UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Vandroth Backus, Willie Harrison Brown, Charlesann Buttone, Booker Manigault, Edward McKnight, Moses Mims, Jr., Roosevelt Wallace, and William G. Wilder, on behalf of themselves and all other similarly situated persons, Plaintiffs, vs. The State of South Carolina, "Nikki" R. Haley, in her capacity as Governor, Ken Ard, in his capacity as Lieutenant Governor, Glenn F. McConnell, in his capacity as President Pro Tempore of the Senate and Chairman of the Senate Judiciary Committee, Robert W. Harrell, Jr., in his capacity as Speaker of the House of Representatives, James H. Harrison, in his capacity as Chairman of the House of Representatives' Judiciary Committee, Alan D. Clemmons, in his capacity as Chairman of the House of Representatives' Election Law Subcommittee, Marci Andino, in her capacity as Executive Director of the Election Commission, John H. Hudgens, III, Chairman, Cynthia M. Bensch, Marilyn Bowers, Pamella B. Pinson, and Thomas Waring, in their capacity as Commissioners of the Elections Commission, Defendants.	Case No.: 2:11-cv-03120-PMD-HFF-MBS

DEFENDANT ROBERT W. HARRELL, JR.'S
MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Introduction

Pursuant to Local Rule 7.04 D.S.C., Defendant Robert W. Harrell, Jr., in his capacity as Speaker of the House of Representatives, hereby submits this Memorandum of Law in Support of his motion to dismiss the Amended Complaint.

Overview

Plaintiffs commenced this litigation alleging that the state legislative and congressional redistricting plans (collectively, "Redistricting Plans" or "Plans") passed and enacted into law by the South Carolina House of Representatives ("State House") and the South Carolina Senate ("State Senate") (collectively the "General Assembly") discriminate "on the basis of race for the purpose of determining which voters belong in which districts." (Am. Compl. ¶ 2). As the basis of their Complaint, Plaintiffs claim that the Plans diminish "the political power of black voters whose influence is diluted by packing them into election districts in concentrations that exceed what is necessary and lawful to give them an opportunity to participate in the political process," and deny these voters "any opportunity to elect a candidate of their choosing." (*Id.*)

Importantly, Plaintiffs do not assert that by adopting the Redistricting Plans, the State House or the State Senate failed to create additional districts in which black voters constitute a majority and, therefore, are able to elect candidates of their choice. *See Thornburg v. Gingles*, 478 U.S. 30 (1986). Rather, Plaintiffs allege that the Plans should either a) contain a fewer number of majority–minority districts or b) reduce the black voting age population ("BVAP") of the proposed majority-minority districts. *See* Am. Compl. at ¶ 43(a) (the plan "create[s] nine (9) new majority-minority seats with no justification as to why it was necessary to add black VAP to these seats"); ¶ 43(b) (the plan "preserve[s] the twenty-one (21) majority-minority seats that previously existed . . . with no justification for maintaining artificially high black VAP

percentages."). Instead, Plaintiffs claim that the State House and State Senate should have maintained the BVAP of districts "where black voters were able to elect a candidate of choice **with the support of the white community.**" (Am. Compl. ¶¶ 43(c), 45(b) (emphasis added); *see also id.* at ¶ 47(b), (c).)

At bottom, Plaintiffs' challenge amounts to a claim that Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (as amended), requires the State House and State Senate to eliminate or severely imperil the majority-minority districts contained within each of the Redistricting Plans in order to create additional "[c]rossover districts where white voters join together with black voters to help them elect a candidate of choice." (Am. Compl. ¶¶ 79-80, 82-84.) Aside from the fact that the relief sought by Plaintiffs likely would deny or abridge the right of minorities to vote through a retrogression of minority voting strength, *see* 42 U.S.C. § 1973c; *Beer v. United States*, 425 U.S. 130, 141 (1976), Section 2 does not authorize a claim when minority voters cannot elect their candidate of choice based on their own votes and without assistance from others. *Bartlett v. Strickland*, 556 U.S. 1, ___, 129 S. Ct. 1231, 1243 (2009).

In addition to these failures, Plaintiffs have not stated a cognizable racial gerrymandering or vote dilution claim that would be supported under the Fourteenth or Fifteenth Amendments. Moreover, the Amended Complaint is fatally deficient for lack of standing because Plaintiffs either do not reside in a district alleged to have been gerrymandered or have not identified with specificity any concrete or particularized injury suffered as a result of the enactment and implementation of the Plans. Therefore, all of the claims must be rejected from consideration by the Court.

Procedural History and Facts

This matter arises out of challenges to the State of South Carolina's enactment of redistricting plans for the South Carolina House of Representatives and Senate, and the United States Congress during the 2011 legislative session. The State House's redistricting efforts began following the March 23, 2011 release of the official tabulation of the population of the State of South Carolina by the United States Census Bureau pursuant to Public Law 94-171 (1975). (Am. Compl. ¶¶ 26, 38.) House Bill 3991 (H. 3991) and House Bill 3992 (H. 3992) served as the legislative vehicles for the redistricting of the State House and Congressional districts in South Carolina, and Senate Bill 815 (S. 815) served as the legislative vehicle for the redistricting of the State Senate districts. (Am. Compl. ¶ 38.) *See also* South Carolina House of Representatives Redistricting 2011 Home Page, http://redistricting.schouse.gov/; South Carolina Redistricting 2011 Senate Judiciary Committee, http://redistricting.scsenate.gov.

Following the passage of the bills, the State House and State Senate passed and ratified, and Governor Nikki R. Haley signed, H. 3991, H. 3992, and S. 815 thereby enacting the redistricting plans into law as Act 71 of 2011 ("Act 71" or "Senate Redistricting Plan")[1], Act 72 of 2011 ("Act 72" or "House Redistricting Plan")[2] and Act 75 of 2011 ("Act 75" or

[1] The General Assembly passed the Senate Redistricting Plan on June 22, 2011. Governor Haley signed the Senate Redistricting Plan into law on June 28, 2011. (Am. Compl. ¶ 46.) The Senate Redistricting Plan became effective on November 14, 2011, following federal administrative preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. (*Id*. at ¶ 53.)

