No. 04-870

IN THE

Supreme Court of the United States

JOAN HALL, *et al.*,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether minority plaintiffs challenging electoral districts under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(b), fail to state a vote-dilution claim where they affirmatively allege that their minority group is *not* sufficiently numerous and geographically compact to constitute a majority in a single-member district, and that the group's preferred candidates therefore cannot be elected except by a political coalition of minority and nonminority voters.

PARTIES TO THE PROCEEDINGS

The names of all Petitioners are: Joan Hall, Leslie Speight, Richard Pruitt, Thomasina Pruitt, Vivian Curry, Eunice McMillan, James Speller, and Robbie Garnes.

The names of all Respondents are: the Commonwealth of Virginia; Jean Jensen, in her official capacity as Secretary of the State Board of Elections; Jerry W. Kilgore, in his official capacity as Attorney General of the Commonwealth of Virginia; Gary Thompson; Charles Brown; James Brown; James Alfred Carey; Evelyn Chandler; Clifton E. Hayes, Jr.; Quentin E. Hicks; Irene Hurst; and Wayne Osmore.

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STATEMENT OF THE CASE

1. Factual Background

Petitioners brought this action challenging the configuration of Virginia's Fourth Congressional District under the reapportionment plan (the "2001 Redistricting Plan") enacted by the Virginia General Assembly and signed into law by the Governor in 2001 based on the results of the 2000 census. The Department of Justice precleared the 2001 Redistricting Plan under Section 5 of the Voting Rights Act. Pet. App. 53a.

The configuration of the Fourth Congressional District challenged by Petitioners is inextricably tied to that of the adjacent Third District. Pet. App. 49a, 50a. Whereas the former Fourth Congressional District was close to the ideal size for Virginia congressional districts under the 2000 census, the population of the former Third District was nearly 76,000 people, or nearly 12%, below the ideal district size. Pet. App. 26a, 48a-49a. Substantial reapportionment was necessary to comply with the Fourteenth Amendment's "one person, one vote" requirement. Accordingly, the 2001 Redistricting Plan shifted a number of black residents from the former Fourth District to the Third District. Pet. App. 26a.

Before the enactment of the 2001 Redistricting Plan, blacks constituted 39.4% of the total population ("TPOP") and 37.8% of the voting-age population ("VAP") in the Fourth District. Pet. App. 3a. In the reconfigured Fourth District, blacks constitute 33.6% of the TPOP and 32.3% of the VAP. The 2001 Redistricting Plan left the TPOP and VAP figures for blacks in the Third District virtually unchanged. Pet. App. 3a-4a. In the reconfigured Third District, blacks comprise 56.8% of the TPOP and 53.2% of the VAP in the Third District, compared to 57% and 53.3% in the former Third District. Pet. App. 4a.

Petitioners filed a complaint in the Eastern District of Virginia, alleging that the Voting Rights Act required the

Fourth Congressional District to be drawn with a black population of roughly 40%—well short of a majority, and only about six percentage points higher than the enacted plan. Pet. App. 26a-27a, 45a-46a, 48a-49a. Petitioners 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 District. Pet. App. 26a-27a, 52a.

2. The District Court's Decision

The District Court dismissed the complaint.[1] The court explained that *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), requires a Section 2 plaintiff to show that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district." Pet. App. 31a. The court noted that while *Gingles* "left open the question of whether a vote dilution claim could be brought with respect to an 'influence district'" where a minority group is too small to be a majority in a district, lower courts have "uniformly rejected such claims." Pet. App. 36a-37a. Recognizing Section 2 claims where a minority group could not constitute a majority in a district, the court held, would force courts to engage in "intrusive speculation on political matters" beyond their capacities and would raise the specter of a flood of marginal Section 2 claims. Pet. App. 44a. Because Petitioners conceded that blacks could not constitute a majority in the Fourth District, the District Court dismissed Petitioners' complaint.

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[1] The District Court held that seven of nine Petitioners lacked standing to bring a Section 2 claim because they lived outside the new Fourth District. Pet. App. 29a-30a. The Fourth Circuit did not reach this issue, Pet. App. 10a n.10, and Petitioners do not seek certiorari on this question. Pet. at 3 n.2.

3. The Court of Appeals' Decision

The Fourth Circuit affirmed unanimously. The court explained that Petitioners' vote-dilution claim required that their voting strength under the challenged plan "be measured against some reasonable benchmark of 'undiluted' minority voting strength." Pet. App. 11a. Relying on the majority opinion in *Gingles* and on Justice O'Connor's concurrence, the Fourth Circuit held that "[t]he electoral ability of a group concentrated within a hypothetical single-member district makes sense as the measure of *undiluted* minority voting strength" because "minority voters have the potential to elect a candidate *on the strength of their own ballots* when they can form a majority of the voters in some single-member district." Pet. App. 13a (emphases in original). In contrast, when minority voters cannot form a majority in a district, "they have no ability to elect candidates of *their own* choice," but must instead form political coalitions with other groups to elect candidates. Pet. App. 14a (emphasis in original). "Under these circumstances, minorities cannot claim that their voting strength—that is, the potential to independently decide the outcome of an election—has been diluted in violation of Section 2." Pet. App. 14a. "A redistricting plan that does not adversely affect a minority group's potential to form a majority in a district," the court held, "but rather diminishes its ability to form a political coalition with other racial or ethnic groups, does not result in vote dilution 'on account of race' in violation of Section 2." Pet. App. 18a-19a. To hold otherwise would impermissibly "transform the Voting Rights Act from a law that removes disadvantages based on race, into one that creates advantages for political coalitions that are not so defined." Pet. App. 17a-18a.

