SUPREME COURT OF THE UNITED STATES

No. 07–689

GARY BARTLETT, EXECUTIVE DIRECTOR OF THE
NORTH CAROLINA STATE BOARD OF ELECTIONS,
ET AL., PETITIONERS *v.* DWIGHT
STRICKLAND ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH
CAROLINA

[March 9, 2009]

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The question in this case is whether a minority with under 50% of the voting population of a proposed voting district can ever qualify under §2 of the Voting Rights Act of 1965 (VRA) as residents of a putative district whose minority voters would have an opportunity "to elect representatives of their choice." 42 U. S. C. §1973(b) (2000 ed.). If the answer is no, minority voters in such a district will have no right to claim relief under §2 from a statewide districting scheme that dilutes minority voting rights. I would hold that the answer in law as well as in fact is sometimes yes: a district may be a minority-opportunity district so long as a cohesive minority population is large enough to elect its chosen candidate when combined with a reliable number of crossover voters from an otherwise polarized majority.

In the plurality's view, only a district with a minority population making up 50% or more of the citizen voting age population (CVAP) can provide a remedy to minority voters lacking an opportunity "to elect representatives of their choice." This is incorrect as a factual matter if the statutory phrase is given its natural meaning; minority

voters in districts with minority populations under 50% routinely "elect representatives of their choice." The effects of the plurality's unwillingness to face this fact are disturbing by any measure and flatly at odds with the obvious purpose of the Act. If districts with minority populations under 50% can never count as minority-opportunity districts to remedy a violation of the States' obligation to provide equal electoral opportunity under §2, States will be required under the plurality's rule to pack black voters into additional majority-minority districts, contracting the number of districts where racial minorities are having success in transcending racial divisions in securing their preferred representation. The object of the Voting Rights Act will now be promoting racial blocs, and the role of race in districting decisions as a proxy for political identification will be heightened by any measure.

I

Recalling the basic premises of vote-dilution claims under §2 will show just how far astray the plurality has gone. Section 2 of the VRA prohibits districting practices that "resul[t] in a denial or abridgement of the right of any citizen of the United States to vote on account of race." 42 U. S. C. §1973(a). A denial or abridgment is established if, "based on the totality of circumstances," it is shown that members of a racial minority "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." §1973(b).

Since §2 was amended in 1982, 96 Stat. 134, we have read it to prohibit practices that result in "vote dilution," see *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), understood as distributing politically cohesive minority voters through voting districts in ways that reduce their potential strength. See *id.*, at 47–48. There are two classic patterns. Where voting is racially polarized, a districting

plan can systemically discount the minority vote either "by the dispersal of blacks into districts in which they constitute an ineffective minority of voters" or from "the concentration of blacks into districts where they constitute an excessive majority," so as to eliminate their influence in neighboring districts. *Id.*, at 46, n. 11. Treating dilution as a remediable harm recognizes that §2 protects not merely the right of minority voters to put ballots in a box, but to claim a fair number of districts in which their votes can be effective. See *id.*, at 47.

Three points follow. First, to speak of a fair chance to get the representation desired, there must be an identifiable baseline for measuring a group's voting strength. *Id.*, at 88 (O'Connor, J., concurring in judgment) ("In order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates §2, . . . it is . . . necessary to construct a measure of 'undiluted' minority voting strength"). Several baselines can be imagined; one could, for example, compare a minority's voting strength under a particular districting plan with the maximum strength possible under any alternative.[1] Not surprisingly, we have conclusively rejected this approach; the VRA was passed to guarantee minority voters a fair game,

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[1] We have previously illustrated this in stylized fashion:

"Assume a hypothetical jurisdiction of 1,000 voters divided into 10 districts of 100 each, where members of a minority group make up 40 percent of the voting population and voting is totally polarized along racial lines. With the right geographic dispersion to satisfy the compactness requirement, and with careful manipulation of district lines, the minority voters might be placed in control of as many as 7 of the 10 districts. Each such district could be drawn with at least 51 members of the minority group, and whether the remaining minority voters were added to the groupings of 51 for safety or scattered in the other three districts, minority voters would be able to elect candidates of their choice in all seven districts." *Johnson* v. *De Grandy*, 512 U. S. 997, 1016 (1994).

