No. 15-1262

In The
Supreme Court of the United States

PATRICK MCCRORY, IN HIS CAPACITY AS GOVERNOR OF NORTH CAROLINA, ET AL.,

Appellants,

v.

DAVID HARRIS AND CHRISTINE BOWSER,

Appellees.

On Appeal From The United States District Court For The Middle District Of North Carolina

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND THE CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Amici respectfully restate the Questions Presented by the McCrory Appellants as follows. In so doing, *Amici* should not be heard to cast doubt on the validity of any of those Questions. Instead, they wish to reflect the narrower focus of their brief.

This case involves a challenge to two of North Carolina's congressional districts. The three-judge court below held that North Carolina's Congressional Districts 1 (CD 1) and 12 (CD 12) were unconstitutional racial gerrymanders. With respect to CD 1, the court rejected North Carolina's reliance on this Court's decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009), holding that the State improperly increased the minority voting-age population minimally so that it was a majority in the district. With respect to CD 12, the court second-guessed North Carolina's pursuit of its "legitimate political objectives" deeming them race-based. *But see Easley v. Cromartie*, 532 U.S. 234 (2001). The lower court's rulings effectively trap North Carolina between the "competing hazards of liability," *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring), of compliance with the Voting Rights Act and avoiding unconstitutional racial gerrymandering.

The Question Presented is:

Whether Section 2 of the Voting Rights Act, which does not mandate the creation of crossover districts in which the minority population is less than 50% of the

QUESTION PRESENTED – Continued

total, requires their preservation when that would entail far greater racial sorting than the alternatives chosen by North Carolina.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. Its work extends to cases involving redistricting and is reflected in SLF's filing of *amicus* briefs in support of efforts to rein in federal oversight of the states in cases like *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), and *NW Austin Municipal Utility Dist. No. 1 v. Holder*, 557 U.S. 193 (2009).

The Center for Equal Opportunity (CEO) is a research and educational organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code and devoted to issues of race and ethnicity. Its fundamental vision is straightforward: America has always been a multiethnic and multiracial nation, and it is becoming even more so. This makes it imperative that our national policies not divide our people according to skin color and national origin. Rather, these policies should emphasize and nurture the principles that unify us. *E pluribus unum* . . . out of many, one. CEO supports

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[1] All parties have consented to the filing of this brief by blanket or individual letter. *See* Sup. Ct. R. 37.3(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

color-blind public policies and seeks to block the expansion of racial preferences in all areas, including voting. It has participated as *amicus curiae* in past Voting Rights Act cases, including *Bartlett v. Strickland*, 556 U.S. 1 (2009), and *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). In addition, officials from CEO testified before Congress several times in connection with the 2006 reauthorization of the Voting Rights Act.

Amici have a substantial interest in advocating for limiting or eliminating the use of race as a factor in redistricting, and contend that the Voting Rights Act cannot and should not be used to promote or protect representative districts in which a protected racial minority group is less than 50% of a proposed district's population.

SUMMARY OF ARGUMENT

In *Bartlett v. Strickland*, the plurality concluded that Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, "does not mandate creating or preserving crossover districts." 556 U.S. at 23. Its decision was firmly grounded in the text of the statute, this Court's decisions, and the practical difficulties associated with the alternative. This case provides this Court with an opportunity to reaffirm the validity of the *Bartlett* plurality's reasoning.

From a practical perspective, this case presents an issue like that in *Bartlett v. Strickland*: What to do

with existing crossover districts. To recreate them as if they were to be preserved in amber would require a significant degree of racial and political sorting. Courts generally are ill-equipped for that inquiry. More to the point, such racial sorting is, at best, hard to square with the Constitution. *Amici* urge this Court to not encourage further racial division in redistricting, which is all that the lower court and the Appellees offer it.

The government should not consider race when it is drawing voting lines – the lines should be drawn where people live, not based on the color of their skin. With that said, the Voting Rights Act and this Court's decisions appear to require that on some level, race be considered in the redistricting process. However, they also require that it not be considered too much or in the wrong way.

To the extent that the Voting Rights Act and this Court's precedents call for the consideration of race in redistricting, those calls should be interpreted narrowly and consistently with the Constitution. "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. . . . This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.). In the redistricting context, the harm stems from the fact that "[r]ace-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to a criterion barred to

the Government by history and the Constitution.'" *Miller v. Johnson*, 515 U.S. 900, 912 (1995) (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting)).

