to the filing of this brief have been filed with the Clerk of this Court.

arbitrary "50% Rule" adopted by the North Carolina Supreme Court below.[2]

This theory is rooted in recognition of the fact that there are neither *per se* violations nor *per se* remedies under the VRA. Instead, violations and remedies under the VRA depend on local factors, such as the geographic distribution of racial groups, patterns of racially polarized voting, patterns of crossover voting among racial groups, and racial differentials in voter turnout. As a result, identical systems for electing public officials may impact minority voting strength differently from one jurisdiction to the next. Under some circumstances, such as where minority voter turnout is quite low based on a history of racial discrimination, and racial voting patterns are marked by a strong monolithic white bloc vote against minority-preferred candidates, a single-member district in which minority voters comprise 55% of the voting-age population in the district may nevertheless dilute minority voting strength. Under other circumstances, such as disproportionately high minority turnout and significant white crossover support for minority-preferred candidates, a single-member district in which minority voters comprise less than 50% of the voting-age

[2] This general theory of vote dilution was originally detailed in a 1993 law review article co-authored by *amicus*' counsel of record J. Gerald Hebert, together with Dr. Allan J. Lichtman. *See* Allan J. Lichtman & J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 La Raza L.J. 1 (1993).

population in the district may provide minority voters with an effective opportunity to elect their preferred candidate.

In short, whether vote dilution exists does not turn solely on the racial composition of the district. Consequently, the application of Section 2 should not hinge on the mere presence of an arbitrary 50% numerical majority population of a minority group, but should instead entail consideration of the realistic potential of minority voters to elect candidates of their choice. There is no magic number with respect to a district's racial minority group population that definitively establishes whether that minority group's voting strength has been diluted in violation of the VRA. As some scholars have observed, "the Voting Rights Act, properly interpreted, should focus on actual election outcomes, not on rigid demographic 'cutoff lines' such as 50% black population." Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*. 79 N.C. L. Rev. 1383, 1385 (2001).

It is for this reason that *amicus* respectfully urges the Court to hold that a racial minority group that constitutes less than 50% of a proposed district's population *can* state a vote dilution claim under Section 2. Similarly, Section 2's protections should guard against the elimination of a district in which minority voters have shown a consistent and effective opportunity to elect their candidate of choice. In the case of North Carolina House District 18, minority

voters constitute less than 50% of the voting-age population, but nevertheless have been able to elect representatives of their choice. In such a case, minority voters have proven to be a "functional majority."[3] Any dilution of such a "functional majority's" ability to elect its candidates of choice should be deemed by this Court to present a cognizable claim under Section 2.

ARGUMENT

I. SECTION 2, AS INTERPRETED BY THIS COURT, GUARANTEES MINORITY GROUPS EQUAL OPPORTUNITY TO ELECT REPRESENTATIVES OF THEIR CHOICE AND DOES NOT ESTABLISH A 50% MINORITY POPULATION RESTRICTION ON SUCH OPPORTUNITY.

A racial or language minority group may state a claim under Section 2 of the Voting Rights Act when

[3] The term "functional majority" as used herein is consistent with this Court's decision in *Johnson v. De Grandy*, 512 U.S. 997 (1994), which examined Florida's legislative districts in a Section 2 challenge to determine which districts provided "a functional majority of Hispanic voters." *Id.* at 1004. The term functional majority is also devised from this Court's "repeated admonition [in *Gingles*] to federal judges to perform a 'functional' analysis of minority vote dilution, and to use their 'familiarity with the indigenous political reality' to conduct 'an intensely local appraisal' of the likely impact of the challenged plan, suggest[ing] a rejection of simple formulae or rules of thumb." Grofman, Handley & Lublin, *supra*, at 1389 (footnote omitted) (citing *Gingles*, 478 U.S. at 45, 62, 66-67, 73, 78-79).

