No. _____

In The

Supreme Court of the United States

JOAN HALL, *et al.*,

Petitioners

v.

COMMONWEALTH OF VIRGINIA, *et al.*

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

PETITION FOR A WRIT OF CERTIORARI

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December 21, 2004

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 allege that members of their minority group have the ability to "elect representatives of their own choice" in a single-member district, but do not allege that their minority group constitutes an arithmetical majority of the population in that district.

LIST OF ALL PARTIES

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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PETITION FOR A WRIT OF CERTIORARI

Joan Hall and seven other individuals (collectively "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 385 F.3d 421 (2004). App., *infra*, 1a-19a. The opinion of the district court is reported at 276 F. Supp. 2d 528 (E.D. Va. 2003). App., *infra*, 22a-44a.

JURISDICTION

The court of appeals entered its judgment on September 22, 2004. App., *infra*, 20a-21a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

As amended in 1982, Section 2 of the Voting Rights Act ("VRA") is violated whenever

> based on the totality of circumstances, it is shown that the political processes leading to the nomination or election in the State or political subdivision are not equally open to participation by members of a [protected minority] class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b).

STATEMENT OF THE CASE

1. Factual Background

In the former Fourth Congressional District of Virginia, African-Americans made up 38% of the voting-age population ("VAP"). App., *infra*, 3a. In a special election held on June 19, 2001 – an election marked by relatively low voter turnout and interest because it was held one week after a gubernatorial election – the African-American candidate of choice lost by only 4 percentage points, 52%-48%. App., *infra*, 50a. Given this strong showing by an African-American in a majority-white district that has never elected an African-American Representative, there was good reason to believe that African-Americans had (and continue to have) the ability to elect a candidate of their choice in that district or a similar one with the help of limited yet predictable white crossover voting. App., *infra*, 50a.

In July 2001, Virginia passed a new redistricting plan (the "2001 Plan") that reduced the share of African-American VAP in the new Fourth District from 38% to 32% by reassigning a substantial number of African-American voters from the Fourth District to the Third and Fifth Congressional Districts. App., *infra*, 3a-4a, 49a. The 2001 Plan reduced the percentage of African-Americans in the Fourth District more than any other plan proposed during the redistricting process. App. *infra*, 52a.

In October 2001 and over the opposition of the African-American community, the United States Department of Justice "precleared" the 2001 Plan under Section 5 of the VRA as non-retrogressive.[1] App., *infra*, 50a, 53a; *see* 42 U.S.C. § 1973c. The Justice Department's preclearance did

[1] Due to past racial discrimination, Virginia is a covered jurisdiction under Section 5, 28 C.F.R. § 51.54, and thus must receive preclearance from the Justice Department or the U.S. District Court for the District of Columbia before any new redistricting plans can take effect. 42 U.S.C. § 1973c.

not address the Commonwealth's potential liability under Section 2 for adoption of the 2001 Plan, and in any event, preclearance does not bar Petitioners' Section 2 claim. *See Major v. Treen*, 574 F. Supp. 325, 327 n.1 (E.D. La. 1983) (in suit involving, *inter alia*, Section 2 claims, three-judge district court "conclud[ed] that the Assistant Attorney General's preclearance determination [under Section 5] has no probative value. . . ."); *cf. Morris v. Gressette*, 432 U.S. 491, 506-07 (1977) ("Where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation.").

On February 21, 2003, Petitioners[2] filed suit in the United States District Court for the Eastern District of Virginia, claiming that the Commonwealth violated Section 2 by its enactment of the 2001 Plan. App., *infra*, 45a-46a. In their complaint, Petitioners alleged facts that satisfied the pleading requirements of *Thornburg v. Gingles*, 478 U.S. 30 (1986).

First, they alleged that African-Americans had the ability to elect a candidate of their choice, even though they constituted only 39.4% of the total population (and 37.8% of the citizen voting-age population) in the previous Fourth District.[3] App., *infra*, 3a, 50a. They alleged this

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[2] The district court later held that seven of nine Petitioners lacked standing to bring a Section 2 claim because they lived outside the newly-drawn Fourth District even though they were residents of the previous Fourth District. App., *infra*, 29a-30a. All but one of the Petitioners dismissed for lack of standing appealed this ruling, but the court of appeals declined to rule on it, stating that the issue was "academic" because two Petitioners (Ms. Hall and Mr. Speight) unquestionably had standing. App., *infra*, 10a n.10. If this Court were to hold that ability-to-elect district claims are not barred under Section 2, then Petitioners would seek to revisit the standing ruling in either the court of appeals or the district court.

[3] Whether total population, voting age population, or citizen voting-age population is the appropriate metric for Section 2 claims, *see Johnson v. De Grandy*, 512 U.S. 997, 1008-09 (1994), is not relevant in

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ability to elect was demonstrated, at least in part, by the close loss of the African-American candidate of choice in June 2001. App., *infra*, 50a. They also alleged that only a minimal amount of white crossover voting was required for election of African-American candidates of choice. App., *infra*, 50a. In other words, Petitioners were making an "ability-to-elect" district claim under Section 2, not an "influence" district claim.[4]

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this case, since Petitioners' claim does not depend on the choice of metric used. For ease of presentation, this Petition has followed the court of appeals' lead and used VAP shares. *See* App., *infra*, 3a-4a n.3.

