IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

JAMILA JOHNSON, et al. Plaintiffs, v. KYLE ARDOIN, in his official capacity as the Acting Secretary of State of Louisiana, Defendant.	Case No. 3:18-cv-625-SDD-EWD

MEMORADUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Plaintiffs bring a claim under § 2 of the Voting Rights Act of 1965 ("VRA") alleging that the Louisiana Legislature intentionally "packed" and "cracked" African American voters to dilute their vote when it created a single majority-minority district in Louisiana following the 2010 census. As such, Plaintiffs seek declaratory and injunctive relief as well as a court-ordered re-drawing of at least some of Louisiana's Congressional Districts.

As a threshold matter, this Court lacks jurisdiction to hear this case because Plaintiffs have failed to request a three-judge court pursuant to 28 U.S.C. § 2284. Notwithstanding the three-judge court issue, this Court lacks subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) because the Plaintiffs lack standing to bring these claims. Furthermore, the Plaintiffs never sufficiently allege that a second *compact* congressional district can be created in Louisiana. Because of this, and other defects found on the face of the Complaint, Plaintiffs have failed to state a claim under 12(b)(6). Finally, this case should be dismissed on the equitable ground of laches since Plaintiffs waited until mere months before the fourth congressional elections held under the current Louisiana apportionment plan, and seek a new plan for only the fifth and last election cycle to be held under the current plan.

I. Plaintiffs Have Failed to Request a Three-Judge Panel and Therefore this Court Should Dismiss the Complaint.

Section 2284 of Chapter 28 of the United States Code states, in relevant part, that "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts . . . ." 28 U.S.C. § 2284. Through artful pleading, Plaintiffs attempt to avoid the statutory trigger for a three-judge court under 28 U.S.C. § 2284 by not *expressly* raising claims under the Fourteenth and Fifteenth Amendments to the United States Constitution. However, an examination of the text reveals, as noted in *City of Mobile*, the underlying language of Section 2 of Voting Rights Act and the Fifteenth Amendment are essentially identical. *See City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980). The Fifteenth Amendment provides, "[t]he *right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color*, or previous condition of servitude . . . . " (emphasis added). Section 2 of the Voting Rights Act provides, "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner *which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color*, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b)." 52 U.S.C. § 10301 (emphasis added). Subsection (b) was added in 1982 in order to add the totality of the circumstances test.

The Plaintiffs' actions in this case create an issue of first impression for the federal judiciary: can a plaintiff skirt the provisions of 28 U.S.C. § 2284, therefore avoiding a three-judge panel, by not expressly mentioning constitutional claims when bringing a claim under

Section 2 of the Voting Rights Act of 1965? As will be shown, this attempted end-run around federal law is as ill-fated as it is unprecedented.[1]

As the United States Supreme Court noted in *City of Mobile v. Bolden*, "Section 2 was an uncontroversial provision in proposed legislation whose other provisions engendered protracted dispute. . . . The view that this section simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings." 446 U.S. at 61. Both the legislative history of 28 U.S.C. § 2284 and purposes and effect of the Voting Rights Act lead inexorably to the conclusion that this action should be dismissed, or alternatively, referred to the Chief Justice for Fifth Circuit for the impaneling of a three-judge court. In fact, pursuant to 28 U.S.C. § 2284 this Court lacks power to do anything else.

a. The Purposes of the Voting Rights Act and the Legislative History of Section 2284 Make Clear that all Cases Brought Under the Voting Rights Act Are Required to Be Heard by a Panel of Three Judges.

In *Page v. Bartels*, the Court of Appeals for the Third Circuit looked extensively at the history and purpose of both the Voting Rights Act and Section 2284. 248 F.3d 175 (3d Cir. 2001). The court in *Page* held that when constitutional and Voting Rights Act claims are brought together, a single district court judge could not separately reach claims brought under the Voting Rights Act without referring the case to a three judge panel under 28 U.S.C. § 2284.[2] *Id*. at 190.