In answering the question of how governments should zig and zag, this Court's precedents support following a line that is simultaneously most consistent with the statutory text and the Constitution, and least race-conscious. And, likewise, the statutory text should be interpreted so that it avoids raising constitutional issues, that is, in a way that it avoids racial classifications and preferences, which are presumptively unconstitutional. *See, e.g.*, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

On a more mundane level, race-based redistricting encourages racial essentialism, racial appeals, and identity politics generally. As it does, it discourages interracial coalition building and broader nonracial appeals. Accordingly, when redistricting officials are deciding when to zig and when to zag, that decision should not turn on the skin color of the person who lives in the house.

ARGUMENT

I. Introduction.

Congressional redistricting is tantamount to a zero-sum game. Since this Court's decision in *Karcher*

v. Daggett, 462 U.S. 725 (1983), congressional redistricting plans have been drawn to very tight population equality standards, with only limited exceptions. *See Tennant v. Jefferson Cty. Comm'n*, 133 S. Ct. 3 (2012) (holding that a congressional plan with an overall population deviation of 0.79% did not violate one-person, one-vote principles where the deviation served valid, neutral state districting policies.). This means that unless a state needs to repopulate an under-populated district, adding people to a district will require "moving" others out of it. Whenever people are moved, they come from a contiguous district and with a racial and political identity that the Voting Rights Act and this Court's decisions make relevant.

This case involves challenges to two of North Carolina's congressional districts. According to the 2010 Census, one of those districts (CD 1) was "severely under-populated" by some 97,563 persons. Jurisdictional Statement (J.S.) at 3, 12. The other district (CD 12) was drawn as a remedy for a past racial gerrymandering violation and is "nearly identical" to its previous version. *Id*. at 3. These two districts presented the North Carolina Legislature with two entirely different challenges.

At the time of the 2010 Census, African-Americans represented a majority of the registered voters in the under-populated district, CD 1. *Id*. at 13. African-Americans also represented the majority for total population and for voting-age population. *Id*. at 12-13. The McCrory Appellants insist that the lower court erred in concluding that CD 1 was "majority white." *Id*. at 5,

35. The State Legislature faced the challenge of repopulating the district, which, as a plurality African-American district, had historically elected Democrats.

As for CD 12, the McCrory Appellants note that in 2001, this Court rejected a challenge to this district in *Easley v. Cromartie*, 534 U.S. 234 (2001). The district proved to be a constitutional remedy for the unconstitutional racial gerrymandering found in *Shaw v. Reno*, 509 U.S. 630 (1993) and *Shaw v. Hunt*, 517 U.S. 899 (1996). *Amici* note that it is unusual that a past remedy for racial gerrymandering should be found itself to be a racial gerrymander.

Oddity aside, the changes to CD 12 in 2011 were designed to make it a stronger Democratic district by shifting voters to and from neighboring districts according to their past political performance. J.S. at 17-18. In particular, the drafters' moves included shifting Democratic voters from CD 6 in Guilford County into CD 12 and shifting Republican voters from CD 12 in Carrabus, Rowan, Davidson and other counties to other districts. *Id*. at 19.

II. Neither the Voting Rights Act, the Constitution, nor this Court's precedents support protection of crossover districts.

Congress enacted Section 2 of the Voting Rights Act to guarantee that a minority group is not denied, on account of race, color, or language minority status, the ability "to elect its candidate of choice on an equal basis with other voters[,]." *Voinovich v. Quilter*, 507

U.S. 146, 153 (1993), and to prohibit voting qualifications, standards, practices and procedures that deny the right to vote. *See* 52 U.S.C. § 10301. Specifically, the statute bars voting qualifications, standards, practices and procedures that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of *race* . . . [,]" 52 U.S.C. § 10301(a) (emphasis added), and looks at whether a voting practice provides a minority with "less opportunity than other members of the electorate to . . . elect representatives of their choice." *Id*. at § 10301(b).

To be sure, the objective of Section 2 is not to ensure that a candidate supported by minority voters can be elected in a district. In fact, in declining to force governments to draw crossover districts, the *Bartlett* plurality explained: "It would be an irony, however, if § 2 were interpreted to entrench racial differences by expanding a 'statute meant to hasten the waning of racism in American politics.'" 556 U.S. at 25 (quoting *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994)).

