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

JOAN HALL, RICHARD PRUITT, THOMASINA PRUITT, VIVIAN CURRY, ELIJAH SHARPE, EUNICE MCMILLAN, JAMES SPELLER, ROBBIE GARNES, and LESLIE SPEIGHT, Plaintiffs, vs. COMMONWEALTH OF VIRGINIA, and JEAN JENSEN, SECRETARY, STATE BOARD OF ELECTIONS in her official capacity. Defendants.	Civil Action No.: 2:03-CV-151

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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DA TED: MAY 24, 2003

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INTRODUCTION

Plaintiffs respectfully submit this Memorandum in Opposition to Defendants' Motion to Dismiss Plaintiffs' Complaint. As discussed below, Plaintiffs have stated a claim for relief under Section 2 of the Voting Rights Act and have adequately alleged their standing to sue. Accordingly, the Court should deny Defendants' motion.

STATEMENT OF THE CASE

Plaintiffs are African-American registered voters in the Commonwealth of Virginia who either currently reside in the present Fourth Congressional District or resided in the Fourth Congressional District as it was composed before the adoption of a new redistricting plan in July 2001 (the "2001 Redistricting Plan"). (CompI. ¶ 1, 7.) Prior to the adoption of a new redistricting plan in July 2001, African-Americans constituted 39.4% of the population of the Fourth Congressional District. (Id. ¶ 17.) Despite lacking majority status, the African-American community had the opportunity under the old districting plan to elect a candidate of their choice by combining their bloc vote with the votes of a sufficient number of white crossover votes. (Id. ¶ 25.) African-American voters enjoyed the ability to elect their preferred candidates despite the racially polarized environment that characterizes elections in the Fourth Congressional District.[1] (Id. ¶ 30.) For example, in a special election held on June 19,2001 under the former districting plan, the candidate of choice of the African-American community obtained 48% of the vote and

[1] The African-American voting community in the Fourth Congressional District is cohesive and tends to vote as a bloc for their favored candidate. (Id. ¶ 27.) Similarly, white voters in the district also tend to vote as a bloc in numbers sufficient to defeat the candidate of choice of African-American voters. (Id. ¶ 29.)

narrowly lost to her challenger who won 52% of the vote.[2] (Id. ¶¶ 21, 24.) The close results of this special election are particularly telling because of the unusually low voter turnout of38% caused by its close proximity to the gubernatorial election. (Id. ¶ 23.)

Under the 2001 Redistricting Plan, African-Americans comprise only 33.6% of the total population in the new Fourth Congressional District, a reduction of approximately 6% of the district's total population and 15% of the previous African-American population. (Id. ¶ 18.) This change has had the effect of eliminating the opportunity for African-Americans in the Fourth Congressional District to elect their preferred candidate. (Id. ¶ 32.) In fact, this erosion of the African-American voter base caused the community's preferred candidate for election to the House of Representatives in 2002 to withdraw from the election race. (Id. ¶ 31.)

The African-Americans who were removed from the Fourth Congressional District under the 2001 Redistricting Plan were reassigned to adjoining districts. (Id. ¶ 20.) In one of these adjoining districts, namely the Third Congressional District, African-Americans already constitute a substantial majority of the population.. (Id. ¶ 26.) Thus, not only does the 2001 Redistricting Plan dilute the voting strength of the African-American community in the Fourth Congressional District, but it also wastes the votes of many of the displaced voters by packing them into the only majority-minority district in the state. (Id. ¶ 20.)

During the July 2001 legislative session, the Virginia General Assembly had before it several alternatives to the 2001 Redistricting Plan that would not have had this deleterious effect on the African-American community in the Fourth Congressional District. (Id. ¶ 33.) Indeed, several of the proposed alternative plans would have increased the African-

[2] This candidate, Louise Lucas, was the preferred candidate of African-American voters since she received a majority vote in all but one of the majority African-American cities and counties in the Fourth Congressional District. (Id. ¶ 22.)

American voting population in the Fourth Congressional District to above 40%. (Id.) The

adoption of any of these alternate plans would have permitted African-Americans in the district to retain the opportunity to exercise a meaningful vote in congressional elections while maintaining a majority-white district. (Id.) Instead, the General Assembly chose the 2001 Redistricting Plan, a plan that impeded the ability of the Fourth Congressional District's African American community to elect the candidate of its choice. (Id. ¶ ¶ 1, 4.) Former Governor Jim Gilmore signed the 2001 Redistricting Plan into law on July 19, 2001. (Id. ¶ 1.)

