IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

THE SOUTH CAROLINA STATE CONFERENCE OF THE NAACP,

and

TAIWAN SCOTT, on behalf of himself and all other similarly situated persons,

Plaintiffs,

vs.

HENRY D. MCMASTER, in his official capacity as Governor of South Carolina; THOMAS C. ALEXANDER, in his official capacity as President of the Senate; LUKE A. RANKIN, in his official capacity as Chairman of the Senate Judiciary Committee; JAMES H. LUCAS, in his official capacity as Speaker of the House of Representatives; CHRIS MURPHY, in his official capacity as Chairman of the House of Representatives Judiciary Committee; WALLACE H. JORDAN, in his official capacity as Chairman of the House of Representatives Elections Law Subcommittee; HOWARD KNAPP, in his official capacity as interim Executive Director of the South Carolina State Election Commission; JOHN WELLS, JOANNE DAY, CLIFFORD J. ELDER, LINDA MCCALL, and SCOTT MOSELEY, in their official capacities as members of the South Carolina State Election Commission,

Defendants.

Case No.: 3:21-cv-03302-JMC-TJH-RMG

THREE-JUDGE PANEL

MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT BY HOUSE DEFENDANTS JAMES H. LUCAS, CHRIS MURPHY, AND WALLACE H. JORDAN

Defendants James H. Lucas (in his official capacity as Speaker of the South Carolina House of Representatives), Chris Murphy (in his official capacity as Chairman of the South Carolina House of Representatives Judiciary Committee), and Wallace H. Jordan (in his official capacity

as Chairman of the South Carolina House of Representatives Redistricting Ad Hoc Committee) (collectively, the "**House Defendants**"), by and through undersigned counsel and pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), respectfully move this Court to dismiss[1] Plaintiffs'[2] Amended Complaint (ECF No. 84) ("**Motion**").[3] The grounds for this Motion are that (1) Plaintiffs lack both individual and organizational standing; (2) Plaintiffs fail to state a racial gerrymandering claim for which this Court can grant relief; and (3) this Court lacks subject-matter jurisdiction to adjudicate political gerrymandering claims, which constitutes the heart of Plaintiffs' Amended Complaint.

FACTUAL BACKGROUND

Governor Henry D. McMaster ("**Governor McMaster**") filed a Motion to Dismiss (the "**Governor's Motion**") on November 9, 2021. (*See* ECF No. 61). The House Defendants hereby adopt and incorporate the factual background as set forth in the Governor's Motion. (*See* ECF No.

[1] Pursuant to Local Civil Rule 7.04 (D.S.C.), "a supporting memorandum is not required" because this Motion contains "a full explanation" of the House Defendants' arguments such that a separate memorandum "would serve no useful purpose."

[2] "Plaintiffs" as used herein is a collective reference to The South Carolina State Conference of the NAACP ("**Plaintiff SC NAACP**") and Taiwan Scott, on behalf of himself and all other similarly situated persons ("**Plaintiff Scott**").

[3] The House Defendants have elected to file an Answer to the Amended Complaint simultaneously with the filing of this Motion. The House Defendants do so based on the comments of at least one member of the assigned Panel during the status hearing held on December 22, 2021. *See* ECF No. 85 at 18:19-19:13 ("Judge Childs: [filing a parallel motion to dismiss and answer] would be great to just know what the position [is]."). As noted by counsel at that hearing, while the House Defendants are mindful that the Court wishes this litigation to proceed expeditiously, the House Defendants nevertheless believe this Motion has substantial merit and cannot waive the arguments made herein or fail to preserve the issues for appeal. These responsive pleadings are filed simultaneously in furtherance of a most expeditious resolution of this case as discussed with the Court. Plaintiffs' counsel has agreed that filing an Answer does not waive any arguments or privileges asserted in this Motion.

61 at 2-4). Additionally, since the filing of the Governor's Motion, the following activities have transpired and are pertinent to the factual background of this Motion:

- **November 10, 2021**: The House Redistricting Ad Hoc Committee ("**Ad Hoc Committee**") held a hearing on its staff's working plan for new districts for the South Carolina House of Representatives ("**House Districts**"), which was open to the public—as are all meetings—and accommodated virtual testimony.[4]

- **November 12, 2021**: The Court partially granted the House Defendants' Motion to Stay, (ECF No. 51), and stayed this case until January 18, 2022. (ECF No. 63).

- **December 6, 2021**: The House of Representatives passed H. 4493,[5] which contained the new House Districts.

- **December 6, 2021**: "In order to facilitate the timely and judicious resolution of these issues once the stay is lifted," the Court ordered that parties desiring to respond to Plaintiffs' Motion for Preliminary Injunction, (ECF No. 59), or the Governor's Motion do so by December 17, 2021. (ECF No. 69).

- **December 8, 2021**: The Senate passed H. 4493, with amendment, establishing new legislative districts for the South Carolina House of Representatives and the South Carolina Senate ("**Senate Districts**").[6]

[4] Leah C. Aden, Esq., of the NAACP Legal Defense & Educational Fund, Inc., and Somil B. Trivedi, Esq., of the American Civil Liberties Union Foundation, both counsel of record and admitted *pro hac vice* in this matter, testified and—paradoxically—complained that the House's redistricting process was moving ***too quickly***. Available at https://www.scstatehouse.gov/video/archives.php (November 10, 2021 hearing beginning at 1:48:23; transcript forthcoming). The President of Plaintiff SC NAACP also testified at this hearing.

[5] H. 4493 received a favorable report from the House Judiciary Committee and was sent to the full House for consideration on December 1, 2021. H. 4493 received a second reading on December 2, 2021, after having received a first reading on June 29, 2021. On December 6, 2021, H. 4493 received a third reading and was passed with a vote of 100 "Yeas" and 15 "Nays." *See* https://www.scstatehouse.gov/billsearch.php?billnumbers=4493&session=124&summary=B.

[6] H. 4493 passed the Senate with a vote of 43 "Yeas" and 1 "Nay." *Id.*

- **December 9, 2021**: The House passed H. 4493 with the Senate's amendment.[7]

- **December 10, 2021**: Governor McMaster signed H. 4493 into law, creating Act No. 117 ("**Act No. 117**").

- **December 15, 2021**: Plaintiffs filed a letter informing the Court of their intent to file an amended complaint (the "**Amended Complaint**") on or before December 23, 2021, which would address the newly enacted legislative districts. (ECF No. 73).

- **December 16, 2021**: The Court postponed the filing of responses to the Governor's Motion, (ECF No. 61), and Plaintiffs' Motion for Preliminary Injunction, (ECF No. 59), and ordered that "any new motions regarding the Amended Complaint shall be filed by December 28, 2021, and any subsequent responses shall be due by January 5, 2021 [*sic*]." (ECF No. 74). The Court later extended the responsive motions deadline to January 6, 2022. (ECF No. 80).

