No. 03-2113

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

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

REPLY BRIEF OF APPELLANTS

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SUMMARY OF ARGUMENT

The Plaintiffs in this case are African-Americans who were formerly residents of Virginia's Fourth Congressional Distric prior to redestricting. They contend that they would have an opportunity to elect candidates of their choice equal to that of white voters in the Commonwealth of Virginia had the General Assembly enacted a Congressional redistricting plan following the 2000 Census that recognized their legitimate voting strength in this region of the State. Instead, the General Assembly enacted a plan that divided them among three districts, making it impossible for black voters in the new Fourth District to elect a candidate of their choice to Congress, and limiting the ability of all black voters in the state to election of a candidate of their choice in a single district, the Third.

The Defendants set up a straw man by mischaracterizing Plaintiffs' claim in several key respects. First, they fail to acknowledge the distinction, recognized by the Supreme Court in *Georgia v. Ashcroft*, 123 S. Ct. 2498, 2516 (2003), between a minority population that has the ability to elect a candidate of their choice and a minority population that can merely influence the outcome of an election contest between two or more candidates who are candidates of the majority population. By defining the "ability to elect" as existing only where a minority population is the majority of the voting age population in a single-member district, the Defendants then argue adamantly in favor of the tautology they have created: that

a minority group must be fifty percent of the voting age population in order to have the ability to elect their candidate of choice.

Second, the Defendants insist on the factual finding that District 4 cannot be 40% black in total population without decreasing the black voting age population in the Third District to below fifty percent. The plans submitted to the legislature are not the only possible redistricting plans. Defendants' burden on this motion is to demonstrate that Plaintiffs can prove no set of facts that support their claim, not that the set of facts Defendants prefer does not support the claim. Again, they set up a straw man by assuming facts that are different from those pled or potentially proven by Plaintiffs.

Another major set of flaws in Defendants' position arises from their use of legal precedent. First, they argue that *McGhee v. Granville County*, 860 F. 2d 110 (4th Cir. 1988), and *Smith v. Brunswick Cty.*, 984 F. 2d 1393 (4th Cir. 1993), are binding precedent for the proposition that this Circuit does not recognize ability-to-elect claims where the black population is less than 50% of the total population in a single-member district. However, these Fourth Circuit precedents are not on point. As the court below acknowledged, this case presents an issue of first impression for this Circuit. App. 141. Second, Defendants erroneously argue that the Supreme Court's summary affirmance in *Parker v. Ohio*, 263 F. Supp. 2d 1100 (S.D. Ohio 2003), *aff'd mem.*, 124 S. Ct. 574 (2003) ("*Parker*"), is

dispositive on this issue when in fact, the lower court's opinion rests on various grounds, thereby preventing reading *Parker* to foreclose Plaintiffs' claim here.

Finally, Defendants' standing argument rests on the erroneous assertion that the six plaintiffs who do not live in the current Fourth Congressional District lack a concrete, particularized, and actual protected interest in this case. Each of these six plaintiffs had the ability to elect a candidate of choice as residents of the Fourth District before the redistricting, but now is unable to. These grievances are common to former residents of the Fourth District, are particularized and are concrete.

ARGUMENT

I. DEFENDANTS SET UP A STRAW MAN BY MISCHARACTERIZING PLAINTIFFS' CLAIM.

A. Defendants' Definition of "Ability to Elect" is Contrary to the Statutory and Supreme Court Interpretations of Vote Dilution.

The Plaintiffs' claim in this case is that they meet the first prong of the *Gingles* three-part threshold for a showing of vote dilution because they can demonstrate that they have the ability to elect a candidate of their choice in an illustrative single-member district. *Thornburg v. Gingles*, 478 U.S. 30 (1986) ("*Gingles*"). Defendants argue that the ability to elect can only exist in a district that is 50% or greater in black population. See Brief for Appellees, (hereinafter "Defs' Br.") at 13-26. They advance a host of reasons why, in their view, a

candidate of choice of black voters can only be elected by black voters where they are the only voters who vote for that candidate. *Id*. By defining the phrase "ability to elect" as requiring a 50% or greater majority in the district, it becomes a mere tautology to argue that black voters must be 50% of a single-member district in order to satisfy the *Gingles* standard. Since plaintiffs in a vote-dilution case must demonstrate that there is some district configuration that will give them the opportunity to elect a candidate of their choice, if that opportunity, by definition, can only exist in a 50% district, then it follows by necessity that *Gingles'* first prong requires a bright-line standard of a 50% black district.