[4] An influence district is a district where minority voters are not a majority, and *cannot elect a candidate of their choice*, but can "exert a significant – if not decisive – force in the election process." *Georgia v. Ashcroft*, 539 U.S. 461, 470 (2003) (emphasis added). On the other hand, an ability-to-elect district (also known as a "coalitional district," "crossover district," or "performance district") is one where "minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district *in order to elect candidates of their choice*." *Id.* at 493 (emphasis added). In truth, as discussed *infra*, sometimes less-than-50% minority groups in such districts can elect their candidates of choice without any white crossover votes. An ability-to-elect district claim is more difficult to plead than an influence district claim because for the former, the ability to elect must be pled (and later proven). *See Metts v. Murphy*, 217 F. Supp. 2d 252, 258 (D.R.I. 2002), *vacated by* 363 F.3d 8 (1st Cir. 2004) (*en banc*); Richard H. Pildes, *Is Voting Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000's*, 80 N.C. L. REV. 1517, 1539-40 (2002) (influence districts are "nebulous and difficult to quantify" whereas ability-to-elect districts, which require the ability to elect, are defined by actual electoral outcomes). Therefore, if a court embraces influence district claims, it necessarily embraces the narrower concept of ability-to-elect district claims. Conversely, a rejection of influence district claims does not imply a rejection of ability-to-elect district claims. *See, e.g.*, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 378, 382-404 (S.D.N.Y. 2004) (refusing to recognize influence dilution claims, yet analyzing the merits of plaintiffs' ability-to-elect district claim), *aff'd w/o op.*, No. 04-218 (Nov. 29, 2004). Because Petitioners are not asserting an influence district claim, they take no position on whether Section 2 prohibits influence district claims. Moreover, Petitioners are not bringing a "minority coalition" claim, where two different minority

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Petitioners also alleged that the 2001 Plan "cracked" the Fourth District, which reduced African-American voting strength in the district, and "packed" the Third District, thus wasting numerous African-American votes in the district. App., *infra*, 49a; *see* App., *infra*, 13a-14a n.12 (explaining the concepts of packing and cracking). Petitioners further alleged that the cracking of the Fourth District has deprived African-Americans in the district from having an equal opportunity to elect their candidate of choice. App., *infra*, 51a.

Second, Petitioners alleged that African-Americans in the district voted cohesively. App., *infra*, 50a.

Third, they alleged that there was racial bloc voting in the Fourth District such that politically cohesive white voters usually would defeat the African-American candidate of choice. App., *infra*, 51a.

Fourth, Petitioners alleged specific facts demonstrating that in the totality of the circumstances, African-American votes have been diluted. Such facts included past official racial discrimination in the Fourth District and Virginia as a whole; election-related discrimination; and the marked disparity between African-Americans and whites in housing, education, health care, employment opportunities, and access to the resources needed to participate effectively in the political process. App., *infra*, 52a.

Before discovery started, the Commonwealth and intervenors[5] (collectively "the Commonwealth") moved to dismiss Petitioners' complaint as a matter of law under

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groups are combined and then treated as the equivalent of a single minority group for purposes of *Gingles*' first prong. *See Growe v. Emison*, 507 U.S. 25, 41 (1993).

[5] The intervenors are the Virginia Attorney General and a group of private citizens who claimed the Virginia state defendants would not adequately represent their political interests. *See* App., *infra*, 25a.

Federal Rule of Civil Procedure 12(b)(6). The Commonwealth's motion focused solely on the first *Gingles* prong that, in its view, required Petitioners to allege that a single-member district could be drawn containing an arithmetical majority of African-Americans. App., *infra*, 23a-24a. Petitioners conceded that such a district could not be drawn. App., *infra*, 26a.

2. District Court Opinion

On August 7, 2003, the district court granted the Commonwealth's motion to dismiss. App., *infra*, 24a. The court recognized that Petitioners were making an ability-to-elect district claim, not an influence district claim. App., *infra*, 35a-36a, 39a-40a. The district court also recognized that this Court has not held "that a vote dilution claim could never be brought unless the protected group could constitute a majority." App., *infra*, 36a.

Nevertheless, the district court held that requiring the minority group to be a majority in a new single-member district for Section 2 claims was appropriate to prevent courts from engaging in difficult, subjective political judgments about what percentage of population is necessary to establish a minority group's potential to elect. App., *infra*, 40a-42a. The court also believed that a flat 50% cutoff would avoid interference with a State's exercise of its Congressional redistricting power. App., *infra*, 42a-43a. Thus, the court held that a minority group that was less than an arithmetical majority in a single-member district could not bring a Section 2 vote dilution claim, even if the group could allege an ability to elect. App., *infra*, 43a-44a.

3. Court of Appeals Opinion

On September 22, 2004, a panel of the Fourth Circuit Court of Appeals affirmed. App., *infra*, 2a. The court of appeals first agreed with Petitioners and the district court that Petitioners were bringing an ability-to-elect district

claim, not an influence district claim. App., *infra*, 11a n.11. The court of appeals did not assert that this Court had definitively resolved whether Section 2 prohibits ability-to-elect district claims. *See* App., *infra*, 10a-18a.

Like the district court, the court of appeals then held that a minority group that constituted less than an arithmetical majority in a single-member district has no ability to elect candidates of its own choice under any set of facts, and thus under the first prong of *Gingles* could not bring a Section 2 vote dilution claim. App., *infra*, 13a-14a. The court of appeals framed Petitioners' claim as "a claim that an election law or practice dilutes the voting strength of a multiracial coalition" under Section 2.[6] App., *infra*, 9a. The court of appeals then rejected that claim, holding that to permit such a claim "would 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." App., *infra*, 17a-18a. The court of appeals also stated that *Georgia v. Ashcroft*, 539 U.S. 461 (2003), which discussed both ability-to-elect and influence districts in the context of Section 5 of the Voting Rights Act, did not help Petitioners' position. App., *infra*, 19a n.13.

* * *

REASONS FOR GRANTING THE PETITION

The fundamental purpose of the VRA is to ensure full and fair political opportunity for all Americans. *Gingles*, 478 U.S. at 47. Congress amended Section 2 of the VRA in 1982 to ensure that members of minority groups could be on equal political footing with others. As amended, Section 2 prohibits all electoral practices that dilute minority votes. One such practice is destroying or failing to create

[6] As discussed *infra*, Petitioners dispute this characterization of their claim.

an ability-to-elect district during a redistricting process. An ability-to-elect district is a single-member district where a minority group has the ability to elect a candidate of its own choice – often, but not always, with the help of a limited yet predictable number of white "crossover" voters – even though members of the minority group do not constitute a majority of the population in that district.

