No. 02-2204

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

HAROLD METTS, et al.,

Plaintiffs - Appellants,

v.

LINCOLN ALMOND, et al.,

Defendants - Appellees.

Appeal from the United States District Court for the District of Rhode Island
(District Court Docket No. 02-204T)

BRIEF OF AMICUS CURIAE RHODE ISLAND AFFILIATE, AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANTS HAROLD METTS, ET AL. IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

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STATEMENT OF AMICUS CURIAE

The Rhode Island Affiliate, American Civil Liberties Union (the "RI-ACLU") is the Rhode Island affiliate of the American Civil Liberties Union (the "ACLU"), a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU has been active as *amicus curiae* in defending the equal right of racial

and other minorities to participate in the electoral process. The ACLU has operated a Voting Rights Project since 1966. Through this project and other ACLU offices nationwide, the ACLU has provided representation to plaintiffs in literally hundreds of voting cases involving electoral processes throughout the country. Like its parent organization, the RI-ACLU has appeared before this Court and the District Court of Rhode Island, both as direct counsel and as *amicus curiae*, in numerous cases involving the rights of voters to a fair electoral process.

The RI-ACLU is interested in this appeal because it raises important issues concerning whether the Voting Rights Act recognizes "influence-dilution" claims. The RI-ACLU is filing, with this memorandum, a motion seeking leave to appear as *amicus curiae.*

ARGUMENT

The task before the district court was to decide whether, under section 2 of the Voting Rights Act (the "VRA"), the plaintiffs-appellants had stated a cognizable "influence-dilution" claim. In an influence-dilution claim, members of a protected group complain that, but for the dilutive effect of an electoral structure or device, they would have been an influential minority in their district, potentially able to elect the candidate of their choice with the assistance of cross-over voters. Instead of addressing that issue, the district court decided to examine whether the plaintiffs' influence-dilution claim satisfied the factors for a <u>different</u> type of claim

under section 2—a typical "vote-dilution" claim, in which the protected-group members would have been numerous enough to elect their candidate on their own. The district court concluded not only that the plaintiffs' claim fell short, but also that no influence-dilution claim could ever be made out because such a claim could never satisfy the requirements of a vote-dilution claim—a different type of section-2 claim.

This Court is asked to decide whether influence-dilution claims are viable under section 2. The Court should recognize such claims, since they are consistent with the language, and would advance the goals, of the VRA.

I. THE LANGUAGE OF SECTION 2, AS CONSTRUED BY THE SUPREME COURT, PERMITS THE RECOGNITION OF INFLUENCE-DILUTION CLAIMS.

The Supreme Court has left open the possibility that influence-dilution claims are cognizable under section 2. See Johnson v. De Grandy, 512 U.S. 997, 1009 (1994); Voinovich v. Quilter, 507 U.S. 146, 154 (1993) ("We have not yet decided whether influence-dilution claims such as appellees' are viable under § 2," citing its prior Gingles decision as "leaving open the possibility of influence dilution claims"); Growe v. Emison, 507 U.S. 25, 41 n.5 (1993); Thornburg v. Gingles, 478 U.S. 30, 46-47 n.12 (1986). See also Vecinos de Barrio Uno v. City of Holyoke, 72 F.3d 973, 979 n.2 (1st Cir. 1995) (regarding validation of "so-

called influence dilution claims," lower courts divided and Supreme Court has so far declined to decide). But the Supreme Court has read the statutory language in such a way as to permit the recognition of an influence-dilution claim under section 2.

Section 2 of the VRA prohibits the imposition of any "voting qualification or prerequisite to voting or standard, practice, or procedure" that results in the denial or abridgement of the right to vote of any citizen who is a member of a protected class of racial and language minorities. 42 U.S.C. § 1973(a). Section 2 does not itemize the various devices or structures by which the right to vote might be curtailed and deem them *per se* violative of section 2. Instead, claimants must demonstrate, "based on the totality of circumstances," that the result of a given device or structure is that the political process is not equally open to a protected class

> 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); see Gingles, 478 U.S. at 44, 46. The Supreme Court has held that section-2 claimants must allege and prove that they have less opportunity both "to participate in the political process" and "to elect representatives of their choice." Chisom v. Roemer, 501 U.S. 380, 397 (1991).

