No. 03-2113

UNITED STATES COURT OF APPEALS-*/-*
FOR THE FOURTH CIRCUIT

JOAN HALL, et al.,	)
Appellants,	)
v.	)
COMMONWEALTH OF VIRGINIA, et al.,	)
Appellees.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants (hereinafter "Disfranchised Black Voters") are United States citizens and registered voters who bring this action seeking declaratory and injunctive relief under 42 U.S.C. § 1983 to redress injuries suffered through the deprivation, under color of state law, of rights secured by Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343; and 42 U.S.C. § 1973j(f). Disfranchised Black Voters' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202; and by Rules 57 and 65 of the Federal Rules of Civil Procedure. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

This is an appeal from a final decision and judgment on the merits granting a motion to dismiss the Complaint and disposing of all parties' claims. The district court's Order (Joint Appendix ("App.") 124) and accompanying Judgment were dated August 7, 2003, and filed August 8, 2003. Disfranchised Black Voters timely filed a Notice of Appeal on September 4, 2003. App. 143.

STATEMENT OF ISSUES

I. Did the district court err in holding that as a matter of law, a minority group whose members constitute less than a majority of the population in an illustrative single-member district can *never* maintain an action under Section 2 of the Voting Rights Act, even if the complaint alleges that they had the *ability to elect* their candidate of choice in a coalition district?

II. Do black voters who have been removed from an effective coalition district have standing to challenge the reduction of their voting strength?

STATEMENT OF CASE

The Disfranchised Black Voters filed this action on February 21, 2003, alleging that the Congressional redistricting plan that the Commonwealth of Virginia enacted following release of the 2000 Decennial Census data diluted their voting strength in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 et seq., because the new plan unnecessarily reduced the percentage of black voters such as themselves in the Fourth Congressional District. The original defendants were the Commonwealth of Virginia and Secretary of the State Board of Elections Jean Jensen. Virginia Attorney General

Jerry W. Kilgore filed an unopposed motion to intervene which the district court's Order of July 17, 2003, granted.

Gary Thompson and several others, a group of private citizens, (hereinafter "Thompson Intervenors"), also moved to intervene on the ground that the state defendants would not adequately represent their interests as Republicans. Over opposition, and after hearing argument, the court granted intervention by Order of July 9, 2003.

A Rule 16(b) scheduling Order was entered in the case but no discovery has occurred.

The Commonwealth of Virginia and Secretary of the State Board of Elections Jean Jensen, Attorney General Kilgore, and the Thompson Intervenors, each filed a motion to dismiss. After briefing and hearing by the court on July 22, 2003, the court dismissed all Disfranchised Black Voters except Joan Hall and Leslie Speight for lack of standing and dismissed the Complaint with regard to Hall and Speight's claims. All Disfranchised Black Voters filed a timely notice of appeal on September 4, 2003.

STATEMENT OF FACTS

Virginia's 2001 Congressional redistricting plan was enacted just three weeks after a candidate of choice of black voters in Virginia's Portsmouth and Chesapeake areas, State Senator Louise Lucas, came within three percentage

points of winning election to Congress in a district that was 39.4% black in population. Complaint ¶¶ 1, 21-24, App. 9, 5-6. During the redistricting process, several alternative plans were considered, including two, Senate Bill 6 - Congressional Plan 188 (App. 31-34) and House Bill 19 - the Deeds Plan (App. 35-38), that held the percentage of blacks at approximately 40% in the Fourth Congressional District while also keeping the adjacent Third Congressional District at 53.2 and 52.5% black in population, respectively. Complaint ¶ 33, and App. 8. A third alternative plan, the Maxwell-Crittenden plan (App. 39-42), increased the black population in the Fourth District to 52.8%, and reduced the percentage of blacks in the Third Congressional District to 48.9%. Complaint ¶ 33, App. 8.

Despite the possibilities demonstrated by these alternative plans, the enacted plan fragments cohesive black population concentrations among different districts and unnecessarily packs black voters into the Third Congressional District. Complaint ¶ 39, App. 9-10. The 2001 plan decimated the voting strength of black voters in the Fourth Congressional district to the point where State Senator Lucas, running again in 2002, could not garner enough support to wage a credible campaign. Facing the lack of a sufficient base of voters just one year after she nearly won, she withdrew from the race before the election. Complaint ¶¶ 30-31, App. 7-8; App. 65-71.

Disfranchised Black Voters Hall and Speight are black voters who lived in the Fourth Congressional District prior to implementation of the 2001 Redistricting Plan and who still live in Fourth District under the new plan. Complaint ¶¶ 8 & 9, App. 3. As residents of the current Fourth District, they can no longer elect a candidate of their choice to Congress due to the prevalence of racially polarized voting in this region of the state. Complaint ¶¶ 20, 25, 31, App. 6-7. The plan shifted Disfranchised Black Voters Curry, McMillan, the Pruitts, and Speller, voters and residents of the former Fourth Congressional District, to the Third Congressional District. Complaint ¶¶ 7, 10, 12 & 13, App.3-4. While they can elect a candidate of their choice in that previously majority-black district, their votes are, in effect, wasted because they are packed into a district that does not need to be 56.8% black in total population in order to elect a candidate of choice of black voters. Complaint ¶ 26, App. 6-7. Disfranchised Black Voter Garnes, another former resident of the Fourth Congressional District, was split off and moved to the Fifth Congressional District under the 2001 Plan, where he no longer has a chance to elect a candidate of his choice to Congress because the district is only 24.3 percent black. Complaint ¶14, App. 4; App. 27. All of these Disfranchised Black Voters were harmed by the Commonwealth's implementation of a Congressional redistricting plan that diluted

the voting strength of black voters in the Fourth Congressional District. Complaint ¶¶ 31, 34 & 39, App. 31-32.

Under the 2001 Redistricting Plan, blacks comprise only 33.6% of the total population in the new Fourth Congressional District, a reduction of approximately 6% of the district's total population and 15% of the previous black population. Complaint ¶ 18, App.5. This change eliminates the opportunity for blacks in the Fourth Congressional District to elect their preferred candidate. Complaint ¶ 32, App. 8. Virginia's population statewide is 19.6% black. See App. 27-30. The 2001 plan contains only one district that affords black voters an opportunity to elect a candidate of their choice, giving them a say in electing only 9% of the state's eleven-member Congressional delegation.

Elections in the part of the state included in the Fourth Congressional District and in the Fourth District as drawn in the non-dilutive alternative plans, are characterized by a racially divided electoral environment. Complaint ¶ 30, App. 7. In addition, blacks in this part of the state still suffer the effects of past official discrimination. As a group, they have fewer opportunities for housing, education, adequate health care and employment than do non-blacks. Black voters lag behind the white population on basic measures of socio-economic status, including access to the resources necessary to participate effectively in the political process. Complaint ¶ 35, App. 9. Under the totality of circumstances, the

2001 Redistricting Plan denies black voters an equal opportunity to elect candidates of their choice and to participate equally in Congressional elections.

The district court dismissed the claims of all the Disfranchised Black Voters except Hall and Speight on the grounds that they do not suffer the same type of harm as those who continue to reside in the Fourth District. App. 129. The court concluded that they assert only a generalized grievance against governmental conduct. In addition the court reasoned that they lack standing because they have no guarantee that they will be put back into the Fourth District in any remedial plan implemented if the Disfranchised Black Voters prevail. *Id.*

Disfranchised Black Voters Hall and Speight have standing. With regard to their claims, the district court focused entirely on whether the allegations of the Complaint, that Hall and Speight would have the ability to elect a candidate of their choice in a district that is approximately 40 percent black in population, meet the first precondition of a vote-dilution claim under *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) ("*Gingles*"). The court carefully distinguishes the Disfranchised Black Voters' claim as involving a "coalition district", a "performance district" or an "ability-to-elect district" in contrast to an "influence district." App. 132-139. Each of the first three designations come from various cases that identify districts where a minority group, together with a smaller number of cross-over votes from non-black voters, can elect a candidate of their choice.

Influence districts, on the other hand, are ones in which the minority group influences but does not determine the candidate who is elected. App. 133.

The district court also acknowledged that this is an issue of first impression for this circuit. After recognizing the applicability of the Supreme Court's recent opinion in *Georgia v. Ashcroft*, ___ U.S. ___, 123 S.Ct. 2498, (2003), the court concluded that since a majority of the circuits previously rejected influence-district claims, a coalition-district claim is likewise not permitted under the Voting Rights Act. App. 140-141.