Despite substantial community opposition to the plan, the u.s. Department of Justice pre-cleared the 2001 Redistricting Plan on October 16, 2001. (Id. ¶ 37.) To prevent the impairment of their ability to elect candidates of their choice to congressional office, Plaintiffs filed the instant suit against the Commonwealth of Virginia (the "Commonwealth") and the Secretary of the State Board of Elections, Jean Jensen ("Secretary Jensen").[3] In this suit, Plaintiffs seek a declaration that the 2001 Redistricting Plan violates Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 (the "Voting Rights Act"), and an injunction prohibiting the use of the 2001 Redistricting Plan to conduct future elections. (Id. at ¶ 2.)

On May 9, 2003, Defendants filed their motion to dismiss all of the Plaintiffs' claims.

SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act ("Section 2") was enacted to protect minority groups against all electoral laws and practices that impair their ability to elect candidates of their choice on an equal basis with other voters. See Thornburg v. Gingles, 478 U.S. 30,43 (1985). Contrary to Defendants' contention, Plaintiffs need not allege that African-American voters

[3] Defendants' characterization that plaintiffs' earlier state court action "suffered" non-suit is misleading. Plaintiffs elected to voluntarily dismiss their state court action prior to any ruling on the merits of any claims.

within the Fourth Congressional District can constitute a majority of the population to state a claim under Section 2. Neither the plain language of Section 2 nor the United States Supreme Court's ruling in Gingles requires the imposition of such a requirement for all Section 2 claims. In fact, Defendants' proposed imposition of a 50% minority-majority as a magic threshold contradicts the language and purposes of the Voting Rights Act as it has been interpreted by Gingles and other Supreme Court cases. Rather, to state a claim under Section 2, a plaintiff need only allege that the minority group challenging the districting plan is sufficiently numerous so as to have the ability to elect a candidate of their choice, even if the aid of limited yet predictable white crossover votes is necessary to do so. Plaintiffs readily allege facts sufficient to establish this factor. Furthermore, because the Complaint alleges that African-American voters in the Fourth Congressional District are politically cohesive and that the white majority tends to vote as a bloc to defeat African-American voters' preferred candidate, Plaintiffs have alleged a claim under Section 2.

Furthermore, Plaintiffs have alleged sufficient facts to create standing to sue.[4] Defendants seek to mechanically apply a standing analysis borrowed from racial gerrymandering cases. Plaintiffs' claims have been brought under Section 2. There is no precedent for the notion that Plaintiffs must reside in the illustrative district in order to have standing to bring a Section 2 case or that they must reside in any particular single-member district. Two Plaintiffs currently reside in the challenged Fourth Congressional District. They and the remaining Plaintiffs suffered a concrete, particularized, and imminent injury-in-fact, namely the dilution of their personal vote under the 2001 Redistricting Plan.

[4] Due to a clerical error, the Complaint fails to allege specific facts relevant to Plaintiffs Richard and Thomasina Pruitt. Yet, the complaint is sufficient because it alleges that all the Plaintiffs are citizens and registered voters residing in the former or present Fourth Congressional District. (Compl.¶ 7.)

STANDARD OF REVIEW

Contrary to Defendants' assertion, Rule 12(b)(1) does not require Plaintiffs to prove conclusively the existence of subject matter jurisdiction at this stage. (See Defs. Mot. to Dismiss at 2.) Only when a defendant's motion to dismiss asserts that jurisdictional facts alleged in the complaint are untrue does the plaintiff bear the burden of proving that such jurisdiction exists. See Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). Otherwise, in instances, such as this case, where the defendants contend that the complaint fails to allege facts upon which subject matter jurisdiction can be based, then the plaintiff is entitled to the same procedural safeguards that would ordinarily apply under Rule 12(b)(6). Id.

Here, Defendants claim that Plaintiffs Richard and Thomasina Pruitt fail to allege subject matter jurisdiction for their claims and that Vivian Curry, Eunice McMillan, James Speller, and Robbie Games' allegations are insufficient as a matter of law to support subject matter jurisdiction over their claims. (See Defs. Mot. to Dismiss at 14.) Nowhere do Defendants assert that any jurisdictional facts alleged in the Complaint are untrue. Thus, the Court must apply the same procedural guidelines and considerations to Defendants' Rule 12(b)(1) motion that it does to Defendants' motion under Rule 12(b)(6) by accepting as true all the facts alleged in the Complaint and construing those facts in a light most favorable to Plaintiffs. See Ibarra v. United States, 120 F.3d 472, 473 (4th Cir. 1997); Faircloth v. Nat'l Home Loan Corp., No. 1:01CVOl140, 2003 WL 1232825 (M.D.N.C. Mar. 17,2003).

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the complaint. See Randall v. United States, 30 F.3d 518, 522 (4th Cir. 1994). It does not "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." Id. Thus, such a motion may be granted only if it appears certain

that the plaintiff cannot prove any set of facts in support of his claim entitling him or her to relief. See Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999). As stated above, the Court must accept all well-pled allegations set forth in the complaint as true and must construe the facts and reasonable inferences in the light most favorable to the plaintiff. See Ibarra, 120 F.3d at 473.