[2] The General Assembly passed the House Redistricting Plan on June 22, 2011. The vote included the affirmative vote of many Democrats and members of the Legislative Black Caucus. The bipartisan support of H. 3991 was reflected in public comments made by Representative Harry Ott, House Minority Leader, that "[t]his plan is fair." 2011 House of Representatives Preclearance Submission, Ex. 19 – Newspaper articles discussing the South Carolina Redistricting Process and H3991, Gina Smith, House Approves Redistricting Plans, Dems Plan to Sue, The State, June 15, 2011, available at http://redistricting.schouse.gov/PreclearanceSubmissionH3991.html. (Rep. Ott also stated that

"Congressional Redistricting Plan")[3]. Subsequently, the State House and Senate submitted the plans to the United States Department of Justice ("DOJ") for administrative preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.[4] DOJ granted preclearance to each redistricting plan thereby establishing that the enacted plans do not reduce minority voting strength as compared to the pre-existing plans. (Am. Compl. ¶¶ 53, 55, 57.)

On November 11, 2011, Plaintiffs Vandroth Backus, Willie Harrison Brown, Charlesann Buttone, Booker Manigault, Roosevelt Wallace, and William G. Wilder ("Plaintiffs") commenced this declaratory judgment action with the filing of a Summons and Complaint that was served on the moving Defendants on November 17, 2011. Subsequently, on November 23, 2011, Plaintiffs amended their Complaint to, among other things, add Edward McKnight and Moses Mims as Plaintiffs. In the Amended Complaint, Plaintiffs, all alleged to be registered black voters residing in various counties in the State of South Carolina, (Am. Compl. ¶¶ 8-16), challenge the implementation and enforcement of Acts 71, 72 and 75. Plaintiffs seek both declaratory and injunctive relief under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §

"[i]t's not perfect, and we've got a few Democrats who find themselves in collapsed districts. But there's an equal number of Republicans who find themselves in the same situation."). *Id.* Governor Haley signed the House Redistricting Plan into law on June 28, 2011. (Am. Compl. ¶ 44.) The House Redistricting Plan became effective on October 11, 2011, following federal administrative preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. (*Id*. at ¶ 55.)

[3] The General Assembly passed the Congressional Redistricting Plan on July 26, 2011 with bi-partisan support. Governor Haley signed the Congressional Redistricting Plan into law on August 1, 2011. (Am. Compl. ¶ 48.) The Congressional Redistricting Plan became effective on October 28, 2011, following federal administrative preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. (*Id*. at ¶ 57.)

[4] Concurrent with its submission of Act No. 72 to DOJ for administrative preclearance, the State House filed with the United States District Court for the District of Columbia a complaint for Declaratory Judgment seeking a determination that the plan satisfied Section 5 of the Voting Rights Act. Similarly, the State House and Senate filed complaints pertaining to Act 71 and 75 seeking similar relief. Following DOJ's administrative preclearance of all three plans, the State House and State Senate withdrew their complaints.

1973, 42 U.S.C. § 1983, Article I, Section 2 of the United States Constitution, and the Fourteenth and Fifteenth Amendments to the United States Constitution.

According to Plaintiffs, each of the redistricting plans "use race as the predominant factor in drawing election district boundaries" and "result in a diminution in the political power of black voters whose influence is diluted by packing them into election districts in concentrations that exceed what is necessary and lawful to give them an equal opportunity to participate in the political process." (Am. Compl. ¶ 2.) Specifically, Plaintiffs allege that in passing the House Redistricting Plan, the General Assembly adopted a plan that (a) packs black voters into districts in order to create nine new majority-minority seats; (b) wrongfully preserves the twenty-one majority-minority seats that existed under the benchmark plan; (c) reduces the black voting age population ("BVAP") percentage in nearly all house districts where blacks allegedly are able to elect a candidate of choice with support of the white community; and (d) disproportionately diminishes the political power of black voters in poor, rural counties. (*Id.* ¶ 43.) As further maintained by Plaintiffs, similar infirmities exist in the Senate Redistricting Plans. (*Id.* ¶45.)

Similarly, Plaintiffs allege that the General Assembly adopted a Congressional Redistricting Plan that (a) unnecessarily adds BVAP percentage to the Sixth Congressional District; (b) reduces the BVAP percentage in all other existing districts, thereby "reducing or eliminating the possibility that black voters in these districts could work together with part of the white community to elect a candidate of choice"; and (c) creates a new Seventh Congressional District with a BVAP low enough "to make it unlikely black voters would have an equal opportunity to elect a candidate of choice by joining together with part of the white community." (*Id.* ¶ 47.) In so doing, Plaintiffs claim the redistricting plans "deliberately reduce the number of

'crossover' districts or prevent them from emerging over time through natural population shifts." (*Id.* ¶ 79.)

Legal Standards

A. Rule 12(b)(1), Fed. R. Civ. P.

A motion to dismiss for lack of standing may be brought pursuant to Federal Rule of Civil Procedure 12(b)(1) because standing "is a fundamental component of a court's subject-matter jurisdiction." *Miller v. Pac. Shore Funding*, 224 F. Supp. 2d 977, 994 (D. Md. 2002) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998)); *see also Marshall v. Meadows*, 105 F.3d 904, 905 (4th Cir. 1997). When subject matter jurisdiction is challenged, "[i]t is elementary that the burden is on the party asserting jurisdiction to demonstrate that jurisdiction does, in fact, exist." *Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999) (citing *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942)). The plaintiff bears the burden of establishing the elements of standing, and each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof—*i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In reviewing the dismissal of the complaint under Rule 12(b), a court may take judicial notice of items in the public record, such as legislative activity and official redistricting data. *See Hall v. Virginia*, 385 F.3d 421, 424, n.3 (4th Cir. 2004); *see also Papasan v. Allain*, 478 U.S. 265, 268, n.1 (1986).

B. Rule 12(b)(6), Fed. R. Civ. P.

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for failure to state a claim upon which relief can be granted. Rule 12(b)(6), Fed. R. Civ. P. "A motion filed under Rule 12(b)(6) challenges the legal sufficiency of a complaint, considered with the

assumption that the facts alleged are true[.]" *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009) (internal citations omitted). Moreover, when a defendant questions whether a plaintiff has been injured as a result of alleged vote dilution, a challenge to standing may be raised by a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. *Perry-Bey v. City of Norfolk, Va.*, 678 F. Supp. 2d 348, 360 (E.D. Va. 2009).