"its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The plain language of the statute contains no reference to any numerical threshold nor uses the term "majority." The statute instead tracks this Court's decision in *White v. Regester*, 412 U.S. 755 (1973), and focuses on a minority group's ability to elect representatives of choice. "As the plain text of section 2 makes clear, the central focus of a minority voting rights challenge to a redistricting plan is its effect on minority voters' opportunities 'to elect representatives of their choice.'" Grofman, Handley & Lublin, *supra*, at 1387.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court set forth criteria to determine whether a minority group's voting strength has been submerged or diluted in white-controlled districts in violation of Section 2. *Id.* at 50-51. Although in *Gingles* the Court considered the application of Section 2 in the context of a challenge to multi-member districts, the principles announced in that case have since been applied to single-member districts. *See Growe v. Emison*, 507 U.S. 25 (1993). Under *Gingles*, a minority group may state a vote dilution claim under Section 2 where: it "is sufficiently large and geographically compact to constitute a majority in a single-member district"; it is "politically cohesive"; and where the "white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51. The *Gingles* decision explicitly

reserved the question of whether Section 2 permits – as well as the standards that should pertain to – a claim brought by a minority group that would not constitute a majority in a single-member district. *Id*. at 46 n.12.

Though this Court in *Gingles* did not address the question of whether a minority group could establish a Section 2 violation if it comprised less than a numerical majority in a single-member district, the Court repeatedly referenced the *effectiveness* of the minority community within existing and proposed districts.[4] In doing so, the Court in essence looked at whether the minority group was functioning as an electoral majority in the district. Thus, in discussing the District Court's findings, the *Gingles* Court described the black communities at issue not in numerical terms, but as "sufficiently large and contiguous to constitute *effective* voting majorities in single-member districts." *Id*. at 38 (emphasis added). The Court also noted that "dilution of racial minority group voting strength may be caused by the dispersal of blacks

[4] A functional majority district is not an influence district. An influence district, as this Court noted in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), is a district in which "minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *Id.* at 482 (citing *Shaw v. Hunt,* 517 U.S. 899, 947 n.21 (1996) (Stevens, J., dissenting); *Hays v. Louisiana*, 936 F. Supp. 360, 364, n.17 (W.D. La. 1996); *Johnson v. De Grandy*, 512 U.S. 997, 1011, 1012 (1994); *Gingles*, 478 U.S. 30, 98, 100 (1986) (O'Connor, J., concurring in judgment)).

into districts in which they constitute an *ineffective* minority of voters." *Id*. at 46 n.11 (citations omitted) (emphasis added).

This Court further explained in *Gingles* that:

> The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: 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.

Id. at 51 n.17 (emphasis in original).

The language in *Gingles*, that a minority group "must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority," is simply a way of requiring minority voters to establish that under some alternative system of election, they would have the *potential* to elect representatives of choice in order to demonstrate a valid Section 2 vote dilution claim. Where, as in House District 18, minority voters may be shown to have sufficient strength to elect their candidates of choice with some crossover voting from non-minority group members, minority voters have the requisite potential to elect representatives – a potential that is destroyed if the minority group is split into districts such that it lacks an effective opportunity to elect the representatives of its choice.

Language in more recent Court decisions confirms that the "sufficiently large . . . to constitute a majority" language in *Gingles* established an effective, functional majority standard, not a mathematical majority standard. In *Johnson v. De Grandy*, 512 U.S. 997 (1994), for example, this Court made clear that "no single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength," *id.* at 1020-21, and repeatedly stressed political "effectiveness" as the appropriate metric to gauge vote dilution. *See*, *e.g.*, *id.* at 1000 ("minority voters form effective voting majorities in a number of districts"); *see also id.* at 1014 ("Treating equal political opportunity as the focus of the enquiry, we do not see how these district lines, apparently providing political effectiveness in proportion to voting-age numbers, deny equal political opportunity"), *id*. at 1017 ("districts in which minority voters form an effective majority"), *id.* at 1023 n.19 ("an effective voting majority"), *id*. at 1024 ("an effective majority").

This Court again made clear in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), that many factors beyond the mere racial or ethnic composition of a district must be considered when analyzing vote dilution and states should be allowed the flexibility to consider local circumstances.

> The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine. In order to maximize the electoral success of a minority

> group, a State may choose to create a certain number of safe districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. Alternatively, a State may choose to create a greater number of districts in which it is likely – although perhaps not quite as likely as under the benchmark plan – that minority voters will be able to elect candidates of their choice.

Id. at 480 (internal citations omitted) (citing *Gingles*, 478 U.S. at 48-49; *id.* at 87-89 (O'Connor, J., concurring in judgment)).