REASONS FOR DENYING THE WRIT

Contrary to the premise of Petitioners' challenge, the Voting Rights Act does not mandate that redistricting plans be designed to maximize the electoral success of a political

coalition of minority and nonminority voters. The Act 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 the relevant black population is not sufficiently numerous or compact to constitute a majority in a district. In such circumstances, the redistricting plan does not deny black voters the ability "to elect" a representative of their own choice. 42 U.S.C. § 1973(b). Rather, the only "deprivation" 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. 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; does not grant minorities a *superior* "right" to have their preferred candidate win; 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, this 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 an avalanche of precedents from lower federal courts has subsequently rejected any Section 2 dilution claim brought by minority voters constituting less than a potential majority. All of these decisions recognized that a minority-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, Petitioners'

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.

Because federal courts have overwhelmingly and correctly rejected Section 2 claims where plaintiffs cannot meet *Gingles*' majority-in-a-district requirement, the Court should adhere to its consistent past practice of declining to consider the viability of such "influence" claims.[2]

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[2] This Court and lower courts have often referred interchangeably to "influence" and "ability-to-elect" claims. In *Voinovich v. Quilter*, 507 U.S. 146 (1993), the Court referred to an "influence district[]" as one "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 candidate of choice." *Id.* at 150. Petitioners can find no refuge in the semantic distinction between "influence" and "ability-to-elect" claims, *see* Pet. at 4 n.4, because all of the cases enforcing the *Gingles* majority-in-a-district requirement, *see infra* at 6-9, 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 most courts used the "influence" terminology, rather than Petitioners' newly minted "ability-to-elect" nomenclature, is because this Court after *Gingles* routinely denoted the type of districts sought by Petitioners here as "influence districts." Thus, the Court should not attach talismanic significance to whether Petitioners' claim is labeled with the "influence" or "ability-to-elect" terminology.

Indeed, if anything, "ability-to-elect" claims are less viable than "influence" claims. This is because *Gingles* expressly held that the majority-in-a-district requirement applies where "plaintiffs alleg[e] . . . 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). The only question reserved was whether a group

I. Overwhelming Precedent Establishes That A Section 2 Claim Fails Where The Minority Group Could Not Constitute A Majority In A District.

Five federal courts of appeal have agreed with the Fourth Circuit and rejected vote-dilution claims brought by minorities comprising less than a compact majority. Moreover, in each of these cases in which a petition for certiorari was filed, this Court denied the petition.

For example, in *Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998), *cert. denied*, 525 U.S. 1138 (1999), the Sixth Circuit rejected the claim that the Voting Rights Act compelled the creation of a single-member district with a 34% black voting-age population. 145 F.3d at 828. The court found "the plaintiffs' [claim] . . . particularly lacking because it [was] based on the premise that the Section 2 violation . . . consist[ed] of an impairment of the minority's ability to *influence* the outcome of the election, rather than to *determine* it." *Id.* at 828-29 (emphasis in original). Earlier, the Sixth Circuit, sitting en banc, confirmed that where a single minority group cannot comprise the majority of a proposed district's VAP, minorities have no valid Section 2 objection to a redistricting plan. *Nixon v. Kent County*, 76 F.3d 1381, 1389 (6th Cir. 1996). The court explained that, to elect representatives of their choice, members of such a group would be required to form political coalitions with members of one or more other groups. *Id.* at 1391-92. 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

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that is less than a majority would be able to state a claim by alleging that a plan impairs its ability to *influence* elections, *see Gingles*, 478 U.S. at 46 n.12, which Petitioners do not allege here. Thus, if one is to draw a distinction between ability-to-elect claims and influence claims in cases where the majority-in-a-district requirement is not satisfied, *Gingles* forecloses the former and leaves open only the latter.

advances contrived interest-group coalitions or racial or ethnic minorities." *Id.* at 1392 (internal citations omitted).

Similarly, the Seventh Circuit rejected a Section 2 claim that a district could be created with a black VAP between 43 and 44%. The court explained that "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 a sizable and long-standing white crossover vote." *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942 (7th Cir. 1988) (footnote omitted), *cert. denied*, 490 U.S. 1031 (1989).

The Fifth, Ninth, and Eleventh Circuits have likewise rejected influence claims. *See Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 851, 852-53 (5th Cir. 1999) (affirming a judgment against plaintiffs where Hispanics could make up only 48.3% of a district's citizen VAP, because vote-dilution claimants are "required . . . to prove that their minority group exceeds 50% of the relevant population in [a potential] district"), *cert. denied*, 528 U.S. 1114 (2000); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997) (rejecting a claim based on potential districts in which Hispanics comprised less than 50% of the citizen VAP); *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.").

