UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA 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, Senator Dick Elliott Intervenor-Plaintiff, 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, Nicole S. White, Marilyn Bowers, Mark Benson, and Thomas Waring, in their capacity as Commissioners of the Elections Commission, Defendants.	Case No.: 2:11-cv-03120-PMD-HFF-MBS

Memorandum in Support of Motion for Summary Judgment by Defendant Robert W. Harrell, Jr.

Introduction

Speaker Robert W. Harrell, Jr., is entitled to judgment as a matter of law as to Plaintiffs' Fourteenth and Fifteenth Amendment claims because there is no genuine issue of material fact as to whether, in enacting Acts 71, 72, and 75 of 2011 ("Redistricting Plans"), the State abandoned compliance with traditional redistricting principles; subordinated those principles to racial considerations; or unlawfully discriminated against a minority group. In no way do Plaintiffs comply with the "demanding" burden imposed upon them to prove these contentions. Instead, they make bald allegations unsupported by any material, probative evidence and then contend that Defendants have the burden of proving their unsupported allegations wrong. Consequently, there is no evidence that would permit the finder of fact to return a judgment in favor of Plaintiffs on their Fourteenth and Fifteenth Amendment claims.

Defendants also are entitled to summary judgment on Plaintiffs' claim under Section 2 of the Voting Rights Act of 1965. Although they attempt to escape their failure to establish any of the necessary preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 47, 50-51 (1986), by alleging intentional discrimination, they have not shown or even contended, as Section 2 requires, that minority voting strength is diluted under the Redistricting Plans. The only harm they have stated is not the failure to create additional majority-minority districts, but the failure to create crossover districts. This alleged harm, even if true, is not a violation of Section 2 under Supreme Court or Fourth Circuit precedent because it does not constitute the dilution of minority voting strength.

For these reasons, as well as the Plaintiffs' lack of standing, Speaker Harrell is entitled to judgment as a matter of law.

Analysis

1. Plaintiffs have failed to establish a genuine issue of material fact with respect to their allegations of intentional discrimination under the Fourteenth and Fifteenth Amendments to the United States Constitution.

A. Plaintiffs have a heavy burden to prove racial gerrymandering.

Citing *Shaw v. Reno*, 509 U.S. 630, 642 (1993) ("*Shaw I*"), Plaintiffs complain that Defendants have engaged in "[r]ace-based discrimination [that] causes 'fundamental injury to the individual rights of the person'" in violation of the Equal Protection Clause. [ECF 59, p. 7 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) ("*Shaw II*").] But in order to prevail on this *Shaw* claim, Plaintiffs must do more than employ intemperate language to allege a violation. They instead must come forward with evidence demonstrating both that race was not just a factor but the *predominant* motivation of the General Assembly in drawing the districts at issue and that it ignored traditional redistricting principles in its implementation of that racial motivation. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("*Cromartie II*"); *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("*Cromartie I*"). Plaintiffs' failure to make either of these predicate showings is fatal to their case.[1]

Plaintiffs' burden here is a "demanding" one. *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (O'Connor, J., concurring). They, "not the defendants, [ ] must first establish that the legislature subordinated traditional race-neutral districting principles." *Montiel v. Davis*, 215 F. Supp.2d 1279, 1287-88 (S.D. Ala.) (three-judge court). Plaintiffs attempt to evade their heavy burden through refuge in the standard of strict scrutiny. But Plaintiffs have not adduced any evidence sufficient to make strict scrutiny applicable. "To invoke strict scrutiny, [Plaintiffs] must

[1] Plaintiffs say that they "have alleged something more than simply a claim under *Shaw I*." ECF 81, p. 3. Whatever this means, they cannot escape the heavy burden of proving their race-based claims. *Cromartie II*, 532 U.S. at 242; *Cromartie I*, 526 U.S. at 546-47.

show that the State has relied on race in *substantial* disregard of customary and traditional redistricting practices." *Chen v. City of Houston*, 206 F.3d 502, 506 (5th Cir.2000) (citing *Miller*, 515 U.S. at 928 (O'Connor, J., concurring)). Plaintiffs have identified no such evidence in the pleadings or their discovery responses. In short, whatever the theory, Plaintiffs and not the Defendants have the burden of proving that race was the predominant factor, a burden that requires them to prove that all other non-racial justifications for the redistricting plan are excluded. *See Cromartie II* at 241. This they cannot do.

B. Because of Plaintiffs' lack of evidence to support their hyperbolic allegations of "racial apartheid" and in view of the requirement that federal courts defer to legislative plans, consideration of summary judgment is especially appropriate here.