The use of functional majority districts to remedy or prevent Section 2 violations is thus fully consistent with the *Gingles* threshold requirement that a minority group demonstrate that it is "sufficiently large" to effectively function as a majority in a single-member district. *Gingles*, 478 U.S. at 50. Contrary to some lower court considerations of the issue, *see*, *e.g.*, *Hall v. Virginia*, 385 F.3d 421, 423 (4th Cir. 2004); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 850 (5th Cir. 1999); *Negrón v. City of Miami Beach, Florida*, 113 F.3d 1563, 1571 (11th Cir. 1997),[5]

[5] Although some courts have been attracted to the simplicity and clarity of a strict mathematical cutoff line [of 50%], others have opted to focus on whether a minority group has an "effective" voting majority, meaning that the minority group members are actually capable of electing their preferred candidates over the

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the *Gingles* requirement that a group be sufficiently large to constitute a majority should not be interpreted as a strict numerical majority requirement (inevitably based on out-of-date, incomplete census data). Such an interpretation is incompatible with the explicit statutory command of Section 2 that effects of the political system must be considered "based on the totality of circumstances" in a jurisdiction. 42 U.S.C. § 1973(b) ("A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) . . . ."). As detailed below, variations in factors such as voter turnout, minority political cohesion, and white bloc voting all impact the potential for a minority group to function as a majority in a given district and, consequently, to elect representatives of their choice. The "totality of circumstances" test explicitly set forth in Section 2 requires that these factors be taken into consideration when determining whether a minority group is sufficiently large and geographically compact to elect the representatives of its choice.

> opposition of most, though not necessarily all, of the white voters in the district.

Grofman, Handley & Lublin, *supra*, at 1389 (footnotes omitted).

II. A "NUMERICAL MAJORITY" STANDARD INADEQUATELY PROTECTS MINORITY VOTING RIGHTS WHILE AN "OPPORTUNITY TO ELECT" STANDARD APPROPRIATELY ADVANCES THE PURPOSES AND INTENT OF SECTION 2.

A "numerical majority" standard inadequately reflects minority group potential for electoral success because the racial composition of a district is only one of the factors in measuring whether a district provides minority voters with an effective opportunity to elect their preferred candidate. Voting rights scholars have proposed "a conceptual framework for determining the percentage minority needed to create an effective minority district." Grofman, Handley & Lublin, *supra*, at 1393. Under this framework:

> The likelihood of electing a minority-preferred candidate to office depends on several factors: the relative rate at which minorities and whites participate in the electoral process, the degree to which minority and white voters support minority-preferred candidates, and the fact that the United States has a multi-stage electoral process that includes a primary election, a general election, and sometimes a run-off election as well. In order to determine the percentage minority necessary to provide minorities with an equal opportunity to elect minority candidates, *all* of these factors *must* be considered.

Id. at 1403-04 (emphasis added).

Thus, levels of voter turnout and the degree of voting cohesion among both minority and majority communities interact with the size of each community to create the full context in which the ability of a minority community to elect its candidate of choice must be considered. *Amicus* advocates employment of a "functional majority" standard, which adequately captures these factors and advances the purposes and intent of Section 2.

As this Court recognized in *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006), even in cases in which minority voters comprise a citizen voting-age majority, such a district may still "lack real electoral opportunity." *Id.* at 2615. If minority turnout is low or where white or Anglo bloc voting outweighs the cohesion of the minority community, majority-minority districts might still not enable minority voters to elect a candidate of choice. A majority-minority district in which whites turnout at much higher rates than minority voters may be controlled by white voters, even though white voters constitute a numerical minority within the district. Similarly, in a majority-minority district in which white voters are almost uniformly opposed to the minority candidate of choice and vote for the white opponent, and where minority support for a minority candidate, though substantial, is less uniform, minority voters still may be unable to elect their candidate of choice. Numerical majorities, even of the voting-age citizen population, simply do not ensure effective electoral opportunity.

In contrast, a cohesive minority group which makes up a large, but less than majority, percentage of voting-age citizens in a district can effectively elect a representative of its choice where some minimal crossover voting exists. In such functional majority districts, like House District 18 in this case, crossover voting reliably allows the minority community to elect their candidates of choice under most circumstances.

The following two tables illustrate the theory of vote dilution advanced by *amicus* here – the theory that factors other than strict numerical population weigh heavily on the ability of minority voters to elect the representatives of their choice. Consequently, differences in minority and white voting patterns and turnout explain why a district in which minority voters comprise 55% of the voting-age population may violate Section 2 in one jurisdiction and may be perfectly legal in another.

