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' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Michael A. Carvin (Admitted *pro hac vice*)
Louis K. Fisher (Admitted *pro hac vice*)
Cody R. Smith (Va. Bar No. 48790)
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

Attorneys for Proposed Defendant-Intervenors

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I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and the Local Rules of this Court, Proposed Defendant-Intervenors Gary Thompson, Charles Brown, James Brown, James Alfred Carey, Evelyn Chandler, Clifton E. Hayes, Jr., Quentin E. Hicks, Irene Hurst, and Wayne Osmore hereby submit this brief in support of their motion to dismiss the Complaint. A court deciding a Rule 12(b)(6) motion may consider the well-pleaded facts stated in the complaint, which are taken as true, *see, e.g.*, *Franks v. Ross*, 313 F.3d 184, 192 (4th Cir. 2002), as well as matters subject to judicial notice, *see, e.g.*, *Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986) (judicial notice appropriate on motion to dismiss). A complaint should be dismissed for failure to state a claim upon which relief can be granted if it is clear that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *See, e.g.*, *Franks*, 313 F.3d at 192. Here, the Complaint clearly shows that African-American voters are not sufficiently numerous and geographically compact to constitute a majority of an additional congressional district in Virginia. Since Plaintiffs cannot possibly satisfy this necessary precondition recognized by the Supreme Court for a vote dilution claim, their challenge under Section 2 of the Voting Rights Act fails as a matter of law. Furthermore, the Complaint demonstrates Plaintiffs' inability to allege another necessary precondition to a Section 2 claim: white bloc voting that usually defeats the preferred candidates of most minority voters.

II. FACTS

Plaintiffs in this case challenge the configuration of Virginia's Fourth Congressional District under the reapportionment plan enacted by the Virginia Legislature and signed into law by the Governor based on the results of the 2000 census. As the Complaint recognizes, the

configuration of the Fourth Congressional District is inextricably tied to that of the adjacent Third Congressional District. (Compl. ¶¶ 20, 26.) Under the 2000 census, the former Third District had an African-American total population ("TPOP") of 57 percent and voting-age population ("VAP") of 53.3 percent, while the former Fourth District had an African-American TPOP of 39.4 percent and VAP of 37.8 percent. (*Id.* ¶ 17; Virginia Division of Legislative Services ("DLS") Redistricting Website.[1]) Whereas the former Fourth Congressional District was close to the ideal size for Virginia congressional districts under the 2000 census, the population of the former Third Congressional District was nearly 76,000 people, or nearly 12 percent, below the ideal district size. (*See* Compl. ¶ 17, Virginia DLS Website (Ex. 1).) Accordingly, substantial reapportionment was necessary to comply with the Fourteenth Amendment's "one person, one vote" requirement.

To make up for its lost population, the Third Congressional District under the enacted plan includes residents of the former Fourth District. (Compl. ¶ 20.) Under the enacted plan, the Third District has an African-American TPOP of 56.8 percent and a VAP of 53.2 percent, both of which are nearly identical to the figures in the "benchmark" plan – *i.e.*, the former Third District under the results of the 2000 census. (Virginia DLS Website.[2]) As in the benchmark plan, the Fourth District in the enacted plan is minority African-American, with a TPOP of 33.6 percent and a VAP of 32.3 percent. (Compl. ¶ 17; Virginia DLS Website (Ex. 2).) The

[1] The Complaint provides total population figures but not VAP figures. More importantly, although the population figures for the Fourth Congressional District and the Third Congressional District are interdependent, the Complaint provides data for the former but not the latter. The missing information is publicly available on the official redistricting website of the Virginia Division of Legislative Services at http://dlsgis.state.va.us/congress/congressPlanDir.htm. (A printout from the website, showing the data for the former districts, is attached as Exhibit 1.) Because this information is material, indisputable, and judicially noticeable, it should be considered on the motion to dismiss. *See Papasan*, 478 U.S. at 268 n.1 ("Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record . . . .").

[2] A printout from the website, showing the data for the enacted plan, is attached as Exhibit 2.

Department of Justice precleared the enacted plan pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which requires a showing that the enacted plan does not reduce minority voting strength as compared to the pre-existing plan. (Compl. ¶ 37.)

The Complaint's central claim is that the Voting Rights Act required the Fourth Congressional District to be drawn with an African-American population of roughly forty percent, which is well short of a majority and only about six percentage points higher than the enacted plan. (Compl. ¶¶ 2, 17-19.) Under the prior plan, an African-American candidate, Louise Lucas, ran a competitive race in 2001 and received about 48 percent of the vote under unusually challenging conditions. (*Id.* ¶ 24.) A white Democratic candidate would receive even more support, including more financial support, from Democrats than Ms. Lucas received in 2001. (*Id.* ¶ 30.) There is no allegation that white Democrats would not often win in the challenged district.

Plaintiffs also do not allege that it is possible for both the Third and Fourth Districts to be compact, majority-African-American districts. On the contrary, the Complaint demonstrates that, to draw the Fourth District with even a forty percent African-American population, it is necessary to imperil the majority-African-American status of the neighboring Third Congressional District.[3] Under "Congressional Plan 188," the Fourth District would have a 40.4 percent African-American TPOP and a 38.3 percent African-American VAP, while the Third District's African-American percentages would be reduced to 53.2 percent TPOP and 49.6 percent VAP. (Compl. ¶ 33; Virginia DLS Website.[4]) Similarly, the African-American percentages under the "Deeds Plan" would be 40.3 percent TPOP and 38.5 percent VAP in the

[3] The Complaint also does not allege that the alternative districts are geographically compact.