- **December 23, 2021**: Plaintiffs filed the Amended Complaint. (ECF No. 84).

- **January 4, 2022**: Plaintiffs filed a corrected Amended Complaint to include missing paragraphs 150 and 156.[8] (ECF No. 84).

- **January 4, 2022**: The Court denied as moot the Governor's Motion because Plaintiffs' Amended Complaint is now the controlling pleading in the case. (ECF No. 86).

- **January 6, 2022**: The Court denied as moot Plaintiff's Motion for Preliminary Injunction because the Amended Complaint challenges newly passed district maps, as opposed to any Legislative delay in their passage. (ECF No. 87).

LEGAL STANDARDS

In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court accepts the factual allegations of the complaint as true and asks whether the complaint states

[7] The House concurred in the Senate amendment and passed H. 4493 with a vote of 75 "Yeas" to 27 "Nays." *Id*.

[8] The corrected Amended Complaint also appears to supplement paragraph 146, although this was not noted in the docket text.

a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). On such a motion, a "complaint must be dismissed if it does not allege enough facts to state a claim to relief that is ***plausible*** on its face." *Simmons v. United Mortg. & Loan Inv., LLC*, 634 F. 3d 754, 768 (4th Cir. 2011) (internal quotation marks omitted) (emphasis in original). A claim is plausible "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 v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, in reviewing a Rule 12(b)(6) motion to dismiss, the Court "must determine whether it is plausible that the factual allegations in the complaint are 'enough to raise a right to relief above the speculative level.'" *Andrew v. Clark*, 561 F. 3d 261, 266 (4th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 555 U.S. 544, 545 (2007)).

Importantly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678; *see also US Airline Pilots Ass'n v. AWAPPA, LLC*, 615 F.3d 312, 317 (4th Cir. 2010) (holding a "complaint must 'provide the grounds of [the plaintiff's] entitlement to relief' with 'more than labels and conclusions' and more than 'a formulaic recitation of the elements of a cause of action'") (quoting *Iqbal*, 550 U.S. at 555 (2007)). Indeed, "courts must overlook 'conclusory, unwarranted deductions of fact, or unreasonable inferences.'" *Brown v. Lowe's Cos., Inc.*, 52 F. Supp. 3d 749, 753 (W.D.N.C. 2014) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)).

Further, regarding the subject-matter jurisdiction of federal district courts, Article III of the United States Constitution limits the federal judicial power to resolving "Cases" or "Controversies." U.S. Const. art. III § 2; *Ansley v. Warren*, 861 F.3d 512, 517 (4th Cir. 2017). Accordingly, whether a plaintiff has identified an actual case or controversy is a question of subject-matter jurisdiction. *See South Carolina v. United States*, 912 F.3d 720, 726 (4th Cir.

2019). Federal Rule of Civil Procedure 12(b)(1) allows a defendant to move for dismissal when it believes that the plaintiff has failed to establish subject-matter jurisdiction. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 630 (1993) ("The three-judge District Court held that it lacked subject matter jurisdiction . . .").

ARGUMENT

I. Plaintiffs lack standing to challenge the selected House Districts.

It is well established that an "essential element" of the Constitution's limitation on the power of the federal courts is "that any party who invokes the court's authority must establish standing." *Ansley v. Warren*, 861 F.3d 512, 517 (4th Cir. 2017). "Standing is a doctrine that refers to a plaintiff's ability to bring a suit before the court." *Holloway v. City of Virginia Beach, Virginia*, No. 2:18-CV-69, 2020 WL 4758362, at *5 (E.D. Va. Aug. 17, 2020). "[I]t is not enough that the party invoking the power of the court have a keen interest in the issue." *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013). Establishing standing requires the plaintiff to show (1) an "injury in fact," (2) "a causal connection between the injury and the conduct complained of," and (3) that a favorable decision will likely redress the injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, Plaintiffs have failed to show that either Plaintiff Scott or Plaintiff SC NAACP has suffered any injury in fact.

a. Plaintiff Scott has not suffered an injury in fact because he does not reside in a Challenged District.

The Supreme Court has distinguished that voters residing in a racially gerrymandered district "suffer the special representational harms racial classifications can cause in the voting context," but "where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference."

United States v. Hays, 515 U.S. 737, 745 (1995). The Supreme Court went on to state that "[u]nless such evidence is present, that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve." *Id.*

Based on this distinction, the Supreme Court has made clear that those not residing in a challenged district do not have standing to pursue such a claim:

> Our district-specific language makes sense in light of the nature of the harms that underlie a racial gerrymandering claim. Those harms are personal. They include being "personally ... subjected to [a] racial classification," *Bush v. Vera*, 517 U.S. 952, 957 (1996) (principal opinion), as well as being represented by a legislator who believes his "primary obligation is to represent only the members" of a particular racial group, *Shaw v. Reno*, 509 U.S. 630, 648 (1993). They directly threaten a voter who lives in the district attacked. But they do not so keenly threaten a voter who lives elsewhere in the State. Indeed, the latter voter normally lacks standing to pursue a racial gerrymandering claim. *Hays*, 515 U.S. at 744–45.

Alabama Legislative Black Caucus v. Alabama, 575 U.S. 254, 263 (2015) (internal citations added).

Plaintiff Scott is the only individual plaintiff who brings these claims. (ECF No. 84 at ¶ 22). He is alleged to be "a U.S. Citizen and Black, registered voter, and resident of Hilton Head in Beaufort County, South Carolina." *Id.* Of the 28 House Districts enacted by Act No. 117 being challenged by Plaintiffs (the "**Challenged Districts**"), none encompass any portion of Beaufort County—where Plaintiff Scott resides. *See id.* at ¶ 9). Therefore, because Plaintiff Scott does not reside in any Challenged District, he lacks standing to pursue his claims. *See Backus v. South Carolina*, 857 F. Supp. 2d 553, 564 (D.S.C.), *aff'd*, 568 U.S. 801 (2012) ("no Plaintiff lived in [the other challenged districts, and, as a result] Plaintiffs lack standing to challenge those districts.").

Further, even if Plaintiffs challenged the district in which Plaintiff Scott resides, the enactment of Act No. 117 has not caused him to suffer a concrete injury in fact because the House District lines remain unchanged on Hilton Head Island. As such, Plaintiff Scott's residence remains

in the same House District as it was prior to the enactment of Act No. 117. Accordingly, Plaintiff Scott cannot establish the elements of standing necessary to maintain his claims because the enactment of Act No. 117 had no concrete effect on him. *See Lujan*, 504 U.S. at 560-61.

b. Plaintiff SC NAACP has not adequately established the requirements for organizational standing.