Disfranchised Black Voters seek a declaration that the 2001 Redistricting Plan violates Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended, and an injunction prohibiting the use of this plan in future elections. Complaint ¶ 2. App. 9-10.

SUMMARY OF ARGUMENT

At issue in this case is whether Congress intended Section 2 of the Voting Rights Act to prohibit all instances where black voters, in the totality of the circumstances, do not have an equal opportunity to elect candidates of their choice, and a remedy exists that will allow them to do so; or whether Congress intended a bright-line numerical cut-off requiring black voters to be a numerical majority in a single-member district.

The illogic of such a requirement can be illustrated by a hypothetical but realistic case of a district that is 49.9% black and has consistently elected candidates of the black minority's choice: could redistricting reduce the black population to 33% and deny the blacks any opportunity to continue to elect candidates of their choice?

The district court, while properly characterizing Disfranchised Black Voters' claims as involving the ability to elect a candidate of choice, misunderstood this claim to be one seeking to expand the reach of the Voting Rights Act. Rather, the unique facts in this case raise the questions whether judicial interpretations of Section 2 of the Voting Rights will evolve as polarized voting is ameliorated but not eliminated, and whether the concept of politically cohesive minority voters being able to elect candidates of their choice will be applied consistently where the ability to elect exists in districts that are less than fifty percent black. The very judgments that the district court thought too difficult to make are made routinely when defendants raise "ability-to-elect" districts as defenses to Section 2 claims.

While recognizing the significance of the Supreme Court's unanimous analysis of the political opportunities of black voters in *Georgia v. Ashcroft*, *supra* p. 8, at 2498 (2003), for Disfranchised Black Voters' claims here, the district court, on this issue of first impression for the Fourth Circuit, declined to follow the logic

of *Georgia v. Ashcroft,* choosing instead to follow the older, pre- *Georgia v. Ashcroft* holdings of other circuits presented with very different influence-district claims. This Court should correct that mistake.

The district court also erred in mechanically applying the standing analysis of *U.S. v. Hays*, 515 U.S. 737, 744-45 (1995), a racial gerrymandering case arising under the Equal Protection clause of the Fourteenth Amendment, to this statutory claim of vote dilution under the Voting Rights Act. Requiring residence in the "challenged district" makes no sense in the vote dilution context. Blacks who live inside the previous but outside the new district, and who have lost the opportunity to elect their candidate of choice, have suffered harm and thus have standing to sue. The district court Order confused two analytically distinct types of voting rights claims. *See Shaw v. Reno*, 509 U.S. 630, 652 (1993) (holding that racial gerrymandering is "analytically distinct" from vote dilution).

ARGUMENT

I. STANDARD OF REVIEW

This Court must conduct a *de novo* review of a district court's order dismissing a complaint for failure to state a claim for relief. *Eastern Shore Markets v. J.D. Associates Ltd.*, 213 F.3d 175, 180 (4th Cir. 2000). Only the legal sufficiency of the complaint, and not the facts in support of it, are tested on a motion to dismiss. Therefore, all facts alleged in the complaint must be assumed

to be true and all reasonable factual inferences must be drawn in the Disfranchised Black Voters' favor. *See Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984); *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). As a general matter, a Rule 12(b)(6) motion is a "disfavored motion" because it has *res judicata* effect even though the Disfranchised Black Voters have no opportunity for discovery or the presentation of evidence in support of their claims. *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1471 (4th Cir. 1991).

Moreover, when reviewing the dismissal of a civil rights complaint, this Court "must be especially solicitous of the wrongs alleged" and "must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged." *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002), *quoting Harrison v. United States Postal Serv.,* 840 F.2d 1149, 1152 (4th Cir. 1988). Dismissal is proper only where it appears beyond a doubt that the Disfranchised Black Voters can prove no set of facts in support of their claims that would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In making its *de novo* determination, this Court need not accept as true unwarranted inferences, unreasonable conclusions, or arguments. *Eastern Shore Markets*, *supra* p. 10, at 180. While a motion to dismiss is decided on the allegations of the Complaint, the Court is permitted to review factual information to the extent it is contained in

documents attached to the Complaint and incorporated by reference, including public documents. *Simons v. Montgomery County Police Officers*, 762 F.2d 30, 31-32 (4th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986).

II. THE COMPLAINT STATES A CAUSE OF ACTION ON WHICH RELIEF MAY BE GRANTED

A. Plaintiffs Disfranchised Black Voters Allege the 2001 Plan Illegally Reduced Their Voting Strength Because the Fourth District No Longer Contains Sufficient Black Population To Afford Them the Ability To Elect Their Candidate of Choice

The district court correctly explained that Disfranchised Black Voters seek to satisfy the first prong of the *Gingles* standard by showing that they had the ability to elect a candidate of their choice in a district that was approximately 40% black in population.[1] App. 4, 16. Courts have variously referred to such a district as a "coalitional district", *Georgia v. Ashcroft*, *supra* p. 8, at 2513, a "performing district", *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1301 (S.D. Fla. 2002), or an

[1] The district court assumed that black voting-age population rather than total population is the correct data to analyze when assessing the first *Gingles* precondition. *See* App. 12. That is not the state of the law; the Supreme Court has expressly left open the question of whether a court considering a vote-dilution claim should look to the minority population overall, or only the minority voting-age population. *See Johnson v. DeGrandy*, 512 U.S. 997, 1008-09 (1994). As a result, courts look to both the overall minority population percentage as well as the minority voting-age population percentage. *See Stabler v. County of Thurston, Neb.,* 129 F.3d 1015, 1021-22 (8th Cir. 1997); *see also Meek v. Metropolitan Dade County*, 908 F.2d 1540, 1546 (11th Cir. 1990).

"ability-to-elect" district, *Armour v. Ohio*, 775 F. Supp. 1044, 1059 n.19 (N.D. Ohio 1991). In each instance, what is being referred to is a district in which a politically cohesive minority group is large enough numerically to elect a candidate of their choice even though they are not a majority of the district's voters. As the *Martinez* court explained: "[b]lack candidates of choice often *will* prevail, however, in a district in which blacks comprise a *near* majority of actual voters, even when they do not comprise a majority, because a significant number of non-black voters support black candidates of choice." *Martinez*, *supra* p. 12, at 1299 (emphases in original).

Influence districts, in contrast, are districts with sufficient minority voters to influence or affect the selection of candidates, but where the minority group is not numerous enough to field and elect their candidate of choice. *See, e.g., Uno v. City of Holyoke*, 72 F.3d 973, 990-991 (1st Cir. 1995) (using "influence district" to refer to this situation); *Armour*, *supra* at 1059 n.19 (explaining the distinction); *see also* Richard H. Pildes, *Is Voting-Rights Law Now At War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517, 1539-40 (June 2002) (distinguishing influence districts from "coalitional districts" which are defined as a district with a significant albeit non-majority minority that has a fifty-fifty probability of electing the minority's preferred candidates); Stephanie E. Ord, *Ruiz v. Santa Maria: Defining*

"Minority-Preferred Candidate" Within Section 2 of the Voting Rights Act, 14 BYU J. Pub. L. 295, 302 (2000) (listings factors some courts use to determine whether minority community can be said to have sponsored a candidate, degree to which minorities participate in conducting or financing a campaign, and other indicia of a candidate of choice of minority voters).

Unlike "ability-to-influence" claims, an "ability-to-elect" claim is based on actual electoral outcomes such that the size of the minority population and the amount of crossover votes necessary to be able to determine the election outcome may be specifically quantified. *See* Pildes, *supra* p. 13, at 1531-32, 1539-40. Whether or not the Voting Rights Act protects the ability of a minority to influence elections, the Act is explicitly designed to eliminate government-imposed obstacles that hinder minority groups who would otherwise have the power to elect their candidates of choice. *See* 42 U.S.C. § 1973(b); *see also Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) (Section 2 prohibits "*any* practice or procedure that . . . impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." (emphasis added)). Accordingly, as explained below, "ability-to-elect" claims fall squarely within the scope of Section 2 and *Gingles, supra* p. 7, the seminal case interpreting Section 2.[2]

[2] Disfranchised Black Voters do not concede that "ability to influence" claims lack viability under Section 2.