Speaker Harrell is entitled to summary judgment if the record "shows that there is no genuine dispute as to any material fact and [that he] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Importantly, Rule 56 requires "that there be no *genuine* issue of *material* fact"; thus, the "mere existence of *some* alleged factual dispute" does not entitle the non-moving party to survive summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) ("Factual disputes that are irrelevant or unnecessary will not be counted.") (all emphases in original). In establishing the existence of a material fact, the non-moving party "'may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.' " *Id*. at 248 (quoting *First Nat'l Bank of Arizona v. Cities Svc. Co*., 391 U.S. 253, 289 (1968)).

When considering summary judgment on a claim of racial gerrymandering, this Court's review "must be understood in the context of the court's traditional reluctance to interfere with the delicate and politically charged area of legislative redistricting." *Chen*, 206 F.3d at 505. This in large part is because states have the primary responsibility of drafting and implementing

redistricting plans. *Growe v. Emison*, 507 U.S. 25, 34 (1993); *see also Perry v. Perez*, ___ U.S. ___, 2012 WL 162610, *2 (Jan. 20, 2012) (requiring deference even to a state-drafted redistricting plan not yet precleared under Section 5). A legislative body is entitled to a presumption that it acted in good faith, *Miller*, 515 U.S. at 916, and "the Supreme Court does not believe that the mere presence of race in the mix of decision making factors, and even the desire to craft majority-minority districts, . . . alone automatically triggers strict scrutiny" *Chen*, 206 F.3d at 514. Rather, a legislative body has discretion "to exercise the political judgment necessary to balance competing interests" in creating redistricting plans, and "courts must 'exercise extraordinary caution'" in determining that an electoral district was motivated by racial, not political, interests when there is a high correlation in the voting age population between race and political affiliation. *Cromartie II* at 242.

Under these circumstances, the General Assembly should not be put to the burden of defending the Redistricting Plans in light of Plaintiffs' failure to adduce specific evidence that supports the "demanding" burden they have undertaken. The Supreme Court has held that the legislature must be given discretion to exercise its political judgment in balancing competing interests and requirements and courts "must 'exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.'" *Id.* at 242 (quoting *Miller*, 515 U.S. at 916). To abandon this restraint and require the legislature to defend against the unsupported claims set forth here would be tantamount to a conclusion that redistricting legislation may be challenged in federal court based on nothing more than innuendo and baseless accusations. Given the rampant hyperbole in the Amended Complaint, it also is an invitation for theatre over a legitimate fact-finding hearing.

Plaintiffs have not identified any evidence suggesting, much less proving, that considerations of race predominated the General Assembly's redistricting decisions. Thus, summary judgment should be granted to avoid imposing the unjustified burden on the General Assembly to defend unsubstantiated claims that are based on nothing more than racially-charged language and conclusory allegations instead of evidence. *See Anderson*, 477 U.S. at 248 (It is "the substantive law's identification of which facts are critical and which facts are irrelevant that governs" the materiality inquiry under Rule 56.).

C. The evidence identified by Plaintiffs does not create a genuine issue of material fact regarding an "inference" of racial gerrymandering.

Although they make certain specific allegations regarding the motivation of the plan, *see* discussion *infra* Part III.B., Plaintiffs' entire case is premised upon an assertion that the demographics and shapes of the districts "support the inference that the *Shaw* Doctrine has been violated" and that "race was the predominant factor in drawing the challenged redistricting plans." (ECF No. 81 at.4; *see also* Declaration of Dr. Michael P. McDonald, p.1 ¶ 5, attached as Exhibit A to ECF No. 73.)[2] At bottom, Plaintiffs' argument is that a redistricting plan that splits counties or that draws districts to comply with the Voting Rights Act is a *per se* constitutional violation of the Equal Protection Clause that obviates their burden of proof. As explained above, Plaintiffs' burden shifting argument is wrong and, as explained below, they have not shown that considerations of race in the Redistricting Plans predominated over traditional redistricting criteria, politics, or other factors.

[2] *See also* the discussion of this issue in Defendant Harrell's motion in limine to prevent Dr. McDonald's unsupported opinions from being introduced into evidence that is being filed simultaneously with this Motion and Memorandum.

