IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

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

Plaintiffs,

v. **Civil Action No. 2:03-CV-151**

COMMONWEALTH OF VIRGINIA,
and
JEAN JENSEN, SECRETARY,
STATE BOARD OF ELECTIONS,
in her official capacity.

Defendants,

and

JERRY W. KILGORE, in his
official capacity as Attorney General
of the Commonwealth of Virginia.

Proposed Defendant-Intervenor.

REBUTTAL BRIEF IN SUPPORT OF MOTION TO DISMISS

The Commonwealth of Virginia and Jean Jensen, Secretary of the State Board of Elections, and proposed intervenor defendant, Attorney General Jerry W. Kilgore, by their counsel, submit the following Rebuttal Brief in support of their Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6):

BACKGROUND LEADING TO THE 2001 REDISTRICTING

The Virginia legislature was required to re-draw congressional district lines in 2001 in response to the decennial census. The United States Constitution and the Virginia Constitution,

require the Commonwealth of Virginia to reapportion its U.S. House of Representatives districts every ten years, upon completion of the decennial census. U.S. CONST. Art. I, § 2; VA. CONST. Art. II, § 6. In July 2001, the Virginia General Assembly met in Special Session to draw the new district lines.

The Supreme Court has recognized that redistricting or "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Growe v. Emison*, 507 U.S. 25, 34 (1993). "The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies." *Abrams v. Johnson,* 521 U.S. 74, 101 (1997). In undertaking this task, the legislature was required to comply with state and federal law, including, perhaps most importantly, the requirement of equal population or "one person-one vote." *See* U.S. CONST. Art. I, § 2 and *Karcher v. Daggett*, 462 U.S. 725 (1983) (requiring equal population among districts). Any deviation from this standard must be justified by important competing considerations. *See Abrams v. Johnson*, 521 U.S. 74 (1997). Where there are established minority-majority districts, such as the Third Congressional District in Virginia, any redrawing of the district lines must avoid retrogression of that minority population.

The 2000 census figures demonstrate that there was substantial migration of the population in Virginia into the northeast and away from the southwest and the area of the southeast that makes up the Second and Third Congressional districts. *See* Exhibit A attached hereto (areas shaded yellow show increases in population and areas shaded green show decreases in population). These figures show significant population increases and decreases in the districts drawn in 1991 and 1998, necessitating the movement of all district boundaries. *See* Exhibit A. In

order to satisfy the equal population requirement, it was necessary that the 2000 redistricting reduce the population of District 4 and increase the population of District 3 *without* retrogressing or reducing the minority population of District 3. Plaintiffs allege that the 2001 redistricting wasted "the votes of African Americans through packing into the Third Congressional District." *See* Compl. ¶¶ 20, 39; Pls.' Memo. in Opp. to Defs.' Motion to Dismiss pp. 3, 9. In fact, although the 2001 redistricting necessarily resulted in a net increase in population in District 3, the minority voting age population in District 3 was decreased by .1% from 53.3% under the old plan to 53.2% under the 2001 redistricting. *See* chart "Percent of Black VAP in 2000 and 2001 Districts," attached as Ex. B.

The General Assembly drew and passed a plan that met all of the legal prerequisites. The Governor signed the bill into law and the new plan was pre-cleared by the United States Department of Justice pursuant to Section 5 of the Voting Rights Act. The first general election under the new plan was scheduled for November 5, 2002. Two candidates qualified to run for the District 4 seat – Randy Forbes, the incumbent, and Louise Lucas, the challenger. On August 23, 2002, Louise Lucas withdrew her name as a candidate explaining that "the financial support for my candidacy in Democratic circles here in Virginia and in Washington has not materialized as it did in 2001." *See* Exhibit C, *Lucas backs out of bid for Congress; Forbes wielded financial lead*, DAILY PRESS, Aug. 24, 2002; *Lucas will not take on Forbes; incumbent had big edge in funds*, RICHMOND TIMES DISPATCH, Aug. 24, 2002; *Drama missing in state elections, many congressional seats seem decided*, RICHMOND TIMES DISPATCH Sept. 1, 2002; *No opposition for Forbes in 4th*, RICHMOND TIMES DISPATCH, attached.