However, this simplistic view is completely at odds with the *Gingles* opinion itself, and every Supreme Court pronouncement on the issue. The Court has repeatedly reserved the question of whether Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 ("VRA"), permits a claim where minority voters are asserting an ability to elect their candidate of choice in a district that is less than 50% minority. *Gingles*, 478 U.S. at 46 n. 12; *see also Johnson v. De Grandy*, 512 U.S. 997, 1007-08 (1994); *Growe v. Emison*, 507 U.S. 25, 41 n. 5, (1993) and *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993). Most recently, the Supreme Court reiterated the principle that black voters can elect a candidate of their choice in a district that is less than 50% black in population. *Georgia v. Ashcroft*, 123 S. Ct. at 2512.

The Defendants set up a straw man by narrowly defining what it means to have the "ability to elect" a candidate of choice. Plaintiffs' claim fits squarely within the concept of vote dilution as it was originally understood by the drafters of the amendments to Section 2 of the VRA, (see Brief of Appellants at 20-23), as it has always been understood by the Supreme Court, and as it operates in the real world.

If the Commonwealth had chosen not to dilute the voting strength of black voters, they would have been able to elect candidates of their choice to two of Virginia's eleven congressional seats. Instead, black voters in Virginia are only able to elect their candidate of choice to one seat. This is vote dilution and not permitted by Section 2 of the VRA.

B. Avoiding Vote Dilution in the 4th Congressional District Does Not Require Eliminating the Black Population Majority in the Third Congressional District.

Defendants also set up a straw man by mischaracterizing the facts in this case when they argue that Plaintiffs concede that in order to avoid diluting the voting strength of black voters in the Fourth District, they must reduce the adjoining Third District (to the North and East of the Fourth) to below 50% in black population. See Defs' Br. at 3, and 27 n. 12. Plaintiffs make no such concession. First, at least one of the plans which creates a Fourth Congressional District at 40% black in total population, Congressional Plan 188, also created the

Third Congressional District with 53.2% total black population. App. 31. Defendants rely on voting age population to make their argument, but the Supreme Court has expressly declined to specify which population characteristics, including age, should be the touchstone for proving a vote-dilution claim. *See De Grandy*, 512 U.S. at 1008. *See also Martinez v. Bush*, 234 F Supp. 2d 1275, 1322 (S.D. Fla. 2002) (performing districts "may or may not have an actual majority. . .of minority population, voting age population, or registered voters."). Even so, the black voting age population in the Third District in Congressional Plan 188 is 49.6 percent, lacking just .4% of being a majority. App. 33. It would be a simple matter to slightly alter the boundaries of the Third District to achieve a district that is 50.1% black in voting age population, as the difference involves less than two thousand people. However, such minute manipulations are not required by the VRA. Since black voters in the Third District with 53.2% of the total popultation could elect a candidate of their choice, there would be no impermissible vote dilution.

Second, Plaintiffs are not limited in their proof on the first prong of *Gingles* to plans that were introduced during the redistricting process. Plaintiffs can introduce into evidence other districting plans that they contend prove their allegations with regard to the first prong of *Gingles*. Defendants are asking this Court, on a motion to dismiss, to take judicial notice of facts that are in the public

record, which is appropriate. However, it is not appropriate to take the additional step of assuming that such facts are the only relevant ones that can be demonstrated in support of Plaintiffs' claim. This case should not be dismissed on the basis of any assumptions about how an increased percentage of black population in the Fourth Congressional District might affect the Third Congressional District.

II. *McGHEE* AND *SMITH* ARE NOT DISPOSITIVE OF THIS ISSUE OF FIRST IMPRESSION

McGhee v. Granville County, N.C., 860 F.2d 110 (4th Cir. 1988), is far from dispositive of this case. It did not involve a redistricting that removed a minority's ability to elect candidates of choice, as in this case. Rather, it involved two different redistricting plans changing from an at-large system to multiple individual districts.