(1) ***The legislation does not support Plaintiffs' claim either inferentially or otherwise.***

The available evidence demonstrates that, in adopting the Redistricting Plans, the House sought to balance traditional redistricting principles, including the requirements of the Voting Rights Act. As demonstrated by the adopted Redistricting Criteria, *see* Exhibit A, the House took several considerations other than race into account in drawing new districts, including 1) minimizing population deviations to comply with 'one person, one vote'; 2) contiguity of all 124 House districts and the seven Congressional districts; 3) maintaining the reasonable compactness of the districts; 4) respecting county, municipal and precinct boundaries where possible; 5) considering other communities of interest; 6) and taking reasonable efforts to ensure that incumbent legislators remain in their current districts. These all are traditional redistricting criteria approved by the Courts. *See, e.g.*, *Miller*, 515 U.S. at 916 (discussing compactness, contiguity, respect for political subdivisions, and communities of interest as "traditional race-neutral districting principles).

A review of the Redistricting Plans adopted by the House demonstrates that the shapes of the house and Congressional districts substantially are the same as the shapes of the districts in the Benchmark plan. The differences arise from changes required to make those districts equipopulous as a result of population growth experienced by the State over the past ten years. Furthermore, each of the districts challenged by Plaintiffs are reasonably compact, are no more irregular in shape than any other district created by the legislature or by the *Colleton* court,[3] and certainly are not so bizarre to support Plaintiffs' suggested inference that the districts are racially gerrymandered. Furthermore, the undisputed evidence is that the Redistricting Plans achieved the required mathematical equality of "One Person One Vote" and maintain or improve the number

[3] *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002).

of county and precinct splits and whole counties and precincts in both the House and Congressional plans.[4]

The conclusion that the Redistricting Plans do not support Plaintiffs' allegations of racial gerrymandering are even more apparent when one considers the actual shape of the districts specifically challenged by Plaintiffs. *See Miller*, 515 U.S. at 912 (noting that the harm in *Shaw I* derived from the "appearance [of the district] in combination with certain geographic evidence."). In the case of each district challenged by Plaintiffs, the population shifts represent a relatively minor portion of the districts at issue. Moreover, the movement of white and black voters in the challenged districts was made at the margins or perimeters of the districts, and the core of each district in the Benchmark Plan remains largely unchanged.

Moreover, the House was required to comply with the Voting Rights Act mandate that a redistricting plan not dilute African American voter strength, 42 U.S.C. § 1973, and not contain fewer majority minority districts than the prior plan. 42 U.S.C. § 1973c. In formulating the Redistricting Plan in accordance with the Voting Rights Act, the House properly considered race, not as the sole criteria in drawing lines, but as one of many factors to be considered including core retention, incumbency protection, communities of interest, and compliance with the Voting

[4] The Benchmark House plan contained 35 county splits, 11 whole counties, 562 precinct (Voting Tabulation District) splits, and 1,560 whole precincts. Act No. 72 contains 37 county splits, 9 whole counties, 425 precinct splits, and 1,697 whole precincts. Considering Abbeville County minimally is split to recognize a municipal boundary and that Oconee County is comprised solely of two House districts, (*see* ECF No. 63 at 9 n.2,) all aspects of recognizing political subdivisions improved in Act No. 72 over the Benchmark plan.

The Benchmark Congressional plan contained 12 county splits, 34 whole counties, 103 precinct splits, and 2,019 whole precincts. Act No. 75 contains 12 county splits, 34 whole counties, 57 precinct splits, and 2,065 whole precincts. Again, all political subdivisions in the Congressional Plan were either maintained or improved. This feat is even more impressive considering the General Assembly was under the additional burden of creating an entirely new congressional district following the reapportionment of seats to the United States House of Representatives. (*See* ECF No. 63 at 9 n.2.)

Rights Act. The Redistricting Plans demonstrate that the House properly considered these traditional redistricting criteria and application of the Voting Rights Act's objective of ensuring that minority voters are not denied the chance to effectively participate in the political process.[5]

(2) ***A review of the specific allegations made by Plaintiffs further illustrates the absence of evidence supporting any of their contentions.***

Plaintiffs' contention that race was the predominant factor in the Redistricting Plans is based upon four allegations:

(a) The Redistricting Plans segregate white and black voters into election districts by using predetermined percentages of black and white voters for each district to assign voters on the basis of race.[6]

(b) The Redistricting Plans "packs" black voters into election districts.[7]

(c) The Redistricting Plans destroy or fail to maintain "crossover" districts in which black voters were able to elect a candidate of choice with the support of the white community.[8]

(d) The Redistricting Plans abandon traditional redistricting principles.[9]

However, a review of the evidence cited by Plaintiffs to support these allegations shows that they have failed to establish any genuine issue of material fact with respect to any of these allegations. As shown above, the Redistricting Plans do not support the contention that race was the predominant factor in adoption of the plan, and Plaintiffs have not produced any other evidence.

