No. 03-2113

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOAN HALL, RICHARD PRUITT, THOMASINA PRUITT, VIVIAN CURRY, ELIJAH SHARP, EUNICE MCMILLAN, JAMES SPELLER, ROBBIE GARNES, and LESLIE SPEIGHT,

Plaintiffs-Appellants

v.

COMMONWEALTH OF VIRGINIA, and JEAN JENSEN, SECRETARY, STATE BOARD OF ELECTIONS in her official capacity,

Defendants-Appellees,

JERRY W. KILGORE, in his official capacity as Attorney General of the Commonwealth of Virginia,

Defendant-Intervenor-Appellee,

and

GARY THOMPSON, CHARLES BROWN, JAMES BROWN, JAMES ALFRED CAREY, EVELYN CHANDLER, CLIFTON E. HAYES, JR., QUENTIN E. HICKS, IRENE HURST, and WAYNE OSMORE,

Defendants-Intervenors-Appellees

On Appeal from the United States District Court
for the Eastern District of Virginia

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

Page

Page

STATUTES

Page

MISCELLANEOUS

STATEMENT OF ISSUES

1. Did the district court correctly hold that pursuant to *Thornburg v. Gingles*, 478 U.S. 30 (1986), plaintiffs bringing an action under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, must show that a minority racial group could constitute a majority in a potential district?

2. Did the district court correctly hold that plaintiffs who reside outside the district they challenge have no standing to bring an action under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973?

STATEMENT OF FACTS

Plaintiffs challenge the configuration of Virginia's Fourth Congressional District under the reapportionment plan enacted by the Virginia General Assembly and signed into law by the Governor based on the results of the 2000 census. As the Plaintiffs recognize, the configuration of the Fourth Congressional District is inextricably tied to that of the adjacent Third Congressional District. (J.A. 13-14; Compl. ¶¶ 20, 26.) Under the 2000 census, the former Third District had a black total population ("TPOP") of 57% and voting-age population ("VAP") of 53.3%, while the former Fourth District had a black TPOP of 39.4% and VAP of 37.8%. (J.A. 12; Compl. ¶ 17; J.A. 22-26, Virginia Division of Legislative Services ("DLS") Redistricting Website.[1]) Whereas the former Fourth Congressional

[1] The Complaint provides total population figures but not VAP figures. More important, although the population figures for the Fourth Congressional District and the Third Congressional

District was close to the ideal size for Virginia congressional districts under the 2000 census, the population of the former Third Congressional District was nearly 76,000 people, or nearly 12%, below the ideal district size. (*See* J.A. 12, Compl. ¶ 17; J.A. 22-26, Virginia DLS Website.) Accordingly, substantial reapportionment was necessary to comply with the Fourteenth Amendment's "one person, one vote" requirement.

To make up for its lost population, the Third Congressional District under the enacted plan includes residents of the former Fourth District. (J.A. 13; Compl. ¶ 20.) Under the enacted plan, the Third District has a black TPOP of 56.8% and a VAP of 53.2%, both of which are nearly identical to the figures in the "benchmark" plan—i.e., the former Third District under the results of the 2000 census. (J.A. 27-30, Virginia DLS Website.[2]) As in the benchmark plan, the Fourth District in the enacted plan is minority black, with a TPOP of 33.6% and a VAP of 32.3%. (J.A. 12-13, Compl. ¶ 17; J.A. 27-30, Virginia DLS Website.)

(continued…)

District are interdependent, the Complaint provides data for the former but not the latter. The missing information is publicly available on the official redistricting website of the Virginia Division of Legislative Services *at* http://dlsgis.state.va.us/congress/congressPlanDir.htm. (A printout from the website, showing the data for the former districts, is included in the Joint Appendix at pages 22-26.) Because this information is material, indisputable, and judicially noticeable, this Court may properly consider it in reviewing the district court's grant of the motion to dismiss. *See Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986) ("Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record . . . .").

[2] A printout from the website, showing the data for current Congressional Districts in Virginia under 2000 census numbers, is included in the Joint Appendix at pages 31-34.

The Department of Justice precleared the enacted plan pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which requires a showing that the enacted plan does not reduce minority voting strength as compared to the pre-existing plan. (J.A. 17; Compl. ¶ 37.)

The Plaintiffs' central claim is that the Voting Rights Act required the Fourth Congressional District to be drawn with a black population of roughly 40%, which is well short of a majority and only about six percentage points higher than the enacted plan. (J.A. 9-10, 12-13; Compl. ¶¶ 2, 17-19.) Under the prior plan, a black candidate, Louise Lucas, ran a competitive race in 2001 and received about 48% of the vote under unusually challenging conditions. (J.A. 14; Compl. ¶ 24.) A white Democratic candidate would receive even more support, including more financial support, from Democrats than Ms. Lucas received in 2001. (J.A. 15; Compl. ¶ 30.) There is no allegation that white Democrats would not often win in the challenged district.

Plaintiffs also do not allege that it is possible for both the Third and Fourth Districts to be compact, majority-black districts. On the contrary, the Complaint demonstrates that, to draw the Fourth District with even a 40% black population, it is necessary to imperil the majority-black status of the neighboring Third Congressional District.[3] Under "Congressional Plan 188," the Fourth District

[3] The Complaint also does not allege that the alternative districts are geographically compact.

would have a 40.4% black TPOP and a 38.3% black VAP, while the Third District's black percentages would be reduced to 53.2% TPOP and 49.6% VAP. (J.A. 16, Compl. ¶ 33; J.A. 31-34, Virginia DLS Website.[4]) Similarly, the black percentages under the "Deeds Plan" would be 40.3% TPOP and 38.5% VAP in the Fourth District, and 52.5% TPOP and 48.8% VAP in the Third District. (J.A. 35-38.[5]) The Complaint identifies one alternative, the "Maxwell-Crittenden Plan," that creates a bare black majority in District 4 (52.8% TPOP and 50.3% VAP), but the same plan transforms District 3 into a *minority*-black district (48.9% TPOP and 45.3% VAP). (J.A. 39-42.[6])

SUMMARY OF ARGUMENT

As a matter of law, Plaintiffs' challenge here is facially deficient because it is premised on the notion that the Voting Rights Act requires maximizing the electoral success of a political coalition of black and white voters, rather than protecting a potential black majority against submergence into a majority-white district where it constitutes an ineffective minority. Indeed, under Plaintiffs' theory, the Voting Rights Act requires dismantling the first and only majority-black congressional district in the history of Virginia—District 3—in order to

[4] A printout from the website, showing the data for "Congressional Plan 188," is included in the Joint Appendix at pages 31-34.

[5] A printout from the website, showing the data for the "Deeds Plan," is included in the Joint Appendix at pages 35-38.

[6] A printout from the website, showing the data for the "Maxwell-Crittenden Plan," is included in the Joint Appendix at pages 39-42.

increase the black percentage in adjacent District 4 to approximately 40%, the point at which a black candidate allegedly can be elected by attracting white "crossover" supporters. In *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003), however, the Supreme Court authorized state legislatures—not the federal judiciary—to make such "political choice[s]" between "one theory of effective representation [and another]." *Id.* at 2512. Under *Georgia*, federal courts may not require states to preserve existing majority-minority districts where minorities can elect their preferred candidates, because the Voting Rights Act leaves this "political choice" to legislatures. *See id.* *A fortiori*, federal courts cannot dictate the creation or preservation of "influence" districts on the theory that section 2 mandates that *any* cognizable group of minority voters must always be able to elect a candidate of choice.

Indeed, the Voting Rights Act does not mandate that redistricting plans be designed to maximize the electoral success of black or black-preferred candidates. Rather, it guarantees only an *equal* opportunity for minority *voters*. This equal opportunity may be denied when a compact black community is split into two ineffective minorities in adjacent districts, rather than preserved as an effective majority in one. But no such injury is possible where, as here, the relevant black population is not sufficiently numerous or compact to constitute a majority in a district. In such circumstances, the black community's submergence in a majority-

white district is not caused by any aspect of the redistricting plan or any decision by the legislature; it is, rather, "simply an unavoidable mathematical consequence of the demographics" constraining all redistricting plans. *McGhee v. Granville County*, 860 F.2d 110, 118-19 (4th Cir. 1988). Since the redistricting plan did not cause black voters to constitute less than a majority and since, in a two-party democratic system, only a majority has the power to elect its candidate, a redistricting plan does not deny black voters the ability "to elect" unless it has deprived them of potential majority status. 42 U.S.C. § 1973(b). Where black voters do not possess this potential majority status, the only "deprivation" allegedly or possibly caused by the redistricting plan is the inability to influence the election of a minority-preferred candidate by forming a winning coalition with sympathetic white, "crossover" voters. (*See* J.A. 14, 16; Compl. ¶¶ 25, 33.) This alleged political "harm," however, is not a cognizable deprivation under the Voting Rights Act because the Act does not protect minority voters' ability to "influence" elections; does not protect multi-racial *political* coalitions against vote dilution; and otherwise does not require redistricting plans to maximize minority-preferred candidates' potential electoral success in every district where minority voters constitute a cognizable presence.

For these reasons, the Supreme Court established, in the seminal case of *Thornburg v. Gingles*, 478 U.S. 30 (1986), that minorities must be able to

constitute a majority in a compact, single-member district in order to allege vote dilution under Section 2, and the overwhelming majority of federal courts have subsequently rejected any Section 2 dilution claim brought by minority voters constituting less than a potential majority. More generally, this Court has repeatedly made clear that the standard for determining whether a minority group's voting power has been diluted is whether they have been denied majority status in a district, not whether they have been denied the percentage they allegedly need to elect a minority candidate through a combination of minority and "crossover" votes. All of these Supreme Court and lower federal court decisions recognized that a black-preferred candidate *could* win in a majority-white district with the aid of white "crossover" voting, but nevertheless expressly held that Section 2 does not create any *right* to have districts designed to ensure that such a potential bi-racial coalition usually wins. Consequently, Plaintiffs' repeated belaboring of the obvious—that courts and commentators have frequently recognized that minority-preferred candidates *can* be elected when minorities comprise a minority of the population—is utterly beside the point and lends no support to their radical assertion that bi-racial coalitions supporting minority candidates have a statutory *entitlement* to districts in which their potential political coalition will usually win.