[4] A printout from the website, showing the data for "Congressional Plan 188," is attached as Exhibit 3.

Fourth District, and 52.5 percent TPOP and 48.8 percent VAP in the Third District. (*Id.*[5]) The Complaint identifies one alternative, the "Maxwell-Crittenden Plan," that creates a bare African-American majority in District 4 (52.8 percent TPOP and 50.3 percent VAP), but the same plan transforms District 3 into a *minority*-African-American district (48.9 percent TPOP and 45.3 percent VAP). (*Id.*[6])

III. SUMMARY OF ARGUMENT

As a matter of law, Plaintiffs' challenge here is facially deficient because it is premised on the notion that the Voting Rights Act requires maximizing the electoral success of minority *candidates* – through the mandatory creation of districts where a political coalition of black and white voters will support such candidates – rather than the protection of black *voters* against submergence into a majority white district where they constitute an ineffective minority. Indeed, under Plaintiffs' radical theory, the Voting Rights Act requires dismantling the first and only black majority congressional district in the history of Virginia – District 3 – in order to increase the black percentage in adjacent District 4 to approximately 40 percent; the point at which a black candidate allegedly can be elected by attracting white "crossover" supporters.

The Voting Rights Act, however, plainly does not require the creation of districts where the African-American population is of sufficient size to influence the election of African-American candidates through a political alliance with like-minded white voters. That is, the Voting Rights Act does not mandate that redistricting plans be designed to maximize the electoral success of black or black-preferred candidates. Rather, the Voting Rights Act guarantees only an *equal* opportunity for minority *voters*. This equal opportunity may be denied

[5] A printout from the website, showing the data for the "Deeds Plan," is attached as Exhibit 4.

[6] A printout from the website, showing the data for the "Maxwell-Crittenden Plan," is attached as Exhibit 5.

when a compact African-American community is split into two ineffective minorities in adjacent districts, rather than preserved as an effective majority in one. But no such injury is possible where, as here, the relevant African-American population is not sufficiently numerous or compact to constitute a majority in a district. In such circumstances, the African-American community's submergence in a majority white district is not caused by any aspect of the redistricting plan or any decision by the legislature; it is, rather, "simply an unavoidable mathematical consequence of the demographics" constraining all redistricting plans. *McGhee v. Granville County*, 860 F.2d 110, 118-19 (4th Cir. 1988). Since the redistricting plan did not cause black voters to constitute less than a majority and since, in a two-party democratic system, only a majority has the power to elect its candidate, a redistricting plan does not deny black voters the ability "to elect" unless it has deprived them of potential majority status. 42 U.S.C. § 1973(b). Where African-American voters do not possess this potential majority status, the only "deprivation" allegedly or possibly caused by the redistricting plan is the inability to influence the election of a minority-preferred candidate by forming a winning coalition with sympathetic white, "crossover" voters. (*See* Compl. ¶¶ 25, 33.) This alleged political "harm," however, is not a cognizable deprivation under the Voting Rights Act because the Act does not protect minority voters' ability to "influence" elections; does not protect multi-racial *political* coalitions against vote dilution; and otherwise does not require redistricting plans to maximize minority-preferred candidates' potential electoral success in every district where minority voters constitute a cognizable presence.

For these reasons, the Supreme Court established, in the seminal case of *Thornburg v. Gingles*, 478 U.S. 30 (1986), that minorities must be able to constitute a majority in a compact, single-member district in order to allege vote dilution under Section 2, and every lower federal

court has subsequently rejected any Section 2 dilution claim brought by minority voters constituting less than a potential majority. More generally, the Fourth Circuit has repeatedly made clear that the standard for determining whether a minority group's voting power has been diluted is whether they have been denied majority status in a district, not whether they have been denied the percentage they allegedly need to elect a minority candidate through a combination of minority and "crossover" votes.

IV. ARGUMENT

Under Section 2 of the Voting Rights Act, a challenged voting practice is unlawful if it abridges the right to vote "on account of race or color" by causing a "protected" "class of citizens" 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(b).

Here, the challenged redistricting plan has one black majority district – District 3 – and Plaintiffs do not and cannot allege that it is possible to create two black majority districts, much less two *compact* black majority districts. Thus, the alleged Section 2 violation is not that the redistricting plan "dilutes [minority] votes by submerging them in a white majority" district, in the face of a feasible alternative under which majority black districts could be created in Districts 3 and 4. *Gingles*, 478 U.S. at 46. Rather, the alleged Section 2 violation is that the inevitable white majority in District 4 is too large a majority: Section 2 allegedly requires an African-American population of approximately 40 percent, rather than 33 percent, because it is only at 40 percent that African-American voters can form a winning coalition with white "crossover" voters to elect Ms. Louise Lucas, or a similarly situated African-American candidate. (Compl. ¶ 25.) This increase to 40 percent is to be accomplished by transferring black voters from District 3,

with the result that this black majority district will be converted to one where blacks constitute a minority of the voting-age population.[7]

Plaintiffs fail to state a cognizable claim under Section 2 of the Voting Rights Act. Section 2 vote dilution is potentially established only where a redistricting plan splits (or fails to unite) a minority group that is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. It is legally insufficient to allege, as Plaintiffs do here, that the redistricting plan fails to create a more robust minority population, which allegedly would be sufficient to elect a minority-preferred candidate through a combination of black and white voting support. The seminal *Gingles* case makes this clear.