[1] It is interesting to note that a review of the case law shows that singular claims under the Voting Rights Act are exceedingly rare. In fact, Counsel for Defendant is unaware of any instance such a claim made it past the Motion to Dismiss stage. *See Huertas v. City of Camden*, 245 Fed. Appx. 168 (3d Cir. 2007). However, Plaintiffs' counsel now brings three such claims, including this one, presumably in an effort to avoid a three-judge panel for reasons that are currently unclear. *See Chestnut v. Merrill*, No. 2:18-cv-907 (N.D. Ala. 2018); *Dwight v. Kemp*, No. 1:18-cv-2869 (N.D. Ga. 2018).

[2] While the holding and underlying facts in *Page* are not entirely on point, the same reasoning undergirding the court's holding, and its discussion of the history and purpose of the three-judge court statute, is wholly applicable here. Furthermore, there is a lack of precedent in this context simply because Voting Rights Act claims are universally brought in concert with claims under the Fourteenth or Fifteenth Amendments. Based on counsel's research, this instant action and two cases filed the same day as the complaint in this matter in federal courts in Georgia and Alabama by the same counsel appear to be the first time congressional districts have ever been challenged under Section 2 without an express invocation of a constitutional amendment in the complaint. *Compare*

As an initial matter, it is well accepted by the courts that the Voting Rights Act is simply Congress enforcing provisions of the Fourteenth and Fifteenth Amendments. *See e.g. City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) ("We have also concluded that . . . measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States."); *Lewis v. Governor of Ala.*, No. 17-11009, *17-18 (11th Cir. July 25, 2018) ("The Voting Rights Act, which is designed to implement the Fifteenth Amendment and, in some respects, the Fourteenth Amendment was enacted pursuant to an identical enforcement provision, U.S. Const. amend. XV, § 2, which the Supreme Court has referred to [in *City of Boerne*] as a parallel power to enforce the provisions of the Fifteenth Amendment." (internal quotations and citations omitted)); U.S. Const. amend. XV, § 2 ("The Congress shall have the power to enforce this article by appropriate legislation."); U.S. Const. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

In 1976, Congress revised 28 U.S.C. § 2284 to its current form "in response to complaints" that the statute as then written was "cumbersome, labyrinthine, and unnecessary." *Page*, 248 F.3d at 189. When enacting the change it is clear from the legislative history that "Congress was concerned less with the source of the law on which the apportionment challenge was based than on the *unique importance of apportionment cases generally*." *Id.* at 190 (emphasis added). This is further reinforced by the fact that when the 1976 amendments were made, the only possible claim to invalidate a congressional apportionment under the Voting Rights Act was under §5, which itself provides for a three-judge court. *Id*. at 189-90. In other words, when Congress amended § 2284 it appeared nearly impossible for "any case involving

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Complaint (Doc. No. 1) (*filed* June 13, 2018) *with Chestnut*, No. 2:18-cv-907 (*filed* June 13, 2018); *and Dwight*, No. 1:18-cv-2869 (*filed* June 13, 2018).

congressional reapportionment," *see* 28 U.S.C. § 2284, to be brought in federal court and *not* be subject to a panel of three-judges. *See Page*, 248 F.3d at 189; *see also Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969).

This properly captures Congress' understanding of the three-judge statute at the time it was written because "[t]he Senate Report . . . consistently states that 'three-judge courts would be retained . . . in any case involving congressional reapportionment or the reapportionment of any statewide legislative body. . . .'" *Page*, 248 F.3d at 190 (second alteration in original) (citing and quoting S. Rep. No. 94-204 (1976), reprinted in 1976 U.S.C.C.A.N. 1988, 1988). As such, "[c]hallenges to apportionment are the kinds of claims requiring what has been described as the 'special and extraordinary procedure' represented by the convening of a three-judge district court." *Page*, 248 F.3d at 190 (citing and quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 155 (1963)).