ARGUMENT

I. Standard of Review

This Court reviews a district court's grant of a motion to dismiss *de novo*. *See, e.g.*, *Korb v. Lehman*, 919 F.2d 243, 246 (4th Cir. 1990). In deciding a Rule 12(b)(6) motion, the Court may consider the well-pleaded facts stated in the complaint, which are taken as true, *see, e.g.*, *Franks v. Ross*, 313 F.3d 184, 192 (4th Cir. 2002), as well as matters subject to judicial notice, *see, e.g.*, *Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986) (judicial notice appropriate on motion to dismiss). "[T]he Court need not accept as true mere legal conclusions couched as factual allegations." *Assa'Ad-Faltas v. Commonwealth of Virginia*, 738 F. Supp. 982, 985 (E.D. Va. 1989). Nor must the Court "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002). The grant of a motion to dismiss for failure to state a claim upon which relief can be granted should be affirmed if it is clear that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *See, e.g.*, *Franks*, 313 F.3d at 192.

II. The Plaintiffs' Section 2 Claim Fails Because They Cannot Show that a Minority Racial Group Could Constitute a Majority in Virginia's Fourth Congressional District.

Under Section 2 of the Voting Rights Act, a challenged voting practice is unlawful if it abridges the right to vote "on account of race or color" by causing a

"protected" "class of citizens" to "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).

Here, the challenged redistricting plan has one majority-black district—District 3—and Plaintiffs do not and cannot allege that it is possible to create two majority-black districts, much less two *compact* majority-black districts. Thus, the alleged Section 2 violation is not that the redistricting plan "dilutes [minority] votes by submerging them in a white majority" district, in the face of a feasible alternative under which majority-black districts could be created in Districts 3 and 4. *Gingles*, 478 U.S. at 46. Rather, the alleged Section 2 violation is that the inevitable white majority in District 4 is too large a majority: Section 2 allegedly requires a black population of approximately 40%, rather than 34%, because it is only at 40% that black voters can form a winning coalition with white "crossover" voters to elect Ms. Louise Lucas, or a similarly situated black candidate. (J.A. 14; Compl. ¶ 25.) This increase to 40% is to be accomplished by transferring black voters from District 3, with the result that this black majority district will be converted to one where blacks constitute a minority of the voting-age population.[7]

[7] While the Supreme Court has not directly addressed "which characteristic of minority populations . . . ought to be the touchstone for proving a dilution claim," *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994), voting-age population is the only measure consistent with the Voting Rights Act. As the Eleventh Circuit has explained, this is because "[i]n order to elect a representative or have a meaningful potential to do so, a minority group must be composed of a sufficient number of voters or of those who can readily become voters through the simple step of registering to vote." *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997). *See also Barnett v. City of Chicago*, 141 F.3d 699, 704-05 (7th Cir. 1998); *LULAC v. Clements*, 986 F.2d 728, 743 (5th Cir.

Plaintiffs fail to state a cognizable claim under Section 2 of the Voting Rights Act. Section 2 vote dilution is potentially established only where a redistricting plan splits (or fails to unite) a minority group that is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. It is legally insufficient to allege, as Plaintiffs do here, that the redistricting plan fails to create a more robust minority population, which allegedly would be sufficient to elect a minority-preferred candidate through a combination of black and white voting support. The seminal *Gingles* case makes this clear.

In *Gingles*, the Supreme Court established three "*necessary preconditions*" for a claim under Section 2: (1) a minority racial group must be sufficiently large and geographically compact to constitute a *majority* in a single-member district; (2) the group must be politically cohesive; and (3) bloc voting by a white majority must usually defeat the minority group's preferred candidate. *Id.* at 50-51.[8]

(continued…)

1993); *Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 503 (7th Cir. 1991); *Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989); *Montano v. Suffolk County Leg.*, 268 F. Supp. 2d 243, 263 (E.D.N.Y. 2003); *McDaniel v. Mehfoud*, 708 F. Supp. 754, 755 (E.D. Va. 1989) (majority determined by voting-age population rather than total population).

Here, as noted, two of the allegedly nondiscriminatory alternatives would increase the black VAP in District 4 to slightly over 38%, and decrease the black VAP in District 3 to approximately 49%. A third alternative would reduce District 3's black VAP to 45.3%. Thus, no alternative would provide a majority-black district for both Districts 3 and 4.

[8] If these preconditions are met, "the trial court is to consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters." *Id.* at 79 (internal citations and quotation marks omitted); *see also De Grandy*, 512 U.S. at 1011 ("But if *Gingles* so clearly identified the three

Although *Gingles* involved multi-member districts, its preconditions apply to challenges to single-member plans, *Growe v. Emison*, 507 U.S. 25, 40 (1993), and are necessary prerequisites to all Section 2 vote dilution challenges. *See, e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994); *Voinovich v. Quitter*, 507 U.S. 146, 157-58 (1993); *McGhee*, 860 F.2d at 116-17. Thus, the very first "precondition" for a vote dilution challenge under Section 2 is that the relevant minority group be sufficiently numerous and compact to constitute a majority in a single-member district. Since Plaintiffs have not alleged that the black community in the relevant area could constitute a majority in an additional single-member district, the district court's dismissal of their complaint under *Gingles* should be affirmed.

To be sure, the *Gingles* Court expressly held only that the three mandatory preconditions applied where "plaintiffs alleged . . . that their ability *to elect* the representatives of their choice was impaired" by the challenged redistricting plan. *Gingles*, 478 U.S. at 46 n.12 (emphasis in original). It reserved the question of whether Section 2 permits a claim by a group not sufficiently large and compact to constitute a majority if the plaintiffs alleged that the challenged district "impairs its

(continued…)

[preconditions] as generally necessary to prove a [vote dilution] claim, it just as clearly declined to hold them sufficient in combination, either in the sense that a court's examination of relevant circumstances was complete once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution.").

ability *to influence* elections." *Id.* (emphasis in original). This is no aid to Plaintiffs here, however, for two separate reasons.

First, as in *Gingles*, Plaintiffs' Complaint here plainly *does* allege that "their ability *to elect* representatives of their choice was impaired by" the configuration of District 4. (J.A. 10, 14, 16-18; Compl. ¶¶ 3, 4, 25, 26, 32, 37, 38, 39.) Accordingly, *Gingles*' "majority-in-a-district" requirement unambiguously applies with full force. Moreover, in an apparent effort to avoid the avalanche of lower federal court precedent rejecting "influence" claims, Plaintiffs' brief repeatedly emphasizes that they are asserting that their proposed alternative district will empower minority voters *to elect* their preferred candidate. (*See, e.g.*, Appellants' Brief ("Pls.' Br."). at 14, 25-32). This deliberate decision to so frame their claim—in a feeble effort to avoid contrary lower court precedent—brings them squarely within *Gingles*' clear holding. Plaintiffs' mystifying assertion that "*Gingles* left open the possibility that a minority group could bring an 'ability-to-elect' claim under Section 2" (*see* Pls.' Br. at 25), is belied by the plain language of Justice Brennan's *Gingles* opinion. It is quite impossible that plaintiffs claiming an "ability to elect"—which falls within the express holding of *Gingles*—are in a better position with respect to the *Gingles* preconditions than plaintiffs claiming an ability to influence, a question that the *Gingles* Court reserved. Yet Plaintiffs'

proffered distinction between influence and ability-to-elect claims seeks to turn *Gingles* on its head in precisely this way.

In any event, lower federal courts have overwhelmingly rejected all forms of Section 2 claims where minorities cannot form a compact majority, however the claim is labeled. *See infra*, pp. 40-44. Accordingly, since Plaintiffs do not allege that blacks could constitute an additional compact district majority, they do not state a viable Section 2 claim, regardless of whether the redistricting plan allegedly impairs their ability to elect, or to influence the election of, their preferred candidate. The reasons for this "majority-in-a-district" rule are straightforward and set forth both in *Gingles* and in subsequent cases.

A. A Group that Is a Numerical Minority in a District Has No Ability to Elect Its Preferred Representative.

The "majority-in-a-district" requirement is mandated by the language of Section 2. Under that statute, it must be "shown" that a "protected" "class of citizens" has "*less* opportunity" "*to elect* representatives of *their* choice." 42 U.S.C. § 1973(b) (emphasis added). Of course, a redistricting plan can *deny* minority plaintiffs the ability "to elect" only if the minority group would possess the ability to elect in the absence of the challenged plan. Since only a majority can elect, the minority group needs to show that it is a potential majority. Otherwise, a redistricting plan "cannot be responsible for minority voters' inability to elect its candidates." *Gingles*, 478 U.S. at 50; *see Smith v. Brunswick Cty.*, 984 F.2d 1393,

1399 (4th Cir. 1993) ("If . . . no such majority single-member district would be feasible, than the protected class could *never* argue that a multi-member [majority-white] configuration denied its members an equal opportunity to vote.") (emphasis added); *McGhee*, 860 F.2d at 116.

Thus, as the *Gingles* Court cogently explained, the "reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 51 n.17 (emphasis in original); *see also Growe*, 507 U.S. at 40 ("The 'geographically compact majority' and 'minority political cohesion' showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district."). The "majority-in-a-district" standard, then, reflects basic causation principles and "would only protect racial minority votes from *diminution* proximately *caused* by the districting plan." *Gingles*, 478 U.S. at 51 n.17 (emphasis added); *see Cano v. Davis*, 211 F. Supp. 2d 1208, 1231 (C.D. Cal. 2002) ("That is, unless the minority group can establish that an effective majority-minority district can be created, a vote dilution claim is not cognizable because there is no minority voting power to dilute."), *aff'd*, 123 S. Ct. 851 (2003).