In addition, three-judge district courts have unanimously foreclosed influence claims, and this Court has repeatedly affirmed their judgments without opinion. *See Session v. Perry*, 298 F. Supp. 2d 451, 478-79, 486 (E.D. Tex.) ("[T]he State was under no § 2 obligation to create [coalition] districts [defined as "voting districts where minority voters 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 we find that the State labors under no corresponding compulsion to preserve these districts." (footnote and internal quotation marks omitted)), *vacated on other grounds*, 125 S. Ct. 351l (2004); *Parker v. Ohio*, 263 F. Supp. 2d 1100, 1104-05 (S.D. Ohio) (three-judge court) (defining an influence district as "one where a distinct group cannot form a majority, but they are sufficiently large and cohesive to effectively influence elections, getting their candidate of choice elected" and holding that "influence claims are not cognizable"), *aff'd*, 540 U.S. 1013 (2003); *O'Lear v. Miller*, 222 F. Supp. 2d 850, 861 (E.D. Mich.) (three-judge court) ("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."), *aff'd*, 537 U.S. 997 (2002); *Cano v. Davis*, 211 F. Supp. 2d 1208, 1231 (C.D. Cal. 2002) (three-judge court) ("[U]nless 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." (footnote omitted)), *aff'd*, 537 U.S. 1100 (2003); *Smith v. Clark*, 189 F. Supp. 2d 529, 537 (S.D. Miss. 2002) (three-judge court) (rejecting a claim that the black VAP in a district should have been higher than the 30% in the court's plan and concluding that influence claims "are inappropriate for a federal court to consider"), *aff'd sub nom. Branch v. Smith*, 538 U.S. 254 (2003); *Balderas v. Texas*, No. Civ. A. 6:01CV158, 2001 WL 34104836, at *2 (E.D. Tex. Nov. 28, 2001) (three-judge court) ("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."), *aff'd*, 536 U.S. 919 (2002); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 643 n.22 (D.S.C. 2002) (three-judge court) (concluding that the creation of influence districts is "an inherently politically based policy" not to be considered by courts); *Turner v. Arkansas*, 784 F. Supp. 553, 569-70 (E.D.

Ark. 1991) (three-judge court) (rejecting "ability to elect" and "influence" claims when minority voters cannot form a district majority), *aff'd*, 504 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*.").

Faced with the overwhelming weight of these precedents denying influence claims, Petitioners distort numerous cases in an attempt to create the appearance of a split of authority. Pet. at 14-16. In *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002) (three-judge court), the viability of influence districts was never in question, 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. *Id.* at 1321-24. Likewise, in *Puerto Rican Legal Defense & Education Fund, Inc. v. Gantt*, 796 F. Supp. 681 (E.D.N.Y. 1992) (three-judge court), all of the districts at issue had "over a 55% VAP of the relevant minority." *Id.* at 694. In *West v. Clinton*, 786 F. Supp. 803 (W.D. Ark. 1992) (three-judge court), the court merely "*assume[d]* that the influence theory [was] legally viable" before concluding that "the facts of [the] case" did not "make out a cognizable claim under that theory." *Id.* at 806 (emphasis added). And in *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) (three-judge court), a case abrogated by the Sixth Circuit in *Cousin* and *Nixon*, the court based its analysis of influence claims on the premise that the *Gingles* preconditions did not apply to single-member districts, a premise subsequently rejected by this Court, *see Growe v. Emison*, 507 U.S. 25, 40-41 (1993).

Thus, notwithstanding Petitioners' mystifying assertion that "legislative bodies and courts are increasingly uncertain about their obligations" to form districts in which minorities constitute less than 50% of the relevant population, Pet. at

18, overwhelming precedent makes clear that Section 2 plaintiffs must satisfy the majority-in-a-district requirement. Against this backdrop, only one federal court has recognized an influence claim, and even that court did so tentatively and without setting forth any standard that would govern the claim. In *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc), the divided court refused to affirm a Rule 12(b)(6) dismissal based on the plaintiffs' inability to satisfy the first necessary *Gingles* precondition. While the decision is wrong for all the reasons stated *infra* at 16-29, the opinion is more accurately characterized as a decision not to decide the issue. The court stated that it was unwilling "to foreclose the *possibility* that a section 2 claim can ever be made out where the African-American population of a single member district is reduced in redistricting legislation from 26 to 21 percent." 363 F.3d at 11 (emphasis in original). The court noted, however, that "[a]s courts get more experience dealing with these cases and the rules firm up, it may be more feasible to dismiss weaker cases on the pleadings . . . ." *Id.*

It is plainly a mistake to defer resolution of the *Gingles* preconditions until after fact-finding because, as the original panel's dissenting opinion noted, "the *Gingles* preconditions act as a sentry at the gates—a bright-line rule that must be satisfied *before* the totality of circumstances comes into play." *Metts v. Murphy*, No. 02-2204, 2003 WL 22434637, at *17 (1st Cir. Oct. 28, 2003) (withdrawn following grant of reh'g en banc) (Selya, J., dissenting) (emphasis in original). Moreover, the en banc majority leaves influence claims utterly standardless, since it provides no hint about relevant factors that would determine the viability of such claims. The court said it wanted to examine the "motive for the change in district or the selection of the present configuration, the contours of the district chosen or the feasible alternatives"—all of which go to the *purpose* behind how the district lines were drawn. 363 F.3d at 12. The whole point of the 1982 amendment to Section 2, however, was to ensure that the purpose of the line-drawers was not

dispositive, *see, e.g.*, *Voinovich*, 507 U.S. at 155, so the focus of the First Circuit is precisely wrong. Moreover, the majority stated that "plaintiffs cannot prevail merely by showing that an alternative plan gives them a greater opportunity to win the election . . . or that an otherwise justified boundary change happened to cost African-Americans a seat." 363 F.3d at 12. But the entire gravamen of the claim here is that the redistricting plan has "cost African-Americans a seat" and denied minorities an "opportunity to win the election." It is therefore quite difficult to reconcile this assertion by the First Circuit with acceptance of a claim like Petitioners', or to discern what plaintiffs might be able to show (other than purpose) that would allow them to succeed.

