No. 04-870

In The Supreme Court of the United States

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

Petitioners,

v.

COMMONWEALTH OF VIRGINIA; JEAN JENSEN, in her official capacity as Secretary of the Virginia State Board of Elections Secretary; JUDITH WILLIAMS JAGDMANN, in her official capacity as Attorney General 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,

Respondents.

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

BRIEF OF THE COMMONWEALTH OF VIRGINIA, JEAN JENSEN, AND JUDITH WILLIAMS JAGDMANN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

JUDITH WILLIAMS JAGDMANN
Attorney General
of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

CARLA R. COLLINS
JOEL C. HOPPE
D. MATHIAS ROUSSY
Associate State Solicitors
General

MAUREEN RILEY MATSEN
Deputy Attorney General

EDWARD M. MACON
Senior Assistant Attorney General

JAMES C. STUCHELL
Assistant Attorney General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 371-0200 (facsimile)

Counsel for the Commonwealth of Virginia, Jean Jensen, and Judith Williams Jagdmann

February 28, 2005

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

When minority voters cannot constitute a majority in a single-member district, may they maintain a claim that a State's redistricting plan dilutes their ability to elect their candidates in violation of § 2 of the Voting Rights Act?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

BRIEF IN OPPOSITION

The Respondents, the Commonwealth of Virginia, Jean Jensen, in her official capacity as Secretary of the Virginia State Board of Elections, and Judith Williams Jagdmann, in her official capacity as Attorney General of Virginia (collectively "Virginia"), respond to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.[1] The Fourth Circuit, following *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) and its progeny, held that when minority voters cannot constitute a majority in a single-member district, minority voters *may not maintain* a claim that a State's redistricting plan dilutes their ability to elect their candidates in violation of § 2 of the Voting Rights Act. For the reasons set out below, the Writ of Certiorari should be denied.

STATEMENT OF THE CASE

1. Almost twenty years ago, this Court established certain preconditions that minority voters must meet before filing a claim under § 2 of the Voting Rights Act ("§ 2"), 42 U.S.C. § 1973. *See Gingles*, 478 U.S. at 50. Among other requirements, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at

[1] On February 1, 2005, Judith Williams Jagdmann succeeded Jerry W. Kilgore as Attorney General for the Commonwealth of Virginia. "When a public officer who is a party to a proceeding in this Court in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate and any successor in office is automatically substituted as a party." Sup. Ct. R. 35.3. The Clerk of this Court was notified of the succession by letter.

50. "When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. DeGrandy*, 512 U.S. 997, 1008 (1994). By requiring that minority voters demonstrate that they could be a numerical majority in a single-member district, this Court ensures that minority voters are capable of electing a candidate *without assistance from non-minority groups*. *See Gingles,* 478 U.S. at 90-91 (O'Connor, J., concurring) (emphasis added). *See also Baker v. Carr,* 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting) ("One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth."). Quite simply, "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles,* 478 U.S. at 50 n.17 (emphasis original).

In the present matter, it is undisputed that the minority voters cannot form a numerical majority in a single-member district. *See Pet.* at 6. Because this Court has never excused minority voters from the requirement that they constitute a majority in a single-member district, the Petitioners' § 2 claim must fail as a matter of law. Indeed, both the district court and the court of appeals reached this conclusion. *See App.* at 19a, 24a, 32a, 43a.

a. Nevertheless, the Petitioners, a group of African-American voters who reside in Virginia's Fourth Congressional District, assert that they should be allowed to maintain a § 2 claim to challenge Virginia's 2001 congressional redistricting plan. The Petitioners' theory focuses

not on the presence of an African-American majority, but on the difficulty of forming a majority coalition of African-Americans and non-African-Americans to elect the candidate of the African-Americans' choice.[2] *See Pet.* at 4, 8.

