IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOAN HALL, RICHARD PRUITT, THOMASINA PRUITT, VIVIAN CURRY, ELIJAH SHARP, EUNICE MCMILLAN, JAMES SPELLER, ROBBIE GARNES, and LESLIE SPEIGHT, Plaintiffs, v. COMMONWEALTH OF VIRGINIA, and JEAN JENSEN, SECRETARY, STATE BOARD OF ELECTIONS in her official capacity, Defendants, GARY THOMPSON, CHARLES BROWN, JAMES BROWN, JAMES ALFRED CAREY, EVELYN CHANDLER, CLIFTON E. HAYES, JR., QUENTIN E. HICKS, IRENE HURST, and WAYNE OSMORE, Proposed Defendant Intervenors.	Civil Action No. 2:03-CV-151

PROPOSED DEFENDANT -INTERVENORS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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Plaintiffs do not dispute their inability to allege the first "necessary precondition[]" set forth in *Thornburg* v. *Gingles,* 478 U.S. 30 (l986) – that the African-American population "is sufficiently large and geographically compact to constitute a majority in" Virginia's Fourth Congressional District. *Id.* at 50.[1] Instead, Plaintiffs contend that this Court should not "slavishly follow" Supreme Court precedent by applying the *Gingles* majority requirement here. (Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss ("PIs.' Br.") at 14.) But Plaintiffs' various reasons for ignoring *Gingles* have no merit. The first *Gingles* precondition reflects the Act's limitation of cognizable injury in fragmentation cases to situations where district lines split a cohesive minority community that could elect candidates on its own, without the need to form political coalitions with members of other racial or ethnic groups. By following *Gingles,* Fourth Circuit precedent, and the overwhelming body of lower court decisions, this Court can avoid the political favoritism and racially preferential treatment inherently entailed by recognition of a Section 2 right to districts which maximize representation of candidates preferred by a minority group and its political allies.

1. In a feeble attempt to avoid the tsunami of precedent rejecting their claim, Plaintiffs argue that the *Gingles* majority precondition applies only when plaintiffs claim that their racial group can somehow "influence" (but not win) elections in a white majority district, and not when plaintiffs claim they have the ability to positively influence elections by forming a winning coalition that can elect their preferred candidate. It is clear, however, that the first *Gingles* precondition applies, if anything, more forcefully to "ability to elect" claims, and that

[1] Plaintiffs also fail to even mention, much less dispute, our showing at pages 22-24 of our opening brief that they neither satisfy the third *Gingles* precondition - "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate," 478 U.S. at 51 - nor allege that minority voters lack an opportunity to participate in the political process. The Complaint fails to state a valid Section 2 claim for these independent reasons as well.

there is certainly no difference between "ability to elect" and "influence" claims that would justify more relaxed evidentiary standards for the former type of claim.

First, to the extent that labels matter, Plaintiffs are even worse off by virtue of their attempt to use the "ability to elect" label. For the Supreme Court itself expressly stated that the first *Gingles* precondition does apply where, as here, Plaintiffs claim an ability to elect the representatives of their choice. 478 U.S. at 46 n.12 ("The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability *to elect* the representatives of their choice was impaired by the [challenged plan]." (emphasis in original)).[2] Thus, *Gingles* expressly *held* that plaintiffs must constitute a potential majority where they claim an "ability to elect," but held open only the possibility - subsequently rejected by the lower courts - that plaintiffs claiming an "ability to influence" might be subject to lower evidentiary requirements and therefore need not constitute a majority. It is quite impossible, therefore, that plaintiffs claiming an "ability to elect" are in a better position with respect to the *Gingles* preconditions than plaintiffs claiming an ability to influence. Yet Plaintiffs' proffered distinction seeks to turn *Gingles* on its head in precisely this way.[3]

[2] The statement quoted in the text, which Plaintiffs conveniently ignore, flatly contradicts their remarkable assertion that "the *Gingles* Court explicitly distinguished its test from that which would be applied under an 'ability to elect' claim brought by a minority group that does not constitute a majority in a single member district." (PIs.' Br. at 14-15.) Indeed, under Plaintiffs' nonsensical position, the Court fashioned the majority requirement for use only in those cases where the requirement is satisfied.

