UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

LOUISIANA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al*. Plaintiffs, v. STATE OF LOUISIANA, *et al*. Defendants.	Case No. 3:19-cv-00479-JWD-EWD Judge John W. deGravelles Magistrate Judge Scott D. Johnson

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DEFENDANT STATE OF LOUISIANA'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Defendant, the State of Louisiana (the "State"), hereby moves to dismiss Plaintiffs' First Amended Complaint ("FAC").

In July of 2019, Plaintiffs Louisiana State Conference of the National Association for the Advancement of Colored People (the "Louisiana NAACP"), Anthony Allen, and Stephanie Anthony filed a complaint seeking declaratory and injunctive relief alleging that the current *court-ordered* system of apportioning Louisiana State Supreme Court districts violates § 2 of the Voting Rights Act of 1965 ("VRA"), 52 U.S.C. § 10301. *See* ECF No. 1 at ¶¶ 66–70. This action was brought against the State of Louisiana and then Secretary of State of Louisiana Kyle Ardoin in his official capacity. *See* ECF No. 1 at ¶¶ 14–15. Both the State and Secretary Ardoin filed motions to dismiss, ECF Nos. 27, 28, the parties fully briefed the issues, *see* ECF Nos. 34–37, 39–44, and the Court denied both motions, ECF No. 47. Defendants then filed their answers. ECF Nos. 48, 49.

With the goal of achieving a settlement, the parties filed a Consent Motion to Stay and Administratively Close Case in July of 2022, ECF No. 136, which the Court granted, ECF No.

137. At Plaintiffs' request, ECF No. 166, the Court lifted that stay in July of 2023 and then entered a new Scheduling Order, ECF Nos. 167, 174.

Plaintiffs subsequently submitted their FAC, realleging their § 2 claim and adding a claim under 42 U.S.C. § 1983 as a means to enforce their VRA § 2 claim. *See* ECF No. 178 at ¶¶ 71–77. This motion seeks to dismiss that FAC. Importantly for this motion, Plaintiffs have still not provided this Court or the public with a proposed remedial map that demonstrates that a second reasonably compact second majority-minority district is possible in Louisiana.[1]

INTRODUCTION

Litigation over Louisiana's Supreme Court districts has an expansive history spanning over 33 years. Prior to the original *Chisom* litigation, seven justices for the Louisiana Supreme Court were elected from six districts. *Chisom v. Jindal*, 890 F. Supp. 2d 696, 702 (E.D. La. 2012). Five of the six districts elected a single justice. *Id*. The First Supreme Court District was comprised of four parishes and elected the two remaining two justices on an at-large basis. *Id.*

In 1986, several plaintiffs brought suit alleging violations of the U.S. Constitution and § 2 of the VRA. *Chisom v. Edwards*, 659 F. Supp. 183 (E.D. La. 1987). *See also Chisom v. Jindal*, 890 F. Supp. 2d at 702.[2] After a number of appeals to the Fifth Circuit, *see, e.g.*, *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), and a decision of the U.S. Supreme Court, *Chisom v. Roemer*, 501 U.S. 380 (1991), a Consent Decree was entered on August 21, 1992 ("Consent Decree"). *See* ECF No. 27-3 (Consent Decree).

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[1] Although Plaintiffs have not provided a map, five Justices of the Louisiana Supreme Court have asked the state legislature to enact a map. *See* Josehp Cranney, *Louisiana could be in line for a second Black Supreme Court justice. Here's how* (Dec. 29, 2023), https://www.nola.com/news/courts/louisiana-justices-urge-second-black-supreme-court-district/article_608b9d7e-a66b-11ee-93e3-8f5a55898215.html.

[2] A more complete history of the litigation involving Louisiana's Supreme Court districts can be found in *Chisom v. Jindal*, 890 F. Supp. 2d 696 (E.D. La. 2012).