In *Gingles*, the Supreme Court established three "*necessary preconditions*" for a claim under Section 2: (1) a minority racial group must be sufficiently large and geographically compact to constitute a *majority* in a single-member district; (2) the group must be politically cohesive; and (3) bloc voting by a white majority must usually defeat the minority group's preferred candidate. *Id.* at 50-51.[8] (Although *Gingles* involved multi-member districts, its preconditions apply to challenges to single-member plans, *Growe v. Emison*, 507 U.S. 25, 40

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[7] As noted, two of the allegedly nondiscriminatory alternatives would increase the black VAP in District 4 to slightly over 38%, and decrease the black VAP in District 3 to approximately 49%. A third alternative would reduce District 3's black VAP to 45.3%. Thus, no alternative, would provide a majority black district for both Districts 3 and 4. *See McDaniel v. Mehfoud*, 708 F. Supp. 754, 755 (E.D. Va. 1989) (majority determined by voting-age population rather than total population); *see also Barnett v. City of Chicago*, 141 F.3d 699, 704-05 (7th 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, 1426 (9th Cir. 1989).

[8] If these preconditions are met, "the trial court is to consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters." *Id.* at 79 (internal citations and quotation marks omitted); *see also Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994) ("But if *Gingles* so clearly identified the three [preconditions] as generally necessary to prove a [vote dilution] claim, it just as clearly declined to hold them sufficient in combination, either in the sense that a court's examination of relevant circumstances was complete once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution.").

(1993), and are necessary prerequisites to all Section 2 vote dilution challenges. *See, e.g.*, *Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994); *Voinovich v. Quilter*, 507 U.S. 146, 157-58 (1993); *McGhee*, 860 F.2d at 116-17.) Thus, the very first "precondition" for a vote dilution challenge under Section 2 is that the relevant minority group be sufficiently numerous and compact to constitute a majority in a single-member district. Since Plaintiffs have not alleged that the African-American community in the relevant area could constitute a majority in an additional single-member district, their Complaint should be dismissed under *Gingles*.

To be sure, the *Gingles* Court expressly held only that the three mandatory preconditions applied where "plaintiffs alleged . . . that their ability *to elect* the representatives of their choice was impaired" by the challenged redistricting plan. *Gingles*, 478 U.S. at 46 n.12 (emphasis in original). It reserved the question of whether Section 2 permits a claim by a group not sufficiently large and compact to constitute a majority if the plaintiffs alleged that the challenged district "impairs its ability to *influence* elections." *Id.* (emphasis in original). This is no aid to Plaintiffs here, however, for two separate reasons. First, as in *Gingles*, Plaintiffs' Complaint here plainly *does* allege that "their ability *to elect* representatives of their choice was impaired by" the configuration of District 4. (Compl. ¶¶ 3, 4, 25, 26, 32, 37, 38, 39.) Accordingly, *Gingles*' "majority-in-a-district" requirement unambiguously applies with full force. In any event, even if Plaintiffs attempt to recast their challenge as an "influence" claim,[9] it still is deficient because the lower federal courts have uniformly rejected all "influence" claims. (*See* pp. 19-21 below.) Accordingly, since Plaintiffs do not allege that African-Americans could constitute an additional compact district majority, they do not state a viable Section 2 claim, regardless of whether the redistricting plan allegedly impairs their ability to elect, or to influence

[9] One paragraph in the Complaint does ambiguously state that an alternative plan would provide African-American voters with the "ability to elect a candidate of choice *and/or influence* Congressional elections." (Compl. ¶ 33 (emphasis added).)

the election of, their preferred candidate. The reasons for this "majority-in-a-district" rule are straightforward and set forth in both *Gingles* and the lower federal court opinions implementing *Gingles*.

A. A Group that Is a Numerical Minority in a District Has No Ability to Elect Its Preferred Representative.

1. First, the "majority-in-a-district" requirement is mandated by the language of Section 2. Under that statute, it must be "shown" that a "protected" "class of citizens" has "less opportunity" "*to elect* representatives of their choice." 42 U.S.C. § 1973(b) (emphasis added). Of course, a redistricting plan can *deny* minority plaintiffs the ability "to elect" only if the minority group would possess the ability to elect in the absence of the challenged plan. Since only a majority can elect, the minority group needs to show that it is a potential majority. Otherwise, a redistricting plan "cannot be responsible for minority voters' inability to elect its candidates." *Gingles*, 478 U.S. at 50; *see Smith v. Brunswick*, 984 F.2d 1393, 1399 (4th Cir. 1993) ("If . . . no such majority single-member district would be feasible, than the protected class could *never* argue that a multi-member [majority white] configuration denied its members an equal opportunity to vote.") (emphasis added); *McGhee*, 860 F.2d at 116; *Metts v. Almond*, 217 F. Supp. 2d 252, 260 (D.R.I. 2002) ("In a democracy, candidates for political offices are elected by a majority of the voters. Therefore, it is difficult to see how a group constituting less than a majority can claim the ability to 'elect' a candidate."). Thus, as the *Gingles* Court cogently explained, 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 51 n.17 (emphasis in original);

see also Growe, 507 U.S. at 40 ("The 'geographically compact majority' and 'minority political cohesion' showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district."). The "majority-in-a-district" standard, then, reflects basic causation principles and "would only protect racial minority votes from *diminution* proximately *caused* by the districting plan." *Gingles*, 478 U.S. at 51 n.17 (emphasis added); *see Cano v. Davis*, 211 F. Supp. 2d 1208, 1231 (C.D. Cal. 2002) ("That is, unless the minority group can establish that an effective majority-minority district can be created, a vote dilution claim is not cognizable because there is no minority voting power to dilute."), *aff'd*, 123 S. Ct. 851 (2003).