not a killing. See *Johnson* v. *De Grandy*, 512 U. S. 997, 1016–1017 (1994). We have held that the better baseline for measuring opportunity to elect under §2, although not dispositive, is the minority's rough proportion of the relevant population. *Id.*, at 1013–1023. Thus, in assessing §2 claims under a totality of the circumstances, including the facts of history and geography, the starting point is a comparison of the number of districts where minority voters can elect their chosen candidate with the group's population percentage. *Ibid;* see also *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 436 (2006) *(LULAC)* ("We proceed now to the totality of the circumstances, and first to the proportionality inquiry, comparing the percentage of total districts that are [minority] opportunity districts with the [minority] share of the citizen voting-age population").[2]

Second, the significance of proportionality means that a §2 claim must be assessed by looking at the overall effect of a multidistrict plan. A State with one congressional seat cannot dilute a minority's congressional vote, and only the systemic submergence of minority votes where a number of single-member districts could be drawn can be treated as harm under §2. So a §2 complaint must look to an entire districting plan (normally, statewide), alleging that the challenged plan creates an insufficient number of minority-opportunity districts in the territory as a whole. See *id.*, at 436–437.

Third, while a §2 violation ultimately results from the

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[2] Of course, this does not create an entitlement to proportionate minority representation. Nothing in the statute promises electoral success. Rather, §2 simply provides that, subject to qualifications based on a totality of circumstances, minority voters are entitled to a practical chance to compete in a roughly proportionate number of districts. *Id.*, at 1014, n. 11. "[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *Id.*, at 1020.

dilutive effect of a districting plan as a whole, a §2 plaintiff must also be able to place himself in a reasonably compact district that could have been drawn to improve upon the plan actually selected. See, *e.g., De Grandy*, *supra*, at 1001–1002. That is, a plaintiff must show both an overall deficiency and a personal injury open to redress.

Our first essay at understanding these features of statutory vote dilution was *Thornburg* v. *Gingles*, which asked whether a multimember district plan for choosing representatives by at-large voting deprived minority voters of an equal opportunity to elect their preferred candidates. In answering, we set three now-familiar conditions that a §2 claim must meet at the threshold before a court will analyze it under the totality of circumstances:

> "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U. S., at 50–51.

As we have emphasized over and over, the *Gingles* conditions do not state the ultimate standard under §2, nor could they, since the totality of the circumstances standard has been set explicitly by Congress. See *LULAC*, *supra*, at 425–426; *De Grandy*, *supra*, at 1011. Instead, each condition serves as a gatekeeper, ensuring that a plaintiff who proceeds to plenary review has a real chance to show a redressable violation of the ultimate §2 standard. The third condition, majority racial bloc voting, is necessary to establish the premise of vote-dilution claims: that the minority as a whole is placed at a disadvantage owing to race, not the happenstance of independent poli-

tics. *Gingles*, 478 U. S., at 51. The second, minority cohesion, is there to show that minority voters will vote together to elect a distinct representative of choice. *Ibid.* And the first, a large and geographically compact minority population, is the condition for demonstrating that a dilutive plan injures the §2 plaintiffs by failing to draw an available remedial district that would give them a chance to elect their chosen candidate. *Growe* v. *Emison*, 507 U. S. 25, 40–41 (1993); *Gingles*, *supra*, at 50.