But the requirement that claimants establish that they have less opportunity "to elect representatives of their choice" does not mean that a protected group without a population majority in an electoral district could never make out a section-2 claim on the ground that the group would lack the numbers to "elect," on its own, its preferred candidate. See id. at 409-10 & n.2 (Scalia, J., dissenting) The Supreme Court has explained that that reading of section 2 "rests on the erroneous assumption that a small group of voters can never influence the outcome of an election." Id. at 397 n.24 (rejecting Justice Scalia's argument).

The Supreme Court, thus, has read the statutory language "participate in the political process" and "elect representatives of their choice" broadly enough so that an "influence-dilution" claim—wherein "a small group of voters," voting in a coalition with others, could have "elected" their candidate but were thwarted by an electoral structure or device—could be recognized under section 2. The Supreme Court has defined influence-dilution claims thus:

> The complaint in such a case is not that [minority] voters have been deprived of the ability to constitute a *majority*, but of the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the . . . majority.

Voinovich, 507 U.S. at 158. Further, the Supreme Court has defined an influence district thus:

> [minority] voters in such influence districts, of course, could not dictate electoral outcomes independently. But they could elect their candidate of

> choice nonetheless if they are numerous enough and their candidate attracts sufficient cross-over votes from [other] voters.

Id. at 154.

By recognizing that the statutory language does not foreclose the possibility of influence-dilution claims, the Supreme Court has moved away from the "artificiality" of any distinction "between claims that a minority group's 'ability *to elect* the representatives of [its] choice' has been impaired and claims that 'its ability to *influence* elections' has been impaired." Gingles, 478 U.S. at 89 n.1 (O'Connor, J., concurring). As Justice O'Connor explained,

> 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.

Id. The language of section 2 is sufficiently broad to guard against dilution of a minority group's chances to elect a representative by joining forces with cross-over voters.

II. THE GOALS OF THE VOTING RIGHTS ACT, AS EXPLAINED BY THE SUPREME COURT AND THIS COURT, SUPPORT THE RECOGNITION OF INFLUENCE-DILUTION CLAIMS.

As the Supreme Court has read section 2, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and [other] voters to elect their preferred representatives." Gingles, 478 U.S. at 47. The Supreme Court has construed the language of the VRA in such a way that the protection of minorities' opportunities to elect their chosen candidates could include the protection of their opportunity to band together with others to influence the outcome of the election. Such protection would comport with the goals of the VRA.

The Supreme Court and this Court have recognized that section 2 contains an "inherent tension":

> We know that Congress intended to allow vote dilution claims to be brought under § 2, but we also know that Congress did not intend to create a right to proportional representation for minority voters. There is an inherent tension between what Congress wished to do and what it wished to avoid, because any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large.

Id. at 84 (O'Connor, J., concurring), cited in Uno, 72 F.3d at 991 n.12. In a prototypical "vote-dilution" claim, the remedy is to create an electoral district in which the minority group, on its own, can elect its chosen candidate—a so-called

majority-minority district. But the Supreme Court has acknowledged some unease with deploying that remedy in all situations, since what might be necessary to achieve equal political and electoral opportunity might not always be the creation of a majority-minority district:

> If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice.

De Grandy, 512 U.S. at 1020, cited in Uno, 72 F.3d at 990.

In Uno, this Court reviewed the Supreme Court's influence-dilution pronouncements and concluded that

> These precedents merely confirm the lessons of practical politics: the voting strength of a minority group is not necessarily limited to districts in which its members constitute a majority of the voting age population, but also extends to every district in which its members are sufficiently numerous to have a significant impact at the ballot box most of the time.

Uno, 72 F.3d at 991, citing, *inter alia*, Latino Political Action Comm., Inc. v. City of Boston, 609 F. Supp. 739, 747-48 (D. Mass. 1985), *aff'd*, 784 F.2d 409 (1st Cir. 1986).

As this Court has recognized, the Supreme Court has emphasized that the VRA's goals include the goal of "eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions." Uno, 72 F.3d at 991, quoting Miller v. Johnson, 515 U.S. 900, 927 (1995). The VRA

also works toward "the goal of a political system in which race no longer matters." Shaw v. Reno, 509 U.S. 630, 657 (1993), cited in Uno, 72 F.3d at 991. In light of those goals, this Court has contrasted majority-minority districts and influence districts thus:

> The[] goals [of the VRA] are poorly served by balkanizing electorates and carving them into racial fiefdoms. . . . Influence districts, on the other hand, are to be prized as a means of encouraging both voters and candidates to dismantle the barriers that wall off racial groups and replace those barriers with voting coalitions. . . . In fine, influence districts bring us closer to "the goal of a political system in which race no longer matters."