The 1992 Consent Decree mandated, *inter alia*, that there be a "Supreme Court district comprised solely of Orleans Parish, for the purpose of electing a Supreme Court justice from that district when and if a vacancy occurs in the present First Supreme Court District prior to January 1, 2000." *Id.* at 4. The 1992 Consent Decree went on to provide that legislation would be enacted in 1998 to establish a new map with seven single-member districts. *Id*. at 7. The 1992 Consent Decree effectively "memorialized" La. Acts 1992, No. 512 of the Louisiana Legislature. *Chisom v. Jindal*, 890 F. Supp. 2d at 703-705 (quoting *Perschall v. State*, 697 So. 2d 240, 245-47 (La. 1997)). The Act created a district comprised of Orleans Parish that would take effect on January 1, 2000, or earlier if a vacancy occurred in the first district before January 2000. *Id*.

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Act 776 of 1997 was signed into law in July of 1997 and provided for the reapportionment of the Supreme Court districts as envisioned by the Consent Decree. *Chisom v. Jindal*, 890 F. Supp. 2d at 705. Specifically, Act 776 mandated seven single member Supreme Court districts and assigned the three remaining justices to individual districts. *Id*. at 706. In 1999 "certain parties" moved that the original Consent Decree be modified to reflect the fact that the parties accepted Act 776 as an addendum to the 1992 Decree. *Id*. That request was granted. *Id*.; *see also* ECF No. 27-4 (2000 Consent Decree Modification).

Earlier this decade, Justice Johnson (now Chief Justice) of the Louisiana Supreme Court as well as the *Chisom* plaintiffs moved in the Eastern District of Louisiana for that court to interpret the terms of the 1992 Consent Decree. *Id*. at 701. At issue in *Chisom v. Jindal*, 890 F. Supp. 2d 696 was the proper method to calculate Justice Johnson's seniority for tenure purposes—and therefore to determine who would serve as the Chief Justice—under the terms of the 1992 Consent Decree, as modified. Several parties moved to dismiss the action under the theory that the district court no longer had jurisdiction under the Consent Decree. The Eastern District flatly rejected that

argument and asserted that it alone had "subject matter jurisdiction to interpret and enforce the decree's terms." *Id*. at 710-11. Absent an "affirmative ruling" by the Eastern District "that the Consent Judgment has been completely satisfied and thus has been vacated and terminated," the Eastern District would continue to retain exclusive jurisdiction. *Id*. at 711.

In 2021, the State moved to dissolve the consent decree in the Eastern District of Louisiana. *Chisom v. Edwards*, 342 F.R.D. 1, 6 (E.D. La. 2022). That motion was denied, *id.* at 4, and appealed to the Fifth Circuit, *Chisom v. Louisiana*, 85 F.4th 288, 296 (5th Cir. 2023). A three-judge panel affirmed the trial court's denial of the motion. *Id.* at 292. On November 8, 2023, the State sought en banc review of that panel opinion. *See* Pet. for Rehearing En Banc, *Chisom v. Louisiana*, No. 22-30320 (5th Cir. Nov. 8, 2024) (Doc. No. 106). As of the date of that filing, that petition remains pending. *See generally Chisom v. Louisiana*, No. 22-30320 (5th Cir.) (containing neither denial nor grant of en banc review on the docket).

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Meanwhile, during this case's stay, the U.S. Supreme Court has handed down two significant ruling that alter the landscape of this litigation. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.,* 600 U.S. 181, 215 (2023) ("*SFFA*") ("While the dissent would certainly not permit university programs that discriminated *against* black and Latino applicants, it is perfectly willing to let the programs here [that discriminate for black and Latino applicants to] continue. In its view, this Court is supposed to tell state actors when they have picked the right races to benefit. . . . That is a remarkable view of the judicial role—remarkably wrong."); *see also Allen v. Milligan*, 143 S. Ct. 1487, 1519 (2023) (Kavanaugh, J., concurring) (noting Justices Thomas' dissenting opinion "that even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future," and explaining that

"Alabama did not raise that temporal argument in this Court," and consequently Justice Kavanaugh "would not consider it at this time").