The sum total of the *Metts* opinion, then, is that influence claims remain a theoretical possibility, yet *Metts* provides no idea of what would constitute a viable claim. Indeed, because even *Metts* reserves the possibility of dismissing cases on the pleadings where plaintiffs fail to meet the first *Gingles* precondition, it creates no clear conflict with the overwhelming number of federal courts that have rejected such claims. But even if this Court were inclined to consider the question, it would be premature to do so before any court has articulated standards that would govern an influence claim. If the Court were to authorize influence claims, *but see infra* at 16-29, it should do so in a way that provides guidance to lower courts and to state legislatures about the duties imposed by Section 2. *Cf. Vieth v. Jubelirer*, 124 S. Ct. 1769, 1777 (2004) (plurality op.) (lamenting the Court's "inability to specify a standard" for political gerrymandering claims); *id.* at 1793 (Kennedy, J., concurring in the judgment) (noting that "clear, manageable, and political neutral standards" are "critical" to political gerrymandering claims). Unless and until courts articulate a clear standard by which valid influence claims can be differentiated from meritless ones, there is no ripe conflict among lower courts and no reason for the Court to depart from its consistent

practice of declining to rule on the viability of influence claims.

Indeed, it would be particularly dangerous to simply abandon the *Gingles* "majority-in-a-district" precondition without providing clear guidance on what new standard would emerge to establish a *prima facie* case of a Section 2 violation. This is because, as we explain more fully below, elimination of the first *Gingles* precondition creates a virtually irrebuttable mandate for proportional representation. *See infra* at 23-24. Under the second and third *Gingles* preconditions, a *prima facie* Section 2 violation is established if the candidate supported by most minority voters does not usually win and it is physically possible to create a district where that candidate would win. *See id.* Thus, under Petitioners' proposed regime, it would be presumptively illegal not to create a district favoring minority-preferred candidates, wherever feasible, and the remaining totality-of-circumstances factors would provide no inkling on whether or when such a failure to maximize might be permissible. Since elimination of the majority-in-a-district requirement impermissibly creates a *de facto* proportional representation mandate, its potential elimination necessarily needs to be accompanied by further alteration of Section 2 standards to avoid this result. But neither *Metts* nor any other case has provided any hint as to what such an adjustment might encompass, and therefore it is premature for this Court to consider this question.

II. The Facts Of This Case Make It Particularly Unsuitable To Decide Whether The *Gingles* Preconditions Should Be Altered To Permit Influence Claims.

Not only has no federal court articulated a standard for assessing the viability of influence claims, but Petitioners themselves offer no alternative beyond a grab bag of amorphous factors—"real-world variables such as plurality vote requirements, primary elections, political cohesiveness,

and voter turnout" that may make it possible for "less-than-50% minority groups . . . to elect candidates of their choice." Pet. at 8. Petitioners' "flexible, fact-specific standard" amounts to nothing more than a "totality of the circumstances" test, *id.* at 22, 24, that eviscerates the purpose of the *Gingles* preconditions—to weed out meritless claims *before* the totality of the circumstances comes into play, and to prevent Section 2 from becoming a mandate for proportional representation.

In any event, because none of the factors identified by Petitioners as being theoretically relevant are present here, this case is a poor vehicle for this Court to consider influence claims. First, Petitioners argue that "under certain factual circumstances, less-than-50% minority groups could have the ability to elect without *any* white crossover voting." *Id.* at 21 (emphasis in original). Whatever these factual circumstances may be, they are not at issue here, as Petitioners themselves allege that blacks in the Fourth District can *only* elect their preferred candidate with the aid of white crossover voting. Pet. App. 5a, 46a, 51a.

Second, Petitioners allege that "less-than-50% minority groups" "have the ability to elect" by a *plurality* in a race involving more than two candidates. Pet. at 20. But Petitioners have not alleged that there will be a three-way race in this case or that minorities would be unable to elect their preferred candidate in the *challenged* district if there were such a multi-candidate race. Moreover, a three-way race affords no reasonable basis for distinguishing *Gingles*, in which the Court was obviously aware of the potential for such a race when it erected the majority-in-a-district requirement. It did so because 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. There is no basis to depart from the majority-in-a-district rule 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. *See McNeil*, 851 F.2d at 944 ("Movement away from the *Gingles* standard invites courts to build castles in the air, based on quite speculative foundations.").

Third, Petitioners argue that in some instances, a minority group that is not a majority may still constitute more than 50% of a particular political party. That minority group, Petitioners argue, can decide the winner of that party's primary, who, in turn, can win the general election with white crossover votes. Pet. at 20-21. Again, however, Petitioners' hypothetical has nothing to do with this case or the decision below. Petitioners do not allege that the Fourth District as drawn deprives them of the opportunity to win the Democratic primary. Rather, they allege that blacks cannot win a *general* election against a predominantly white, Republican electorate. Pet. App. 49a-51a. Thus, it is undisputed here that blacks will constitute a minority of voters in the dispositive election and that a black-supported candidate will need substantial white support to prevail. Petitioners' academic speculation about different districts where white support might not be necessary is therefore entirely beside the point here.