Table 1 analyzes two hypothetical districts with an identical 40% minority voting-age population. In hypothetical District 1, minority voter turnout is lower than white turnout and minority political cohesion is less than the level of white bloc voting. Under these conditions, white bloc voting would usually be sufficient to defeat the minority-preferred candidate. In hypothetical District 2, minority turnout equals white turnout, and minority cohesion is substantially greater than the degree of white bloc voting. Under these conditions, minority voters are able to elect a candidate of their choice.

Table 1
Projected Vote for Minority Candidate of Choice
Two Hypothetical Districts

District 1: Minority Voting-Age Population = 40%
Minority Turnout = 30%
White Turnout = 40%
Percent Minority Among Total Voters =
40x.30/(40x.30+60x.40) = 33%

1. Minority Vote for Minority Candidate	=	.70 x 33%	=	23.1%*
2. White Vote for Minority Candidate	=	.20 x 67%	=	13.4%**
3. Total Vote for Minority Candidate	=	23.1% + 13.4%	=	36.5%

District 2: Minority Voting-Age Population = 40%
Minority Turnout = 30%
White Turnout = 30%
Percent Minority Among Total Voters =
40x.30/(40x.30+60x.30) = 40%

1. Minority Vote for Minority Candidate	=	.90 x 40%	=	36.0%*
2. White Vote for Minority Candidate	=	.25 x 60%	=	15.0%**
3. Total Vote for Minority Candidate	=	36.0% + 15.0%	=	51.0%

*The minority vote for the minority candidate is the product of minority cohesion (70% in District 1 and 90% in District 2) and the percent minority among voters.

**The white vote for the minority candidate is the product of white crossover voting (20% in District 1 and 25% in District 2) and the percent white among voters.

Even districts with a population majority of minority-group members may violate Section 2 if, given district-specific circumstances, the level of minority concentration fails to provide minorities a realistic potential to elect candidates of their choice. Table 2 analyzes two hypothetical districts with 55% minority voting-age populations. In neither district are minority voters able to elect a candidate of choice, despite their numerical majority. Both districts are under the effective political control of the white electorate: District 1 because of the extremely low minority turnout and District 2 because of the monolithic white opposition to minority-preferred candidates.

Table 2
Projected Vote for Minority Candidate of Choice
Two Hypothetical Districts

District 1: Minority Voting-Age Population = 55%
Minority Turnout = 30%
White Turnout = 40%
Percent Minority Among Total Voters =
55x.30/(55x.30+45x.40) = 48%

1. Minority Vote for Minority Candidate	=	.75 x 48%	=	36.0%*
2. White Vote for Minority Candidate	=	.20 x 52%	=	10.4%**
3. Total Vote for Minority Candidate	=	36.0% + 10.4%	=	46.4%

District 2: Minority Voting-Age Population = 55%
Minority Turnout = 30%
White Turnout = 30%
Percent Minority Among Total Voters =
40x.30/(40x.30+60x.30) = 55%

1. Minority Vote for Minority Candidate	=	.80 x 55%	=	44.0%*
2. White Vote for Minority Candidate	=	.05 x 45%	=	2.3%**
3. Total Vote for Minority Candidate	=	44.0% + 02.3%	=	46.3%

*The minority vote for the minority candidate is the product of minority cohesion (75% in District 1 and 80% in District 2) and the percent minority among voters.

**The white vote for the minority candidate is the product of white crossover voting (20% in District 1 and 5% in District 2) and the percent white among voters.

Tables 1 and 2 make clear that the racial or ethnic composition of a district is merely a starting point in determining whether a district provides minority voters with an effective opportunity to elect a candidate of choice. To determine whether such an opportunity exists, it is also important to examine the levels of voter turnout and the extent of racial bloc voting among white voters (*i.e.*, crossover voting). Thus, although minority voters in Table 1 comprised only 40% of the population in the district, the combination of relatively low white voter turnout with significant white crossover voting would enable the minority group to elect its candidate of choice in Table 1 District 2. Conversely, relatively low minority voter

turnout or extreme bloc voting by whites in a majority-minority (55%) district could prevent minority voters from electing their preferred candidate.