Unlike Alabama, the State here raises the temporal argument that was not asserted (and hence unresolved) in *Milligan* and used in *SFFA* to end race-based admissions programs.

I. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER THE VRA.

Federal Rule of Civil Procedure 8(a)(2) requires a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." To "weed[] out meritless claims" that do not satisfy the Rule 8 pleading requirements, "a defendant may file a Rule 12(b)(6) motion to dismiss a complaint for failure to state a claim. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). While "detailed factual allegations" are not required, Rule 8 requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a claim for relief. *Id.* Although the Court must accept all *factual* allegations as true, that "tenet . . . is inapplicable to legal conclusions." *Id.*

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Critically, the *Iqbal* standard requires a plaintiff to provide factual allegations that "permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 556 U.S. at 679. The claim must be more than conceivable and must instead be facially plausible. *See Twombly*, 550 U.S. at 670. A claim is facially plausible if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Plaintiff does not allege such facts here.

A. Plaintiffs' Construction of § 2 Violates the Constitution as Applied Here.

Plaintiffs are explicitly seeking racially proportional districting for Louisiana's Supreme Court Districts. *See* ECF No. 178 at ¶¶ 2, 20–21, 71–72 (arguing that Louisiana is roughly 1/3 Black, but only one of the seven Louisiana Supreme electoral districts is majority Black and, therefore, § 2 requires "two properly-apportioned, majority-black, constitutional single-member Louisiana Supreme Court districts in a seven-district plan"). But § 2 affirmatively rejects Plaintiffs' racial-proportionality construction.[3] And if §2 somehow permitted what §2(b) explicitly disavows, such a construction of § 2 would violate the Constitution. But this Court need not (and should not) even reach that issue because, at a bare minimum, Plaintiffs' construction of § 2 invites severe doubts as to § 2's as-construed constitutionality that require adoption of more defensible interpretations. Where "a serious doubt is raised about the constitutionality of an act of Congress, it is a cardinal principle that [courts must] first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (citation omitted).

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Under *SFFA* and the concurrence of Justice Kavanaugh (the decisive fifth vote) in *Milligan*, there are *at least* serious doubts as to whether the aggressive governmental use of racial classifications to compel race-based proportionality comports with the Equal Protection Clause. *See SFFA*, 600 U.S. at 201 ("Eliminating racial discrimination means eliminating all of it."); *Milligan*, 143 S. Ct. at 1519 (Kavanaugh, J., concurring) (noting that § 2 of the VRA may also have a temporal requirement requiring it be justified in light of current circumstances). That is particularly true as the VRA "'imposes current burdens [that] *must be justified by current needs*.'"

[3] "If *Gingles* demanded a proportional number of majority-minority districts, States would be forced to group together geographically dispersed minority voters into unusually shaped districts, without concern for traditional districting criteria such as county, city, and town lines. But *Gingles* and this Court's later decisions have flatly rejected that approach." *Milligan*, 599 U.S. at 32 (collecting cases).

Shelby County v. Holder, 570 U.S. 529, 536 (2013) (emphasis added) (citation omitted). And while racial polarization in voting has *decreased* in the 22 years since the *Chisom* Consent Decree was entered, Plaintiffs here are seeking to increase *dramatically* the amount of race-based gerrymandering: *doubling* the number of majority-minority districts. Plaintiffs simply have not pled plausibly that this radical augmentation of the "sordid business [of] divvying us up by race" could be justified by current circumstances. *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part).

SFFA has dramatically altered the landscape of cases—like this one—that involve the governments intentional use of racial classifications to achieve putative racial justice. *SFFA*, 600 U.S. at 201. In *SFFA*, the Supreme Court made clear that when statutes utilizing race-based classification achieve their purpose, they become obsolete. *See id.* at 213 (explaining that *Grutter v. Bollinger*, 539 U. S. 306 (2003), "made clear that race-based admissions programs eventually had to end" and the current circumstances demonstrated that such a time had come).

