No. 07-689

In the Supreme Court of the United States

GARY BARTLETT, ET AL., PETITIONERS,

v.

DWIGHT STRICKLAND, ET AL., RESPONDENTS.

On Petition for Writ of Certiorari to the North Carolina Supreme Court

BRIEF FOR THE STATES OF ILLINOIS, LOUISIANA, MARYLAND, AND OHIO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under § 2 of the Voting Rights Act, 42 U.S.C. § 1973.

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INTEREST OF THE *AMICI CURIAE*[1]

This case asks whether a minority group must constitute a numerical majority in a single-member district to state a claim under § 2 of the Voting Rights Act ("Act"), or whether it is sufficient that the minority group—although comprising less than 50% of the population—is effectively the majority because it has a realistic opportunity to elect its preferred candidates as a result of reliable white crossover voting.

Amici States have a critical interest in this matter. Every ten years, based on the results of the dicennial census, state and local legislatures redraw district lines to comply with the Constitution's "one person, one vote" principle and § 2's prohibition against vote dilution. Any uncertainty in the law on which these redistricting decisions are based inevitably engenders time-consuming and costly litigation and, worse still, requires judicial intervention if a legislative solution is not obtainable—thereby removing to the judicial branch a distinctly legislative function.

The current discord surrounding the so-called "50% rule" is no exception. White crossover voting is common, and, as a result, whether § 2 permits, or even requires, crossover districts has a significant impact on how legislatures draw district lines. For this reason, the uncertainty surrounding the 50% rule caused substantial litigation during the redistricting following

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[1] Pursuant to Rule 37.2(a), the *amici curiae* mailed notice of their intention to file this brief to counsel of record at least 10 days prior to the due date of the brief.

the 1990 and 2000 census. Given the high stakes and the continued lack of consensus surrounding the rule, the same result is sure to obtain if this dispute is not resolved prior to the next round of redistricting. For this reason, regardless of how the Court resolves the question presented, *amici* States have a strong interest in obtaining the certainty that resolution will provide.

STATEMENT

1. Members of the North Carolina House of Representatives ("House") are elected from single-member districts and serve two-year terms. Pet. App. 58a. In 1982, using the results of the 1980 census, the North Carolina General Assembly ("General Assembly") enacted a redistricting plan that divided Pender County between two districts. *Id.* at 60a-61a. This plan was in effect for all House elections from 1982 through 1990. *Id.* at 60a.

2. In 1992, the General Assembly undertook redistricting based on the results of the 1990 census. The resulting plan, which was in effect from 1992 through 2000, divided Pender County among three districts. Pet. App. 61a. One of the districts (District 98) was drawn on the insistence of the United States Department of Justice ("USDOJ") that minority voting strength was not being sufficiently recognized in southeastern North Carolina. *Id.* at 64a-65a.[2]

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[2] North Carolina must submit its redistricting plans to the USDOJ for approval because 40 of its counties are subject to the federal "preclearance" requirement in § 5 of the Act. Pet. App. 63a; see also *infra* p. 18.

3. At the time of the 1990 census, District 98 had an African-American population of 59.26% and an African-American voting age population of 55.72%. Pet. App. 61a. By the 2000 census, however, these figures had declined to 50.70% and 47.07%, respectively. *Ibid.* At the same time, 62.53% of the district's registered voters were Democrats, 53.37% of whom were African-American. *Ibid.* Because Democrats constituted a majority of registered voters and African-Americans constituted a majority of Democrats, the candidate preferred by African-American voters had the best chance of winning the House seat in District 98—by prevailing in the Democratic primary and then, as a result of crossover votes from white Democrats, by winning the general election. *Id.* at 61a-62a. Indeed, Representative Thomas Wright, an African-American and a Democrat, was elected to represent District 98 from 1992 through 2000. *Id.* at 61a.