"[T]he legal sufficiency of a complaint is measured by whether it meets the standards for a pleading stated in Rule 8 (providing general rules of pleading) . . . and Rule 12(b)(6) (requiring that a complaint state a claim upon which relief can be granted)." *Francis*, 588, F.3d at 192. "Rule 8 itself requires a *showing of entitlement* to relief . . . [a]nd Rule 12(b)(6) authorizes a court to dismiss any complaint that does not state a claim 'upon which relief can be granted.'" *Id*. at 192-93 (emphasis in original). "The aggregation of these specific requirements reveals the countervailing policy that plaintiffs may proceed into the litigation process *only when their complaints are justified by both law and fact*." *Id*. at 193 (emphasis added).

To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, ___, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "'A pleading that offers 'labels and conclusions' or 'a formalistic recitation of the elements of a cause of action will not do.'" *Ashcroft*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557). The motion should be granted where the asserted claim is "so attenuated and unsubstantial as to be absolutely devoid of merit." *Hagans v. Lavine*, 415 U.S. 528, 536 (1974) (citations omitted).

"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." *Ashcroft*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft*, 129 S. Ct. at 1949. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). As the United States Supreme Court elucidated:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'

Ashcroft, 129 S. Ct. at 1949-50 (internal citations omitted).

None of Plaintiffs' claims in the present case are legally cognizable. Indeed, the very theory of Plaintiffs' case, that the Plans fail because they eliminate "crossover" districts (Am. Compl. ¶¶ 79-80), has been squarely rejected by the Supreme Court and the Fourth Circuit. Further, Plaintiffs fail to allege or satisfy any of the elements required for a claim arising under Section 2 of the Voting Rights Act, or the Fourteenth or Fifteenth Amendments. For these reasons and for the reasons set forth below, this Court should dismiss Plaintiffs' Amended Complaint with prejudice.

Argument

This case involves a challenge to legislatively approved and enacted redistricting plans for the State House, State Senate, and Congressional election districts in South Carolina. "[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court," *Chapman v. Meier*, 420 U.S. 1, 27 (1975), and "federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements." *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993). Because "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller v. Johnson*, 515 U.S. 900, 915 (1995), courts must recognize "the intrusive potential of judicial intervention into the legislative realm, when assessing . . . the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed." *Id.* at 916-17.

I. Plaintiffs Have Not Stated a Claim Under Section 2 of the Voting Rights Act.

Section 2 of the Voting Rights Act of 1965 provides that "[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." 42 U.S.C. § 1973(a). A violation of Section 2 occurs

> if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [§ 2(a)] 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**.

Id. § 1973(b) (emphasis added).

"The 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 black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. Thus, to establish a Section 2 violation, a minority group must allege and prove by a preponderance of the evidence that it satisfies the following threshold requirements:

> *First*, 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. . . . *Second*, the minority group must be able to show that it is politically cohesive. . . . *Third*, the minority must be able to demonstrate that the white majority votes sufficiently as a block to enable it—in the absence of special circumstances . . . to defeat the minority's preferred candidate.

Id. at 50-51 (emphasis added) (footnote and internal citations omitted).[5] Importantly, "a Section 2 claim cannot proceed unless all three *Gingles* pre-conditions are satisfied." *Cousin v. Sundquist*, 145 F.3d 818, 823 (1998); *Voinovich*, 507 U.S. at 158 (disposing of the plaintiffs' Section 2 claim without analyzing the first *Gingles* precondition, since the court found that plaintiffs had failed to meet the third precondition); *Growe v. Emison*, 507 U.S. 25, 40-41 (1993) ("Unless [the three *Gingles* factors] are established, there neither has been a wrong nor can be a remedy."). "[T]he failure of a minority group to satisfy all of the *Gingles* preconditions means that it cannot sustain a claim under Section 2 that the challenged electoral practice 'impede[s] the ability of minority voters to elect representatives of their choice.'" *Hall*, 385 F.3d at 426 (quoting *Gingles*, 478 U.S. at 48).

[5] In *Gingles*, the Supreme Court construed Section 2 "in the context of a lawsuit claiming that the election of candidates from a multimember district diluted minority voting strength by submerging a cohesive racial minority group within a bloc-voting white majority." *Hall*, 385 F.3d at 426 (footnote omitted). However, "[t]he *Gingles* preconditions are equally applicable in vote dilution challenges to single-member legislative districts." *Id*. at 426, n.9 (citing cases).

Even if these threshold requirements are met, a plaintiff must prove that "based on the totality of circumstances . . . members of a class of citizens . . . 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).[6] *See Hall*, 385 F.3d at 426 (holding that proof of the *Gingles* preconditions "is not alone sufficient to establish a claim of vote dilution under Section 2"); *see also Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994) ("[I]f *Gingles* so clearly identified the three [preconditions] as generally necessary to prove a § 2 claim, it just as clearly declined to hold them sufficient in combination, either in the sense that a court's examination of relevant circumstances was complete once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution.") Rather, a plaintiff asserting vote dilution must also show "that, under the totality of the circumstances, the State's apportionment scheme has the effect of diminishing or abridging the voting strength of the protected class." *Voinovich*, 507 U.S. at 157.

Plaintiffs have failed to state a claim for vote dilution under Section 2 of the Voting Rights Act. Moreover, claims premised on an ability to influence the election of candidates based on crossover districts are not cognizable under Section 2 or the constitution as a matter of law. Accordingly, Plaintiffs fail to allege a cognizable claim under Section 2 of the Voting Rights Act, and this cause of action must be dismissed.

[6] Section 2 of the Voting Rights Act was substantially revised in 1982 to make clear that a plaintiff is not required to prove that "a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose." *Gingles*, 478 U.S. at 35. Instead, a "results test" based on consideration of "the totality of the circumstances" provides the relevant legal standard." *Id.*

A. Plaintiffs do not allege that additional districts can be drawn where a minority group can constitute a majority in a single-member district.