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This constitutional requirement that governmental use of race must be justified by *current* circumstances is hardly a novel concept. It has previous been applied in the VRA context when the Supreme Court struck down § 5's coverage formula (found in § 4). *See Shelby Cty.*, 570 U.S. at 557 ("Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.").

Although the *Shelby County* Court did specifically address § 2 of the VRA, *id.* at 577, nothing about its reasoning is confined to § 4 or § 5. Indeed, the Supreme Court has recently telegraphed that this temporal requirement applies equally to § 2. *See Milligan*, 143 S. Ct. at 1519 (Kavanaugh, J., concurring). But while this temporal argument was acknowledged by members of

the *Milligan* Court—including Justice Kavanaugh, who cast the deciding vote—Alabama's failure to raise it squarely precluded the Court from using that limitation as a basis for decision. *See Milligan*, 143 S. Ct. at 1519 (Kavanaugh, J., concurring) ("Justice Thomas notes, however, that even if Congress in 1982 could constitutionally authorize race-based redistricting under §2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future."). But here the State is specifically raising that issue, which controls this case.

In establishing the VRA—including by amending § 2 to reach beyond intentional discrimination, *see Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2332 (2021)—Congress made "'findings' that each of the protected minorities is, or has been, the subject of pervasive discrimination and exclusion from the electoral process.*" Nixon v. Kent Cnty.*, 76 F.3d 1381, 1390 (6th Cir. 1996) (en banc). In 1982, there were "extensive congressional findings of voting discrimination." S. Rep. No. 97–417, 97th Cong.2nd Sess. 28 (1982), U.S. Code Cong. & Admin. News 1982, p. 192. But Congress has made no findings in recent decades that justify § 2 in light of advances the VRA made possible. Indeed, Congress has made no adjustments to § 2's scope or standard in nearly two decades. *See Shelby Cnty.*, 570 U.S. at 553–54 (discussing deficiencies in most recent findings of 2006).

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The intensification of race-based classifications and decision-making that Plaintiffs seek here is underscored by the fact that § 2 has *never* previously been read to require a second majority-minority district in Louisiana. Instead, the *Chisom* Consent Decree requiring a single such district was all that the VRA was understood to require for *decades* until this case.

As the *Shelby County* Court acknowledged, "[o]ur country has changed," *id.* at 557. Yet, § 2 has not. And current burdens—the burdens Plaintiff seek to impose via § 2—must be justified by current evidence. Specifically, Plaintiff expressly call for the creation of another majority-

minority district, in predominant part, because of the current racial composition of the state of Louisiana. *See* ECF No. 178 at ¶¶ 2, 20–21, 71–72. Taking Plaintiffs' allegations as true, such districting is not justified by current needs in the state of Louisiana.

Notably, one of the only "current" facts that Plaintiffs can point to is the demographics of the State of Louisiana, *id.*, which is not enough, *see supra* n.5. That is particularly true as § 2 explicitly disavows imposition of any proportionality requirement. *See* 52 U.S.C.S. § 10301(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

Moreover, in Plaintiffs' section titled "History of Official Voting Discrimination," Plaintiffs cite only two purported instances in the last decade: (1) the *Robinson v. Ardoin* VRA case involving Louisiana's Congressional Districts[4], which is set to go to trial in February of this year, and (2) *Terrebonne Parish Branch NAACP v. Jindal*, 274 F. Supp. 3d 395 (M.D. La. 2017), which challenged only the 32nd Judicial District (one of 42 judicial districts) and was reversed on appeal. *See* ECF No. 178 at ¶¶ 48–49. Put differently, Plaintiffs' primary alleged evidence of "current" conditions justifying § 2's expansive remedial powers appear to consist of: (1) the bare racial demographics of Louisiana, whose racial composition has changed little in the last four decades[5]; (2) a VRA case that has yet to go to trial, and (3) another VRA case which involved a single judicial district that was reversed on appeal.