In short, Petitioners' Section 2 claim fails even under their own speculative factors for assessing an influence claim. In addition, Petitioners' 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). This 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) (footnote omitted). 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. Pet. App. 46a, 53a. Thus, even if Petitioners were to prevail with respect to the opportunity to elect, they would be entitled to no relief because they have not alleged that minority voters lack the opportunity to participate in the political process.

Finally, Petitioners make much of the Justice Department's purported support for influence claims. Pet. at 24-26. But as Petitioners tacitly acknowledge, *see id.* at 26, the Justice Department urged this Court to *reject* influence claims in its amicus brief in *Voinovich v. Quilter*, 507 U.S. 146 (1993). Citing the overwhelming precedent disallowing influence claims, the Government expressed its "agree[ment] with those courts that have rejected [the] notion" that "Section 2 requires creation of districts in which minorities are demonstrably *not* a majority of the voting age population." Brief for the United States as *Amicus Curiae*, *Voinovich v. Quilter*, No. 91-1618, 507 U.S. 146 (1993) (emphasis in original). Thus, the one time the Government urged the Court to recognize influence claims, the Court declined to consider the question, and the Government has elsewhere taken the opposite position. Cases since *Valdespino* and following the 2000 census, moreover, have overwhelmingly confirmed the need to comply with *Gingles*' majority-in-a-district requirement and been affirmed by this Court. *See Parker*, 263 F. Supp. 2d at 1104-05; *O'Lear*, 222 F. Supp. 2d at 861; *McConnell*, 201 F. Supp. 2d at 643 n.22; *Cano*, 211 F. Supp. 2d at 1231; *Smith*, 189 F. Supp. 2d at 537. If the Justice Department is, as Petitioners suggest, a bellwether of when a voting-rights question merits the Court's attention, the Department's silence in this case reaffirms that the lower courts are in accord and that the Court should deny the instant petition for certiorari.

III. The Decisions Below And The Overwhelming Precedent Are Correct.

A. Petitioners' Claim Is Foreclosed By The Statute's Plain Language.

The majority-in-a-district requirement is mandated by the language of Section 2. Under the statute, it must be "shown" that (1) a citizen's right to vote is impaired "on account of *race*," in that members of a "*protected*" "class of citizens" "have *less* opportunity than other members of the electorate . . . to *elect* representatives of their choice," and (2) the challenged practice "*results*" in this inequality. 42 U.S.C. § 1973(a) & (b) (emphasis added). Plaintiffs must prove that, but for the challenged plan, minority voters would have been able to elect representatives of their choice. *Gingles*, 478 U.S. at 50 n.17. Otherwise, the plan "cannot be responsible for minority voters' inability to elect its candidates." *Id.* at 50; *accord Cano*, 211 F. Supp. 2d at 1231 (claim of minority vote dilution not possible if "there is no minority voting power to dilute").

In *Gingles*, the Court squarely held that if "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" practice under attack. 478 U.S. at 50 n.17 (emphasis added). At best, such a minority group can allege "that the [challenged practice] impairs its ability to *influence* elections" by joining multi-racial political coalitions. *Id.* at 46 n.12 (emphasis in original); *accord Johnson v. De Grandy*, 512 U.S. 997, 1009 (1994) (where "members of a minority group are a minority of the voters," they allege that their group is "potentially influential"); *Voinovich*, 507 U.S. at 154 (voters allege "influence-dilution" where they "do not allege that [the challenged plan] prevented black voters from constituting a *majority* in additional districts" (emphasis in original)); *Growe*, 507 U.S.

at 41 n.5 ("a minority group not sufficiently large to constitute a majority" alleges an "ability to influence, rather than alter, election results"). Accordingly, the majority-in-a-district showing is the first "necessary precondition[]" of a claim that a challenged practice deprives black voters of the ability to *elect* the candidates of their choice. *Gingles*, 478 U.S. at 50.

As Petitioners concede, Pet. at 20, the Court *always* has recognized that candidates preferred by a group of minority voters, however small, can be elected with the support of white voters. *See Gingles*, 478 U.S. at 89 n.1 (O'Connor, J., concurring in judgment); *De Grandy*, 512 U.S. at 1020 ("[T]here 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 their candidates of their choice."); *Voinovich*, 507 U.S. at 154 (black voters that do not constitute a district majority "could not dictate electoral outcomes independently," "[b]ut they could elect their candidate of choice nonetheless if they are numerous enough and their candidate attracts sufficient cross-over votes from white voters"). One of the challenged districts in *Gingles* itself consistently had elected a black candidate even though blacks constituted only 36.3% of the population. 478 U.S. at 77, 74 & n.35. Indeed, under *Gingles*, the absence of such victories for minority-preferred candidates is an *additional* precondition for vote-dilution claims. *See id.* at 56 (no Section 2 claim where "the combined strength of minority support plus white 'crossover' votes" usually prevails over a white majority under the challenged plan).

Thus, in clearly holding that a group too small to be a district majority "cannot maintain that they would have been able to elect representatives of their choice," *Gingles*, 478 U.S. at 50 n.17, the *Gingles* Court necessarily concluded that the opportunity "to elect" protected by Section 2 is the ability of a protected class "to elect a representative of its *own* choice," by "dictat[ing] outcomes independently."

