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

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HAROLD METTS; JEAN WIGGINS; BRYAN EVANS; STEPHANIE CRUZ;  
URBAN LEAGUE; NAACP – PROVIDENCE;  
BLACK AMERICAN CITIZENS POLITICAL ACTION COMMITTEE  
Plaintiffs-Appellants,

v.

WILLIAM J. MURPHY, Speaker of the House of Representatives;  
ROGER N. BEGIN, in his official capacity as State Board of Elections Chairman;  
MATTHEW A. BROWN, Secretary of State;  
JOSEPH A. MONTALBANO, Senate President  
Defendants-Appellees,

DONALD L. CARCIERI, Governor;  
CHARLES FOGARTY, Lt. Governor and  
Presiding Officer of the Senate  
Defendants.

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**REPLY BRIEF OF APPELLEES FOR EN BANC HEARING**

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## **I. Plaintiffs' Claim Is Not Cognizable Under Section 2**

Plaintiffs continue to insist (and indeed concede) that they are making an “ability to elect” claim. However, *Thornburg v. Gingles*, 478 U.S. 30 (1986) held that an “ability to elect” claim requires that the plaintiff minority group be “sufficiently large and geographically compact to constitute a majority in a single-member district,” *id.* at 46-51 and n.12. Plaintiffs also concede that they are not a majority, or even close to one.

Plaintiffs do not cite a single authoritative decision holding that a minority group can state a cognizable claim under § 2 of the Voting Rights Act (VRA) when the minority group’s theory is as here: as part of a coalition with *majority* crossover voters, they can elect candidates of their choice from a district in which they constitute *less than a majority* of the population.<sup>1</sup> In fact, the only two cases

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<sup>1</sup> *Parker v. Ohio*, 263 F. Supp.2d 1100 (S.D. Ohio 2003) (three-judge court), *aff’d*, 124 S.Ct. 574 (2003), cited in Pl. Supp. Br. at 14, holds the exact opposite: that such claims are *not* cognizable. See 263 F. Supp.2d at 1004-05. (*Parker* also holds, contrary to Plaintiffs’ assertion, that *Cousin v. Sundquist*, 145 F.3d 818, 828-29 (6<sup>th</sup> Cir. 1998), not *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), is governing precedent on that issue in Ohio. *Id.* at 1005). Neither of the other two cases that Plaintiffs cite involved a claim that the Legislature should have drawn a district of the type Plaintiffs are here seeking. *McNeil v. Leg. Apportionment Comm’n*, 828 A.2d 840 (N.J. 2003), a state court case brought under the New Jersey Constitution, upheld the State’s choice and discretion to do so (by “unpacking” districts that had been packed with minority voters). See 828 A.2d at 851-52. In *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002) (three-judge court) (which misstated this Court’s decision in *Uno v. City of Holyoke*, 72 F.3d 973 (1<sup>st</sup> Cir. 1995), see 234 F. Supp.2d at 1322), plaintiffs challenged whether

to address this issue following *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003) have rejected the argument that § 2 requires States to create such districts. *Session v. Perry*, \_\_F. Supp.2d \_\_\_, 2004 WL 42591 (E.D. Tex., Jan. 6, 2004) at 40-42, 44-46; *Hall v. Virginia*, 276 F. Supp.2d 528, 532-38 (E.D. Va. 2003).

The legislative history of § 2 provides no basis to conclude that Congress intended to create a cause of action for the creation of “coalition” or “influence” districts. Congress was concerned about pervasive, wholesale discrimination and exclusion from the political process based on race. That is why § 2(a) protects against the denial or abridgement of the right to vote “on account of race or color” and § 2(b) protects “equal” opportunity to “participate.”<sup>2</sup> Nothing in the legislative history of § 2 suggests that Congress intended to give African-Americans the right,

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particular districts that the State had enacted, most of which were slightly above 50% African-American, would in fact elect African-American-preferred candidates, and the court rejected those claims as a matter of fact. *Id.* at 1298-1324.

<sup>2</sup> “Section 2 protects the right of minority voters to be free from election practices, procedures or methods, that deny them the same opportunities to participate in the political process as other citizens enjoy.” S. Rep. No. 97-417 (97<sup>th</sup> Cong., 2d Sess.) (1982) at 28. Section 2(b) provides: “A violation of subsection (a) of this section is established if, based upon the totality of the circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens protected by subsection (a) of this section 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” and further cautions that “nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” 42 U.S.C. § 1973(b).

in effect, to constitute a swing voting bloc in a district in which they barely constitute one-quarter of the population.<sup>3</sup>