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[5] This is especially so in view of the holding in *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144, 168 (1977), that "it [is] permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential voting patterns afford an opportunity of creating districts in which they will be in the majority."

[6] *See* Am. Compl. (ECF No. 6) ¶¶ 3, 41, 49, 63(d), 65(d).

[7] *See* Am. Compl. (ECF No. 6) ¶¶ 41, 43(a), 47(a), 49, 65(b), 73, 79, 84.

[8] *See* Am. Compl. (ECF No. 6) ¶¶ 43(c), 47(c), 63(e), 80, 83, 84.

[9] *See* Am. Compl. (ECF No. 6) ¶¶ 3, 16, 43(b), 50, 63(b), 63(c), 65(c), 73, 76, 81.

Plaintiffs' allegations remain unsupported, and Speaker Harrell is entitled to judgment as a matter of law.

(a) *There is no evidence the legislature employed "predetermined percentages."*

There is no evidentiary support for Plaintiffs' allegations that Speaker Harrell or the members of the House of Representatives adopted any predetermined percentages of black and white voters or any other arbitrary racial quota in enacting the Redistricting Plans. In responding to Defendant Harrell's Interrogatories and Requests to Produce concerning this issue, Plaintiffs have not provided any documents or asserted any facts that would support this allegation. Importantly, in their Response to the Court, Plaintiffs stated that their case is based only upon the demographics of the plan and certain publicly available information that allegedly supports the "inference" that the *Shaw* Doctrine has been violated. (*See* ECF No. 81 at 4.) Plaintiffs optimistically "reserve[d] the right to use additional, yet-to-be-discovered facts in order to prove that race was the predominant factor in drawing these districts." *Id.* But when requested in discovery by Defendant Harrell to provide evidence and facts supporting these claims, Plaintiffs regurgitated the same argument that public documents support these allegations but failed to present any concrete, circumstantial, or even conjectural evidence that would supports this inference.

Plaintiffs' failure to identify material evidence in support of their claims shows that they are endeavoring to rest on the allegations of their pleadings, a respite to which they are not entitled under Rule 56. *See Anderson*, 477 U.S. at 248. Therefore, because Plaintiffs have not demonstrated any cognizable claim of discrimination, much less intentional discrimination, they have failed to establish any genuine issue of material fact and Speaker Harrell is entitled to judgment as a matter of law on Plaintiffs' "predetermined percentages" claims.

(b) *There is no evidence of packing.*

Second, Plaintiffs acknowledge that they have no evidence that would support their contention that "Republican leaders in the General Assembly sought to make the Democratic Party the 'black' party by packing as many black voters as possible into a few election districts." (Exhibit B, Pls.' Resp. to Defs.' First Set of Req. Prod. ¶23.) Plaintiffs claim that their use of the term packing means "the practice of adding black voters to a district in a manner that violates race-neutral redistricting principles and is either unnecessary to meet a federal obligation or not the least-restricting means by which to meet a federal obligation. (*See* Exhibit C, Pls.' Resp. to Defs.' First Set of Interrogs. ¶12.) However, Plaintiffs concede that they have not conducted a racial block voting analysis or a racially polarized voting analysis and that they therefore lack knowledge of the exact BVAP that will elect a candidate of choice. (*See* Exhibit C, Pls.' Resp. to Defs.' First Set of Interrogs. ¶¶ 7, 12.) Because they lack any evidence to prove that any concentrations of minority voters in any districts "exceed what is necessary and lawful to give [minorities] an equal opportunity to participate in the political process," Am. Compl. (ECF No. 6) ¶ 2, Plaintiffs cannot meet their burden of proof and Speaker Harrell is entitled to judgment as a matter of law.

(c) *There is no evidence supporting Plaintiffs' "crossover district" allegations.*

Plaintiffs have presented no evidence on what would constitute a crossover district or which districts allegedly violate this elusive standard. As noted by Defendant McConnell in his Motion for Partial Summary Judgment, a vote dilution claim cannot be proven without expert testimony. *See Barnett v. City of Chicago*, 969 F. Supp. 1359, 1369 n.4 (N.D. Ill. 1997), *vacated in part on other grounds*, 141 F.3d 699 (7th Cir. 1998); *LULAC v. Roscoe Indep. Sch. Dist.*, 123 F.3d 843, 846 (5th Cir. 1997). Therefore, Plaintiffs cannot demonstrate an occurrence of

"packing" or of vote dilution in any district because they have not presented any analysis to demonstrate what percentage of black population would be excessive or would be required to create a "crossover" district even if such a district were required. *See Bartlett*, 556 U.S. at 24; *Hall*, 385 F.3d at 430 (explicitly rejecting constitutional claims calling for the protection of crossover districts). Consequently, Speaker Harrell is entitled to judgment as a matter of law on Plaintiffs' crossover district allegations.