b. The Petitioners' theory appears to be nothing more than an "ability to influence" claim under § 2. Although the Petitioners admit that African-Americans cannot constitute a majority in the Fourth Congressional District, the Petitioners contend that Virginia's 2001 redistricting plan – which reduces the African-American voting age population by just six percent – somehow deprives them of the ability to elect a candidate of their choice with the help of "crossover voting" from non-African-Americans. *See Pet.* at 3-4. Such a contention is remarkably similar to this Court's description of "ability to influence" claims under § 2. *See Voinovich v. Quilter*, 507 U.S. 146, 150 (1993) ("Ability to influence" districts are "districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice."). Thus, it is logical to characterize the Petitioners' claim as an "ability to influence" claim. By summarily affirming *Parker v. Ohio*, 263 F. Supp. 2d 1100 (S.D. Ohio) (three-judge court), *summarily aff'd*, 540 U.S. 1013 (2003), this Court, at least implicitly, established that "ability to influence" claims are not viable.[3] *See Mandel v. Bradley*,

[2] Indeed, it appears that the Petitioners' interpretation of § 2 actually requires that affirmative measures be taken to maximize the influence of minority voters. Although African-Americans were less than 40% of the voting age population in the Fourth Congressional District prior to redistricting, the Petitioners demanded that the district court create a district that was at least 40% African-American. *Pet*. at 4. *App.* at 26a, 27a, 33a.

[3] *Parker* involved a § 2 challenge to an apportionment plan for electing the Ohio General Assembly. *See Parker,* 263 F. Supp. 2d at

(Continued on following page)

432 U.S. 173, 176 (1977) ("Summary affirmances . . . without doubt reject the specific challenges presented in the statement of jurisdiction. . . .").

c. However, the Petitioners explicitly disclaim any attempt to bring an ability to influence claim. *See Pet.* at 4 n.4. Indeed, they assert that there is a fundamental difference between an "influence district," which they define

---

1102. Like the Petitioners here, the plaintiffs in *Parker* tried to convince the court that the first *Gingles* precondition does not apply "where a distinct [minority] group cannot form a majority, but they are sufficiently large and cohesive to effectively influence elections, getting their candidate of choice elected." *Id.* at 1104. *Parker* rejected this argument and ruled that influence claims are not cognizable because the first *Gingles* precondition is mandatory. *See Id.* at 1105; *Id.* at 1108 (Graham, J., concurring). Indeed, as one member of the Court stated:

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

Id. at 1108 (Graham, J., concurring).

On direct appeal to this Court, the minority voters asked this Court to review a question that is virtually identical to the question presented by the Petitioners in this matter. Specifically, the *Parker* appellants framed the issue as:

> Whether Section 2 of the Voting Rights Act . . . permits minority voters to maintain a claim for vote dilution under the Act when minority voters constitute less than a majority of the voting age population, but are sufficient in number and politically cohesive to be able to otherwise elect their preferred candidate . . . under a different redistricting scheme in conjunction with like-minded non-minority voters within the same geographically compact area.

Jurisdictional Statement at i, *Parker v. Ohio*, 540 U.S. 1013 (2003) (No. 03-411). Confronting the issue whether "influence" districts are cognizable under the Voting Rights Act, this Court summarily affirmed the judgment in *Parker*. *See* 540 U.S. 1013 (2003).

as a situation where minorities can influence the outcome of an election, but cannot elect the candidate of their choice, and a "coalitional district," where minorities in conjunction with voters of other races may actually elect the candidate of the minorities' choice. *See Id*. Consequently, the Petitioners insist that their claim involves a coalitional district and, thus, is properly characterized as an "ability to elect" claim.

d. Quite simply, there is no meaningful distinction between an "ability to influence" claim and a Petitioners' "coalitional majority ability to elect" claim. However, regardless of whether the Petitioners' theory is characterized as "ability to influence" or "ability to elect," the fact remains that the Petitioners are seeking to bring a § 2 claim when they cannot form a majority in a single-member district. This Court has never excused minority voters from the requirement that they constitute a majority in a single-member district. Thus, the Petitioners effectively are inviting this Court to rewrite its § 2 jurisprudence. This Court should reject that invitation.

2.a. The factual background for this Petition is relatively straightforward. The results of the 1990 Census entitled Virginia to an additional seat in the U.S. House of Representatives. *See Moon v. Meadows*, 952 F. Supp. 1141, 1143 (E.D. Va. 1997). In 1991, Virginia enacted legislation redrawing the Third Congressional District so that African-Americans comprised a majority of both the total population and the voting age population. *See Id.* at 1144. Specifically, African-Americans comprised 64% of the total population and 61.2% of the voting age population. *Id.* In drawing a district where African-Americans were the majority, Virginia was motivated, in part, by its desire to comply with § 2. *See Id.* at 1149. Following the redrawing

of the Third Congressional District, Robert Scott, an African-American, won election to Congress in 1992, *see Id.* at 1144, and has been reelected in every subsequent election.