To establish a vote dilution claim under Section 2, Plaintiffs must prove that they have been "unlawfully denied the political opportunity they would have enjoyed as a voting-age majority in a single-member district: namely, the opportunity to 'dictate electoral outcomes independently' of other voters in the jurisdiction." *Hall*, 385 F.3d at 430 (quoting *Voinovich*, 507 U.S. at 154). "When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires 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." *De Grandy*, 512 U.S. at 1008. "The reason that a minority group . . . must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 50 n.17 (emphasis in original).

In short, to state a vote dilution claim under Section 2 of the Voting Rights Act, Plaintiffs must allege that the minority group is sufficient to constitute a majority in another district. *See Bartlett v. Strickland*, 556 U.S. 1, ___, 129 S. Ct. 1231, 1246 (2009) ("[A] party asserting [Section] 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). Stated differently, in order for a Section 2 claim to be viable on the theory that minority voting strength has been diluted as a result of packing, the legislature must have been able to create additional majority-minority districts, but avoided doing so by drawing other districts with an overwhelming majority. *Voinovich*, 507 U.S. at 153-43.

In 2009, the United States Supreme Court emphasized the importance of a plaintiff showing that a minority group can meet the threshold requirement of its ability to comprise 50 percent or more of a district's population in order to satisfy the first prong of *Gingles*. This majority-minority requirement provides "workable standards and sound judicial and legislative administration . . . [and] draws clear lines for courts and legislatures alike." *Bartlett*, 129 S. Ct. at 1244. To require otherwise not only "would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions," but also would expand the scope of Section 2 to "protect any possible opportunity or mechanism through which minority voters could work with other constituencies to elect their candidate of choice." *Id.* at 1246.

Notwithstanding this clear direction from the Supreme Court, the Amended Complaint sets forth the very claims the Supreme Court squarely has rejected. Plaintiffs contend that the House, Senate, and Congressional Redistricting Plans dilute minority voting strength by packing black voters into certain districts and "maintaining artificially high black VAP percentages" in those districts. (Am. Compl. ¶¶ 74, 75, 77.)[7] While it is true that "packing" may result in a

[7] Plaintiffs' claims of "packing" are perplexing in and of themselves. In the present case, the BVAPs for the allegedly packed House districts are as follows:

District	BVAP	District	BVAP
12	51.01%	93	45.40%
23	50.03%	102	51.70%
49	51.95%	103	51.57%
61	43.33%	111	51.77%
64	51.98%	121	54.70%
79	51.44%	122	56.83%
82	52.52%		

The BVAPs for the House districts with allegedly "artificially high" BVAPs are as follows:

dilution of minority voting strength, *see, e.g., Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 633 (D.S.C. 2002) (quoting *Voinovich*, 507 U.S. at 153-54), the allegation of packing must be accompanied with an allegation that the number of black voters alleged to have been wrongly included or excluded from various districts in the State House and Congressional Redistricting Plans would be sufficient to create additional districts in which black voters would constitute a numerical majority. *E.g., Bartlett*, 129 S. Ct. at 1246; *Hall*, 385 F.3d at 431. That is not the case here.

Plaintiffs instead contend that the Redistricting Plans dilute minority voting strength by packing black voters into certain districts, thereby "deliberately ***reduc[ing] the number of 'crossover' districts*** or prevent[ing] them from emerging over time through natural population shifts." (Am. Compl. ¶ 79) (Emphasis added).[8] Plaintiffs further allege that the destruction of

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District	BVAP
22	55.85%
55	42.38%
66	62.23%
70	60.78%

2011 House of Representatives Preclearance Submission, Ex. 2 – Spreadsheet containing the demographics for H. 3991, available at http://redistricting.schouse.gov/PreclearanceSubmissionH3991.html. Finally, the BVAP for the allegedly packed Sixth Congressional District is 55.18%. (Am. Compl. ¶ 47(a).) None of these districts exhibit minority percentages which courts have typically held are so high as to give rise to an unconstitutional "packing" claim. *Cf. Ketchum v. Byrne*, 740 F.2d 1398, 1408, n.7 (7th Cir. 1984) (A guideline of 65% population of a particular minority group "has been adopted and maintained for years by the Department of Justice and by reapportionment experts and . . . approved by the Supreme Court" as sufficient to provide [a] minority group with a meaningful opportunity to elect candidates of their choice.); *Illinois Legislative Redistricting Comm. v. LaPaille*, 786 F. Supp. 704, 712 (N.D. Ill. 1992) (same).

[8] Importantly, while Plaintiffs decry the Redistricting Plans alleging that the State House and Senate use race as the predominant factor in drawing the election district boundaries, it is the relief sought by Plaintiffs that "would result in a substantial increase in the number of mandatory districts drawn with race as 'the predominant factor motivating the legislature's decision.'" *Bartlett*, 129 S.Ct. at 1247 (quoting *Miller*, 515 U.S. at 916). Plaintiffs' theory that "crossover" districts must be protected would require every district which contains minorities to be

crossover districts "denie[s] black voters an equal opportunity to participate in the political process and relegate[s] them to only participating in electing a candidate of choice in the handful of districts Defendants have packed with black voters." (*Id.* ¶ 84.) Therefore, there is no doubt that this alleged failure to create or maintain purported "crossover" districts is the linchpin of the Amended Complaint.

For that reason, Plaintiffs have failed to state a claim upon which relief can be granted as a matter of law under Section 2. The Supreme Court repeatedly has refused invitations to rule that establishing or dismantling crossover districts constitutes a Section 2 violation. *E.g.*, *De Grandy*, 512 U.S. at 1008-1009; *Voinovich*, 507 U.S. at 154. To the contrary, redistricting jurisprudence is clear that "[t]here is no support for the claim that [Section 2] can require the creation of crossover districts in the first instance." *Bartlett*, 129 S. Ct. at 1249 (recognizing that no federal court of appeals has held that Section 2 requires creation of coalition districts and holding that a vote dilution claim is not stated unless the Plaintiffs can establish the existence of a majority-minority district).[9] Rather,

> [m]inority voters have the potential to elect a candidate *on the strength of their own ballots* when they can form a majority of the voters in some single-member district. When the voting potential of a minority group that is large enough to form a majority in a

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maintained inasmuch as a minority group, no matter how small, would be able to "influence" elections with the assistance of other voters in the district. Even if it were not clear that the law does not provide minority groups with such enhanced voting rights, Plaintiffs' interpretation therefore "would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (2006).