This Court, composed of a single judge, lacks subject matter jurisdiction over this matter. Defendant requests that if this portion of the Motion to Dismiss is denied, that the question be certified for immediate appeal pursuant to 26 USC 1292(b), because it is a significantly important question and it is vital to the judicial economy of this matter.[3] *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 914-15 (5th Cir. 2008) (accepting certified question of a denial of motion to dismiss for lack of subject matter jurisdiction); *Lemery v. Ford Motor Co.*, 244 F. Supp. 2d 720, 728-29 (S.D. Tex. 2002) (district court certifying question under § 1292(b) as there was an outstanding "controlling question of law concerning the Court's subject matter jurisdiction.") If a single judge does not have jurisdiction over this claim, it would be a

[3] 28 U.S.C. § 1292(b) states, in relevant part, that "[w]hen a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order."

significant waste of resources to proceed with this action for it to be vacated, only to have to rehear the entire matter before a fully composed three-judge panel. *See Lemery*, 244 F. Supp. 2d at 728 ("It would pain the Court to see both attorneys of this excellence and well-motivated Parties proceed to judgment after considerable expense and delay, only to discover that the judgment must be overturned on appeal because the federal judiciary lacks subject matter jurisdiction.").

II. This Court Is Without Jurisdiction as Plaintiffs Lack Standing to Bring Their Claims.

a. Legal Standard

The determination of whether a case or controversy exists is jurisdictional. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-241 (1937). When a Motion to Dismiss is predicated on jurisdictional and other grounds, the court should first resolve the jurisdictional issue before an attack on the merits of the claim. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

When addressing a lack of subject matter jurisdiction, "[a] court may base its disposition of a motion to dismiss . . . on (1) the complaint alone; (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Robinson v. TCI/US West Communs.*, 117 F.3d 900, 904 (5th Cir. 1997). The allegations in the Plaintiffs' complaint receive no presumption of the truthfulness when determining whether the court has jurisdiction. *Montez v. Dep't of the Navy*, 392 F.3d 147, 149 (5th Cir. 2004). Accordingly, the burden of proof for a Rule 12(b)(1) Motion to Dismiss is on the party asserting jurisdiction. *Ramming*, 281 F.3d. at 161. In this case, the Plaintiff constantly bears this burden. *See id.*

As this Court is no doubt aware, Article III of the U.S. Constitution limits the jurisdiction of federal courts to "cases" or "controversies." *See* U.S. Const. art. III, § 2; *Allen v. Wright*, 468

U.S. 737, 750 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). "The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government." *Allen*, 468 U.S. at 750. Standing "is perhaps the most important of these doctrines." *Id.* To invoke federal jurisdiction under Article III, a plaintiff must establish the following "irreducible constitutional minimum[s] of standing": (1) an injury-in-fact; (2) traceability; and (3) redressability. *Lujan*, 504 U.S. at 560-61.

Nowhere in their Complaint do Plaintiffs meet the "irreducible constitutional minimum[s]" of standing required by *Lujan* and its progeny. To meet the redressability requirement a plaintiff must "show[] that a favorable decision will relieve a discrete injury to himself." *James v. City of Dallas*, 254 F.3d 551, 556, n.14 (5th Cir. 2001). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). Without standing, Plaintiffs merely make a "generalized grievance against governmental conduct of which he or she does not approve." United States v. *Hays*, 515 U.S. 737, 745 (1995); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1921 (2018).

The Supreme Court in *Gingles* stated that to make a successful claim under § 2, "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." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). Therefore, any viable § 2 remedy *must be reasonably compact*. *League of Latin Am. Citizens v. Perry*, 548 U.S. 399, 430 (2006). Plaintiffs have failed to produce any proof that: (1) any of the Plaintiffs would actually live in either newly created majority-minority district; and (2) the newly formed districts containing Plaintiffs would be reasonably compact. The lack of a viable remedial plan is a pleading failure under Rule 8 and *Iqbal*. *See Broward Citizens for*