ARGUMENT

I. ALL NAMED PLAINTIFFS HAVE ADEQUATELY ALLEGED STANDING TO ASSERT THEIR CLAIMS

Standing is a constitutional requirement imposed under Article III to ensure that prospective plaintiffs have a personal stake in the outcome of a case as opposed to merely a generalized or tangential grievance. See Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d 315,319 (4th Cir. 2002); see also Luian v. Defenders of Wildlife, 504 U.S. 55, 560, 112 S. Ct. 2130,2136, 119 L. Ed. 2d 351 (1992). To establish standing to sue, a plaintiff must allege three factors: (1) that he or she has suffered an "injury-in-fact;" (2) a causal connection between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. Luian, 504 U.S. at 560-61; Stasko, 282 F.3d at 320. An injury-in-fact is an invasion of a legally protected interest that is concrete and particularized, and actual or imminent rather than conjectural or hypothetical. See Stasko, 282 F.3d at 320; see also FEC v. Akins, 524 U.S. 11,22, 118 S. Ct. 1777, 1785, 141 L. Ed. 2d 10 (1998). The second factor ensures that it is likely the plaintiffs injury was caused by the challenged conduct of the defendant, and not by the independent actions of third parties not before the court. Stasko, 282 F.3d at 320. The redressability prong requires that it be likely, and not merely speculative, that a favorable decision from the court will remedy the plaintiffs injury. Id. In this case, named Plaintiffs meet all three requirements.

Furthermore, Plaintiffs have alleged sufficient facts to create standing to sue.[5] Defendants seek to mechanically apply a standing analysis borrowed from racial gerrymandering cases. Plaintiffs' claims have been brought under Section 2. There is no precedent for the notion that Plaintiffs must reside in the illustrative district in order to have standing to bring a Section 2 case or that they must reside in any particular single-member district.

Even if it were true that standing determinations in racial gerrymandering cases apply to vote dilution cases, Plaintiffs have established standing in this case. As Defendants concede, Plaintiffs Joan Hall and Leslie Speight have standing in this case because they are currently residents of the Fourth Congressional District, the district that is the subject of the vote dilution claim in this suit. (See CompI. ¶¶ 8, 9.) A litigant always has standing to challenge the fol11ulation of the district in which she resides because her ability to influence the election outcome in that district has been directly impacted by the redistricting process. See, e.g. Shaw v. Hunt, 517 U.S. 899,904 (1996); United States v. Hays, 515 U.S. 737, 744-45.

Alleging that a plaintiff resides in the challenged district, however, is not the only means of establishing standing in voting rights cases. See Hays, 515 u.S. at 744-45. A plaintiff who lives outside of the particular district at issue may allege standing by demonstrating an individualized injury that arises from the wrongful redistricting. See id. For example, a plaintiff who claims that another district in which she does not reside was subject to racial gerrymandering nonetheless may establish standing by showing that she was personally subjected to or was injured by a racial classification during the gerrymandering process. See Hunt, 517 U.S. at 904; Hays, 515 U.S. at 744. By analogy, a plaintiff in a vote dilution case who

[5] Due to a clerical error, the Complaint fails to a1lege specific facts relevant to Plaintiffs Richard and Thomasina Pruitt. Yet, the complaint is sufficient because it a1leges that a11 the Plaintiffs are citizens and registered voters residing in the former or present Fourth Congressional District. (Compl. ¶ 7.)

lives outside of the challenged district, but who made up part of the minority voting group under the former district boundaries, may establish standing by alleging that she is part of a racial minority group and her individual vote was rendered less effective by the new districting plan. See, e.g. Kaplan v. County of Sullivan, 74 F.3d 398, 400 (2d Cir. 1996).

Under this standard, Plaintiffs Vivian Curry, Eunice McMillan, James Speller, and Robbie Garnes have standing to sue because their allegations demonstrate a personal interest in the dispute and a particularized injury resulting from the implementation of the 2001 Redistricting Plan. These Plaintiffs are African-Americans who were registered to vote in the Fourth Congressional District, as it existed prior to the implementation of the 2001 Redistricting Plan. (CompI. ¶¶ 10, 12-16.) The 2001 Redistricting Plan packed Plaintiffs Curry, McMillan, and Speller into the Third Congressional District in which African-Americans have traditionally, as well as under the new plan, constituted a voting majority.[6] (Id. ¶ 10, 12, 13.) The plan further forced Plaintiff Garnes into the Fifth Congressional district in which African-Americans comprise a relatively insubstantial minority of the voting age population. (Id.¶ 14.)