Plaintiffs attempt to circumvent this problem by alleging that "African-American voters would have the opportunity to elect a candidate of their choice with some white cross-over votes in a district that is approximately 40% or greater African-American in population." (J.A. 14; Compl. ¶ 25.) But this is simply an allegation that a black-preferred *candidate* can *be elected* through a bi-racial coalition of black and white voters, as is the case in many districts where blacks are a minority. It does not mean that black *voters* have the ability "*to elect*," since their ability to elect their preferred candidate is totally dependent on a coalition with white voters. In such circumstances, the minority group plainly does not have "the potential to elect a representative of its *own* choice in some single-member districts." *Growe*, 507 U.S. at 40 (emphasis added). *Gingles* itself makes this crystal clear: "[I]f . . . the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters *cannot* maintain that they would have been able to elect representatives of their choice in the absence of [the challenged plan]." 478 U.S. at 51 n.17 (emphasis added). If the potential "to elect" under Section 2 included the potential to elect in *combination* with *other* groups, *Gingles* would not have said that a group constituting a substantial minority of a district is unable to "elect" their preferred representative.

1. Plaintiffs nonetheless assert that *Gingles*' explicit "majority" requirement was inadvertently based on a mistaken factual premise that the Supreme Court did not recognize until its recent *Georgia* opinion: namely, that blacks constituting a minority *can* elect their preferred candidate with the aid of sufficient white "crossover" votes for that candidate. Justice Brennan was allegedly oblivious to this political reality, and thus his *Gingles* opinion mistakenly required that blacks constitute a majority in order to claim that their ability to elect has been diluted by a redistricting scheme. (*See* Pls.' Br. at 24-35.) Now that the Supreme Court has finally realized that blacks constituting a minority can be part of a victorious, bi-racial political coalition, Section 2 should be expanded to require the creation of any such district where there is a cognizable group of minorities, rather than remaining a simple prohibition against submerging a compact black community (that could constitute a majority) into a majority-white district.

The fundamental flaw in Plaintiffs' syllogism, however, is that it was blazingly obvious to the *Gingles* Court (and to the Supreme Court in numerous pre-*Georgia* opinions) that a coalition of "cohesive" blacks and white "crossover" voters could elect a black-preferred black candidate when blacks constitute a minority of the electorate. The reason that *Gingles* nevertheless required that blacks constitute a potential majority in the face of this obvious reality is precisely

because minority voters have no *right* under Section 2 to have districts arranged so that the political coalition they support will usually win.

First, Justice Brennan obviously understood that minority candidates could be elected in majority-white districts since that is how he defined districts where there was no legally significantly racial bloc voting under the third *Gingles* prong and since at least one of the districts in *Gingles* had consistently elected a black candidate even though blacks constituted only 36.3% of the population. *See Gingles*, 478 U.S. at 76, 75 n.35. *See also De Grandy*, 512 U.S. at 1020 ("[T]here are communities in which minority citizens are able to form political coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice."). *Gingles* nevertheless makes clear that coalitional districts are not required, because, as Justice Brennan emphasized, a Section 2 "violation is established if it can be shown that members of a protected minority group 'have less opportunity than other members of the electorate to . . . elect representatives of *their* choice,'" which minorities cannot do in coalition districts where they are dependent on white voters. 478 U.S. at 67 (quoting Section 2(d)) (emphasis in original). In contrast, extending Section 2 to protect a bi-racial political coalition where minorities are a minority does not protect against *minority* vote *dilution* or a denial of *equal* opportunity, but grants to minorities a preferential right—enjoyed by no other

group—to have their political coalition elect their preferred candidate, at least up to the point of proportionality. Thus, as Justice Brennan also emphasized, the "reason" that Section 2 authorizes vote dilution claims only "in districts in which members of a racial minority would constitute a majority of the voters" is to ensure that Section 2 will "only protect racial minority votes from diminution proximately caused by the districting plan; [but] *would not assure racial minorities proportional representation*." *Id.* at 50 n.17 (emphasis in original).

In short, *Gingles* required that blacks constitute a potential majority not because the Court was under the delusion that black-preferred candidates could only be elected in such districts, but because it recognized that populations that can only constitute a minority have no *right* to "representation" or "proportional representation," since it is a basic precept of our democracy that "voting minorities lose." *Nixon v. Kent County*, 76 F.3d 1381, 1392 (6th Cir. 1996) (internal citations omitted). Indeed, binding precedent of this Court has already held that the purpose of the first *Gingles* precondition was to put "principled bounds upon the vote dilution concept," to avoid converting it into a preferential right for minorities to enjoy representation when no other groups would. *McGhee*, 860 F.2d at 117. As the *McGhee* Court presciently noted, as if in anticipation of Plaintiffs' claim here, if the vote dilution concept were left "unbounded, it could be applied to find 'dilution' of a minority group's voting power in any situation where the group had

been unable, despite effort, to achieve representation by the election of candidates of its choice in proportion to its percentage of the total voting age constituency." *Id.* at 116. "Of particular importance to our analysis, the [*Gingles*] Court noted that the 'size and compactness' requirement confines dilution claims to situations where diminution of voting power is 'proximately caused by the districting plan,' and thus '*would not assure racial minorities proportional representation.*'" *Id.* at 117 (quoting *Gingles*, 478 U.S. at 51 n.17).

Applying this requirement, the *McGhee* Court expressly stated that it "agree[d] with Judge Cudahy's recent observation that the *Gingles* Court's careful efforts to contain the vote dilution concept and claims based upon it within principled bounds necessarily involved a deliberate trade-off which *precludes* some small and unconcentrated minority groups from attempting to rectify vote dilution." *Id.* at 119 (quoting *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942 (7th Cir. 1988)) (emphasis added) (internal quotation marks omitted). As the *McGhee* Court noted, *McNeil* had correctly interpreted *Gingles'* first prong as a limitation on the "problems presented by [the] theoretically open-ended nature" of vote dilution concepts, by imposing the "special requirement" of having "minimum size and characteristics of a racial minority group that could be considered an 'effective voting majority,' both for purposes of finding that 'dilution' of such a group's potential voting power existed and for then devising an appropriate

districting remedy." *Id.* at 116, (quoting *McNeil*, 851 F.2d at 944-45). Specifically, in the passage relied upon in *McGhee*, the *McNeil* Court squarely held that "minorities not large and concentrated enough to comprise a majority in a single-member district and therefore unable to sustain a Section 2 claim under *Gingles* may nonetheless 'possess the potential' to elect candidates of their choice in a single-member district with the help of a sizeable and long-standing white cross-over vote." *McNeil*, 851 F.2d at 942. Of course, this is precisely the claim brought by Plaintiffs here. Thus, this Court has already squarely held that the *Gingles* "majority in a district" requirement is explicitly designed to avoid granting Section 2 plaintiffs a "vote dilution" claim simply because they cannot elect their chosen candidate when they are not a potential majority.[9]

2. Contrary to Plaintiffs' assertion, so cabining Section 2 claims is *required* by the explicit language of the statute, as well as *Gingles*. (*See* Pls.' Br. at 20-23.[10]) Under the statute, Plaintiffs must show that the challenged districting

[9] *McGhee* dealt specifically with a proposed single-member remedy to an at-large system which provided black voters one or two districts of a seven-person board (14% to 28%) in a county where blacks constituted 40% of the voting-age population, thus leading the district court to abandon the single-member proposal in preference to a "limited voting" alternative. *McGhee*, 860 F.2d at 112-15. Thus, the specific holding in *McGhee* concerns permissible *remedies* for Section 2 violations. But, as its extensive discussion of the *Gingles* preconditions makes clear, the Court in essence decided a Section 2 liability question because, as the Court put it, "implicit in the *Gingles* Court's analysis of the nature of Section 2 vote dilution claims is the notion that, so far as those claims are concerned, right and remedy are inexplicably bound together, for to prove vote dilution by districting one must prove the specific way in which dilution may be remedy by redistricting." *Id.* at 120 (citing *McNeil*, 851 F.2d at 942 ("Courts' approach . . . focusing up front on whether there is an effective remedy for the claimed injury . . . reins in the almost unbridled discretion that Section 2 gives courts.")).

[10] Of course, *none* of the *Gingles* preconditions is explicit in the language of Section 2, which makes no reference to racially polarized voting or the like. The first *Gingles* precondition, however,

plan results in minorities suffering a disadvantage, relative to nonminorities, "on account of race or color." 42 U.S.C. § 1973(a). Thus, "a violation of" Section 2 is established only if "the political processes leading nomination or election . . . are not *equally* open to participation by [minorities]." *Id.* § 1973(b). Relatedly, the Act is violated only if minorities "have *less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice'." *Id.* Depriving minorities of the ability to form a winning coalition does not "result" in vote dilution "on account of *race*" and does not mean that minorities have "*less* opportunity than other members of the electorate . . . to elect representatives of their choice." 42 U.S.C. § 1973(b). Bi-racial coalitions are not defined by "race" and are not protected by the Voting Rights Act; racial groups are. Blacks are not provided with "less opportunity than other members of the electorate" if they are unable to form a winning coalition because no racial group (or group defined by any other characteristic) has a right to form a winning coalition. To the contrary, they would be in precisely the same position as all groups constituting a minority of the population: their ability to elect their preferred candidate will be frustrated unless they are able to persuade the majority of the relative merits of their candidate. Granting minorities a right to rearrange

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faithfully applies the statutory text, for the reasons set forth above. In any event, lower courts are not authorized to set aside binding Supreme Court precedent based upon second-guessing of the Supreme

districts so that their political coalition will usually win has nothing to do with equal opportunity, but is preferential treatment afforded to no others. *See De Grandy*, 512 U.S. at 1020 ("[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground" to elect their preferred representatives).

In addition, the *Gingles* "majority-in-a-district" requirement reflects the only understanding of "to elect" that is consistent with the rest of the language of Section 2. An electoral device is illegal only if it deprives a "class of citizens protected by subsection (a)"—*i.e.*, a racial or language minority group—of the ability to elect. 42 U.S.C. § 1973(b). That being so, the only appropriate focus for determining whether a "class" has the power to elect is a focus on *that* class of citizens. It is not appropriate to look at that class, *plus* an additional group of citizens from different racial or ethnic groups, that happen to share the political preferences of the minority voters. *See Nixon*, 76 F.3d at 1392 (biracial coalition that loses elections is "indistinguishable from political minorities as opposed to racial minorities").