Uno, 72 F.3d at 991, citing Miller, 515 U.S. at 927, and Shaw, 509 U.S. at 657.

Recognition of influence-dilution claims under section 2 would protect from dilution the opportunities of racial and language minorities to elect their preferred candidates. The creation of influence districts would reflect the fact that "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics." De Grandy, 512 U.S. at 1020, cited in Uno, 72 F.3d at 991.

III. IN UNO, THIS COURT HAS ARTICULATED WORKABLE FACTORS FOR INFLUENCE-DILUTION CLAIMS.

In Gingles, the first Supreme Court case to construe the current version of the VRA, the Supreme Court crafted three now-familiar factors for the assertion of

a vote-dilution claim. Despite that the Supreme Court has clearly stated that the Gingles factors "cannot be applied mechanically and without regard to the nature of the claim" under section 2, Voinovich, 507 U.S. at 158, lower courts—including the district court in this case–have done just that. Since the Supreme Court has not yet decided whether influence-dilution claims are cognizable under section 2, it has not put forward factors for such claims. But this Court, in Uno, has prescribed criteria for determining whether an influence district exists such that it should be evidence that the absence of a majority-minority district is not a section 2 violation. The Gingles factors can be modified by the Uno criteria to provide workable factors for influence-dilution claims under section 2.

In Gingles, the Supreme Court started with the proposition that the amendments to the VRA revised the former requirement that claimants prove that a contested electoral practice or mechanism was adopted with the intent to discriminate against minorities; that intent test "ask[ed] the wrong question." Gingles, 478 U.S. at 43-44 (citation omitted). "The 'right' question," said the Supreme Court, was whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." Id. at 44 (citations omitted).

The Court continued:

> In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities "on the basis of objective factors."

Id. (citation omitted). Typical factors could be found in the VRA's legislative history. See id. at 44-45 (citation omitted). Other factors could be relevant. See id. at 45 (citation omitted). All were to be applied using a "'functional' view of the political process" in "a searching practical evaluation of the 'past and present reality.'" Id. (citations omitted). But, for a given type of claim, certain factors could emerge to permit a court, as a threshold matter, to evaluate whether or not a given structure or practice could potentially be the cause of the resulting unequal opportunity. See id. at 48-49.

It was in this context that the Gingles Court created its three factors for a vote-dilution claim challenging a multi-member district structure:

- First, the minority group in the district must be "sufficiently large and geographically compact to constitute a majority in a single-member district";
- Second, the minority group must be "politically cohesive"; and
- Third, there must be significant bloc voting by non-minorities.

Gingles, 478 U.S. at 50-51, cited in Uno, 72 F.3d at 979.

The Gingles factors are designed to test whether the way district lines have been drawn prevents members of a minority group from electing, on its own, its preferred candidate. The first two Gingles factors, numerosity and cohesion, look to whether, district lines aside, the minority group has the potential to elect the

representative of its choice. The second and third factors, cohesion and majority bloc voting, look to whether the challenged district lines dilute the minority vote by submerging minority members among others.

But any judicially-crafted "factors" to a challenge under section 2 must depend on the nature of the device or structure at issue and the nature of the claim. See Voinovich, 507 U.S. at 158. Gingles declared that when the claim is vote dilution, and the challenged structure is a multi-member district, the applicable criteria are the three articulated in Gingles.

Since Gingles, as the Supreme Court has reviewed various types of section-2 claims, it has considered the applicability of the Gingles factors to the claim at issue. In Growe, the Supreme Court held that the factors applied, without modification, to a vote-dilution claim challenging a single-member district. Growe, 507 U.S. at 39.

But in Voinovich, the Court made plain that if a court were to analyze an influence-dilution claim, then the factors would have to change. At the least, the first Gingles factor would have to change or go:

> Had the District Court employed the *Gingles* test in this case, it would have rejected appellees' § 2 claim. Of course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim. For example, the first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume, *arguendo*, to be actionable today.