Fair Dists. v. Broward County, 2012 U.S. Dist. LEXIS 46828, *18, n. 6 (S.D. Fla. 2012) ("The first *Gingles* factor . . . requir[es] a plaintiff to demonstrate the existence of a proper remedy. Plaintiffs mere allegation that [a possible remedial maps exist] is conclusory and insufficient to meet Plaintiffs' pleading burden."). The Supreme Court has "set out the condition that a challenge to an existing set of single-member districts must show the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *League of Latin Am. Citizens*, 548 U.S. 399 (internal quotations omitted). The failure of Plaintiffs to allege with any specificity that they would, could, or will live within one of two reasonably compact majority-minority districts deprives them of standing.

In this case, Plaintiffs have alleged that their votes are diluted and as such have requested two majority-minority districts to remedy the alleged wrong. Doc. 1 ¶¶ 19-23, 91. However, Plaintiffs have failed to prove that they would reside in *any* congressional district created that provides a remedy to their complained of harms—let alone a district that was reasonably compact as is required by the Supreme Court. Therefore, Plaintiffs fail to maintain standing and this case should be dismissed.

b. Plaintiffs Have Failed to Show that they Would Reside in any Reasonably Compact Remedial District

i. Standing of Plaintiffs Living Specifically Within Louisiana's Congressional District 2.

Plaintiffs Johnson,[4] Henderson, Thomas, and Howard all currently reside in Congressional District 2 ("CD-2"). *See* Complaint at ¶¶ 15-18 (Doc. No. 1). CD-2 is currently

[4] Plaintiff Johnson has yet to suffer any harm at all as she is a new resident of the district and has yet to vote in any election in CD-2. Complaint ¶15 (Ms. Johnson "*will vote* for a candidate for the U.S. house of Representatives in CD 2 for the first time in the November 2018 general election."). Some future hypothetical harm, without more, is insufficient for standing purposes.

Louisiana's only majority-minority district. The Plaintiffs who reside in CD-2 do not specifically request that their own district be redrawn, but instead seek "the adoption of a valid congressional redistricting plan for Louisiana that includes two majority-minority districts." *Id*. at 26C. Federal courts in Louisiana have thrice rejected the Louisiana legislature's attempts to do just that. In *Hays v. Louisiana* (hereinafter, *Hays I*), the state of Louisiana, crafted a map with two majority-minority congressional districts in order to comply with the U.S. Attorney General's office's insistence that only a map with two such districts would be "precleared." 839 F. Supp. 1188, 1197-98, n. 21 (W.D. La. 1993). That map was found to be a racial gerrymander. *Id*. at 1215-16. Louisiana subsequently drafted yet another plan with two majority-minority districts, which was also found to be a racial gerrymander. *Hays v. Louisiana*, 862 F. Supp. 119, 125 (W.D. La. 1994) (hereinafter, *Hays II*). The district court drew its own plan and was only able to create one majority-minority district because the court "did not carve districts along race lines, except in District 2, where the Constitution and fairness requires us to consider it." *Id. Hays II* was subsequently vacated by the Supreme Court on standing grounds. *United States v. Hays*, 515 U.S. 737 (1995). *Hays* came back again to the district court "like the Australian who went bonkers trying to throw away his old boomerang" and the two majority-minority district plan was once again invalidated and once again a plan with a single majority-minority district was put in its place. *Hays v. Louisiana*, 936 F. Supp. 360 (W.D. La. 1996) (hereinafter, *Hays III*).