Section 2's text, which protects the equal opportunity of minority groups to "elect representatives of their choice" and requires evaluation of vote dilution claims under the "totality of [the] circumstances," does not prohibit ability-to-elect district vote dilution claims. Yet the court of appeals below held that under the first prong of *Gingles*, only minority groups constituting a majority of the population were entitled to bring a Section 2 claim. Given real-world variables such as plurality vote requirements, primary elections, political cohesiveness, and voter turnout, less-than-50% minority groups often do have the ability to elect candidates of their choice. By dismissing their complaint under Federal Rule of Civil Procedure 12(b)(6), the court of appeals never gave Petitioners a chance to prove their ability to elect.

Over the last twenty years, this Court has repeatedly reserved the issue of whether ability-to-elect district claims are barred under Section 2. Courts of appeals, district courts, and scholars are now split over the issue. Some courts, recognizing that a cohesive minority group often does not need an absolute majority of the population to elect its preferred candidate, have held that refusing to recognize such claims is contrary to the text of Section 2, the language and intent of *Gingles*, and will leave minorities underrepresented and without redress. Other courts have read Section 2 and *Gingles* as barring ability-to-elect district claims, worried that without a flat 50% rule, there would be a flood of marginal or frivolous vote dilution cases.

The Justice Department, recognizing the importance of the issue, urged this Court five years ago to decide this issue and hold that ability-to-elect district claims are not prohibited under Section 2. Since then, the issue has increased in importance as the Nation has become more multicultural, giving rise to additional potential ability-to-elect district claims. As the Nation heads toward the 2010 Census and subsequent redistrictings, it has become even more important to resolve the issue, one way or another.

This Court should grant certiorari.

A. Whether Section 2 Forbids Ability-To-Elect District Claims Is An Unsettled Question That Needs Resolution.

In *Gingles*, this Court provided three criteria that are preconditions for a Section 2 violation: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a [proposed] single-member district"; (2) the minority group must be "politically cohesive"; and (3) sufficient majority racial bloc voting must exist such that the majority group (typically, whites) usually defeats the minority group's candidate of choice. 478 U.S. at 50-51. If a plaintiff succeeds on all three *Gingles* prongs, then the court must look at the totality of the circumstances to determine whether minority vote dilution exists in violation of Section 2. *Johnson v. De Grandy*, 512 U.S. 997, 1011-12 (1994). This Court has noted that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993).

The issue here implicates *Gingles'* first prong, but is fundamentally a statutory interpretation question: whether Section 2 bars vote dilution claims in single-member districts where the minority group does not make up an arithmetical majority (that is, over 50%) of the

population in that district. This is an unsettled question that requires resolution.

1. This Court Has Deliberately Left The Issue Open.

Over the last twenty years, this Court has consistently held open the question of whether a Section 2 claim is barred where members of a minority group do not constitute an arithmetical majority of the population in a single-member district.

In its first case interpreting the amended Section 2, this Court recognized, but reserved, the issue: "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[.]" *Gingles*, 478 U.S. at 46 n.12. Notably, Justice O'Connor, joined by three other Justices, explained in a concurrence that "*if a minority group that is not large enough to constitute a voting majority in a single-member district* can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, *that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.*" *Id.* at 90 n.1 (O'Connor, J., concurring) (emphasis added).

Later, in *Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993), this Court "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." Since influence district claims are easier to plead than ability-to-elect district claims, *Growe,*

by implication, also declined to resolve whether ability-to-elect district claims are impermissible.

In *Voinovich*, this Court assumed that an ability-to-elect district claim was not barred under Section 2:

> [T]he first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume, *arguendo*, to be actionable today. . . . The complaint in such a case is not that black voters have been deprived of the ability to constitute a *majority, but of the possibility of being a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes from the white majority.* (emphasis added.)

507 U.S. at 158.[7] This Court went on to resolve the Section 2 claim on the basis of the third *Gingles* factor (majority bloc voting). *See id.*

Similarly, in *De Grandy*, this Court assumed that Section 2 ability-to-elect district claims were feasible: "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." 512 U.S. at 1008.

Some have suggested that past summary affirmances by this Court of three-judge district court opinions rejecting ability-to-elect district claims mean this Court has already spoken on the issue. *See Parker v. Ohio*, 540 U.S.

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[7] When read in light of *Ashcroft*'s distinction between influence districts and ability-to-elect/coalitional districts, the "influence-dilution claim" in *Voinovich* is actually an ability-to-elect district claim, since the *Voinovich* plaintiffs alleged that African-American voters could elect a candidate of their choice, even though they constituted less than 50% of the population in a single-member district. 507 U.S. at 158.

1013 (2003) (affirming 263 F. Supp. 2d 1100, 1104-05 (S.D. Ohio 2003)); *Rodriguez v. Pataki,* No. 04-218 (Nov. 29, 2004) (affirming 308 F. Supp. 2d 346, 404 (S.D.N.Y. 2004)). But in *Parker*, there were alternative grounds with which to affirm the lower court. *See* Juris. Statement, No. 03-411, at *i (Sept. 15, 2003); Motion to Affirm, at *i (Oct. 17, 2003). And in *Rodriguez*, the district court's disapproval of ability-to-elect district claims was dicta because it eventually rejected the plaintiffs' vote dilution claims on other grounds. 308 F. Supp. 2d at 404, 406. In any event, past summary affirmances have little precedential value for this Court. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979). Moreover, if this Court's decision in *Parker* truly had decided that Section 2 ability-to-elect district claims were barred, then post-*Parker* decisions would have cited it as controlling authority. That has not happened; in fact, the court of appeals below did not cite *Parker*. *See also Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (*en banc*) (majority opinion not citing *Parker*; dissenting opinion citing the lower court decision in *Parker*).