4. Using the results of the 2000 census, the General Assembly again undertook redistricting, resulting in the "2003 plan," which divided Pender County between two districts, District 16 and District 18. Pet. App. 69a.[3] District 18, home to Representative Wright, has an African-American population of 42.89% and an African-American voting age population of

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[3] Because the General Assembly's initial redistricting plan failed to garner judicial approval, the 2002 elections were held pursuant to a judicially crafted interim plan. Pet. App. 60a. Representative Wright was elected to represent interim District 18, which had an African-American population of 46.99% and an African-American voting age population of 43.44% but a Democratic population of 64.31% (of registered voters), 52.58% of whom were African-American. *Id.* at 68a.

39.36% but a Democratic population of 59.01% (of registered voters), 53.72% of whom are African-American. *Id.* at 69a-70a. In the 2004 elections, Representative Wright won re-election. *Id.* at 60a.

5. In 2004, respondents brought this lawsuit, alleging that the division of Pender County into two districts violated the "Whole County Provisions" ("WCP") of the North Carolina Constitution, Pet. App. 6a, which provide that "[n]o county shall be divided" in the formation of legislative districts, N.C. Const. art. II §§ 3(3), 5(3). Previously, the North Carolina Supreme Court had applied the WCP to hold that county lines may be cut to comply with federal law, so long as they are divided no more than that law requires. Pet. App. 3a. In the current litigation, a three-judge panel of North Carolina's Superior Court unanimously rejected respondents' claims, holding that § 2 of the Act mandated District 18 and that the WCP therefore did not preclude the division of Pender County. Pet. App. 116a-117a.

6. The panel acknowledged that the General Assembly drew District 18 as a "preemptive strike" against the likelihood that, if an effective minority district was not maintained in southeastern North Carolina, a lawsuit would allege impermissible vote dilution. Pet. App. 90a. Indeed, without dividing Pender County, the maximum African-American population achievable within a single district was less than 36%, the maximum African-American voting age population less than 32%, and the maximum African-American Democratic population less than 49%—not enough to ensure that African-American voters had a

realistic opportunity to elect their preferred candidate. *Id.* at 138a.

7. The panel then addressed the three preconditions to a § 2 claim set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986)—that (1) the minority group is "'sufficiently large and geographically compact to constitute a majority in a single member district,'" (2) the minority group is "'politically cohesive,'" and (3) "'the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate.'" Pet. App. 77a (quoting *Gingles*, 478 U.S. at 50-51). Focusing on the first precondition, the panel rejected respondents' proposed, "bright-line" rule, which would require a minority group to form an absolute numerical majority to state a § 2 claim. Pet. App. 90a-91a, 93a. Instead,"as a matter of practical common sense," the court held that the "inquiry must focus on the *potential of black voters to elect representatives of their own choosing* not merely on sheer numbers alone." *Id.* at 93a (emphasis in original). Thus, satisfaction of the first *Gingles* precondition depends on "whether or not the political realities of the district, such as the political affiliation and number of black registered voters when combined with other related, relevant factors present within the single-member district operate to make the black voters a *de facto* majority that can elect candidates of their own choosing." *Ibid.*

8. Applying this approach, the panel concluded that African-Americans did constitute a *de facto* majority in District 18. Pet. App. 97a-99a. As the panel explained, "[i]n North Carolina, a *more important indicator of*

effective black voting strength [than sheer numbers of African-Americans, or African-Americans of voting age] *is the percentage of registered Democrats who are black*." *Id.* at 97a (emphasis in original). Specifically, the court determined that districts with an African-American voting-age population of 37.81% or greater—like District 18—will provide an effective opportunity for the election of candidates preferred by African-American voters. *Ibid.* Based on these findings, the panel concluded that District 18 satisfied the first two *Gingles* preconditions as a matter of law. *Id.* at 99a-100a. Then, after the parties stipulated to the satisfaction of the third *Gingles* precondition, the panel granted summary judgment for petitioners on its finding that, based on the totality of the circumstances, the creation of District 18 was required by § 2. *Id.* at 112a-113a, 115a-116a.