In the *racial gerrymandering context*, the Supreme Court has held that a plaintiff only has standing to challenge the district in which the plaintiff resides. *Hays*, 515 U.S. at 744-45; *Shaw v. Hunt*, 517 U.S. 899, 904 (1996). However, pursuant to Plaintiffs' Complaint, they have not brought a racial gerrymandering claim and have instead brought a claim solely under § 2 of the Voting Rights Act. *See* Doc. No. 1 ¶¶ 88-95. Vote-dilution, which Plaintiffs singularly allege,

cannot be remedied "by creating a safe majority-black district *somewhere else* in the State." *Shaw*, 517 U.S. at 917 (emphasis added). Instead, "for standing purposes, to the extent plaintiffs' alleged harm from gerrymandering is the dilution of their votes, that injury is district specific." *Gill*, 138 S. Ct. at 1930. Consequently, "plaintiff's remedy must be 'limited to the inadequacy that produced [his] injury-in-fact.'" *Id*. (internal alterations in original) (citing and quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). There is no specific evidence in the Complaint that the creation of a second majority-minority district would remedy any injury specific to Plaintiffs residing in CD-2. Furthermore, since Plaintiffs do not bring a *Shaw* based intentional racial gerrymandering claim, and also fail to allege how a second congressional district somewhere in the state would remedy their harm, they are unable to maintain standing as there is nothing but an assertion that they are "packed." Therefore, the Plaintiffs residing in CD-2 currently lack standing to bring their claims.

ii. Standing of Plaintiffs Living Specifically Within Louisiana's Congressional District's 5 and 6.

Plaintiffs Rogers, Armstrong, Smith, Hart, and Lanus fail to allege that they would actually live in any majority-minority district that this Court may order. Plaintiffs each allege that "an additional majority-minority district could be drawn incorporating" the parish in which the Plaintiffs live. *See* Doc. No. 1 ¶¶ 19-23. No specific allegation is made that any of the Plaintiffs currently living in CD-5 or 6 (or CD-2 for that matter) would actually reside in any newly created district—should one be drawn. No specific map was provided nor were any facts alleged that would allow the Court to conclude Plaintiffs harm could be remedied. *Broward Citizens for Fair Dists.*, 2012 U.S. Dist. LEXIS 46828, *18, n. 6. As a practical matter, counties—or in the case of Louisiana, parishes—are often split to comply with various traditional districting criteria, chief of which is the equal population requirements found in *Baker*

v. Carr and its progeny. 369 U.S. 186 (1962); *see also Gray v. Sanders*, 372 U.S. 368 (1962). As a result, Defendant has no way to know what relief these Plaintiffs seek that would provide a remedy to their claimed harm.

c. The Secretary of State Lacks the Power to Implement Any Remedy the Court May Order.

It is an "elemental fact that a state official cannot be enjoined to act in any way that is beyond his authority to act in the first place." *Okpalobi v. Foster*, 244 F. 3d 405, 427 (5th Cir. 2001). It is unquestionable that the Secretary of State cannot redress the Plaintiffs' alleged injury. The Secretary has no authority to draw congressional districts in the first instance, re-draw districts to, or change the composition of any district. *See* La. Const. art. IV, § 7. Finally, the Secretary of State has no ability to amend La. R.S. 18:1276.1, the statute that Plaintiffs challenge in their Complaint. *See* La. Const. art. III, § I (vesting the legislative power with the Louisiana Legislature). The Secretary of State does not have the authority to effectuate a cure for the injury about which the Plaintiffs sue. Therefore, this case should be dismissed because the plaintiffs' complaint is one that the Secretary simply cannot fix.

d. The Actions Plaintiffs Complain of Are Not Traceable to the Louisiana Secretary of State.

The second element of the standing analysis is that there must be a causal connection which is "fairly traceable" to "the action of defendant." *Lujan*, 504 U.S. at 560-61. The State of Louisiana has legislative, executive, and judicial branches similar to those found in the federal government. These three branches, again nearly identical to their federal counterparts, are granted enumerated powers by the Louisiana Constitution. The Louisiana Constitution is clear that "no one . . . branch[], nor any person holding office in one of them, shall exercise power belonging to either of the others." La. Const. art. II, § 2. The Secretary of State is a member of

the executive branch. La. Const. art. IV, § 7. While the Secretary of State is the chief elections officer of the state, only the Louisiana Legislature is vested with the power to actually make laws. *See* La. Const. art. IV, § 7; La. Const. art. III, § 1. The Louisiana legislature codified the current congressional apportionment following the 2010 census via Acts 2011, 1st Extraordinary Session, No. 2, § 5(A), codified in the Louisiana statutes as La.R.S. 18:1276.1.[5]