After Virginia redrew the Third Congressional District so that it had an African-American majority, the Fourth Congressional District, which is generally adjacent to the Third Congressional District, contained a significant African-American population. Specifically, as of 2000, African-Americans constituted 39.4% of the total population and 37.8% of the voting age population. Prior to the 1991 redistricting, the Fourth Congressional District was represented by Congressman Norman Sisisky, a Caucasian and a Democrat. Congressman Sisisky won reelection in the redrawn Fourth Congressional District throughout the 1990's.

In 2001, Virginia enacted its redistricting plan in response to the 2000 Census, and Congressman Sisisky died. In the ensuing special election, Randy Forbes, a Caucasian and a Republican State Senator, defeated Louise Lucas, an African-American and a Democratic State Senator, by a margin of 52% to 48%. Given that a Democrat had represented the Fourth Congressional District for many years, it is unsurprising that the Democratic candidate who had served in the General Assembly for many years would run a competitive race in the special election.

b. The results of the 2000 Census indicated that the population of the Third Congressional District, the one

with an African-American majority, was 12% lower than the size of an ideal Virginia congressional district.[4] Thus, under the terms of this Court's decisions, Virginia was required to move voters from other Congressional Districts to the Third Congressional District. Moreover, the African-American population had declined to 57% of the total population and 53.3% of the voting age population. Virginia considered several alternative redistricting plans – none of which would have created an African-American majority in both the Third and Fourth Congressional Districts. *See App.* at 19a, 26a, 27a. Indeed, as the Petitioners concede, it is impossible to draw the lines so that there is an African-American majority in both the Third and Fourth Congressional Districts. *See App*. at 6a. Being unable to create a *second* African-American majority district in the Fourth Congressional District, Virginia ultimately enacted a redistricting plan that resulted in a Third Congressional District with an African-American voting age population of 53.2% and a Fourth Congressional District with an African-American voting age population of 32.3%. *See App*. at 3a-4a, 25a-25a. In other words, under the new plan, the African-American share of the voting age population remained essentially the same in the Third Congressional District (53.3% to 53.2%) and declined slightly in the Fourth Congressional District (37.8% to 32.3%). The U.S. Department of Justice precleared Virginia's redistricting plan. *See App.* at 25a.

[4] The results of the 2000 Census also indicated that the number of Virginia seats in the U.S. House of Representatives would remain unchanged.

3. On February 21, 2003, more than a year after the plan took effect and three months after the 2002 congressional elections, the Petitioners filed this lawsuit in the United States District Court for the Eastern District of Virginia. Specifically, the Petitioners alleged that the redrawn Fourth Congressional District violated § 2 of the Voting Rights Act by diluting their ability to elect their candidate of choice. *See Pet*. at 3. The Petitioners conceded, as they must, that it is simply impossible to draw the lines so that African-Americans constitute a majority in both the Third and Fourth Congressional Districts. *See Pet.* at 6; *App.* at 26a-27a. Nevertheless, the Petitioners asked the district court to order Virginia to repeat the redistricting process and increase the African-American population in the Fourth Congressional District to 40%, a level at which the Petitioners believe that African-Americans could elect their candidate of choice with the assistance of non-African-American voters. *See Pet.* at 4; *App.* at 26a, 27a, 33a.

Although the Petitioners explicitly asserted an "ability to elect" claim, *see Pet.* at 4, they based their argument for their requested relief on the potential viability of an "ability to influence" claim. In an "ability to influence" claim, the Petitioners argued, the minority voters, though too small to constitute a majority and thus elect their candidate, should be excused from the first *Gingles* pre-condition because they are "large enough to influence the selection of candidates." *App.* at 34a. The Petitioners' argument was two-fold. First, they contended that this Court has left open the issue of whether a vote dilution claim could be brought under such an "ability to influence" claim. Second, assuming that this Court has left open the question of an "ability to influence" claim, the Petitioners

argued that they should be excused from the first *Gingles* precondition on their "ability to elect" claim. *See App.* at 43a.