9. In a divided opinion, the North Carolina Supreme Court reversed. Although the majority recognized that, as a result of reliable support from white voters, African-Americans in District 18 had the effective ability to elect their preferred candidate, Pet. App. 5a, the court nevertheless held that § 2 did not require District 18 because African-Americans did not comprise 50% of the district's eligible voters, *id.* at 19a-22a. In reaching this conclusion, the majority reasoned that *Gingles* requires an actual numerical majority, and that such a rule would be "logical" and "readily applicable in practice." *Id.* at 19a-20a.

10. By contrast, the dissenting justices relied on the language of § 2—specifically, its requirement that courts consider "the totality of the circumstances." 42 U.S.C.

§ 1973. According to the dissent, this language favors a "flexible standard based on political realities" rather than a literal numerical majority. Pet. App. 48a. The dissent also noted that this Court had "repeatedly declined to close the door" to § 2 relief under the circumstances of this case and, moreover, "caution[ed] lower courts against applying *Gingles* to impose a rigid numerical majority requirement." *Id.* at 41a-42a. Finally, the dissent questioned the majority's view that a strict, 50% rule was necessary for administrative ease. Past election results in North Carolina demonstrate that African-American Democratic voter registration is "the most relevant indicator of black voting strength," and, indeed, "districts where such registration exceeds fifty percent consistently elect black representatives." *Id.* at 46a. Justice Timmons-Goodson wrote separately to note the majority's "insufficient deference to the legislature's considered judgment." *Id.* at 50a.

REASONS FOR GRANTING THE WRIT

As election results from the past two decades demonstrate, minority voters are routinely able to elect their preferred candidates from districts in which they constitute less than a numerical majority. Thus, the question whether federal law permits, or requires, "crossover districts" is of paramount importance to state and local authorities. As North Carolina's certiorari petition explains, however, courts have been unable to reach agreement on this difficult question. And as members of this Court recently observed, "the day has come to answer it." *League of United Latin American Cities ("LULAC") v. Perry*, 126 S. Ct. 2594, 2648 (2006) (Souter, J., joined by Ginsburg, J.,

concurring in part and dissenting in part). This case provides an ideal vehicle for doing so.

The North Carolina Supreme Court adopted a numerical majority requirement that has become the more prevalent approach, but the question is the subject of a mature split among state and federal courts. And while this Court has thus far declined to address the propriety of the 50% rule, at least three of its members have rejected it outright. This absence of conclusive authority has left States and other redistricting bodies without essential guidance in their efforts to comply with § 2, resulting in lengthy and expensive redistricting proceedings and inevitable litigation.

Significantly, this case may present the final opportunity for the Court to resolve this important question prior to the 2010 census. Accordingly, the Court should grant the petition for certiorari and thereby allow the next round of redistricting to proceed unencumbered by the costs and delays engendered by ongoing uncertainty over the 50% rule.

I. THIS COURT HAS DELIBERATELY LEFT OPEN THE QUESTION PRESENTED BY THIS APPEAL.

As the North Carolina Supreme Court acknowledged, this Court repeatedly has confronted the question presented here—whether a minority group may obtain § 2 relief even though it does not constitute a numerical majority in a single-member district—and, on each occasion, has reserved judgment. Pet. App. 14a-15a; see also *id.* at 39a-43a (Parker, C.J., dissenting). In *Gingles* itself, the Court expressly declined to address

"whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district." 478 U.S. at 46 n.12. Notably, four members of the Court would have held that § 2 may afford relief under such circumstances, based on the view that if a minority group

> can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

Id. at 89 n.1 (O'Connor, J., joined by Burger, C.J., and Powell and Rehnquist, JJ., concurring in the judgment).

Since *Gingles*, the Court has continued to face claims that § 2's protections are not limited to "majority-minority" districts, and has left the door open to such claims. See, *e.g.*, *LULAC*, 126 S. Ct. at 2624 (assuming without deciding that minority group may satisfy initial *Gingles* prong if its members "constitute a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes") (citation and internal quotations omitted) (Kennedy, J., writing for the plurality); *Johnson v. DeGrandy,* 512 U.S. 997, 1008 (1994) ("assum[ing] without deciding that even if Hispanics are not an absolute majority of the relevant

population in the additional districts, the first *Gingles* condition has been satisfied in these cases"); *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (assuming without deciding that § 2 claim may be based on allegations "not that black voters have been deprived of the ability to constitute a *majority*, but of the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority") (emphasis in original).