In *Granville County,* the stipulated violation of Section 2 was the submergence of minority voters through the at-large system. The defendant county's redistricting plan provided the maximum relief that the minority could obtain through redistricting alone, as the plaintiffs so stipulated. Although the county could have gone so far as to provide proportional representation to the minority, increasing their likelihood of electing candidates of choice from two of seven district to three of seven districts, there was no requirement to do so and the

court found the plan to be legal. The question then was whether the district court could substitute its own plan, which afforded greater minority representations than that of the county's. This Court held that the question was not whether the district court's plan was better, which this Court acknowledged might well be the case, but whether the district court's inquiry must end with the conclusion that the defendants' plan satisfied the law.

If *Granville County* had subsequently involved a further redistricting so as to reduce the minority's ability to elect candidates to one district rather than two, it would be significant here. But *Granville County* was not such a case.

Smith v. Brunswick County, VA., Bd. of Sup'rs, 984 F.2d 1393 (4th Cir. 1993), was decided in accordance with *Granville County's* stated requirement of deference to a legally sufficient legislative redistricting plan, and involves a factual situation even farther afield from the present case than did *Granville County*. The "minority" black plaintiffs in Brunswick County challenged a redistricting plan that they had previously agreed satisfied all legal requirements. The plan created a total of five districts, in three of which both black population and black voting-age population exceeded 60% and in four of which blacks constituted an absolute majority. Although election results in the county varied quite widely respecting race, with some black candidates receiving extremely low percentages of the vote and others doing very well, the plaintiffs asserted that black candidates were not

winning because 20% of the black population voted against them. In effect, plaintiffs sought to divide the black population into the 80% which allegedly voted for candidates of their choice, and the other 20% of the blacks and allegedly monolithic white bloc voting that caused the defeat of the candidates of choice of the 80% of the blacks. This Court declined to endorse such a novel theory. The case did not involve a claim that redistricting had impermissibly reduced minority voting strength or ability to elect in any district. It is hardly compelling precedent here.

III. THE SUPREME COURT'S SUMMARY AFFIRMANCE OF *PARKER V. OHIO* DOES NOT FORECLOSE PLAINTIFFS' CLAIM

Summary dispositions should be narrowly construed. There are many instances where courts of appeals have independently decided the merits of a claim even though the claim was presented to the Supreme Court in an earlier case that it resolved summarily. That is consistent with the Supreme Court's guidance. It thus is appropriate to examine the merits of a case when it can be distinguished from a summary disposition case on one or more factual or legal bases. In addition, it is appropriate to examine the merits of a case where the Supreme Court's summary disposition of an earlier case could have rested on two or more alternate grounds. Only where the same precise issue was necessarily decided by the summary disposition does it resolve the issue.

While a summary affirmance decides the merits of a case and constitutes binding precedent upon all lower state and federal courts, *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974), such dispositions do not foreclose later lower court determination of issues that were not clearly before the Supreme Court. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14 (1976).

The *per curiam* decision in *Mandel v. Bradley* provides some guidance here. 432 U.S. 173 (1977). There the Court explained that summary affirmances 1) reject the specific challenges presented in the statement of jurisdiction; 2) leave undisturbed the judgment appealed from; 3) prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions; and 4) should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved. *Id*. at 176. Further, Justice Brennan's concurrence states that lower courts should give "appropriate, but not necessarily conclusive, weight to summary dispositions." 432 U.S. at 180. He suggested that lower courts should first examine the appellant's jurisdictional statement to determine whether the issues presented in the earlier case were the same as those being presented in the later case. *Id*. Even if the questions are the same, a court should determine whether the judgment in the earlier case in fact rests upon a decision of that ground and "not even arguably" upon some alternative ground. *Id*.

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 181 (1979), also calls for limited binding effect; lower courts are foreclosed only from re-examining the exact question formally made part of the jurisdictional statement. No opinion on the merits of issues that "merely lurk in the record" may be inferred. *Id*. at 183.