[3] According to Plaintiffs, their "ability to elect" claim *is* an "ability to influence" claim for purposes of the Supreme Court's reservations of the issue, and is *not* an "ability to influence" claim for purposes of the lower courts' overwhelming rejection of such claims. But Plaintiffs cannot have it both ways, especially when (as discussed above) the *Gingles* Court expressly held that an "ability to elect" label does not avoid the majority requirement, and when (as discussed below) the courts have drawn no substantive distinctions among cases in which the majority requirement is not met.

In any event, there is no real world difference between Plaintiffs' "ability to elect" claim and what the rest of the world considers an "influence" claim - so it must be rejected for all the reasons that "influence" claims have been held invalid. Apparently recognizing this, Plaintiffs attempt to create a new definition of "influence" claims - *i.e.,* where plaintiffs cannot form a coalition under which their preferred candidate is elected, but nevertheless can somehow "influence" elections. The Supreme Court, however, did not mean this when it described "influence" claims. Rather, it described an "influence" claim in precisely the same way that Plaintiffs characterize their "ability to elect" claim. That is, an "influence" claim is one where the challenged plan fails to include "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." *Voinovich* v. *Quilter,* 507 *U.S.* 146, 150 (1993).

Similarly, the lower court cases enforcing the *Gingles* majority requirement also have clearly involved allegations that minority-preferred candidates could be elected, with the assistance of "cross-over" votes from other racial groups, under an alternative plan. For example, the court in *Metts* v. *Almond,* 217 F. Supp. 2d 252 (D.R.I. 2002), rejected an "influence" claim and went on to state:

> The plaintiffs' alternative argument is that their claim satisfies *Gingles'* first precondition because, even though African-Americans would constitute only a minority of residents in a properly configured District 2, with the help of "crossover" voters from other groups, they would have the opportunity to "elect" candidates of their choice. That claim amounts to nothing more than are-labeling of the plaintiffs' influence-dilution claim, and it fails *for* several reasons.

/d. at 260. Similarly, the *en bane* Sixth Circuit in *Nixon* v. *Kent County,* 76 F.3d 1381, 1392 (6th Cir. 1996), rejected claims that multi-racial political coalitions could have the ability to "elect an African-American representative, or a Hispanic-American one, or some other person, depending on whom the members of the coalition believe will best protect their shared interests." *Id.* at

1392. And in *Valdespino v. Alamo Heights Indep. Sch. Dist.,* 168 F.3d 848 (5th Cir. 1999), the Fifth Circuit rejected the notion that, without satisfying the *Gingles* majority requirement, the plaintiffs could show "that there could be a single-member district in which they could elect candidates of their choice." *Id.* at 852 (internal quotation marks omitted); *see also O'Lear v. Miller,* 222 F. Supp. 2d 850 (E.D. Mich.) (three-judge court), *aff'd,* 123 S.Ct. 512 (2002) (discussed below at page 11); *Illinois Legislative Redistricting Comm'n v. LaPaille,* 786 F. Supp. 704, 715 (N.D. Ill.) (three-judge court) (claim that minority group would hold "swing" vote under alternative plan), *aff'd,* 506 U.S. 948 (1992); *Kingman Park Civic Ass 'n v. Williams,* Civ. No. 01-2675, 2002 U.S. Dist. LEXIS 15254 (D.D.C. Aug. 16,2002) (attached as Ex. A) (holding that where African-American population was not "sufficiently large [to make up a] majority. . . , Plaintiffs cannot claim that the Ward Plan somehow now impairs their opportunity to elect a candidate of their choice" (internal quotation marks omitted)). These cases refute Plaintiffs' notion that their "ability to elect" claim is somehow distinguishable from the "influence" claims that the lower courts have held not cognizable under Section 2.

Indeed, *no* court has held that the "influence" claim described in *Voinovich* and pursued by Plaintiffs here is distinguishable from other "influence" claims. Contrary to Plaintiffs' assertion, the court in *Armour v. Ohio,* 775 F. Supp. 1044 (N.D. Ohio 1991), much like *Gingles* itself, stated that it "need not reach the question." *Id.* at 1059 n.19. And the court in *Uno v. City of Holyoke,* 72 F.3d 973 (1st Cir. 1995), characterized an "influence" claim as, *inter alia,* a claim that a group has "no need to be a majority within a single district in order to elect candidates of their choice" because it can "form coalitions with voters from other racial and ethnic groups." *!d.* at 990 (internal quotation marks omitted).