Growe, 507 U.S. at 40 (emphasis added); *Voinovich*, 507 U.S. at 154; *see also Gingles*, 478 U.S. at 67-68 ("Section 2(b) states that a 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*.'" (quoting 42 U.S.C. § 1973) (emphasis added in *Gingles*)); Pet. App. 14a-15a. Petitioners' argument to the contrary rests on the fundamentally mistaken premise that minority voters have a statutory right to the election of their preferred candidates. On the contrary, "[t]he objective of Section 2 is not to ensure that a candidate supported by minority voters can be elected in a district. Rather, it is to guarantee that a minority group will not be denied, on account of race, color, or language minority status, the ability 'to elect its candidate of choice on an equal basis with other voters.'" Pet. App. 16a (quoting *Voinovich*, 507 U.S. at 153).

When a districting plan denies black voters the numbers they need to form a winning coalition with white voters, the plan deprives the *entire* coalition, black *and* white, of the ability to elect its preferred representatives. Such a plan does not "result[]" in vote dilution "on account of *race*" and does not cause black voters to have "*less* opportunity than other members of the electorate . . . to elect representatives of their choice." 42 U.S.C. § 1973(a) & (b) (emphasis added). Bi-racial coalitions are not defined by "race" and are not protected by the Voting Rights Act; racial groups are. And members of a racial group 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. Granting minorities a right to rearrange districts so that their political coalition will usually win has nothing to do with equal opportunity, but is preferential treatment afforded to no others. If a plan impairs votes not "on account of race" but on account of membership in a political coalition, the plan does not violate Section 2.

See, e.g., *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971) (no vote-dilution claim when a minority group, "*along with all other Democrats*, suffers the disaster of losing too many elections" (emphasis added)); *City of Mobile v. Bolden*, 446 U.S. 55, 109 (1980) (Marshall, J., dissenting) (no Section 2 claim where minorities' "lack of success at the polls was the result of partisan politics, not racial vote dilution"); Pet. App. 17a-19a.

B. Petitioners' Claim Also Conflicts Irreconcilably With The Purpose Of Section 2.

Petitioners' claim runs afoul of not only the statutory language but also its unmistakable purpose to protect *racial* groups. Pet. App. 18a ("The Voting Rights Act is a balm for racial minorities, not political ones—even though the two often coincide." (internal quotation marks omitted)). Experience in the lower courts confirms that a "coalition" claim simply seeks advantage for a political party to which minority voters belong. *See, e.g.*, *McConnell*, 201 F. Supp. 2d at 643 n.22 (claim seeks 25% to 40% black districts because "[w]ith 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"); *Smith*, 189 F. Supp. 2d at 537 (claim reduces to argument "that more minorities are required in [a district] to make the congressional race more competitive for democratic candidates"). Indeed, Petitioners' own counsel acknowledges that these claims are driven by party operatives who attempt—with uneven success—to gain support from minority politicians. *See* J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 Geo. Mason L. Rev. 431, 455 (2000) (stating that "the Democratic Party will seek to work closely with minority officeholders and civil rights advocates to create districts that" are "less than 50% minority"). As one court of appeals aptly put it, the plaintiffs in these cases are "indistinguishable from political minorities

as opposed to racial minorities." *Nixon*, 76 F.3d at 1392 (internal citations omitted).

Thus, "coalition" claims are not cognizable under Section 2 for the simple reason that "[t]he Act's purpose is not to ensure the election of candidates . . . of any particular political party." *Lewis v. Alamance County*, 99 F.3d 600, 617 (4th Cir. 1996). No exception to this rule exists where a political party is supported by a minority group. *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."). Granting minorities a right to rearrange districts so that their political coalition will usually win has nothing to do with equal opportunity, but is preferential treatment afforded to no others.

Courts, moreover, are ill-equipped to decide which of two plans will elect more minority-preferred candidates. It was recognized as early as *Gingles* that shifting black voters between districts has an inherently unpredictable effect on the number of black-preferred candidates elected. *See* 478 U.S. at 87-89 (O'Connor, J., concurring in judgment); *accord Georgia v. Ashcroft*, 539 U.S. 461, 480-82 (2003). Petitioners' claim illustrates this point perfectly. According to Petitioners, Section 2 *requires* the black population of one district to be increased from 34% to 40%, largely by shifting black voters *out* of Virginia's only majority-black congressional district, which has a black voting-age population of only 53.2%. Pet. App. 3a-5a, 42a. By "spreading out minority voters over" the two districts, Petitioners' proposal might result in the election of minority-preferred representatives from both districts. *Georgia*, 539 U.S. at 481. "It also, however, creates the risk that the

minority group's preferred candidate may lose" in *both* districts. *Id.*; *accord* Pet. App. 42a.

As then-Judge Breyer observed, entertaining claims like Petitioners' "would require courts to make 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). The district court here emphasized:

> Plaintiffs allege that a 34 percent black population in the Fourth District denies black voters their basic voting rights but an 'approximately 40%' black population would guarantee those rights. Thus, the Court will be required to find that this six percent differential is of critical significance, because white crossover voting is enough to elect a black-preferred candidate at 40 percent, but plainly insufficient at 34 percent.

Pet. App. 41a (footnote omitted). At the same time, Petitioners allege that a corresponding *reduction* of black population by approximately *seven percent* in the adjacent district, which is Virginia's first majority-black district, would have *no* effect. *See id.* at 42a; *see also id.* at 4a, 26a-27a & n.4. Thus, in adjudicating the type of claim advanced by Petitioners, courts would be asked to decide whether the slightest of population shifts has a dispositive effect in one district and no impact in another. The Voting Rights Act does not authorize claims that would require counterintuitive prognostications with a level of certainty that no court can achieve.