The Complaint attempts to circumvent this problem by alleging that "African-American voters would have the opportunity to elect a candidate of their choice with some white cross-over votes in a district that is approximately 40% or greater African-American in population." (Compl. ¶ 25.) But this is simply an allegation that an African-American preferred *candidate* can *be elected* through a bi-racial coalition of black and white voters, as is the case in many districts where African-Americans are a minority. It does not mean that African-American *voters* have the ability "*to elect*," since their ability to elect their preferred candidate is totally dependent on a coalition with white voters. In such circumstances, the minority group plainly does not have "the potential to elect a representative of its *own* choice in some single-member districts." *Growe*, 507 U.S. at 40 (emphasis added). *Gingles* itself makes this crystal clear: "[I]f . . . the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters *cannot* maintain that they would have been able to elect representatives of their choice in the absence of [the challenged plan]." 478 U.S. at 51 n.17 (emphasis added). If the potential "to elect" under Section 2

included the potential to elect in *combination* with *other* groups, *Gingles* obviously would not have said that a group constituting a substantial minority of a district is unable to "elect" their preferred representative. Obviously, groups comprising 40 percent or 45 percent of the polity often are able to form coalitions to elect their preferred representatives. Therefore, it is quite clear that a group has the ability "to elect" within the meaning of Section 2 only if it constitutes a majority. As the Fourth Circuit has explained, so interpreting "the 'size and compactness'" *Gingles* precondition is necessary to "confine dilution claims to situations where diminution of voting power is 'proximately' caused by the districting plan," and thus "*would not assure racial minorities proportional representation.*" *McGhee*, 860 F.2d at 117 (quoting *Gingles*, 478 U.S. at 51 n.17) (emphasis in *Gingles* opinion).

Also, the *Gingles* "majority-in-a-district" requirement reflects the only understanding of "to elect" that is consistent with the rest of the language of Section 2. An electoral device is illegal only if it deprives a "class of citizens protected by subsection (a)" – *i.e.*, a racial or language minority group – of the ability to elect. 42 U.S.C. § 1973(b). That being so, the only appropriate focus for determining whether a "class" has the power to elect, is a focus on *that* class of citizens. It is not appropriate to look at that class, *plus* an additional group of citizens from different racial or ethnic groups, that happen to share the political preferences of the minority voters. *See Nixon v. Kent County*, 76 F.3d 1381, 1392 (6th Cir. 1996) (biracial coalition that loses elections is "indistinguishable from political minorities as opposed to racial minorities").

2. For these reasons, the Fourth Circuit and this Court have repeatedly held that the ability "to elect" under Section 2, and Section 2 vote dilution, are measured by whether the racial minority constitutes a numerical majority, not by whether the black percentages are

sufficient to elect their preferred candidate as part of a bi-racial coalition. Accordingly, the vote of racial minorities is potentially diluted under Section 2 only if majority status is denied.

In *Smith v. Brunswick County*, 984 F.2d 1393 (4th Cir. 1993), it was argued that majority black districts diluted minority voting power because the black percentages were insufficient to elect minority preferred candidates, since "whites in Brunswick County vote monolithically and . . . 20% of the blacks cross over and join the whites," thereby resulting in defeat of candidates preferred by 80% of minority voters. *Id.* at 1400. The Court, however, emphasized that whether the minority vote was diluted turned on whether they constituted a majority in the district, not whether black-preferred candidates would be elected in the face of white bloc voting. As the Court put it, "[a]lthough the [plaintiffs'] theory may have some inherent logic if election outcomes are the goal, it finds no support in the law." *Id.* Indeed, the Court emphasized that it "violates both the letter and spirit of the Voting Rights Act by resolving discrimination issues on the basis of whether members of the protected group are elected." *Id.* Consequently, the "district court erred in . . . requiring further adjustments [to the districting plan] to increase the chances of actual success by blacks at the polls." *Id.* at 1402.

In short, the issue of whether a districting scheme is potentially dilutive under Section 2 is resolved by whether minorities constitute a numerical majority, not by whether voting patterns of blacks and whites will lead to the election of black-preferred candidates. Plaintiffs' claim here seeks to turn that rule precisely on its head. The gravamen of Plaintiffs' complaint is that the ability to elect is not measured by whether minorities constitute a majority, but by whether black and white voting patterns would enable the election of a black-preferred candidate. Just as Section 2 did not require "further adjustments to increase" the black percentages in *Smith* to the point at which they could overcome white bloc voting, no such adjustments are required here.