In the redistricting context, implementation of Section 2 has led to the creation of majority-minority single-member districts. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court considered a challenge to a multi-member districting plan that was said to dilute the votes of the minority voters. It held that a single-member districting plan could be a remedy if three conditions were met. The first focused on the size of the minority community – a group too small to be a district majority "cannot maintain that they would have been able to elect representative of their choice[.]" *Id*. at 50

n.17. In doing so, the *Gingles* Court concluded that the opportunity "to elect" protected by Section 2 is the ability of a protected class to elect a representative of its choice, by "dicat[ing] electoral outcomes *independently*." *Voinovich*, 507 U.S. at 154 (emphasis added); *see also Gingles*, 478 U.S. at 67-68.

More specifically, the *Gingles* Court set forth the following test to determine when a vote dilution claim directed at a multi-member districting scheme may proceed – a minority group must (1) "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district[,]" (2) "show that it is politically cohesive[,]" and (3) establish "that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." 478 U.S. at 50-51.

As noted, satisfaction of the *Gingles* test can, and has, resulted in the drawing of minority-majority districts. Notably, in the almost 40 years since *Gingles*, the minority-majority districts that could be drawn have been drawn. But, as this Court has explained, the statutory text and the Constitution demand that plaintiffs challenging a redistricting plan "show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916.

While Section 2 as interpreted by the *Gingles* Court allows for vote dilution claims under particular circumstances, the *Bartlett* plurality held that Section

2 of the Voting Rights Act does not require the creation of "crossover districts" – districts "in which minority voters make up less than a majority of the voting-age population . . . , [but] is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett*, 556 U.S. at 13. Noting that it relied on statutory language, this Court's precedents, and prudential considerations, the plurality "decline[d] to depart from the uniform interpretation of § 2 that has guided federal courts and state and local officials for more than 20 years." *Id*. at 19.

Notably, in her *Bartlett* dissent, Justice Ginsburg encouraged Congress to amend the statute, to presumably require crossover districts. 556 U.S. at 44 (Ginsburg, J., dissenting) ("Today's decision returns the ball to Congress' court. The Legislature has just cause to clarify beyond debate the appropriate reading of § 2."). And while Congress has, in the past, amended the Voting Rights Act in response to this Court's decisions,[2]

[2] Indeed, when Congress amended the Voting Rights Act in 2006, it did so, in large part, to statutorily reject this Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). In *Georgia*, the Court held that Georgia's drawing of several crossover districts did not mean that the plan resulted in retrogression in violation of Section 5. It explained that a State could comply with Section 5 by choosing to draw minority-majority districts or by "creat[ing] 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" 539 U.S. at 480. As Congress explained in its purpose and findings, it viewed *Georgia* as "significantly weaken[ing]" the Voting Rights

Congress has not acted on Justice Ginsburg's dissent. In the absence of congressional action, this Court should proceed cautiously, as to not exceed the scope of the Voting Rights Act.

This rings especially true where, neither the statutory text nor the legislative history supports the concept of crossover districts. As the Sixth Circuit Court of Appeals has pointed out, the Voting Rights Act speaks of "citizens" not "classes" of them; a violation is established when political processes are not equally open to the "members" of a protected class; and, one consideration is the extent to which the "members of a protected class" have been elected to office. *Nixon v. Kent Cty.*, 76 F.3d 1381, 1386-87 (6th Cir. 1996),[3] *see also* 52 U.S.C. § 10301(b). The committee reports for the 1975 amendments make no reference to an "aggregation" or coalition of voters, the "voluminous" legislative history for the 1982 amendments "contains no reference to a 'coalition' suit," and there's nothing to that effect since. *See* S. Rep. No. 295, 94th Cong., 1st

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Act's "effectiveness" because it "misconstrued Congress' original intent . . . and narrowed the protections afforded by section 5 of such Act." *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(6), 120 Stat. 577 (2006). Accordingly, Congress amended Section 5 to clarify that it protects the ability of minority voters to "elect their preferred candidates of choice." *Id*. § 5(d).

[3] The Sixth Circuit also noted that the only time the "aggregation of separately protected groups" is addressed in the Voting Rights Act, such aggregation is excluded for language minorities seeking to meet the numerical thresholds for foreign-language ballots. *See Nixon*, 76 F.3d at 1387 n.7.