However, the district court failed to view the facts as alleged in the Complaint in the light most favorable to the Disfranchised Black Voters on one point that appeared to be influential in the court's consideration of the case and certainly merits clarification. During oral argument the court raised the question of "where [do] you expect to get that 6 percent from" with regard to Disfranchised Black Voters' alternative plans demonstrating that the Fourth District could be close to 40% or more black. Transcript at page 22, App. 96. Based on Counsel's response to this question, the court states in its opinion that: "The Plaintiffs do not allege that the Third District would remain a black majority district should their plan be adopted." App. 127. In fact, when asked "Is it your position that the court has the authority to reduce the black percentage population in the third district to less than 50 percent?", App. 96, Counsel responded as follows:

> No, Your Honor. What a federal court has the obligation to examine is what percentage of population is necessary to make that district a district in which black voters can elect a candidate of their choice. … Now, we do not allege in the complaint that you need to reduce the third congressional district below 50 percent in order to make the fourth congressional district a district that gives black voters an opportunity. … Our allegation is that it is possible to draw a second district, make the fourth congressional district roughly 40 percent black in population. That would give black voters in that district an opportunity to elect their candidates of choice while leaving the third congressional district as also a district that gives black voters an opportunity to elect candidates of their choice.

Transcript p. 22-23, App. 96-97. While it may be expressed inartfully in the Complaint and at oral argument, the gist of the Disfranchised Black Voters'

position, and the facts taken in the light most favorable to them on this motion, can be summed up in two basic propositions:

1. Black voters in the region of Virginia covered by the previous Fourth Congressional district can elect candidates of their choice to Congress from a district in which they are approximately 40% of the population.

2. Keeping the Fourth Congressional District at approximately 40% black in population does not impair or prevent black voters in the Third Congressional District from continuing to have the ability to elect candidates of their choice.

The Disfranchised Black Voters in this case ultimately seek to have a Congressional redistricting plan implemented that gives black voters in the state the opportunity to elect candidates of their choice in two of the state's eleven congressional districts. Instead of basing its ruling on the facts as alleged and all reasonable inferences from those facts in the light most favorable to the Disfranchised Black Voters, the district court assumed otherwise, stating that:

> [t]he Plaintiffs' proposal could jeopardize the ability of black voters to elect their candidate of choice in the Third District. Thus, under Plaintiffs' view, Section 2 should be interpreted to threaten Virginia's first majority black district in order to increase the Fourth District's black population to 40 percent. In other words, Plaintiffs argue § 2 mandates the creation of two minority black districts where black voters in each are dependent upon white crossover voting to elect their preferred candidates.

App. 139. The Complaint does not allege that the ability of black voters in the Third District to elect their candidate of choice will be compromised. In fact, it alleges just the opposite. Complaint at ¶ 26, App. 14. The district court labeled this allegation a dangerous and speculative forecast that federal courts should avoid, App. 140, yet courts make similar forecasts time and time again in voting rights cases when evaluating whether current or prospective districts will give black voters an opportunity to elect candidates of their choice. *See, e.g., Georgia v. Ashcroft*, *supra* p. 8, at 2516 (assessing which Georgia districts are likely to give black voters the opportunity to elect candidates of choice and which districts more likely give them the ability to be an effective voting bloc to influence the election); *Martinez v. Bush*, *supra* p. 12. Indeed, the Supreme Court's opinion in *Georgia v. Ashcroft* rests on the premise that courts and the Justice Department can assess whether a minority group can merely influence the political process or elect a candidate of its choice, using evidence of racial polarization. *Id.*, 123 S. Ct. at 2514. While acknowledging that "[t]he ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine," *Georgia* does not suggest, as the district court here did, that to do so is dangerous, speculative or beyond the province of the federal courts in a Voting Rights Act case. *Id.* at 2511.

Thus, the district court's conclusion that "Plaintiffs ask this Court to create a rule that would substitute the Federal Courts' subjective estimate of minority voter influence in an "influence" or "coalition" district for the well established and objective rule requiring a majority-minority district" (Opinion at 18, App. 141) is wrong on two counts. First, as *Georgia* and numerous social scientists have demonstrated, estimating when a black population is large enough in a district to be able to elect their candidates of choice, is not "subjective" but rather a calculation based on observable patterns of racially polarized voting. *See Georgia*, *supra* p. 8, at 2515-17; Bernard Grofman, et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1423-24 (2001); Pildes, *supra* p. 13, at 1530-32. It is a fact that "[w]hich candidate wins is a function not only of the *proportion* that minority voters form of the active electorate, but also of the levels of *cohesion* among the two groups of voters." J. Morgan Kousser, *Beyond Gingles : Influence Districts & The Pragmatic Tradition in Voting Rights Law,* 27 U.S.F. L. Rev. 551, 563 (1993) (emphasis added). For instance, in a jurisdiction that is 30% minority and 70% white, the minority candidate will prevail if there is minority cohesion of 90% and white cohesion of 60%. *See id.* at 563; *accord* Pildes, *supra* p. 13, at 1538 (black candidates can be elected to office despite polarized voting where black VAP is

33-39%); Allan J. Lichtman & Gerald Hebert, *A General Theory of Vote Dilution,* 6 La Raza L. J. 1, 10-11 (1993).

Second, the conclusion is wrong because we are not asking the court to create a new rule, but rather to conduct the "searching practical evaluation of the 'past and present reality,'" *Gingles*, *supra* p. 7, at 45, based on a "functional view of the political process," *id.,* that voting rights cases have always required to determine under what circumstances black voters can elect a candidate of their choice.

The district court had to accept the facts of the Complaint as true. *See Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). The Disfranchised Black Voters argue that packing black voters into Virginia's Third Congressional District, which is now 56.8% black in total population, in the name of compliance with the Voting Right Act, while decimating the black population in an adjacent district that came very close to electing the black voters' candidate of choice, reduces their voting strength and violates the Voting Rights Act. The district court, and now this Court, must determine whether, assuming that black voters can elect their candidates of choice in both the Third and Fourth Congressional districts as drawn in an alternative redistricting plan, Disfranchised Black Voters have stated a claim for relief under Section 2 of the Voting Rights Act.

B. The Language and Purpose of Section 2 Demonstrate that Congress Intended To Provide a Claim for Relief When Ability-To-Elect Districts Are Possible

The district court found against the Disfranchised Black Voters primarily because it believed that the first prong of the *Gingles* prerequisites "establishes a bright line that precludes vote-dilution claims in other than so called majority-minority districts." Opinion at 18, App. 141. In other words, the court held as a matter of law that a necessary predicate for a Section 2 claim is that the minority group in question constitute a *numerical majority* in a proposed district. However, neither the language of Section 2 nor the purposes behind it supports this interpretation.

The state violates Section 2 "if, *based on the totality of the circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected minority] class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process *and to elect representatives of their choice*. 42 U.S.C. § 1973(b) (emphasis added). There is no hint from this language that plaintiffs seeking relief must show that the "protected minority class of citizens" constitutes over 50% in a single-member district. Rather, the key "totality of the circumstances" language counsels heavily for a flexible standard dependent on the facts of a particular case.

The plain language of Section 2 does not forbid "ability-to-elect" claims, which should end the inquiry. *E.g., Scott v. United States,* 328 F.3d 132, 138-139 (4th Cir. 2003); *United States v. Johnson,* 325 F.3d 205, 208 (4th Cir. 2003), *cert. denied,* ___ S. Ct. ___, 2003 WL 21693523, 72 USLW 3242 (2003); *United States v. Commonwealth Energy Sys. & Subsidiary Cos.,* 235 F.3d 11, 15 (1st Cir. 2000) (where language of statute is unambiguous, unnecessary to consider other factors).

The need for a fact-specific inquiry is validated by the legislative history of the statute, which urges consideration of "all of the circumstances in the jurisdiction in question" when determining whether a challenged system results in a denial of equal ability to elect.[3] See S. Rep. No. 97-417, at 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205. Tellingly, the Senate Report, which specifies in great detail nine objective factors which typically may be relevant to assessing the impact of the contested structure or practice on minority electoral opportunities, *see Gingles*, *supra* p. 7, at 44-45 & n.8, contains no statement or requirement of a 50% population threshold requirement. Accordingly, this Court should not read a 50% minority-majority threshold requirement into the statute. *See United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994), *cert. denied*, 513 U.S. 1135 (1995)

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[3] The Supreme Court looked to the Senate Report as "the authoritative source for legislative intent." *See Gingles*, 478 U.S. at 44 n.7.

(stating that "[c]ourts are not free to read into the language [of a statute] what is not there . . .").