The Fourth Circuit's decision in *McGhee* further confirms that a racial minority group cannot bring a vote dilution claim unless it constitutes a potential majority of a district. There, the Court squarely held that the first *Gingles* precondition established "minimum size and characteristics of a racial minority group that could be considered an 'effective voting majority' . . . for purposes of defining . . . [whether] 'dilution' of such a group's potential voting power existed." 860 F.2d at 116. The Court emphasized that so "preclud[ing] some small and unconcentrated minority groups from attempting to rectify vote dilution" was necessary to effectuate the "*Gingles* Court's careful efforts to contain the vote dilution concept." *Id.* at 119 (quoting *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942 (7th Cir. 1988)). Without the requirement that minorities constitute a district majority, Section 2 could be improperly "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." *Id.* at 116; *see also McDaniel v. Mehfoud*, 708 F. Supp. 754, 755 (E.D. Va. 1989) (first *Gingles* precondition satisfied if minorities constitute majority of voting-age population, without regard to whether minority-preferred candidates can be elected).

In short, the Fourth Circuit has recognized a clear distinction between fracturing an African-American community that could constitute a majority in a single-member district, and failing to place all pockets of minorities in districts where their preferred candidates can achieve success – only the former practice can constitute *prima facie* vote dilution under Section 2. The fact that racial minorities, like non-minorities, can reside in districts where they constitute voting minorities, does not suggest that they have any "less opportunity" than others to elect their preferred candidates.

3. Moreover, granting minority voters alone a right to have a certain level of representation, whereby they can form a bi-racial coalition to elect their preferred candidates, is simply preferential treatment designed to insure that the minorities' political coalition will consistently win in every district where minorities are present. (In Virginia and most other states, this political coalition is, of course, the Democratic Party, given African-Americans' overwhelming support for that party.) So maximizing the electoral chances of the political coalition to which the minority group belongs would, as *Smith* noted, "violate[] the letter and spirit of the Voting Rights Act." 984 F.2d at 1400. Indeed, a special three-judge redistricting panel in South Carolina rejected the creation of districts with 25 percent to 40 percent African-American voting-age populations for precisely this reason. In *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002), the three-judge court explained the purpose and effect of districts with minority populations of the sort advocated by Plaintiffs here: "With the aid of a substantial (but not majority) black population that votes nearly exclusively for a Democratic candidate, a [Democratic candidate can] . . . use the black vote to defeat any Republican challenger in the general election." *Id.* at 643 n.22; *cf.* J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 Geo. Mason L. Rev. 431, 455 (2000) (stating that "the Democratic Party will work closely with minority officeholders and civil rights advocates to create districts that" are "less than 50% minority"). The Court held that the creation of such districts "is, therefore, an inherently politically based policy," and it refused to consider "influence" districts in drawing a plan to comply with the Voting Rights Act. *Id.*

Similarly, a three-judge panel in the Southern District of Mississippi observed that claims seeking merely to tinker with the number of minority voters in a district, rather than to create a majority-minority district, reduce to arguments "that more minorities are required in [a district]

to make the congressional race competitive for democratic candidates." *Smith v. Clark*, 189 F. Supp. 2d 529, 537 (S.D. Miss. 2002), *aff'd sub nom. Branch v. Smith*, 123 S. Ct. 1429 (2003). The court declined to increase the minority percentage in this district, because "political considerations are inappropriate for a federal court to consider when drafting a congressional redistricting plan." *Id.* And a three-judge court in Texas concluded: "The matter of creating such a permissive district is one for the legislature. As we have explained, such an effort would require that we abandon our quest for neutrality in favor of raw political choice." *Balderas v. Texas*, No. 6:01 CV 158, slip op. (Congress) at 13 (E.D. Tex. Nov. 14, 2001) (Ex. 6), *aff'd*, 536 U.S. 919 (2002); *see also Cousin v. Sundquist*, 145 F.3d 818, 827-29 (6th Cir. 1998); *McNeil*, 851 F.2d at 947; *Gingles v. Edmisten*, 590 F. Supp. 345, 381 (E.D.N.C. 1984), *aff'd in part, rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-53 (5th Cir. 1999).

This rationale for rejecting "influence" claims simply applies the more general rule that the Voting Rights Act cannot be used to aid one political party at the expense of another, even if one party is supported by some minority groups. As the Fourth Circuit stated in *Lewis v. Alamance County*, 99 F.3d 600 (4th Cir. 1996), "[t]he Act's purpose is not to ensure the election of candidates . . . of any particular political party." *Id.* at 617. Clearly, the political neutrality of the Voting Rights Act applies even if minority voters happen to prefer one political party. *See, e.g.*, *Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) ("The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates."); *Nixon*, 76 F.3d at 1392 (A "group that is too small to be expected to win a seat, were it purely a political group, cannot legitimately have heightened expectations because the basis for the group's existence is tied to the race of its

members."). Any other rule would "provide minority groups with a political advantage not recognized by our form of government, and not authorized by the constitutional and statutory underpinnings of that structure." *Nixon*, 76 F.3d at 1392.