2. The Circuit Courts Are Divided.

The federal courts of appeals are divided on whether Section 2 claims are barred as a matter of law for minority groups claiming the ability to elect a candidate of choice without comprising 50% of the population in a single-member district. *Compare Metts v. Murphy*, 347 F.3d 346 (1st Cir. 2003) (claims permitted), *vacated and replaced by* 363 F.3d 8 (1st Cir. 2004) (*en banc*) (same) *with Hall v. Commonwealth of Va.*, 385 F.3d 421 (4th Cir. 2004) (claims barred); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 850 (5th Cir. 1999) (same); *Perez v. Pasadena Indep. Sch. Dist.*, 165 F.3d 368, 372-73 (5th Cir. 1999) (same). The Ninth Circuit has stated in dictum that ability-to-elect district claims might be cognizable under Section 2, at least "in a district where candidates are

elected by plurality." *Romero v. City of Pomona*, 883 F.2d 1418, 1424 n.7 (9th Cir. 1989). The Eleventh Circuit, noting this Court's past refusals to decide this issue, has left the question open. *Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260, 1269 n.7 (11th Cir. 2004).

Courts that have rejected a 50% rule have taken a functional approach to determining a minority population's ability to elect a candidate of choice, which comports with this Court's recognition that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Voinovich*, 507 U.S. at 158; *De Grandy*, 512 U.S. at 1007 (same). For example, in *Metts*, the *en banc* First Circuit recognized that numerous factors are relevant to determining a minority group's electoral strength: *e.g.*, why the district was changed, how many white crossover voters predictably join with minority voters, how many crossover votes are needed for the minority-preferred candidate to win, "the impact of alternative districts on other minorities," and past minority electoral success. *See* 363 F.3d at 11-12.

Metts is a concrete example of how a minority group can have the ability to elect without comprising a majority in a single-member district. Prior to Rhode Island's 2002 redistricting, the State's only African-American State Senator had been consistently elected in a district that was only 26% African-American. *Metts*, 363 F.3d at 9. After a pre-lawsuit redistricting decreased the African-American population in the district to 21%, the African-American incumbent lost in the primary. *Id.* African-Americans in the district sued and eventually won at the First Circuit the chance to prove their case at trial. The State then settled the case before trial by restoring a 26% African-American population in the district. In the first post-redistricting election, the State's second African-American State Senator was elected in the restored district. *See* http://www.elections.ri.gov/2004GE/SenateDis6.htm; http://www.elections.ri.gov/2004Primary/SenateDis6.htm. Thus,

before and after the dilutional redistricting, the minority community was able to elect the candidate of their choice, even with a population share far lower than that present in this case (26% in *Metts* versus 38% here). In addition, seemingly-small reductions in minority population shares (roughly 5-6% in both *Metts* and this case) have had large impacts on electability of minority-preferred candidates.

By contrast, some courts of appeals have rejected ability-to-elect district claims based simply on a strict reading of *Gingles*' first prong. *See, e.g., Valdespino*, 168 F.3d at 850. Other courts, like the court of appeals in this case, believed that less-than-50% minorities cannot "elect" a candidate of their choice under any set of facts. Some courts claim that a strict 50% cutoff shields courts from meritless claims. *See, e.g., McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942, 943 n.9, 947 (7th Cir. 1988) (in context of analyzing influence district claim).

3. District Courts Are Also Divided.

The lack of clear guidance from federal courts of appeals has led to even less uniformity at the district court level. *Compare Martinez v. Bush*, 234 F. Supp. 2d 1275, 1322 (S.D. Fla. 2002) (ability-to-elect district claims permitted); *Puerto Rican Legal Def. & Educ. Fund v. Gantt*, 796 F. Supp. 681, 693-95 (E.D.N.Y.) (same), *appeal dismissed as moot*, 506 U.S. 801 (1992); *West v. Clinton*, 786 F. Supp. 803, 807 (W.D. Ark. 1992) (same); *Armour v. Ohio*, 775 F. Supp. 1044, 1051-52 (N.D. Ohio 1991) (same) *with Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 404 (S.D.N.Y. 2004) (ability-to-elect district claims prohibited; dictum), *aff'd w/o op.*, No. 04-218 (Nov. 29, 2004); *Meza v. Galvin*, 322 F. Supp. 2d 52, 64 (D. Mass. 2004) (same) *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 299 (D. Mass. 2004) (same); *Session v. Perry*, 298 F. Supp. 2d 451, 483 (E.D. Tex. 2004) (holding that ability-to-elect district claims were barred under Section 2), *vacated and*

remanded on other grounds, No. 03-1391 (Oct. 18, 2004); *Parker v. Ohio*, 263 F. Supp. 2d 1100, 1104-05 (S.D. Ohio) (same), *aff'd w/o op.*, 540 U.S. 1013 (2003);[8] *Turner v. Arkansas*, 784 F. Supp. 553, 569-72 (E.D. Ark. 1991) (same); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 655 (N.D. Ill. 1991) (same).

The district courts that have recognized ability-to-elect district claims use a functional approach in determining whether a minority population has the ability to elect a candidate of choice, focusing on the unique character of each case and requiring a factually-intensive inquiry into "all circumstances that are likely to affect voting behavior and election outcomes. . . . " *Martinez*, 234 F. Supp. 2d at 1322. These courts reject the use of a mechanical numerical cutoff to evaluate a minority group's ability to elect a candidate of choice. *See, e.g.*, *Puerto Rican Legal Def. & Educ. Fund*, 796 F. Supp. at 689 ("[R]esort to absolutes is inappropriate in evaluating minority voting strengths."). Rather, they consider factors that may demonstrate a minority population's ability to elect a candidate of choice, including the extent of voter turnout, voter registration, voting cohesion, white crossover voting, and prior electoral success. *See, e.g.*, *Martinez*, 234 F. Supp. 2d at 1322-23; *Puerto Rican Legal Def. & Educ. Fund*, 796 F. Supp. at 689.

On the other hand, many district courts that impose a flat 50% cutoff (thus disallowing ability-to-elect district claims) opine that it is necessary to avert a flood of "myriad marginal Voting Rights Act claimants likely to jam the courthouse door. . . . " *Hastert*, 777 F. Supp. at 654. Some courts assert that the recognition of ability-to-elect districts would extend Section 2's protection of minorities to the protection of groups linked by political affiliation.