III. AN "OPPORTUNITY TO ELECT" STANDARD IS CLEAR AND ADMINISTRABLE.

The court below has suggested that a bright-line population rule establishes the most easily administrable standard for minority districts. *See* Pet. App. 23a-24a. *Amicus* agrees that clear standards are necessary, but the "opportunity to elect" standard for functional majorities is also sufficiently clear and administrable and, more importantly, is a far more accurate measure of minority voter effectiveness than an arbitrary numerical population standard.[6]

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[6] The supposed advantages of a bright-line 50% rule, however, may prove chimerical. Creating a strict cut-off line generates several thorny issues: What is the relevant population base – total population, adult (or voting age) population (known as VAP), adult citizen population (known as CVAP), the population of registered voters, the population of voters who actually turn out on election day, the population of voters who turn out and do not "roll off" before getting far enough down the ballot to select a candidate for the office in question? If the answer is not total population or VAP, how does one estimate these figures, because they are not part of the Census Bureau's P.L. 94-171 redistricting database and therefore are not available when states have to draw new district lines? Even if total population or VAP is the relevant base, how does one count people who check off more than

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Interpreting Section 2 to require a numerical majority of minorities in any remedial district also places too much emphasis on Census figures. Census figures show the population composition at one specific snapshot in time, are outdated by the time they are released, and certainly stale by the time litigation over a redistricting plan is completed.

A district in which minority voters make up an arithmetical majority of citizens of voting age but are still unable to elect their candidate of choice is not a sufficient remedial district under Section 2. Similarly, a district with a numerical majority of white voters could, for all functional purposes, be an effective remedial district for minority voters if minority voters are able to elect their candidates of choice. It is the ability to elect, not the numerical configuration, that is relevant.

Indeed, given the integrationist goals of American public policy during the past 50 years, use of functional majority districts would be a better way to analyze vote dilution than simple reliance on whether the district is majority-minority. The reason for this is that a functional majority district, where minority voters comprise a substantial percentage of a district but fall just short of a numerical majority, will be the result of politically cohesive minority voters and some

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> one racial category – for example, individuals who are both African-American and white?

Grofman, Handley & Lublin, *supra*, at n.25.

degree of crossover voting by whites. Such districts tend to promote interactions between whites and minorities and emphasize and encourage interracial coalitions. This is yet another reason that the remedial option of creating functional majority districts should not be foreclosed for the purpose of maintaining an arbitrary population standard.

In order to determine whether minority voters have sufficient strength in a district to elect their preferred candidate, litigants use past election results to determine voter turnout levels for minorities and whites, minority voter cohesion, and white bloc voting. In this analysis, the total percentages of voting-age residents must be adjusted to take into account voter turnout differentials. Thus, for example, if a district's voting-age population is 55% minority, but minorities vote at a rate of 30%, while non-minorities vote at a rate of 40%, the percentage of actual *voters* on Election Day would be only 48% minority (assuming complete racial polarization).

In addition to racial or ethnic differences in levels of voter turnout, the analysis must further consider evidence of racially polarized voting in the district. Racially polarized voting is composed of two elements: minority political cohesion and white bloc voting. In considering these two components of racially polarized voting, it is possible to examine the pattern of results for a variety of candidates and offices. Cohesive voting among minority voters is necessary for the minority group to have an opportunity to elect (and is also required in the second

Gingles prong). The extent to which a minority group votes cohesively, considered in combination with the size of the minority population in the district and its level of turnout, will determine the level of support that the minority community is able to provide to its candidate of choice. Thus, in a district with a 40% minority voting-age population, in which minority and non-minority voters had the same turnout rate, if 90% of the minority community supported its candidate of choice, that would supply 36% of the total votes in the district to that candidate. Such a candidate would need to obtain only 25% crossover votes from whites to be elected. The potential for crossover voting by whites can be gleaned from previous elections, and most probative in determining the likelihood of such crossover will be past elections in which minority candidates have run against white candidates.

IV. AN "OPPORTUNITY TO ELECT" STANDARD IS CONSISTENT WITH THE THIRD *GINGLES* FACTOR.

The use of functional majority districts to remedy Section 2 violations, based on an "opportunity to elect" theory taking into consideration crossover voting, does not clash with the third *Gingles* precondition that the "white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. The court below mistakenly conflated the small amount of reliable crossover voting that makes a remedial

functional majority district possible, with large scale crossover voting that might undermine the *Gingles* white bloc voting precondition. *See* Pet. App. 25a-26a.

The limited, but reliable, amount of crossover voting by whites which enables minorities within functional majority districts to elect a candidate of choice is not inconsistent with the third prong of *Gingles*. As this Court held in *Gingles*, "in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Gingles*, 478 U.S. at 56. And, again, stressing that local circumstances are of the utmost importance to vote dilution analysis, the *Gingles* Court continued: "The amount of white bloc voting that can generally 'minimize or cancel' black voters' ability to elect representatives of their choice, however, will vary from district to district according to a number of factors . . . ." *Id*. (citations omitted).