Sess. (1975), reprinted in 1975 U.S.C.C.A.N. 774; S. Rep. No. 417, 97th Cong., 2d Sess. 28 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 205; Katharine I. Butler & Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act?*, 21 Pac. L.J. 619, 642 (1990) ("no reference" in "voluminous" 1982 legislative history); Rick G. Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups – When is the Whole Greater Than the Sum of the Parts?*, 20 Tex. Tech L. Rev. 95, 111-12 n.99 (1989) ("no answer" concerning coalition suits).

While the Voting Rights Act and this Court's decisions appear to require that race be considered in the redistricting process, in addition to those limits discussed herein, that consideration is constitutionally limited: Race may not be considered too much or in the wrong way. This case presents yet another iteration of the following question: Where should the line be drawn? This case also presents an opportunity for this Court to answer that question by following the line that is simultaneously most consistent with the statutory text, least race-conscious, and avoids unconstitutional racial classifications and preferences. *See generally, e.g.*, *Catholic Bishop of Chicago*, *supra*.

III. In evaluating redistricting claims and proposed remedies, courts should favor those that are less reliant on racial balancing over those that require more of it.

In *Bartlett*, the plurality observed that interpreting Section 2 to require the creation of crossover districts would give rise to "serious constitutional concerns under the Equal Protection Clause." 556 U.S. at 21. The *Bartlett* holding that a majority of minority voters is required before Section 2 will require action, effectively cabins the consideration of race in the redistricting process. This Court should reaffirm *Bartlett*'s holding and reject Appellees' invitation to "unnecessarily infuse race into virtually every redistricting. . . ." *Id*. (quoting *LULAC*, 548 U.S. at 446 (opinion of Kennedy, J.)).

The lower court's decision suggests that the Voting Rights Act requires that some minority-majority districts must be preserved in amber. If generalized, the lower court's decision will require greater consideration of race than the *Bartlett* alternative.

The lower court faulted the State Legislature for increasing the African-American population in those districts so that the black voting-age population (BVAP) was slightly over 50% of the total population. In so doing, the three-judge panel rejected the State's invocation of political considerations for CD 12 and its reliance on *Bartlett* for CD 1. Given the high correlation between race and voting behavior, the lower court should have proceeded with far greater caution with

respect to CD 12. Likewise, it should have recognized the dilemma the State faced in repopulating CD 1 and the degree of racial balancing that the Appellees would require.

A. Requiring a minority group to show that it can be a majority in a single-member district is minimally race conscious.

In *Gingles*, this Court established a common-sense, minimally race-conscious test for drawing minority-majority districts. In particular, under that test, a reviewing court looks at whether a minority group can "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. As the plurality explained in *Bartlett*, the requirement that the minority group show that it can be a majority in a single-member district is firmly grounded in the statutory language and by prudential considerations. 556 U.S. at 11.

In pertinent part, Section 2 of the Voting Rights Act focuses on voting qualifications, standards, practices, and procedures that give minorities "less opportunity than other members of the electorate to . . . elect representatives of their choice." 52 U.S.C. § 10301(a). Section 2 is not offended by voting practices that give minorities the same opportunity to participate as others. As the plurality explained in *Bartlett*, the African-American voters in North Carolina's District 18, who

were only 39% of the voting age population, had the same opportunity as any other group of voters constituting 39% of the whole. 556 U.S. at 9-10. In the same way, Section 2 does not "impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting [white] crossover voters." *Id*. at 15.

Moreover, a straightforward *Gingles* analysis is far easier for plan drafters and courts to apply. *See id*. at 12 ("The rule draws clear lines for courts and legislators alike."). As the *Bartlett* plurality explained: "Determining whether a § 2 claim would lie – i.e., determining whether potential districts could function as crossover districts – would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions." *Id*. at 17. More particularly, courts and legislators would have to answer questions like:

> What percentage of white voters supported minority-preferred candidates in the past? How reliable would the crossover votes be in future elections? What types of candidates have white and minority voters supported together in the past and will those trends continue? Were past crossover votes based on incumbency and did that depend on race? What are the historical turnout rates among white and minority voters and will they stay the same?

Id. To answer those questions, legislatures and courts would have to make predictive judgments based on political and racial data that may not be complete.[4]

The goal of the inquiry would be to put no more minority voters in a district than needed to allow them to elect the candidate of their choice. The answer would differ for each district turning on, among other things, the degree of white crossover voting. And the solution for one district might not be the solution for another.