ARGUMENT

The allegations in the Complaint are insufficient as a matter of law to satisfy two of three threshold requirements established by the Supreme Court in *Thornburg v. Gingles*. The Supreme Court has consistently held that these threshold requirements - that the minority group be sufficiently large and geographically compact to constitute a majority in a single-member district *and* the minority group be able to establish that the white majority usually votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate -- must first be met before plaintiffs may proceed under the totality of the circumstances test to attempt to prove a Section 2 violation. Plaintiffs have not alleged that the minority group constitutes a majority in a single-member district. Furthermore, the allegations that the white majority usually votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate are insufficient factually and legally to satisfy the *Gingles* requirements.[1]

In *Gingles*, the Supreme Court read § 2 to impose "necessary preconditions" on the prosecution of vote dilution claims and held that, to establish such claims, plaintiffs must prove three threshold conditions. First, the minority group must demonstrate that its population is sufficiently large and geographically compact to constitute a majority in a single-member district. Second, the minority group must be able to show that it is politically cohesive. And third, the minority group must be able to establish that the white majority usually votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate. *Gingles*, 478 U.S. at 50-51 (citations omitted).

[1] With respect to the applicable standard of review, plaintiffs bear the burden of establishing subject matter jurisdiction. Moreover, defendants have contested certain allegations made by Plaintiffs that are contradicted by public documents. For example, plaintiffs alleged in ¶ 33 of the Complaint, that "Congressional Plan 188 would have increased the African-American *voting population* in the Fourth Congressional District to 40.4%." In fact, the African American *Voting Age Population* is actually 38.3%. *See* Defs.' Mem. In Op. at n.3. Even accepting the allegations in the Complaint as true, plaintiffs have failed to state a cognizable Section 2 claim.

The *Gingles* preconditions thus establish a bright line test for determining whether there has been a § 2 violation. *See, e.g.*, *Valdespino v. Alamo Heights Indep. School Dist.*, 168 F.3d 848, 852 (5th Cir. 1999), *cert. denied* 528 1114 (2000). If plaintiffs can prove each of these three preconditions, they may then present evidence that, under the "totality of the circumstances" test identified in 42 U.S.C. § 1973(b), there has been impermissible vote dilution. However, "*[u]nless these points are established*, *there neither has been a wrong nor can be a remedy*." *Growe v. Emison*, 507 U.S. at 40-41 (1993) (emphasis added). Plaintiffs cannot satisfy the preconditions, and, therefore, cannot establish a § 2 claim. *Uno v. City of Holyoke*, 72 F.3d 973, 988 (1st Cir. 1995) ("In any claim brought under . . . § 2, the *Gingles* preconditions are central to the plaintiffs' success.").

I. PLAINTIFFS CANNOT SAVE THEIR § 2 INFLUENCE DILUTION CLAIM BY RE-CASTING IT AS AN "ABILITY TO ELECT" CLAIM

The requirements of Section 2 and the *Gingles* preconditions remain the same whether plaintiffs label their claim an "ability to influence" or "ability to elect" claim. In *Gingles,* the Supreme Court specifically held that the "majority" requirement of the first precondition is applicable to "ability-to-elect" claims. 42 U.S. at 47 ("These circumstances are necessary preconditions for multimember districts to operate to impair minority voters' *ability to elect* representatives of their choice….") (emphasis supplied). As the District Court in *Metts v. Almond,* 217 F. Supp. 2d 252 (D.R.I. 2002), explained, there is little doubt that the Gingles preconditions apply to an "ability to elect" claim. 217 F. Supp. 2d at 258. Where the minority group is less than 50% of the population, for purposes of applying Section 2 requirements, the distinction between so called "ability to influence" and "ability to elect" claims is artificial and legally insignificant. Section 2 protects the right of *minority* groups "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). If a minority

group does not constitute a majority in a single member district then, at best, the minority group possesses the ability to influence, not elect. With crossover voting from other groups the minority group may elect their candidate of choice, but that is a result of the minority's influence *plus* the voting strength of other groups and likely reflects political alliances or preferences that are not protected by Section 2. The passing reference in dicta in *Voinovich* regarding non-mechanical application of the *Gingles* factors is just that. This Court should not recognize or accept such a claim when the Supreme Court has repeatedly declined to do so.

By definition, only a majority possesses the ability to elect. Where the minority group makes up less than 50% of the district, their "ability to elect" the candidate of choice necessarily depends upon their political alliances and other factors beyond the reach of Section 2 that may enhance their voting strength. Even in the special election in June 2001 conducted under the old District 4 lines, Lucas, the minority candidate of choice, lost by about a 4% margin after receiving 48% of the vote to Forbes' 52%. (Compl. ¶¶ 21, 22). These results contradict plaintiffs' assertion that the minority group possessed the ability *to elect* its candidate of choice even with white crossover voting.