Separate from the infirmities of Plaintiff Scott's standing, the Amended Complaint does not adequately demonstrate how Plaintiff SC NAACP has standing to assert its claims as to the Challenged Districts.[9]

First, the allegations in the Amended Complaint do not establish that Plaintiff SC NAACP has the requisite "organizational" or "associational" standing to pursue its claims. *Kravitz v. United States Dep't of Com.*, 366 F. Supp. 3d 681, 736 (D. Md. 2019). An organization can establish direct organizational standing if it shows that "the injury is to the organization itself." *Id.* Alternatively, an organizational plaintiff's standing can be based on representational standing, which is "where the injury is to the organization's members." *Id.* (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). However, in order to do so, the organization must show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* During the pleading stage, the burden remains on the plaintiffs to clearly allege facts demonstrating each element of standing. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016), *as revised* (May 24, 2016).

[9] The "South Carolina State Conference of the NAACP" does not appear to be the proper name of the organization. Other Defendants have pointed out this defect as well. (*See* ECF No. 67 at ¶¶ 7, 9, and 11). According to the South Carolina Secretary of State's office, there is a "South Carolina State Conference, NAACP" that is registered with the Secretary of State to operate in South Carolina.

The Amended Complaint appears to assert only organizational standing, but does not allege sufficient facts to demonstrate the elements required for such standing. Instead, the Amended Complaint baldly alleges that Plaintiff SC NAACP has "members [who] live in the Challenged Districts." (ECF No. 84 at ¶ 18). The Amended Complaint does not allege which of the Challenged Districts these members live in, who the members are, whether the members have standing to sue in their own right, or that neither the claim asserted nor the relief requested requires the participation of these members in this lawsuit. These allegations are insufficient. In *Alabama Legislative Black Caucus*, the Supreme Court advised the district court on remand that the organizational plaintiffs should file a list of members, at least with respect to the districts at issue, demonstrating the significance of such facts to maintenance of the proceeding. *See Alabama Legislative Black Caucus*, 575 U.S. at 271. Moreover, alleging that Plaintiff SC NAACP has members in each South Carolina ***county***, (*see* ECF No. 84 at ¶ 17), even if true, does not compel the conclusion that it has a member residing in each of the Challenged Districts, let alone provide their identity or specify their concrete injury.

The Amended Complaint also fails to allege specific complaints that members of SC NAACP may have with regard to the Challenged Districts. Nor is there any mention of a member who now resides in a new House District because of the change in boundaries for the Challenged Districts. Accordingly, Plaintiff SC NAACP has not alleged that its members would otherwise have standing to sue in their own right and thus fails to satisfy the first element of organizational standing. *See Kravitz*, 366 F. Supp. 3d at 736.

Finally, the Amended Compliant does not allege why the participation of individual members of Plaintiff SC NAACP is not required. This element of the organizational standing test requires that the "nature of the claim and of the relief sought . . . not make the individual

participation of each injured party indispensable to proper resolution of the cause . . .” *United Food & Commercial Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 552 (1996) (internal quotations omitted). A district court in this Circuit recently held that in order to satisfy this prong, an organizational plaintiff must identify which members were affected by governmental action and how each of the members were affected. *See Hanover Cty. Unit of the NAACP v. Hanover Cty.*, 461 F. Supp. 3d 280, 290 (E.D. Va. 2020) (stating that the organizational plaintiff “would have to introduce evidence showing which members objected to which speech and how each of the members were compelled to speak. That showing necessarily requires individualized proof . . .”). This case is analogous because the Amended Complaint fails to specify which members were allegedly affected by which Challenged Districts or how the enactment of Act No. 117 otherwise impacted each such member. Consequently, Plaintiff SC NAACP lacks standing to bring its claims because it has failed to allege facts sufficient to satisfy the first and third elements of organizational standing.

II. Plaintiffs fail to state a claim for racial gerrymandering.

In their Amended Complaint, Plaintiffs make a series of unsupported assertions regarding the intent of the General Assembly and demand, colloquially, to “have it both ways” when it comes to accounting for race when drawing legislative districts. These bald claims, without more, do not adequately state a racial gerrymandering claim for which this Court can grant relief. Therefore, Plaintiffs’ claims of racial gerrymandering as to the Challenged Districts should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

At the outset, Plaintiffs summarily allege that Defendants engaged in “racial gerrymandering and intentional vote dilution.” (ECF No. 84 at ¶ 3). Plaintiffs proceed to allege the “Legislature did so by using race as the predominant factor in creating certain state House districts without legally acceptable justifications and having a discriminatory purpose in packing and

cracking Black voters to dilute their vote." *Id.* at ¶ 4. While Plaintiffs provide a few examples, *see, e.g., id.* at ¶ 6, they generally make unsupported accusations, without expert opinion, statistical analysis, or claims by actual voters allegedly injured by the enactment of Act No. 117. Plaintiffs improperly assume the intent of the General Assembly based on a quick look at the map and some cursory statistics. This is not enough to survive the "plausibility" standard required by federal courts. *See Twombly*, 550 U.S. at 557 (a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."); s*ee also Iqbal*, 556 U.S. at 677 (the "plausibility" standard requires a plaintiff to demonstrate more than "a sheer possibility that a defendant has acted unlawfully"); *Young v. City of Mount Ranier*, 238 F.3d 567, 577 (4th Cir. 2001) (recognizing that mere "bald assertions and conclusions of law" do not prevent dismissal of a complaint under Rule 12(b)(6)).

At the most basic level, Plaintiffs overlook or ignore the multitude of considerations that impact drawing new legislative districts.[10] As stated in the Ad Hoc Committee's 2021 Guidelines and Criteria for Congressional and Legislative Redistricting, the Ad Hoc Committee was required to comply with Constitutional mandates as well as state and federal law, maintain equal populations, have contiguous districts, preserve communities of interest, and consider incumbency.[11] The Ad Hoc Committee received hundreds of pages of written submissions from

[10] The House Defendants recognize and assert legislative privilege that protects the process of drawing new maps, and are not waiving this privilege, but are merely pointing out what is apparent from the map. At least one other federal court presiding over a current redistricting case has suggested that legislative defendants who, among other things, participated in motions practice "without giving the slightest indication that they were participating in the litigation for the limited purpose of asserting legislative immunity," waived their legislative immunity and privilege. *Singleton v. Merrill*, No. 2:21-CV-1291-AMM, 2021 WL 5979516, at *7 (N.D. Ala. Dec. 16, 2021). No such waiver is intended here.