Mandel is a case where a factual distinction was critical. There a three-judge district court had invalidated a state's early-filing statute as unconstitutional based upon the Supreme Court's summary affirmance in *Tucker v. Salera*, 424 US 959 (1976). *Mandel*, 432 U.S. at 175. The *Mandel* statute required all independent candidates desiring placement on the general election ballot to file a certificate of candidacy seventy days before the party primaries. 432 U.S. at 173. The statute in *Salera*, however, combined an early-filing deadline with a twenty-one day limitation on signature gathering for independents. *Id*. at 175. The Supreme Court had summarily affirmed the lower court's invalidation of the statute in *Salera*. *Id*. The three-judge court in *Mandel* held that the summary affirmance of *Salera* constituted binding precedent on the issue of the constitutionality of the statute. *Id*. On appeal, the Supreme Court vacated and remanded the decision, finding the facts of *Salera* to be "very different" from those in *Mandel*. *Id*. at 177, 179.

Courts of appeal have accordingly limited the precedential effect of an earlier summary disposition where the facts differed materially. In *Lamar Outdoor*

Advertising v. Mississippi State Tax Commission, the appellees asserted a First Amendment challenge to the constitutionality of state statutes that banned intrastate liquor advertisements. 701 F.2d 314, 316 (5th Cir. 1983). The Supreme Court had recently dismissed a liquor advertiser's First Amendment challenge to a similar Ohio statute that prohibited vendors of liquor from referring to price or price advantages in their advertising in *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138, *appeal dismissed*, 459 U.S. 807 (1982). Nonetheless, the Fifth Circuit held that it was proper to consider the merits of *Lamar*. *See* 701 F.2d at 330. The court reasoned that the Ohio statute was much narrower in scope than the Mississippi statute, and that Ohio's limitation on price advertising may well have involved different state interests. *Id*. Additionally, the court reasoned that application of the regulation against liquor licensees raised different constitutional issues than enforcement of a subject-matter ban against publishers and broadcasters. *Id*.

The facts here differ significantly from those in *Parker*. There, African-Americans comprised 11.46% of the total population. However, African-Americans still held 14% of the Ohio house seats and 12% of the Ohio senate seats after the 2000 elections. 263 F. Supp. 2d at 1102, 1114. Ten of the fourteen African-American candidates elected to the House were from districts where African-Americans comprised a numerical minority. *Id*. More important, the

Parker plaintiffs seem to claim that their injury was the Ohio Apportionment Board's failure to maximize their voting power. See Parker Jurisdictional Statement 8-10. By contrast, Virginia's overall African-American population is considerably larger, 19.6%, while African-Americans hold only 9% (1 of 11) of the state's Congressional seats. Plaintiffs seek only to retain their ability to elect their preferred candidate in a second district.

Differences in legal issues also can limit the effect of a summary affirmance. In *Auburn Police Union et al. v. Carpenter*, 8 F.3d 886, 889 (1st Cir. 1993), the appellants asserted a First Amendment challenge to the validity of a state statute that prohibited a person from soliciting property from the general public that tangibly benefited any law enforcement officer, agency, or association. The appellants claimed that the statute was both overbroad and underinclusive. *Id*. at 892. The state argued that the Supreme Court's summary dismissal of an appeal in *State v. Main State Troopers Association* ("*MSTA*"), 491 A.2d 538 (Me. 1985), which had also involved a First Amendment challenge to the same statute years earlier, controlled, as it upheld the constitutionality of the statute. *Auburn Police*, 8 F.3d at 890.

The First Circuit carefully examined the jurisdictional statement of *MSTA* to determine what issues the Supreme Court had considered. *Id*. at 895. Although the *MSTA*'s jurisdictional statement had initially defined the issue presented as

whether the statute violated the First and Fourteenth Amendments, it later limited its challenge by "urg[ing] upon the Court the desirability of its being able to question counsel as to 'the overbreadth doctrine.'" *Id*. at 989. Thus, *MSTA* was binding upon the First Circuit's decision on the overbreadth claim, but the court was free to decide the underinclusiveness claim. *Id*. at 895.