[9] A plurality of Justice Kennedy, joined by Chief Justice Roberts and Justice Alito determined that Section 2 does not require states to draw crossover districts. Justice Thomas, joined by Justice Scalia concurred in the judgment, but stated their view that Section 2 does not permit vote dilution claims in any form. Therefore, a majority of the present Court has held that claims like that alleged in the Complaint based on so-called crossover districts may not be brought under Section 2.

> district has been thwarted by the manipulation of district lines, minorities may justly claim that that their 'ability to elect' candidates has been diluted in violation of Section 2. On the other hand, when minority voters, as a group, are too small or loosely distributed to form a majority in a single-member district, they have no ability to elect candidates of *their own* choice, but must instead rely on the support of other groups to elect candidates. Under these circumstances, minorities cannot claim that their voting strength—that is the potential to independently decide the outcome of an election—has been diluted in violation of Section 2.

Hall, 385 F.3d at 430 (emphasis in original) (footnote omitted). Thus, "[a] redistricting plan that does not adversely affect a minority group's potential to form a majority in a district, but rather diminishes its ability to form a political coalition with other racial or ethnic groups, does not result in vote dilution 'on account of race' in violation of Section 2." *Hall*, 385 F.3d at 431 (footnote omitted). The essence of Plaintiffs' claim in this case is the same as the claims in *Hall*: "[T]he assertion of a right to preserve their strength for the purposes of forging an advantageous political alliance." *Id.*

Even if it were not clear that the law does not provide minority groups with such enhanced voting rights, *see League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (2006) ("*LULAC*") ("The opportunity 'to elect representatives of their choice,' requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice") (citation omitted)), this construction "would transform the Voting Rights Act from a law that removes disadvantages based on race, into one that creates advantages for political coalitions that are not so defined. *Hall*, 385 F.3d at 431. When, as here, a minority group cannot form a majority in a district, they "standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength" and "can join other voters-including other racial minorities, or whites, or both-to reach a majority and elect their preferred candidate. *Bartlett*, 129 S. Ct. at 1243. Therefore, in order to

elect a preferred candidate in these districts, "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *De Grandy*, 512 U.S. at 1020. Consequently, because minorities groups in these districts have an equal opportunity to elect representatives of their choice, as do other members of the electorate, *see* 42 U.S.C. § 1973(b), Section 2 does not grant them any special protections. *Bartlett*, 129 S. Ct. 12 1243 ("Nothing in [Section] 2 grants special protection to a minority group's right to form political coalitions.").

The reasoning of the court's holdings in *Bartlett* and *Hall* simply do not support Plaintiffs' claims of vote dilution based on the alleged failure of the General Assembly to protect or maintain so-called "crossover districts."[10] The Redistricting Plans do not affect adversely the potential of Plaintiffs' minority group to form a majority in any district in the state and Plaintiffs do not so claim. Rather, Plaintiffs only allege that the Redistricting Plans diminish the minority group's ability to form a political coalition with other racial or ethnic groups. This purported class of "vote dilution" claim is not supported by Section 2 and Plaintiffs' second cause of action must be dismissed as a matter of law. *Hall*, 385 F.3d at 431. [11]

B. Plaintiffs fail to present a reasonable alternative voting practice.

It is well established that in order for a Section 2 claim to be viable, a plaintiff must allege "'the possibility of creating *more* than the existing number'" of reasonably compact

[10] The preservation of crossover districts may constitute a relevant factor in *defending* against a vote dilution claim. *E.g.*, *De Grandy*, 512 U.S. at 1020. But, "any construction of Section 2 that authorizes the vote dilution claims of multiracial coalitions would transform the "Voting Rights Act from a law that removes disadvantages based on race, into one that creates advantages for political coalitions that are not so defined." *Hall*, 385 F.3d at 431.

[11] In addition to the Fourth Circuit, most courts that have addressed the issue of whether claims based on an ability to influence the election of candidates are cognizable under Section 2 have concluded that they are not. *See Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-853 (5th Cir. 1999); *Cousin v. Sundquist*, 145 F.3d 818, 828-829 (6th Cir. 1998); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 552-654 (N.D. Ill. 1991).

majority-minority districts. *LULAC*, 548 U.S. at 429-30 (quoting *De Grandy*, 512 U.S. at 1008). Indeed, "[b]ecause the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997). "For that reason, to establish the first *Gingles* precondition, plaintiffs typically have been required to propose hypothetical redistricting schemes and present them to the district court in the form of illustrative plans." *Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 669 (5th Cir. 2009).

In the present case, it is undisputed that Plaintiffs neither allege the possibility of creating more than the existing number of compact, majority-minority districts, nor present "a hypothetical alternative" plan that may be considered by this Court. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) ("[T]he comparison must be with a hypothetical alternative . . . ."). The challenged Plans include several majority-minority districts, and indeed more majority-minority districts than the benchmark Plans. Rather, Plaintiffs demand the creation and protection of "crossover" districts that do not constitute viable claims under Section 2 as argued above. Accordingly, Plaintiffs' second cause of action must be dismissed.

C. Plaintiffs similarly fail to allege an affected minority group is politically cohesive or that elections are racially polarized and, thus, fail to allege the second and third *Gingles* factors.

In addition to Plaintiffs' failures with respect to the first *Gingles* prong, the second *Gingles* precondition requires that a minority group allege and establish that "it is politically cohesive." *Gingles*, 478 U.S. at 51. "If the minority group is not politically cohesive, it cannot be said that the . . . [challenged] structure thwarts distinctive minority group interests." *Id.* While "[p]roof of cohesion in actual elections is required," *Rodriguez*, 308 F. Supp. 2d at 372

(citing cases), in the present case Plaintiffs have failed even to allege this second *Gingles* precondition.