Nor, as Petitioners urge, would recognizing influence claims "encourage the transition to a society where race no longer matters." Pet. at 29 (quoting *Georgia*, 539 U.S. at 490-91). Race-consciousness is not *decreased* if legislators are required to adjust racial percentages in districts where blacks are present in sufficient numbers to "influence" electoral outcomes. If legislatures must constantly tinker with black percentages to avoid liability, then virtually no

redistricting decision will be made where race is not a predominant factor (in violation of the color-blind commands of *Shaw v. Reno*, 509 U.S. 630 (1993)). 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.

Moreover, racial harmony is hardly enhanced when the interests of one minority group are subverted to further those of another minority group. In *Metts*, for example, the district challenged had a 21.4% black population and a 46.7% Hispanic population. This had altered the preexisting district from 25.7% black and 41% Hispanic. Perhaps as a consequence, a Hispanic challenger defeated the black incumbent and went on to win the election in the new district. 363 F.3d at 9. Following the en banc opinion in *Metts*, the State settled the case by increasing the black population back to 26%. Pet. at 13. In the next election, a black candidate was elected instead of the Hispanic in the district. *See* Pet. at 13 *citing* http://www.elections.ri.gov/2004GE/SenateDis6.htm; http://www.elections.ri.gov/2004Primary/SenateDis6.htm. The net result of *Metts*, then, was to authorize the lower court to deprive Hispanic voters, who constituted the bulk of the district, of their new electoral opportunity and return power to the smaller black group that had enjoyed representation during the prior decade. Neither the *Metts* court nor Petitioners provide any inkling of why modifying legislative choices in order to elevate blacks over another minority group furthers racial harmony or is authorized by the Voting Rights Act.

C. Petitioners' Claim Improperly Would Authorize Section 2 Lawsuits Wherever Minority-Supported Candidates Lose Elections.

Petitioners directly concede that their theory would eliminate the first *Gingles* precondition entirely, and there is no merit to their assurance that claims may "easily be

rejected" under "the second and third *Gingles* prongs, and [under] the totality of circumstances factors." Pet. at 28. To the contrary, the district court recognized that "[m]embers of any protected minority group could always launch a lawsuit to increase their presence in a district from 15 percent to 20 percent, or from 20 percent to 25 percent, and argue that this increase will cause their candidate to prevail" in a district where, for example, the Democratic candidate previously received 45-46% of the vote. Pet. App. 40a. In these circumstances, the second *Gingles* precondition would be satisfied by the minority group's cohesive support for Democrats, and the third *Gingles* precondition would be satisfied by the usual defeat of the Democratic candidate. *See Gingles*, 478 U.S. at 56 ("[I]n general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting.").

It is utterly absurd to argue that recognizing influence claims—and eliminating the first *Gingles* precondition, the principal bulwark against proportional representation and against frivolous Section 2 claims—would somehow "reduce the amount of Section 2 litigation brought by less-than-50% minority groups." Pet. at 18-19. Contrary to Petitioners' claim, Pet. at 28, the floodgates would not be obstructed by plaintiffs' need to prove that their political coalition could prevail under an alternative plan. This "requirement" is nothing more than a restatement of the third *Gingles* prong, which itself requires that the challenged plan causes the minority group's preferred candidates usually to lose elections that they otherwise usually would win. Petitioners effectively are saying that maximization is required "only" when maximization is *possible*—hardly a serious limitation on their proffered maximization rule.

Moreover, Petitioners' vote-dilution theory would entail judicial second-guessing and mandatory redrawing of district lines in 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 Petitioners claim, the area encompassing the challenged district is one in which black candidates can be elected in a 40% black district, then this is an electorate where white voters will willingly support a black candidate and that therefore does not present the sort of racial bloc voting problem that Section 2 is designed to correct. This is in stark contrast to the districts at issue in *Gingles* and elsewhere, in which 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 Petitioners' 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.

This is well illustrated by the recent *Metts* case in the First Circuit, where black voters had the potential to constitute only 26% of a district. By alleging that their multi-racial political coalition had the potential to elect its preferred representatives, the plaintiffs necessarily were contending that the white and Hispanic crossover rate was at least *32%*, meaning that *more* non-black voters than black voters were voting for black-preferred candidates. *See* 363 F.3d at 13 (Selya, J., dissenting). Thus, Petitioners ask the Court to authorize *greater* judicial interference in the areas where racially polarized voting is *less* of a problem. Such a rule would be intolerable under "a statute meant to hasten the waning of racism in American politics." *De Grandy*, 512 U.S. at 1020.

Petitioners' *de facto* elimination of the first *Gingles* precondition effectively would require creation of districts where a minority group's preferred representatives are usually elected, at least up to the point of proportionality between the percentage of such districts in the jurisdiction and the group's percentage of the jurisdiction's population. A Section 2 plaintiff would be able to establish a nearly irrebuttable *prima facie* case by showing that whites outvote a cohesive minority group, and courts would be required to impose an alternative redistricting scheme that allows the minority's political coalition to outvote the white majority. The *Gingles* preconditions do not technically establish a Section 2 violation, since the "totality of circumstances" must be further analyzed. *See De Grandy*, 512 U.S. at 1011. But, in practice, the totality-of-circumstances factors have not often been the basis for denial of Section 2 claims. *See id.* at 1012 ("lack of equal electoral opportunity may be readily imagined and unsurprising when demonstrated under circumstances that include the three essential *Gingles* factors"). The only reliable defense would be that proportionality has been achieved under *De Grandy*, *see id.*, thus confirming that Petitioners' theory requires representation up to the point of proportionality.