These current-circumstances allegations do not satisfy Plaintiffs' burden, and thus require dismissal. *Shelby Cty.*, 570 U.S. at 536. And applying § 2 in such a way raises serious constitutional

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[4] Although Plaintiffs cite the Fifth Circuit's opinion as proof of racial discrimination, *id.* at ¶ 49, Plaintiffs neglect to mention that the Fifth Circuit vacated the District Court's preliminary injunction and instructed the court to conduct a trial on the merits in advance of the 2024 election cycle, *Robinson*, 86 F.4th 578–81.

[5] Plaintiffs rely on this despite § 2(b)'s explicit rejection of any proportionality requirement. *See* 52 U.S.C. § 10301.

doubts. *See SFFA*, 600 U.S. at 201; *Milligan*, 143 S. Ct. at 1519 (Kavanaugh, J., concurring); *Shelby Cty.*, 570 U.S. at 557.

B. As Pleaded, Plaintiffs Cannot Satisfy the Gingles Preconditions.

Plaintiffs' allege Defendants violated § 2 of the VRA.[6] *See* ECF No. 178 at ¶¶ 71–77. To bring a successful claim under § 2, a plaintiff must show (1) "the minority group . . . is *sufficiently large and geographically compact to constitute a majority in a single-member district*;" (2) "the minority group . . . is politically cohesive;" and (3) the minority group is subject to racial bloc voting. *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (emphasis added). These *Gingles* preconditions are a prerequisite to *any* § 2 claim and each factor must be met to prove a § 2 claim.[7] *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017). The first *Gingles* precondition has two operative elements: numerosity and compactness. The first *Gingles* precondition is unique in that it requires a showing of a potential remedy—a compact majority-minority district—as a threshold question for a cause of action under Section 2. Plaintiffs have failed to provide one here.

1. *Failure to Plead Factual Matter Under Rule 8, Twombly, and Iqbal.*

Plaintiffs present the exact sort of "formulaic recitation of the elements of a cause of action," *Iqbal,* at 678, that the Supreme Court has warned is insufficient under Rule 8. Plaintiffs time and again posit some version of the following threadbare statement: "Louisiana's African-American population and voting-age population are sufficiently numerous and geographically compact to form a majority of the total population and voting-age population in two properly-apportioned, constitutional single-member Supreme Court districts in a seven-district plan." *See, e.g.,* ECF No.

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[6] As noted above, Plaintiff also bring a § 1983 claim, but that claim is only a vehicle to assert violations of the VRA and does not allege separate violations of federal law. *See* ECF No. 178 at ¶¶ 71–77. Consequently, the two rise and fall together.

[7] Plaintiffs' litany of factual allegations under the totality of the circumstances is of no moment since the *Gingles* factors must be met in order for the Court to even reach the totality of the circumstances question. *See Cooper*, 137 S. Ct. at 1470.

178 at ¶ 38. Such a mere regurgitation of the *Gingles* elements with conclusory assertions that they are met here does not suffice under *Twombly*. *Compare id.*, *with Gingles*, 478 U.S. at 50 ("[T]he minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."). Nor do federal courts accept as true assertions of legal conclusions in complaints. *Id*.

In the context of the *Gingles* factors, the only "factual matter" Plaintiffs introduce is demographic information for Louisiana as a whole under the 2000, 2010, 2020 censuses. *See* ECF No. 1 at ¶¶ 17–18 (showing African American voting age population of 29.9% in 2010). That is insufficient for two reasons. *First*, Plaintiffs fail to allege compliance with *Gingles'* compactness requirement.[8] *See Gingles*, 478 U.S. at 50. Even assuming Plaintiffs' allegations as true, Plaintiffs have failed to supply *any* basis for this Court to conclude plausibly (or even implausibly) that the African American community of Louisiana is sufficiently compact to permit drawing a second majority-minority district that is lawful under the VRA.[9]