Recently, however, the question has assumed a growing urgency. In *LULAC*, Justice Souter, joined by Justice Ginsburg, called upon the Court to reach the issue, explaining that although in the past the Court had "sidestepped the question whether a statutory dilution claim can prevail without the possibility of a district percentage of minority voters above 50%, * * * the day has come to answer it." 126 S. Ct. at 2647-48 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part). Justice Souter went on to write that a minority group might satisfy the first *Gingles* precondition in ways other than by showing that it constitutes more than 50% of the population, such as by demonstrating that its members "constitute a majority of those voting in the primary of the dominant party, that is, the party tending to win the general election." *Id.* at 2648. And Justice Stevens, writing separately, "agree[d] with Justice Souter that the '50% rule,' which finds no support in the text, history, or purposes of § 2, is not a proper part of the statutory vote dilution inquiry." *Id.* at 2645 n.16 (Stevens, J., concurring in part and dissenting in part).

Moreover, while the Court's prior cases implicating the 50% rule were amenable to resolution on other grounds, this case presents no such possibility. In light of the parties' stipulations, the case turns solely on the "narrow question [of] * * * whether th[e first *Gingles*] precondition * * * requires that the minority group constitute a numerical majority of the relevant population, or whether a numerous minority can satisfy the precondition." Pet. App. 14a. Thus, this case presents the ideal vehicle for addressing a question that this Court has deliberately left open and that several of its members have recently urged should be resolved.

II. THE VIABILITY OF THE 50% RULE PRESENTS A QUESTION OF SIGNIFICANT PRACTICAL IMPORTANCE.

It is no accident that the question presented here has arisen many times in this and other courts. The viability of the 50% rule is an issue of critical practical importance because, as election results of the past two decades demonstrate, a minority group need not constitute 50% of a district to have a realistic chance to elect its preferred candidate.

"[T]he most current social-scientific data" indicate that "black candidates can be elected to office, despite the presence of significantly polarized voting patterns, in at least some districts * * * where the black voting-age population is 33% to 39% * * *." Richard H. Pildes, *Is Voting Rights Law Now at War with Itself? Social Science & Voting Rights in the 2000's*, 80 N.C. L. Rev. 1517, 1537-38 (2002); accord Sam Hirsch, *Unpacking* Page v. Bartels*: A Fresh Redistricting Paradigm*

Emerges in New Jersey, 1 Election L.J. 7, 12 (2002) (after 2000, most African-American and Hispanic members of the New Jersey Legislature were elected from districts that are not majority-minority, and some were elected from districts that are less than 30% minority); Bernard Grofman, Lisa Handley, & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework & Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1397-98 (2001) (during the 1990s, African-American congressional candidates in Florida, Georgia, North Carolina, Texas, and Virginia prevailed in districts that were not majority African-American); J. Morgan Kousser, *Beyond* Gingles*: Influence Districts & the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. Rev. 551, 566-68 (1993) (in 1990, African-Americans and Hispanics elected to state and national office from California were elected from districts that were not majority-minority and in some cases were less than 34% minority).

That minority-preferred candidates are routinely elected from districts in which minority voters fall short of a numerical majority reflects the fact that minority electoral success is a function of more than raw population percentages. Election results also hinge, for example, on

> the relative weight 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.

Grofman, Handley, & Lublin, *supra*, at 1403-04; accord Allan J. Lichtman & J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 La Raza L.J. 1, 18 (1993).