Similarly, the third *Gingles* precondition requires Plaintiffs to allege and demonstrate that elections are racially polarized—that "there is a consistent relationship between the race of the voter and the way in which the voter votes[.]" *Gingles*, 478 U.S. at 53, n.21. As with the first two *Gingles* preconditions, Plaintiffs fail to allege this essential precondition. In fact, the Amended Complaint suggests just the opposite. Plaintiffs' complaint is that the Redistricting Plans destroy or fail to create districts in which crossover voting would result in electoral victories for candidates of choice of black voters. (Am. Compl. ¶ 84.) Moreover, because the General Assembly maintains majority-minority districts in the Redistricting Plans, Plaintiffs accuse Defendants of "resegregating electoral politics in South Carolina." Thus, Plaintiffs allege that black voters do not need to be in majority black districts in order to elect candidates of their choice suggesting that pervasive racial block voting no longer exists, notwithstanding the fact that racial bloc voting has existed in South Carolina for decades. *See Colleton County*, 201 F. Supp. 2d at 643-44 (granting the requested protection to minority voters under these conditions would exceed the scope and purpose of Section 2.) As stated by Justice Kennedy, "[n]othing in [Section 2] grants special protection to a minority group's right to form political coalitions." *Bartlett*, 129 S. Ct. at 1243. And as held by the Fourth Circuit, minority voters cannot establish in the context of crossover districts that they have less opportunity than other members of the electorate to elect a candidate of choice as required under Section 2. *Hall*, 385 F.3d at 431.

In sum, Plaintiffs have not alleged a claim under the second or third *Gingles* preconditions and their second cause of action must be dismissed with prejudice as a matter of law.

II. Plaintiffs Also Fail to Allege a Viable Fourteenth Amendment Claim.

Plaintiffs further complain that the Redistricting Plans violate the Equal Protection Clause of the Fourteenth Amendment by "discriminat[ing] against Plaintiffs and all other black voters on the basis of race" and that this alleged behavior is evidenced by irregularly shaped districts drawn with specific racial compositions and consisting of a race-based gerrymander. (Am. Compl. ¶ 63.) In support of these racial gerrymandering allegations, Plaintiffs essentially restate their Section 2 claims, alleging that the Redistricting Plans have the effect of "diluting black voting power by limiting the number of districts where they have an equal opportunity to participate in electing a candidate of their choosing." (Am. Compl. ¶ 65(b).)

Plaintiffs do not point to any specific facts or any "irregularly shaped" or offensive district boundaries that would support their bald assertions that the Redistricting Plans have the effect of denying a minority group's chance to influence the political process. In bringing a racial gerrymandering claim, "[t]he plaintiff bears the burden of proving the race-based motive," *Shaw v. Hunt*, 517 U.S. 899, 905 (1996), and showing that the state conducted a "deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes." *Shaw v. Reno*, 509 U.S. 630, 640 (1993) (citing *Davis v. Bandemer*, 478 U.S. 109, 164 (1986)). As more fully explained above, Plaintiffs do not present any hypothetical alternative or otherwise demonstrate how black voters can form a majority in any additional districts in the redistricting plans and thereby elect a candidate, without the support of voters from other racial or ethnic groups. *See* Argument, § 1, *supra.* Therefore, any claim that the Redistricting Plans have the effect of discrimination is unfounded.

To the contrary, Plaintiffs Fourteenth Amendment Claims are solely based upon an allegation that the Redistricting Plans dilute the voting power of a minority group. When

asserting a discrimination claim under the Constitution, a plaintiff must show that a redistricting scheme was implemented with a "discriminatory intent or purpose." *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). It is therefore clear that a vote dilution claim is cognizable only if such intent is established. *Lodge v. Buxton*, 639 F.2d 1358, 1363 (5th Cir. 1981), *aff'd sub nom. Rogers v. Lodge*, 458 U.S. 613 (1982). However, the existence of a disproportionate impact or effect alone "cannot be decisive" where the "challenged system's existence 'is readily explainable on grounds apart from race.'" *Washington v. Finlay*, 664 F.2d 913, 920 (4th Cir. 1981) (quoting *Mobile*, 446 U.S. at 70). Instead, a plaintiff must show that its purpose was invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. *See White v. Regester*, 412 U.S. 755 (1973).

Plaintiffs have failed to allege, much less prove, any intentional or purposeful racial motivation for the Redistricting Plans or for the General Assembly's retention and maintenance of majority-minority districts throughout the state. Plaintiffs contend in the Amended Complaint that the General Assembly should have decreased the black population of certain districts in order to create "crossover" districts in other areas such that black voters could "help determine the winner" in those districts. (Am. Compl. ¶ 63(e).) By failing to do so, Plaintiffs suggest that the General Assembly purposefully "maintained an artificially high black VAP percentage" in certain districts. However, Plaintiffs also recognize that "black voters continue to overwhelmingly prefer Democratic candidates in South Carolina," thus recognizing a strong correlation between racial composition and party preference.

This acknowledgement by Plaintiffs that there is a high level of racial polarization and high correlation between black voters and the Democratic Party defeats any Fourteenth Amendment Claim that may arise out of the Redistricting Plans. To bring a claim under the

Equal Protection Clause, Plaintiffs have the high burden of proving that the General Assembly's motive "was predominantly racial, not political," *Easley v. Cromartie*, 532 U.S. 234, 241 (2001), and is "unexplainable on grounds other than race." *Shaw*, 509 U.S. at 643 (quoting *Arlington Heights*, 429 U.S. at 266). Because Plaintiffs allege that race correlates closely with political behavior, "[t]he basic question is whether the legislature drew [the district boundaries] because of race *rather than* because of political behavior." *Easley*, 532 U.S. at 257 (emphasis in original).

Plaintiffs therefore fail to make any plausible claim that race was "the predominant factor motivating the legislature's districting decision." *Id*., at 241. Indeed, the Amended Complaint affirms what has long been the case in South Carolina—the existence of a high correlation between African American voters and a preference for the Democratic Party. (Am. Compl. ¶41.) *See Colleton County*, 201 F. Supp. 2d at 652 ("It is well-documented . . . that black citizens in South Carolina vote almost unanimously for Democratic candidates against Republican candidates and, in a primary, for black Democrats against white Democrats."). As a result, even if a district has an "irregular shape," Plaintiffs' do not demonstrate that race, and not politics, predominated in its creation. *See Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact."); *Colleton County*, 201 F. Supp. 2d at 639 n.16 ("Districts drawn by a state legislature which deviate from traditional districting principles for the purpose of serving partisan politics do not trigger strict scrutiny analysis.").