As Plaintiffs admit, the Secretary of State "is responsible for preparing and certifying the ballots for all elections, promulgating all elections returns, and administering the election laws." Doc. No. 1 ¶ 24; *see also* La. Const. art. IV, § 7. Nowhere in their Complaint do Plaintiffs allege *any* wrongdoing attributable to the Secretary of State. *See e.g.*, Doc. No. 1 ¶ 31 (On April 13, 2011, the Legislature established Louisiana's six Congressional districts with the passage of Act 2, the 2011 Congressional Plan."); Doc. No. 1 ¶ 3 ("Even though Louisiana had maintained a substantial African-American population, the *Louisiana State Legislature* ('the Legislature') chose to limit minority voting strength" of African American voters); Doc. No. 1 ¶ 92 ("Under Section 2 of the Voting Rights Act, the Legislature was required to create a second majority-minority district in which African Americans have the opportunity to elect their candidates of choice."). In fact, nowhere in the complaint do Plaintiffs allege *any wrongdoing* by the Secretary of State. *See id*. at ¶¶ 50, 53-55, 57-61, 63, 68-69 (all allegations of wrongdoing by the Louisiana Legislature). The Plaintiffs' alleged injury, if any, owes to the conduct of other departments, agencies, or branches of the State governments, not to the Secretary of State. Plaintiffs therefore lack standing to bring this case against the Secretary of State.

III. Plaintiffs Have Failed to State a Claim Under 12(b)(1) and Therefore this Case Should Be Dismissed.

a. Legal Standard

[5] In fact, with limited exceptions, it is impossible for a legislative body other than either the state legislature or Congress to apportion congressional districts. *See* U.S. Const. art. I, § 4, Cl. 1.

A pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). "The pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing and quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). As such, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.*

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id*. The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. *Id.* Although a district court must assume the veracity of well-pleaded facts, a complaint that "fail[s] to show more than mere conclusory allegations" is properly met with dismissal for failure to state a claim. *Smith v. Dep't of Health & Hosps. La.*, 581 Fed. Appx. 319 (5th Cir 2014) (citing *City of Clinton v. Pilgrim's Pride Corp.*, 632 F. 3d 148, 155 (5th Cir. 2010)). Plaintiffs' Complaint is rife with the exact sort of unadorned and conclusory allegations that *Iqbal*, *Twombly*, and their progeny sought to eliminate.

b. Plaintiffs Request for a Majority-Minority District Created of "Eligible Voters" Without More Is Insufficient to Afford Relief.

In their Complaint, Plaintiffs state that "African Americans in Louisiana" can "constitute a majority of eligible voters in two congressional districts." Doc. No. 1 ¶91. Furthermore, the balance of the Complaint is inconsistent in how it references African American voters. Occasionally the complaint refers to "Black Voting Age Population" or ""BVAP". Doc. No. 1 ¶¶

8, 34, 36. Other times the Complaint simply discusses "eligible voters." *Id.* at ¶¶ 9, 91. Race, however, is not binary. *See e.g., Pope v. County of Albany*, 2014 U.S. Dist. LEXIS 10023, *7, n.3 (N.D.N.Y. 2014). For this exact reason, demographers often use, "non-Hispanic Black", in addition to BVAP, and "Any Part Black" as part of their calculations. *See e.g., Pope v. County of Albany*, 2014 U.S. Dist. LEXIS 10023, *7, n.3 (N.D.N.Y. 2014) *Fairley v. Hattiesburg Miss.*, 662 Fed. Appx. 291 (5th Cir. 2016); *Fairley v. Hattiesburg*, 122 F. Supp. 3d 553, 559 (S.D. Miss. 2015). Furthermore, the first *Gingles* prong requires "citizens of voting age" who could form a majority. *See Reyes v. City of Farmers Branch Tex.*, 586 F.3d 1019, 1023 (5th Cir. 2009). Plaintiffs' naked assertion that "African Americans in Louisiana" can "constitute a majority of eligible voters in two congressional districts" is insufficient on its face to warrant relief and therefore this complaint should be dismissed.

c. Plaintiffs Fail to Sufficiently Allege that African American Voters Can Constitute a Reasonably Compact Majority in Two Districts.