As a result, none of these Plaintiffs presently are able to exercise the amount of voting strength they enjoyed under the prior redistricting plan. Although three of the Plaintiffs were removed to a minority-majority district, their interests and the purposes of the Voting Rights Act are better served by the formation of two or more districts composed of a sufficiently large population of African-Americans voters who are able to elect candidates of their choice, with limited yet predicable crossover voting, rather than by the formation of a single minority majority district.

[6] Plaintiffs Richard Pruitt and Thomasina Pruitt also were registered voters in the former Fourth Congressional District and are currently registered to vote in the Third Congressional District.

This injury is not the generalized and abstract harm of the kind that has traditionally been held insufficient to establish standing. Rather, each Plaintiff has "a personal stake in the outcome" of this case since their personal voting strength was directly diluted by the 2001 Redistricting Plan and their removal from the Fourth Congressional District contributed to the overall injury of the dilution of the African-American voters remaining in the district.

Plaintiffs easily satisfy the remaining two factors. Since the 2001 Redistricting Plan shifted them from the Fourth Congressional District into adjoining districts, a causal connection exists between the dilution of Plaintiffs' individual voting strength and the challenged redistricting plan. Furthermore, there is a substantial likelihood that the Plaintiffs' injury will be redressed by a favorable decision. Should Plaintiffs prevail on the merits, the legislature will be enjoined from utilizing the 2001 Redistricting Plan and will instead be forced to adopt a plan that comports with Section 2 and does not improperly dilute Plaintiffs' vote. Accordingly, named Plaintiffs have adequately alleged their standing to sue in this case.

II. PLAINTIFFS HAVE STATED A VIABLE CLAIM UNDER SECTION 2 OF THE VOTING RIGHTS ACT.

A. PLAINTIFFS HAVE ALLEGED AN "ABILITY TO ELECT" CLAIM AND NOT AN "ABILITY TO INFLUENCE" CLAIM.

Defendants' arguments supporting their 12(b)(6) motion rest on an erroneous understanding of the nature of Plaintiffs' claim. They assert that Plaintiffs' claim is based on the Fourth Congressional District African-American voters' ability to influence the election. (See Defs. Mot. to Dismiss at 9; Proposed Intervenors' Mot. to Dismiss at 15,21.) Plaintiffs, however, have not alleged merely that African-American voters in the Fourth Congressional District have the ability to *influence* elections. Rather, Plaintiffs allege that African-American voters in the district have the ability to *elect* a candidate of their choice as a minority population

with the support of white crossover votes. (See CompI. _ 25.) In other words, Plaintiffs assert an "ability to elect" claim and not an "ability to influence" claim.

This distinction is important because courts have used the terms "influence district" or "influence claim" loosely to cover two different circumstances: (I) claims by minority voters who are numerous enough within a single district to elect a candidate of their choice with a limited and predictable crossover majority vote, i.e., an "ability to elect" claim; and (2) claims by minority voters who have sufficient numbers within a single district to influence or effect the selection of candidates, but are not numerous enough to elect their candidate of choice, i.e., an "ability to influence" claim. See, e.g., Vecinos De Barrio Uno v. City of Holyoke, 72 F.3d 973,990-991 (1st Cir. 1995) (using "influence district" to refer to the latter fact pattern); Armour v. Ohio, 775 F. Supp. 1044, 1059 n.19 (N.D. Ohio 1991) (explaining the distinction); see also Richard H. Pildes, Is Voting-Rights Law Now At War With Itself? Social Science and Voting Rights in the 2000s, 80 N.C. L. Rev. 1517, 1539-40 (June 2002) (distinguishing influence districts from "coalitional districts" which are defined as a district with a significant albeit non majority minority that has a fifty-fifty probability of electing the minority's preferred candidates).

Unlike "ability to influence" claims, an "ability to elect" claim is based on actual electoral outcomes such that the size of the minority population and the amount of crossover votes necessary to be able to determine the election outcome may be specifically quantified. See PiIdes, 80 N.C. L. Rev. at 1531-32, 1539-40. Whether or not the Voting Rights Act protects the ability of a minority to influence elections, the Act is explicitly designed to eliminate government-imposed obstacles that hinder minority groups who would otherwise have the power to elect their candidates of choice. See 42 U.S.C. § I 973(b); see also Voinovich v. Quilter, 507

U.S. 146, 153 (1993) (Section 2 prohibits *"any* practice or procedure that. . . impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters."). Accordingly, as explained below, "ability to elect" claims fall squarely within the scope of Section 2 and Gingles, the seminal case interpreting Section 2.[7]