It makes little sense to interpret the third *Gingles* prong to mean that where a small number of non-minority voters crossover to support minority supported candidates, no remedy exists under Section 2. To do so would run counter to the explicit statutory command of Section 2 that the practical effect of an electoral system must be measured against the "totality of circumstances" in a jurisdiction. Obviously, districts with some minimal crossover voting may nevertheless be under the effective political control of whites and violate Section 2. Just as violations of Section 2 may occur despite some crossover

voting by white voters for minority-preferred candidates, so too can districts be created to avoid or remedy a Section 2 violation that take into account some degree of white crossover voting in a district that will function as a minority opportunity district.

V. DISTRICT 18 IS A VALID REMEDIAL DISTRICT UNDER THE SECTION 2 "OPPORTUNITY TO ELECT" STANDARD.

North Carolina House District 18 perfectly illustrates how a functional majority district provides a minority group comprising less than a numerical majority of a district's population with the opportunity to consistently elect its candidates of choice. District 18 is a valid remedial district under the Section 2 "opportunity to elect" standard.

House District 18, as designed by the North Carolina legislature, has an African-American voting-age population of 39.36% (and a total African-American population of 42.9%). *See* Pet. App. 5a. "In House District 18, election results have already established that minority voters have the potential to elect a representative of choice . . . . Unquestionably, a black candidate can be elected in House District 18, notwithstanding that the number of minority voters in the district is less than fifty percent." Pet. App. 46a. Indeed, it is undisputed that the presently-constituted District 18 has for years consistently elected the candidate of choice of African-American voters. *See* Pet. App. 70a.

Another important local condition that undoubtedly impacts the ability of District 18's black voters to elect their candidates of choice, but that is not captured by a numerical majority-driven analysis of vote dilution, is the role that party primary elections have played in determining the candidate of choice. As a general matter in numerous North Carolina districts, black candidates who win Democratic Party primary elections go on to win the general election with the assistance of a small but predictable level of crossover support by non-black voters. *See* J.A. 123-26 (Engstrom Rept. Tbls. 1-2). In District 18, 53.7% of registered Democrats are black. Pet. App. 70a. Registered Democrats outnumber registered Republicans by a 2-1 margin in District 18. *Id.* Unsurprisingly, the Democratic nominee in District 18 is consistently the victor in the general election. These local factors of Democratic Party dominance and black voter majority status within the Democratic Party have made District 18 a functional majority-minority district for black voters within it.[7]

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[7] Voting rights scholars have noted the important role that party primaries can play in assessing minority voters' ability to elect a candidate of their choice. As Grofman, Handley and Lublin have observed:

> [T]he percent black needed to win the Democratic primary is usually considerably lower than the percent needed to win the runoff or the general election – and sometimes the highest percentage is in the runoff, sometimes in the general election . . . .
>
> The highest of the three percentages necessarily interests us most because it is the percentage needed for the black-preferred candidate to win all three elections –

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Given the undisputed facts regarding District 18, it is clear that black voters within it have realized their full potential to elect their preferred candidate in the district. For the purpose of Section 2 vote dilution claims, what matters most is this difference between a minority population that, based on the facts and circumstances on the ground, would have the ability to elect its candidates of choice and one that would lack such ability. Again, this Court explained in *Gingles* that the purpose of the "sufficiently large and geographically compact" requirement is to make clear that, "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 51 n.17 (emphasis in original). But where, as in District 18, minority voters *clearly possess the potential* to elect representatives as a result of the challenged district, such minority voters would clearly be injured by the destruction of the district.

As Justice Souter observed for the Court in *De Grandy*: "[S]ociety's racial and ethnic cleavages

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> the Democratic primary, the Democratic runoff and the general election – and attain a seat in the legislature. The fact that the highest percentage black needed to win is not always found in the general election illustrates the importance of examining all stages of the election process, and not simply relying on an analysis of the general election.

Grofman, Handley & Lublin, *supra*, at 1409-1411 (footnote omitted).

sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity." *De Grandy*, 512 U.S. at 1020. But such circumstances, he added, "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." *Id.* District 18 in North Carolina is exactly such a district.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the judgment of the Supreme Court of North Carolina should be reversed.

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Respectfully submitted,

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