(d) *There is no evidence that traditional redistricting principles were abandoned.*

Finally, Plaintiffs have not presented any evidence that would suggest that the legislature abandoned or subordinated traditional redistricting principles to racial considerations. As discussed above, although Plaintiffs have the burden of proving that the Redistricting plans were "motivated by a racial purpose or object," *Miller*, 515 U.S. at 913, they now improperly attempt to shift that burden to Defendants to prove that the State did not impermissibly consider race. (*See* Exhibit C, Pls.' Resp. to Defs.' First Set of Interrogs. ¶ 7 ("Plaintiffs believe that the State of South Carolina and her agents have the burden of conducting and producing a racially polarized voting analysis that justifies Defendants' decision to use race to draw election districts.").)

Aside from the fact that this assertion is diametrically opposed to the holdings of the Supreme Court, this novel burden shifting argument would require the State to constantly bear the burden of defending unsupported claims such as the ones now advanced by Plaintiffs based merely upon an allegation of discriminatory purpose. Longstanding redistricting jurisprudence has squarely rejected the contention that the State has the initial burden to justify the creation of majority-minority districts. To the contrary, if the State's creation of majority-black districts violates the law in some manner, "the burden of 'showing' the prohibited effect, of course, is on

the plaintiff; surely Congress could not have intended the State to prove the invalidity of its own apportionment scheme." *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) (citing *Gingles,* 478 U.S. at 46 (holding that plaintiffs must demonstrate that the challenged device results in unequal access to the electoral process) and at 49, n.15 (holding that plaintiffs must "prove their claim before they may be awarded relief")).

Other courts have dismissed other cases based upon similar unsupported allegations. In *Montiel v. Davis,* the plaintiffs also made claims of racial gerrymandering based solely on the face of the redistricting legislation and "relying on the population numbers and district boundaries alone." *Montiel*, 215 F. Supp.2d at 1283. Plaintiffs then argued that the defendants had the burden of proving those claims wrong. The three-judge district court rejected that argument, stating that "Plaintiffs . . . set forth legal precedent that establishes their burden of proof but then promptly ignore that burden and rely on the contention that the defendants have somehow failed to prove that the State did not impermissibly consider race." *Id*. at 1287. As the Court further stated, "Plaintiffs predicate their contention that the apportionment process utilized by the … legislature had a taint of arbitrariness or discrimination on unsubstantiated supposition." *Id*. at 1284. So it is here and, for the same reasons, Defendants are entitled to judgment as a matter of law.

(3) ***Plaintiffs fail to present a legitimate alternative for the Court's consideration.***

Where race and politics overlap, a redistricting plaintiff has an additional burden of proof:

> Where majority-minority districts . . . are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at least that the legislature could have achieved its legitimate political objectives in alternate ways that are comparably consistent with traditional

> redistricting principles. That party must also show that those districting principles would have brought about significantly greater racial balance.

Cromartie II 532 U.S. at 258. Because Plaintiffs acknowledge there is a high correlation in the voting age population between race and political affiliation, *see* Am. Compl. (ECF No. 6) ¶ 41, they therefore are also required to produce districting alternatives that are comparably consistent with traditional redistricting principles and that could have brought significantly greater balance while still achieving legitimate political objectives. This they have utterly failed to do.

In fact, notwithstanding the fact that Plaintiffs' plans modify all 124 House districts and all 7 Congressional districts,[10] Plaintiffs' proposals violate many more traditional redistricting principles than do the Redistricting Plans adopted by Defendants.[11] First and foremost, Plaintiffs' House plan haphazardly eradicates incumbent members throughout the State. At least 28 members are paired together under Plaintiffs' proposal, creating 15 districts with no resident incumbent.[12] Of the paired incumbents, six minority members are drawn together, resulting in the unavoidable outcome that at least three minority candidates of choice could not be elected. An additional four minority members are drawn into districts with four white House members (two Democrat, two Republican). It is a serious flaw for a plan to have excessive incumbent pairings—especially when compared to the plan actually adopted by the legislature—and Plaintiffs' proposed plan should be rejected on that basis alone. *Bush v. Vera*, 517 U.S. at 965 ("[W]e have recognized incumbency protection, at least in the limited form of 'avoiding contests between incumbent[s],' as a legitimate state goal.").