B. PLAINTIFFS' "ABILITY TO ELECT" CLAIM IS VALID UNDER SECTION 2 OF THE VOTING RIGHTS ACT AND APPLICABLE CASELAW

Defendants further contend that Plaintiffs cannot state a claim under Section 2 because they cannot allege that African-Americans could comprise a majority population in the Fourth Congressional District and or that the white majority votes as a bloc to prevent election of African-American voters' preferred candidates. (See Defs. Mot. to Dismiss at 6.) Defendants are wrong on both counts. Neither the language nor purposes behind Section 2 or Gingles and its progeny requires as a necessary predicate allegations that the minority group challenging the districting plan constitute a numerical majority. Furthermore, Plaintiffs have explicitly alleged the existence of racially polarized voting in the Fourth Congressional District such that white voters systematically block the election of African-American voters' preferred candidates. At this stage of the proceeding, this is all Plaintiffs must do to survive a motion to dismiss. See Ibarra, 120 F.3d at 473 (requiring courts to accept facts alleged in the complaint as true). Accordingly, the Court should reject Defendants' arguments.

1. To State An "Ability to Elect" Claim Under Section 2, Plaintiffs Need Not Allege That African-American Voters Can Comprise A Majority Of The Population In The Fourth Congressional District

Defendants contend that Gingles imposes as a necessary precondition to demonstrating the ability to elect a candidate of choice the requirement that Plaintiffs

[7] Plaintiffs do not concede that "ability to influence" claims lack viability under Section 2.

demonstrate that they are able to constitute a majority within the Fourth Congressional District. However, neither Section 2 nor the United States Supreme Court hinges a group's ability to elect its preferred candidate on achievement of a 50% minority-majority threshold status.

a. Plaintiffs' "Ability to Elect" Claim is Valid Under Section 2 the Voting Rights Act, Which Does Not Require Plaintiffs to Demonstrate a 50% Majority Threshold

As an initial matter, Section 2 is violated:

> if, based on the totality of the circumstances, it is shown that the political processes leading to 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). Nowhere in its plain language does the Act require that the protected minority class comprise at least fifty percent of the population in the challenged district. To the contrary, the totality of the circumstances test imposed by the statute weighs heavily in favor of a flexible standard that is adaptable to the facts of a given case. This fact-specific inquiry is validated by the legislative history of the statute, which urges consideration of "all of the circumstances in the jurisdiction in question" when determining whether a challenged system results in a denial of equal ability to elect.[8] See S. Rep. No. 97-417, at 27 (1982), reprinted in 1982 U.S.C.C.A.N. 177,205. Tellingly, the Senate Report contains no statement or requirement of a 50% population threshold requirement. Accordingly, this Court should not read a 50% minority-majority threshold requirement into the statute. See United States v. Murphy, 35 F.3d 143, 145 (4th Cir. 1994) (stating that "courts are not free to read into the language [of a statute] what is not there").

[8] The Supreme Court looked to the Senate Report as "the authoritative source for legislative intent" See Gingles, 478 U.S. at 44 n.7.

b. Plaintiffs' "Ability to Elect" Claim is Valid Under the Applicable Caselaw

Likewise, neither Gingles nor its progeny supports an interpretation of a minority group's ability to elect a preferred candidate as hinging on the group's capability to attain majority population status. In early cases brought under the Voting Rights Act, litigants primarily challenged the use of multimember or at-large election schemes as diluting the voting strength of minority groups and impairing the ability of minority voters to elect representatives of their choice. See Gingles, 478 U.S. at 35, 46, 47. In resolving such a case, the United States Supreme Court outlined three threshold factors that a minority group must prove to sustain a claim that the use of multimember districts would violate Section 2:

> 1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district;
>
> 2) the minority group is politically cohesive; and
>
> 3) the white majority votes sufficiently as a bloc to enable it in the absence of special circumstances to defeat the minority group's preferred candidate.[9]

Id. at 49-51. Upon satisfaction of these threshold elements, a plaintiff is then entitled to present evidence demonstrating that under the totality of the circumstances the members of the plaintiffs protected group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. See id. at 44-45; see also 42 U.S.C. § 1973(b).

Defendants attempt to portray the first Gingles prong as establishing a bright-line rule that this Court should slavishly follow. Yet, such a construction ignores the fact that the Gingles Court explicitly distinguished its test from that which would be applied under an "ability

[9] The Gingles test has since been extended for use in cases challenging single-member districts. Growe v. Emison, 507 U.S. 25, 40 (1993).

to elect" claim brought by a minority group that does not constitute a majority in a single member district. The Court refused to hold that "ability to elect" claims are not viable, but instead stated that it had "no occasion to consider whether Section 2 permits, and if it does what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to influence elections." Gingles, 478 U.S. at 46 n.12; see also Growe v. Emison, 507 U.S. 25,41 n.5 (1993) (noting that the Supreme Court expressly declined to resolve the issue). Thus, Gingles left open the possibility that a minority group could bring an "ability to elect" claim under Section 2.