Plaintiffs therefore have not alleged sufficient facts to state a claim that race *predominated* such that an Equal Protection Clause violation has occurred. "[G]iven the fact that

the party attacking the legislature's decision bears the burden of proving that racial considerations are 'dominant and controlling,' given the 'demanding' nature of that burden of proof, and given the sensitivity, the 'extraordinary caution,' that district courts must show to avoid treading upon legislative prerogatives, the attacking party has not successfully shown that race, rather than politics, predominantly accounts for the result." *Easley*, 532 U.S. at 257 (citations omitted); *see also Colleton County*, 201 F. Supp. at 652 ("In view of the mandate that race must be of at least some consideration given the high levels of racial polarization in the state, we find it most difficult to determine whether and when the incumbents' proper motives gave way to improper ones."). Therefore, Plaintiffs claims of a purported Equal Protection Clause violation are unavailing and should be dismissed.

III. Plaintiffs' Fifteenth Amendment Claims Are Similarly Not Cognizable.

The Fifteenth Amendment provides: "The 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." U.S. Const. amend. XV, § 1. The Amendment does not entail the right to have certain candidates elected but prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote "on account of race, color, or previous condition of servitude." *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980).

Plaintiffs claim that the Redistricting Plans "use race to dilute black voting power." (Am. Compl. ¶ 90.) However, vote dilution is not cognizable as a claim under the Fifteenth Amendment. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000); *Prejean v. Foster*, 227 F.3d 504, 519 (5th Cir. 2000) ("[T]he Supreme Court has rejected application of the Fifteenth Amendment to vote dilution causes of action."). As established above, because Plaintiffs cannot establish the existence of a vote dilution claim under Section 2 of the Voting

Rights Act, it follows that Plaintiffs cannot establish purposeful vote dilution in support of their Fifteenth Amendment claim. Furthermore, because racial gerrymandering claims generally have been treated as subject to the same analysis under the Equal Protection Clause and the Fifteenth Amendment, *see Shaw*, 509 U.S. at 645, Plaintiffs claims in this regard are similarly not cognizable. *See* Argument § III, *supra.*[12] Consequently, Plaintiffs have failed to state a cognizable claim under the Fifteenth Amendment.

IV. Plaintiffs Lack Standing Because They Are Not Residents of the Districts They Challenge And Because They Allege Only Generalized Claims Against the Statewide Plan.

A. Standing is an important jurisdictional issue.

Whether a claimant has standing "is the 'threshold question in every federal case, determining the power of the court to entertain the suit.'" *Pac. Legal Found. v. Goyan*, 664 F.2d 1221, 1224 (4th Cir. 1981) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). The standing inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth*, 422 U.S. at 498. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court set forth the elements of standing sufficient to maintain an actual "case or controversy" under Article III of the Constitution:

> The irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

[12] It is further questionable whether a Fifteenth Amendment claim exists in any instance other than preventing a citizen's "access to the ballot." *See Mobile v. Bolden*, 446 U.S. at 63-65; *N.W. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 129 S. Ct. 2504, 2520 (2009) (Thomas, J., concurring).

Id. at 560-561 (footnote, citations, and internal quotation marks omitted). In short, a plaintiff cannot maintain a claim unless the plaintiff has suffered an actual or threatened injury. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

B. Most of the Plaintiffs do not have standing because they do not reside in a challenged district.

The vast majority of the Plaintiffs lack standing to maintain any of the claims alleged in the Amended Complaint because they do not live in any of the districts challenged in the Amended Complaint. The Amended Complaint alleges that certain specified districts—namely House districts 12, 23, 25, 49, 55, 61, 64, 66, 70, 79, 82, 93, 102, 103, 111, 121, and 122 and Congressional district 6—dilute minority voting strength by packing black voters into the districts and maintaining artificially high black voting age population percentages contrary to population shift and traditional redistricting principles. However, five of the Plaintiffs—Vandroth Backus, Willie Harrison Brown, Edward McKnight, Roosevelt Wallace, and William G. Wilder (the "Out-of-District House Plaintiffs")—have not alleged that their residence is located in any of these districts. Similarly, seven Plaintiffs—Backus, Brown, Charlesann Buttone, Booker Manigault, Moses Mims, Jr., Wallace and Wilder (the "Out-of-District Congressional Plaintiffs")—have not pleaded that they live in Congressional district 6.

A determination that these Plaintiffs have standing to maintain their claim would be a ruling that any resident of the State has standing to challenge any district within the State. The Supreme Court has expressly rejected such a standard for racial gerrymandering claims. *United States v. Hays*, 515 U.S. 737, 744 (1995). "Where a plaintiff resides in a racially gerrymandered district . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." *Bush v. Vera*,

517 U.S. 952, 958 (1996) (quoting *Hays*, 515 U.S. at 744-45). But "where a plaintiff does not live in such a district, he or she does not suffer those special harms." *Hays*, 515 U.S. at 745; *see also Shaw v. Hunt*, 517 U.S. 899, 899 (1996) (holding that appellants lacked standing because they did not reside in a challenged district and did not provide specific evidence that they personally were assigned to their voting districts on the basis of race); *Bush*, 517 U.S. at 956 (1996); *Cannon v. Durham County Bd. of Elections*, 959 F. Supp. 289, 296 (E.D.N.C. 1997) (holding that plaintiffs who no longer reside in a district as a result of a redistricting plan and who claim no more than a generalized grievance lack standing). Thus, a Plaintiff must live in the district that they challenge.