In *Metts v. Almond*, the court was faced with a Section 2 claim by a less than 50% minority group and recognized that under this circumstance the concepts of ability to elect or to influence are one in the same. The District Court in *Metts* addressed the very issue now before this Court.

> The principle presented is whether a group whose members constitute less than a majority of the population in a proposed voting district but who claim the ability to 'elect' or 'influence' the election of candidates can maintain an action for a violation of Section 2 on the ground that the plan denies members of the group the opportunity 'to elect representatives of their choice.'

217 F. Supp. 2d at 253. The court answered this question in the negative and granted defendants motion to dismiss.

Absent a showing that the minority group would constitute a geographically compact *majority* in a single-member district, it cannot establish that it has "the potential to elect" the candidate of its choice. *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…." *Id.* (*citing Gingles, supra*, at 50, n.17). This Court should decline plaintiffs' invitation to endorse the concept of either an "ability to elect" or "ability to influence" claim under § 2.

II. PLAINTIFFS MUST SATISFY THE *GINGLES* PRECONDITIONS.[2]

The threshold requirements established by the Supreme court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), to state a Section 2 claim, including the requirement that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute *a majority* in a single-member district," *id*, at 50 (emphasis supplied), must be satisfied in this case.

> Our decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), set out the basic framework for establishing a vote dilution claim against at-large, multimember districts; we have since extended the framework to single-member districts. *Growe v. Emison*, 507 U.S. 25, 40-41 (1993). Plaintiffs must show three threshold

[2] Plaintiffs have not addressed the argument that plaintiffs allegations fail to satisfy the third Gingles' precondition -- that white bloc voting that usually defeats the minority group's candidate of choice. Plaintiffs allege that African American voters in District 4 "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. Plaintiffs argue that under the pre-2001 district lines they could elect their candidate of choice, and presumably did, with the exception of the 2001 special election. The only election under the new District 4 lines that the plaintiffs point to is the 2002 regular election from which Lucas withdrew because of a "lack of financial support." *See* Exhibit C. Because Lucas withdrew, the results provide no support for plaintiffs' claims. Even in the 2001 special election conducted under the old District 4 lines, Lucas received only about 48% of the vote. Under these circumstances, plaintiffs cannot demonstrate white block voting that usually defeats the minority group's candidate of choice. In order to demonstrate white bloc voting that usually defeats the minority group's candidate of choice plaintiffs must point to "a sufficient number of elections to enable [the Court] to determine whether white bloc voting *usually* operates to defeat minority-preferred candidates." *Lewis v. Alamance County, N.C.,* 99 F.3d 600, 605-606 (4th Cir. 1996).

> conditions: first, the minority group "is sufficiently large and geographically compact *to constitute a majority in a single-member district*"; second, the minority group is "politically cohesive"; and third, the majority "votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." 478 U.S., at 50-51. Once plaintiffs establish these conditions, the court considers whether, "on the totality of circumstances," minorities have been denied an "equal opportunity" to "participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

Abrams v. Johnson, 521 U.S. 74, 90-91 (1997) (emphasis supplied). *See also Shaw v. Hunt,* 517 U.S. 899, 914 (1996) ("To prevail on [an alleged a § 2 violation in a single-member district], a plaintiff must prove that the minority group 'is sufficiently large and geographically compact to constitute a majority in a single-member district'; that the minority group 'is politically cohesive'; and that 'the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate'"); *Shaw v. Reno,* 509 U.S. 630, 655 (1993) ("We have indicated that [the *Gingles*] preconditions apply in § 2 challenges to single-member districts.") (citing *Voinovich v. Quilter*, 507 U.S., at 157-58; *Growe v. Emison*, 507 U.S. at 40.).

In order to support their Section 2 claim based the slight reduction in the total minority population in District 4 -- from 39.4% under the old plan to 33.6% (total *voting age population* minority population reduced from 37.8% to 32.3%), *see* Exhibit B, -- plaintiffs would have this Court ignore the majority requirement or apply it to the minority group *plus* all of those voters who happen to vote with the minority group for political or other reasons. Plaintiffs assert that *any* "minority group 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*." *See* Pls. Brf. In Op. at 5 (emphasis supplied). The fact that a certain percentage of white voters also voted for the democratic nominee in the 2001 special election does not make those white voters part of the "minority group" for purposes of Section 2. Such a novel approach is not supported by the Voting Rights Act or controlling precedent. Moreover, it would eviscerate the first

Gingles prong because *any* size minority group could meet this requirement. Section 2 does not protect non-minority white crossover voters simply because they happen to vote with the minority group. Section 2 of the Voting Rights Act is only violated if members of the minority group can demonstrate 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).