Similarly, *Republican Party of North Carolina v. Martin* involved whether minority vote dilution in judicial elections violated the Equal Protection Clause of the Fourteenth Amendment. 980 F.2d 943, 947 (4th Cir. 1992). The defendants argued that the issue was controlled by the summary affirmance of *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem*., 409 U.S. 1095 (1973), which held that the one-person, one-vote doctrine of the Equal Protection Clause did not apply to judicial elections. *Martin*, 980 F.2d at 954. This Court, however, narrowly construed the summary affirmance as not mandating the dismissal of a claim based on vote dilution in judicial elections. *Id*.

Moreover, where more than two grounds for decision are argued in a case that the Supreme Court resolves summarily, lower courts have utilized an approach similar to the collateral estoppel theory to reach the merits of issues before them, requiring that an issue had to have been necessarily resolved in order for the summary disposition to be controlling. *E.g.*, *SDJ, Inc. v. City of Houston*, 841 F.2d 107 (5th Circuit 1988). The appellant in SDJ asserted on a petition for rehearing

that the district court was required to use a least-restrictive-means analysis to determine the constitutionality of a city ordinance in accordance with the Seventh Circuit's analysis in *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547 (1986). *Id*. In *Watseka*, the Seventh Circuit had analyzed the constitutionality of a time, place, and manner restriction on political solicitation using a two-part test. *Id*. at 1554. First, the city had to show that there was a significant relationship between its regulatory interest and the means chosen. *Id*. at 1555-57. Second, the city had to show that it had chosen the least restrictive means to further that interest. *Id*. The Seventh Circuit had found neither requirement to be satisfied, and the Supreme Court summarily affirmed. *See SDJ*, 841 F.2d at 107.

The Fifth Circuit examined *Watseka*'s jurisdictional statement, and noted that, due to "opaque" language, it was not entirely clear that the least-restrictive-means issue was squarely before the Court. 841 F.2d at 108. However, even assuming that the issue was before the Court, the Fifth Circuit reasoned that it could not conclude that the Supreme Court's summary affirmance required it to apply a least-restrictive-means analysis. *Id*. The Supreme Court could have agreed with the alternate conclusion that the city had failed to demonstrate a significant relationship between the regulation and the city's interests. Because the decision could have rested on one of two alternate grounds, the least-restrictive-

means issue was not essential to the Supreme Court's summary affirmance. Thus, the Fifth Circuit held that its analysis of the least-restrictive-means issue was not controlled by the Supreme Court's summary affirmance in *Watseka*, and denied the appellant's petition for a rehearing. *SDJ*, 841 F.2d at 109.

In determining the controlling breadth of the summary affirmance, the Fifth Circuit heeded *Mandel*'s warning against interpreting the Supreme Court's summary dispositions in ways that would "break new ground." 432 U.S. at 107. Because the Supreme Court had previously been unwilling to apply the least-restrictive-means scrutiny in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), the Fifth Circuit reasoned that it was unlikely that the Supreme Court had affirmed the lower court's decision in *Watseka* on that ground. 841 F.2d at 108.

The Fifth Circuit's reasoning in *SDJ* is applicable here. It is impossible to determine on what basis the Supreme Court summarily affirmed *Parker*. Since there are alternate grounds on which the Court could have ruled, the summary affirmance in *Parker* does not bind this Court.[1]

The most likely alternate issue on which the summary affirmance in *Parker* could have rested is whether three-judge panels are bound only by Supreme Court

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[1] Indeed, a majority of the Supreme Court Justices may vote to summarily affirm a decision without any agreement on the rationale. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 282 (8th ed. 2002). Where a summary disposition could rest on more than one basis, it may be impossible to determine its exact precedential effect. *See id*.

holdings rather than circuit court holdings. *Parker*'s jurisdictional statement lists this as the first question presented to the Supreme Court, and the Supreme Court may well have affirmed on that issue alone. A summary affirmance on this ground would mean only that three-judge district courts are bound by circuit court holdings.