[11] 2021 Guidelines and Criteria for Congressional and Legislative Redistricting, available at https://redistricting.schouse.gov/docs/2021%20Redistricting%20Guidelines.pdf.

the public, as well as oral testimony during 11 public hearings,[12] numerous Ad Hoc Committee meetings,[13] and 7 public map submissions proposing revised House Districts, including one from Plaintiff SC NAACP.[14] The Ad Hoc Committee reviewed this testimony and analyzed the public map submissions, all of which proposed different approaches to drawing district boundaries. The Ad Hoc Committee then had the difficult task of taking that information, along with proposed districts by incumbent House Members and County delegations, and ultimately develop a single, cohesive map with all 124 House Districts drawn within deviation. While Plaintiff SC NAACP and its Counsel participated in this process at public hearings and by providing maps, written and oral testimony, and multiple substantive memoranda, Plaintiffs' Amended Complaint simply ignores this complex multi-factor process and asserts, without support, that the predominant factor considered was race. This is incorrect and unfounded. Much more went into that process—ensuring that populations are equal or within deviation, considering town and city limits, calculating the number of districts that are proper for a larger county, determining which smaller counties or portions of counties to group together, and recognizing places of social, community, and economic interest. Preservation of the core of an existing district and unification of split voting precincts ("**precincts**"), counties, or other political subdivisions were also significant factors. All of this was taken into account during the process, while also considering public input, incumbency, and the variety of ways that a community of interest might be defined.[15]

[12] Public Hearing Videos and Transcripts, available at https://redistricting.schouse.gov/publichearing.html.

[13] Ad Hoc and Judiciary Meeting Video Archives, available at https://www.scstatehouse.gov/video/archives.php.

[14] 2021 Public Submissions, available at https://redistricting.schouse.gov/publicsubmissions.html.

[15] As stated in the Ad Hoc Committee's Guidelines and Criteria, and subject to judicial notice, "[a] variety of factors may contribute to a community of interest including, but not limited to the

Indeed, readily available evidence such as the public record of redistricting activities to date, which are found on the House Redistricting Website, refutes the Plaintiffs' unsupported allegations that race was predominant in drawing the Challenged Districts. *See Twombly*, 550 U.S. at 557; *Iqbal*, 556 U.S. at 677; *see also Loftus v. F.D.I.C.*, 989 F. Supp. 2d 483, 490 (D.S.C. 2013) (holding a court may consider documents incorporated into the pleadings by reference or attached to a dismissal motion if integral to plaintiff's claims and authentic). Instead, the General Assembly had objectives such as reducing the number of smaller, rural counties that were split, as those are more likely to be their own communities of interest. *See Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618, 648 (D.S.C. 2002), *opinion clarified* (Apr. 18, 2002). In Act No. 117, [16] there are 13 counties that are entirely whole within a single House District, which is an improvement from the 2010 redistricting cycle where only nine counties remained intact.[17] Act No. 117 keeps more counties whole than any public submission, including Plaintiff SC NAACP's proposed plan, which kept only 11 counties whole. In addition, Act No. 117 unified a substantial number of precincts that were previously split and had significantly fewer precinct splits than Plaintiff SC NAACP's proposal. Clearly, one of the factors prioritized by the General Assembly was preserving political subdivision boundaries, such as county and precinct lines.

following: (a) economic; (b) social and cultural; (c) historic influences; (d) political beliefs; (e) voting behavior; (f) governmental services; (g) commonality of communications; and (h) geographic location and features." 2021 Guidelines and Criteria for Congressional and Legislative Redistricting, *supra* note 11. Thus, communities of interest might be in conflict with each other. For example, city limits often extend across county lines and there may be differing opinions on whether the community of interest is better served by keeping the city whole or using the county line as a boundary. These are the types of decisions the General Assembly had to make.

[16] Statewide Map of Act No. 117, available at https://redistricting.schouse.gov/docs/housepassed/FloorPassedStatewideMap.pdf.

[17] Redistricting 2011, available at https://redistricting.schouse.gov/archives/2011/index.html.

Plaintiffs fail to sufficiently allege how the General Assembly used race as the predominant factor in drawing ***any*** of the Challenged Districts. Indeed, there are many legitimate reasons for drawing a district a certain way that have nothing to do with race. Of course, as Plaintiffs admit in their Amended Complaint, the consideration of race is "necessary" to ensure compliance with the Voting Rights Act. (ECF No. 84 at ¶ 5). Here, however, in areas where House Districts have minority populations smaller than Plaintiffs prefer, Plaintiffs accuse the General Assembly of "cracking Black voters," yet in other areas where House Districts have a larger minority population, Plaintiffs accuse the General Assembly of "using race to maintain ***political*** power by unnecessarily packing Black South Carolinians into certain districts." *Id.* (emphasis added). Hypocritically, Plaintiff SC NAACP's plan clearly uses race as the predominant factor in evaluating these House Districts and in drawing its own proposed lines, with no discussion of any race-neutral factors considered when determining where those lines were drawn. There is no justification offered for why Plaintiff SC NAACP's proposed map is immune from the same criticism of racial gerrymandering.[18] The General Assembly used a variety of race-neutral factors to draw the Challenged Districts. The following summary, supported by facts the Court can consider, plainly disproves the conclusory charge that race was the predominant factor used, making it evident that the Plaintiffs do not state a claim for racial gerrymandering.

Plaintiffs' claims should be dismissed, just as similar challenges to the 2011 redistricting plan were dismissed for failure to state a claim. In *Backus*, the three-judge panel granted a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and found that:

[18] *See Miller v. Johnson*, 515 U.S. 900, 904 (1995) (holding that "[r]acial and ethnic distinctions of any sort are inherently suspect and . . . call for the most exacting judicial examination" under the Equal Protection Clause, and recognizing that "[t]his rule obtains with equal force regardless of the race of those burdened or benefited by a particular classification") (internal citations omitted).

> Plaintiffs failed to establish that race was the predominant factor used in drawing the district lines in either the House plan or the Congressional plan because their evidence did not support any of the following: (a) the reapportionment plans contained district lines that were so bizarre or highly irregular on their face that they cannot be rationally understood as anything but an effort to separate voters based on race; (b) the legislature subordinated traditional race-neutral redistricting principles to race; or (c) any legislative purpose indicating that race was the predominant factor.