As discussed *supra*, the Supreme Court in *Gingles* stated that to make a successful claim under § 2, "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." *Gingles*, 478 U.S. at 50-51. There are two operative parts to the first *Gingles* precondition: numerosity and compactness. Plaintiffs repeatedly allege that "African Americans in Louisiana are sufficiently numerous and geographically compact to constitute a majority of eligible voters in two congressional districts." *See* Doc. No. 1 ¶¶ 9, 91.

Assuming there is enough BVAP to constitute two majority-minority districts in Louisiana, there is no shred of "factual matter" anywhere in the Complaint, "taken as true" that two *compact* districts could be created. *See Twombly*, 550 U.S. at 555. "Satisfying the first *Gingles* precondition—compactness—normally requires submitting as evidence hypothetical

redistricting schemes in the form of illustrative plans." *Gonzalez v. Harris County*, 601 Fed. Appx. 255, 258 (5th Cir. 2015) (per curium); *see also Fairley v. Hattiesburg*, 584 F.3d 660, 669 (5th Cir. 2009) ("Requiring the district court to fish through the record for evidence that might conceivably support redistricting approaches that were never urged by the plaintiffs or presented as a developed plans would be downright perverse."). In fact, the Court of Appeals for the Eleventh Circuit requires the demonstration of a proper remedy through maps, a failure of which constitutes a pleading deficiency sufficient to warrant dismissal under Rule 8 and *Iqbal*. *Broward Citizens for Fair Dists. v. Broward County*, 2012 U.S. Dist. LEXIS 46828, *18, n. 6 (S.D. Fla. 2012); *see also Burton v. City of Belle Glade*, 178 F.3d 1175, 1199 (11th Cir. 1999).

A remedial map has special importance when, as here, there is a history of litigation in the relevant jurisdiction which resulted in the utter failure to produce a legally compliant second majority-minority district. *See generally Hays I*, 839 F. Supp. 1188; *Hays II*, 862 F. Supp. 119; *Hays III*, 936 F. Supp. 360. As discussed *supra*, in each *Hays* case the Louisiana Legislature attempted to draw a second majority-minority district expressly for the purpose of gaining pre-clearance under § 5. *See e.g., Hays II*, 936 F. Supp. at 363 ("From the outset the legislators received unmistakable advisories from the Attorney General's office that only redistricting legislation containing two majority-minority district would be approved . . . , so the Legislature directed its energies toward crafting such a plan."[6]). In fact, "[t]he primary justification espoused by the State for the enactment of . . . a second majority-minority district was [that it] was required under the Voting Rights Act." *Hays III*, 936 F. Supp. at 369 (emphasis in original). However, like many cases since the Supreme Court's decision in *Shaw v. Reno*, the Voting

[6] It also should be noted that, likely as a result of *Hays I-III*, no such demand for a second majority-minority district was made by the Attorney General's office when applying for pre-clearance after the 2010 census. The Attorney General's office promptly pre-cleared the map with a single majority-minority district. *See* Letter of Assistant Attorney General Day, Aug. 01, 2011.