II

Though this case arose under the Constitution of North Carolina, the dispositive issue is one of federal statutory law: whether a district with a minority population under 50%, but large enough to elect its chosen candidate with the help of majority voters disposed to support the minority favorite, can ever count as a district where minority voters have the opportunity "to elect representatives of their choice" for purposes of §2. I think it clear from the nature of a vote-dilution claim and the text of §2 that the answer must be yes. There is nothing in the statutory text to suggest that Congress meant to protect minority opportunity to elect solely by the creation of majority-minority districts. See *Voinovich* v. *Quilter*, 507 U. S. 146, 155 (1993) ("[Section 2] says nothing about majority-minority districts"). On the contrary, §2 "focuses exclusively on the consequences of apportionment," *ibid.*, as Congress made clear when it explicitly prescribed the ultimate functional approach: a totality of the circumstances test. See 42 U. S. C. §1973(b) ("A violation . . . is established if, based on the totality of circumstances, it is shown . . ."). And a functional analysis leaves no doubt that crossover districts vindicate the interest expressly protected by §2: the opportunity to elect a desired representative.

It has been apparent from the moment the Court first took up §2 that no reason exists in the statute to treat a

crossover district as a less legitimate remedy for dilution than a majority-minority one (let alone to rule it out). See *Gingles*, *supra*, at 90, n. 1 (O'Connor, J., concurring in judgment) ("[I]f a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably . . . 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"); see also Pildes, Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s, 80 N. C. L. Rev. 1517, 1553 (2002) (hereinafter Pildes) ("What should be so magical, then, about whether there are enough black voters to become a formal majority so that a conventional 'safe' district can be created? If a safe and a coalition district have the same probability of electing a black candidate, are they not functionally identical, by definition, with respect to electing such candidates?").

As these earlier comments as much as say, whether a district with a minority population under 50% of CVAP may redress a violation of §2 is a question of fact with an obvious answer: of course minority voters constituting less than 50% of the voting population can have an opportunity to elect the candidates of their choice, as amply shown by empirical studies confirming that such minority groups regularly elect their preferred candidates with the help of modest crossover by members of the majority. See, *e.g., id.*, at 1531–1534, 1538. The North Carolina Supreme Court for example, determined that voting districts with a black voting age population of as little as 38.37% have an opportunity to elect black candidates, *Pender Cty.* v. *Bartlett*, 361 N. C. 491, 494–495, 649 S. E. 2d 364, 366–367 (2007), a factual finding that has gone unchallenged and is well supported by electoral results in North Carolina. Of the nine House districts in which blacks make up more

than 50% of the voting age population (VAP), all but two elected a black representative in the 2004 election. See App. 109. Of the 12 additional House districts in which blacks are over 39% of the VAP, all but one elected a black representative in the 2004 election. *Ibid.* It would surely surprise legislators in North Carolina to suggest that black voters in these 12 districts cannot possibly have an opportunity to "elect [the] representatives of their choice."

It is of course true that the threshold population sufficient to provide minority voters with an opportunity to elect their candidates of choice is elastic, and the proportions will likely shift in the future, as they have in the past. See Pildes 1527–1532 (explaining that blacks in the 1980s required well over 50% of the population in a district to elect the candidates of their choice, but that this number has gradually fallen to well below 50%); *id.*, at 1527, n. 26 (stating that some courts went so far as to refer to 65% "as a 'rule of thumb' for the black population required to constitute a safe district"). That is, racial polarization has declined, and if it continues downward the first *Gingles* condition will get easier to satisfy.

But this is no reason to create an arbitrary threshold; the functional approach will continue to allow dismissal of claims for districts with minority populations too small to demonstrate an ability to elect, and with "crossovers" too numerous to allow an inference of vote dilution in the first place. No one, for example, would argue based on the record of experience in this case that a district with a 25% black population would meet the first *Gingles* condition. And the third *Gingles* requirement, majority-bloc voting, may well provide an analytical limit to claims based on crossover districts. See *LULAC*, 548 U. S., at 490, n. 8 (SOUTER, J., concurring in part and dissenting in part) (noting the interrelationship of the first and third *Gingles* factors); see also *post*, at 1–5 (BREYER, J., dissenting) (looking to the third *Gingles* condition to suggest a

mathematical limit to the minority population necessary for a cognizable crossover district). But whatever this limit may be, we have no need to set it here, since the respondent state officials have stipulated to majority-bloc voting, App. to Pet. for Cert. 130a. In sum, §2 addresses voting realities, and for practical purposes a 39%-minority district in which we know minorities have the potential to elect their preferred candidate is every bit as good as a 50%-minority district.