Plaintiffs reliance on dicta in *Voinovich v. Quilter,* 507 U.S. 146, 158 (1993), and *Johnson v. DeGrandy*, 512 U.S. 997, 1008-09 (1994), does not support their argument that the word "majority" as used in the first prong of the *Gingles* test somehow means *less than* 50% of a minority group. The Supreme Court has consistently refused to recognize such a vote dilution or influence dilution claim. At best, this *dicta* indicates only the Supreme Court's unwillingness, for whatever reason, to weigh in on the viability of an influence dilution claim, leaving that to the lower courts. This does not mean that "the Court will likely embrace this broad interpretation of § 2 without limitation in the future." *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 652 (N.D. Ill. 1991). It is true that in *Voinovich v. Quilter,* 507 U.S. 146, 158 (1993), the Court assumed for the sake of argument that such a claim would be actionable, however, the Court also noted that "[h]ad the District Court employed the Gingles test…it would have rejected appellees' § 2 claim." *Voinovich v. Quilter,* 507 U.S. 146, 158 (1993). "The Supreme Court's reluctance in *Voinovich* to state that Section 2 authorizes [an influence dilution] claim, when the Court was so squarely presented with factual circumstances favorable to so holding, suggests that the existence of an influence cause of action should not be inferred." *Cousin v. Sundquist*, 145 F.3d 818, 828-29 (6th Cir. 1998).

In more recent cases the Supreme Court has reiterated that "[t]o prevail on [an alleged a § 2 violation in a single-member district], a plaintiff must prove that the minority group 'is sufficiently large and geographically compact to constitute a *majority* in a single-member district'…." *Shaw v. Hunt,* 517 U.S. 899, 914 (1996). The following year, the Supreme Court showed no reluctance in upholding a district court's mechanical application of the *Gingles* first prong to deny a Section 2 claim in *Abrams v. Johnson,* 521 U.S. 74 (1997):

> Here the District Court found, without clear error, that the black population was not sufficiently compact for a second majority-black district. 922 F. Supp., at 1567. So the first of the *Gingles* factors is not satisfied. As we have noted before, § 2 does not require a State to create, on predominantly racial lines, a district that is not "reasonably compact." *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994). And the § 2 compactness inquiry should take into account "traditional districting principles such as maintaining communities of interest and traditional boundaries." *Bush, supra*, at 977.

521 U.S. at 91-92 ("Plaintiffs must show…first, the minority group 'is sufficiently large and geographically compact to constitute a majority in a single-member district' ").

The District Court's opinion in *Metts v. Almond*, 217 F. Supp. 2d 252 (D.R.I. 2002), supplies a detailed discussion of the reasons requiring application in this case of *Gingles* requirement of a 50% majority.

> First, there is nothing in the wording of the statute that supports the assertion of 'influence' claims.
> …
> Second, permitting 'influence' claims would be inconsistent with the plain language of *Gingles*.
> …
> Third, recognizing such 'influence' claims would undermine the purposes served by *Gingles*' 'majority' precondition. That precondition provides an ascertainable and objective standard for adjudicating claims that would be lacking if 'ability-to-influence the election of candidates' claims were allowed.
> …
> Fourth and perhaps most compelling, there is no sound reason why the "majority" precondition that *Gingles* has held applicable to 'ability-to-elect' claims should be considered inapplicable to 'ability-to-influence election' claims.

217 F. Supp. 2d at 257-58. In this case it appears plaintiffs' efforts are aimed at increasing the chances of election of a particular candidate who happens to be a member of the minority group. Plaintiffs offer no compelling argument, however, that justifies ignoring the concerns expressed by the court in *Metts*.

III. THIS COURT SHOULD FOLLOW THE MAJORITY OF LOWER COURT DECISIONS THAT HAVE DECLINED TO RECOGNIZE VOTE DILUTION CLAIMS.