This case law reflects that it is extraordinarily implausible that "influence" claim connotes the extraordinarily modest and purposeless claim that Plaintiffs now describe - *i.e.,* a suit to enhance minority voting strength even though, by definition, the minority group cannot form a *winning* coalition with other voters. Unless plaintiffs' racial group can potentially win in conjunction with other groups, it hardly has any influence. Even if the group could, as Plaintiffs claim, influence the "*selection of* candidates" that are doomed to lose, this would hardly increase their voting or representational power in any cognizable way. (PIs.' Br. at 11 (emphasis added).) It is therefore hardly surprising that no one else has ever thought that "influence" claim describes the pyhrric victories that Plaintiffs now contend constitute such claims.

2. Plaintiffs also claim that the overwhelming lower court authority is "readily distinguishable" and thus "inapposite" because "most of those cases" (three of the more than a dozen cases cited in our opening brief) "arose in the context of challenges to at-large or multi member districting schemes - the very scenario under which *Gingles* was decided and to which *Gingles* originally was intended to apply." (PIs.' Br. at 20.) But the Supreme Court in *Growe* v. *Emison,* 507 U.S. 25 (1993), clearly held that the *Gingles* preconditions apply with equal or *greater* force to single-member challenges. Because multimember and at-large schemes "pose greater threats" to minority voting rights than single-member systems, "[i]t would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single-member district" *Id.* at 40. In so holding, the Court specifically reinforced the importance of the majority requirement: "Certainly the reasons for the three *Gingles* prerequisites continue to apply: The 'geographically compact majority' . . . showing[] [is] needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district. . . .

Unless these points are established, there neither has been a wrong nor can be a remedy." *Id.* at 40-41.

Even before *Growe* settled the matter, lower courts explicitly rejected the notion that the majority requirement should only apply in multimember cases. *See, e.g., Hastert v. State Bd. of Elec.,* 777 F. Supp. 634, 654 (N.D. III. 1991) (three-judge court) ("[W]e are unable to perceive, as a matter of simple logic, a principled justification for waiving the minority voter majority requirement in single-member district cases while preserving it in multi-member or at-large district cases."); *Turner v. Arkansas,* 784 F. Supp. 553, 570 (E.D. Ark. 1991) ("The Court also rejects plaintiffs' contention that *McNeil [v. Springfield Park Dist.,* 851 F.2d 937 (7th Cir. 1988), which refused to recognize "influence" claims,] should not apply to this case because it involved multi-member districts. On the contrary, the statements of the *McNeil* court apply even more aptly to the single-member districts in question here."), *aff'd,* 504 U.S. 952 (1992). Plaintiffs' reliance on this meaningless distinction provides them with no assistance here.

3. Plaintiffs argue that "this Court should not read a 50% minority-majority threshold requirement into the statute" because it is neither expressly set forth in the statutory text nor recited in the legislative history. (PIs.' Br. at 13.) Of course, *none* of the necessary preconditions of *Gingles* is explicit in the language of Section 2, which makes no reference to racially polarized voting or the like. Lower courts, however, are not authorized to set aside binding Supreme Court precedent based upon second-guessing of the Supreme Court's faithfulness to statutory text. In any event, the majority requirement represents a straightforward application of the principle that a group's "opportunity. . . to elect representatives of their choice," 42 U.S. C. § 1973(b), is deprived by demographic patterns, rather than by the challenged

redistricting plan, if the group would have no such opportunity even under a proposed alternative plan. *(See* pp. 7-9, *infra,* and our opening brief at 9-13.)

Indeed, Plaintiffs' claim is contrary to the statutory language. Under Plaintiffs' theory, a *prima facie* Section 2 case is made out, not only when a minority group could have the raw power to elect that goes along with majority status, but also whenever districts could be reconfigured to give the minority group's preferred candidate a good chance to be elected. But minority groups have suffered Section 2 harm only if they have *"less* opportunity than other members of the electorate." 42 U.S.C. § 1973(b) (emphasis added). And *no* members of the electorate - whether a group based on occupation, political affiliation, or race - have a right to maximize the electoral chances of their preferred candidates.

4. Plaintiffs are least successful in their effort to show that *Gingles* itself does not really establish a majority requirement. According to Plaintiffs, "the requirement of a majority minority district was intended to be only one possible method for demonstrating that the structure of the election process impacted a voting group's potential to elect a candidate of its choice and not the only method." (PIs.' Br. at 15.) This is contrary to the express language and logic of the opinion. The portion of *Gingles* cited for this proposition clearly states precisely the *opposite:* If minority voters "could not constitute a majority in a single-member district, these minority voters *cannot* maintain that they would have been able to elect representatives of their choice" under a different districting configuration. 478 U.S. at 50 n.17 (emphasis added). Thus, as our opening brief established (at 9-11), while the Court clearly recognized the obvious point that a district minority's preferred candidates can *be elected* with the help of "cross-over" voting, it plainly held that a district majority is necessary for an ability *to elect* candidates. Indeed, Plaintiffs' contrary notion would render the first *Gingles* precondition an absolute nullity.