Voinovich, 507 U.S. at 158, cited in Uno, 72 F.3d at 979 n.2 ("This precondition will have to be reconfigured to the extent that the courts eventually validate so-called influence dilution claims.")

In Uno, this Court held that the presence of influence districts must be considered in evaluating whether, in the totality of the circumstances in a vote-dilution claim, minority voting strength has been illegally diluted. See Uno, 72 F.3d at 990-91. Alluding to the critical question in a VRA case, the Court stressed that "[i]t is important to realize that influence districts serve the[] goals [of the VRA] only to the extent that they reflect a meaningful opportunity for minority voters to participate in the political process." Id. at 980, 991 n.13. In this light, this Court set out necessary characteristics for an influence district before it would be recognized and "given significant weight in the balance" as a defense to section-2 liability:

- First, the minority group's members in the district must be "sufficiently numerous to have a significant impact at the ballot box most of the time";
- Second, "minority voters in the district have in fact joined with other voters to elect representatives of their choice"; and
- Third, "elected representatives from such a district serve, at least in part, the interests of the minority community and vie for its support."

Uno, 72 F.3d at 991 & n.13.

This framework can and should serve as the basis for a workable set of objective factors for an influence-dilution claim. This is so because it would help to answer the right question: as a result of the challenged practice or structure,

have the minority voters been given an unequal opportunity to participate politically and elect their candidates? See Gingles, 478 U.S. at 44.

The third Uno factor, service by the representative, would be only marginally relevant and so should not be considered a necessary factor for an affirmative influence-dilution claim under section-2. There is no analog among the Gingles factors for the "service by the representative" factor. A related question is already asked by the second Uno factor: does the minority group choose a candidate, and does the group then reach out to others to elect that candidate. Finding a candidate who will serve a population minority may be difficult. In the context of an influence-dilution claim, the minority's "choice" is not always an ideal one; as the Supreme Court itself has said, "[t]hose candidates may not represent perfection to every minority voter." De Grandy, 512 U.S. at 1020. The third Uno factor is more pertinent to a defense to a vote-dilution claim, where the presence of a representative who is responsive to the needs of an influential minority might help make a majority-minority district unnecessary.

On the other hand, to make out a section-2 influence-dilution claim, plaintiffs would still need to show racially polarized voting. So, to the two remaining Uno factors should be added a third—the third Gingles factor: "Third, there must be significant bloc voting by others."

This three-part test—sufficient numerosity, coalition-building, and majority bloc voting—would examine whether the way district lines have been drawn in fact prevents members of a minority group from electing its preferred candidate through building coalitions with voters from other groups. The first two factors would test two separate but related elements of the minority group's "ability to elect" in an influence-dilution context: would the group have been numerous enough to be an influential minority, and would the group join with other voters "to elect representatives of their choice." And the third factor would look to whether the challenged district lines dilute the minority voters' influence ability to influence the outcome of the election.

The first factor would modify—not eliminate—the first Gingles factor, that of numerosity. This factor would measure whether there would have been enough minority voters to have "influence" by having the "*potential* to elect" their candidate in concert with other, cross-over voters. See Gingles, 478 U.S. at 50 & n.17. This modified first Gingles factor would comply with the Supreme Court's instruction that the majority "numerosity" factor "would have to be modified or eliminated when analyzing [an] influence-dilution claim." Voinovich, 507 U.S. at 158. Unlike in the section-2 defense context, claimants should not have to show that they actually had "significant impact at the ballot box" in the past. Like in a vote-dilution claim context, it should be enough for claimants to show that they

would have such influence in the present absent the allegedly dilutive structure or practice.

In Uno, this Court was, wisely, "unwilling to prescribe any numerical floor above which a minority is automatically deemed large enough to convert a district into an influence district." Uno, 72 F.3d at 991. Instead, to account for the myriad factual scenarios a court could face, this Court employed a fact-sensitive test—whether the minority group was "sufficiently numerous" to have "significant" electoral impact. This factor includes a measure of success— "most of the time"—that ensures that the group's electoral impact is not ephemeral and creates a benchmark against which the impact of the challenged structure can be measured. Cf. Gingles, 478 U.S. at 51 ("we observe that the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election.")