Minority electoral success also depends largely on the cohesiveness of majority and minority group voters. This is because "[a]s minority group cohesiveness increases and majority group cohesiveness declines, the level of minority group concentration necessary to elect the choice of that group declines, and vice versa." Kousser, *supra*, at 563; accord Lichtman & Herbert, *supra*, at 10-11. Thus, where minority voters are highly cohesive and white voters are not, minority groups may be able to elect their preferred candidates with less than 50% of the population.[4] This is especially so in districts where minority voters command a majority of the dominant political party, thereby enabling the minority-preferred candidate to prevail in the primary and then, if enough white voters cross racial lines to vote according to party affiliation, in the general election. In fact, studies of voting patterns since 1990 indicate that

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[4] The impact of minority- and majority-group cohesiveness on election results is illustrated by the following examples, which assume (for simplicity's sake) that the electorate is divided between two groups, the "majority" and the "minority." If the majority votes wholly as a bloc (that is, is 100% cohesive), the minority must constitute at least 50% of the population and be 100% cohesive to elect its preferred candidate. See Kousser, *supra*, at 563. However, if the majority is only 60% cohesive, the minority need constitute only 30% of the population and be only 90% cohesive for the minority-preferred candidate to prevail. See *ibid.*

minority voters do tend to vote highly cohesively, and that a reliable bloc of white voters—as much as one-third of the white population—are voting consistently on the basis of party affiliation, rather than race, in general elections. See, *e.g.*, Pildes, *supra*, at 1529-35.

Accordingly, the question presented in this case is of tremendous practical importance. It is essential for legislatures nationwide to know whether they must take into account cohesiveness and crossover voting in applying § 2 of the Act, or whether that provision applies only to districts in which minority voters form a numerical majority. Consider a recent example from Illinois. During redistricting following the 2000 census, the Illinois General Assembly enacted a plan designed to offer African-American voters a realistic opportunity to elect their preferred candidates in 19 districts. In one of these districts (District 78), however, African-Americans made up only 39% of the voting-age population. But as state planners anticipated, African-Americans have been able to elect their preferred candidate from District 78, for African-Americans constitute a majority of Democratic voters in that highly Democratic district. Under one view of § 2, federal law may shield districts like this one from minority vote dilution in future redistricting efforts; under the competing view (adopted expressly by the North Carolina Supreme Court), it would not. Knowing which is the proper interpretation of federal law is essential to the future work of the Illinois General Assembly, and its counterparts nationwide.

III. THIS COURT'S INTERVENTION IS NEEDED TO RESOLVE THIS IMPORTANT QUESTION DEFINITIVELY.

The question whether a minority group must constitute 50% of the relevant population to state a claim under § 2 thus presents a question of significant practical importance for state and local redistricting efforts, and, as the certiorari petition demonstrates, courts have been unable to reach a consensus on this issue. See Pet. 12-21. Moreover, although the North Carolina Supreme Court followed what has become the more common approach, there is a mature split among state and federal courts on this question. Pet. Br. 12-21. Three members of this Court have indicated that they would resolve the question differently than the North Carolina Supreme Court did, see *supra* p. 10, and the issue does not lend itself to easy answers. Accordingly, absent this Court's intervention, the uncertainty surrounding the 50% rule is certain to persist.

Like the North Carolina Supreme Court, courts that read § 2 to require an absolute numerical majority rely heavily on one phrase from *Gingles*, specifically, the requirement that § 2 plaintiffs demonstrate that their minority group "'is sufficiently large and geographically compact to constitute a *majority* in a single-member district.'" Pet. App. 19a (quoting *Gingles*, 478 U.S. at 50, and adding emphasis). But § 2 requires courts to consider "the totality of the circumstances," and to determine whether "the political processes leading to nomination or election" provide minority voters with equal opportunity both "to participate in the political process and to elect representatives of their choice." 42

U.S.C. § 1973(b). As the dissenting justices in the North Carolina Supreme Court noted, this statutory language appears to counsel against a rigid numerical majority requirement. Pet. App. 48a.