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[8] One judge dissented from this aspect of *Parker*, arguing that ability-to-elect district claims were not barred under Section 2. *Parker*, 263 F. Supp. 2d at 1109 (Gwin, J., concurring).

Session, 298 F. Supp. 2d at 483-84. Still others rely solely on perceived judicial consensus. *See Parker*, 263 F. Supp. 2d at 1105.

4. Most, But Not All, Commentators Support Ability-To-Elect District Claims.

Most commentators believe that ability-to-elect district claims are not prohibited under Section 2 or *Gingles*. They agree that a functional approach to determining whether a minority group has the ability to elect a chosen candidate, rather than using a 50% population cutoff as a proxy, is more consistent with the language and policies of the VRA. *See, e.g.*, Pildes, *supra*, at 1554-56; Bernard Grofman *et al.*, *What Minority Populations Are Sufficient to Afford Minorities a Realistic Chance to Elect Candidates of Choice? Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1385, 1388-90, 1423 (2001); J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431, 437-38 (2000); Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 HARV. L. REV. 2598, 2606-08 (2004).

At least one commentator disagrees, however. *See* Sebastian Geraci, Comment, *The Case Against Allowing Multiracial Coalitions to File Section 2 Dilution Claims*, 1995 U. CHI. LEGAL F. 389, 391-93, 398-99 (arguing that recognition of ability-to-elect district claims violates the purposes behind the VRA because it impermissibly shifts the focus from historically oppressed racial minorities to multiracial coalitions joined not by race, but by common ideas, values, and political goals).

B. This Is The Right Case At The Right Time To Address This Important Issue.

1. This case comes to this Court after being dismissed as a matter of law, with all facts in the complaint assumed to

be true. App., *infra*, 9a-10a. Accordingly, this case presents a pure question of statutory construction for this Court to resolve.

2. Whether ability-to-elect district claims are forbidden under Section 2 has been unsettled for the last two decennial redistrictings. *See, e.g.*, *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002) (post-2000 redistricting); *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) (post-1990 redistricting). As already discussed, the issue has percolated in numerous courts at all levels and has been discussed extensively in academic commentary. The Justice Department also believes that the issue can be decided now without further consideration by lower courts. *See* Brief for the United States as *Amicus Curiae*, *Valdespino v. Alamo Heights Ind. Sch. Dist.*, No. 98-1987 (Dec. 17, 1999) ("*Valdespino* Amicus Brief"), at 6 (urging review).

Trying to resolve unsettled legal issues too close in time to an election or redistricting may result in no decision at all. *See Spencer v. Pugh*, Nos. 04A360, 04A364, 125 S. Ct. 305 (2004) (Stevens, J., Circuit Justice) (denying applications to vacate election-related stays because "the hour is late and time is short"). Therefore, it is now time for this Court to decide this important Section 2 issue, which has been left open since *Gingles*.

3. Ability-to-elect district claims under Section 2 have been asserted more frequently in recent years. For instance, in 2004 alone federal courts have decided six cases that involved ability-to-elect district claims. *See Hall*, 385 F.3d at 421; *Metts*, 363 F.3d at 8; *Meza*, 322 F. Supp. 2d at 52; *Rodriguez*, 308 F. Supp. 2d at 346; *Black Political Task Force*, 300 F. Supp. 2d at 291; *Session*, 298 F. Supp. 2d at 451. This is the highest number in any year since the Court left the issue open in *Gingles*. It is likely that the number of such cases will continue to increase. Ability-to-elect district vote dilution claims are a natural result of our increasingly-multicultural society, wherein minorities' voting strength will often – not always, but often – be a

function of their ability to form effective coalitions with other groups.[9] *See* Grofman *et al.*, *supra*, at 1392 (discussing the effect of Hispanic populations on African-Americans' ability to elect); *see also* Carol M. Swain, *Race and Representation*, THE AMERICAN PROSPECT A11, A13 (June 2004) (discussing the importance of coalitions in America's new multiracial society).

Yet, even as minority voting power becomes increasingly dependent on minority groups' ability to form coalitions, legislative bodies and courts are increasingly uncertain about their obligations to form such coalition districts when engaging in redistricting. *See, e.g., Wilson v. Eu*, 823 P.2d 545, 549 (Cal. 1992) (noting the "present uncertainties concerning the scope and intent of the [Voting Rights] act."). As a result of this continuing uncertainty, it is not uncommon for the redistricting process to entail extensive (and unquestionably expensive) proceedings – and, as noted above, subsequent litigation. *See generally id.* at 547-50 (discussing the protracted process of redistricting in California following the 1990 Census).

By granting the instant petition and addressing squarely the issue of ability-to-elect districts, this Court will reduce this uncertainty and subsequent litigation, regardless of this Court's ultimate holding on the merits. If this Court holds that ability-to-elect district claims are not barred under Section 2, then state legislatures and other redistricting bodies will know that such districts are permissible (and in some circumstances, required) to avoid Section 2 liability, and will be more likely to create such districts. This should reduce the amount of Section 2

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[9] Petitioners emphasize the type of "coalitions" at issue in ability-to-elect districts usually involve a sizable, although not 50%, minority population and a small, reliable white population that would vote for the minority group's preferred candidate. This means that minority voters have an "effective majority" in such districts and can elect *their* candidate of choice.

litigation brought by less-than-50% minority groups. On the other hand, barring ability-to-elect district claims will also reduce or eliminate the amount of Section 2 litigation brought by less-than-50% minority groups.

4. Thus, whether Section 2 plaintiffs must always show that their minority group is a majority of the population in a single-member district is an issue of recurring significance in the administration and enforcement of Section 2, which applies nationwide. Resolving this issue will provide needed direction to the Nation's courts and legislators in advance of the next decennial census in 2010.