According to Plaintiffs, all plaintiffs need show to satisfy the first *Gingles* prong is that a white majority votes sufficiently as a bloc to defeat the minority-preferred candidate. But the *third Gingles* precondition already requires the challenged plan to be such that "a white bloc vote. . . normally will defeat the combined strength of minority support plus white 'crossover' votes." *Id.* at 56. Thus, under Plaintiffs' theory, the majority requirement under *Gingles* is superfluous since it adds nothing to what the third precondition already requires.

Contrary to Plaintiffs' suggestion, Justice O'Connor's concurring opinion in *Gingles* confirms the significance of the 50 percent requirement in the majority opinion. Justice O'Connor clearly recognized that the Court established a potential majority threshold for Section 2 claims: "In explaining the elements of a vote dilution claim, the Court first states that 'the minority group must be able to demonstrate that it is sufficiently large and geographically compact to con_titute a majority in a single-member district.' If not, apparently the minority group has *no cognizable claim* that its ability to elect representatives of its choice has been impaired._' *Id.* at 89 (emphasis added). In addition, Justice O'Connor "express[ed] no view" as to whether this holding was correct. *!d.* at 89 n.!. More important, Justice O'Connor's statements about the majority requirement were made in the context of her broader concern that "[t]he court should *not* focus solely on the minority group's ability to elect representatives of its choice," because such a test "come[s] closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2." *Id.* at 99,94 (emphasis added). As the Fourth Circuit and other courts have clearly recognized, the majority threshold is an essential *barrier* to prevent the very proportionality rule that Justice O'Connor sought to avoid. (In all events, of course, it is the *Gingles* majority opinion which controls.)

The patent implausibility of Plaintiffs' theory is further demonstrated at pages 9-21 of our opening brief, which Plaintiffs nowhere seek to refute. In particular, Plaintiffs do not even mention the Fourth Circuit precedent confirming that an "ability to elect" depends on a group's majority status, and not on the group's success as part of a bi-racial coalition. *See Smith* v. *Brunswick County,* 984 F.2d 1393, 1400, 1402 (4th Cir. 1993) (because it "violates both the letter and spirit of the Voting Rights Act" to "resolv[e] discrimination issues on the basis of whether members of the protected group are elected," a "district court err[s] in. . . requiring further adjustments to increase the chances of actual success by blacks at the polls"); *McGhee* v. *Granville County,* 860 F.2d 110, 116 (4th Cir. 1988) *(Gingles'* majority requirement is necessary to prevent Section 2 from being "applied to find' dilution' of a minority group's voting power in any situation where the group had been unable, despite effort, to achieve representation by the election of candidates of its choice in proportion to its percentage of the total voting age constituency"). The Second Circuit, as well, has recognized the clear and critical distinction between the first *Gingles* precondition, which is concerned with ability to elect, and the third *Gingles* precondition, which is concerned with electoral outcomes:

> No matter how severe the racial polarization, if black voters could not constitute a majority in a hypothetical single-member district, then they cannot claim to be worse off by virtue of the [challenged] scheme. This issue. . . is distinct from whether the voting patterns indicate that. . . a substantial change in the character of the population arguably could affect. . . the ability of white voters to defeat the minority's preferred candidates.

NAACP v. *City of Niagara Falls,* 65 F.3d 1002, 1011 (2d Cir. 1995).