Moreover, in addition to political favoritism, simply assessing *whether* a certain minority percentage will affect an electoral outcome would require courts to make, as then-Judge Breyer aptly noted in rejecting a similar claim, "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). Members of any protected minority group could always launch a lawsuit to increase their presence in a district from 15 percent to 20 percent, or from 20 percent to 25 percent, and argue that this increase will cause their candidate to prevail. As the Seventh Circuit put it, "[c]ourts might be flooded by the most marginal section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections." *McNeil*, 851 F.2d at 947; *see also McGhee*, 860 F.2d at 116 (citing *McNeil* for proposition that first *Gingles* precondition is necessary to prevent vote dilution concept from being "an open-ended one subject to no principled means of application"). "Nothing but raw intuition could be drawn upon by courts to determine in the first place the size of those smaller aggregations having sufficient group voting strength to be capable of [vote] dilution in any legally meaningful sense and, beyond that, to give some substantive content other than raw-power-to-elect to the concept as applied to such aggregations." *Gingles*, 590 F. Supp. at 381.[10]

[10] *See also Metts*, 217 F. Supp. 2d at 258 (observing that there would be no "ascertainable and objective standard for adjudicating [influence] claims" because it would be "virtually impossible to reliably calculate the number of minority voters that would be required in order to 'influence' election results"); *Illinois Legislative Redistricting Comm'n v. LaPaille*, 786 F. Supp. 704, 715 (N.D. Ill.) ("The requirement that a minority group be large enough to control a district, not just 'influence' it, enables the courts to adjudicate Voting Rights claims with a reasonable amount of efficiency and consistency."), *aff'd*, 506 U.S. 948 (1992); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 654

This point is vividly illustrated here, where Plaintiffs allege that a *34 percent* black population in District 4 denies black voters their basic voting rights but an "approximately *40%*" black population would guarantee those rights. (Compl. ¶ 25 (emphasis added).) Thus, the Court will be required to find that this six percent differential is of talismanic significance, because white crossover voting is enough to elect a black-preferred candidate at 40 percent, but plainly insufficient at 34 percent. Moreover, the Court is to make such fine-tuned political prognostications on the basis of regression analyses that the Fourth Circuit has repeatedly emphasized are inherently insufficient to allow such nuanced judgments. *Lewis*, 99 F.3d at 605 n.3; *Smith*, 984 F.2d at 1400 n.6. Which is precisely why the federal courts have consistently refused to entertain vote dilution claims dependent on "findings" that there is a clear political difference between a 30 percent or 35 percent or 40 percent African-American population.

More important, the "enhanced" opportunity requested by Plaintiffs in District 4 can be attained only by shifting African-American voters *out* of the majority African-American Third Congressional District. Rather than simply trading an increase of African-American "influence" in District 4 for a decrease of African-American "influence" in District 3, the proposed alternative would jeopardize the ability of African-American voters to *elect* their candidates of choice in District 3. Thus, under Plaintiffs' idiosyncratic view, Section 2 *requires* the conversion of Virginia's first majority black district into a minority black district, in order to increase District 4's black population to 40 percent. In other words, Section 2 purportedly mandates the creation of two minority black districts where African-American voters, by definition, are

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(N.D. Ill. 1991) (three-judge court) ("Once th[e *Gingles* majority] threshold is breached, there appears to be no logical or objective measure for establishing a threshold minority group size necessary for bringing an influence claim under § 2.").

dependent upon white crossover voting to elect their preferred candidates, even at the expense of sacrificing a black majority district where no such dependence is required. This result vividly illustrates the dangers of redrawing legislative districts to enhance minority voters' "influence" on the basis of ill-defined concepts of dilution and inherently speculative political predictions, and illustrates as well why federal courts have uniformly rejected such an intrusive judicial role in enforcing the Voting Rights Act.

This is particularly true here because, while Plaintiffs blithely suggest that District 3 would still provide minorities with an "opportunity to elect" when converted to a minority black district, the diminution of District 3's black population would violate the *non-retrogression* requirement of Section 5, *even if* such an "opportunity" were preserved. (Compl. ¶ 26.) In *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002), *probable juris. noted by* 123 S. Ct. 964 (2003),[11] the Court adopted the Justice Department's position that, "if existing opportunities of minority voters to exercise their franchise are robust, a proposed plan that leaves those voters with merely a 'reasonable' or 'fair' chance of electing a candidate of choice may constitute retrogression in overall minority voting strength." *Id.* at 77. Significantly, the Court agreed with the Justice Department that the State's plan had a retrogressive effect in part due to one district's decrease in African-American VAP from 54.94 percent to 50.22 percent. *Id.* at 94. More generally, the finding of retrogression was based on a finding that the State's plan, like Plaintiffs' plans here, "proposes to decrease the BVAPs in existing majority-minority districts such that they would constitute only bare majorities, or slightly less than majorities." *Id.*

Thus, Plaintiffs' conclusory suggestion that a reduced District 3 would comply with Section 5 is based on a legally erroneous standard. In fact, the Complaint demonstrates that the

[11] On April 29, 2003, the Supreme Court heard oral argument on the State of Georgia's appeal from the three-judge court.

Virginia Legislature's enactment of the challenged plan, rather than Plaintiffs' proposed alternatives, was necessary to avoid a denial of Section 5 preclearance. It also shows that, even if "influence" districts were relevant, the creation of such a district could not be required where, as here, it would necessitate a significant reduction of minority voting strength in a majority-minority district. More generally, the Complaint illustrates the inevitable trade-off involved in *any* creation of "influence" districts, which is one of the many reasons that courts have uniformly rejected such claims.