## **II. There Is No Need For Remand**

There is no need to remand to develop a record on whether African-Americans often constitute a plurality of voters in State Senate Democratic Party primary elections. This Court can take judicial notice of the following facts: in the Senate district upon which the Plaintiffs' complaint relies (the former 9<sup>th</sup> district), (a) Senator Walton won a special election in 1983 and thereafter was unopposed in the Democratic primary through the 2000 elections, with the sole exception of 1992, in which Senator Walton received 72% of the vote against a single opponent; and (b) in the 2002 Democratic primary in the new 2<sup>nd</sup> Senate District, there were only two candidates: then-Senator Walton and now-Senator Pichardo.<sup>4</sup>

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<sup>3</sup> Finally, the Plaintiffs mischaracterize the Legislature's position as being one that espouses exceptions to the "majority" rule. Pl. Supp. Br. at 15. Simply stated, the Legislature's point is that *if* exceptions to *Gingles* (such as the panel dissent articulated) are to be recognized, then the Plaintiffs' allegation here – a district of no more than approximately 26% African-American voters – is well beyond what could be deemed to be a reasonable exception.

<sup>4</sup> Rhode Island State Board of Elections, "Primary & Election Count Book" (1984-2000) (each election year is a separate volume); [www.elections.state.ri.us](http://www.elections.state.ri.us). Unlike some Southern States, Rhode Island does not keep records of voter registration or turnout by race, and it is highly doubtful that accurate information on that subject in South Providence could be developed, even if there were a significant number of occasions in which more than two candidates ran in the Democratic primary there, which there are not.

### **III. Plaintiffs' Offer Of Proof On The "Totality Of The Circumstances" Is So Vague And Unclear That It Provides Virtually Nothing Of Substance**

Although Plaintiffs' offer of proof is ill-defined,<sup>5</sup> the Legislature briefly addresses the three topics that Plaintiffs assert are the most significant to this inquiry. Ironically, each provides strong support for the Legislature.

1. *The extent to which members of the minority group have been elected to public office in the jurisdiction.* Members of the minority group specified here, Non-Hispanic African-Americans, have consistently been elected to the Rhode Island General Assembly in numbers that exceed their proportion of the Rhode Island population for at least the last two decades.<sup>6</sup>

2. *The extent to which voting is racially polarized.* If, as Plaintiffs allege, African-Americans can elect their candidates of choice (even when they constitute only about one-quarter of the population of the district), then their Hispanic and white allies must constitute roughly another one-quarter of the electorate (in order

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<sup>5</sup> It should be noted that *Brown v. Dean*, 555 F. Supp. 502 (D.R.I. 1982) did not question the good faith of the Board of Canvassers; *see id.* at 506 ("The Court does not question the good faith of the Board of Canvassers of the City of Providence. There is no evidence that the Board of Canvassers has acted out of bias or improper motivation.").

<sup>6</sup> According to the federal census, members of this group constituted 2.82% of Rhode Island's population in 1980, 3.42% in 1990, and 4.0% (as the amended complaint alleges) in 2000. [www.census.gov](http://www.census.gov). The percentage of African-Americans in the Rhode Island House of Representatives, by legislative term starting with 1985-86, was 4%, 5%, 6%, 7%, 8%, 7%, 7%, 8%, 6%, and currently is 6.7%, and their percentage in the Rhode Island General Assembly (the House



for the coalition to constitute a majority) and thus constitute one-third of all Hispanic and white voters. Therefore, although for purposes of the motion to dismiss Plaintiffs may have adequately alleged that voting is racially polarized, their other allegations, for Rule 12(b)(6) purposes, show the reliable support of roughly one-third of majority voters, which necessarily means that the extent of such alleged polarization is neither extreme nor severe. *Cf. Abrams v. Johnson*, 521 U.S. 74, 92 (1997), (third *Gingles* precondition not satisfied where, *inter alia*, majority crossover ranged from 22% to 38%).

3. *Proportionality*. Nor does *Johnson v. DeGrandy*, 512 U.S. 997, 1014 n.11 (1994) support Plaintiffs' case. The Court there expressly considered proportionality in terms of "the number of majority-minority voting districts." Here, the number of "majority-minority voting districts" in the Plaintiffs' proposed plan is the *same* as the number of such districts in the plan that the Legislature duly enacted.<sup>7</sup>

### CONCLUSION

For the reasons stated here and in the Legislature's earlier briefs, the District Court's judgment should be affirmed.

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and Senate combined) was 3.3%, 4.0%, 4.7%, 5.3%, 6.0%, 5.3%, 5.3%, 6.0%, 4.7%, and is currently is 4.4%.

<sup>7</sup> Each of the districts upon which *DeGrandy* relied in its assessment of proportionality was either majority African-American or supermajority Hispanic. *Id.* at 997; *DeGrandy v. Wetherell*, 815 F. Supp. 1550, 1580 (N.D. Fla. 1992).

Dated: January 20, 2004

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**CERTIFICATE OF COMPLIANCE WITH  
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