More fundamentally, Congress intended in amending the Voting Rights Act in 1982 to ensure that minority groups have the ability to meaningfully participate in elections, not just elect candidates of their choice where they are a numerical majority. *See* S.Rep. No. 97-417, at 29 n.115 (1982). "The issue to be decided under the results test is whether the political processes are equally open to minority voters." *Id.* at 2. If minority voters can attract sufficient, though small, numbers of cross-over white voters, or indeed, voters of any other racial group, to join them and thereby meaningfully participate in elections, in districts where they are not the majority of the voters, then they have demonstrated that a structure which prevents them from doing so is dilutive. There is simply nothing in the Act or the legislative history behind it, to "suggest that Congress intended to limit Section 2 claims to ones involving districts where minorities were a majority of the voters." *Parker v. Ohio*, 263 F. Supp. 2d 1100, 1113 (S.D. Ohio), *petition for cert. filed*, 72 U.S.L.W. 3193 (Sept. 15, 2003), *cf.* Beth A. Levene, *Influence-Dilution Claims Under the Voting Rights Act,* 1995 U. Chi. Legal F. 457, 466 (arguing that even influence-district claims are consistent with the purposes of the Voting Rights Act because political effectiveness includes a group's ability to use its voting strength to persuade candidates to address particular issues).

The Supreme Court has cautioned that courts should not frustrate Congressional intent in enacting Section 2 of the Voting Rights Act by imposing judicially crafted limitations to Section 2 litigation. In *Chisom v. Roemer,* 501 U.S. 380 (1991), holding that Section 2 applies to judicial elections, the Court said "[e]ven if serious problems lie ahead in applying the 'totality of the circumstances' described in Section 2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress." *Id.* at 416. Here, the district court, shying away from what it saw as the difficulty of determining when black voters might have an ability to elect if they are less than a majority, imposed just such a limitation, without support from the text or legislative history of the Act.

Whether or not the Voting Rights Act protects the ability of a minority group merely to influence elections, the Act plainly sweeps away obstacles that hinder minority groups who would otherwise have the power to elect. 42 U.S.C. § 1973(b). Claims based on the ability to elect a candidate of choice fall squarely within the scope of Section 2 and *Gingles*. The Disfranchised Black Voters here should be allowed to proceed on their claim.

C. The Supreme Court's Rulings on Vote-Dilution Claims Do Not Support the District Court's Ruling on the Ability-To-Elect Claim

The Supreme Court's analysis of Section 2 claims in *Gingles* does not support the interpretation of a minority group's ability to elect a preferred candidate as hinging on the group's capability to attain majority population status. In early cases brought under the Voting Rights Act, litigants primarily challenged the use of multimember or at-large election schemes as diluting the voting strength of minority groups and impairing the ability of minority voters to elect representatives of their choice. *See Gingles*, *supra* p. 7, at 35, 46, 47. The Court outlined three threshold factors that a minority group must prove to sustain a claim that the use of multimember districts would violate Section 2:

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 in the absence of special circumstances to defeat the minority group's preferred candidate.[4]

Id. at 49-51. Upon satisfaction of these threshold elements, a plaintiff is then entitled to present evidence demonstrating that under the totality of the

[4] The *Gingles* test has since been extended for use in cases challenging single-member districts. *Growe v. Emison*, 507 U.S. 25, 40 (1993).

circumstances the members of the plaintiff's protected group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. *See id.* at 44-45; *see also* 42 U.S.C. § 1973(b).

The district court believed that the first *Gingles* prong established a bright-line rule that applies in every type of vote-dilution claim. Yet, such a construction ignores the fact that the *Gingles* Court explicitly distinguished its test from that which would be applied under an "ability-to-elect" claim brought by a minority group that does not constitute a majority in a single member district. The Court refused to hold that "ability-to-elect" claims are not viable, but instead stated that it had "no occasion to consider whether Section 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, alleging that the use of a multimember district impairs its ability to influence elections." *Gingles*, *supra* p. 7, at 46 n.12; *see also Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993) (noting that the Supreme Court expressly declined to resolve the issue). Thus, *Gingles* left open the possibility that a minority group could bring an "ability-to-elect" claim under Section 2.

Indeed, the *Gingles* Court did more than simply leave the door open to such claims by acknowledging that numerical majority status is not the sole avenue

for voting groups to elect candidates of their choice. Instead, the requirement of a majority-minority district was intended to be only one possible method for demonstrating that the structure of the election process impacted a voting group's potential to elect a candidate of its choice, and not the only method. *See Gingles*, *supra* p. 7, at 50 n.17. As Justice O'Connor pointedly observed, black voters may have the ability to elect candidates of their choice where they have the assistance of limited yet predictable crossover voting just as they do where they are the majority in a proposed district:

> [T]he Court recognizes that when the candidates preferred by a minority group are elected in a multimember district, the minority group has *elected* those candidates, even if white support was indispensable to these victories. On the same reasoning, if 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 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.

Gingles, *supra* p. 7, at 90 n.1 (O'Connor, J., joined by Burger, J., Powell, J. and Rehnquist, J., concurring in the judgment) (emphasis in original).

Any suggestion that the *Gingles* majority effectively resolved this question by limiting vote dilution to situations where black voters are a majority in a single-member district is belied by the fact that Justice Stevens, who joined all relevant portions of the Court's opinion in *Gingles*, has observed that it is patently *obvious* that vote-dilution claims of the type advanced by Disfranchised Black

Voters are cognizable under Section 2. *See Shaw v. Hunt,* 517 U.S. 899, 947 n.21 (1996) (Stevens, J., joined by Ginsburg, J., and Breyer, J., dissenting) ("*Of course*, a State that unfairly 'packs' African-American voters into a limited number of districts may be subject to a § 2 challenge on the ground that it failed to create so-called 'influence' districts.") (emphasis added).

Just this year, all nine Justices recognized that under certain circumstances black voters can elect candidates of their choice even where they are not a majority within a single district. *See Georgia v. Ashcroft, supra* p. 8, at 2512, 2518. Moreover, the *Georgia* majority explicitly noted that determining whether a district allows minority voters to elect candidates of their choice is a context-specific inquiry that cannot be based on strict numerical cutoffs. *Id.* at 2511 ("The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine.") If black voters in a particular jurisdiction can demonstrate that they have the ability to elect candidates of their choice in a 40% black district, then they have met the first *Gingles* requirement.

Since *Gingles*, the Court has twice been presented with the issue of whether a minority group that is not able to constitute a majority within the challenged district can maintain a vote-dilution claim under Section 2 of the Voting Rights Act. In each case, however, the Court chose not to rigidly mandate a 50% population threshold showing for such claims. Instead, the Court presumed

that the plaintiff had established the first prong of *Gingles* even where the plaintiff's minority group did not constitute a majority in the particular district if the group had the power to elect a candidate of its choice.[5] *See Johnson v. DeGrandy*, *supra* p. 12, at 1007-9; *Voinovich*, *supra* p. 14, at 154.

The Court has never imposed a rigid bright-line cutoff for determining ability to elect in Section 2 cases. As a recent law review article pointed out, "Justice Souter, writing for the seven-Justice majority in *DeGrandy*, reiterated the *Gingles* Court's admonition to perform a functional analysis and went out of his way to use the terminology of 'effective' or 'functional' voting majorities, rather than relying entirely upon strict demographic tallies." Grofman, *supra* p. 18, 79 N.C. L. Rev. 1383, 1389. In critically important language that completely undermines the district court's holding here, *DeGrandy* pointed out that "No single statistic provides courts with a shortcut to determine whether a set of single-

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[5] Until *Georgia v. Ashcroft,* the Court usually addressed the issue of a claim brought by a minority group that cannot constitute a majority in a particular district in the context of an "ability-to-influence" claim rather than an "ability-to-elect" claim. *See, e.g., Johnson v. DeGrandy*, *supra* p. 12, at 1009 (referring to an "influence district" as a district in which members of a minority group are a potentially influential minority of voters); *Growe*, *supra* p. 23, at 41 n.5 (referring to claims by minorities who have the ability to influence but not determine an election); *Gingles*, *supra* p. 7, at 46; *but see Voinovich*, *supra* p. 13, at 154; (defining an "influence-dilution claim" as one in which the minority group is numerous enough to elect their candidate of choice when their candidate attracts sufficient crossover votes from white voters). However, "ability to influence" claims necessarily subsume "ability to elect" claims which are narrower in scope.

member districts unlawfully dilutes minority voting strength." *Johnson v. DeGrandy*, *supra* p. 12, at 1020-21; *see also Georgia*, *supra* p. 8, at 2511 (quoting *DeGrandy*).[6]