Indeed, the Gingles Court went beyond merely leaving the door open to such claims by acknowledging that numerical majority status is not the sole avenue for voting groups to elect the candidates of their choice. Instead, 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. See Gingles, 478 U.S. at 50 n.l7. As Justice O'Connor thoughtfully observed, any distinction between cases where a minority group constitutes a majority in a proposed district (the circumstances presented in Gingles) and cases where a minority group does not constitute a majority but has the ability to elect a candidate with the assistance of limited yet predictable crossover voting is entirely artificial:

> [T]he Court recognizes that when the candidates preferred by a minority group are elected in a multimember district, the minority group has *elected* those candidates, even if white support was indispensable to these victories. On the same reasoning, 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.

Gingles, 478 U.S. at 90 n.1 (O'Connor, J., joined by Burger, J., Powell, J. and Rehnquist, J., concurring in the judgment) (emphasis in original); see also Chisom v. Roemer, 501 U.S. 380, 397 n.24 (1991) (acknowledging that a small group of voters can affect the outcome of an election).

Since Gingles, the Court has twice been presented with the issue of whether a minority group that is not able to constitute a majority within the challenged district can maintain a vote dilution claim under Section 2 of the Voting Rights Act. See Johnson v. DeGrandy, 512 U.S. 997, 1007-8 (1994); Voinovich, 507 U.S. at 154. In each case, however, the Court chose not to rigidly mandate a 50% population threshold showing for such claims. Instead, the Court presumed that the plaintiff had established the first prong of Gingles even where the plaintiffs minority group did not constitute a majority in the particular district if the group had the power to elect a candidate of its choice.[10] See Johnson, 512 U.S. at 1008-9; Voinovich, 507 U.S. at 154.

Consistent with this approach, the Supreme Court has disavowed the mechanical application of the Gingles factors. See Voinovich 507 U.S. at 158 ("Of course, the Gingles factors cannot be applied mechanically and without regard to the nature of the claim."). Indeed, the Court has embraced the possibility that the first Gingles factor would need to be modified, or

[10] The Court has usually addressed the issue of a claim brought by a minority group that cannot constitute a majority in a particular district in the context of an "ability to influence" claim rather than an "ability to elect" claim. See Johnson, 512 U.S. at 1009 (referring to an "influence district" as a district in which members of a minority group are a potentially influential minority of voters); Growe, 507 U.S. at 41 n.5 (referring to claims by minorities who have the ability to influence but not determine an election); Gingles, 478 U.S. at 46; but see Voinovich, 507 U.S. at 154; (defining an "influence-dilution claim" as one in which the minority group is numerous enough to elect their candidate of choice when their candidate attracts sufficient crossover votes from white voters). However, as explained in section II.A. above, "ability to influence" claims necessarily subsume "ability to elect" claims which are necessarily narrower in scope.

even eliminated, to fit an "ability to elect" claim. See Johnson, 512 U.S. at 1007. Johnson itself 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." Id. at 1008. Correspondingly, Plaintiffs seek the formation of more than one district composed of African-American voters numerous enough to elect candidates of their choice with limited yet predictable crossover voting.

C. THE UNITED STATES DEPARTMENT OF JUSTICE'S POSITION SUPPORTING PLAINTIFFS IS ENTITLED GREAT PERSUASIVE WEIGHT

Notably, the U.S. Department of Justice ("DOJ"), an agency that has tremendous experience in interpreting the Voting Rights Act and litigating Section 2 cases, has interpreted Section 2 and Gingles to permit "ability to elect" claims.[11] Most recently, in an amicus brief submitted at the Supreme Court's invitation in Valdespino v. Alamo Heights Ind. Sch. Dist., No. 98-1987 (Dec. 1999), the DOJ explained that the key inquiry for the first Gingles prong is whether minority voters have the potential to elect a representative of their choice and stated that this inquiry is satisfied even where the minority population does not constitute a majority in the proposed district. (See Brief for the U.S. as Amicus Curiae at 6, 10 (attached hereto as Ex. 1).) The DOJ disclaimed any necessity for a flat 50% rule to establish the first Gingles prong based on Voinovich's warning against mechanical application of the Gingles test and the Gingles Court's observation that Section 2 claims require a practical evaluation of the past and present reality of the circumstances. (Id. at 11-13.) This Court should accord substantial weight to the

[11] The DOJ's position is not inconsistent with its preclearance of the 2001 Redistricting Plan under Section 5 of the Voting Rights Act because the DOJ is not permitted to deny preclearance of a districting plan solely because the plan in question violates Section 2. See Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 483-485 (1997).

DOJ's interpretation of the Voting Rights Act given the DOJ's extensive experience and role in voting rights jurisprudence. See United States v. Board of Comm'rs, 435 U.S. 110, 131 (1978) (according deference to Attorney General's construction of the Voting Rights Act).