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[10] Plaintiffs do this despite the fact that all of those districts have not been challenged.

[11] (*See* Exhibits D-I, Political Subdivision Split Report for Benchmark, Approved, and Plaintiffs' Redistricting Plans for the House of Representatives and for Congress.)

[12] (*See* Exhibit J, Member Addresses).

In addition, Plaintiffs' plan violates more political subdivision boundaries than the House Redistricting Plan, directly contradicting Plaintiffs' stated position in this case. Plaintiffs' House plan contains 38 county splits (at least one more than the House Plan); only eight whole counties (at least one less than the House plan); 626 split precincts (201 more than the House Plan); and only 1,496 whole precincts (201 less than the House Plan). Furthermore, Plaintiffs' House plan results in districts that are not as equipopulous as Act 72 and have an overall deviation of 9.97%.[13] *See Chapman v. Meier*, 420 U.S. 1, 26-27 (1975) ("[A] court-ordered reapportionment plan of a state legislature . . . must ordinarily achieve the goal of population equality with little more than de minimis variation.")

More importantly, Plaintiffs' House and Congressional Plans clearly violate both Section 2 and Section 5 of the Voting Rights Act., which renders them useless from the outset. The Benchmark House Plan had 21 majority-minority districts and the Benchmark Congressional Plan had one majority-minority district based upon the 2010 Census. Notwithstanding Plaintiffs assertion that Section 5 does not require districts which have fallen below the 50% threshold to be reestablished as majority-minority districts, Plaintiffs proposal *reduces* the number of House majority-minority districts from 21 to 18 and the number of Congressional majority-minority districts from one to none. [14] Under no theory of Section 5 compliance is it possible that such a plan does not result in illegal retrogression as it indisputably would "decrease . . . the absolute

[13] By comparison, Act 72 has an overall deviation of 5.0%.

[14] Plaintiffs' House Plan reduces House districts 82 and 121 to a BVAP below 50%. More shockingly, Plaintiffs reduce district 50 from 58.82% to 35.62% - a 23.2% reduction – without any justification. The cores of each of these districts were recognized by *Colleton* as districts that "all satisfied the *Gingles* test," *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 656-57 (D.S.C. 2002), and Plaintiffs do not present any evidence that would suggest they no longer meet the requirements to continue to receive Section 2 protections. Additionally, Plaintiffs' Congressional Plan reduces Congressional District 6 from 52.08% to 47.36%.

number of representatives which a minority group has a fair chance to elect." *Ketchum v. Byrne*, 740 F.2d. 1398, 1402 n.2 (7th Cir. 1984).

In addition, Plaintiffs dismantle historic majority-minority districts, thereby directly violating the *Gingles* requirements and resulting in a Section 2 violation. Nor can Plaintiffs assert that the districts that have been taken below the 50% threshold still allow minorities the opportunity to elect candidates of their choice because Plaintiffs a) admittedly did not perform any analysis as to racial block voting or racially polarized voting which would enable them to opine as to what level of black voting age population would allow minorities to elect a candidate of choice; and b) presented no expert testimony or other evidence that would suggest reducing these districts below 50% would perform.

At bottom, Plaintiffs have not even attempted to put forth any actual evidence that race was the *predominant* factor in the Redistricting Plans. Rather, Plaintiffs continue to attempt to have this Court speculate that race predominated based solely on the demographics of the districts and their shape. However, a review of the Redistricting Criteria and the actual Redistricting Plans establishes that the plans were crafted relying upon traditional redistricting principles, including compliance with the Voting Rights Act. Plaintiffs have failed to present any evidence demonstrating that race was more than *a* factor and that, in considering race, the House *substantially* disregarded customary and traditional redistricting principles. Furthermore, Plaintiffs have not presented a viable alternative plan that would better balance racial concerns while additional enhancing compliance with traditional redistricting criteria. Consequently, Plaintiffs have not presented any evidence that establishes a genuine dispute as to any material fact and Defendant Harrell is entitled to judgment as a matter of law.

2. Speaker Harrell is Entitled to Judgment as a Matter of Law as to Plaintiffs' Section 2 Claim.

A. There is no evidence to establish any of the preconditions to relief under Section 2.

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." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Thus, to establish a Section 2 violation, a minority group must allege and prove by a preponderance of the evidence 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).[15] 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 v. Quilter*, 507 U.S. 146, 158 (1993) (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 v. Virginia*, 385 F.3d 421, 426 (4th Cir. 2004) (quoting *Gingles*, 478 U.S. at 48).