Indeed, although courts rely on the quoted language from *Gingles* to support a 50% rule, *Gingles* made clear that it was leaving open the question. See *supra* pp. 9-10. Moreover, *Gingles* admonished lower courts to engage in "an intensely local appraisal" and a "searching practical evaluation of the past and present reality," as they undertake a "functional" analysis of vote dilution claims. 478 U.S. at 62, 78-79 (internal punctuation and citations omitted). Thus, *Gingles* itself may be understood to provide that minorities' actual ability to elect their preferred candidates, and not any numerical threshold, is determinative of the § 2 inquiry.[5]

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[5] The North Carolina Supreme Court also believed that its interpretation of the first *Gingles* precondition was compelled by the language of the third precondition—that is, the required showing that the majority votes "'sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate'"—which the majority described as in "tension" with any recognition of protected status for crossover districts. Pet. App. 25a-26a (quoting *Gingles*, 478 U.S. at 51). But because the criteria for crossover districts "may not be the same" as the criteria for the majority-minority districts at issue in *Gingles*, *LULAC*, 126 S. Ct. at 2651 n.8 (Souter, J., joined by Ginsburg, J.), not even the third precondition necessitates a 50% rule. And, in any event, *Gingles* itself specifically considered crossover voting and found prong three satisfied as long as "a white block vote * * * normally will defeat the combined strength of minority support plus white 'crossover' votes." 478 U.S. at 56.

The North Carolina Supreme Court also was of the view that the 50% rule is "more logical and more readily applicable in practice." Pet. App. 19a-20a. As for the former, the court explained that "[w]hen a minority group lacks a numerical majority in a district, the ability to elect candidates of their own choice was never within the minority group's grasp." *Id.* at 22a (internal punctuation and citation omitted). But, as we have explained, see *supra* pp. 11-12, this is demonstrably false; minority groups routinely elect their preferred candidates from districts that are less than 50% minority. As to the court's latter point, its concern about obtaining a workable standard for vote-dilution claims is legitimate. It is not obvious, however, that adoption of a 50% rule is the only way to achieve this goal.

Indeed, members of this Court have proposed an alternate, equally "clear-edged" rule: a requirement "that minority voters in a reconstituted or putative district constitute a majority of those voting in the primary of the dominant party." *LULAC*, 126 S. Ct. at 2648 (Souter, J., joined by Ginsburg, J.). This limiting principle flows from the settled proposition that "a dominant party's primary can determine the representative ultimately elected." *Id.* at 2649; see also *supra* pp. 13-14. Other limiting principles may be available as well. See *LULAC*, 126 S. Ct. at 2648 n.3 (Souter, J., joined by Ginsburg, J.) (declining to "rule out other circumstances in which a coalition district might be required by § 2"). For example, courts concerned about "marginal," Pet. App. 24a, vote dilution claims might ask whether the number of majority-minority districts in combination with any

crossover districts meets the "rough proportionality" standard this Court has identified as an indicator of § 2 compliance, *Johnson*, 512 U.S. at 1023; see also Note, *The Implications of Coalitional & Influence Districts for Vote Dilution Litigation*, 117 Harv. L. Rev. 2598, 2609-10 (2004).

The North Carolina Supreme Court also failed to consider *Georgia v. Ashcroft*, 539 U.S. 461 (2003), which members of this Court have called "[c]hief among the reasons" the Court's review of the 50% rule is warranted. *LULAC*, 126 S. Ct. at 2648 (Souter, J., joined by Ginsburg, J.). *Ashcroft* addressed § 5 of the Act, which requires jurisdictions with a history of racially discriminatory voting practices to preclear redistricting plans with the Department of Justice (or the federal district court in Washington, D.C.). Pet. App. 123a-25a. Proposed changes will receive federal preclearance only if they will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). In *Ashcroft*, this Court observed that "various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts," and, accordingly, held that there is no impermissible retrogression under § 5 if a jurisdiction recasts a majority-minority district as a crossover district. 539 U.S. at 482-83. This determination that the 50% rule is inapplicable in the § 5 inquiry raises the question whether the rule should be rejected in the § 2 context as well. See *LULAC*, 126 S. Ct. at 2648.