C. The Court Of Appeals Was Wrong To Disallow Ability-To-Elect District Claims As A Matter Of Law.

1. Section 2's Language Supports Such Claims.

Nothing in the language of Section 2 states that the "protected minority class of citizens" must constitute more than 50% of the relevant population in a proposed district. Rather, all that is necessary is a showing, by the totality of the circumstances, that the minority group's members lack equal opportunity "to participate in the political process and to elect representatives of their choice," 42 U.S.C. § 1973(b), and that a differently-drawn redistricting map could remedy the problem. Nevertheless, the court of appeals in this case misinterpreted the "opportunity . . . to *elect*" language in Section 2 as the basis for its mechanical imposition of a 50% cutoff. App., *infra*, 13a-16a (emphasis added). This is wrong for three primary reasons:

First, "elect" does not necessarily require winning an election with over 50% of the population (however defined) in a jurisdiction. Rather, the term typically means that a candidate has been chosen for office by receiving the most votes – the number of people in the voting pool is usually irrelevant. *Cf.* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 400 (1983) (defining "elect" only as "to select by

vote for an office, position, or membership"); J. Morgan Kousser, *Beyond Gingles: Influence Districts & The Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551, 563-68 (1993) (noting that numerous factors can affect whether a smaller-than-majority group constitutes an effective voting majority). Indeed, this Court has often recognized in both the Section 2 and Section 5 contexts that less-than-50% minority groups can "elect" candidates of their choice, sometimes (but not always) with the support of limited yet reliable white crossover voting. *See Voinovich*, 507 U.S. at 158 Section 2; *Gingles*, 478 U.S. at 90 n.1 (O'Connor, J., concurring) (same); *Ashcroft*, 539 U.S. at 480 (majority op.), 492 (Souter, J., dissenting) (Section 5); *City of Rome v. United States*, 446 U.S. 156, 183-84 (1980) (same).

Second, structural election factors can affect whether less-than-50% groups can elect their candidate of choice. For instance, in Virginia, political candidates – both in primary and general elections – may be elected by a plurality vote, not an outright majority. *See* Va. Code Ann. § 24.2-673 ("the person having the highest number of votes for any office shall be deemed to have been elected to such office"). This is true in all states for federal elections and a majority of states for all elections. *See* Congressional Research Service Report for Congress, *Voting Technologies in the United States*, at 1 n.2 (2001); Benjamin Ginsberg, *Election* § V ¶ 1 ("Virtually all national elections in the United States use the plurality system, although the majority system survives in some primary, state, and local elections, especially in Southern states."), *available at* http://encarta.msn.com/text_761569491_0/Election.html. Thus, depending on the number of candidates, less-than-50% minority groups in "plurality states" like Virginia have the ability to elect, as the Ninth Circuit has noted. *See Romero*, 883 F.2d at 1424 n.7.

In addition, in a traditional primary election, a winning candidate need not receive 50% of his or her votes from the entire district; rather, the candidate just needs to

receive 50% from voters who voted in that primary (and if plurality election laws apply, then often much less than 50% suffices). In many districts, minorities constitute a significant majority of a particular political party, and that party has a majority of registered voters in such districts. Accordingly, minority voters in such districts could control the party primary and then count on a limited amount of white crossover voting – despite an overall pattern of racially polarized white bloc voting – to elect candidates of their choice. *See Martinez v. Bush*, 234 F. Supp. 2d 1275, 1298-99, 1315 (S.D. Fla. 2002); *Page v. Bartels*, 144 F. Supp. 2d 346, 356 (D.N.J. 2001); Grofman *et al.*, *supra*, at 1410-11; Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2219 (2003). This further demonstrates that depending on the facts, less-than-50% minority populations can "elect" a candidate of their choice.

Third, other variables, such as voter turnout and political cohesion within groups, also affect the percentage of votes needed to elect a representative. "Which candidate wins is a function not only of the proportion that minority voters form of the active electorate, but also of the levels of cohesion among the two groups of voters." Kousser, *supra*, at 563. For instance, in a jurisdiction that is 30% minority and 70% white, the minority-preferred candidate will prevail if there is minority cohesion (*i.e.*, minority members vote together for the same candidate) of 90% and white cohesion of 60%. *See id.* at 563. And if voter turnout varies by race (*e.g.*, it is higher in the minority group than for whites), then minority voters are even more likely to be able to elect their candidate of choice without constituting an arithmetical majority of the population in a single-member district. *See id.* at 563-65. In fact, under certain factual circumstances, less-than-50% minority groups could have the ability to elect without *any* white crossover voting.

The above argument is not based on supposition, but on actual statistical evidence. This evidence demonstrates that minorities often do not need to constitute a numerical majority to elect their candidate of choice. *See* Pildes, *supra*, at 1527-39; Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Redistricting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1222-23 (1999); Charles Cameron *et al.*, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794, 808 (Dec. 1, 1996); Richard Vallely, THE AMERICAN PROSPECT 43 (Sept. 1999-Oct. 1999).

In short, because the ability to elect is dependent on more than raw population percentages, a court must assess a minority group's ability to elect under the fact-specific "totality of circumstances" standard, which Congress put into the statute in 1982. Ability-to-elect district claims therefore are not barred under Section 2. Since this conclusion flows directly from the text of the statute, this Court's inquiry should be at an end. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (internal quotation marks omitted).

2. Section 2's Legislative History Sets A Flexible, Fact-Specific Standard For Vote Dilution Claims.

If the language of the amended Section 2 is deemed ambiguous, then this Court can look to the legislative history of the 1982 amendments to the VRA for direction. *See, e.g., Gingles*, 478 U.S. at 43-46 (interpreting Section 2 in light of the legislative history); *McDaniel v. Sanchez*,

452 U.S. 130, 148 n.25 (1981) ("Because the 1975 extension of the Voting Rights Act is the controlling statute in this case, the legislative history of that extension is of particular relevance.") (citation omitted); *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) ("[O]ur obligation is to take statutes as we find them, guided, if ambiguity appears, by the legislative history and statutory purpose.").