Plaintiffs also mischaracterize subsequent Supreme Court cases discussing the first *Gingles* precondition. For example, Plaintiffs state that *"Johnson [v. DeGrandy,* 512 U.S. 997 (1993),] . . . interpreted the first *Gingles* prong to merely require 'the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority

population to elect the candidates of its choice.'" (PIs.' Br. at 17 (quoting 512 U.S. at 1008).) Contrary to Plaintiffs' implication, this is fully consistent with the *Gingles* holding that the minority population must constitute a district majority in order to be "sufficiently large. . . to elect the candidates of its choice." *Gingles* itself expressly stated as much - *i.e.,* that a smaller group "cannot" claim an ability to elect, 478 U.S. at 50 n.17 - and, in the same term that it decided *DeGrandy,* the Court confirmed that a district majority is "needed to establish that the minority has the potential to elect a representative of its *own* choice." *Growe,* 507 U.S. at 40 (emphasis added). There also is no merit to Plaintiffs' claim that application of the majority requirement "conflict[s] with the Supreme Court's clear mandate that the *Gingles* factors not 'be applied mechanically and without regard to the nature of the claim.'" (PIs.' Br. at 21 (quoting *Voinovich,* 507 U.S. at 158).) *Voinovich* held only that the majority requirement "would have to be modified or eliminated" *if* an "influence" claim were to be held cognizable, which the Court expressly declined to do on that and repeated other occasions. 507 U.S. at 158. As discussed above and in our previous brief, these nominal reservations of the issue do not overcome the lower courts' overwhelming rejection of "influence" claims.[4]

5. Plaintiffs also are unable to cite *any* lower court precedent for the proposition that a Section 2 claim is viable without an ability to satisfy the *Gingles* majority requirement. Indeed, Plaintiffs' primary citation is not to a case at all, but to a legal brief filed during the Clinton Administration by the Department of Justice. There is no merit to Plaintiffs' assertion that the Clinton Justice Department's view in another case was "entitled to great persuasive weight" in that case, much less in this one, where the Attorney General has not appeared. For the notion of such deference, Plaintiffs cite to a case involving Section 5 of the Voting Rights Act, which the

[4] The same is true for the court's refusal to decide the issue in *West v. Clinton,* 786 F. Supp. 803,806 (W.D. Ark. 1992) (three-judge court), upon which Plaintiffs rely.

Justice Department has a unique role in administering. Since the Attorney General has no comparable role under Section 2, his views are entitled to no special deference. This is certainly the lesson of *Valdespino* v. *Alamo Heights lndep.Sch. Dist.,* 528 U.S. 1114 (2000), in which the brief at issue was filed. The Attorney General urged the Court to grant certiorari and reverse the lower court's holding that a Section 2 plaintiff "may not make out a claim of vote dilution unless the plaintiff can show that the minority could constitute a majority in a single-member district" (Pis.' Br. Ex. A at i.) To the extent that one wants to find significance in the Supreme Court proceedings in *Valdespino,* the Court's *denial* of certiorari, which allowed this holding to stand, carries more weight than the Clinton Administration's brief unsuccessfully urging review.

Plaintiffs next cite to *dicta* in a concurring opinion that did not have the support of a plurality of the Eleventh Circuit in *Solomon* v. *Liberty County,* 899 F.2d 1012 (11th Cir. 1990) (en bane). In that early *post-Gingles* opinion, Judge Kravitch merely speculated in a footnote that blacks might have the potential to elect candidates of their choice even without currently constituting a majority of the voting age population - if, for example, "blacks may constitute a majority of the overall population and may be expected to comprise a majority of the voting age population in the near future." *Id.*. at 1018 n.7. Moreover, contrary to Plaintiffs' assertion, *Armour* v. *Ohio,* 775 F. Supp. 1044 (N.D. Ohio 1991) (three-judge court), clearly has been overruled. First, the *Armour* court relied substantially on the now-discredited view that the *Gingles* preconditions applied only to challenges to multimember, as opposed to single-member, districting schemes. *Id.* at 150-51; *see supra* pp. 5-6. Second, *Cousin* v. *Sundquist,* 145 F.3d 818 (6th Cir. 1998), clearly did overrule *Armour* because it rejected all "'influence' claim[s]," *id.* at 828, and *Armour* clearly held that *Gingles* does not apply to claims alleging "a dilution of minority influence." 775 F. Supp. at 1052. Moreover, courts in the Sixth Circuit understand

Cousin as rejecting all claims where plaintiffs do not constitute a majority. Specifically, the plaintiffs in 0 *'Lear* v. *Miller,* 222 F. Supp. 2d 850 (E.D. Mich.) (three-judge court), *aff'd,* 123 S. Ct. 512 (2002), made nearly identical allegations to those in *Armour.* The three-judge court's dismissal of the' complaint, under Fed. R. Civ. P. 12(b)(6), was based on *Cousin* and did not depend on the technical label of "ability to elect" versus "ability to influence": "Because plaintiffs cannot satisfy the *Gingles* preconditions *and* because we do not recognize 'influence' claims, plaintiffs cannot state a claim under the Voting Rights Act" 222 F. Supp. 2d at 861 (emphasis added).