"[E]very circuit and most district courts that have addressed the issue have held that claims based on alleged ability to influence the election of candidates are not cognizable under Section 2." *Metts v. Almond*, 217 F. Supp 2d. 252, 257 (D.R.I. Sept. 9, 2002) (citing *Valdespino v. Alamo Hts. Indep. Sch. Dist.,* 168 F.3d 848, 852-853 (5th Cir. 1999*); Cousin v. Sundquist,* 145 F.3d 818, 828-829 (6th Cir. 1998*);* McNeil v. Springfield Park Dist., 851 F.2d 937, 947 (7th Cir. 1988); *Skorepa v. City of Chula Vista,* 723 F. Supp. 1384, 1392 (S.D. Cal. 1989*); Hastert v. State Bd. of Elec.,* 777 F. Supp. 634, 652-654 (N.D. Ill. 1991*). See also Perez v. Pasadena Indep. Sch. Dist.,* 165 F.3d 368, 371-73 (5th Cir. 1999)*; Negron v. City of Miami Beach*, 113 F.3d 1563, 1571 (11th Cir. 1997) (finding no section 2 violation when minority community is just below 50% of citizen voting-age population).

The Fourth Circuit Court of Appeals has consistently applied all three *Gingles* preconditions to § 2 claims, *see, e.g.*, *Lewis v. Alamance County*, 99 F.3d 600, 604 (4th Cir. 1996); *Collins v. City of Norfolk*, 883 F.2d 1232, 1239 (4th Cir. 1989), and has recognized that the preconditions are "essential" to the proof of vote dilution claims, *see Collins v. City of Norfolk*, 816 F.2d 932, 935 (4th Cir. 1987). The Fourth Circuit has emphasized that the *Gingles* preconditions are necessary to place "principled bounds" on the concept of vote dilution as codified in § 2. *See McGhee v. Granville County*, 860 F.2d 110, 117 (4th Cir. 1988). The Voting

Rights Act by its own terms does not guarantee that a proportionate number of minority voters will be elected. 42 U.S.C. § 1973(b). Yet if minority groups with less than a majority are allowed to litigate vote dilution claims, this may be the net effect.

The bright line majority requirement established by the *Gingles* preconditions for determining whether there has been a § 2 violation is essential inasmuch as Section 2 was never intended to prevent any reapportionment of minority populations. *See, e.g.*, *Valdespino v. Alamo Heights Indep. School Dist.*, 168 F.3d 848, 852 (5th Cir. 1999) ("We have repeatedly disposed of vote dilution cases on the principle that 'failure to establish any one of the [the *Gingles*] threshold requirements is fatal.'"). Plaintiffs' persistent arguments in favor of bypassing the *Gingles* preconditions in challenges under Section 2 to single member districts, *see, e.g.*, Pls. Mem. In Op. at 20, ignores the Supreme Court's more recent holding in *Growe v. Emison, supra*. If plaintiffs cannot establish the preconditions, they cannot establish a § 2 claim. *Uno v. City of Holyoke*, 72 F.3d 973, 988 (1st Cir. 1995) ("In any claim brought under . . . § 2, the *Gingles* preconditions are central to the plaintiffs' success.").

In view of the overwhelming precedent rejecting influence dilution claims such as plaintiffs and the Supreme Court's apparent willingness to let these decisions stand, there is no reason for this Court to defer to a position taken in a petition for certiorari filed at the end of the Clinton administration in an unsuccessful effort by the Justice Department to reverse the Fifth Circuit's decision in *Valdespino.*[3] Plaintiffs rely on *United States v. Sheffield Board of Comm'rs,* 435 U.S. 110, 129-34 (1978) to support their assertion that this Court should defer to a position taken nearly four years ago by Justice Department attorneys. There, the Court noted that the Attorney General's "contemporaneous administrative construction" concerning the scope of Section 5 of the Voting Rights Act, warranted some measure of deference. 435 U.S. at 131. The

Valdespino petition for certiorari deserves no such deference because the Justice Department has no such administrative role with respect to Section 2. Moreover, the petition sought to advance a legal argument that had already been rejected by the Fifth Circuit and which the Supreme Court refused to decide in *Valdespino* just as it has in earlier cases.