Also contrary to Plaintiffs' assertion, far from endorsing any such construction of Section 2, Justice O'Connor's concurring opinion in *Gingles* made

(continued…)

Court's faithfulness to statutory text.

it clear that she believed that the *Gingles* preconditions, even *with* the majority-in-a-district requirement, impermissibly established a test for "a vote dilution claim [that would] create an entitlement to roughly proportional representation within the framework of single-member districts." 478 U.S. at 89 n.1, 93 (O'Connor, J. concurring). *See id.* at 94, 99 ("The court should *not* focus solely on the minority groups' ability to elect representatives of its choice" because such a test "come[s] closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2."). With respect to the majority-in-a-district requirement specifically, Justice O'Connor "express[ed] no view" as to whether this holding was correct, given her larger concerns about the manner in which the *Gingles* framework came close to mandating proportional representation. *Id.* at 89 n.1.

3. In addition, there is a separate reason that the Court should reject Plaintiffs' effort to erroneously conflate the issue of whether blacks constitute a potential numerical majority with the entirely distinct question of whether a bi-racial coalition of blacks and "crossover" whites can elect a black-preferred black candidate: Any such interpretation would render the first *Gingles* precondition an entirely superfluous subpart of the third *Gingles* precondition. In Plaintiffs' view of the first *Gingles* prong, if minorities bloc vote under the second *Gingles* prong, and whites bloc vote in sufficient numbers under the third *Gingles* prong to defeat

the minority-preferred candidate, Plaintiffs have established vote dilution sufficient to require increasing minority population to the point at which the minorities' preferred candidate could be elected in combination with white crossover voting. Thus, the only required vote dilution showing is that minority-preferred candidates lose because a sufficient number of the white majority votes against them. This, of course, is precisely the same showing that Plaintiffs would need to make under the third *Gingles* prong if the first *Gingles* precondition were entirely eliminated. Needless to say, common canons of construction preclude the Court from so rendering the first *Gingles* precondition entirely irrelevant by collapsing it into the third *Gingles* precondition.

In addition, binding Fourth Circuit precedent makes clear that whether blacks constitute a majority is an entirely different issue from whether voting by blacks and whites will be sufficient to elect a black-preferred candidate. In *Smith v. Brunswick County*, 984 F.2d 1393 (4th Cir. 1993), it was argued that majority-black districts diluted minority voting power because the black percentages were insufficient to elect minority-preferred candidates, since "whites in Brunswick County vote monolithically and . . . 20% of the blacks cross over and join the whites," thereby resulting in defeat of candidates preferred by 80% of minority voters. *Id.* at 1400. The Court, however, emphasized that whether the minority vote was diluted turned on whether they constituted a majority in the district, not

whether black-preferred candidates would be elected in the face of white bloc voting. As the Court put it, "[a]lthough the [plaintiffs'] theory may have some inherent logic if election outcomes are the goal, it finds no support in the law." *Id.* Indeed, this Court emphasized that it "violates both the letter and spirit of the Voting Rights Act by resolving discrimination issues on the basis of whether members of the protected group are elected." *Id.* As the Court noted, "judicial inquiry into the electoral success of black candidates begins an inappropriate process of affirmatively establishing quotas to assure results and concomitantly denying other classes of persons equal access to the political system." *Id.* at 1402. Consequently, the "district court erred in . . . requiring further adjustments [to the districting plan] to increase the chances of actual success by blacks at the polls." *Id.* Again, then, the Fourth Circuit has already made clear that equating black voters' inability to elect preferred candidates with illegal "vote dilution" impermissibly converts Section 2 from a guarantee of equal opportunity into a guarantee that minority voters will enjoy a certain level of success in "election outcomes."

4. Finally, in attempting to escape the mandatory first *Gingles* precondition, Plaintiffs mischaracterize subsequent Supreme Court cases that have interpreted *Gingles*. For example, Plaintiffs state that *De Grandy* "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 the candidates of its choice.'" (Pls.' Br. at 30 (quoting 512 U.S. at 1007)). Contrary to Plaintiffs' suggestion, this is fully consistent with the *Gingles* holding that the minority population must constitute a distinct majority in order to be "sufficiently large . . . to elect the candidates of its choice." *Gingles* itself expressly stated as much, i.e., that a smaller group "cannot" claim an ability to elect. 478 U.S. at 50 n.17.[11] And in the same Term that it decided *De Grandy*, the Court confirmed that a district majority is "needed to establish that the minority has the potential to elect a representative of its *own* choice." *Growe*, 507 U.S. at 40 (emphasis added). There is also no merit to Plaintiffs' claim that application of the majority requirement "conflict[s] with the Supreme Court's clear mandate that the *Gingles* factors not 'be applied mechanically and without regard to the nature of the claim.'" (*See* Pls.' Br. at 39 (quoting *Voinovich*, 507 U.S. at 158)). *Voinovich* held only that the majority requirement "would have to be modified or eliminated" *if* an influence claim were held cognizable—which the Court expressly declined to do on that and repeated other occasions. 507 U.S. at 158. These

[11] Indeed, while Plaintiffs rely on footnote 21 of Justice Stevens' dissent in *Shaw v. Hunt*, 517 U.S. 899 (1996), *see* Pl.' Br. at 26-27, they ignore the dispositive portion of the text, in which Justice Stevens explained that "*Johnson v. De Grandy* expressly states that, at least in the context of single-member districting plans, a plaintiff cannot make out a prima facie case of vote dilution under § 2 unless he can demonstrate that his proposed map contains more *majority-minority* districts than the State's." *Shaw*, 517 U.S. at 946 (Stevens, J., dissenting) (emphasis in original). As Justice Stevens recognized, *De Grandy* reaffirmed the first *Gingles* precondition.

nominal reservations of the issue do not overcome the lower courts' overwhelming rejection of influence claims. *See infra*, pp. 40-44.

B. *Georgia v. Ashcroft* Forecloses Influence Claims

The "enhanced" opportunity requested by Plaintiffs in District 4 can be attained only by shifting black voters *out* of the majority-black Third Congressional District.[12] Thus, under Plaintiffs' idiosyncratic view, Section 2 *requires* the conversion of Virginia's first majority-black district into a minority black district, in order to increase District 4's black population to 40%. In other words, Section 2 purportedly mandates the creation of two minority black districts where black voters, by definition, are *dependent* upon white crossover voting to elect their preferred candidates, even at the expense of sacrificing a black majority district where no such dependence is required.

Georgia v. Ashcroft, 123 S. Ct. 2498 (2003), forecloses such an intrusive judicial role in enforcing the Voting Rights Act and reaffirms that the Act does not require the creation of influence districts or the reduction of the black population in

[12] Plaintiffs are careful not to disavow their explicit concession to the district court that increasing the black population in District 4 by 6% or 7% would convert adjacent District 3, which currently has a black VAP of 53.2%, into a district where blacks constitute a *minority* of the voting-age population. They state, instead, that the reduction in black population in District 3 would not "prevent black voters in the Third Congressional District from continuing to have the ability to elect candidates of their choice." (Pls.' Br. at 16.) Of course, Plaintiffs believe that black voters do not need a majority to elect their chosen candidates, so this assertion in no way negates the concession that District 3 would be converted into a minority-black VAP district. As noted, all of the proposed alternatives in Plaintiffs' complaint would result in blacks constituting a minority of District 3's VAP. *See supra* n.7. In any event, *Georgia* could not have been clearer that this "choice" between a "safe" majority-black district or two less-safe districts is the province of the state legislature, not the judiciary. See *Georgia*, 123 S. Ct. at 2512.

District 3. *Georgia* authorized state legislatures, even under the stringent requirements of section 5 of the Voting Rights Act, to *voluntarily* create influence districts in place of majority-minority districts—thus substantially *enhancing* state legislative autonomy to redistrict free from federal judicial interference. Although section 5, unlike section 2, bluntly "insures" preservation of "current minority voting strength," states are nevertheless free to *reduce* the number of majority-minority districts, creating "fewer minority representatives" and more districts where "minority voters may not be able to elect a candidate of choice." *See id.* at 2502, 2510. Such redistricting decisions, the Supreme Court explained, constitute a "political choice," and state legislatures, not the federal judiciary, are the entities empowered in a democratic society to "choose one theory of effective representation over the other." *Id.* at 2502, 2510, 2512, 2513. The Court held:

> In order to maximize the electoral success of a minority group, a State may choose to create a certain number of "safe" districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. *See Thornburg v. Gingles*, 478 U.S. at 48-49, (O'Connor, J., concurring in judgment). Alternatively, a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice. *See id.*, at 88-89, (O'Connor, J., concurring in judgment); cf. Pildes, *Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517 (2002). Section 5 does not dictate that a State must pick one of these methods of redistricting over another.

Id. at 2511-12.

Georgia is thus fatal to the Plaintiffs' claims. Since it is now clear that, even under the blunt commands of section 5, federal courts may not require states to preserve existing majority-minority districts where minorities can elect their preferred candidates, because the Voting Rights Act leaves such a political choice to legislatures, *a fortiori* federal courts cannot dictate the preservation or creation of *influence* districts, on the theory that section 2 mandates that *any* cognizable group of minority voters must *always* be able to elect a candidate of choice.

Plaintiffs correctly note that, under *Georgia*, states are *free* under Section 5 to choose influence or coalitional districts over majority-minority districts. That influence and coalitional districts are *permissible*, however, in no way suggests that state legislatures are *required* to create such districts under the Voting Rights Act.