B. The first *Gingles* criterion aids in grounding representative districts where people live.

In addition to its being well grounded statutorily and prudentially, applying the first *Gingles* criterion has the benefit of drawing districts where people live. Put simply, if a geographically compact minority community is large enough to be a majority in a single-member district, a district should be drawn around it. And, it should make no difference whether that minority community is more than 50% African-American or some higher percentage. If the district is drawn where people live, that should suffice for the Voting Rights Act.

That may be easier to do in urban areas than in rural because population is more concentrated there. As a result, urban districts are generally more compact

[4] Redistricting commissions would face the same difficulties, and there is no reason to believe a commission would do any better than legislatures or courts.

than rural ones. Whether urban or rural, though, drawing districts where people live implicitly recognizes communities of interest. In *Miller*, this Court included "respect for political subdivisions or communities defined by actual shared interests" in the list of traditional race-neutral redistricting considerations that should guide the process. 515 U.S. at 916. One would think that people who live in a neighborhood, community, or region share some underlying interests even if they disagree politically.

C. To implement relief in this and future similar cases requires an unconstitutional degree of racial microbalancing.

The alternative offered by the Appellees offers none of these advantages of limited race-consciousness and statutory consistency.[5] To preserve CD 1 as a performing crossover district requires precise racial and

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[5] Appellants note that the three-judge court did not require the Appellees to present an alternative, less racially conscious plan for CD 12 that would still have achieved the State Legislature's political objectives. J.S. at 22. As a result, the remedy would appear to be, nothing more or less, than something other than what the State Legislature did.

In *Amici's* judgment, such an alternative plan is a necessary part of any redistricting case. It shows not just that the plaintiff is serious, but also that a remedy is feasible. Without a remedy, there is no basis for a claim. *See Nipper v. Smith*, 39 F.3d 1494, 1533 (11th Cir. 1994) (en banc) ("[F]rom the inception of a section 2 case, the existence of a workable remedy within the confines of the state's system of government is critical to the success of a vote dilution claim. The absence of an available remedy is not only relevant at the remedial stage of the litigation, but also precludes,

political calculations. Those calculations threaten to treat white voters as pawns to be used for the purpose of racial balancing. They are also hard enough for legislators to do; they should not be undertaken by courts.

Amici note that "[n]othing in § 2 grants special protection to a minority group's right to form political coalitions." *Bartlett*, 556 U.S. at 15. The absence of any such special protection guided this Court in its rejection of the contention that Section 2 requires the creation of minority crossover districts. The same understanding should apply here to CD 1.

Moreover, to preserve a 49.65% single-race black and 48.07% BVAP district like CD 1 as a performing district would require not just adding 97,563 persons in the right racial and demographic mix, but in the right political mix as well. Otherwise, the district would not "perform" as hoped. *Cf. Bartlett*, 556 U.S. at 16 (noting how the creation of crossover districts is in "serious tension" with the third *Gingles* criterion).

Leaving aside the political calculations, the racial ones would require adding some 48,440 African-Americans and approximately the same number of white people to maintain the total population balance. That number might have to be adjusted upward or downward to compensate for any racial difference in voting-age population. Finally, one would have to look at the political results in the voting tabulation districts to make sure that Republican voters do not swamp the

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under the totality of the circumstances inquiry, a finding of liability.").

Democrats. In this calculation, all that matters is the percentage of African-Americans in the district. The white voters put into the district are put there because of their race in order to balance out the political demographics. That is just as pernicious as putting African-Americans into a district because of their race. And, the zero-sum nature of congressional redistricting makes this practice all the more likely.

Finally, the calculations are time-bound because the distribution of voters and voting behavior changes with time. *Amici* note that CD 1 was seriously underpopulated. Each census shows how, within each state and most localities, the distribution of population has changed. At the very least, that population will need to be reallocated among the districts. Furthermore, voting turnout and behavior changes with the identity of candidates, the issues, and the fortunes of the parties.

Put simply, it is far more difficult, and requires far more racial tuning, to preserve a minority crossover district in amber than it is to turn it into a minority-majority district. Thus far, and in North Carolina, *Amici* have presumed that only one large minority group is involved. If there is more than one such minority group, to say nothing of the nonminority group, gerrymandering will have to be considered for all of them. That complicates the work of plan drafters and reviewing courts in a completely incoherent way.