In fact, a crossover district is better. Recognizing crossover districts has the value of giving States greater flexibility to draw districting plans with a fair number of minority-opportunity districts, and this in turn allows for a beneficent reduction in the number of majority-minority districts with their "quintessentially race-conscious calculus," *De Grandy*, 512 U. S., at 1020, thereby moderating reliance on race as an exclusive determinant in districting decisions, cf. *Shaw* v. *Reno*, 509 U. S. 630 (1993). See also Pildes 1547–1548 ("In contrast to the Court's concerns with bizarrely designed safe districts, it is hard to see how coalitional districts could 'convey the message that political identity is, or should be, predominantly racial.' . . . Coalitional districts would seem to encourage and require a kind of integrative, cross-racial political alliance that might be thought consistent with, even the very ideal of, both the VRA and the U. S. Constitution" (quoting *Bush* v. *Vera*, 517 U. S. 952, 980 (1996))). A crossover is thus superior to a majority-minority district precisely because it requires polarized factions to break out of the mold and form the coalitions that discourage racial divisions.

III

A

The plurality's contrary conclusion that §2 does not recognize a crossover claim is based on a fundamental misunderstanding of vote-dilution claims, a mistake

epitomized in the following assessment of the crossover
district in question:

> "[B]ecause they form only 39 percent of the voting-age
> population in District 18, African-Americans standing
> alone have no better or worse opportunity to elect a
> candidate than does any other group of voters with
> the same relative voting strength [in District 18]."
> *Ante*, at 9–10.

See also *ante*, at 16 ("[In crossover districts,] minority
voters have the same opportunity to elect their candidate
as any other political group with the same relative voting
strength").

The claim that another political group in a particular
district might have the same relative voting strength as
the minority if it had the same share of the population
takes the form of a tautology: the plurality simply looks to
one district and says that a 39% group of blacks is no
worse off than a 39% group of whites would be. This
statement might be true, or it might not be, and standing
alone it demonstrates nothing.

Even if the two 39% groups were assumed to be compa-
rable in fact because they will attract sufficient crossover
(and so should be credited with satisfying the first *Gingles*
condition), neither of them could prove a §2 violation
without looking beyond the 39% district and showing a
disproportionately small potential for success in the
State's overall configuration of districts. As this Court has
explained before, the ultimate question in a §2 case (that
is, whether the minority group in question is being denied
an equal opportunity to participate and elect) can be an-
swered only by examining the broader pattern of districts
to see whether the minority is being denied a roughly
proportionate opportunity. See *LULAC*, 548 U. S., at 436–
437. Hence, saying one group's 39% equals another's, even
if true in particular districts where facts are known, does

not mean that either, both, or neither group could show a
§2 violation. The plurality simply fails to grasp that an
alleged §2 violation can only be proved or disproved by
looking statewide.

B

The plurality's more specific justifications for its coun-
terfactual position are no more supportable than its 39%
tautology.

1

The plurality seems to suggest that our prior cases
somehow require its conclusion that a minority population
under 50% will never support a §2 remedy, emphasizing
that *Gingles* spoke of a majority and referred to the re-
quirement that minority voters have "'the *potential* to
elect'" their chosen representatives. *Ante*, at 10 (quoting,
Gingles, 478 U. S., at 50, n. 17). It is hard to know what to
make of this point since the plurality also concedes that
we have explicitly and repeatedly reserved decision on
today's question. See *LULAC*, *supra*, at 443 (plurality
opinion); *De Grandy*, 512 U. S., at 1009; *Voinovich*, 507
U. S., at 154; *Growe*, 507 U. S., at 41, n. 5; *Gingles*, *supra*,
at 46–47, n. 12. In fact, in our more recent cases applying
§2, Court majorities have formulated the first *Gingles*
prong in a way more consistent with a functional ap-
proach. See *LULAC*, *supra*, at 430 ("[I]n the context of a
challenge to the drawing of district lines, 'the first *Gingles*
condition requires the possibility of creating more than the
existing number of reasonably compact districts with a
sufficiently large minority population to elect candidates
of its choice'" (quoting *De Grandy*, *supra*, at 1008)). These
Court majorities get short shrift from today's plurality.