Plaintiffs make the bizarre assertion that since states may point to influence districts to establish non-retrogression of minority voting strength under Section 5, or as an affirmative defense to statewide Section 2 claims of vote dilution, it somehow follows that Section 2 *requires* creation of influence districts. But the fact that a state need not blindly create majority-minority districts, but may choose less-than-majority districts if sufficient to empower minority voters, hardly suggests that federal courts may require such influence districts in *addition to* the majority-minority district(s) the state has created. Indeed, any such rule would fly

in the face of the "political choice" entrusted to the states under *Georgia*, and of the Supreme Court's longstanding recognition that states are entitled to deference in deciding how to ensure minorities the opportunity to participate in the political process. *See Georgia*, 123 S. Ct. at 2512; *see also Miller v. Johnson*, 515 U.S. 900, 915 (1995) (federal interference with state districting "represents a serious intrusion on the most vital of local functions"); *Connor v. Finch*, 431 U.S. 407, 414 (1977) (reapportionment "is primarily a matter for legislative consideration and determination"); *Chapman v. Meier*, 420 U.S. 1, 27 (1975) ("[R]eapportionment is primarily the duty and responsibility of the State"). Plaintiffs cannot turn *Georgia*, which *rejected* a voting rights challenge and *enhanced* states' "flexibility to choose one theory of effective representation over the other," into a judicially created straightjacket that *requires* states to choose a 40% black district over a 34% black district. *Georgia*, 123 S. Ct. at 2512.

Similarly, the fact that several cases have recognized "influence" districts as a *defense* to liability under Section 2 in no way suggests, as Plaintiffs contend, that the failure to create such districts gives rise to Section 2 liability. (*See* Pls.' Br. at 30-38.) It is, indeed, illogical to suggest that aspects of a districting plan that aid in its defense are somehow required. For example, the fact that proportional representation aids in defense of a redistricting plan hardly suggests that it is required. *See De Grandy*, 512 U.S. at 1020. Moreover, even in the defensive

context, these courts expressly declined to decide the issue before this Court. *See, e.g.*, *Uno v. City of Holyoke*, 72 F.3d 973, 979 n.2 (1st Cir. 1995) ("We take no view of the matter . . . ."); *Rural West Tenn. African-Am. Affairs Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1101 (W.D. Tenn. 1995) ("[T]he problem of whether the Voting Rights Act *requires* the creation of influence districts does not arise in the present case."), *aff'd*, 516 U.S. 801 (1995). These cases simply recognize the maxim set forth in *De Grandy*—"there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice"—and, if so, there is no requirement that states maximize the number of such districts. 512 U.S. at 1020. It cannot logically be the basis for a rule that a state must maximize the number of minority-majority districts *and* any potential influence districts.

Thus, while *Georgia* recognizes again the obvious electoral reality that minority-preferred candidates can succeed in districts where blacks constitute less than a majority, it did not *require* the creation of influence districts because the Voting Rights Act does not ensure the success of black-supported candidates.

C. The Supreme Court Rejected Influence Claims in *Parker v. Ohio*.

Any doubt that influence claims are not cognizable under Section 2 was dispelled by the Supreme Court's recent summary affirmance in *Parker v. Ohio*,

263 F. Supp. 2d 1100 (S.D. Ohio 2003) (three-judge court), *aff'd*, 2003 WL 22171264 (U.S. Nov. 17, 2003). *Parker* involved a Section 2 challenge to an apportionment plan for electing the Ohio General Assembly. *See* 263 F. Supp. 2d at 1102. Like the Plaintiffs here, the plaintiffs in *Parker* tried to convince the court "that the first *Gingles* precondition is not fully applicable" to districts "where a distinct [minority] group cannot form a majority, but they are sufficiently large and cohesive to effectively influence elections, *getting their candidate of choice elected*." *Id.* at 1104 (emphasis added). *Parker* rejected this argument and followed the established rule that "influence claims are not cognizable" because the first *Gingles* precondition is mandatory. *Id.* at 1105; *see also id.* at 1108 (Graham, J., concurring) ("[I]nfluence claims are not authorized under § 2 . . . ."). Judge Graham aptly explained why:

> If influence claims are permitted, then any system of districting, no matter how fair and impartial in its conception, is subject to attack unless it pools minority voters in sufficiently large enclaves so that they can 'influence' the result of elections. This would transfer the principle of 'one man—one vote' into 'one group—one election victory.'

Id. at 1108.

On direct appeal to the Supreme Court, the plaintiffs in *Parker* presented precisely the question raised by the Plaintiffs in this case: "Whether Section 2 of the Voting Rights Act . . . permits minority voters to maintain a claim for vote

dilution under the Act when minority voters constitute less than a majority of the voting age population, but are sufficient in number and politically cohesive to be able to otherwise elect their preferred candidate for State General Assembly under a different redistricting scheme in conjunction with like-minded non-minority voters within the same geographically compact area." *Parker v. Ohio*, Jurisdictional Statement, 2003 WL 22429007, at *i. Faced squarely with the issue of whether "influence" districts are cognizable under the Voting Rights Act, the Supreme Court summarily affirmed the judgment in *Parker*. Indeed, the plaintiffs in *Parker* made precisely the same arguments to the Supreme Court that the Plaintiffs make here, including misplaced reliance on *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003). *See Parker v. Ohio,* Jurisdictional Statement, 2003 WL 22429007, *at 21.

Because "[s]ummary affirmances . . . without doubt reject the specific challenges presented in the statement of jurisdiction," *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), the Supreme Court's affirmance in *Parker* establishes that Section 2 does not permit "a claim for vote dilution under [Section 2] when minority voters constitute less than a majority of the voting age population." *See* Jurisdictional Statement, 2003 WL 22429007, at *i.

D. Influence Claims Seek Political Favoritism, Not Racial Equality.

In addition to the cases cited above, numerous courts have recognized that granting minority voters alone a right to have their political coalition consistently win in every district where minorities are present would, as *Smith* noted, "violate[] the letter and spirit of the Voting Rights Act." 984 F.2d at 1400.

Indeed, a three-judge redistricting panel in South Carolina rejected the creation of districts with 25% to 40% black voting-age populations for precisely this reason. In *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002), the three-judge court explained the purpose and effect of districts with minority populations of the sort advocated by Plaintiffs here: "With the aid of a substantial (but not majority) black population that votes nearly exclusively for a Democratic candidate, a [Democratic candidate can] . . . use the black vote to defeat any Republican challenger in the general election." *Id.* at 643 n.22; *cf.* J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 Geo. Mason L. Rev. 431, 455 (2000) (stating that "the Democratic Party will work closely with minority officeholders and civil rights advocates to create districts that" are "less than 50% minority"). The Court held that the creation of such districts "is, therefore, an inherently politically based policy," and it refused to consider "influence" districts in drawing a plan to comply with the Voting Rights Act. *Id.*

Similarly, a three-judge panel in the Southern District of Mississippi observed that claims seeking merely to tinker with the number of minority voters in a district, rather than to create a majority-minority district, reduce to arguments "that more minorities are required in [a district] to make the congressional race competitive for democratic candidates." *Smith v. Clark*, 189 F. Supp. 2d 529, 537 (S.D. Miss. 2002), *aff'd sub nom. Branch v. Smith*, 123 S. Ct. 1429 (2003). The court declined to increase the minority percentage in this district, because "political considerations are inappropriate for a federal court to consider when drafting a congressional redistricting plan." *Id.* And a three-judge court in Texas concluded: "The matter of creating such a permissive district is one for the legislature. As we have explained, such an effort would require that we abandon our quest for neutrality in favor of raw political choice." *Balderas v. Texas*, No. 6:01 CV 158, slip op. (Congress) at 13 (E.D. Tex. Nov. 14, 2001), *aff'd*, 536 U.S. 919 (2002); *see also Cousin v. Sundquist*, 145 F.3d 818, 827-29 (6th Cir. 1998); *McNeil*, 851 F.2d at 947; *Gingles v. Edmisten*, 590 F. Supp. 345, 381 (E.D.N.C. 1984), *aff'd in part, rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-53 (5th Cir. 1999).

This rationale for rejecting "influence" claims simply applies the more general rule that the Voting Rights Act cannot be used to aid one political party at the expense of another, even if one party is supported by some minority groups.

As this Court stated in *Lewis v. Alamance County*, 99 F.3d 600 (4th Cir. 1996), "[t]he Act's purpose is not to ensure the election of candidates . . . of any particular political party." *Id.* at 617. Clearly, the political neutrality of the Voting Rights Act applies even if minority voters happen to prefer one political party. *See*, *e.g.*, *Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) ("The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates."); *Nixon*, 76 F.3d at 1392 (A "group that is too small to be expected to win a seat, were it purely a political group, cannot legitimately have heightened expectations because the basis for the group's existence is tied to the race of its members."). Any other rule would "provide minority groups with a political advantage not recognized by our form of government, and not authorized by the constitutional and statutory underpinnings of that structure." *Id*.

Moreover, as the district court recognized here, *see Hall v. Virginia*, 276 F. Supp. 2d 528, 536 (E.D. Va. 2003), in addition to political favoritism, simply assessing *whether* a certain minority percentage will affect an electoral outcome would require courts to make, as then-Judge Breyer aptly noted in rejecting a similar claim, "the very finest of political judgments about possibilities and effects—judgments well beyond their capacities." *Latino Political Action Comm., Inc. v. City of Boston*, 784 F.2d 409, 412 (1st Cir. 1986). Members of any

protected minority group could always launch a lawsuit to increase their presence in a district from 15% to 20%, or from 20% to 25%, and argue that this increase will cause their candidate to prevail. As the Seventh Circuit put it, "[c]ourts might be flooded by the most marginal section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections." *McNeil*, 851 F.2d at 947; *see also McGhee*, 860 F.2d at 116 (citing *McNeil* for proposition that first *Gingles* precondition is necessary to prevent vote dilution concept from being "an open-ended one subject to no principled means of application"). "Nothing but raw intuition could be drawn upon by courts to determine in the first place the size of those smaller aggregations having sufficient group voting strength to be capable of [vote] dilution in any legally meaningful sense and, beyond that, to give some substantive content other than raw-power-to-elect to the concept as applied to such aggregations." *Gingles*, 590 F. Supp. at 381.[13]

This point is vividly illustrated here, where Plaintiffs allege that a *34%* black population in District 4 denies black voters their basic voting rights but an "approximately *40%*" black population would guarantee those rights. (J.A. 14;

[13] *See also Illinois Legislative Redistricting Comm'n v. LaPaille*, 786 F. Supp. 704, 715 (N.D. Ill.) ("The requirement that a minority group be large enough to control a district, not just 'influence' it, enables the courts to adjudicate Voting Rights claims with a reasonable amount of efficiency and consistency."), *aff'd*, 506 U.S. 948 (1992); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 654 (N.D. Ill. 1991) (three-judge court) ("Once th[e *Gingles* majority] threshold is breached, there appears to be no logical or objective measure for establishing a threshold minority group size necessary for bringing an influence claim under § 2.").