The district court dismissed the Petitioners' entire case under § 2 of the Voting Rights Act.[5] The court recognized that, under this Court's precedents of *Gingles* and *Johnson*, "a § 2 plaintiff must demonstrate that it is possible to create additional geographically compact majority-minority districts." *App.* at 32a. Since the Petitioners admitted that African-Americans could not constitute a majority in the Fourth Congressional District, the district court dismissed their complaint for failing to meet this necessary precondition to all VRA § 2 claims. *See App.* at 32a. With regard to the Petitioners' argument concerning "ability to influence" claims, the district court found that "[a]ll five Circuit Courts of Appeal that have considered the question of an 'influence district' have held that the first precondition in *Gingles* establishes a bright line that precludes vote dilution claims in other than so called majority-minority districts." *App.* at 43a. Since no circuit court had even affirmed the viability of an "ability to influence" claim, the district court correctly applied the "well established and objective rule requiring a majority-minority district" to the Petitioners' "ability to elect" claim. *App.* at 44a.

[5] As an initial matter, the district court correctly found that seven of the nine Petitioners no longer resided in the Fourth Congressional District and so lacked standing to challenge its composition under the Voting Rights Act. Specifically, the district court dismissed Petitioners Richard Pruitt, Thomasina Pruitt, Vivian Curry, Elijah Sharpe, Eunice McMillan, James Speller, and Robbie Garnes.

4. On appeal, the Petitioners acknowledged the *Gingles* precondition mandating that § 2 plaintiffs demonstrate that a minority group is large enough to form a majority in the challenged district. Nevertheless, they contended that the first *Gingles* precondition is satisfied not only when a minority group constitutes a numerical majority in a single-member district, but also when minorities are sufficiently numerous to form an "effective" or "functional" majority by combining with voters from other racial or ethnic groups. *See App.* at 9a.

The Fourth Circuit rejected Petitioners' argument. The court, in an opinion written by Judge Duncan, ruled that, under *Gingles* and § 2, minority voters must have the ability to elect their candidates on the strength of their *own* ballots. Where, as here, minorities cannot constitute a majority, they have no ability to elect the candidates of their own choice and thus have no claim under § 2. *See App.* at 13a-14a. The court noted that *Gingles* addressed minority voters' "ability to elect" their preferred candidates and did not address an "ability to influence" claim. *See App.* at 11a. Because the Petitioners could not establish that African-American voters in the Fourth Congressional District could form a majority as required by *Gingles*, the Fourth Circuit affirmed the district court's order dismissing the § 2 claim.[6] *See App.* at 19a.

[6] The Fourth Circuit also declined to reverse the district court's ruling that seven Petitioners lacked standing**.** *See App.* at 10a. Since the Petitioners have not raised this ruling in their Petition, that issue is not before this Court.

REASONS FOR DENYING THE WRIT

Certiorari should be denied for two reasons. First, regardless of how it is characterized, the Petitioners' theory is inconsistent with this Court's decisions as well as the text and purpose of § 2. Allowing the Petitioners to bring a § 2 claim when they do not form a majority in a single-member district is inconsistent with this Court's previous decisions. This Court has held that, in order to bring a § 2 claim under the "ability to elect" theory, minority voters must constitute a majority in a single-member district. In subsequent decisions addressing both the "ability to elect" and the "ability to influence" theory, this Court never excused minority votes from this requirement. Moreover, any theory that allows minority voters to pursue a § 2 claim when they do not constitute a majority in a single-member district is inconsistent with the text and purpose of § 2.

Second, there is no split among the Circuits. When confronted with a situation where minority voters cannot constitute a majority in a single district, every Circuit to address the issue has ruled that the minority voters may not maintain a § 2 claim. Although the First Circuit did suggest that it might be possible for minority voters to maintain such a claim, nothing in the First Circuit's decision expressly held that. To the contrary, the First Circuit simply held that, in some instances, there should be further factual development before applying the *Gingles* preconditions.