If *Gingles* did indeed require proof of majority status under all circumstances, then the Court could easily have resolved *DeGrandy* and *Voinovich* on that ground. *See Parker v. Ohio*, *supra* p. 22, at 1111 (Gwin, J. concurring) (noting that "[i]f the *Voinovich* Court had intended to stop influence claims in districts where minorities do not make up a majority, it could have made that finding on a legal basis. Instead it engaged in a factual review …"). The Supreme Court consciously chose not to do so, and instead decided those cases on other (and more complicated) grounds. *See Johnson v. DeGrandy*, *supra* p. 12, at 1009 (assuming that the first *Gingles* condition is satisfied although Hispanics were not

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[6] Under some circumstances, a minority community may need to constitute a supermajority to elect a candidate of its choice. *See, e.g., Martin v. Mabus,* 700 F. Supp. 327, 336 (S.D. Miss. 1988) (finding a 60% black majority was needed to allow black voters an opportunity to elect candidates of choice, while rejecting suggestions that a larger black majority was necessary, and emphasizing that "the court must make a specific inquiry as to what may properly give the minority an equal opportunity to elect candidates of their choice"); *Fund for Accurate and Informed Representation, Inc., v. Weprin*, 796 F. Supp. 662, 672 (N.D.N.Y. 1992) (three-judge panel) (per curiam), *aff'd* 506 U.S. 1017 (1992) (upholding supermajority-minority districts against claims that they had been unlawfully "packed" because the legislature exercised reasonable judgment that absent such supermajorities, "ineffective minority control districts" might result); *see generally Georgia*, *supra* p. 9, at 2511-12.

an absolute majority in the challenged districts and instead reversing the district court's assessment of the totality of the circumstances); *Voinovich*, *supra* p. 14, at 158 (assuming that plaintiffs could satisfy *Gingles* with proof that their minority group could elect a candidate of choice with white crossover votes, but reversing the district court's finding of a Section 2 violation for failure to establish racially polarized voting). In each case, the Court continued to presume the viability of such claims and caution lower courts against the application of *Gingles* as a rigid "bright-line" test. *See Voinovich*, *ibid.*; *Johnson v. DeGrandy*, *supra* p. 12, at 1007.

Consistent with this approach, the Supreme Court has repeatedly disavowed the mechanical application of the *Gingles* factors. *See, e.g., Voinovich supra* p. 14, at 158 ("Of course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim."). Indeed, the Court has embraced the possibility that the first *Gingles* factor would need to be modified, or even eliminated, to fit an "ability-to-elect" claim. *See Johnson v. DeGrandy*, *supra* p. 12, at 1007. *Johnson* itself interpreted the first *Gingles* prong to merely require "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." *Id.* at 1008. Similarly, Disfranchised Black Voters here seek the formation of more than one district composed of black voters numerous

enough to elect candidates of their choice with limited yet predictable crossover voting.

Given the Supreme Court's deliberate and repeated choice to leave open the viability of "ability-to-elect" claims under Section 2 and its explicit language regarding the flexibility of the first *Gingles* factor, the district court's interpretation of *Gingles* as imposing a bright line threshold requirement that as a matter of law the minority group must demonstrate it has the potential to comprise a 50% majority of the population in the challenged district simply is unsupportable and should not be adopted by this Court.[7] Rather, the Court should interpret the first *Gingles* prong as the Supreme Court did in *Johnson*, namely as requiring an allegation that the minority group comprises a sufficiently large population so as to have the potential to elect the candidate of its choice. *See Johnson v. DeGrandy*, *supra* p. 12, at 1008; *Gingles*, *supra* p. 7, at 50 n.17; *West v. Clinton*, 786 F. Supp.

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[7] Furthermore, since the legal sufficiency of "ability-to-elect" claims is an open issue, it is likely that appellate courts will again be presented with this issue and will benefit from having a full factual record developed on the matter. In instances where a thorough and complete development of the factual circumstances and relevant evidence is critical to the Court's determination of the proper interpretation of challenged laws, the Supreme Court has remanded cases for the purpose of allowing the parties to create a detailed and complete record. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1033 (1992) (Kennedy, J. concurring); *Turner Broadcasting System v. Federal Communications Comm'n*, 512 U.S. 622, 627 (1994).

at 803, 807 (W.D. Ark. 1992). This test provides a logical, objective and quantifiable measure that is consistent with the purposes of Section 2.

Here, Disfranchised Black Voters have readily satisfied this standard by alleging that blacks in the area contained in the former Fourth Congressional District comprise a sufficiently large population to have the potential to elect the candidate of their choice. *See* Complaint ¶¶ 32, 38, App. 16-17. Before redistricting, blacks made up 39.4% of the total population of the former Fourth Congressional District. Complaint ¶ 17, App. 4-5. In the 2001 Special Election, the candidate overwhelmingly preferred by the black community garnered 48% of the overall vote. *Id*. ¶¶ 24. Thus in an election plagued by unusually low voter turnout of 38%, the black community still was able to mobilize sufficient votes (both black and crossover) to nearly succeed in their endeavor. *See Uno v. City of Holyoke, supra* p. 13, at 991 n.13 (requiring showing that crossover votes exist to support the minority group's chosen candidate). With normal levels of voter turnout, it is reasonable to infer, and the district court should have inferred that the black community would be able to elect its chosen candidate.

D. The Supreme Court's Decision in *Georgia v. Ashcroft* Demonstrates That Ability-To-Elect Claims Are Viable

The district court acknowledged that the Supreme Court's opinion in *Georgia v. Ashcroft* supports Disfranchised Black Voters' position that there is a

distinction between a coalition district, where minority voters, with reliable cross-over votes, elect their candidates of choice, and influence districts, where a discrete group is too small to elect their own candidate but nevertheless can have some influence over the outcome of the election. Opinion at 14-15, App. 137-38. However, the district court failed to appreciate the significance of what it termed *dicta* for Disfranchised Black Voters' claim here.

As an initial matter, the distinction between coalition districts and influence districts is not a legal conclusion but a factual distinction. Thus, it is not correct to say that the Supreme Court's extensive discussion of coalition and influence districts in *Georgia* was *dicta*. In *Georgia*, the Court devoted a great deal of attention to the importance of considering districts where minority voters could play a major role in electoral outcomes even when they constituted less than a majority of the district. 123 S.Ct. at 2511-2514. The Court went so far as to say that in preclearance cases under Section 5 of the Voting Rights Act, "a court *must* examine whether a new plans adds or subtracts 'influence' districts—where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive role, in the electoral process." *Id.* at 2512 (emphasis added).

More importantly the Supreme Court did express the legal conclusion that, for the purposes of the Voting Rights Act, it is relevant to look at coalition

and influence districts as well as majority-minority districts in assessing the ability of a minority group to elect a candidate of its choice. It is this conclusion, which is not *dicta*, that has relevance for Disfranchised Black Voters' claim here under Section 2 of the Voting Rights Act. The Court concluded that "we hold only that the District Court did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts." *Id.* at 2516. What the district court in *Georgia* failed to do was take into account the evidence of how black voters could participate in the electoral process in other districts where they were a substantial minority, the coalition and influence districts. *Id.* at 2511-14. Here, the district court failed to apply that same legal principle – that black voters can elect candidates of their choice and participate in the political process in districts where they are less than a majority if there is a reliable level of white cross-over voting – to the Section 2 context.

To be sure, the inquiry into non-retrogression under Section 5 is distinct from the vote-dilution inquiry under Section 2. *Id.* at 2510. The two provisions "differ in structure, purpose, and application." *Id.*, quoting *Holder v. Hall*, 512 U.S. 874, 883 (1994). Nonetheless, "some parts of the § 2 analysis may overlap with the § 5 inquiry." *Georgia*, *supra* p. 8, at 2510. This is one such area of overlap. It would be extremely anomalous to have a rule of law that courts *must*

consider mere influence districts in the Section 5 context but *cannot* consider genuine "ability-to-elect" districts under Section 2. Either a district that is less than 50 percent minority can afford minority voters the ability to elect candidates of choice, or it cannot. If it can, it does so whether the redistricting plan is considered under Section 5 of the Voting Rights Act or challenged under Section 2.

Thus, the *Georgia* opinion has greater significance for Disfranchised Black Voters' claims than the district court recognized. A consistent application of the legal principles articulated in *Georgia* requires the conclusion that they have adequately stated a claim for relief. At least one other court has come to the same conclusion. Referring to influence-district claims, the New Jersey Supreme Court stated: "we believe that *Georgia v. Ashcroft* supports our conclusion that such claims are permitted." *McNeil v. Legislative Apportionment Commission of State*, 177 N.J. 364, 828 A.2d 840, 853 (2003).