Backus, 857 F. Supp. 2d at 560. The defendants in *Backus*, which included members of the General Assembly, "were able to disprove that race was the predominant factor by demonstrating that their decisions adhered to traditional race-neutral principles." *Id.* The three-judge panel criticized the plaintiffs for focusing "too much on changes that increased the BVAP in certain districts and not enough on how traditional race-neutral principles were subordinated to race in making those changes." *Id*. at 565. The panel explained that the plaintiffs' approach risked "ignoring that race might have been an unintended consequence of a change rather than a motivating factor," as well as ignoring "that race can be—and often must be—a factor in redistricting." *Id.* The same is true here. Plaintiffs have failed to state facts sufficient to support that race predominated over traditional race-neutral redistricting principles in Act No. 117.

a. Overview of Statewide Plan

Each Challenged District is addressed below, but it is clear from looking at the variety of factors discussed above that there are race-neutral justifications for the way the Challenged Districts were drawn, such as respecting communities of interest, equalizing populations, respecting county lines, unifying split precincts, and using natural geography and things like major roads and railways as natural dividing points. Also, it is important to keep in mind that the House Districts enacted in 2011 were precleared by the Department of Justice ("**DOJ**") under the leadership of former Attorney General Eric Holder during President Obama's first administration, survived a federal court challenge at a time when Section 5 of the Voting Rights Act still applied,

and were affirmed by the Supreme Court. *See Backus v. South Carolina*, 568 U.S. 801 (2012). Those precleared and court-approved lines served as a starting point to drawing new districts because they were approved by the executive and judicial branches of the federal government as not being racially gerrymandered. In *Colleton Cty.*, the three-judge panel held that a core principle historically observed in South Carolina was also maintaining core constituencies in a district. *See* 201 F. Supp. 2d at 647. Rather than calling this "incumbency protection," the court "view[ed] the principle as more accurately protecting the core constituency's interest in reelecting, if they choose, an incumbent representative in whom they have placed their trust." *Id.*

With that as a starting point, it is undisputed that population changes since the 2010 Census in South Carolina necessitated not only new district lines, but in some areas population losses necessitated "collapses" or combining of multiple districts. While the overall population of South Carolina grew, the increased population was not spread evenly over the state. There was significant growth in the Myrtle Beach area, in the suburbs south of Charlotte, and around Charleston.[19] This growth necessitated new House Districts in those areas. However, there was population loss in rural areas, such as along Interstate 95, across the Pee Dee region, around the Orangeburg area, and in Richland County. In addition, the population growth and loss did not occur evenly among races. While South Carolina's population grew by 10.7% (or 493,061) between the 2010 Census and 2020 Census, the Black Voting Age Population ("**BVAP**")[20] decreased by nearly two percent.

[19] *See* Michelle Liu, *Horry County Sees 'Most Concentrated Growth' In SC, Census Data Shows*, ASSOCIATED PRESS, August 12, 2021, https://wpde.com/news/local/horry-county-sees-most-concentrated-growth-in-sc-census-data-shows.

[20] Unless otherwise noted, House Defendants use the DOJ demographic, which is defined as age 18 and over non-Hispanic Black population. The "any part Black" demographic includes Hispanic Black population. Therefore, the DOJ demographic is generally lower than the any part Black statistic.

In 2010, the overall state percentage of BVAP was 26.49%.[21] In 2020, that dropped to 24.59%.[22] While the overall number of Black voters in South Carolina increased by 48,132 since 2010, this increase in voting age African Americans constituted less than 10% of the overall population growth in the state over the last ten years.[23] As a result of these population changes, there was a natural decrease in the number of majority-minority districts in South Carolina. Following the 2010 redistricting cycle, there were 30 majority-minority districts.[24] However, using those same House District boundaries with the 2020 Census results there were only 17 majority-minority "benchmark" districts.[25]

Finally, when looking at Act No. 117, the statistics do not support Plaintiffs' allegation that the General Assembly engaged in racial gerrymandering. In Act No. 117, there are 21 majority-minority districts using either the DOJ demographic or the any part Black demographic. This results in more majority-minority districts than the "benchmark" plan and more than any plan submitted by the public, including the plan submitted by Plaintiff SC NAACP, which had 15 majority-minority districts using the DOJ demographic and 19 majority-minority districts using the any part Black demographic. Act No. 117 also includes 11 "opportunity" districts, which Plaintiffs describe as those districts with between 40% and 50% BVAP.[26] (ECF No. 84 at ¶ 77).

[21] 2011 Judicial Preclearance Submission for Act No. 72 of 2011 (Exhibit No. 2), available at https://redistricting.schouse.gov/archives/2011/PreclearanceSubmissionH3991.html.

[22] Act No. 117 Plan Demographics, available at https://redistricting.schouse.gov/index.html.

[23] *See supra*, notes 21-22.

[24] *See supra*, note 21.

[25] 2020 District Demographics Pre-Draw, available at https://redistricting.schouse.gov/demographicspredraw.html.

[26] Importantly, 40% BVAP is not a minimum threshold that has been judicially determined in order to be considered an "opportunity" district.

Thus, Act No. 117 provides for a total of 32 districts with above 40% BVAP. Plaintiff SC NAACP's plan provides for a total of 35 districts with above 40% BVAP, just three more than in Act No. 117. This distinction represents less than 2.5% of the 124 House Districts presented in Act No. 117. Such a small distinction is not indicative of intentional racial gerrymandering.

b. Anderson County House Districts (House Districts 7, 8, 9, and 11)

Plaintiffs first challenge four House Districts in Anderson County, which center on the City of Anderson. (*See* ECF No. 84 at ¶¶ 112-123). Plaintiffs' core allegation is that Anderson is split "like a shattered mirror," which had the effect of "cracking . . . Black voters." *Id.* at ¶¶ 114-115.

In Act No. 117, most of the City of Anderson is in House Districts 6, 8, and 9, with 1,648 city residents in House District 7. These are the same four House Districts representing the residents of the City of Anderson as following the 2010 redistricting cycle, which again, was precleared by the DOJ and survived scrutiny in federal court. In fact, when considering race-neutral factors, the splits in Act No. 117 are an improvement from the "benchmark" plan, as major roads and precinct lines are used as natural boundaries in the enacted plan. These types of considerations, along with the core of the existing House Districts, were the predominant factors used in drawing these House Districts, not race.

Plaintiffs allege that this "cracking" was done by splitting multiple precincts in Anderson. *Id.* at ¶ 113. A careful look at Anderson, specifically the city, shows that precincts were generally kept whole and where split, major roads such as S.C. Highway 28 and U.S. Route 29 were used as natural dividing lines. Using major roads as district lines avoids bizarre shapes by having stretches of straight boundaries between neighboring House Districts.

Nonetheless, Plaintiffs suggest an alternative House District 7, which contains a BVAP of 37.57%. (ECF No. 84 at ¶ 117). This is an example of Plaintiffs wanting to "have it both ways."