Plaintiffs also cite a few cases in which the existence of "influence" districts was recognized as a possible *defense* to liability under the "totality of circumstances" analysis. According to Plaintiffs, "it logically follows" that the failure to create such districts could give rise to Section 2 liability. (PIs.' Br. at 19.) First, it does not logically follow that aspects of a districting plan that aid in its defense are somehow required. For example, the fact that proportional representation aids in defense of a redistricting plan hardly suggests that it is required. *See DeGrandy,* 512 U.S. at 1020. Moreover, even in the defensive context, these courts expressly declined to decide the "influence" issue. *See Uno* v. *City of Holyoke,* 72 F.3d at 979 n.2 ("We take no view of the matter. . . ."); *Rural West Tenn. African-Am. Affairs Council, Inc.* v. *McWherter,* 877 F. Supp. 1096, 1101 (W.D. Tenn. 1995) ("[T]he problem of whether the Voting Rights Act *requires* the creation of influence districts does not arise in the present case."), *aff'd,* 516 U.S. 801 (1995). Moreover, contrary to Plaintiffs' characterization, *Barnett* v. *City of Chicago,* 141 F.3d 699, 703 (7th Cir. 1998), did not refuse to reject the viability of "ability to influence" claims. In *Barnett,* the court held that *Gingles* requires the minority group to be sufficiently numerous to constitute a district majority under the relevant population measure –

whether it be voting age population, citizen voting age population, or the like. */d.* at 702-03. Indeed, the Seventh Circuit was bound to such a holding by its categorical rejection of "influence" claims in *McNeil* v. *Springfield Park Dist.,* 851 F.2d 937,942 (7th Cir. 1988). Like *Uno* and *McWherter,* the court in *Barnett* held only that "influence" claims might be relevant to a proportionality defense under the totality of circumstances. 141 F.3d at 703. Accordingly, none of the cases cited by Plaintiffs supports the proposition that a redistricting plan can be struck down for failure to create a minority-minority district.

6. Finally, Plaintiffs fail to refute the several reasons that the type of claim brought here is judicially unmanageable and fundamentally inconsistent with the political neutrality of the courts. With respect to the observation of many courts, including the Fourth Circuit in *McGhee,* 860 F.2d at 116, that abandonment of the majority requirement would allow Section 2 claims by almost any group of minority voters, Plaintiffs argue that "such fears are unfounded" because "meritless cases would fail under the overall analysis." (PIs.' Br. at 21.) But Plaintiffs provide no dividing line between "meritless" and meritorious cases if courts cannot use a bright line distinction based on power to elect. In any event, courts could hope to separate "meritless" claims from meritorious ones only by making "the very finest of political judgments about possibilities and effects - judgments well beyond their capacities." *Latino Political Action Comm., Inc.* v. *City of Boston,* 784 F.2d 409, 412 (1st Cir. 1986). This problem is well illustrated by the instant case, where the Court is being called upon to tinker with the black population of districts by decreeing that it was illegal for the legislature to draw one 32 percent black voting age population ("V AP") district and one 53 percent black V AP district, as opposed to one 38 percent district and one 49 percent district. *(See* CompI. " 17, 33.) If this is not "meritless,"

then obviously the flood gates are wide open for all kinds of efforts to have the judiciary impose marginal partisan advantage.

Plaintiffs also make no effort to dispute that their theory would transform the Voting Rights Act into a tool for political ends. Thus, this lawsuit reflects the strategic decision, candidly acknowledged by Plaintiffs' attorney, that "the Democratic Party will work closely with minority officeholders and civil rights advocates to create districts that" are "less than 50% minority." J. Gerald Hebert, *Redistricting in the Post-2000 Era,* 8 Geo. Mason L. Rev. 431, 455 (2000). As shown in our opening brief at pages 14-16, numerous cases have rejected claims of the type raised here precisely out of a recognition that the creation of such districts affects voting strength on the basis of political affiliation, not race, and thus is an inherently political issue for legislatures rather than courts. Because "[t]he Act's purpose is not to ensure the election of candidates. . . of any particular political party," *Lewis* v. *Alamance County,* 99 F.3d 600, 617 (4th Cir. 1996), a *prima facie* case cannot be made out based on a legislature's failure to maximize the number of districts in which candidates will be elected with the support of minority voters and like-minded whites from the same party.

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Respectfully submitted,

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