Compl. ¶ 25 (emphasis added).) Thus, the Court would be required to find that this six-percent differential is of talismanic significance, because white crossover voting is enough to elect a black-preferred candidate at 40%, but plainly insufficient at 34%. Moreover, the Court is to make such fine-tuned political prognostications on the basis of regression analyses that it has repeatedly emphasized are inherently insufficient to allow such nuanced judgments. *See Lewis*, 99 F.3d at 605 n.3; *Smith*, 984 F.2d at 1400 n.6. This is precisely why the federal courts have consistently refused to entertain Section 2 "ability to influence" claims dependent on "findings" that there is a clear political difference between a 30% or 35% or 40% black population.

Contrary to Plaintiffs' assertion, there is no principled dividing line between cases where minorities constitute 10% or 15% of the population and the present case. Like the Plaintiffs here, plaintiffs in such cases would simply argue that they have been denied the ability to elect because the minority-preferred candidate received 45% to 48% of the vote under the existing districts, so that increasing the black population from 10% to 15% or 16% would provide the necessary additional votes to have the minority-preferred candidate prevail. Contrary to what Plaintiffs assert, the State would not prevail under their conception of the third *Gingles* prong in such circumstances because Plaintiffs could establish that voting by a

majority of whites would "usually" defeat the minority-preferred candidate, absent the increase to a 15% or 16% black population. *Gingles*, 478 U.S. at 49.

Conversely, as Plaintiffs correctly note and as the *Smith* case exemplifies, some districts will require a super-majority of the minority group in order to enable them to elect a preferred candidate. (*See* Pls.' Br. at 29 n.6.) Thus, if *Gingles*' straightforward majority-in-a-district requirement is replaced with Plaintiffs' proposed "ability to elect" standard, minority Plaintiffs in such jurisdictions cannot establish the first *Gingles* precondition *even if* they constitute a majority of the voting age population because that bare majority will not be sufficient to enable them "to elect" their preferred candidate, given the absence of meaningful white crossover voting.[14] Thus, in *every* case, courts will be forced to engage in the exhaustive, and imprecise, analysis of black cohesion and white "crossover" to determine whether the intersection of such voting and turnout patterns will result in the election of the minority-preferred candidate. As established above, and as *McGhee* and *Smith* make clear, the whole point of the first *Gingles* prong is to avoid this complicated analysis under the second and third *Gingles* preconditions and to provide *some* bright line standard to "rein in the almost unbridled discretion

[14] We presume that not even Plaintiffs are suggesting that the first *Gingles* precondition should be converted into a one-way ratchet where the new "ability to elect" standard only applies if minorities constitute a minority, but is abandoned when minorities constitute a numerical, albeit ineffective voting, majority.

Section 2 gives courts." *McGhee*, 860 F.2d at 120 (quoting *McNeil*, 851 F.2d at 942).

Moreover, as Plaintiffs correctly note, all this judicial second-guessing and mandatory redrawing will be directed at areas that do not present the sort of "racial and ethnic cleavages" in the electorate that the Voting Rights Act was designed to eradicate. *De Grandy*, 512 U.S. at 1020. If, as Plaintiffs claim, the area surrounding current congressional District 4 is one in which black candidates can be elected in a 40% black VAP district, then this is an electorate where white voters will willingly support a black candidate and thus does not present the sort of racial bloc voting problem Section 2 is designed to correct. This is in stark contrast to the districts at issue in *Gingles* and elsewhere in the old South, where whites would not vote for minority candidates and thus there was a demonstrable need for minorities to constitute a majority in order for them to elect their preferred candidate. Hence, the ultimate perversity of Plaintiffs' proposed rule is that it would *penalize* those areas where voters do engage in colorblind voting on the merits, such that minority candidates can be elected through the aid of substantial white crossover voting. On the other hand, it would leave untouched those areas where whites continue to refrain from voting for candidates of a different race because, in those jurisdictions, Plaintiffs will not be able to argue that minority-preferred candidates can be elected since there will be no white "crossover" voting

to aid minorities in their proposed bi-racial coalition. Accordingly, by definition, judicially-mandated redrawing will occur in those areas where there is no serious white bloc voting problem to solve.

E. Overwhelming Precedent from Other Courts Establishes that Plaintiffs Fail to State a Claim.

1. The foregoing establishes that Plaintiffs' claim is contrary to Supreme Court and Fourth Circuit precedent, the spirit and language of the Voting Rights Act, and a proper conception of the limited judicial role in entering the political thicket. For all these reasons, the federal courts have overwhelmingly rejected vote dilution claims brought by minorities comprising less than a compact majority—whether phrased as "influence" or "ability to elect" challenges.

In addition to the numerous cases already cited, the Sixth Circuit in *Cousin* rejected the claim that the Voting Rights Act compelled the creation of a single-member district with a 34% black VAP. 145 F.3d at 827. The Sixth Circuit held:

> We find the plaintiffs' [claim] . . . particularly lacking because it is based on the premise that the Section 2 violation in this case consists of an impairment of the minority's ability to *influence* the outcome of the election, rather than to *determine* it. . . . [W]e would reverse any decision to allow such a claim to proceed since we do not feel that an 'influence' claim is permitted under the Voting Rights Act.

Id. at 828-29 (emphasis in original).[15] In a subsequent case, the Sixth Circuit, sitting *en banc*, confirmed that where a single minority group cannot comprise the majority of a proposed district's voting-age population, minorities have no valid Section 2 objection to a redistricting plan. *Nixon*, 76 F.3d at 1384. The Sixth Circuit explained that, to elect representatives of their choice, members of such a group would, by definition, be required to form political coalitions with members of one or more other groups. *Id.* at 1392. Requiring districts amenable to such bi-racial coalitions would "transform[] the Voting Rights Act from a statute that levels the playing field for all races to one that forcibly advances contrived interest-group coalitions of racial or ethnic minorities." *Id.* (quoting *LULAC v. Clements*, 999 F.2d 831, 894 (5th Cir. 1993) (en banc) (Jones, J., concurring)).

Similarly, in the case endorsed by *McGhee*, the Seventh Circuit in *McNeil* rejected a Section 2 claim that a district could be created with black voting-age populations between 43 and 44% because "minorities not large and concentrated enough to comprise a majority" are "unable to sustain a Section 2 claim" even though they "'possess the potential' to elect candidates of their choice in a single-member district with the help of sizable and long-standing white crossover vote."

[15] Contrary to Plaintiffs' assertion, *see* Plaintiffs' Br. at 38, *Sundquist* "squarely addressed" the issue of influence claims and *held* them impermissible under Section 2, as numerous courts have recognized. *See Parker*, 263 F. Supp. 2d at 1105; *id.* at 1108 (Graham, J., concurring); *O'Lear v. Miller*, 222 F. Supp. 2d 850, 861-62 (E.D. Mich. 2002). Indeed, "[s]ince the court in *Sundquist* rejected one of plaintiffs' claims as an impermissible influence claim, and also rejected plaintiffs' proposed two-district system on that basis, it is inaccurate to characterize the court's ruling as '*dicta*'." *Parker*, 263 F. Supp. 2d at 1108 (Graham, J., concurring).

McNeil, 851 F.2d at 942. And the Fifth Circuit, holding that vote dilution claimants are "required . . . to prove that their minority group exceeds 50% of the relevant population in [a potential] district," affirmed a judgment against plaintiffs after finding that Hispanics could at most make up only 48.3% of a district's citizen voting-age population. *Valdespino*, 168 F.3d at 852-53; *accord Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997) (holding that Section 2 vote dilution claim cannot succeed when minority group cannot make up majority of citizen voting-age population); *Romero v. City of Pomona*, 883 F.2d 1418, 1424 n.7 (9th Cir. 1989) ("We are aware of no successful section 2 voting rights claim ever made without a showing that the minority group was capable of a majority vote in a designated single district."); *Turner v. Arkansas*, 784 F. Supp. 553, 565, 570-71 (E.D. Ark. 1991) (three-judge court) (rejecting "ability to elect" and "influence" claims when minority voters cannot form district majority), *aff'd*, 404 U.S. 952 (1992); *Skorepa v. City of Chula Vista*, 723 F. Supp. 1384, 1392 (S.D. Cal. 1989) ("[This] Court finds that there exists no legally cognizable 'influence' claim under § 2 that would require a lesser standard of proof than set forth in *Thornburg*.").

In the current redistricting cycle alone, federal courts in Michigan and Texas have categorically rejected, as a matter of law, Section 2 "influence" challenges to legislatively enacted redistricting plans. In granting a motion to dismiss, the three-

judge court in Michigan stated succinctly: "Because plaintiffs cannot satisfy the *Gingles* preconditions and because we do not recognize 'influence' claims, plaintiffs cannot state a claim under the Voting Rights Act." *O'Lear v. Miller*, 222 F. Supp. 2d 850, 861 (E.D. Mich. 2002) (three-judge court), *aff'd*, 123 S. Ct. 512 (2002). Similarly, the three-judge court in Texas held: "To the extent the [plaintiffs] invite us to recognize and sustain a challenge to the [enacted] plan based on minority 'influence districts,' we have no warrant to do so." *Balderas v. Texas*, No. 6:01CV158, slip op. (Senate) at 7 (E.D. Tex. Nov. 14, 2001), *aff'd*, 536 U.S. 919 (2002). *See also Kingman Park Civic Ass'n v. Williams,* No. 02-7100, 2003 WL 22681314, at *7 (D.C. Cir. Nov. 14, 2003) (dismissing Section 2 claim under the "first *Gingles* precondition" because "[a]ppellents have not identified, nor on the record does it appear possible to identify, an alternative plan creating more than the existing number of majority African-American wards in the area . . . .")