In any event, even if we ignored *Gingles'*s reservation of
today's question and looked to *Gingles'*s "*potential* to elect"
as if it were statutory text, I fail to see how that phrase

dictates that a minority's ability to compete must be singlehanded in order to count under §2. As explained already, a crossover district serves the same interest in obtaining representation as a majority-minority district; the potential of 45% with a 6% crossover promises the same result as 51% with no crossover, and there is nothing in the logic of §2 to allow a distinction between the two types of district.

In fact, the plurality's distinction is artificial on its own terms. In the past, when black voter registration and black voter turnout were relatively low, even black voters with 55% of a district's CVAP would have had to rely on crossover voters to elect their candidate of choice. See Pildes 1527–1528. But no one on this Court (and, so far as I am aware, any other court addressing it) ever suggested that reliance on crossover voting in such a district rendered minority success any less significant under §2, or meant that the district failed to satisfy the first *Gingles* factor. Nor would it be any answer to say that black voters in such a district, assuming unrealistic voter turnout, theoretically had the "potential" to elect their candidate without crossover support; that would be about as relevant as arguing in the abstract that a black CVAP of 45% is potentially successful, on the assumption that black voters could turn out en masse to elect the candidate of their choice without reliance on crossovers if enough majority voters stay home.

2

The plurality is also concerned that recognizing the "potential" of anything under 50% would entail an exponential expansion of special minority districting; the plurality goes so far as to suggest that recognizing crossover districts as possible minority-opportunity districts would inherently "entitl[e] minority groups to the maximum possible voting strength." *Ante*, at 11. But this conclusion

again reflects a confusion of the gatekeeping function of the *Gingles* conditions with the ultimate test for relief under §2. See *ante*, at 9–10 ("African-Americans standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength").

As already explained, *supra*, at 5–6, the mere fact that all threshold *Gingles* conditions could be met and a district could be drawn with a minority population sufficiently large to elect the candidate of its choice does not require drawing such a district. This case simply is about the first *Gingles* condition, not about the number of minority-opportunity districts needed under §2, and accepting Bartlett's position would in no way imply an obligation to maximize districts with minority voter potential. Under any interpretation of the first *Gingles* factor, the State must draw districts in a way that provides minority voters with a fair number of districts in which they have an opportunity to elect candidates of their choice; the only question here is which districts will count toward that total.

3

The plurality's fear of maximization finds a parallel in the concern that treating crossover districts as minority-opportunity districts would "create serious tension" with the third *Gingles* prerequisite of majority-bloc voting. *Ante*, at 11. The plurality finds "[i]t . . . difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate." *Ibid.*

It is not difficult to see. If a minority population with 49% of the CVAP can elect the candidate of its choice with crossover by 2% of white voters, the minority "by definition" relies on white support to elect its preferred candi-

date. But this fact alone would raise no doubt, as a matter of definition or otherwise, that the majority-bloc-voting requirement could be met, since as much as 98% of the majority may have voted against the minority's candidate of choice. As explained above, *supra*, at 8, the third *Gingles* condition may well impose an analytical floor to the minority population and a ceiling on the degree of crossover allowed in a crossover district; that is, the concept of majority-bloc voting requires that majority voters tend to stick together in a relatively high degree. The precise standard for determining majority-bloc voting is not at issue in this case, however; to refute the plurality's 50% rule, one need only recognize that racial cohesion of 98% would be bloc voting by any standard.[3]

4

The plurality argues that qualifying crossover districts as minority-opportunity districts would be less administrable than demanding 50%, forcing courts to engage with the various factual and predictive questions that would come up in determining what percentage of majority voters would provide the voting minority with a chance at electoral success. *Ante*, at 12–13. But claims based on a State's failure to draw majority-minority districts raise the