In the present case, Plaintiffs must therefore produce evidence[16] that the enacted redistricting plans for the House and Congress fail to create one or more majority black districts where it was possible to do so, and then also show political cohesion by the black electorate and racial bloc voting by white voters. Plaintiffs admit that they do not even make such claims in this case, and there is certainly no evidence that would support such claims even if they were made. As stated above, the proposed alternative plan submitted to the Court by Plaintiffs (ECF No. 81, Exh. I) contains *fewer* majority-minority districts than the enacted plans (and indeed fewer even than the benchmark plans). Rather than asserting racial bloc voting by white voters, Plaintiffs

[15] 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).

[16] As explained above, *see* discussion *supra* Part 1.B., and as this Court is well aware, Plaintiffs may not rest on the pleadings, but must identify actual and specific material factual disputes requiring resolution by the finder of fact. *Anderson*, 477 U.S. at 248.

argue that there is sufficient crossover voting by whites to permit candidates of choice of black voters to be elected in majority white districts. This is exactly the opposite of what Section 2 requires as a condition for relief. Because Plaintiffs cannot adduce any evidence to establish the preconditions to relief under Section 2, and in fact are trying to establish just the opposite, the Section 2 claim should be dismissed as a matter of law.[17]

B. There has been no vote dilution as a matter of law.

Even if these threshold requirements were met, Plaintiffs must also 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).[18] *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.").

[17] Plaintiffs candidly admit that they "cannot satisfy the *Gingles* preconditions because the gravamen of the Section 2 violation in this case is the deliberate re-segregation of black voters into majority black districts when it is unnecessary to give these voters an equal opportunity to elect candidates of choice." (ECF No. 81 at 6.) Plaintiffs attempt to place the burden on the Defendants to satisfy the *Gingles* preconditions because "Defendants have created majority black districts . . . ." (*Id*. at 7.) But the burden of proving the *Gingles* preconditions rests "squarely on the plaintiff's shoulders." *Voinovich*, 507 U.S. at 155. As is discussed below, the fact that Plaintiffs have alleged intentional discrimination does not eliminate their burden to allege and establish the *Gingles* factors.

[18] 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*.

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. As is clearly established in *Bartlett* and *Hall*, dilution must be shown based upon the ability of the protected minority to elect candidates on their own ballots, *Hall*, 385 F.3d at 430, which in turn requires proof that one or more majority-minority districts that could have been created were not created. The "undiluted alternative" plan that Plaintiffs were required to submit to the Court is supposed to show how such districts could have been created in conformity with racially neutral traditional redistricting principles. As previously discussed, however, the alternative plan submitted by Plaintiffs does not show any additional majority-minority districts can be created, and therefore does not establish as a matter of law that the enacted plans dilute the electoral opportunities of black voters.

Plaintiffs concede that they do not seek more majority minority districts, and that they in fact want fewer majority districts and more majority white districts in which Plaintiffs assert that black voters could nonetheless elect candidates of their choice in conjunction with white "crossover" votes. However, the Supreme Court has expressly foreclosed claims premised on a "right" to the creation of such coalition districts. "There is no support for the claim that [Section 2] can require the creation of crossover districts in the first instance." *Bartlett v. Strickland*, 556 U.S. 1, 24_, 129 S. Ct. 1231, 1249 (2009) (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 failure to create a majority-minority district). 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

> 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) (emphasis supplied).

Thus, even if Plaintiffs had any evidence to establish the preconditions to relief under Section 2, their Section 2 claim still fails as matter of law because there is no right to the creation of crossover or coalition districts, and therefore there can be no violation of Section 2 when a plan favors the creation of majority-minority districts over majority-white districts in which political collations might be formed. Defendants are entitled to summary judgment as to the Section 2 claim on this ground as well as the failure of Plaintiffs to adduce evidence in support of the G*ingles* factors.

C. Plaintiffs' allegations of discriminatory intent do not change the result.

Plaintiffs rely on *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) for the erroneous contention that an allegation of intentional discrimination obviates the necessity of proving the *Gingles* preconditions. *Garza noted* that "to the extent that *Gingles* does require a majority showing, it does so only in a case where there has been no proof of intentional dilution of minority voting strength." *Id.* But "[e]ven where there has been a showing of intentional

discrimination, plaintiffs must show that they have been injured as a result." *Id.* at 771. The court held that "[a]lthough the showing of injury in cases involving discriminatory intent need not be as rigorous as in effects cases, some showing of injury must be made to assure that the district court can impose a meaningful remedy." *Id.* Thus, Plaintiffs must still demonstrate vote dilution has occurred by establishing that one or more majority-minority districts that could have been created were not. In other words, "even if there is such intent, there still must be some showing of discriminatory effect." *Comm. For a Fair & Balanced Map v. Illinois*, No. 1:11-CV-5065, 2011 WL 5185567, *4 (N.D. Ill. Nov. 1, 2011). Moreover, Plaintiffs are still required to establish the remaining *Gingles* factors. As the Illinois District Court concluded,