As shown in Plaintiffs' diagram, *see id.*, Plaintiff SC NAACP has "surgically" drawn its line for House District 7 around only the high BVAP census blocks, while splitting at least 14 precincts in the process. Hypocritically, Plaintiffs' Amended Complaint criticizes the House Defendants for splitting just four precincts in this area and alleges that such "surgically" drawn line results in "packing" minority voters. *Id*. at ¶¶ 6, 113. This is just one example of the inconsistent arguments that Plaintiffs present to the Court. Plaintiffs even admit that at "approximately 38% BVAP, there ***may be almost*** a 50% chance of electing a Black-preferred candidate." *Id.* at ¶ 122 (emphasis added). However, Plaintiffs do not allege facts to support how this is the appropriate threshold for such a district.

In addition, Plaintiff SC NAACP's suggested map splits cities across the state, including some much smaller than Anderson, which has a population of 28,106. For example, in this western portion of the state, Plaintiff SC NAACP's plan splits the cities of Abbeville (population of 4,874), Belton (population of 4,335), Pendleton (population of 3,489), Calhoun Falls (population of 1,727), Ridge Spring (population of 579), and Cross Hill (population of 404), all of which are kept whole by the House Defendants in Act No. 117. Plaintiffs dramatically allege the City of Anderson is "shattered" in Act No. 117, while their proposed plan would "shatter" much smaller cities across this area of the state themselves. Even viewing the facts in the light most favorable to Plaintiffs, it is indisputable that Act No. 117 keeps smaller cities whole where possible and followed historic boundary lines in larger cities such as Anderson. In addition to splitting the City of Belton, Plaintiff SC NAACP also places the cities of Belton and Honea Path, which share a common high school among other things, into different House Districts. This is just one example where Act No. 117 respects such a community of interest.

Because Plaintiffs fail to allege how race was the predominant factor used by the General Assembly in drawing the Anderson County House Districts, and also because Plaintiffs ignore the fact that their alternative plan appears to be the product of using race as the predominant factor (which leads to "packing" of Black voters), Plaintiffs have failed to state a claim for relief as to the Anderson County House Districts.

c. Chester County House Districts (House Districts 41 and 43)

As with the Anderson County House Districts, Plaintiffs again allege without support that race was the predominant factor used in drawing House Districts 41 and 43 in Chester County. (*See* ECF No. 84 at ¶¶ 124-128). To support this claim, Plaintiffs only allege that Act No. 117 creates a "bizarrely shaped, bunny-eared appendage that grabs the Black-majority City of Chester, as well as other areas comprised heavily of Black voters in Chester County." *Id.* at ¶ 125. As with the other Challenged Districts, Plaintiffs' Amended Complaint "contains only conclusory and speculative statements that are insufficient to state a claim." *Hunt v. Mortgage Electronic Registration*, 522 F. Supp. 2d 749, 752 (D.S.C. 2007). To the contrary, these district boundaries follow the core of the existing House Districts and make several race-neutral improvements to those prior districts. For example, the City of Chester is now unified in House District 41. In addition, several precincts are also unified, but where there are precinct splits, major roads such as S.C. Highway 72, S.C. Highway 909, and State Road 152 are used as natural dividing lines.

Plaintiffs again ignore these race-neutral and practical factors, opting instead to summarily conclude and allege that the lines were motivated solely by race. Notably, Plaintiffs do not include a proposed map for this area in their Amended Complaint.[27] Plaintiffs also fail to note that there

[27] Plaintiffs instead suggest that House District 43 should be drawn into Lancaster County, which it was not previously in. (*See* ECF No. 84 at ¶ 126). This would needlessly take this House District into a third county. As discussed above, the General Assembly attempted to respect county

are legitimate differences between the City of Chester and the surrounding rural areas of the county that have nothing to do with race, but instead have to do with their communities, economies, and social lives. As with the Anderson County House Districts, Plaintiffs' allegations regarding House Districts 41 and 43 should be dismissed.

d. Sumter County House Districts (House Districts 51 and 67)

The Amended Complaint alleges that House Districts 51 and 67 were drawn using race as the predominant factor to "pack voters into District 51." (*See* ECF No. 84 at ¶¶ 129-133). Again, this accusation is supported by no more than what appears to be a cursory look at the shapes of the districts. A simple review of these House Districts shows that the district cores remain the same and the racial statistics evidence favorable changes when compared to the prior redistricting cycle. Moreover, Plaintiffs ignore one significant point: the so-called "erratic district lines" between House Districts 51 and 67 are ***exactly*** the same in the City of Sumter as they were following the 2010 redistricting cycle, as precleared by the DOJ. *Id.* at ¶ 130. In fact, House District 67 deviated 2.5% under the ideal population, so no major changes were necessary. The only changes made were on the western border with District 64, and those changes were minor, using S.C. Highway 40 and precincts lines as boundaries. Further, the demographics of these House Districts show that the BVAP in House District 51 is less than that following the last redistricting cycle (62.28% versus 60.11%), and the BVAP in House District 67 is greater than it previously was (24.18% versus 27.13%). These statistics are also very similar to those proposed by Plaintiff SC NAACP in its public submission, which would have House District 51 at 59.9% and House District 67 at 28.95%.

boundaries when possible, as is demonstrated by the boundaries for House District 43 that borders York, Lancaster, and Fairfield counties, and only extends into the populous York County as necessary to equalize population.

The foregoing statistics refute Plaintiffs' allegation that these House Districts are "cracked" and "packed" and that race was the predominant factor used. Instead, the predominant factor in this area of the state was population, as there were significant population deficits that needed to be accounted for or proper populations that needed to be maintained. Therefore, Plaintiffs' claims as to Sumter County House Districts 51 and 67 should be dismissed.

e. Marlboro, Dillon, and Horry County House Districts (House Districts 54, 55, 57, and 105)

Plaintiffs next allege that race was the predominant factor in drawing House Districts 54, 55, 57, and 105 in Marlboro, Dillon, and Horry Counties. (*See* ECF No. 84 at ¶¶ 134-140). Again, these claims are unsupported and based entirely on Plaintiffs' apparent dislike of the boundaries for these House Districts. While Plaintiffs challenge House Districts 54, 55, 57, and 105, their main concern appears to be with House District 55 and its extension into Horry County. *See id.* at ¶¶ 135-137. As is seen again with this House District, boundaries of underpopulated districts must move toward population. Horry County experienced more growth than any other county in South Carolina since the 2010 Census, growing by over 30%.[28] This is in stark comparison to House District 55, which was the single most underpopulated House District as a result of the 2020 Census at 22.08% under the ideal population.[29] In order to equalize these populations, House District 55 needed to extend further into Horry County, as other bordering counties also experienced population losses. Thus, the logical choice was to make up the needed population in Horry County, where the growth was tremendous.