The Senate Report ("Report") accompanying the 1982 amendments to the VRA is the definitive legislative history for the amended Section 2. *Gingles*, 478 U.S. at 43-44 & n.7 (relying heavily on the Report). The Report explains that Section 2 of the VRA was amended in order to restore the legal standard governing voting discrimination cases before this Court's decision in *Mobile v. Bolden*, 446 U.S. 55 (1980). S. Rep. No. 97-417, at 2, 15, *reprinted in* 1982 U.S.C.C.A.N. 177. Specifically, Congress intended to clarify that a determination of voting discrimination depends on the overall effect or "result" of the challenged political practice on the minority group in question, not on the presence of discriminatory intent underlying that practice, as a plurality of the *Bolden* court had held. *Id.* at 15-16. Under this "results test," a plaintiff demonstrates a violation of Section 2 where "the challenged system or practice, *in the context of all the circumstances* in the jurisdiction in question, results in minorities being denied equal access to the political process." *Id.* at 27 (emphasis added).

The Senate Report makes clear that this results test necessitates a fact-intensive analysis that often turns on jurisdiction-specific facts; no single factor was meant to be dispositive. *See id.* at 27-29. Indeed, the Report emphasizes that vote discrimination cases should be decided without "mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied proof and local circumstances." *Id.* at 31.

Given this emphasis, to impose a greater-than-50% minority group requirement – or any other numerical cutoff or formula, for that matter – would violate the Report's prohibition against "mechanistic rules." Accordingly, the Report supports a flexible, fact-specific standard for all aspects of the Section 2 analysis. The question is whether minority voters have the ability to elect someone of their choice, not whether they meet an arbitrary 50% cutoff.

3. The Department Of Justice Supports Ability-To-Elect District Claims.

The United States Department of Justice, an agency with vast experience litigating and administering the Voting Rights Act, has consistently interpreted Section 2 and *Gingles* to permit ability-to-elect district claims. This position has remained the same under both Republican and Democratic Administrations, in *amicus curiae* briefs in both lower courts and this Court, and regardless of the minority group seeking relief. The Justice Department's views are worthy of deference, especially given the Attorney General's role in drafting and shaping the VRA. *United States v. Bd. of Comm'rs*, 435 U.S. 110, 131 (1978).

The Justice Department stated its views on this issue most plainly in the *amicus curiae* brief submitted at this Court's invitation in *Valdespino v. Alamo Heights Independent School District*, *supra*. The Justice Department first noted that the key inquiry for the first *Gingles* factor is whether minority voters have the "potential to elect representatives of their choice." *Valdespino* Amicus Br., *supra*, at 10. Although a district comprising over 50% minority voters is *sufficient* to achieve this goal, it is not *necessary* because a "variety of circumstances may give a minority voting population that is compact, politically cohesive and substantial in size yet just short of a majority the potential to elect a representative of its choice." *Id.* at 11. Contrary to the court of appeals' opinion below, the

candidate of choice here is the *minority group*'s candidate of choice, not a "multiracial coalition['s]" candidate of choice. *See* App., *infra*, 9a.

The Justice Department also argued that a strict 50% cutoff is based on the faulty assumption that a Section 2 claim requires that "no white voter will ever vote for the candidate preferred by the minority." *Valdespino* Amicus Br., *supra,* at 11. In the Justice Department's experience, however, "that is almost never the case; although racially polarized voting does in some places reach extreme degrees, it is rarely if ever total." *Id.* Even where voting in a particular jurisdiction is racially polarized, "nonetheless there may be a small amount of consistent crossover voting from the majority (or from a different racial or language minority in the district) that would give the minority voters the potential to elect their representative of choice." *Id.* Such limited yet predictable majority crossover voting permits plaintiffs to satisfy both the first *Gingles* prong (ability to elect in a reasonably compact single-member district) and the third *Gingles* prong (majority bloc voting). *Id.* at 12 n.3.

Finally, the Justice Department highlighted that the other *Gingles* preconditions – political cohesion and majority bloc voting – "do not lend themselves to strict numerical cutoffs, but rather require the application of judgment to the facts of each case. . . . " *Id.* at 13. There is no reason why a similar approach could not be applied to an assessment of whether a minority population was sufficiently large (although not a numerical majority) to be able to elect a representative. *Id.*

It is significant that the Justice Department has endorsed ability-to-elect district claims on multiple occasions, both in this Court and in the lower federal courts. *See Valdespino* Amicus Br., *supra*; Opening and Reply Briefs for the United States, *Bush v. Vera*, No. 94-805, 517 U.S. 952 (1996); Brief for the United States As *Amicus Curiae*, *Campos v. City of Houston*, 113 F.3d 544 (5th Cir.

1997); Brief for the United States, *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990); *but see* Brief for the United States As *Amicus Curiae*, *Voinovich v. Quilter*, No. 91-1618, 507 U.S. 146 (1993).

This Court should give respect to the Justice Department's considered views and hold that Section 2 does not prohibit ability-to-elect district claims.

4. That Section 2 Does Not Bar Ability-To-Elect District Claims Is Consistent With This Court's Decision In *Georgia v. Ashcroft*.

This Court has recognized the value of ability-to-elect districts as a means of strengthening minority voting power and preventing racial balkanization. In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), this Court assessed whether Georgia's redistricting plan for the State Senate, which unpacked minority-majority districts and distributed minority voters more evenly throughout more districts, violated Section 5 of the VRA. This Court held that States covered by Section 5 can fulfill their obligations under the statute by forming ability-to-elect districts, or even by forming influence districts. *Id.* at 482-83.

Although *Ashcroft* endorsed ability-to-elect and influence districts in the Section 5 context, the decision has bearing in the Section 2 arena. *See generally Chisom v. Roemer*, 501 U.S. 380, 401 (1991) (noting the close connection between Section 2 and Section 5, at least for some purposes). First, all nine Justices recognized that minority voters can "elect" candidates of their choice even if they are not a majority within a single district. *See Ashcroft*, 539 U.S. at 480 (majority op.), 492 (Souter, J., dissenting). They also recognized that courts are capable of making this "ability to elect" determination without aid of an arbitrary numerical cutoff. *See id.* at 480 (majority op.); *id.* at 492 (Souter, J., dissenting). That has direct relevance to the issue at bar.