> A showing that the drafters of the plan intended to discriminate very well may lead to the conclusion that the plan had its intended effect, but the other factors in the totality of circumstances test are still relevant in resolving the issue. Therefore, the first *Gingles* factor is appropriately relaxed when intentional discrimination is shown, but the Committee will nevertheless have to show that the plan lessened the Latinos' opportunity to elect a candidate of its choice. We believe for the Committee to show discriminatory effects they will have to prove that the second and third *Gingles* preconditions are established—that the minority group is politically cohesive and that the majority votes as a bloc, allowing the majority voters usually to defeat the minority's preferred candidates. It must make this showing on a district specific basis.

Id. (internal citation omitted).

In the present case, the only harm that Plaintiffs assert is the failure to create coalition districts, which as is discussed above, does not constitute vote dilution or any other legally cognizable harm. Nor have Plaintiffs undertaken any effort to establish the second and third Gingles preconditions. Plaintiffs admit that they themselves "have not conducted a racially polarized voting analysis" and have failed to "verif[y] the methodology or accuracy" of the analysis provided to them. (Exhibit C, Pls.' Resp. to Defs.' First Set of Interrogs. ¶ 7.) Plaintiffs'

expert Dr. McDonald conceded in his deposition that he had done no racially polarized voting analysis, and also admitted that he had not done any analysis of whether a candidate of choose of the black electorate could actually be elected from any majority-white districts in either the enacted plan or the Plaintiffs' alternative plans. There is therefore a complete failure of proof as to Plaintiffs' Section 2 claim and Defendant Harrell is entitled to judgment in his favor as to that claim as a matter of law.

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

The Article III requirement of standing is an important predicate consideration in redistricting cases just as in other cases. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Bush v. Vera*, 517 U.S. 952, 958 (1996); *United States v. Hays*, 515 U.S. 737, 744 (1995); *see* Def. Harrell Mem. Supp. Mot. Dismiss (ECF No. 50-1) Part IV (discussing standing requirements as applied to this case). Five of the Plaintiffs—Vandroth Backus, Willie Harrison Brown, Edward McKnight, Roosevelt Wallace, and William G. Wilder (the "Out-of-District House Plaintiffs")—do not live in any of the districts facially challenged by the Plaintiffs based on the allegations in the Amended Complaint and their depositions.[19] Similarly, seven Plaintiffs—Backus, Brown, Charlesann Buttone, Booker Manigault, Moses Mims, Jr., Wallace and Wilder (the "Out-of-District Congressional Plaintiffs")—do not live in Congressional district 6 based on the Amended Complaint and the depositions. A plaintiff must live in a racially gerrymandered district to challenge its composition. *See 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

[19] (Exhibit K, List of Plaintiffs' Current Addresses).

the basis of race).[20] Therefore, the Out-of-District House and Congressional 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.

Furthermore, for the reasons more fully discussed above and with respect to Speaker Harrell's motion to dismiss, (*see* ECF 50-1), none of the Plaintiffs 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. Thus, Plaintiff's complaint does no more than state 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).

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

[20] Notwithstanding the fact that certain Plaintiffs do not reside in districts challenged in the Complaint, Plaintiffs' Alternative Plans also fail to demonstrate they are entitled to any relief. Under the Alternative House Plan, Plaintiffs McKnight, Mims, Backus, Brown, and Wallace would reside in the same district as they would under the plan adopted in Act 72. Similarly, under the Alternative Congressional Plan, Plaintiffs Mims, Backus, Brown, Buttone, Wallace, and Wilder would all reside in the same district as they would under the plan adopted in Act 75.

infirm or otherwise in violation of the Voting Rights Act and should be dismissed from consideration by this Court.

Conclusion

Speaker Harrell is entitled to judgment as a matter of law because Plaintiffs have failed to create a genuine issue of material fact or even to plead for the only relief available under their Fourteenth Amendment, Fifteenth Amendment, and Section 2 claims. Plaintiffs also lack standing based on residency and the failure to allege more than a generalized grievance. Therefore, this Court should grant summary judgment against Plaintiffs and dismiss this case.

Respectfully submitted,

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