B. Uniform Precedent Establishes that Plaintiffs Fail to State a Claim.

The foregoing establishes that Plaintiffs' claim is contrary to Supreme Court and Fourth Circuit precedent, the spirit and language of the Voting Rights Act, and a proper conception of the limited judicial role in entering the political thicket. For all these reasons, the federal courts have uniformly rejected vote dilution claims brought by minorities comprising less than a compact majority – whether phrased as "influence" or "ability to elect" challenges.

In addition to the numerous cases already cited, the Sixth Circuit in *Cousin* rejected the claim that the Voting Rights Act compelled the creation of a single-member district with a thirty-four percent African-American voting-age population. 145 F.3d at 827. The Sixth Circuit held:

> We find the plaintiffs' [claim] . . . particularly lacking because it is based on the premise that the Section 2 violation in this case consists of an impairment of the minority's ability to *influence* the outcome of the election, rather than to *determine* it. . . . [W]e would reverse any decision to allow such a claim to proceed since we do not feel that an 'influence' claim is permitted under the Voting Rights Act.

Id. at 828-29 (emphasis in original).[12] In a subsequent case, the Sixth Circuit, sitting *en banc*,

[12] Even Plaintiffs' own lawyer concedes that "[m]ost courts . . . reject[] the contention that minority groups can demand districts in which they do not constitute some kind of majority." Hebert, 8 Geo. Mason L. Rev. at 440. On the other side, Plaintiffs' lawyer cites the *only* lower court decision recognizing an influence claim, *Armour v. Ohio*, 775 F. Supp. 1044, 1047-48 (N.D. Ohio 1991), but that sole exception was overruled by the Court of Appeals in *Cousin*. *See O'Lear v. Miller*, 222 F. Supp. 2d 850, 861 (E.D. Mich.) (three-judge court) (dismissing Section

confirmed that where a single minority group cannot comprise the majority of a proposed district's voting-age population, minorities have no valid Section 2 objection to a redistricting plan. *Nixon*, 76 F.3d at 1384. The Sixth Circuit explained that, to elect representatives of their choice, members of such a group would, by definition, be required to form political coalitions with members of one or more other groups. *Id.* at 1392. Requiring districts amenable to such bi-racial coalitions would "transform[] the Voting Rights Act from a statute that levels the playing field for all races to one that forcibly advances contrived interest-group coalitions of racial or ethnic minorities." *Id.* (quoting *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 894 (5th Cir. 1993) (en banc) (Jones, J., concurring)).

Similarly, the Seventh Circuit rejected a Section 2 claim that a district could be created with African-American voting-age populations between forty-three and forty-four percent: "[W]e cannot consider claims that . . . districts merely impair plaintiffs' ability to influence elections. Plaintiffs' ability to win elections must also be impaired." *McNeil*, 851 F.2d at 947. And the Fifth Circuit, holding that vote dilution claimants are "required . . . to prove that their minority group exceeds 50% of the relevant population in [a potential] district," affirmed a judgment against plaintiffs after finding that Hispanics could at most make up only 48.3 percent of a district's voting-age citizen population. *Valdespino*, 168 F.3d at 852-53; *accord Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997) (holding that Section 2 vote dilution claim cannot succeed when minority group cannot make up majority of citizen voting-age population); *Romero v. City of Pomona*, 883 F.2d 1418, 1424 n.7 (9th Cir. 1989) ("We are aware

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2 challenge "because we do not recognize 'influence' claims"), *aff'd*, 123 S. Ct. 512 (2002). He also cites *Uno v. City of Holyoke*, 72 F.3d 973 (1st Cir. 1995), but that court clearly stated: "We take no view of the matter . . . ." *Id.* at 979 n.2.

of no successful section 2 voting rights claim ever made without a showing that the minority group was capable of a majority vote in a designated single district."); *Turner v. Arkansas*, 784 F. Supp. 553, 565, 570-71 (E.D. Ark. 1991) (three-judge court) (rejecting "ability to elect" and "influence" claims when minority voters cannot form district majority), *aff'd*, 404 U.S. 952 (1992); *Skorepa v. City of Chula Vista*, 723 F. Supp. 1384, 1392 (S.D. Cal. 1989) ("[This] Court finds that there exists no legally cognizable 'influence' claim under § 2 that would require a lesser standard of proof than set forth in *Thornburg*.").

In the current redistricting cycle alone, federal courts in Michigan, Texas, and Rhode Island have categorically rejected, as a matter of law, Section 2 "influence" challenges to legislatively enacted redistricting plans. In granting a motion to dismiss, the three-judge court in Michigan stated succinctly: "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." *O'Lear v. Miller*, 222 F. Supp. 2d 850, 861 (E.D. Mich.) (three-judge court), *aff'd*, 123 S. Ct. 512 (2002). Similarly, the three-judge court in Texas held: "To the extent the [plaintiffs] invite us to recognize and sustain a challenge to the [enacted] plan based on minority 'influence districts,' we have no warrant to do so." *Balderas v. Texas*, No. 6:01CV158, slip op. (Senate) at 7 (E.D. Tex. Nov. 14, 2001) (Ex. 7), *aff'd*, 536 U.S. 919 (2002). And the federal court in Rhode Island dismissed not only the plaintiffs' "ability to elect" claim but also their "ability to influence" claim, on the ground that "claims based on an alleged ability to influence the election of candidates are not cognizable under Section 2." *Metts*, 217 F. Supp. 2d at 257; *see also Kingman Park Civic Ass'n v. Williams,* Civ. No. 01-2675 (GK), 2002 U.S. Dist. LEXIS 15254, at *15 (D.D.C. Aug. 16, 2002) (Ex. 8) (dismissing Section 2 claim because whites would have comprised at least 56 percent of the district under an alternative plan).