A second alternate issue on which the summary affirmance could have rested is whether the *Parker* plaintiffs fulfilled the third prong of the *Gingles* test. While the three judges in *Parker* concurred unanimously on the decision of the case, their underlying reasoning was not unanimous. Judge Martin held that influence-dilution claims were not cognizable under Section 2 of the VRA because all influence-dilution claims would fail to meet the first *Gingles* precondition. 263 F. Supp. 2d at 1105. By contrast, Judge Gwin reasoned that influence-dilution claims were cognizable under Section 2 of the VRA, but concurred in the result because the plaintiffs had failed to meet the third *Gingles* precondition. *Id*. at 1113-14. The third judge, Judge Graham, agreed with portions of both opinions. *Id*. at 1108. He reasoned that influence-dilution claims were not cognizable under Section 2 of the VRA because of the Sixth Circuit's decision in *Sundquist v. Miller*, 222 F. Supp. 2d 862 (E.D. Mich. 2002) (influence dilution claims not cognizable under Section 2 of the VRA), and agreed that the plaintiffs had failed to establish the third *Gingles* precondition. 263 F. Supp. 2d at 1108. It thus is clear

that the plaintiffs' claims in *Parker* could have failed on a ground other than that influence-dilution claims are not cognizable under Section 2 of the VRA.

Similarly, *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), *rev'd on other grounds*, *sub nom. Bowers v. Hardwick*, 478 U.S. 1039 (1986), interpreted a previous Supreme Court summary disposition, *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *summarily aff'g* 403 F. Supp. 1199 (E.D. Va. 1975), as based on a narrow ground (lack of standing), even though the jurisdictional statement presented broader issues (whether Virginia's law against sodomy was constitutional). The Eleventh Circuit held that "the Supreme Court has generally referred to two indicia to determine the breadth of an earlier summary disposition, necessity to the decision and presentation in the jurisdictional statement, as if both were necessary." *Id*. at 1208 (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 499 (1981) (summary affirmance binding as to "precise issues presented and necessarily decided") (emphasis added by quoting reference)). The *Hardwick* court went on to hold that "[w]hile a jurisdictional statement prevents speculation as to what issues the Court actually considered . . . it is only a tool in determining the ultimate question: the most narrow plausible rationale for the summary disposition." *Id*. The failure to fulfill the third *Gingles* prong is the "most narrow plausible rationale" for the Supreme Court's summary affirmance in *Parker*.

Another indication that the Supreme Court did not invalidate crossover district claims under the VRA in *Parker* is that the Supreme Court has repeatedly left open whether influence-dilution claims are cognizable under Section 2 of the VRA. *See*, *e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 46 n.12 (1986); *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993). Thus, interpreting *Parker* as invalidating influence-dilution claims under Section 2 of the VRA would constitute "breaking new ground," which *Mandel* specifically warns against. 432 U.S. at 176.

Accordingly, *Parker* does not control this case.

IV. OTHER COURTS HAVE RECOGNIZED AN ABILITY-TO-ELECT CLAIM

Defendants fail to acknowledge the critical distinction between influence districts and ability-to-elect districts. Districts in which a politically cohesive minority group is large enough numerically to elect a candidate of their choice even though they are not a majority of the district's voters have been called "coalition districts", *Georgia v. Ashcroft,* 123 S. Ct. at 2513, "opportunity districts", *Session v. Perry* ---F. Supp. 2d--- (E.D. Tex., January 6, 2004) at 66, "performing districts", *Martinez v. Bush,* 234 F. Supp. 2d 1275, 1301 (S.D. Fla. 2002), and "ability-to-elect" districts, *Armour v. Ohio,* 775 F. Supp. 1044, 1059 n.19 (N.D. Ohio 1991). Courts have used these terms to differentiate such districts from "influence" districts, *i.e.* districts in which the minority group might affect the

selection of candidates, but where the minority group is not numerous enough to field and elect their candidate of choice. *See, e.g., Uno v. City of Holyoke*, 72 F.3d 973, 990-991 (1st Cir. 1995) (using "influence district" to refer to this situation); *Armour*, 775 F. Supp. at 1059 n.19 (explaining the distinction); *see also* Richard H. Pildes, *Is Voting-Rights Law Now At War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517, 1539-40 (June 2002). This Court should not conflate the two concepts, as Defendants do, into the singular concept of "influence districts" and thus ignore the complexity of the courts' consideration in these cases. (Defs.' Br. at 45)