E. Since Ability-To-Elect Districts Are Sufficient To Defeat Vote-Dilution Claims, They Must Be Sufficient To Establish a Claim on Which Relief May Be Granted

Consistent application of the concept of ability to elect that has been recognized by numerous courts in Section 2 cases also establishes the sufficiency of the Complaint. *See, e.g., Uno v. City of Holyoke*, *supra* p. 13, at 990-991. On several occasions, courts have held that redistricting plans pass muster under

Section 2 even though they do not create a majority-minority district because minority voters have the opportunity to elect candidates of their choice in coalition districts, or exert sufficient influence to be able, under the totality of the circumstances, to participate equally in elections. *See id.* at 990; *Page v. Bartels*, 144 F. Supp. 2d 346, 363-365 (D.N.J. 2001), *aff'd*, 516 U.S. 801 (1995); *Rural West Tennessee African-American Affairs Council v. McWherter*, 877 F. Supp. 1096, 1101-04 (W.D. Tenn. 1995), *aff'd*, 516 U.S. 801 (1995); *N.A.A.C.P., Inc. v. City of Columbia, S.C.,* 850 F. Supp. 404, 429 (D.S.C. 1993), *aff'd as modified*, 33 F.3d 52 (4th Cir. 1994), *cert. denied*, 512 U.S. 1147 (1995).

The First Circuit in *Uno,* a vote-dilution case under Section 2, held that the lower court must take into account the fact that the Latino community in Holyoke could elect candidates of their choice in an influence district. *Uno*, *supra* p. 13, at 991. Although calling the district an "influence" district, the court cautioned that "before the existence of an influence district is given significant weight in the balance, the evidence must reveal that minority voters in the district have in fact joined with other voters to elect representatives of their choice." *Id.* at 991, n.13. In addition, "the record must show that elected representatives from such a district serve, at least in part, the interests of the minority community and vie for its support." *Id.* On remand, the lower court found that Latino voters in the city had sufficient opportunity to elect candidates of choice and therefore it was not

necessary for the jurisdiction to create a majority-minority district in order to comply with Section 2 of the Voting Rights Act. *Uno v. City of Holyoke*, 960 F. Supp. 515 (D. Mass. 1997).

Page v. Bartels involved the same type of calculus, this time with regard to the New Jersey legislative redistricting plan drawn in 2001. The plaintiffs in *Page* argued that the plan adopted by the New Jersey Apportionment Commission violated Section 2 of the Voting Rights Act because it dispersed blacks and Hispanics into districts where they were "'an ineffective minority of voters'." *Page v. Bartels*, *supra* p. 36, at 363. The court found that districts that are 27.5% and 35.3% black in voting age population "each have a sufficient African-American voting-age population to provide African Americans with a reasonable opportunity to elect candidates of their choice …" *Id.* at 353, 362. In light of that finding, the court concluded that the plaintiffs had failed to show that the plan would impair or prevent minorities from electing their chosen representatives and therefore it does not violate Section 2 of the Voting Rights Act.

If the presence of a district in which minorities can elect their candidates of choice, even though it is not a majority-minority district, is cognizable as a defense under Section 2, it follows that the failure to maintain or create a district in which the minority group could actually elect its preferred candidate without achieving majority status should be cognizable as an affirmative

claim under Section 2. In either situation, the underlying proposition is the same, namely that courts can assess whether minority voters have the potential "to elect representatives of their choice" in less than 50% minority districts. *See* 42 U.S.C. § 1973(b). To acknowledge that it is possible to determine when a sizeable minority population can elect candidates of their choice when defendants assert it, but to deny it is possible to do so when plaintiffs make the assertion is a double-standard that the law should not tolerate.

F. The Reasoning of Circuit Courts Considering Influence-District Claims Does Not Apply to Ability-To-Elect Claims.

While noting that the First Circuit has suggested that influence district claims may eventually be recognized, the district court concluded that "the five Circuit Courts of Appeal which have considered the issue have uniformly rejected all such claims." Opinion at 12, & n.13, App. 135-136. In fact, none of the Circuit Court opinions cited by the Court rejects the ability-to-elect theory advanced by Plaintiffs here. The Sixth Circuit precedent, *Cousin v. Sundquist,* 145 F.3d 818 (6th Cir. 1998), *cert. denied,* 525 U.S. 1138 (1999), involved a claim that the minority group's ability to influence the outcome of the election had been impaired, not that they could elect their candidate of choice in an alternative district. *Id.* at 828-29. In addition, "[t]he *Sundquist* Court's discussion of the first *Gingles* condition is obvious dicta." *Parker v. Ohio,* supra p. 22 at 1112.

Similarly, the Seventh Circuit and Ninth Circuit authorities also rejected the notion that the mere ability to influence elections is actionable. *McNeil v. Springfield Park Dist.* 851 F.2d 937, 947 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989); *Romero v. City of Pomona,* 883 F.2d 1418, 1423 (9th Cir. 1989).

The Fifth Circuit case, *Valdespino v. Alamo Heights Indep. School Dist.*, 168 F.3d 848, 852-53 (5th Cir. 1999), *cert. denied,* 528 U.S. 1114 (2000), and the Eleventh Circuit case, *Negron v. City of Miami Beach*, 113 F.3d 1563, 1567-60 (11th Cir. 1997), both involved a very different issue, whether Hispanic voters in vote-dilution cases must use registered voter data, citizenship data, or voting age population data to demonstrate the first *Gingles* prerequisite. Those cases did not involve plaintiffs who alleged or had evidence to prove that they could win election in coalition districts. Moreover, the *Valdespino* court flatly rejected plaintiffs' theory of Section 2 liability without any analysis of the purposes underlying Section 2 or *Gingles* and without any consideration of the flexibility of the standard mandated by *Gingles* and subsequent cases. *See Valdespino*, 168 F.3d at 852. In so doing, the *Valdespino* court is in conflict with the Supreme Court's clear mandate that the *Gingles* factor not "be applied mechanically and without regard to the nature of the claim." *See Voinovich*, *supra* p. 14, at 158.

Thus, these holdings from other circuits, noted by the district court, do not offer any guidance on the issue that Disfranchised Black Voters present here. In those cases, the minority group did not allege or seek to prove that they could actually elect a candidate of their choice in an alternative coalition district.

G. The Political Realities of the Two-Stage Election Process and Gradually Declining Levels of Racially Polarized Voting Support Allowing an Ability-To-Elect Claim.

The modern trend in cases is to recognize that, under certain conditions, districts can be drawn where minorities have the ability to elect candidates of their choice even when they do not constitute a majority of the electorate. Late last year, a federal court in Florida noted that "the approach of focusing mechanically on the percentage of minority population (or voting age population or registered voters) in a particular district, without assessing the actual voting strength of the minority in combination with other voters, has been justly criticized." *Martinez v. Bush*, *supra* p. 12, at 1275, 1322 (S.D. Fla. 2002) (three-judge panel). The *Martinez* court cited both academic commentary and a number of cases in making this point, including: *Uno v. City of Holyoke*, *supra* p. 13 (vacating district court's finding of no Section 2 violation based on the impracticality of drawing any district in which the minority would constitute an actual majority and remanding for consideration of influence districts); *Page v. Bartels*, *supra* p. 36 (finding no violation of Section 2 because minority voters,

together with cross-over voters, could usually elect minority candidates of choice, thus negating the third *Gingles* factor); *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter,* 877 F. Supp. 1096, (W.D. Tenn. 1995) (three-judge court) (holding that any district in which a minority group composes 25% to 55% of the voting age population is an "influence district" that should be considered in evaluating the "totality of the circumstances" under *Gingles*); *Martinez, supra* p. 12, at 1322.

Refusing to adopt any bright-line test because it properly recognized that the inquiry was highly context-specific, the *Martinez* court stated,

> We have no occasion to devise a formula for determining how many districts of one type or another are required by Section 2. We use the term "performing minority district" to refer to a district that is likely to perform for -- that is, usually to result in the election of -- minority candidates of choice. Such a district may or may not have an actual majority (or super-majority) of minority population, voting age population, or registered voters.