The second factor would establish the critical fact of potential coalition-building by the minority group with other voters "to elect representatives of their choice." By measuring in terms of electoral success, this factor provides a benchmark, grounded in the statutory language, by which to measure the "significant impact" described in the first factor. Embedded in this factor is the second Gingles factor, that of a politically-cohesive minority group. See Gingles, 478 U.S. at 51. For minority voters, in fact, to "join" with others, the minorities

must be politically cohesive. Again, claimants should not have to show actual, successful coalition-building in the past, only that successful coalitions would be made in the present if not for the dilutive practice.

The third factor, bloc voting by others, would "address[] whether the challenged practice, procedure, or structure is the cause of the minority group's inability to mobilize its potential voting power and elect its preferred candidates." Uno, 72 F.3d at 980.

As with a vote-dilution claim, satisfaction of the factors for an influence-dilution claim would not end the inquiry, but would merely create a rebuttable inference of dilution. "Completing the inquiry demands 'comprehensive, not limited, canvassing of relevant facts.'" Id. (citation omitted).

The Uno framework satisfies an additional section-2 requirement, that the reviewing court "find a reasonable alternative practice as a benchmark against which to measure the existing voting practice." Holder v. Hall, 512 U.S. 874, 880 (1994).

> In certain cases, the benchmark for comparison in a § 2 dilution suit is obvious. The effect of an anti-single-shot voting rule, for instance, can be evaluated by comparing the system with that rule to the system without that rule. But where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2.

Id. at 880-81. In an influence-dilution claim, where district lines have been moved, resulting in the diminution of minority-group electoral influence, the first two Uno

factors, plus the third Gingles factor, provide the same benchmark against which to measure the effect of moving district lines that the Gingles factors provide in a vote-dilution claim.

IV. THE DISTRICT COURT ERRED IN HOLDING THAT AN INFLUENCE-DILUTION CLAIM COULD NEVER BE MADE UNDER SECTION 2 BY A MINORITY GROUP THAT DOES NOT HAVE A POPULATION MAJORITY.

The district court's objections to plaintiffs' assertion of a section-2 influence-dilution claim without a majority in the district boil down to three: the language of section 2 does not permit it, it does not satisfy the Gingles factors, and it would extend section-2 protection to population minorities. The district court erred in all three of its objections.

A. The Language of Section 2

The Supreme Court's reading of the language of section 2 is broad enough to support an influence-dilution claim. See supra Part I. The district court said that section 2 only involved the opportunity for minorities "to participate in the political process and/or [sic: and] to elect representatives of their choice"; since Congress did not say "influence," then influence-dilution claims were not permitted. Order at 13. The district court also said that to recognize "influence"

claims as part of the "participate" prong would render the "separate and distinct" "elect" prong ineffectual. Order at 13-14. The court further complained that the plaintiffs were distorting the meaning of the word "elect," stating that "it is difficult to see how a group constituting less than a majority can claim the ability to 'elect' a candidate." Id. at 20. Although the Supreme Court has not said that influence-dilution claims are cognizable under section 2, the Court has said that the "participate" and "elect" aspects of section 2 are to be read together, not separately, and that the "elect" language does not preclude influence-dilution claims. See supra Part I.[1]

B. The (In)Applicability of the Gingles Factors

Most of the district court's problems with a non-majority making a section-2 claim stem from the court's erroneous attempt to make an influence-dilution claim satisfy the Gingles factors for a different type of claim—a vote-dilution claim.

[1] In Cousin v. Sundquist, 145 F.3d 818 (6th Cir. 1998), the Sixth Circuit failed to acknowledge the Supreme Court's explication of the "participation" and "elect" language in the influence-dilution context in Chisom. Instead, the Sixth Circuit merely noted the discussion of influence-dilution claims in Gingles and Voinovich and concluded that the Supreme Court is "reluctant" to recognize such a claim. Id. at 828-29. It is not useful to attempt to divine the Supreme Court's eagerness or reluctance to recognize influence-dilution claims based on its prior statements. It is useful to recognize that the Supreme Court has read the language of the VRA in such a way so as to permit the recognition of such claims, see supra Part I, and that such claims would advance the goals of the VRA. See supra Part II.