The position of the Out-of-District Plaintiffs in the present case in fact is indistinguishable from those of the challengers in *Hays*, whom the Supreme Court held lacked standing. Based upon the allegations of the Amended Complaint, the Out-of-District Plaintiffs do not reside in one of the challenged districts, but instead reside in districts adjacent to those challenged districts. Thus, because the Out-of-District Plaintiffs are not attacking the constitutionality of Acts 72 and 75 as to the districts in which they actually reside, they do not have standing to challenge the plan because they do not reside in districts alleged to have been "packed" or "gerrymandered" or in districts where the alleged discriminatory dilution occurred. (*See* Am. Compl. ¶¶ 8-15); *see also Hall v. Virginia*, 276 F. Supp. 2d 528, 531 (E.D. Va. 2003) (finding plaintiffs who did not reside in a challenged district lacked standing to bring a Section 2 claim). Therefore, the Out-of-District Plaintiffs have not suffered the required injury in fact through enactment of Act 72 and Act 75, and they consequently lack standing to maintain the constitutional and voting rights violations alleged in the Amended Complaint.

C. The remaining claims are generalized grievances not supported by sufficiently specific allegations.

Plaintiffs Buttone, Manigault, and Mims allege residency in one of the House districts challenged in the Amended Complaint, and Plaintiff McKnight alleges residency in the Sixth Congressional district. (Am. Compl. ¶¶ 10, 11, 12, 15.) Although these Plaintiffs have alleged residency in a challenged district, they—as well as the Out-of-District Plaintiffs—have failed to allege facts sufficient to demonstrate a concrete and particularized injury, as opposed to a general grievance, and therefore lack standing to sue. *Hays*, 515 U.S. at 745–746. Thus, none of the Plaintiffs have articulated sufficient facts to support the claim that he or she has personally been subjected to a racial classification. *See Ashcroft*, 129 S. Ct. at 1949.

Although Plaintiffs generally allege that the districts in each plan were "motivated by race/and or the goal of drawing districts with specific racial composition in each district," (Am. Compl. ¶63), no facts are provided to support this conclusion and no allegations of specific personal injury are stated. Rather, the Amended Complaint only generally asserts that the plans on the whole discriminate on the basis of race, which is no more than a claim for relief based on a generalized grievance that the South Carolina General Assembly allegedly enacted the House and Congressional Redistricting Plans as part of a "race-based redistricting scheme" and "race-based gerrymander." *See Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000) (finding no cognizable injury where plaintiffs produced no evidence that anything other than the deliberate creation of majority minority districts is responsible for the districting lines of which they complain). These general allegations are insufficient to maintain standing in this case.

Nor do Plaintiffs establish standing by their claim that "Defendants' purpose in passing [Acts 72 and 75], either in whole or in part, was motivated by race and/or the goal of drawing districts with specific racial composition in each district." (Am. Compl. ¶¶ 63(d), 64(d), 65(d).)

The Supreme Court has "never held that the racial composition of a particular voting district, without more, can violate the Constitution." *Hays*, 515 U.S. at 746. "Redistricting legislatures will . . . almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Plaintiffs' allegation that the racial composition of a district "might have been different had the legislature drawn the adjacent majority-minority district another way" is both self evident and insufficient to demonstrate the requisite particularized injury. *Sinkfield*, 531 U.S. at 30. "Only those citizens able to allege injury 'as a direct result of having personally been denied equal treatment' . . . may bring such a challenge [alleging a violation of Fourteenth Amendment rights resulting from the configuration of representational districts], and citizens who do so carry the burden of proving their standing, as well as their case on the merits." *Hays* 515 U.S. at 746 (emphasis in original) (citation omitted). Again, however, the Supreme Court has rejected generalized claims which do "not prove anything about the legislature's intentions" and do "not allege a cognizable injury under the Fourteenth Amendment." *Id*.

Finally, the threadbare allegations of racial animus set forth in the Amended Complaint are insufficient to survive this motion to dismiss. *Ashcroft*, 129 S. Ct. at 1949. Plaintiffs' conclusory assertions amount to nothing more than "the defendant-unlawfully-harmed-me accusation" held by the Supreme Court to be insufficient. *Id*. (holding that district court should have dismissed as insufficient claims that Attorney General and Director of the FBI improperly designated Iqbal a person "of high interest" based on his race, religion, or national origin).

In sum, because the Out-of-District Plaintiffs do not reside in one of the challenged districts, they lack standing to challenge Acts 72 and 75 and must be dismissed from this action. Additionally, because none of the Plaintiffs have alleged any facts making their claims facially

plausible or showing that he or she has suffered an injury, or demonstrating a plausible entitlement to relief, the Amended Complaint merely asserts a generalized grievance against governmental conduct of which the Plaintiffs do not approve. Plaintiffs' claims therefore do not rise to the irreducible constitutional minimum of the invasion of a legally protected interest that is concrete and particularized, and actual or imminent, as opposed to merely conjectural or hypothetical. *Hays*, 515 U.S. at 742-43, 745. Accordingly, Plaintiffs lack standing to maintain a claim that Acts 72 and 75 are constitutionally infirm or otherwise in violation of the Voting Rights Act and should be dismissed from consideration by this Court.

Conclusion

Plaintiffs have not alleged any facts that would support a claim under Section 2 of the Voting Rights Act of 1965, Article I, Section 2 of the United States Constitution, or the Fourteenth and Fifteenth Amendments to the United States Constitution. The Amended Complaint only sets forth threadbare and insufficient recitals of alleged harms caused by the Redistricting Plans, which are not cognizable claims. Moreover, all of the Plaintiffs lack standing to bring these claims because they have not shown an actual or threatened injury arising from the implementation of the Plans. For these reasons, this Court should dismiss the Amended Complaint with prejudice.

[Signature page follows]

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: s/ Robert E. Stepp
Robert E. Stepp
Fed. I.D. No.: 4302.
rstepp@sowellgray.com
Robert E. Tyson, Jr.
Fed. I.D. No.: 7815
rtyson@sowellgray.com
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

-and-

WILLOUGHBY & HOEFER, P.A.

Benjamin P. Mustian
Fed. I.D. No.: 9615
bmustian@willoughbyhoefer.com
Tracey C. Green
Fed. I.D. No.: 6644
tgreen@willoughbyhoefer.com
930 Richland Street
Post Office Box 8416
Columbia, South Carolina 29202
(803) 252-3300

Columbia, South Carolina
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