Although the Fourth Circuit has never addressed an "ability to elect" claim, courts in other jurisdictions have affirmatively recognized such claims as viable under Section 2 in the context of challenges to single-member districting schemes. See, e.g., Solomon v. Liberty County, 899 F.2d 1012, 1018 n.7 (1990) (Kravitch, J. specially concurring) (recognizing viability of "ability to elect" claim); Armour v. Ohio, 775 F. Supp. 1044, 1052 (N.D. Ohio 1991) (same). In Solomon, Judge Kravitch writing for five other judges cautioned that the court's holding that plaintiffs satisfied the first Gingles prong with proof that African-Americans could constitute a majority in the challenged district should not be interpreted to exclude the viability of claims by African-Americans who do not comprise a majority of the voting age population in the challenged district. See Solomon, 899 F .2d at 1018 n.7. Instead, the Court affirmed that under Gingles, "[s]o long as the potential exists that a minority group could elect its own representative in spite of racially polarized voting, that group has standing to raise a vote dilution challenge under the Voting Rights Act." Id. Similarly, the Armour court held that the minority plaintiffs had satisfied the Gingles test by demonstrating that they could elect a candidate of their choice even though they could constitute at most one-third of the voting age population in the challenged district.[12] Id. at 1059-60.

[12] Contrary to Defendants' assertion, Armour was not overruled directly or indirectly by either Growe v. Emison, 507 U.S. 25 (1993), or Cousin v. Sundquist, 145 F.3d 818 (6th Cir. 1998). While the Armour court does discuss the applicability of the Gingles test to single-member districts, its holding primarily relied upon Gingles' explicit statements regarding the possibility of sustaining an "ability to influence" claim. See Armour, 775 F. Supp. at 105152, 1059 & n.19. Similarly, Cousin did not disturb the Armour court's recognition of an "ability to elect" claim because Cousin addressed only an "ability to influence" claim. See Cousin, 145 F.3d at 828-29. As explained in section II.A., the two claims are analytically distinct.

Some courts, however, have even gone so far as to recognize the potential viability of such "ability to influence" claims. See Barnett v. City of Chicago, 141 F.3d 699, 703 (7th Cir. 1998) (refusing to reject the viability of "ability to influence" claims); West v. Clinton, 786 F. Supp. 803, 807 (W.D. Ark. 1992) (assuming the viability of an "ability to influence" claim). Alternatively, courts have recognized that the existence of a true "influence district," i.e. one in which the minority group is able to significantly influence but not determine the outcome of the election, should be counted as a factor weighing against a finding of liability under Section 2. See, e.g., Uno, 72 F.3d at 991; Page v. Bartels, 144 F. Supp. 2d 346, 363-365 (D.N.J. 2001); Rural W. Tenn. African-Am. Affairs Council v. McWherter, 877 F. Supp. 1096, 1101-04 (W.D. Tenn. 1995), aff'd, 516 U.S. 801 (1995). In particular, Uno presented the rather unusual context of a city arguing that the provision of an influence district was an adequate defense against liability under a traditional vote dilution claim. Uno, 72 F.3d at 990; Vecinos de Barrio Uno v. City of Holyoke, 960 F. Supp. 515 (D. Mass. 1997) (accepting city's defense on remand); If the presence of an influence district is cognizable as a defense under § 2, it logically follows that the failure to maintain or create a district in which the minority group could actually elect its preferred candidate without achieving majority status where it is otherwise possible is cognizable as an affirmative claim under § 2. In either situation, the underlying concern is the same, namely to enable minority voters who have the potential "to elect representatives of their choice" to participate as equal members in American political life. See 42 U.S.C. § 1973(b). By recognizing an "ability to influence" claim under Section 2, these courts are inherently acknowledging the viability of a necessarily narrower "ability to elect" claim.

D. THE CASES CITED BY DEFENDANTS ARE EASILY DISTINGUISHED

The cases that Defendants cite as rejecting Section 2 claims where the proposed district was comprised of less than a majority of minority voters are readily distinguishable. At the threshold, most of those cases 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. See, e.g., Valdespino v. Alamo Heights Indep. Sch. Dist., 168 F.3d 848,850,852 (5th Cir. 1999) (at large election); McNeil v. Springfield Park Dist., 851 F.2d 937,938,944 (7th Cir. 1988) (same); Skorepa v. City of Chula Vista, 723 F. Supp. 1384, 1386, 1392 (S.D. Cal. 1989) (same). These rulings are inapposite to the instant case.