In sum, the rationale for the 50% rule advanced by the North Carolina Supreme Court—which echoes the rationale employed by other courts that have adopted such a rule—is incomplete, controversial, and has been rejected by several members of this Court. No redistricting State may feel secure that its law on this issue—whether favoring a 50% rule or not—will survive scrutiny; and in those States where the courts have not yet reached this issue, legislators cannot feel confident in their ability to discern the correct result. This Court's intervention is needed to provide a definitive resolution to this difficult question.

IV. This Case May Be The Court's Final Opportunity To Address The Validity Of The 50% Rule Prior To The Next Round Of Redistricting.

We have explained that although there is no doubt that minority voters are routinely able to elect their preferred candidates from districts in which they constitute less than 50% of the relevant population, there nevertheless exists considerable doubt about whether States are required, or even permitted, to draw crossover districts. This conflicting authority has left States and other redistricting bodies without sufficient guidance as they attempt to comply with § 2, leading to costly and time-consuming redistricting proceedings and possible litigation. Indeed, the uncertainty surrounding the 50% rule is particularly problematic in States, like North Carolina, with provisions restricting legislative flexibility when redistricting. In such States, the legislature may be caught in a Catch-22: by drawing a crossover district, the State risks violating state law; but

by declining to create such a district, the State may run afoul of § 2. This Court need look no further than the lower court cases described in the certiorari petition, as well as the protracted proceedings in this case, for evidence that the current uncertainty regarding the 50% rule invariably results in a drain of scarce legislative and judicial resources.

Moreover, claims implicating the 50% rule have arisen more frequently in recent years, and this trend is likely to continue, as minority voting strength is increasingly—though not exclusively—a function of the ability to form effective coalitions with other groups. See, *e.g.*, Pildes, *supra*, at 1529. Because of the uncertainty surrounding the 50% rule, however, legislative bodies cannot be sure about their obligations to form crossover districts when redistricting.

Absent review by this Court, this uncertainty will continue unabated, while claims implicating the 50% rule will likely abound. As the certiorari petition points out, the decennial census will next occur in 2010, and States and other legislative bodies will undertake redistricting shortly thereafter. See Pet. 25-26. This case thus may present the Court with its final opportunity to resolve this significant issue before the next round of redistricting. Without the Court's intervention, the methods used to draw district lines in jurisdictions that follow the 50% rule will differ from the methods used in jurisdictions that do not. Moreover, legislatures in the remaining jurisdictions will be forced to guess which side of the split their courts will ultimately adopt. And should the Court resolve the issue after 2010 but before 2020, district

lines will have to be redrawn in all States that fall on the wrong side of the Court's newly-announced rule.

Thus, the question presented is ripe for this Court's review. The concurring Justices in *LULAC* stated as much. See *supra* p. 10. Moreover, because the propriety of the 50% rule was unsettled during both the 1990 and 2000 decennial redistrictings, the issue has had ample opportunity to percolate in numerous courts at all levels, see Pet. 12-21, and it has been thoroughly addressed in the academic commentary, see, *e.g.*, Luke P. McLoughlin, Note, Gingles *in Limbo: Coalitional Districts, Party Primaries & Manageable Vote Dilution Claims*, 80 N.Y.U. L. Rev. 312, 312-49 (2005); Note, *supra*, at 2604-11; Pildes, *supra*, at 1539-67; J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 Geo. Mason L. Rev. 431, 437-38 (2000); Sebastian Geraci, Comment, *The Case Against Allowing Multiracial Coalitions to File Section 2 Dilution Claims*, 1995 U. Chi. Legal F. 389, 398-406.

Finally, regardless of the Court's ultimate holding on the merits, States and other redistricting bodies will gain from resolution of the uncertainty that currently surrounds the 50% rule. Whether the Court endorses or rejects the rule, legislatures will benefit, because they will no longer have to consider what federal law requires in terms of crossover districts, and will no longer have to litigate their ultimate resolution of this question.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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