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[3]This case is an entirely inappropriate vehicle for speculation about a more exact definition of majority-bloc voting. See *supra*, at 8–9. The political science literature has developed statistical methods for assessing the extent of majority-bloc voting that are far more nuanced than the plurality's 50% rule. See, *e.g.*, Pildes 1534–1535 (describing a "falloff rate" that social scientists use to measure the comparative rate at which whites vote for black Democratic candidates compared to white Democratic candidates and noting that the falloff rate for congressional elections during the 1990s in North Carolina was 9%). But this issue was never briefed in this case and is not before us, the respondents having stipulated to the existence of majority-bloc voting, App. to Pet. for Cert. 130a, and there is no reason to attempt to accomplish in this case through the first *Gingles* factor what would actually be a quantification of the third.

same issues of judicial judgment; even when the 50% threshold is satisfied, a court will still have to engage in factually messy enquiries about the "potential" such a district may afford, the degree of minority cohesion and majority-bloc voting, and the existence of vote-dilution under a totality of the circumstances. See *supra,* at 5–6, 8. The plurality's rule, therefore, conserves an uncertain amount of judicial resources, and only at the expense of ignoring a class of §2 claims that this Court has no authority to strike from the statute's coverage.

5

The plurality again misunderstands the nature of §2 in suggesting that its rule does not conflict with what the Court said in *Georgia* v. *Ashcroft*, 539 U. S. 461, 480–482 (2003): that crossover districts count as minority-opportunity districts for the purpose of assessing whether minorities have the opportunity "to elect their preferred candidates of choice" under §5 of the VRA, 42 U. S. C. A. §1973c(b) (Supp. 2008). While the plurality is, of course, correct that there are differences between the enquiries under §2 and §5, *ante*, at 20, those differences do not save today's decision from inconsistency with the prior pronouncement. A districting plan violates §5 if it diminishes the ability of minority voters to "elect their preferred candidates of choice," §1973c(b), as measured against the minority's previous electoral opportunity, *Ashcroft, supra*, at 477. A districting plan violates §2 if it diminishes the ability of minority voters to "elect representatives of their choice," 42 U. S. C. §1973(b) (2000 ed.), as measured under a totality of the circumstances against a baseline of rough proportionality. It makes no sense to say that a crossover district counts as a minority-opportunity district when comparing the past and the present under §5, but not when comparing the present and the possible under §2.

6

Finally, the plurality tries to support its insistence on a 50% threshold by invoking the policy of constitutional avoidance, which calls for construing a statute so as to avoid a possibly unconstitutional result. The plurality suggests that allowing a lower threshold would "require crossover districts throughout the Nation," *ante*, at 17, thereby implicating the principle of *Shaw* v. *Reno* that districting with an excessive reliance on race is unconstitutional ("excessive" now being equated by the plurality with the frequency of creating opportunity districts). But the plurality has it precisely backwards. A State will inevitably draw some crossover districts as the natural byproduct of districting based on traditional factors. If these crossover districts count as minority-opportunity districts, the State will be much closer to meeting its §2 obligation without any reference to race, and fewer minority-opportunity districts will, therefore, need to be created purposefully. But if, as a matter of law, only majority-minority districts provide a minority seeking equality with the opportunity to elect its preferred candidates, the State will have much further to go to create a sufficient number of minority-opportunity districts, will be required to bridge this gap by creating exclusively majority-minority districts, and will inevitably produce a districting plan that reflects a greater focus on race. The plurality, however, seems to believe that any reference to race in districting poses a constitutional concern, even a State's decision to reduce racial blocs in favor of crossover districts. A judicial position with these consequences is not constitutional avoidance.