I. THE PETITIONERS' THEORY IS INCONSISTENT WITH THIS COURT'S JURISPRUDENCE AS WELL AS THE TEXT AND PURPOSE OF § 2.

As explained above, although the Petitioners appear to bring an "ability to influence" claim, the Petitioners insist that they are bringing a "coalitional majority ability to elect" claim. Yet, regardless of how one characterizes Petitioners' theory, it is clear that they are attempting to bring a § 2 claim even though minority voters do not constitute a majority in a single-member district. Allowing the Petitioners to bring a § 2 claim when they do not form a majority in a single-member district is inconsistent with this Court's previous decisions. This Court has held that, in order to bring a § 2 claim under the "ability to elect" theory, minority voters must constitute a majority in a single-member district. In subsequent decisions addressing both the "ability to elect" and the "ability to influence" theory, this Court never excused minority votes from this requirement. Moreover, any theory that allows minority voters to pursue a § 2 claim when they do not constitute a majority in a single-member district is inconsistent with the text and purpose of § 2.

A. To Bring a § 2 Claim Under the "Ability To Elect" Theory, Minority Voters Must Constitute a Majority in a Single-Member District.

In *Gingles*, this Court laid down three "necessary preconditions" that minority voters must demonstrate before they can pursue a claim under § 2. Only the first such precondition is relevant here: "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles,* 478 U.S. at 50. The

Court's rationale for this first precondition stems from the text of § 2, which recognizes a violation only when minorities have "less opportunity . . . to elect representatives of their choice." 42 U.S.C. § 1973(b). Thus, *Gingles* expressly held that minority voters cannot state a claim under § 2 if they cannot constitute a majority in a single-member district. This Court reaffirmed this rule in *Growe v. Emison*, 507 U.S. 25, 40 (1993) ("[T]he three *Gingles* prerequisites continue to apply . . . [and] are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district.").

B. This Court Has Never Excused Minority Voters from the Requirement That They Constitute a Majority in a Single-Member District.

Although *Gingles* was an "ability to elect" case, this Court has never excused minority voters – even those attempting to assert an "ability to influence" claim – from the requirement that they constitute a majority in a single-member district. Indeed, this Court has never ruled that such an "ability to influence" claim is viable, much less that minority voters asserting such a claim are excused from the requirement that minority voters constitute a majority in a single-member district.

In *Gingles*, this Court limited its holding to "ability to elect" claims and refused to comment on "ability to influence" claims. "We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections." 478 U.S.

at 46 n.12 (emphasis added). Similarly, in *Growe*, this Court explained that "*Gingles* expressly declined to resolve whether, when a plaintiff alleges that a voting practice or procedure impairs a minority's ability *to influence*, rather than alter, election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice. We do not reach that question in the present case either." 507 U.S. at 41 (emphasis added) (internal citation omitted).

In *Voinovich*, minority voters challenged an Ohio redistricting plan under § 2, claiming it deprived them of "influence districts." *Voinovich,* 507 U.S. at 154. This Court defined an influence district as one in which minorities, though too small to constitute a majority in the district, "could elect their candidate of choice nonetheless if they are numerous enough and their candidate attracts sufficient cross-over votes from white voters." *Id.* Once again, this Court refused to decide whether such "ability to influence" claims are viable under § 2. "Instead, we assume for the purpose of resolving this case that [minority voters] in fact have stated a cognizable § 2 claim." *Id.* This Court did not rule on this issue because the minority voters' case failed under the third *Gingles* precondition. "We need not decide how *Gingles*' first factor might apply here, however, because [minority voters] have failed to demonstrate *Gingles*' third precondition. . . ." *Id.* at 158. Because the minority voters' "ability to influence" claim failed under the third *Gingles* precondition, this Court did not decide whether it met the first precondition or whether an "ability to influence" claim is even cognizable.

Finally, *Johnson* involved an appeal of the federal district court's ruling on a minority voters' § 2 challenge to a redistricting plan. *Johnson*, 512 U.S. at 1002. The district

court found that the minority voters' "ability to influence" claim satisfied the three *Gingles* preconditions. The district court then turned to the merits of the § 2 claim and found that, based on the totality of the circumstances, Hispanics continued to feel the political effects of historic discrimination. Accordingly, the district court found that the redistricting plan violated § 2. *Id.* at 1004. On appeal, this Court faced two issues. The first issue was "whether the first *Gingles* condition can be satisfied by proof that a so-called influence district may be created." *Id.* at 1009. Again, this Court refused to reach this issue. "As in the past, we will assume without deciding that even if Hispanics are not an absolute majority of the relevant population in the additional districts, the first *Gingles* condition has been satisfied in these cases." *Id.* Instead, this Court reached the second issue and decided the case based on its finding that "the totality of circumstances appears not to support a finding of vote dilution here. . . ." *Id.* at 1024. Having decided the case on the merits, this Court again had no occasion to rule on the viability of an "ability to influence" claim under § 2.