An "ability-to-elect" claim uses actual electoral outcomes to quantify the size of the minority population and the amount of crossover votes necessary to determine the election outcome. *See Pildes*, 80 N.C.L. Rev. at 1531-32, 1539-40. Accordingly, "ability-to-elect" claims fall squarely within the scope of Section 2 and *Gingles* by forming a mechanism through which to ensure minority groups have access to the power granted under the Voting Rights Act to elect their candidates of choice. *See* 42 U.S.C. § 1973(b); *see also Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) (Section 2 prohibits "*any* practice or procedure that . . . impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." (emphasis added)). Contrary to Defendants' assertion, recent state and federal cases have recognized ability-to-elect district claims. *See*

e.g., Martinez, 234 F. Supp. 2d at 1321 n.66; *Parker*, 263 F. Supp. 2d at 1109 (Gwin, J., concurring); *McNeil v. Legislative Apportionment Commission of State*, 177 N.J. 364, 828 A.2d 840, 851-854 (N.J. 2003) (approving broader concept of influence district claims), *pet. for cert. filed*, Oct. 29, 2003 (No. 03-652). (S*ee also Page v. Bartels*, 144 F. Supp. 2d 346, 363 (D.N.J. 2001) (three-judge court) (noting that minority groups can elect the candidates of their choice in some majority-Anglo districts); *West v. Clinton*, 786 F. Supp. 803, 807 (W.D. Ark. 1992) (assuming that districts in which minority voters constitute less than an absolute majority of the voting-age population ("VAP") are cognizable under Section 2); *Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 694 (E.D.N.Y. 1992) (three-judge court) (stating that there is no bright-line rule for an appropriate VAP level); *Jordan v. Winter*, 604 F. Supp. 807, 814-15 (N.D. Miss. 1984) (recognizing that Section 2 protects a district with a black population of 41.99%). In *Session v. Perry,* the most recent case to be decided on this issue, the court upheld the Texas redistricting plan in part on the finding that "opportunity districts" for Latinos were maintained in the new plan.[2] *Session* at 66. Therefore

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[2] The court's assertion in *Session* that *Georgia v. Ashcroft* creates no obligation for states to preserve ability-to-elect districts during redistricting is plainly wrong. Section 2 prohibits redistricting that results in minority members having "less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice." 42 U.S.C. § 1973(b) To destroy an ability-to-elect district, as the legislature did in the Virginian Fourth District, necessarily denies African American

this Court should perform its own independent analysis of the issue, regardless of what other courts may have done. *See Atchison, Topeka & Santa Fe Ry. v. Pena*, 44 F.3d 437, 443 (7th Cir. 1994) ("[A Circuit's] duty is to independently decide [its] own cases, which sometimes results in disagreements with decisions of the other circuits.").

V. PLAINTIFFS' CLAIM IS NOT MERELY FOR POLITICAL ADVANTAGE, NOR ARE THE ALLEGATIONS OF THE COMPLAINT DEFICIENT AS A MATTER OF LAW

Defendants mischaracterize Plaintiffs' ability-to-elect claim as necessarily being nothing more than political favoritism because of the historical fact that African-Americans in Virginia traditionally vote overwhelmingly for candidates from the Democratic party. Defs' Br. at 34-41. However, this supposed evil, of a partisan gerrymandering case masquerading as a voting rights case, is true of all voting rights claims. On Defendants' logic, any set of black plaintiffs seeking to create or maintain a district where they can elect their candidate of choice, whether it is a majority-black district or a district that is something less than 50% black in population, would be seeking a district that elects a candidate from the Democratic party. This argument could defeat every Section 2 vote dilution claim and is not a

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voters from the former Fourth District the ability to elect representatives of their choice. Indeed, the fact that the Texas court pointed to the existence of viable ability-to-elect districts for Latinos as justification for upholding the redistricting plan contradicts and logically undercuts its holding that ability-to-elect districts are not protected by Section 2.

valid reason for dismissing Plaintiffs' complaint. The VRA protects minority voting rights, irrespective of party considerations.