Second, it is illogical that a court may consider ability-to-elect districts as a defense to Section 5 liability under *Ashcroft*, but cannot impose them as a remedy for Section 2 liability. It makes sense that the creation of such a district would also be a cognizable *remedy* for a violation of the Act, since the underlying concern in both circumstances is to ensure that minority voters with the potential "to participate in the political process *and to elect representatives of their choice*," 42 U.S.C. § 1973(b) (emphasis added), actually have an opportunity to be equal members in American political life. This parallelism is consistent with the language and intent of Section 2 and *Gingles*.

At least two courts have viewed *Ashcroft* as support for holding that ability-to-elect district claims under Section 2 are not prohibited. *Metts v. Murphy*, 347 F.3d 346 (1st Cir. 2003), *vacated and replaced by* 363 F.3d 8 (1st Cir. 2004) (en banc); *McNeil v. Legis. Apportionment Comm'n*, 828 A.2d 840, 853 (N.J. 2003) (recognizing broader concept of influence district claims, which includes ability-to-elect district claims), *cert. denied*, 124 S. Ct. 1068 (2004). Similarly, some federal and state courts have recognized the usefulness of ability-to-elect districts as a defense against Section 2 liability. *See, e.g., Page v. Bartels*, 144 F. Supp. 2d 346, 363-365 (D.N.J. 2001); *In re Senate Joint Resolution 2G, Special Apportionment*, 597 So. 2d 276, 284 (Fla. 1992) (districts with over 40% African-American populations "provide blacks with an effective opportunity to elect representatives of their choice."). As discussed above, this weighs in favor of permitting affirmative ability-to-elect district claims under Section 2.

5. The Recognition Of Ability-To-Elect District Claims Will Not Open The Floodgates To Frivolous Claims.

Allowing plaintiffs to assert ability-to-elect district claims will not drown the courts in frivolous Section 2

claims. Plaintiffs would still be required to plead facts for the second and third *Gingles* prongs, and for the totality of the circumstances factors. "Marginal" claims may easily be rejected on these grounds. Moreover, plaintiffs alleging ability-to-elect district claims remain bound by Federal Rule of Civil Procedure 11. In other words, only those minority groups which can allege in good faith that they have the ability to elect representatives of their choice can proceed with their claims.

Even if plaintiffs survive the pleading stage, they must then prove at the summary judgment stage, and perhaps later at trial, their alleged ability to elect with probative, jurisdiction-specific evidence. *Gingles* requires a district court to conduct a "searching practical evaluation of the past and present reality" for all aspects of Section 2 claims. The district court is then to use its "familiarity with the indigenous political reality" to conduct "an intensely local appraisal" of the likely impact of the challenged electoral plan. *See* 478 U.S. at 45, 79 (internal quotation marks omitted) (citing S. Rep. No. 97-417, at 28-30, 36-37). This fact-intensive, case-by-case approach mandated by Congress will prevent frivolous Section 2 claims.

Finally, federal courts have a great deal of experience in assessing vote dilution claims under Section 2, and are adept at making factual judgments with respect to population statistics and voting patterns. *See Valdespino* Amicus Br., *supra*, at 12 n.3 ("[T]he lower courts have accumulated considerable experience in making judgments about racially polarized and bloc voting and are able to distinguish between fact patterns in which racially polarized, bloc voting exists and those in which it does not exist."); S. Rep. No. 97-417, at 16 ("The 'results' test to be codified in Section 2 is a well defined standard. . . . This test will provide ample guidance to federal courts when they are called upon to review the validity of election laws and procedures challenged under Section 2."). Likewise, courts

are able to determine whether a less-than-50% minority group has the ability to elect a candidate of its choice.

6. Allowing Ability-To-Elect District Claims Makes Sense As A Policy Matter.

"The Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and colorblindness are not just qualities to be proud of, but are simple facts of life." *Ashcroft*, 539 U.S. at 490-91. Requiring ability-to-elect districts to be created or maintained when necessary to provide equal opportunity for minority groups is a practical measure that accounts for the realities of politics in America, encourages integration and cooperation between races, and helps create a more colorblind society.

First, permitting ability-to-elect district claims under Section 2 will naturally create or maintain additional ability-to-elect districts, either through litigation or legislation. *See supra* section B.3. As this Court recognized in *Ashcroft*, such districts help reduce racial balkanization while at the same time permitting historically-disempowered minority groups to exercise their fair share of political power. 536 U.S. at 481-82; *see also* Pildes, *supra*, at 1548. This is exactly what the VRA was designed to do.

Second, in an ability-to-elect district, cooperation among racial groups is encouraged, especially in order for a minority candidate to win.[10] This forces minority groups to work with majority groups to "pull, haul, and trade to find common political ground," and forces elected officials

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[10] As stated *supra*, such cooperation is not always necessary, since under the right factual circumstances, less-than-50% minority groups can elect their candidates of choice without any majority crossover voters.

to represent their entire constituency, rather than a particular racial group. *See De Grandy,* 512 U.S. at 1020; *Shaw v. Reno*, 509 U.S. 630, 650 (1993).

Third, disallowing ability-to-elect district claims gives redistricting bodies freedom to pack minority voters unnecessarily into majority-minority districts whenever possible, and to withdraw all legal protection for ability-to-elect districts that cannot be converted to majority-minority districts. These perverse results improperly elevate race to an "all or nothing" proposition in redistricting. Such packing of minority voters into one district also makes a *Shaw*-based Equal Protection Clause challenge more likely. *See generally Bush v. Vera*, 517 U.S. 952, 995 (1996) (O'Connor, J., concurring); *Shaw*, 509 U.S. at 648-50.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 21, 2004

ALSO PART OF THE PETITION BUT NOT INCLUDED HERE:

Appendix A 9/22/04 Opinion of the 4th Circuit Court of Appeals

Appendix B 9/22/04 Judgment of the 4th Circuit Court of Appeals

Appendix C 8/7/03 Opinion of the Eastern District of Virginia

Appendix D 2/21/03 Complaint filed in the Eastern District of Virginia