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"Satisfying the first *Gingles* precondition—compactness—normally requires submitting as evidence hypothetical redistricting schemes in the form of illustrative plans." *Gonzalez v. Harris Cnty.*, 601 Fed. Appx. 255, 258 (5th Cir. 2015) (per curiam); *see also Fairley v. Hattiesburg*, 584 F.3d 660, 669 (5th Cir. 2009) ("Requiring the district court to fish through the record for evidence that might conceivably support redistricting approaches that were never urged by the plaintiffs or presented as developed plans would be downright perverse."). The compactness showing is sufficiently essential that the Eleventh Circuit requires a map at the motion-to-dismiss stage. *See*

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[8] That is even excluding that compactness, as required under this precondition, is to be measured by the minority community in question and not the district itself. *See LULAC v. Perry*, 548 U.S. 399, 433 (2006) ("The first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district.") (citation omitted).

[9] In fact, there are significant reasons for this Court to doubt that the creation of a second majority-minority district is possible in Louisiana while adhering to the dictates of the U.S. Constitution. *See supra* sec. I.A.

Broward Citizens for Fair. Dists., v. Broward Cnty., 2012 U.S. Dist. LEXIS 46828, *18 n. 6 (S.D. Fla. 2012); *see also Burton v. City of Belle Glade,* 178 F.3d 1175, 1199 (11th Cir. 1999). And while the Fifth Circuit has not squarely held as much (either way), Plaintiffs failure to submit either a map or plausible factual allegations concerning compactness requires dismissal now.

Second, for § 2 purposes, numerosity is not measured statewide. Section 2(b), by its own terms, disclaims proportional representation as evidence of anything. Section 2 specifically states that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). Said differently, merely averring a statewide population figure—voting-age or otherwise—is not a sufficient factual allegation to satisfy numerosity, because even if it is taken as true, the mere existence of a 29.9% African American population does not make relief plausible. *See supra* n.5. Therefore, Plaintiffs have not pleaded facts that plausibly satisfy the *Gingles* numerosity requirement either.

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Additionally, Plaintiffs bear a substantial burden to show that they can meet this *Gingles* requirement while minimizing splitting of Parishes between districts. The only parishes split in the current district map are Orleans and Jefferson, and those were a result of a court order. Judicial administration in Louisiana is based on the Parish system, and maps that split parishes to obtain racial goals raise problematic issues of judicial administration. What's more, wholesale restructuring of state government systems by the federal courts are outside the province of Section 2. *Rose v. Sec'y of State*, 87 F.4th 469, 479 (11th Cir. 2023) ("[P]laintiffs ask that we replace Georgia's chosen form of government (five statewide commissioners) with a completely different system (one commission with five single-member districts) that does not protect the statewide interests the Georgia General Assembly deemed important. Simply put, plaintiffs' request strains both federalism and Section 2 to the breaking point."). Plaintiffs have not supplied any factual

allegations that could plausibly satisfy *Gingles* in the teeth of these substantial obstacles to the second majority-minority district that they seek.

2. *Previous of Litigation Illustrates Plaintiffs' Failure to State a Claim.*

Plaintiffs have also failed to allege a plausible claim because federal courts have repeatedly held that drawing a second majority-minority district in Louisiana violates the Fourteenth Amendment. The federal courts have confronted attempts to draw such a second district on three separate occasions, and have held that they were unconstitutional gerrymanders *all three times*. Plaintiffs have failed to provide any basis for plausibly concluding that their fourth attempt would fare any better than the first three. Indeed, both factual circumstances (*i.e.*, decreased racial voting polarization) and Supreme Court doctrine (*e.g.*, *SFFA*, *Shelby County*, etc.) have both moved *sharply* against Plaintiffs since those first three failed efforts.

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After the 1990 census, the State of Louisiana enacted a congressional district map with seven total congressional districts. *See Hays v. State of Louisiana*, 839 F. Supp. 1188, 1191 (W.D. La. 1993) (three-judge court) (hereinafter, *Hays I*). Of those seven districts, two were majority-minority. *Id*. Plaintiffs, various Louisiana citizens of various ethnicities, brought suit under, *inter alia*, § 2 of the VRA and the U.S. Constitution alleging that the plan impermissibly segregated the state based on race. *Id*. The district court held that the plan constituted an unconstitutional racial gerrymander. *Id*. at 1209.