In fact, *Gingles* specifically stated that the *purpose* of the majority-in-a-district requirement is to foreclose a proportionality rule: 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 insure that Section 2 will "only protect racial minority votes from diminution proximately caused by the [re]districting; [but] *would not assure racial minorities proportional representation.*" 478 U.S. at 50 n.17 (emphasis in original; internal quotation marks omitted). As Justice O'Connor's concurring opinion explained, the majority-in-a-district requirement is a thin barrier against a proportionality rule because, under the framework adopted by the Court, proportionality usually will be required whenever geography

permits the creation of majority-black districts in proportion to the black population percentage. *Id.* at 91-92 (O'Connor, J., concurring in judgment). Justice O'Connor's opinion, moreover, argued that the majority's standards "come *closer* to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2." *Id.* at 94 (emphasis added). The *Gingles* concurrence thus provides an even stronger basis than the majority opinion for rejecting Petitioners' effort to *eliminate* the majority-in-a-district obstacle to a proportionality mandate. The *Gingles* Court unanimously concluded that Section 2's prohibition of a proportionality rule necessitates either the majority-in-a-district requirement or a *higher* threshold for vote-dilution claims.

Gingles also refutes Petitioners' assertion that the Senate Report on amended Section 2 requires courts to explore the totality of the circumstances in every case. *Gingles* itself "rel[ied] heavily on the Report," Pet. at 23, and nevertheless established three "necessary preconditions" to Section 2 vote-dilution claims. 478 U.S. at 50. To be sure, for a finding *in their favor*, plaintiffs must show vote dilution "in the context of all the circumstances," S. Rep. No. 97-417, at 27 (1982), *quoted in* Pet. at 23, but this does not suggest that a court cannot "provide[] some structure to the statute's 'totality of circumstances' test" by recognizing threshold elements. *De Grandy*, 512 U.S. at 1010; *see also id.* at 1011 ("[I]f *Gingles* so clearly identified the three [preconditions] as generally necessary to prove a § 2 claim, it just as clearly declined to hold them sufficient in combination . . . .").

Nor is it true that Section 2 claims must be allowed wherever minorities suffer political defeats because the majority-in-a-district requirement is an "arbitrary" or necessarily inflexible "numerical cutoff." Pet. at 24. Far from being arbitrary, the 50% figure identifies the point at which the minority group cannot possibly need white crossover votes to elect their candidates of choice. For all the reasons discussed above, that point is central to the

statute's protection of racial groups, not multi-racial political ones. Furthermore, this case does not present the issue whether the 50% figure should be based on total population, as opposed to voting-age population or citizen voting-age population. *See, e.g.*, *De Grandy*, 512 U.S. at 1008. Similarly, as Petitioners themselves point out, Pet. at 20, it might be shown in a particular jurisdiction that, due to the consistent presence of more than two candidates, a group need not constitute 50% of voters in order to provide all of the votes that the winning candidate will need. In this case, however, the complaint plainly states that black voters would require "some white cross-over votes" to elect their preferred candidates. Pet. App. 50a; *accord* Pet. at 2. This case therefore presents only the issue whether the Court should eliminate the first *Gingles* precondition in favor of a rough proportionality rule.

D. *Georgia v. Ashcroft* Does Not Authorize Influence Claims.

Georgia v. Ashcroft, 539 U.S. 461 (2003), confirms that the Act does not require the creation of influence districts. *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. That influence districts are *permissible*, however, in no way suggests that state legislatures are *required* to create them under the Voting Rights Act.

Indeed, *Georgia* substantially *enhanced* state legislative autonomy to redistrict free from federal judicial interference. Although Section 5, unlike Section 2, bluntly "insure[s]" 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." *Id.* at 482. Such redistricting decisions, this Court explained, constitute a "political choice," and state legislatures, not federal courts, are

empowered to "choose one theory of effective representation over the other." *Id.* at 482-483. This 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; *id.* at 87-89 (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 480.

Thus, Petitioners' argument that *Georgia* authorizes influence districts "turns the principle of *Georgia v. Ashcroft* on its head." *Session*, 298 F. Supp. 2d at 485. *Georgia* "gave states *greater* latitude in complying with the Voting Rights Act," and thus cannot be read as "fencing even more territory from state legislative reach." *Id.* (emphasis added). 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.

Petitioners make the bizarre assertion that since *Georgia* allows states to point to influence districts as a defense to

Section 5 liability, it somehow follows that Section 2 *requires* the creation of influence districts. Pet. at 27. 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. Any such rule would fly in the face of the "political" choice entrusted to the states under *Georgia*, and of this 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*, 539 U.S. at 481-82; *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"). Moreover, it is illogical to suggest that aspects of a districting plan that aid in its defense are somehow required. For example, although legislatures are free to seek proportionality and may cite proportional representation as a defense to a Section 2 claim, Section 2, by its terms, does not *require* such proportionality. *See De Grandy*, 512 U.S. at 1220.

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 candidates supported by a bi-racial political coalition.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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