Rights Act justification was not enough to save the a second majority minority Congressional District in Louisiana from violating the Fourteenth Amendment. *Shaw v. Reno*, 509 U.S. 630 (1993); *see e.g., Miller v. Johnson*, 515 U.S. 900 (1995); *Copper v. Harris*, 137 S. Ct. 1455, 1464 (2017) ("When a State invokes the VRA to justify race-based districting, it must show (to meet the 'narrow tailoring' requirement) that is had a 'strong basis in evidence' for concluding that the statute required its action." (quoting *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015)); *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788 (2017). Furthermore, taking the Plaintiffs' proposed BVAP at face value and comparing it with the population numbers found in *Hays III*, not much has changed in terms of population percentages.[7] *Compare* Doc. No. 1 ¶ 8 (alleging CD 2 has a BVAP of 59.7%, CD 5 has a BVAP of 33.7%, and CD 6 has a BVAP of 21.5%); *with Hays III*, 936 F. Supp. at 377 (showing similar population numbers as percentage of the district population as to what Plaintiffs allege).[8]

However, irrespective of whether a *map* is required at this stage, what cannot be doubted is that Plaintiffs were required to adduce *some* facts on compactness. In fact, without a plan or other facts showing that two majority-minority districts are plausible, Plaintiffs have given merely "a legal conclusion couched as a factual allegation" which amounts to nothing more than a "threadbare recital[] of the elements of a cause of action." *Iqbal*, 556 U.S. at 678; *compare* Doc. No. 1 ¶ 9 ("African Americans in Louisiana are sufficiently numerous and geographically compact to form a majority of eligible voters in a second congressional district . . . .) *with Gingles*, 478 U.S. at 50 ("First, the minority group must be able to demonstrate that it is

[7] What has changed is that Louisiana *lost* a congressional seat as of the 2010 census, which would make it even more difficult to draw two compact majority-minority districts.

[8] Given the difficulties Plaintiffs face in creating a compact map, made all the more evident as they have yet to produce one, is that Plaintiffs *may* be attempting to create a "minority opportunity district." This attempt, if one is being made at all, should be rejected by this court. *See Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) ("This Court has held that § 2 does not require the creation of influence districts.") (citing and quoting *League of Latin Am. Citizens*, 548 U.S. at 445).

sufficiently large and geographically compact to constitute a majority in a single-member district."). *Twombly, Iqbal*, and the Rule 8 pleading standards play an important role in the fairness of our judicial system because they require fair notice to the Defendant of the claims against him. *See Twombly*, 550 U.S. at 555. Plaintiffs have wholly failed to sufficiently plead their case and as such this claim should be dismissed.

IV. The Equitable Doctrine of Laches Bars Plaintiffs Requested Relief.

The equitable doctrine of laches applies when there is "an inexcusable delay that results in prejudice to the defendant." *Elvis Presley Enters. v. Capece*, 141 F.3d 188, 205 (5th Cir. 1998). Laches has three elements: "(1) delay in asserting a right or claim; (2) that the delay was inexcusable; and (3) that undue prejudice resulted from the delay." *Id*. (internal quotations and alterations omitted).

Plaintiffs waited seven years and three congressional elections to bring their claim. The redistricting statute was enacted in 2011, soon after the completion of the decennial census. *See* Acts 2011, 1st Extraordinary Session, No. 2, § 5(A) (codified in the Louisiana statutes as La.R.S. 18:1276.1). There is no excuse for Plaintiffs' delay since records show that this same claim was previously filed in 2013 by a group of plaintiffs residing in CD-2. *Buckley v. Schedler*, No. 3:13-cv-00763, (M.D. La. 2013). The suit was subsequently dismissed without explanation and without prejudice upon motion of the plaintiffs. The five year delay in reviving the case is likewise unexplained. By waiting seven years to bring their claim, the Plaintiffs will prejudice the Secretary of State and people of Louisiana by throwing the election machinery into disarray for the benefit of a single election under the current apportionment plan. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (holding that, in the preliminary injunction context, waiting until five years into a redistricting cycle weighed against relief).

CONCLUSION

For the aforementioned reasons this Court should either dismiss this case for lack of standing, or, in the alternative, dismiss this case for failure to state a claim.

Dated: July 30, 2018 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that, on this 31st day of July 2018, the foregoing pleading was filed electronically with the Clerk of Court using the CM/ECF system which gives notice of filing to all counsel of record.

/s/ Angelique Duhon Freel