Plaintiffs attempt to distinguish the overwhelming majority of cases that have enforced the *Gingles* majority-in-a-district requirement because those cases allegedly addressed "influence" claims, rather than an "ability-to-elect theory." (*See* Pls.' Br. at 38-40). Plaintiffs can find no refuge in this semantic gamesmanship, since all of these cases required a majority in a district even though Plaintiffs were seeking districts where the minority-preferred candidate would

prevail and that potential was undisputed, or deemed irrelevant, because minorities could not constitute a numerical majority. The reason that most courts used the "influence" terminology, rather than Plaintiffs' newly-minted "ability-to-elect" nomenclature, is because the Supreme Court after *Gingles* and lower courts routinely denoted the type of districts sought by Plaintiffs here as "influence" districts. *See Voinovich*, 507 U.S. at 150 (defining "influence districts" as "districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice").

2. Against this background of overwhelming precedent enforcing the majority-in-a-district requirement, only one federal court has recognized an influence claim. *See Metts v. Murphy*, 347 F.3d 346 (1st Cir. 2003). Over a highly persuasive dissent by Judge Selya, the *Metts* majority refused to affirm a Rule 12(b)(6) dismissal based on the plaintiffs' inability to satisfy the first necessary *Gingles* precondition. The decision of the *Metts* majority is wrong for all the reasons argued above, and for all the reasons that every other federal court has rejected section 2 claims where the majority-in-a-district requirement is not satisfied. Indeed, the *Metts* majority nowhere addresses the central link between the first *Gingles* precondition and the need to show that district lines deprive a group, "*on account of race*," of the ability to elect candidates of its choice. 42

U.S.C. § 1973(b) (emphasis added). Specifically, *Metts* fails to acknowledge that, if a racial or ethnic minority group requires crossover voting to elect candidates of its choice, then there is no distinction between a plan's impact on the racial or ethnic group's members and its impact on like-minded voters from other groups. Furthermore, *Metts* fails to resolve the irreconcilable tension between requiring plaintiffs to show the requisite crossover voting to elect a minority-preferred candidate while also proving that voters are so unwilling to cross over that legally sufficient racial bloc voting exists. In that case, Plaintiffs argued that a 26% black VAP district could elect a black candidate, which would seem to plainly establish that there is no problem of racial bloc voting to be solved by Section 2. *Cf. Georgia*, 123 S. Ct. at 2517 (explaining that the ultimate goal of the Voting Rights Act is to facilitate a "transition to a society where race no longer matters").

To the extent any affirmative rationale can be discerned in the *Metts* opinion, it is that all Section 2 claims should be resolved based on the "totality of the circumstances," with a heavy emphasis on a "functional approach" grounded in a "practical assessment of minority voting power" and whether certain district configurations "are important enough to minority voters." *Metts*, 347 F.3d at 353, 355-56. On the contrary, however, as the dissent points out, "[t]he *Gingles* preconditions act as a sentry at the gates—a bright-line rule that must be satisfied *before* the totality of the circumstances comes into play." *Id.* at 366 (Selya, J.,

dissenting). Thus, the *Metts* majority not only misconstrued the *Gingles* first precondition, but also misunderstood the basic point that courts should examine the "totality of circumstances" only *after* the *Gingles* preconditions have been satisfied.

Metts also seemed to attach significance to the fact that, in Rhode Island, a candidate could be elected with plurality, rather than a majority, of votes—thus apparently implying that a small group of minority voters could elect their preferred-candidate in a three-candidate race where no candidate needs a majority to win. This affords no reasonable basis for distinguishing *Gingles* which, again, was obviously aware of this potential three-way race when it erected the majority in a district requirement. It did so because, as *Gingles* emphasized at every turn, vote dilution deals with "structural" barriers that need to be assessed in terms of the "usual" situation, not "special circumstances" such as a three-candidate race which will lead to "the success of a minority candidate in a particular election." 478 U.S. at 51, 57. This is why Plaintiffs under the third *Gingles* precondition need show only that the white bloc voting will "usually" defeat minority-preferred candidates—even if there are anomalous exceptions where the minority candidate prevails. By the same token, and for the same reason, in order to establish the *Gingles* preconditions, Plaintiffs must establish that their proposed alternative will "usually" result in election of the minority-preferred candidate. If courts are free

to hypothesize future three-way contests in order to find that Plaintiffs' proposed 40% black district could elect the preferred candidate (and thus evade *Gingles* first prong), then the existing 34% black district would also indisputably provide minorities with the ability to elect. Plaintiffs' claim that the 34% black population in District 4 is insufficient is premised directly on the notion that white crossover will usually not provide a *majority* of votes that would be needed in a two-candidate contest. There is no allegation or reason to believe that a black-preferred candidate would not receive a plurality of votes in a 34% black district, if there were a serious third-party challenger that drew votes away from the current Republican representative. Accordingly, there is no basis from departing from the majority-in-a-district rule that *Gingles* laid down for the usual situation, based on speculation about results that might occur in a three-candidate contest that has never occurred, and is not alleged to be plausible in the future. As the *McNeil* Court put it in rejecting a similar "plurality vote" argument, "[m]ovement away from the *Gingles* standard invites courts to build castles in the air, based on quite speculative foundations." 851 F.2d at 944.

3. Finally, relying primarily on *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002), and *Page v. Bartels*, 144 F. Supp. 2d 346, 363-65 (D.N.J. 2001), *aff'd*, 516 U.S. 801 (2001), Plaintiffs again argue that influence claims should be cognizable because these cases recognize that, particularly given a "two-stage

election process," minorities can be elected in majority-white districts. *See id.* at 41. These cases, again, simply confirm an obvious and undisputed reality: minority-preferred candidates *can* be elected in majority-white districts, particularly those free of racial bloc voting, and thus there is no Section 2 requirement to create majority-minority districts, since *influence* districts will suffice. Again, this in no way suggests that influence districts are *required* in order to *maximize* minority electoral success. Specifically, *Page* involved no effort to require influence districts and the viability of "influence" districts was never in question in *Martinez*, since the plaintiffs proposed *majority*-black districts and the court, in *upholding* the challenged plan, declined to decide "the percentage of total population, voting age population, or registered voters" that would be required to satisfy the first *Gingles* precondition. *See Martinez*, 234 F. Supp. 2d at 1321-24.

F. Influence Claims Contravene Public Policy.

Plaintiffs persuasively argue that decreasing the race-consciousness and "balkanization" of the redistricting process is desirable, and that states currently have a difficult time simultaneously satisfying the color-blind commands of *Shaw v. Reno*, 509 U.S. 630 (1993), and the race-conscious requirements of the Voting Rights Act. (*See* Pls.' Br. at 47-49.) This is, of course, a very strong policy argument *against* the Plaintiffs' position. Race-consciousness and balkanization is not *decreased* if legislators are required to adjust racial percentages in districts

where blacks are present in sufficient numbers to "influence" electoral outcomes, *in addition* to districts where they constitute a majority. If a legislature must constantly tinker with black percentages between 20% and 40% to avoid liability, as Plaintiffs urge, then virtually no redistricting decision will be made where race is not a "predominant factor" in violation of *Shaw* and virtually every redistricting decision will pose a Hobson's Choice between violating *Shaw* or defending against a Section 2 challenge. Nor is the federal judiciary equipped, or authorized under *Georgia*, to dictate to state legislatures on whether racial harmony is better enhanced in a 34% black district than it would be in a 40% black district mandated by judicial fiat.

G. Plaintiffs Do Not Allege Cognizable Racial Bloc Voting or Exclusion from the Political Process.

Plaintiffs also cannot meet the third *Gingles* precondition: "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. To be sure, Plaintiffs allege that "white voters in the Fourth Congressional District are politically cohesive and tend to vote as a bloc in numbers sufficient usually to defeat the candidate of choice of black voters." (J.A. 15; Compl. ¶ 29.) However, Plaintiffs impermissibly focus exclusively on whether *black* candidates can be elected. Plaintiffs cannot satisfy the third precondition if, as required, one considers the electoral fortunes of minority-preferred white candidates.

The allegations of the Complaint focus on Louise Lucas, a black candidate in the last two elections in the Fourth Congressional District. (J.A. 13-16; Compl. ¶¶ 21-31.) In 2001, she received 48% of the vote in a 39.4% black TPOP district, and would have fared even better if the contest had not been a special election held only one week after a gubernatorial vote. (J.A. 14; ¶¶ 23-24.) Thus, the Complaint alleges that a *black* candidate would have an opportunity to be elected from a district with a black population of about 40%. Significantly, however, "Lucas received less support, including financial support, from members of her own party than she would have received if she had been a White Democratic candidate." (J.A. 15, ¶ 30.) If a black candidate would have an opportunity to be elected from a 40% district, and a white candidate would receive *more* support, then Plaintiffs cannot allege that minority-preferred candidates would usually be defeated in a 34% district.

Plaintiffs focus exclusively on black candidates because it is clear that a white Democratic candidate preferred by black voters could easily win elections in District 4. Throughout the 1990's, a white Democratic candidate, Norman Sisisky, was easily elected when the district was 32% black or 39% black (following demographic changes and redistricting required by *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997)). (J.A. 12; Compl. ¶ 17.)

Accordingly, if the analysis includes white candidates preferred by black voters, Plaintiffs do not and cannot allege that white bloc voting usually defeats the minority's candidate of choice. And, under the law of this Circuit, the fortunes of white candidates *must* be considered. *See Lewis*, 99 F.3d at 607 ("Our understanding of Section 2 [is] that the minority-preferred candidate may be either a minority or a non-minority, and therefore that both elections in which the candidates are of the same race and elections in which the candidates are of different races must be considered in order to determine whether white bloc voting usually defeats the minority-preferred candidate . . . .").