[28] United States Census Bureau, *South Carolina Gained Almost Half a Million People Last Decade* (Aug. 25, 2021), https://www.census.gov/library/stories/state-by-state/south-carolina-population-change-between-census-decade.html.

[29] *See supra*, note 25.

The public submission from Plaintiff SC NAACP decided to use population from Marion and Darlington Counties to make up the losses in House District 55, bringing the district into five counties. This is more than any House District in Act No. 117 or the previous redistricting cycle. The House Defendants submit this is not an acceptable alternative. While Horry County happens to have a more heavily white demographic, s*ee id.* at ¶ 139, the move further into Horry County was not based on race. Instead, it was driven by the need for additional population in order to equalize population among House Districts. In addition, Plaintiffs fail to allege any facts to support racial gerrymandering in Marlboro, Dillon, and Horry Counties, and also fail to suggest a reasonable alternative demonstrating a more appropriate draw. For these reasons, Plaintiffs' claims as to the Marlboro, Dillon, and Horry County House Districts should be dismissed.

f. Florence and Williamsburg County House Districts (House Districts 59, 60, 63, and 101)

Plaintiffs challenge House Districts 59, 60, 63, and 101 in Florence and Williamsburg Counties, again alleging in conclusory fashion that race was the predominant factor used in drawing these Challenged Districts. (*See* ECF No. 84 at ¶¶ 141-147). A closer look at these House Districts, and the House Districts that preceded them from 10 years ago, demonstrates that the factors used in drawing these House Districts were preserving prior boundaries, respecting county lines, and reuniting previously split precincts.

According to Plaintiffs, the City of Florence is split between three House Districts along "clear racial lines." *Id.* at ¶ 142. However, the City of Florence was actually split between four House Districts (59, 60, 62, and 63) following the last redistricting cycle. By Act No. 117, House District 62 was excised from that portion of Florence County, and its new boundary is now the Darlington-Florence County line. Thus, the City of Florence is split between less House Districts than it previously was. The rest of the border between House Districts 59 and 63 remains as it was

for the prior districts, using a railroad and major roads as dividing lines. A simple comparison of the "benchmark" plan to Act No. 117 evidences a race-neutral motivation—to preserve the core of the previous district. Plaintiffs also fail to note that House District 63 was only 2.0% below the ideal population, which was within deviation and allowed for a majority of the existing boundary lines to be maintained.

Plaintiffs allege that these "district lines in Florence unnecessarily pack Black voters into District 59." *Id.* at ¶ 143. However, House District 59 actually has a slightly lower BVAP than it did 10 years ago (60.67% versus 59.96%). The boundaries for House District 59 are comprised almost entirely of county lines and precinct boundaries. Again, these considerations predominated, not race. Inexplicably, Plaintiffs also allege that "Black incumbent legislators in District 59 had 'been paired and will be forced to compete against one another . . .'" *Id.* at ¶ 144. In none of the proposed maps at any stage of this process has this been true. It appears that Plaintiffs are referring to Rep. Robert Williams and Rep. Terry Alexander, who live in close proximity to one another. However, Rep. Williams lives in Darlington County and Rep. Alexander lives in Florence County.[30] The natural dividing line between these two incumbents is the county line, which was used in Act No. 117 as the boundary between these districts. As a result, Rep. Alexander remains in House District 59 and Rep. Williams remains in House District 62.

Finally, Plaintiffs challenge House District 101 because it crosses county lines to include Lake City, and, "[a]s a result, District 101 is packed . . ." *Id.* at ¶ 146. However, Plaintiffs overlook or ignore that the precincts around Lake City are the same general area that is included with Williamsburg County in the Senate District in Act No. 117 and in the current U.S. Congressional

[30] South Carolina Legislature, Members of the House, https://www.scstatehouse.gov/member.php?chamber=H.

District. Thus, it makes logical sense to include that area with Williamsburg County in the House District as well. Further, those five precincts actually have a lower BVAP than the overall House District 101 (54.67% in those five precincts versus 58.16%), meaning that including those precincts in House District 101 actually ***lowers*** the BVAP in House District 101 by more than one full percentage point. This is not "packing" Black voters into House District 101, but preserving communities of interest that are represented by the same South Carolina Senator and U.S. Congressman. Yet again, Plaintiffs have failed to allege any facts that would support that race was the predominant factor in drawing these House Districts in Florence and Williamsburg Counties. As such, Plaintiffs' claims as to the Florence and Williamsburg County House Districts should be dismissed.

g. Richland County House Districts (House Districts 70, 72, 73, 74, 75, 76, 77, 78, and 79)

By the numbers representing the largest percentage of the House Districts challenged in the Amended Complaint, Plaintiffs challenge every district within Richland County except for House District 71. (*See* ECF No. 84 at ¶¶ 148-154). According to Plaintiffs, "district lines throughout Richland County pack Black voters into Districts 70, 73, 74, 76, 77, and 79, with BVAP ranging from 55.7% to 66.6%." *Id.* at ¶ 149. Plaintiffs allege that as a result of "packing these districts, the map also reduces the influence of Black voters in District 72, 75, and 78." *Id*. Plaintiffs ignore that Richland County has a substantial African American population and that the House Districts in Act No. 117 accurately reflect the overall demographics of the county.

First, House Districts 72 and 78 have similar BVAPs as they had previously. While there was a slight decrease in the BVAP of House District 72 (27.39% versus 25.69%), the lines for this district are almost exactly the same as they were, with the benefit of completing at least one precinct. Meanwhile, House District 78 increased its BVAP by more than five percent (26.42%

versus 31.50%). Clearly, Act No. 117 does not "reduce the influence of Black voters" in this District as the Plaintiffs allege. *Id.* at ¶ 149.

Similarly, the only changes made along the border of House Districts 76 and 78 were to make two precincts whole. Contrary to Plaintiffs' allegations, neither of these two changes had the effect of "packing" Black voters into House District 76 or reducing Black voters' influence in House District 78. *Id.* at ¶ 152. For House District 75, the BVAP increased slightly compared to 10 years ago (16.25% versus 17.04%). Again, this does not reduce the voting power of Black voters in this district. In fact, the boundary lines for House District 75, like others in Richland County, have not moved significantly—or in some areas at all—since the last redistricting cycle. Those boundary lines have the benefit of making at least three precincts whole. Meanwhile, House Districts 70, 73, 74, 76, 77, 79 are all above 50% BVAP. Following the last redistricting cycle, these same House Districts were also all above 50% BVAP. That is reflective of the population that lives in these areas of Richland County.