D. Appellees' proposed solution promises nationwide chaos in redistricting.

In addition to entailing far more racial sorting, Appellees' view promises nationwide chaos in redistricting. As the plurality noted in *Bartlett*, the nationwide scope of Section 2 "[h]eighten[ed its] concerns" with the judicial manageability of the standard. 556 U.S. at 18. In every district in the country that contains a minority population, those charged with drawing representative districts in states, counties, municipalities, and boards of education will not be able to look just for minority communities that might constitute a majority in a single-member district. They will have to look at each minority community and consider whether there are enough majority Democrats to put together with them in the hope that a majority will be produced.[6]

In any event, mandating the creation or preservation of crossover districts is likely to result in far more Section 2 litigation. A redistricting official who does not draw the crossover district (or coalition or influence district for that matter) the minority community wants will be sued. And, the minority community is not always unified in this regard; those who disagree with the redistricting official's decisions will file suit, and those who agree will remain silent. In those lawsuits, courts will have to listen to experts tell them precisely

[6] *Amici* note that, in the past, the received wisdom was that putting a significant number of minority voters, but not enough to gather the right number of crossover voters, in a district would be enough to win the Democratic primary and lose in the general election.

how many minority voters are needed in the district to elect a Democrat.

In every one of these jurisdictions, courts will have to decide who is the kingmaker. They will get claims to kingmaker status from both minority groups and the majority. For a court to decide between them would entail the protection of one racial group instead of the other. That is hardly consistent with "the equal protection of the laws" to which the Constitution entitles each of us. U.S. Const. amend. XIV.

IV. Appellees seek to improperly use the Voting Rights Act for political purposes.

Preserving CDs 1 and 12 in amber has another pernicious effect: It puts the Voting Rights Act to use in serving the institutional interests of the Democratic Party. In so doing, the lower court disregarded the political motivations of the legislative drafters.

That is not just upside down, it is inconsistent with the statute and this Court's decisions. In pertinent part, a violation of Section 2 is established if the minority has "less opportunity" to participate in the political process. 52 U.S.C. § 10301(b). "Granting minorities a right to rearrange districts so that their political coalition will usually win has nothing to do with equal opportunity, but is preferential treatment afforded to no others." Michael A. Carvin & 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, 17 (2005) (citing *DeGrandy*, 512 U.S. at 1020).

Nothing in the statute requires one race to have a greater opportunity than others.[7] "Nothing in § 2 grants special protection to a minority group's right to form political coalitions." *Bartlett*, 556 U.S. at 15. In *Bartlett*, the plurality observed that the minority voters who made up 39% of the district's voting-age population had the same ability to control the outcome of an election as any other group of voters "with the same relative voting strength." *Id*. at 14.

Significantly, the three-judge panel below furthered the interests of the legislative minority. That minority lost its majority status as the result of an election. This Court should not reward it for its political failure. *Cf. Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971) (finding no vote dilution claim when a minority group "along with all other Democrats, suffers the disaster of losing too many elections").

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[7] *Amici* recognize that "[s]tates that wish to draw crossover districts are free to do so where no other prohibition exists." *Bartlett*, 556 U.S. at 24. They note, however, that the creation of a less than minority-majority crossover, coalition, or influence district is a core political decision designed to maximize Democratic electoral prospects. It makes no sense whatsoever to require Republicans to do the political work of Democrats. Moreover, as the *Bartlett* plurality noted, " 'the lack of [influence] districts cannot establish a § 2 violation.' " *Id*. at 25 (quoting *LULAC*, 548 U.S. at 446). "The same analysis applies for crossover districts[.]" *Id.*

Separate and apart from that, the Voting Rights Act was meant to address race, not political party affiliation. President Lyndon Johnson focused on ending practical barriers to minority voting, which he identified and divided into three categories: (1) technical (e.g., poll taxes), (2) noncooperation, and (3) subjective (e.g., literacy tests). *See* Message from the President of the United States Related to the Right to Vote, 89th Cong., 1st Sess. (1965). When he spoke to a special joint-session of Congress, President Johnson observed, "[W]e met here tonight as Americans – *not as Democrats or Republicans* – we are met here as Americans to solve that problem" of assuring equal rights for African-Americans. *Id*. (emphasis added).

This Court should heed President Johnson's exhortation and refrain from doing political work for one party or the other. The political parties don't, or shouldn't, need this Court's help.

CONCLUSION

For the reasons stated in the Jurisdictional Statement and this *amicus* brief, this Court should reverse the decision of the United States District Court for the Middle District of North Carolina and remand for further proceedings.

Respectfully submitted,

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