

No. 02-2204

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

HAROLD METTS, et al.,

Plaintiffs - Appellants,

v.

WILLIAM J. MURPHY, et al.,

Defendants - Appellees,

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

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

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INTRODUCTION

Following redistricting litigation in the early 1980s, African-Americans in a Providence crossover district—a district where they were 26% of the population—were able to elect a candidate of their choice to the State Senate for the first time in Rhode Island’s history. The State took away that ability to elect in 2002 by drawing that crossover district out of existence. Plaintiffs deserve an opportunity to prove at trial that the elimination of this district caused African-Americans to have “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 42 U.S.C. § 1973(b).

ARGUMENT

I. THE STATE’S 50%-OR-NOTHING RULE IGNORES SUPREME COURT SECTION 2 CASES AND RECENT CASE LAW.

Plaintiffs agree that the basic *Gingles* framework—applied in a flexible, case-specific manner—is appropriate for single-member districts. See 1/9/04 Brief for Appellees For *En Banc* Hearing (“State Supp. Op. Br.”) at 12-13. But the State’s assertion that *Gingles*’ first prong requires a 50% rule in all cases contradicts its concession that “the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim.” *Id.* at 14 (internal quotation marks omitted). Like a standing requirement, the first *Gingles* prong was established to ensure minority voters suffered actual harm from the challenged action and a remedy is available. See *Grove v. Emison*, 507 U.S. 25, 28 (1993). Because

Plaintiffs will show that African-Americans had the ability to elect representatives of their choice in the old crossover district, but lost this ability after the State eliminated the district, Plaintiffs can demonstrate actual harm.¹ 1/9/04 Appellants' Supplemental Opening Brief ("Pls. Supp. Op. Br.") at 13; 11/4/02 Brief for Appellants ("Pls. Op. Br.") at 15-21; *accord* App. 7, at 125-26. The Supreme Court has made plain in numerous cases that having the ability to elect in an illustrative district is the key for this factor. *See Thornburg v. Gingles*, 478 U.S. 30, 51 n.17 (1986); *Grove*, 507 U.S. at 41; *Johnson v. DeGrandy*, 512 U.S. 997, 1008 (1994) (requiring "sufficiently large minority population to elect candidates of its choice," but refusing to hold that first *Gingles* prong requires minority population to be over 50% in a proposed district).

Many cases have relied upon *Gingles* and its progeny to recognize Section 2 crossover district claims. Pls. Supp. Op. Br. at 14; Pls. Op. Br. at 31-34. Notably, the Supreme Court recently let stand the New Jersey Supreme Court's recognition of Section 2 crossover district claims. *See McNeil v. Leg. Apportionment Comm'n*, 828 A.2d 840, 851-54 (N.J. 2003), *cert. denied*, 2003 U.S. LEXIS 88 (Jan. 12,

¹ And the remedy, of course, is reinstatement of the African-American crossover district, as adjusted for new Census data and the reduction in size of the State Senate. *See* Appendix ("App.") 2, at 12-13 (¶ 12), 15 (¶ 24).

2004).² *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003), further supports Plaintiffs' claim by reaffirming that "less-than-50%" minority groups often have the power to elect their preferred candidates.³ *See id.* at 2512, 2515-16, 2518; *see also* 10/28/03 Panel Op., slip op. at 15-16 (relying in part on *Georgia* to hold that crossover district claims were allowed under Section 2); *McNeil*, 840 A.2d at 853 (same).

II. THE STATE'S ARGUMENTS RELY ON FACTUAL ASSUMPTIONS THAT CANNOT BE ACCEPTED AS TRUE.

The State attacks Plaintiffs' claim based on factual suppositions that must be proven at trial, not assumed to be true by the Court. First, the State assumes that Plaintiffs' proposed district cannot be "more than about 26% African American." State Supp. Op. Br. at 10; *see also id.* at 4 n.3. But Plaintiffs focused on 26%

² The State relies upon the Supreme Court's summary affirmance in *Parker v. Ohio*, 124 S. Ct. 574 (2003) (affirming 263 F. Supp. 2d 1100 (S.D. Ohio 2003) (three-judge panel)). State Supp. Op. Br. at 6 n.6. A summary affirmance does not bind lower courts, however, where there are two or more alternate grounds presented for affirmance. *SDJ, Inc. v. City of Houston*, 841 F.2d 107, 108-09 (5th Cir. 1988). Here, the Supreme Court in *Parker* could have affirmed the lower court on other grounds besides the crossover/influence district issue. *See* Juris. Statement, No. 03-411, at *i (Sept. 15, 2003), *available on* LEXIS at 2003 U.S. Briefs 411; Motion to Affirm, at *i (Oct. 17, 2003). The *Parker* summary affirmance therefore does not bind this Court on any issue.