While *Hays I* was on appeal at the U.S. Supreme Court, *see Louisiana v. Hays*, 512 U.S. 1230 (1994), the Louisiana Legislature passed, and the Governor signed into law, a new congressional apportionment. *See Hays v. Louisiana*, 862 F. Supp. 119, 121 (W.D. La. 1994) (three-judge court) (hereinafter, *Hays II*), *vacated on other grounds sub nom United States v. Hays*, 515 U.S. 737 (1995) (vacated on standing grounds). Once again, the State of Louisiana adopted a

map that contained two majority-minority districts and, once again, the district court held that map to be unconstitutional. *Id*. at 125. Of specific importance here is that the *Hays II* court found that "the State did not have a basis in law or fact to believe that the VRA *required* the creation of two majority-minority districts." *Id*. at 124 (emphasis in original). There is similarly no "basis in law or fact" to believe that the VRA demands creation of a second majority-minority district 28 years later (and Plaintiffs' FAC certainly does not supply any).

After *Hays II* was vacated on standing grounds, the case was remanded to the district court where plaintiffs were permitted to amend their complaint to allege individualized harm. *See Hays v. Louisiana*, 936 F. Supp. 360, 365-66 (1996) (three-judge court) (hereinafter, *Hays III*). The district court again found that the revised congressional apportionment was a racial gerrymander. *Id*. at 372. The district court, using a special master, ordered that its own map be implemented. *See Hays II*, 862 F. Supp. at 128-29; *see also Hays III*, 936 F. Supp. at 372. The district court concluded that the "diffused population of black voters in Louisiana, outside of District 2, makes it impossible to draw a Congressional plan which contains two minority-majority districts and passes constitutional muster." *Hays II*, 862 F. Supp. at 129.[10] So too here.

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The *Hays* cases are particularly relevant because the percentage of Louisiana's population that is African-American is virtually unchanged since the 1990 census, as Plaintiffs' own FAC demonstrates. Table 1 shows that, as a percentage of the total population, the African American population has stayed flat since the 1990 census.[11] According to the census figures, the African-American population in Louisiana has increased approximately 0.5 % since the 1990 census, and

[10] A map takes on special importance here where there is sufficient evidence and past history showing that that creation of a second majority-minority district constitutes an unconstitutional racial gerrymander.
[11] Census figures are judicially noticeable. *See Hollinger v. Home State Mut. Ins. Co.,* 654 F.3d 564, 571-72 (5th Cir. 2011) ("United States census data is an appropriate and frequent subject of judicial notice"); *see also Hall v. Louisiana*, 2015 U.S. Dist. LEXIS 36107, *8 (M.D. La. 2015).

has decreased 0.6% since 2010. And without any material changes, there is every reason to believe that a second majority-minority district is just as constitutionally indefensible now as it was in 1995

TABLE 1:[12]

	1990 Total Pop.[13]		**2000 Total Pop.**		**2010 Total Pop.**		**2020 Total Population**	
White non-Hispanic	2,776,022	65.7%	2,794,391	62.5%	2,734,884	60.3%	2,596,702	55.8%
Black or African American non-Hispanic[14]	1,299,281	30.7%	1,443,390	32.3%	1,442,420	31.8%	2,596,702	31.2%
Hispanic	93,044	2.2%	107,738	2.4%	192,560	4.3%	322,549	6.9%
Other	59,640	1.4%	123,457	2.8%	163,508	3.6%	286,086	6.1%
Total	4,227,987		4,468,976		4,533,372		4,657,757	

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Similar to Table 1, Table 2 shows that, as a percentage of the voting-age population ("VAP"), the African American population has stayed relatively flat since the 1990 census.

[12] Table 1 expands upon Plaintiffs' Table 1, *see* ECF No. 178 ¶ 20, to add the census data from the 1990 census. Defendant simply recreated Plaintiffs' figures for 2000 , 2010, 2020 as stated in their FAC. Defendant does not represent and does not concede that Plaintiffs' stated numbers are an accurate reflection of the data.