Ibid. The *Martinez* court noted that in certain circumstances districts with a roughly 40% minority voting age population will provide minority voters the opportunity to elect candidates of their choice. *Id.* at 1315 (finding that state House District 118 allowed African Americans to elect candidates of choice where the non-Hispanic black voting age population was 39.9% and the total black voting age population was 41.8%). The court grounded this finding on a crucial reality about the election process in this country—most elections are conducted in two stages in which there is a primary election and then a general election.

Due to the two-stage voting process, "[e]ven with a 41.8% black voting age population, new [House District] 118 will afford black voters a reasonable opportunity to elect candidates of their choice and probably will in fact perform for black candidates of choice." *Id.* at 1315. The court noted that blacks constitute a significant majority of registered Democrats in the district, and Democrats, in turn, constituted a majority of registered voters. Thus, black voters would likely control the Democratic primary and could count on some white cross-over voting—despite an overall pattern of racially polarized voting—to elect candidates of their choice. *Id.* at 1298-99, 1315. Before the most recent round of redistricting, Virginia's Fourth Congressional District was precisely this type of "ability-to-elect" district for minority voters. By significantly reducing black voter strength in the district, the State of Virginia has converted an "ability-to-elect" district into an "inability-to-elect" district for black voters and has thus engaged in vote dilution in violation of Section 2 of the Voting Rights Act.

The *Martinez* opinion is certainly not unique in recognizing the importance of this two-step electoral process. Commentators have made this point quite convincingly in recent years. *See, e.g.*, Grofman, *supra* p. 18, at 1410-11 (emphasizing the need for a context-specific inquiry but noting that the two-stage election process sometimes allows black voters to elect candidates of their choice when they constitute less than 50% of the overall district population even in the

face of racially polarized voting); Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 Harv. L. Rev. 2208, 2219 (2003) (stressing the importance of considering the two-stage nature of the election process and concluding that minority voters may have an opportunity to elect candidates of their choice even when they constitute less than 50% of the district). In cases arising out of this most recent round of redistricting, other courts have agreed. *See, e.g., Page v. Bartels*, *supra* p. 36, at 356 (discussing testimony that in certain districts "whoever prevails in the Democratic primary is likely to be elected in the general election" thus allowing minority voters to elect candidates of choice even without constituting an overall majority in the district); *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 66 (D.D.C. 2002) (three-judge panel), *vacated on other grounds,* ___ U.S. ___, 123 S. Ct. 2498, 2514, 2517 (2003).

In short, numerous courts and commentators have recognized that the two-stage electoral process under certain circumstances allows minority voters to elect candidates of their choice even without constituting a majority in the overall district. Given this political and social science reality, it would border on the absurd and certainly contradicts Congressional intent in amending the Voting Rights Act, to suggest that vote-dilution claims can never be brought unless minority voters can constitute 50% or more of the total population in a district. After all, the *Gingles* court instructed district court judges to employ their

"familiarity with the indigenous political reality" to conduct "an intensely local appraisal" in determining whether challenged practices dilute the strength of minority voters. 478 U.S. at 78-79. Surely, this highly context-specific inquiry should include an assessment of whether a district is an "ability-to-elect" district for minority voters even if they constitute less than a majority of the district's population.

H. Allowing Ability-To-Elect Districts Is Good Public Policy

The district court's reason for ultimately concluding that ability-to-elect claims are not valid under Section 2 rested on policy judgments about the wisdom of allowing such claims. Opinion at 15-17, App. 138-140. First, the court believed it would involve federal courts in judgments about whether a certain minority percentage is sufficient to allow black voters the ability to elect a candidate of their choice which is beyond a court's capacity. This concern is addressed at pages 9, 16-17, 22, 28 n.5 above. As the Supreme Court reaffirmed in *Georgia*, district courts can and must make such determinations in Voting Rights Act cases, as and the district court opinion in *Page v. Bartels*, *supra* p. 36, among many others, demonstrates, there is no lack of expert political science analysis to assist them in making that judgment.

Second, the district court mistakenly assumed that "the Plaintiffs' proposal could jeopardize the ability of black voters to elect their candidate of

choice in the Third District." Opinion at 16, App. 139. Not only is this a factual finding that is inappropriate at this stage of the proceedings, but it is not correct. See argument above at pages 16-17. Disfranchised Black Voters are alleging that black voters can elect candidates of choice in two of Virginia's eleven congressional districts.

Finally, the court appeared concerned that allowing ability-to-elect claims would result in a flood of marginal Section 2 claims. At its heart, the fundamental right to vote protected by Section 2 should not be sacrificed to advance even legitimate needs for judicial ease and economy. *See Reynolds v. Sims,* 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."). In reality, no such flood has been forthcoming to this point, nor will it occur in the future because of the difficulty of proving Section 2 claims generally.

As always, plaintiffs are required to demonstrate that they have the potential to elect their preferred candidate. *See Johnson v. DeGrandy*, *supra* p. 12, at 1008; *Gingles*, *supra* p. 7, at 50 n.17; *West v. Clinton*, *supra* p. 31, at 807. Thus, a minority group that cannot prove that they are able to amass enough white crossover votes to carry their candidate of choice into office cannot meet this standard. *Gingles* makes plain that to determine whether minority voters possess

such ability to elect, a court must conduct a "searching practical evaluation of the 'past and present' reality" and use its "familiarity with the indigenous political reality" to conduct "an intensely local appraisal" of the likely impact of the challenged electoral plan. *Gingles*, *supra* p. 7, at 45, 79 (internal quotations omitted). Under this approach, as long as the facts and voting patterns in that jurisdiction show that the minority group has the potential to elect candidates of choice, the purpose behind the first *Gingles* factor to place "principled boundaries" on the scope of Section 2 claims is satisfied.[8]

Furthermore, plaintiffs must establish two other factors, and courts may easily reject marginal claims on these grounds. For example, a Section 2 claim that a completely politically cohesive black community presses in a district that is 90% white and 10% black would surely fail under the third *Gingles* factor. For a black preferred candidate to win an election, nearly half of the white population would have to vote with the black population. If such crossover voting existed, plaintiffs could not then prove significant racial bloc voting by whites

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[8] Once the claim progresses past discovery to summary judgment and/or trial, the plaintiffs would be required to advance proof of their allegations. Such proof is objective. An "ability to elect" claim is based on actual electoral outcomes. The size of the minority population and the amount of crossover votes necessary to be able to determine the election outcome can be specifically quantified. *See* Pildes, *supra* p. 13 at 1531-32, 1539-40 (discussing studies calculating the minimum levels of white crossover voting and minority population necessary for a non-majority minority to actually elect their candidate of choice in various Southern states).

since white votes would be fairly evenly divided between the white-preferred candidate and the black-preferred candidate. Thus the courts do not need a formalistic numerical cutoff under the first *Gingles* factor to eliminate frivolous claims.

In fact, allowing ability-to-elect claims "will hasten the time when race will not matter" in redistricting. *McNeil v. Legislative Appportionment Commission of State, supra* p. 35, 828 A.2d at 853. Two distinct and occasionally competing laws govern voting rights: the Voting Rights Act and the Equal Protection Clause. Under the Equal Protection Clause, aggrieved voters can challenge a legislature's districting decision if "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *See Miller v. Johnson*, 515 U.S. 900, 916 (1995); *see also Shaw v. Reno*, *supra* p. 10, at 649 (1993). If race is the dominant and controlling consideration, the redistricting plan will survive only if the use of race in districting decisions is narrowly tailored to achieve a compelling interest. *See Miller*, *supra* at 920. Contrasting with this principle is Section 2 of the Voting Rights Act which prohibits the implementation of districting plans that have a dilutive effect on racial minorities and Section 5 which prohibits the implementation of districting plans that are designed with a retrogressive purpose and that have a retrogressive effect on racial minorities. *See Reno v. Bossier*

Parish School Board, 520 U.S. 471, 477-79. Frequently it is necessary to take race into account to avoid violations of Section 2 and Section 5 of the Voting Rights Act.

If the creation or maintenance of districts based upon an ability-to-elect standard is understood to be in compliance with Section 2, then legislatures can use such districts to ensure compliance with both the Equal Protection Clause by not privileging race and the Voting Rights Act by preventing the vote dilution of minority groups.