³ Moreover, under *Georgia* a district court must measure the impact of crossover districts on the ability of minorities to "effectively exercise" the "electoral franchise" under Section 5 of the Voting Rights Act ("VRA"). *See* 123 S. Ct. at 2511-13. This requires the same pragmatic, fact-sensitive judicial skills that are necessary to determine whether minorities in a proposed crossover district have the ability to elect under Section 2 and *Gingles*. Thus, *Georgia* weighs against a rigid application of the *Gingles* factors.

because that percentage of African-Americans in the now-eliminated crossover district previously allowed them to elect candidates of their choice from that district, not because it was the “largest possible concentration of the plaintiff minority group.” *Cf. id.* at 11. Plaintiffs have always alleged that a district with “26% or more” African-Americans was possible. App. 2, at 15 (§ 24) (emphasis added). In fact, Plaintiffs expect to provide expert testimony at trial that, consistent with the Amended Complaint, a district with about a 30% African-American population can lawfully be drawn.

Second, the State blithely asserts that “*in the ordinary course*, the level of majority crossover voting needed to win the election will necessarily be roughly equal to the African American vote [*i.e.*, 26%]” State Supp. Op. Br. at 9 (emphasis added). But how can the State know what the “ordinary course” of voting will be or has been in Rhode Island without a *factual* record? Actual evidence, including voter turnout rates, minority voting patterns, past election results, and the usual number of candidates in State Senate general and primary elections, is needed before a court can conclusively determine whether African-Americans in a proposed district lack the power to elect their chosen candidate.⁴

⁴ Even if the State were correct in its claim that 26% majority crossover support would be required to elect an African-American-preferred candidate, *see* State Supp. Op. Br. at 9, the *Gingles* Court found a Section 2 violation with even-greater levels of majority crossover voting. *See* 478 U.S. at 59 (28% to 49%).

For example, the State assumes the “garden-variety” State Senate primary election has two candidates vying for a majority. *See* State Supp. Op. Br. at 9 n.9. If, however, there were three candidates, one of whom was heavily supported by the African-American community, then that candidate might need only minimal majority crossover voting (or no crossover voting at all) to win by a plurality, which Rhode Island law permits. *See* Pls. Supp. Op. Br. at 19 nn.10-11. Indeed, depending on the facts developed in discovery, a court might find that African-Americans constitute a numerical, as well as functional, voting majority in a “plurality primary” election, thus mooted the need to determine whether Section 2 permits crossover district claims. Thus, Plaintiffs should have an opportunity to prove these facts, either at trial or after a prudential remand.⁵

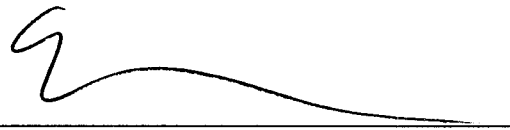
CONCLUSION

For the foregoing reasons, as well as for the reasons stated in Plaintiffs’ prior briefs, the Court should reinstate the Panel Opinion and permit Plaintiffs to proceed with their case, or, at a minimum, prudentially remand the case for further factfinding before deciding the legal question of whether Section 2 crossover district claims are cognizable.

⁵ While Plaintiffs believe the Court can recognize Section 2 crossover district claims without facts developed from a prudential remand, *see* State Supp. Op. Br. at 5 n.4, if the Court were to determine that additional facts would help resolve the legal issue, Plaintiffs would support such a remand. Pls. Supp. Op. Br. at 17-19.

Dated: January 20, 2004

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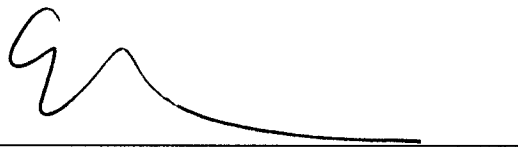
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1. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft® Word 97 SR-2 (1997 version) in 14 point Times New Roman.

2. The brief complies with the page length limitation imposed by Fed. R. App. P. 32(a)(7) and the Court's December 3, 2003 Order because exclusive of the table of contents, table of authorities, and certificates of counsel, this brief contains 5 pages.

3. I understand that a material misrepresentation can result in the Court striking the brief or imposing sanctions. If the Court so directs, I will provide a copy of the word or line print-out.

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**CERTIFICATE OF SERVICE PURSUANT TO FEDERAL RULE OF
APPELLATE PROCEDURE 25**

I hereby certify that on this 20th day of January 2004, I served two paper copies, and one electronic copy (on floppy disk), of the foregoing Appellants' Reply Brief on each counsel of record for Appellees by placing same in the United States Mail, first-class postage prepaid and properly addressed as follows:

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|---|--|
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I further certify that on this 20th day of January 2004, I filed fifteen paper copies and one electronic copy (in floppy disk form) of the foregoing Appellants' Reply Brief with the Clerk of the Court by placing same in properly-addressed overnight delivery envelopes, with appropriate postage prepaid.

Dated: January 20, 2004



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