First, the court declared that "the type of dilution prohibited by Section 2" involves claims of vote dilution from population majorities with enough voters to elect their candidate on their own—that were either dispersed into many ineffective minorities or packed into few super-majorities. Order at 7-9. By postulating vote dilution of a majority as the archetypal section-2 claim, id. at 9, the district court precluded consideration of other types of dilution claims, like influence dilution, and incorrectly framed the issue as whether a minority could ever present a section-2 claim.

Second, after laying out the Gingles factors, the district court misread the Supreme Court's prior pronouncements on the status of influence-dilution claims, stating that "the Supreme Court has expressly refrained from addressing whether Gingles' first factor bars claims under Section 2 by groups that assert the ability to elect or influence the election of candidates even though they lack a majority." Order at 11. What the Supreme Court has refrained from deciding is whether influence-dilution claims are viable under section 2. What the Supreme Court has done is to instruct lower courts that the Gingles factors to vote-dilution claims cannot be applied mechanically to other types of claims, and that, specifically, the first (majority) factor would not apply to an influence-dilution claim. See Voinovich, 507 U.S. at 158. In this regard, the district court put the cart before the horse: it is that the nature of the claim determines the applicable judicially-crafted

factors, not that the factors for one type of claim determine the viability under the statute of other types of claims.

Third, the district court considered – and then expressly disregarded – the Supreme Court's general admonition in Voinovich not to apply the Gingles factors "mechanically and without regard to the nature of the claim," and the specific instruction that the majority factor "would have to be modified or eliminated when analyzing [an] influence-dilution claim." Order at 11. The district court dismissed the Supreme Court's analysis as *dictum*, but that analysis directly applies to the (in)applicability of the Gingles factors in this case.[2]

Fourth, the district court declared that influence-dilution claims would be inconsistent "with the plain language of Gingles" requiring a group to have the "potential to elect" its representatives. See id. at 14; see also id. at 19 (precondition requires group to show it would constitute majority). The court went so far as to say that, "perhaps most compelling," "it makes little sense to impose a stricter 'majority' precondition standard to claims alleging denial of the ability to

[2] In Valdespino v. Alamo Heights Independent School District, 168 F.3d 848 (5th Cir. 1999), the Fifth Circuit also erroneously disregarded the Supreme Court's analysis in Voinovich. The Fifth Circuit said that the unanimous Voinovich Court warned against mechanical application of the majority factor only because it was adapting the Gingles test to single-member districts. Id. at 852 n.2. That is wrong. The Fifth Circuit cites Growe (Scalia, J.) in support of mechanical application of the majority factor, id. at 852, but fails to acknowledge that the unanimous Growe
Footnote continued on next page.

actually elect candidates than to claims merely alleging denial of the ability to influence the election of candidates. Indeed, recognizing such influence claims would effectively negate Gingles' majority precondition." Order at 17-18. But the Supreme Court made plain in Gingles itself that the Gingles factors applied only to the vote-dilution claim before it and that the Court was not considering whether any of those factors would apply to any other sorts of dilution claims, including exactly the influence-dilution claim at issue in this case:

> The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability *to elect* the representatives of their choice was impaired by the selection of a multimember electoral structure. . .
>
> We note . . . that we have no occasion to consider whether the standards we apply to respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.

Gingles, 478 U.S. at 46 n.12 (emphasis added).

Fifth, the district court misapprehends the purpose of the majority factor as an "objective, bright-line standard" that both applies the statutory language "opportunity to . . . elect" (on its own, with a majority) and "screens out cases

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court expressly left open the cognizability of influence-dilution claims. See Growe, 507 U.S. at 41 n.5.

having no prospect of success." Order at 14-15, 17. As Gingles' majority factor effectuates the "elect" language in a vote-dilution claim, so Uno's context-sensitive first and second factors, "sufficiently numerous to have a significant impact at the ballot box most of the time" and "have in fact joined with other voters to elect representatives of their choice," would effectuate the "elect" language in an influence-dilution claim. By contrast, to apply a 50+% majority requirement to an influence-dilution claim would be arbitrary, unreasonable and unworkable.