In this way, ability-to-elect districts embody the ideal promoted in *Shaw*, namely of integrative, cross-racial political alliances. As Justice O'Connor wrote for the majority in that case, "we believe that reapportionment is one area in which appearances do matter." 509 U.S. at 647. Districting schemes that fixate on creating districts where blacks (or any other minority community) constitute an absolute majority bear "an uncomfortable resemblance to political apartheid." *Id.; cf. also Gratz v. Bollinger,* ___ U.S. ___, 123 S.Ct. 2411 (2003) (striking down a college admissions program under the Equal Protection Clause that assigned specific points to applicants based on race in a mechanistic, inflexible manner); *Grutter v. Bollinger,* ___ U.S. ___, 123 S.Ct. 2325 (2003) (upholding law school admissions program that took race into account in a flexible, case-specific manner in order to promote diversity and cross-racial understanding). Disfranchised Black

Voters seek to avoid the appearance of political apartheid by urging a flexible approach to Section 2 claims that examines the totality of the circumstances—in line with the clear mandate of the Voting Rights Act and *Gingles*—to determine whether or not protected groups have an "ability to elect" candidates of their choice in a particular district.

By contrast, the district court insists on a strict numerical cut-off for Section 2 claims and rests on the counter-factual premise that minority voters can only elect candidates of their choice when they constitute an absolute majority in an electoral district. This approach clearly contravenes the Supreme Court's insistence in *Shaw* and in the *Bollinger* cases on eschewing inflexible and mechanistic approaches to race based on ingrained stereotypes about how members of racial groups think and act. Moreover, we have already demonstrated how this approach fails to take account of the reality of the two-stage electoral process (*see supra* pp. 40-44), which allows minority voters in some circumstances, including Virginia's former Fourth Congressional District, to elect candidates of choice even though they constitute less than an absolute majority and even in the face of racially polarized voting. Finally, the district court's position is normatively unattractive. By holding that communities of color can only bring Section 2 claims when they constitute an absolute majority in a district, the court unwittingly

promotes a numerical obsession with race that inhibits the development of cross-racial political coalitions.

In short, the Voting Rights Act was designed to eradicate invidious discrimination from the electoral process. In harmony with this purpose, ability-to-elect districts may encourage the development and extension of voting coalitions between minority and majority groups and bring the United States closer to "the goal of a political system in which race no longer matters." *See Uno v. City of Holyoke, supra* p. 13, at 991 (quoting *Shaw*, 509 U.S. at 657). Thus, not only do ability-to-elect claims comport with the language and binding judicial interpretation of Section 2, they promote its fundamental goals as well. Unlike the mechanical, race-based approach of the Appellees, such claims recognize that "[t]he purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation into a society that is no longer fixated on race." *Georgia*, *supra* p. 8, at 2517.

I. All Disfranchised Black Voters Have Standing To Bring This Case

The constitutional standing requirement imposed under Article III ensures that prospective plaintiffs have a personal stake in the outcome of a case as opposed to merely a generalized or tangential grievance. *See Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 319 (4th Cir. 2002); *see also Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992). To establish standing to sue, a plaintiff must allege: (1) that he or she has suffered an "injury-in-fact"; (2) a causal connection between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan, supra* at 560-61; *Stasko*, *supra* p. 50, at 320. An injury-in-fact is an invasion of a legally protected interest that is concrete and particularized, and actual or imminent rather than conjectural or hypothetical. *See Stasko*, *supra* p. 50, at 320; *see also FEC v. Akins*, 524 U.S. 11, 22 (1998). The second factor ensures that it is likely the plaintiff's injury was caused by the challenged conduct of the defendant, and not by the independent actions of third parties not before the court. *Stasko*, *supra* p. 50, at 320. The redressability prong requires that it be likely, and not merely speculative, that a favorable decision from the court will remedy the plaintiff's injury. *Id.* In this case, Disfranchised Black Voters meet all three requirements and the district court erred in dismissing those who were moved out of the Fourth Congressional District by the new plan.

Disfranchised Black Voters have alleged sufficient facts to demonstrate standing to sue.[9] The district court erred in failing to distinguish how

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[9] While the Complaint does not allege facts unique to Disfranchised Black Voters Richard and Thomasina Pruitt, it is nonetheless sufficient because it alleges that all Disfranchised Black Voters are citizens and registered voters residing in the former or present Fourth Congressional District. Complaint ¶ 7. App. 11.

the standing analysis applies to Section 2 cases from how it applies in racial gerrymandering cases. Disfranchised Black Voters assert a claim under Section 2. No precedent exists for the notion that they must reside in the illustrative district in order to have standing to bring a Section 2 claim or that they must reside in any particular single-member district. The reason is clear. When Section 2 cases are brought challenging at-large elections systems, there are no single-member districts whatsoever. The district court's standing rule would mean that no voter has standing to bring a vote-dilution claim in an at-large system. Similarly, in all vote-dilution cases, whether in at-large or district settings, there is never a guarantee that the jurisdiction will adopt the plaintiffs' illustrative districting scheme at the remedy stage. Plaintiffs can never guarantee that they will ultimately reside in a majority-minority district. These results demonstrate the fallacy of the district court's holding.

Residence in the challenged district is not the only means of establishing standing in voting rights cases. Certainly a plaintiff in a vote-dilution case who lives outside of the challenged district, but who made up part of the minority voting group under the former district boundaries, may establish standing by alleging that she is part of a racial minority group and her individual vote was rendered less effective by the new districting plan. *See, e.g., Wilson v. Minor,*

220 F.3d 1297, 1303-04 (11th Cir. 2000); *Kaplan v. County of Sullivan*, 74 F.3d 398, 400 (2d Cir. 1996).

Under the correct standing analysis, Disfranchised Black Voters Curry, Garnes, McMillan, the Pruitts, and Speller have standing to sue because their allegations demonstrate a personal interest in the dispute and a particularized injury resulting from the implementation of the 2001 Redistricting Plan. They are blacks who were registered to vote in the Fourth Congressional District, as it existed prior to the implementation of the 2001 Redistricting Plan. Complaint ¶¶ 10, 12-16, App. 11-12. The 2001 Redistricting Plan packed all of them except Garnes into the Third Congressional District, where blacks have traditionally, as well as under the new plan, constituted a voting majority. *Id.* ¶ 10, 12, 13. The plan forced Garnes into the Fifth Congressional district, where blacks comprise a relatively insubstantial minority of the voting age population. *Id*. ¶ 14.

As a result, none of these Disfranchised Black Voters presently is able to exercise the amount of voting strength enjoyed under the prior redistricting plan. Although five of them were removed to a minority-majority district, their interests and the purposes of the Voting Rights Act are better served by the formation of two or more districts composed of a sufficiently large population of blacks voters who are able to elect candidates of their choice, with limited yet predicable

crossover voting, rather than by packing them into a single pre-existing minority-majority district.

This injury is not the generalized and abstract harm that fails to establish standing. Rather, each Disfranchised Black Voter has "a personal stake in the outcome" of this case since their personal voting strength was directly diluted by the 2001 Redistricting Plan. Their removal from the Fourth Congressional District also contributed to the overall injury of the dilution of the black voters remaining in the district.

Disfranchised Black Voters easily satisfy the remaining two factors. Since the 2001 Redistricting Plan shifted them from the Fourth Congressional District into adjoining districts, a causal connection exists between the dilution of their individual voting strength and the challenged redistricting plan. Furthermore, there is a substantial likelihood that their injury will be redressed by a favorable decision. Should they prevail on the merits, the legislature will be enjoined from utilizing the 2001 Redistricting Plan and will instead be forced to adopt a plan that comports with Section 2 and does not improperly dilute their vote. Accordingly, all named Disfranchised Black Voters have established standing to sue.

CONCLUSION

For the foregoing reasons and authorities, Disfranchised Black Voters urge this Court to reverse the judgment of the district court that vote dilution in

violation of Section 2 of the Voting Rights Act only occurs where black voters can demonstrate that they were a controlling majority of the voters in a single-member district, and that Disfranchised Black Voters who live outside the diluted district, as enacted, have no standing to challenge their removal from the district. The vote-dilution claim of each of them should be remanded for further proceedings.

REQUEST FOR ORAL ARGUMENT

Disfranchised Black Voters request an opportunity for oral argument in this case. Oral argument would be useful to the Court because this case raises an important issue under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, as amended, that this Court has not yet resolved.

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32

Pursuant to F.R.App.P. 32(a)(7)(C) we hereby certify that the foregoing brief is printed in a proportional typeface of 14 points and does not exceed 14,000 words, including footnotes and quotations, but excluding those items listed at F.R.App.P. 32(a)(7)(B)(iii). MS Word 2000 was used to prepare the brief and indicates that it contains 12,558 words.

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October 27, 2003

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2003, I served copies of Appellants Disfranchised Black Voters' Brief and the Joint Appendix on the following parties, by first-class mail, postage prepaid:

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