In short, this Court has never ruled that an "ability to influence" claim is even legally cognizable; much less that minority voters asserting such a claim are excused from the first *Gingles* precondition. By asking this Court to take both unprecedented steps here, the Petitioners are effectively asking this Court to rewrite its § 2 jurisprudence.

C. The Statutory Text Forecloses the Petitioners' Theory.

The text of the statute also forecloses the Petitioners' theory. A violation of the Voting Rights Act occurs only if a

political process causes racial minorities to have "less opportunity than other members of the electorate to participate in the political process and to *elect* representatives of their choice." 42 U.S.C. § 1973 (emphasis added). Thus, the statute explicitly protects the minority voters ability "to elect" *without help from other racial groups*, but makes no mention at all of the ability to elect with *the help of other racial groups*. This crucial textual distinction was the basis for the requirement that, before they may bring a § 2 claim, minority voters must constitute a majority in a single-member district. As this Court observed:

> The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.

Gingles, 478 U.S. at 50 n.17 (emphasis original).

The essence of a claim under § 2 is dilution of minority votes. *See White v. Regester*, 412 U.S. 755, 765 (1973). Any claim of dilution must be measured against some reasonable benchmark of "undiluted" minority voting strength. *See App.* at 10a-12a. The text of § 2 sets that benchmark at the level at which minorities have the ability "*to elect* representatives of their choice." 42 U.S.C. § 1973 (emphasis added). In *Gingles*, this Court interpreted that benchmark to be the point at which minorities comprise at least 50%. "Where the minority group meets these requirements, the representative that it could *elect* in the hypothetical district or districts in which it constitutes a

majority will serve as the measure of its undiluted voting strength." *Id.* at 90-91 (O'Connor, J., concurring) (emphasis added). In other words, minorities must have the potential to elect candidates on the strength of their own ballots. *See App.* at 13a. The text of § 2 is therefore incompatible with any claim in which African-Americans must rely on non-African-American crossover voters to elect their candidates of choice.

D. The Petitioners' Theory Is Inconsistent with the Purpose of the Voting Rights Act.

The Petitioners' theory also is inconsistent with the purpose of the Voting Rights Act. Quite simply, § 2 is aimed at ensuring equality of opportunity rather than at guaranteeing the electoral success of particular candidates. *See Johnson,* 512 U.S at 1014. The objective of § 2 is not to ensure that a candidate supported by minority voters and their political allies can be elected in a district. Rather, it is to guarantee that a minority group will not be denied, because of race, color, or language minority status, the ability "to elect its candidate of choice on an equal basis with other voters." *Voinovich,* 507 U.S. at 153. Section 2 is not violated unless minorities "have less opportunity *than other members of the electorate* to . . . elect representatives of their choice." 42 U.S.C. § 1973(b) (emphasis supplied). The Circuits to address the issue have held that the purpose of the act is to protect the votes of racial minorities, not the success of any particular candidates or political coalitions. *See Lewis v. Alamance County*, 99 F.3d 600, 617 (4th Cir. 1996); *Nixon v. Kent County*, 76 F.3d 1381, 1392 (6th Cir. 1996).

In sum, the Petitioners' theory is inconsistent with this Court's decisions and with the text and purpose of the Voting Rights Act. Accordingly, certiorari should be denied.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS

Contrary to the Petitioners' assertions, there is no conflict among the Circuits. Every Circuit to address the issue has concluded that, when minority voters cannot constitute a majority in a single-member district, the minority voters may not maintain a § 2 claim. *See Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-52 (5th Cir. 1999); *Cousin v. Sundquist*, 145 F.3d 818, 828-29 (6th Cir. 1998); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1424 n.7 (9th Cir. 1989); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988). Moreover, every three-judge panel to address the issue has reached the same conclusion. *See Session v. Perry*, 298 F. Supp. 2d 451, 478-79, 486 (E.D. Tex.) (three-judge court), *vacated on other grounds*, 125 S. Ct. 351 (2004); *Parker*, 263 F. Supp. 2d at 1104-05; *O'Lear v. Miller*, 222 F. Supp. 2d 850, 861 (E.D. Mich.) (three-judge court), *summarily aff'd*, 537 U.S. 997 (2002); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 643 n.22 (D.S.C. 2002) (three-judge court); *Cano v. Davis*, 211 F. Supp. 2d 1208, 1231 (C.D. Cal. 2002) (three-judge court), *aff'd*, 123 S. Ct. 851 (2003); *Smith v. Clark*, 189 F. Supp. 2d 529, 537 (S.D. Miss. 2002) (three-judge court), *aff'd sub nom. Branch v. Smith*, 538 U.S. 254 (2003); *Turner v. Arkansas*, 784 F. Supp. 553, 565, 570-71 (E.D. Ark. 1991) (three-judge court), *aff'd*, 404 U.S. 952 (1992).

Nevertheless, the Petitioners insist that there is a Circuit split. *See Pet.* at 12.[7] Specifically, the Petitioners claim that the First Circuit's *per curiam* decision in *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (*en banc*) (*per curiam*) stands for the proposition that minority voters may maintain a § 2 claim even though it is impossible for them to constitute a majority in a single district. Quite simply, the Petitioners overstate *Metts*. They seek to transform a casual observation into a formal holding.

Metts involved a § 2 challenge to a Rhode Island state senate district in which 21% of the total population was African-American and 46% was Hispanic. The district court dismissed the complaint for failure to comply with the *Gingles* preconditions. *Id.* at 9. On appeal, the First Circuit did suggest that the Supreme Court has not conclusively ruled "whether dilution of a minority racial group's influence, as opposed to the power to elect, could violate section 2 – a position that would require substantial modification of *Gingles*' first-prong 'majority' precondition." *Id.* at 11.

[7] None of the district court cases Petitioners cite support their "ability to influence" claim. *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) (three-judge court), was overruled in *Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998). *West v. Clinton,* 786 F. Supp. 803 (W.D. Ark. 1992), assumed, without deciding, that the "ability to influence" theory was viable. The district court ultimately rejected the minority voters' claim because the minority voters failed to present evidence that, even under an "ability to influence" theory, their candidate would be elected. *Id.* at 807. Both *Puerto Rican Legal Def. and Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681 (E.D.N.Y. 1992), and *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Cal. 2002) involved districts in which minorities were a majority.

However, the court of appeals focused on the lack of evidence concerning the totality of circumstances surrounding the redistricting plan. As the First Circuit observed:

> At this point we know practically nothing about the motive for the change in district or the selection of the present configuration, the contours of the district chosen or the feasible alternative, the impact of alternative districts on other minorities, or anything else that would help gauge how mechanically or flexibly the *Gingles* factors should be applied.

Id. at 12. Faced with this uncertainty, the First Circuit sought more information concerning both the facts of the case and the governing law. Accordingly, the court of appeals remanded the case to the district court "to allow a fuller development of the evidence, and further legal analysis based on that evidence, before any final determination is made." *Id.* at 10. In other words, *Metts* does not support the proposition that compliance with the *Gingles* preconditions is excused. Rather, *Metts* stands for the proposition that, in some instances, it is necessary to develop the record more fully before determining if the minority voters state a claim.[8]

In short, there is no split in the Circuits. Every Circuit to explicitly rule on the issue has concluded that any claim under § 2 – whether it be an "ability to elect" or an "ability to influence" claim – is subject to the requirement that

[8] In this respect, the First Circuit's decision is simply wrong. 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. *See Growe*, 507 U.S. at 38-40; *Johnson*, 512 U.S. at 1006-09.

minority voters must constitute a majority in a single-member district. Accordingly, Certiorari should be denied.

CONCLUSION

For the reasons set out above, this Court should **DENY** the Petition for a Writ of Certiorari.

Respectfully submitted,

JUDITH WILLIAMS JAGDMANN
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

CARLA R. COLLINS
JOEL C. HOPPE
D. MATHIAS ROUSSY
Associate State Solicitors General

MAUREEN RILEY MATSEN
Deputy Attorney General

EDWARD M. MACON
Senior Assistant Attorney General

JAMES C. STUCHELL
Assistant Attorney General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 371-0200 (facsimile)

Counsel for the Commonwealth of Virginia, Jean Jensen, and Judith Williams Jagdmann

February 28, 2005