C. Plaintiffs Do Not Allege Cognizable Racial Bloc Voting or Exclusion from the Political Process.

The Complaint also shows that Plaintiffs cannot meet the third *Gingles* precondition: "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. To be sure, the Complaint makes the conclusory allegation that "white voters in the Fourth Congressional District are politically cohesive and tend to vote as a bloc in numbers sufficient usually to defeat the candidate of choice of black voters." (Compl. ¶ 29.) Other portions of the Complaint, however, demonstrate that the allegation of cognizable white bloc voting is based on an erroneous legal standard. Specifically, in alleging the usual defeat of African-American voters' preferred candidates, the Complaint impermissibly focuses exclusively on whether *black* candidates can be elected. Plaintiffs cannot satisfy the "usually defeated" requirement if, as is required, one considers the electoral fortunes of those white candidates whom most African-American voters prefer.

The allegations of the Complaint focus on the fortunes of Louise Lucas, an African-American candidate in the last two elections (the 2001 special election and the 2002 regular election) in the Fourth Congressional District. (Compl. ¶¶ 21-31.) According to the Complaint, Lucas in 2001 received 48 percent of the vote in a 39.4 percent African-American TPOP district, and would have fared even better if the contest had not been a special election held only one week after a gubernatorial vote. (*Id.* ¶¶ 23-24.) Thus, the Complaint alleges that an *African-American* candidate would have an opportunity to be elected from a district with an African-American population of about 40 percent. Significantly, however, "Lucas received less support, including financial support, from members of her own party than she would have received if she had been a White Democratic candidate." (*Id.* ¶ 30.) If an African-American candidate would have an opportunity to be elected from a 40 percent district, and a white candidate would receive

more support, then Plaintiffs cannot allege that candidates preferred by minority voters would usually be defeated in a 34 percent district.

The reason that Plaintiffs focus exclusively on potential black candidates is because it is clear that a white Democratic candidate preferred by black voters could easily win elections in District 4. Throughout the 1990's, a white Democratic candidate, Norman Sisisky, was easily elected when the district was 32 percent black or 39 percent black (following demographic changes and redistricting required by *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997)). (Compl. ¶ 17.)[13]

Accordingly, if the analysis includes white candidates preferred by African-American voters, Plaintiffs do not and cannot allege that white bloc voting usually defeats the minority's candidate of choice. And, under the law of this Circuit, the fortunes of white candidates *must* be considered. The Court of Appeals has held: "Our understanding of Section 2 [is] that the minority-preferred candidate may be either a minority or a non-minority, and therefore that both elections in which the candidates are of the same race and elections in which the candidates are of different races must be considered in order to determine whether white bloc voting usually defeats the minority-preferred candidate . . . ." *Lewis*, 99 F.3d at 607. Even before *Lewis*, this Court held that the third *Gingles* precondition had not been satisfied because "the focus of the Plaintiffs' presentation was the race of the candidate elected, whereas the focus of the Voting Rights Act is upon the opportunity of a minority to elect its candidate of choice regardless of race." *Simpson v. City of Hampton*, 919 F. Supp. 212, 215 (E.D. Va. 1996). Here, Plaintiffs' claim should be dismissed because it is premised on precisely the same flaw.

[13] This demographic and electoral information regarding District 4 is publicly available on the Census Bureau's website at http://factfinder.census.gov and on the website of the Clerk of the House of Representatives at www.clerk.house.gov. (Printouts from those sites are attached as Exhibits 9 and 10.)

Finally, even assuming that the Complaint could validly allege a deprivation of minority voters' ability to elect their candidates of choice, the Complaint would still be legally insufficient because it cannot allege a deprivation of an equal opportunity to participate in the political process. Section 2 requires a showing that members of a protected minority group have "less opportunity" than others "to participate in the political process *and* to elect representatives of their choice." 42 U.S.C. § 1973(b) (emphasis added). In interpreting this language, the Supreme Court has held: "It would distort the plain meaning of the sentence to substitute the word 'or' for the word 'and.' Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect." *Chisom v. Roemer*, 501 U.S. 380, 396 (1991). Yet the Complaint here clearly refers only to minority voters' opportunity to elect candidates of their choice, without any suggestion that minority voters lack a full opportunity to participate in the political process. (Compl. ¶¶ 3, 4, 39.) "Under *Chisom*, the plaintiffs' Complaint would not be adequate because it fails to allege both of the elements required by Section 2." *Turner*, 784 F. Supp. at 576. The Complaint should be dismissed for this reason as well.

V. CONCLUSION

For the reasons stated herein, the Complaint should be dismissed and judgment should be entered for Defendants and Defendant-Intervenors.

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Respectfully submitted,

By: _____

Michael A. Carvin (Admitted *pro hac vice*)
Louis K. Fisher (Admitted *pro hac vice*)
Cody R. Smith (Va. Bar No. 48790)
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

Attorneys for Proposed Defendant-Intervenors