IV

More serious than the plurality opinion's inconsistency with prior cases construing §2 is the perversity of the results it portends. Consider the effect of the plurality's

rule on North Carolina's districting scheme. Black voters make up approximately 20% of North Carolina's VAP[4] and are distributed throughout 120 State House districts, App. to Pet. for Cert. 58a. As noted before, black voters constitute more than 50% of the VAP in 9 of these districts and over 39% of the VAP in an additional 12. *Supra*, at 7–8. Under a functional approach to §2, black voters in North Carolina have an opportunity to elect (and regularly do elect) the representative of their choice in as many as 21 House districts, or 17.5% of North Carolina's total districts. See App. 109–110. North Carolina's districting plan is therefore close to providing black voters with proportionate electoral opportunity. According to the plurality, however, the remedy of a crossover district cannot provide opportunity to minority voters who lack it, and the requisite opportunity must therefore be lacking for minority voters already living in districts where they must rely on crossover. By the plurality's reckoning, then, black voters have an opportunity to elect representatives of their choice in, at most, nine North Carolina House districts. See *ibid*. In the plurality's view, North Carolina must have a long way to go before it satisfies the §2 requirement of equal electoral opportunity.[5]

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[4] Compare Dept. of Commerce, Bureau of Census, 2000 Voting Age Population and Voting-Age Citizens (PHC–T–31) (Table 1–1), online at http://www.census.gov/population/www/cen2000/briefs/phc-t31/index.html (as visited March 5, 2009, and available in Clerk of Court's case file) (total VAP in North Carolina is 6,087,996), with *id.*, Table 1–3 (black or African-American VAP is 1,216,622).

[5] Under the same logic, North Carolina could fracture and submerge in majority-dominated districts the 12 districts in which black voters constitute between 35% and 49% of the voting population and routinely elect the candidates of their choice without ever implicating §2, and could do so in districts not covered by §5 without implicating the VRA at all. The untenable implications of the plurality's rule do not end there. The plurality declares that its holding "does not apply to cases in which there is intentional discrimination against a racial minority."

A State like North Carolina faced with the plurality's opinion, whether it wants to comply with §2 or simply to avoid litigation, will, therefore, have no reason to create crossover districts. Section 2 recognizes no need for such districts, from which it follows that they can neither be required nor be created to help the State meet its obligation of equal electoral opportunity under §2. And if a legislature were induced to draw a crossover district by the plurality's encouragement to create them voluntarily, *ante*, at 20–21, it would open itself to attack by the plurality based on the pointed suggestion that a policy favoring crossover districts runs counter to *Shaw*. The plurality has thus boiled §2 down to one option: the best way to avoid suit under §2, and the only way to comply with §2, is by drawing district lines in a way that packs minority voters into majority-minority districts, probably eradicating crossover districts in the process.

Perhaps the plurality recognizes this aberrant implication, for it eventually attempts to disavow it. It asserts that "§2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts. . . . [But] §2 does not mandate creating or preserving crossover districts." *Ante*, at 19. See also, *ante*, at 20 (crossover districts "can be evidence . . . of equal political opportunity . . ."). But this is judicial fiat, not legal reasoning; the plurality does not even attempt to explain how a crossover district can be a minority-opportunity district when assessing the compliance of a districting plan with §2, but cannot be one

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Ante, at 15. But the logic of the plurality's position compels the absurd conclusion that the invidious and intentional fracturing of crossover districts in order to harm minority voters would not state a claim under §2. After all, if the elimination of a crossover district can never deprive minority voters in the district of the opportunity "to elect representatives of their choice," minorities in an invidiously eliminated district simply cannot show an injury under §2.

when sought as a remedy to a §2 violation. The plurality cannot have it both ways. If voluntarily drawing a crossover district brings a State into compliance with §2, then requiring creation of a crossover district must be a way to remedy a violation of §2, and eliminating a crossover district must in some cases take a State out of compliance with the statute. And when the elimination of a crossover district does cause a violation of §2, I cannot fathom why a voter in that district should not be able to bring a claim to remedy it.

In short, to the extent the plurality's holding is taken to control future results, the plurality has eliminated the protection of §2 for the districts that best vindicate the goals of the statute, and has done all it can to force the States to perpetuate racially concentrated districts, the quintessential manifestations of race consciousness in American politics.

I respectfully dissent.