Finally, Plaintiffs allege that the combination of House Districts 70 and 80 resulted in a "packed" district. *Id.* at ¶ 150. Following the 2020 Census, Richland County only had enough population to fill 10 districts, but previously had 11 districts. Like other areas of the state, a combining of two districts was necessary. Both House Districts 70 and 80 were underpopulated and extended into neighboring counties. The combination of the two allowed for the remaining district to be wholly within Richland County and reflect the population that lives in the southeastern portion of the county.

Race was not the predominant factor in drawing these Challenged Districts. Rather, population considerations and the cores of existing districts were used. Accordingly, Plaintiffs' claims as to the Richland County House Districts should be dismissed.

h. Orangeburg County House Districts (House Districts 90, 91, 93, and 95)

Finally, Plaintiffs challenge four House Districts in Orangeburg and Calhoun Counties: House Districts 90, 91, 93, and 95. (*See* ECF No. 84 at ¶¶ 155-159). Plaintiffs' primary allegation is that Act No. 117 "increased District 93's BVAP an unusually high amount, from 43% to 51% unnecessarily moving a large number of BVAP precincts into the area." *Id.* at ¶ 157. Plaintiffs ignore the very significant population loss in Orangeburg following the 2020 Census. As a result, the areas of Orangeburg, Calhoun, Bamberg, Barnwell, and Allendale Counties only had enough population for four House Districts, whereas those areas previously comprised five House Districts. As such, two districts needed to be combined in this area. One of those combined districts was formerly House District 95, which was comprised of 62.64% BVAP, and, as a result of that population shifting into the surrounding House Districts, the BVAP of those districts increased. The population changes alone demonstrate that race did not dominate the plan for these House Districts. Instead, the predominant factor used to draw House Districts in this area was population, as there were severe deficits that needed to be accounted for.

Plaintiffs further complain about the House Districts that split the City of Orangeburg. *See id.* at ¶ 158. However, the City of Orangeburg was historically (and still is) split between two House Districts, and a majority of the split now occurs along precinct lines. The fact remains that there are now four majority-minority House Districts in the Orangeburg area, which is consistent and reflective of the population in that area and will give minority voters the opportunity to elect the candidate of their choice. Based on the foregoing, Plaintiffs' claims as to the Orangeburg House Districts should be dismissed.

III. Plaintiffs' challenge is in fact a partisan gerrymandering claim disguised as a racial gerrymandering challenge.

On its face, Plaintiffs claim the Challenged Districts are racial gerrymanders. However, as demonstrated above, Plaintiffs' claims that race was the predominant factor in drawing the Challenged Districts is nothing more than "labels and conclusions" made without sufficient factual grounds to withstand dismissal. *See Hunt*, 522 F. Supp. 2d at 752. When the veil is lifted, it is obvious that Plaintiffs' Amended Complaint is simply a political quarrel masquerading as racial gerrymandering claims in hopes of being justiciable. Plaintiffs' tactic is prompted by the fact that federal courts do not have subject-matter jurisdiction over claims of partisan gerrymandering. *See Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

In 2019, the Supreme Court held that partisan gerrymandering claims present political questions that are beyond the jurisdiction of federal courts. *See id.* at 2508. While racial discrimination in redistricting raises constitutional issues that can be addressed by the federal courts, partisan gerrymandering claims are not justiciable, in part because "a jurisdiction may engage in constitutional political gerrymandering." *Id.* at 2497 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (internal citations omitted)). The Supreme Court stated that "[t]o hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities." *Id.* Thus, the "central problem" is "not determining whether a jurisdiction has engaged in partisan gerrymandering," it is "determining when political gerrymandering has gone too far." *Id.* (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004)). As a result, federal courts must dismiss these cases for a lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). *See Rucho,* 139 S. Ct. at 2508 ("cases are remanded with instructions to dismiss for lack of jurisdiction").

The same result is required here. A three-judge panel in Illinois very recently denied any injunctive or declaratory relief for similar redistricting claims, upholding a Democrat-controlled legislature's plan and rejecting all of the plaintiffs' proposed remedial maps. *See McConchie v. Scholz*, No. 21-CV-3091, 2021 WL 6197318 (N.D. Ill. Dec. 30, 2021). In that case, similar to this one, the plaintiffs presented constitutional claims, contending that several legislative districts were racially gerrymandered in violation of the Fourteenth Amendment's Equal Protection Clause. *Id.* at *1. The plaintiffs challenged districts where, in all but one of the districts, "Latino voters maintain a census voting age population of 42.7% or higher, which Legislative Defendants insist allow for additional opportunities to form coalitions with voters of other races to elect their candidate of choice, enhancing the overall political power of Latinos in Illinois." *Id.* In a proposed remedial plan, the plaintiffs suggested districts that "barely surpass the 50% mark." *Id.* The three-judge panel noted, "[a]lthough there is debate about how to achieve the guarantees of the Voting Rights Act, one thing is clear: A federal court is not the arbiter of that dispute unless Plaintiffs carry their burden to prove that an elected legislature's approach violates the law." *Id.* at *2 (citing *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) ("the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law")). The three-judge panel found there was only "a 'modicum' of evidence that race predominated, but it was not enough to satisfy the plaintiff's demanding burden" of proving racial gerrymandering. *Id.* at *23. Because the plaintiffs failed to show racial gerrymandering, the three-judge panel, citing *Rucho*, noted that their "role as federal judges is limited and does not extend to complaints about excessive partisanship in the drawing of legislative districts," because "the Supreme Court has declared partisan gerrymandering claims to present political questions beyond the reach of the federal courts." *Id.* at *31 (citing *Rucho*, 139 S. Ct. at 2507).

Respectfully, Plaintiffs' Amended Complaint presents the same political question that is beyond the reach of this Court. As discussed above, Plaintiffs' mere recitals and conclusions of racial gerrymandering lack any substance whatsoever, purportedly derived from simply looking at the district lines in the Challenged Districts. "Although for purposes of this motion to dismiss [the court] must take all the factual allegations in the complaint as true, [the court is] not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Moreover, as the House Defendants have demonstrated herein, using just the publicly available records of the redistricting process to date, there were legitimate, race-neutral explanations for the way each of the Challenged Districts was drawn. To the extent Plaintiffs' claims are in fact political gerrymandering challenges masquerading as racial gerrymandering allegations, they should be dismissed for lack of subject-matter jurisdiction.

CONCLUSION

Based on the foregoing, as well as the reasons articulated in the Governor's Motion to the extent they are not mooted, the House Defendants respectfully request that the Court grant this Motion and dismiss Plaintiffs' Amended Complaint. The House Defendants consulted with Plaintiffs before filing this Motion to ensure strict compliance with Rule 7.02 of the Local Civil Rules for the United States District Court for the District of South Carolina, and Plaintiffs are expected to oppose this Motion.

[signature page follows]

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