Defendants also mischaracterize Plaintiffs' claim by asserting that Plaintiffs have failed to allege that white voters vote sufficiently as a bloc to usually defeat the candidate of choice of black voters, and that Plaintiffs have failed to allege they have less ability to participate in the political process. Defs. Br. at 50-52. In fact, the Complaint does allege white bloc voting (App. 15, ¶ 29), and that the redistricting plan enacted by the Commonwealth denies African-American voters the right "to participate effectively in the political process." App. 16-17, ¶¶ 34, 35.

VI. ALL OF THE PLAINTIFFS HAVE STANDING

There is no dispute among the parties respecting the general constitutional standing requirements. There also is no dispute that all of the Plaintiffs resided in the former Fourth Congressional District, and that those who still reside there have standing. Defendants contend, however, that the Plaintiffs who were moved by the redistricting into other districts lack a concrete, particularized and actual protected interest. Defendants concede that the racial gerrymandering cases upon which they rely are not controlling in a Section 2 case.

The six displaced Plaintiffs had the ability, along with other minority members, to elect a candidate of choice prior to the redistricting. *See* opening Brief of Appellants, pages 16, 40-44; Complaint ¶¶ 2-4, 20, 32, 38, 39, 99; App. 9-

10, 13, 16-18. The redistricting drastically changed their ability to elect a candidate of choice. One of them, Garnes, was moved into the Fifth District, where he is a member of such a small minority that the minority cannot elect a candidate of choice. The other five were moved into the already minority-majority Third District where their votes are superfluous; the redistricting has denied them the opportunity to elect a second minority candidate of choice from Virginia. These grievances are particularized and concrete, and are not shared by anyone who did not formerly reside in the Fourth District.

Defendants contend next that it is not likely that a new redistricting would benefit these six Plaintiffs. They would, however, obviously benefit if, as Plaintiffs request, redistricting were required to preserve the minority ability-to-elect within the Fourth District. The legislature would have to increase the minority population in the Fourth District from the current configuration, and because of compactness and other requirements, it is quite likely that the displaced Plaintiffs would be returned to the Fourth District. In addition, all of the Plaintiffs would benefit from their minority's ability to elect two members of the state's Congressional delegation.

The absurdity of Defendants' arguments can be demonstrated by examining how it would apply if the challenged redistricting had divided the approximately 54% minority population Third District equally into three other districts, in none of

which minority voters have the ability to elect either before or after redistricting. According to Defendants, no one would have standing. Any minority members who were moved into the new Third District could not prevail on a Section 2 claim because they had not been adversely affected by the redistricting, not having had the ability to elect before or afterwards. The illustration is, of course, hypothetical, but it should be noted that there is no requirement that a redistricting retain the numerical designations of prior districts and, due to relative population changes among states, from time to time redistricting must increase or decrease the number of districts. The illustration certainly suggests that the only individuals adversely and concretely affected by the changes made to the Fourth District were ones who resided there prior to the redistricting. They are the ones who have suffered a specific injury that could be redressed by proper redistricting. In contrast, a minority voter who for example had been moved from the Fifth District, where there was no opportunity to elect, into the Fourth District, has suffered no injury by the redistricting since neither before nor afterwards did that voter have the ability to elect a candidate of choice.

At a minimum, the proper test of standing is residence in the previous Fourth District. All of the original plaintiffs in this case have standing to seek redress for the dilution of their voting strength.

CONCLUSION

For the foregoing reasons and authorities, Plaintiffs urge this Court to reverse the judgment of the district court that vote dilution in violation of Section 2 of the VRA only occurs where black voters can demonstrate that they can be a controlling majority of the voters in a single-member district, and that Plaintiffs who live outside the diluted district, as enacted, have no standing to challenge their removal from the district. The vote-dilution claim of each of them should be remanded for further proceedings.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32

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

brief and indicates that it contains 5,971 words.

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January 9, 2004

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2004, I served copies of Appellants Disfranchised Black Voters' Reply Brief on the following parties, by first-class mail, postage prepaid:

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