Most importantly, the plaintiffs in such cases did not allege or prove that the minority community they represented could actually elect a candidate of its choice in the challenged district. In other words, the courts were presented with an "ability to influence" case, and not an "ability to elect" case. See, e.g., Cousin, 145 F.3d at 828-29; Romero v. City of Pomona, 883 F.2d 1418, 1424 (9th Cir. 1989) (rejecting claim that districting plan diminished plaintiffs' ability to influence the outcome of elections); Latino Political Action Comm., Inc. v. City of Boston, 784 F.2d 409, 412 (1st Cir. 1986) (addressing plaintiffs' claim that section 2 forbids the "minimization, cancellation or submergence of minority voting strength below what might otherwise have been "); O'Lear v. Miller, 222 F. Supp. 2d 850,861 (E.D. Mich. 2002) (rejecting an "influence claim"); Hastert v. State Bd. of Elections, 777 F. Supp. 634, 652-55 & n.33 (N.D. Ill. 1991) (rejecting an "ability to influence" claim because of plaintiffs' failure to provide supporting substantive evidence); Skorepa, 723 F. Supp. at 1391-92. Similarly, DeBaca v. County of San Diego, 794 F. Supp. 990 (S.D. Cal. 1992), aff'd, 5 F.3d 535 (9th Cir. 1993), addressed only the applicability of the Gingles test to single-member districts and never

considered plaintiffs' "ability to influence" claim because it was "not seriously argued." Id. at 996-97.

Lastly, those courts that have rejected an "ability to elect" claim conflict with the Supreme Court's clear mandate that the Gingles factor not "be applied mechanically and without regard to the nature of the claim." See Voinovich, 507 U.S. at 158. For example, the Valdespino court flatly rejected plaintiffs' theory of Section 2 liability without any analysis ofthe purposes underlying Section 2 or Gingles and without any consideration of the flexibility of the standard mandated by Gingles and subsequent cases. See Valdespino, 168 F.3d at 852; see also Romero, 883 F.2d at 1424 & n.7; Metts v. Almond, 217 F. Supp. 2d 252, 260 (D.R.I. 2002).

To the extent that Defendants argue that recognition of "ability to elect" claims would open the floodgates to spurious Section 2 claims, such fears are unfounded. Meeting a 50% population threshold requirement is not necessary to eliminate marginal claims where minority voters do not possess the potential to elect their preferred representatives. In order to state a Section 2 violation, a plaintiff would still need to satisfy the remaining Gingles factors and establish that the challenged district impairs their opportunity to elect a preferred candidate under the totality of the circumstances. Thus, meritless cases would fail under the overall standard.

Given the Supreme Court's deliberate and repeated choice to leave open the viability of "ability to elect" claims under Section 2 and its explicit language regarding the flexibility of the first Gingles factor, Defendants' interpretation of Gingles as imposing a bright line threshold requirement of allegations that the minority group has the potential to comprise a 50% majority of the population in the challenged district simply is unsupportable and should not

be adopted by this Court.[13] Rather, the Court should interpret the first Gingles prong as the Supreme Court did in Johnson, namely as requiring an allegation that the minority group comprises a sufficiently large population so as to have the potential to elect the candidate of its choice. See Johnson, 512 U.S. at 1008; Gingles, 478 U.S. at 50 n.17; West, 786 F. Supp. at 807. This test provides a logical, objective and quantifiable measure that is consistent with the purposes of Section 2.

Here, Plaintiffs have readily satisfied this standard by alleging that African Americans in the area contained in the former Fourth Congressional District comprise a sufficiently large population to have the potential to elect the candidate of their choice. (See CompI.¶¶ 32,38.) Before redistricting, African-Americans made up 39.4% of the total population of the former Fourth Congressional District. (CompI. ¶ 17.) In the 2001 Special Election, the candidate overwhelmingly preferred by the African-American community garnered 48% of the overall vote, losing only by a slim margin of 4%. (Id. ¶¶ 24.) Thus in an election plagued by unusually low voter turnout of 38%, the African-American community still was able to mobilize sufficient votes (both African-American and crossover) to nearly succeed in their endeavor. See Uno, 72 F.3d at 991 n.13 (requiring showing that crossover votes exist to support the minority group's chosen candidate). With normal levels of voter turnout, it is reasonable to infer that the African-American community would be able to elect its chosen candidate.

[13] Furthermore, since the viability of" ability to elect" claims is an open issue, it is likely that appellate courts will again be presented with this issue and will benefit from having a full factual record developed on the matter. In instances where a thorough and complete development of the factual circumstances and relevant evidence is critical to the Court's determination of the proper interpretation of challenged laws, the Supreme Court has remanded cases for the purpose of allowing the parties to create a detailed and complete record. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1033 (1992) (Kennedy, 1. concurring); Turner Broadcasting System v. Federal Communications Comm'n, 512 U.S. 622, 627 (1994).

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss. Should the Court decide to grant said motion, Plaintiffs respectfully request leave to file an amended complaint.

Respectfully submitted,

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