Plaintiffs must be required to comply with the *Gingles* threshold requirements, otherwise the vote dilution concept "is logically unbounded." *See McGhee*, 860 F.2d at 116 (citing *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 944-45 (7th Cir. 1988)). Only one case supports plaintiffs' assertion that their vote dilution claim satisfies the first prong of the Gingles test. *Armour v. Ohio*, 775 F. Supp. 1044, 1051-52 (N.D. Ohio 1991). The holding in *Armour,* however, has been overruled by the Supreme Court's holding in *Growe*, 507 U.S. at 40-41, and the Sixth Circuit Court of Appeals' holding in *Cousin v. Sundquist*, 145 F.3d 818, 828-29 (6th Cir. 1998). *See also O'Lear v. Miller*, 222 F. Supp. 2d 850 (E.D. Mich.) (three-judge court), *aff'd*, 123 S. Ct. 512 (2002).

Other cases cited by plaintiffs do not support their position. For example, plaintiffs rely on dicta in a footnote in *Solomon v. Liberty County*, 899 F.2d 1012. 1018 n.7 (11th Cir. 1990). *See* Pls. Mem. In. Opp. at 18. In that case, the Court explained that "[h]ere, the undisputed evidence shows that blacks would constitute a majority of District 1's voting age population. That conclusively establishes that blacks are a sufficiently large and geographically compact group in Liberty County to be eligible for relief under the Voting Rights Act." *Id.,* 899 F. 2d at 1018. In a footnote, the Court explained:

> This holding should not be read to imply an opposite result where blacks do not constitute an outright majority of the voting age population in any district….In some cases, blacks may constitute a majority of the overall population and may be expected to comprise a majority of the voting age population in the near future. In other cases, blacks may be so close to fifty percent that they would have a realistic

[3] The Supreme Court denied the petition.

> chance of electing a representative. Finally, it may be that the addition of only one or two representatives to the deliberative body would make it possible for a minority group to attain a voice. The present case does not involve these more difficult situations, however, and so I leave their consideration for another time.

Id., 899 F. 2d at 1018 n.7. The "more difficult situations" contemplated in this footnote are not before this Court and *Solomon* provides no support for plaintiffs' position.

Plaintiffs also rely on *Barnett v. City of Chicago*, 141 F. 3d 699 (7th Cir. 1998) for the proposition that some courts have recognized what plaintiff calls "ability to influence" claims. *See* Pls. Mem. In. Opp. at 19. But plaintiffs again rely on dicta that does not support the claims alleged in their Complaint. In *Barnett* the court considered a Section 2 challenge to certain "aldermanic wards." Although in at least four wards there was a clear white voting age majority, the District Court classified these wards as "multi-racial" thereby reducing the total number of "white majority" wards. The Seventh Circuit reversed, holding that because the white population in these wards was more than 50%, these wards were clearly majority white. 141 F.3d at 703. The Court in *Barnett* did not decide whether or not a non-majority, minority group could satisfy the *Gingles* requirements. Alternatively, plaintiffs argue that the existence of a true influence district is a factor that weighs against a finding of liability under Section 2. *See* Pls. Mem. In. Opp. at 19. This is consistent with the majority requirement of *Gingles'* first prong.

In the instant case the 2001 redistricting resulted in a *de minimis* decrease in the size of the minority voting age population in District 4, from 37.8% to 32.3%. S*ee* Exhibit B. As in *Growe v. Emison*, in "the present case the *Gingles* preconditions [on the facts alleged are] …unattainable." 507 U.S. 25, 41 (1993). Therefore, plaintiffs' claims should be dismissed.

CONCLUSION AND PRAYER FOR RELIEF

Plaintiffs have failed to state a claim for relief under Section 2 of the Voting Rights Act. Accordingly, the Defendants respectfully request this Court to sustain their Motion to Dismiss and dismiss plaintiffs' claims in their entirety.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA and JEAN JENSEN, Secretary of the State Board of Elections AND JERRY W. KILGORE, ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Rebuttal Brief in Support of Motion to Dismiss were faxed and mailed on June 2, 2003, to Anita Hodgkiss, Lawyers' Committee for Civil Rights Under Law, 1401 New York Avenue, N.W., Suite 400, Washington, D.C. 20005-0400; Donald L. Morgan, Esq., Cleary, Gottlieb, Steen & Hamilton, 2000 Pennsylvania Avenue, NW, Washington, DC 20006; J. Gerald Hebert, Esq., Law Office of J. Gerald Hebert, P.C., 5019 Waple Lane, Alexandria, VA 22304, counsel for Plaintiffs; and Michael A. Carvin, Esq., Louis K. Fisher, Esq., and Cody R. Smith, Esq., Jones Day, 51 Louisiana Avenue, NW, Washington, D.C. 20001, counsel for Proposed Intervenor-Defendants Thompson, et al.

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