The Supreme Court's interpretation of the structure of section 2 demonstrates that there is no artificial 50+% threshold for section 2 claims. Throughout its opinion, the Gingles Court emphasized the "'functional' view of the political process mandated by § 2." Gingles, 478 U.S. at 48 n.15. The three Gingles factors follow that functional view. In the context of the case before the Supreme Court in Gingles, the numerosity (first) and cohesion (second) factors establish that a minority group has the "*potential* to elect" its preferred representatives. Id. at 50 n.17. Those factors provide some proof that goes to a potential to elect; they do not supply an arbitrary cutoff.[3]

[3] In McNeil v. Springfield Park District, 851 F.2d 937 (7th Cir. 1988), a case that predated Growe, Voinovich and De Grandy, the Seventh Circuit, construing Gingles, thought that the Supreme Court "based its brightline [majority] requirement on a plausible scenario under which courts can estimate approximately the ability of minorities in a single-member district to elect candidates of their choice," and did not want to extend the Court's reasoning to other scenarios. Since *Footnote continued on next page.*

By rejecting a rigid 50+% requirement for all types of section-2 dilution claims, this Court would effectuate "the goal of a political system in which race no longer matters." Uno, 72 F.3d at 991, citing Shaw, 113 S. Ct. at 2832. Suppose a protected group has less than 50%—say, as in this case, 26%—of the population in a given district, but votes together and can "pull, haul and trade to find common political ground," De Grandy, 512 U.S. at 997, with enough voters from other groups to elect the representative of their choice. Then, a redistricting comes along and, by reducing the relative size of that group in the district, denies that group the electoral influence it could have had. In that case, in fact, the electoral structure is preventing the group from electing the candidate of its choice. That dilution of minority group voting strength is what section 2 and Gingles forbid.

C. The Protection of Population Minorities.

The district court also expressed concerns about the extension of section-2 protection to protected groups without population majorities. First, the court complained that defining the ability to influence elections would present practical

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Gingles, the Supreme Court has explained that the majority precondition would have to be modified—or eliminated—when analyzing influence-district claims. The factors set forth supra Part III paint, for an influence-dilution claim, "a plausible scenario under which courts can estimate approximately the ability of minorities in a single-member district to elect candidates of their choice" with the help of cross-over voters.

difficulties. Order at 15-16. Such difficulties would be no different in principle from those attendant to the task of defining an effective voting majority in a vote-dilution case.

Second, the court complained that recognizing influence-dilution claims "rests on the insultingly stereotypical assumption that all members of a racial minority vote alike." Id. at 15-16. The question in a section-2 case is whether members of a racial or language minority are in fact deprived of equal voting opportunity on account of their minority status. In a section-2 claim, whether minorities "vote alike" is not a result of an "insultingly stereotypical assumption," but is a fundament of the claim, and proof that they do so in a given district is a threshold requirement for the claim.

Third, the district court complained of a "Catch 22" in which competing influence-dilution claims of two or more minority groups would clash. Id. at 16-17. Noting that there is a pending case involving a section-2 challenge in the same district by another minority group, the court concluded that to grant the plaintiffs in this case any relief would necessarily deny relief to the plaintiffs in the other case, "who are an even larger majority." Id. Such "competing relief" would be granted only if separate groups of plaintiffs in separate cases proved their respective section-2 claims. There should be less concern with competing influence-dilution claims than with competing vote-dilution claims, where the remedies would be the

creation of majority-minority districts. In the influence-dilution context, the result of competing claims would be not "racial fiefdoms," but the creation of influence districts that must form "voting coalitions" with others to elect their candidates. Uno, 72 F.3d at 991.

Fourth, the district court wondered why a protected group without a population majority should ever be permitted to elect the candidate of its choice. See Order at 20. This reveals a fundamental misunderstanding about the VRA. The VRA is designed to ensure that racial and language minorities do not lose elections solely because of "special impediments arising out of the intersection of race and the electoral system." Uno, 72 F.3d at 986. The plaintiffs in this case have alleged that African Americans in this district have enough voting power to reach out to others and build coalitions to elect their preferred representatives. They also allege that the new voting district reduces the number of African Americans in the district to the point where they cannot build coalitions and win the election. That is, in essence, a section-2 violation.

CONCLUSION

The district court erred by applying the standards for typical vote-dilution claims to influence-dilution claims and, as a result, holding that influence-dilution claims cannot be made under section 2 of the VRA. The Court should recognize

influence-dilution claims, since they are consistent with the language, and would advance the goals, of the VRA.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,006 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Joseph M. Fernandez

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of November 2002, I served two paper copies of the foregoing Brief of Amicus Curiae on each counsel of record listed below by first-class mail, postage prepaid:

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