Finally, Plaintiffs' Complaint is legally insufficient for another reason: Section 2 requires a showing that members of a protected minority group have "less opportunity" than others "to participate in the political process *and* to elect representatives of their choice." 42 U.S.C. § 1973(b) (emphasis added). The Supreme Court has held that "[i]t would distort the plain meaning of [Section 2] to substitute the word 'or' for the word 'and.' Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect." *Chisom v. Roemer*, 501 U.S. 380, 397 (1991). Yet the Complaint refers only to minority voters' opportunity to elect candidates of their choice, without any suggestion that minority voters lack a full opportunity to participate in the political process. (J.A. 10, 17-18; Compl. ¶¶ 3, 4, 39.)

III. Six Plaintiffs Lack Standing.

The district court correctly held that six Plaintiffs lack standing. As the Supreme Court has explained:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

United States v. Hays, 515 U.S. 737, 742-43 (1995) (internal ellipsis and citation omitted). In addition, federal courts adhere to a set of prudential principles regarding standing:

> [T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. In addition, even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating "abstract questions of wide public significance" which amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches. Finally, the Court has required that the plaintiff's complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 474-475 (1982) (citations omitted).

In *Hays*, four voters challenged Louisiana's redistricting plan as an impermissible racial gerrymander under the Fourteenth Amendment. The Supreme Court dismissed the case for lack of standing:

> Where a plaintiff resides in a racially gerrymandered district . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action. Voters in such districts may suffer the special representational harms racial classifications can cause in the voting context. On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference. Unless such evidence is present, that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve.

515 U.S. at 744-45.

None of the plaintiffs in *Hays* lived in the challenged district. *See id.* at 739. Moreover, the plaintiffs "pointed to *no* evidence tending to show that *they* have suffered" the requisite injury necessary to confer standing; they failed to show that they were personally "subjected to racially discriminatory treatment." *Id.* at 745 (emphasis in original). The mere fact that the legislature was aware of race when it drew the district line was "inadequate to establish injury in fact." *Id.* at 745-46. Likewise, the fact that the racial composition of the district in which the plaintiffs lived would have been different if the legislature had drawn the challenged district

in another way was again insufficient to confer standing. *See id.* at 746. *See also Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000) (Plaintiffs lacked standing to assert a racial gerrymandering claim where they did not live in the challenged districts and alleged no evidence "that any of them was assigned to his or her district as a direct result of having 'personally been subjected to a racial classification.'"); *Bush v. Vera*, 517 U.S. 952, 957 (1996) (Plaintiff Chen lacked standing to assert a gerrymandering claim because he did not live in the challenged district and "has not alleged any specific facts showing that he personally has been subjected to any racial classification.")

Although *Hays* pertained to racial gerrymandering claims under the Fourteenth Amendment, its rationale applies with full force to this Section 2 litigation. The legal interest protected by Section 2 is the right of minorities to have equal opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973. Thus, to have standing under Section 2, a plaintiff must either live in the challenged district or allege that he has personally been denied equal opportunity to participate in the political process and to elect representatives of his choice on the basis of his race or color.

Here, six of the eight Plaintiffs reside outside the challenged Fourth District. (J.A. 11-12; Compl. ¶¶ 7-14.) None of the six nonresident Plaintiffs allege that they, as individuals, have been denied equal opportunity to participate in the

political process and to elect representatives of their choice on the basis of their race. Thus, these six Plaintiffs have failed to "show that [they] personally ha[ve] suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College*, 454 U.S. at 472 (internal citation omitted). Indeed, the Plaintiffs allege only that the "new plan dilutes the voting strength of African-American voters *in the Fourth Congressional District*." (J.A. 10; Compl. ¶ 13 (emphasis added).) Thus, the six nonresident Plaintiffs attempt to assert a generalized grievance on behalf of third parties.

Furthermore, even if the Plaintiffs had suffered a legally cognizable injury, they have not alleged that a favorable ruling by the district court would redress their harm. If the district court entered judgment in favor of Plaintiffs, it would enjoin the current redistricting plan and order the General Assembly to formulate a new plan that increases the black VAP in the Fourth District. The chances that the General Assembly would move the six nonresident Plaintiffs back into the Fourth District are remote. Although a legislature is always aware of a variety of demographic factors—race, age, economic status, religious and political persuasion—when it draws district lines, *see Hays*, 515 U.S. at 745, there is no evidence that a legislature considers individual names when deciding whom to transfer into or out of a district.

The Plaintiffs' arguments to the contrary are unavailing. First, they claim that they have standing because they resided in the *former* Fourth District. (*See* Pls.' Br. at 51 n.9.) That claim would be sufficient to confer standing if the Plaintiffs were challenging the *former* Fourth District, but it is irrelevant to the case at bar, which challenges the *current* district.

Second, the Plaintiffs claim that the "district court's standing rule would mean that no voter has standing to bring a vote-dilution claim in an at-large system." (*See* Pls.' Brief at 52.) The very cases cited by Plaintiffs belie their argument. In *Wilson v. Minor*, the Eleventh Circuit held that "to have standing one must reside in the area directly affected by the allegedly illegal voting scheme." 220 F.3d 1297, 1303 (11th Cir. 2000). As support for this holding, the Eleventh Circuit cited *Meek v. Metro. Dade County Florida*, 985 F.2d 1471 (11th Cir. 1993), in which the court held that black and Hispanic plaintiffs had standing to bring a Section 2 challenge to an at-large scheme for electing eight county commissioners from eight districts within the county. *See Wilson*, 220 F.3d at 1303. Thus, *Meek* refutes the Plaintiffs' claim that the district court's standing rule would mean that no voter has standing to bring a vote-dilution claim in an at-large system.

Third, the Plaintiffs argue that, in all vote dilution cases, "there is never a guarantee that the jurisdiction will adopt the plaintiffs' illustrative districting scheme at the remedy stage." (*See* Pls.' Brief at 52.) However, the six nonresident

Plaintiffs lack standing not because they could not "guarantee" redressability, but rather because they failed to show redressability was "likely." *See Hays*, 515 U.S. at 743. More important, a vote dilution plaintiff can easily show that redressability is indeed likely. For example, Plaintiffs Hall and Speight have standing here because they reside in the Fourth District. As explained above, should Hall and Speight ultimately prevail in this litigation, the district court would order the General Assembly to formulate a new plan that increases the black VAP in the Fourth District. In that situation, it seems highly unlikely that the General Assembly would move Hall and Speight, who are both black, *out* of the fourth district while attempting to *increase* its black population. In short, the fact that Hall and Speight have standing belies the Plaintiffs' claim that no plaintiff could meet the district court's purportedly exacting standard.

Fourth, the Plaintiffs argue that "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." (Pls.' Brief at 52.) Neither of the cases Plaintiffs cite support their novel proposition. In *Wilson*, the Eleventh Circuit held that the plaintiffs had standing because they "are residents of the area governed by the challenged illegal election scheme." 220 F.3d at 1303. Likewise, in *Kaplan v.*

County of Sullivan, the plaintiff resided in the same county as the election scheme he challenged. 74 F.3d 398, 400 (2d Cir. 1996).

Fifth, the Plaintiffs argue that the six nonresidents have standing because none "is able to exercise the amount of voting strength enjoyed under the prior redistricting plan" and "their interests . . . are better served by the formation of two or more districts composed of a sufficiently large population of black voters who are able to elect candidates of their choice, with limited yet predictable crossover voting." (Pls' Br. at 53-54.) However, Section 2 does not protect these interests. As noted, Section 2 protects the right of minorities to have equal opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973. The six nonresident Plaintiffs cannot show any invasion of these specific interests.

Indeed, the six nonresident Plaintiffs' claims to standing are self-contradictory. On the one hand, they claim they suffered injury in fact when the 2001 Plan moved them out of the former Fourth District. The relief they request to redress this supposed injury is a new plan reinserting them into a new Fourth District with a black VAP of 40%. (*See* Pls.' Br. at 7.) Yet the 2001 Plan moved five of the six nonresident Plaintiffs into the current Third District, which has a black VAP of 56%. (*See* J.A. 27.) Thus, on the one hand, they claim that moving them into a district with a larger black VAP constituted an injury; on the other

hand, they argue that moving them into a district with a larger black VAP will constitute a remedy. They cannot have it both ways. If moving the nonresident Plaintiffs into a prospective new fourth district whose black VAP were to increase from 33% to 40% would constitute a remedy, then the 2001 Plan's transfer of them from former District Four (39% black VAP) to current district three (53% black VAP) cannot constitute a harm.

Finally, the Plaintiffs argue that their "removal from the Fourth Congressional District also contributed to the overall injury of the dilution of the black voters remaining in the district." (Pls.' Br. at 54.) This argument is an explicit acknowledgement that the six nonresident Plaintiffs are not asserting any particularized injury they themselves suffered, but rather are impermissibly attempting to assert a generalized grievance on behalf of third parties.

CONCLUSION

For the reasons stated herein, the judgment of the district court should be affirmed.

REQUEST FOR ORAL ARGUMENT

The Appellees hereby request oral argument in order to facilitate clear and direct presentation of the important issues raised by this appeal.

Dated: December 8, 2003

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using MS Word 1997 in 14 point Times New Roman.

By:_____

Attorney for the Commonwealth of Virginia, Secretary Jensen, and Attorney General Kilgore

Dated: December 8, 2003

CERTIFICATE OF SERVICE

On December 8, 2003, I filed eight copies of the foregoing brief with the clerk of this Court and sent additional copies by U.S. mail, first class and postage prepaid, to Anita S. Earls, Esq., UNC-Center for Civil Rights, Van Hecke-Wettach Hall, Room 5098, 100 Ridge Road, CB No. 3380, Chapel Hill, NC 27599-3380; Donald L. Morgan, Esq., Cleary, Gottlieb, Steen & Hamilton, 2000 Pennsylvania Avenue, NW, Washington, DC 20006; and J. Gerald Hebert, Esq., Law Office of J. Gerald Hebert, P.C., 5019 Waple Lane, Alexandria, VA 22304.

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Dated: December 8, 2003