[13] *See* United States Census Bureau, 1990 Census Population Characteristics of Louisiana, https://www2.census.gov/library/publications/decennial/1990/cp-1/cp-1-20.pdf.

[14] The 1990 census asked slightly different questions which makes data comparisons between the 1990, 2000, 2010, and 2020 censuses more difficult. *See, e.g.*, United States Census Bureau, *Major Differences in Subject-Matter Content Between the 1990 and 2000 Census*, https://www.census.gov/population/www/cen2000/90vs00/ (noting the 2000 census allows for questions of multiple race categories for the same individual whereas the 1990 census required only a single category). What is shown here is the best attempt at a comparison as the data will allow.

TABLE 2:[15]

	1990 VAP		2000 VAP		2010 VAP		2020 VAP	
White non-Hispanic	2,059,808	68.7%	2,128,485	65.5%	2,147,661	62.9%	2,082,110	58.3%
Black or African American non-Hispanic	834,138	27.8%	959,622	29.5%	1,019,582	29.9%	1,066,511	29.9%
Hispanic	66,247	2.2%	77,083	2.4%	138,091	4.0%	223,662	6.3%
Other	38,875	1.3%	83,987	2.6%	110,023	3.2%	198,265	5.6%
Total	2,999,069		3,249,177		3,415,357		3,570,548	

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According to the census figures, the African American voting age population in Louisiana has increased approximately 2.1% since the 1990 census, and has not changed at all since 2010.

The history of the legislature's unsuccessful attempts to create two majority-minority districts out of seven—which have been repeatedly rejected by federal courts on three separate occasions—coupled with the relatively unchanged African American voting-age population in Louisiana compels the conclusion that Plaintiffs have not alleged a plausible § 2 claim. As was the case in 1995, the virtually identical demographics of the 2020 census provide no "basis in law or fact to believe that the VRA *required* the creation of two majority-minority districts." *Hays II*, 862 F. Supp. at 124 (emphasis in original).

The "current needs" of 2024 thus provide even *less* basis for the VRA to compel drawing of a second majority-minority district here—a conclusion that Plaintiffs have not plausibly defeated. Put differently, Plaintiffs' attempt to justify the current burdens of the VRA with current

[15] Table 2 expands upon Plaintiffs' Table 2, *see* ECF No. 178 ¶ 21, to add the census data from the 1990 census. Defendant simply recreated Plaintiffs' figures for 2000, 2010, and 2020 as stated in their Complaint. Defendant does not represent and does not concede that Plaintiffs' stated numbers are an accurate reflection of the data.

circumstances is belied by the fact that Plaintiffs' proposed remedy here has been thrice rejected with analogous population demographics. *See supra* pp. 13–14 To adopt Plaintiffs' approach to the VRA is to call the VRA's constitutionality in question. *Id.* The Court should reject the attempt.

C. Subsequent Decisions of the Supreme Court have Called into Question the Continued Applicability of the VRA to Judicial Districts.

Since the Supreme Court's ruling in *Chisom v. Roemer*, the Court has essentially reversed itself and no longer considers elected Judges as representatives. The Supreme Court held in *Chisom v. Roemer* that elected judges fall "within the ambit of §2 as amended" over the emphatic dissent of a sharply divided Court. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991). *See also id.* at 404–17 (Scalia, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting). However, in subsequent decisions, a substantial number of the Supreme Court has seemingly moved from that position and emphasized that judges are different than their counterparts in the legislative and executive branches. *See generally Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1662 (2015) ("Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office."); *Caperton v. A.T. Massey Coal*, 556 U.S. 868 (2009) (discussing the role of judicial election related activities when assessing recusals of judges); *Republican Party of Minn. v. White*, 536 U.S. 765, 806 (2002) (Ginsburg, J., dissenting) ("Judges . . . are not political actors.").

Because at least three Supreme Court decisions since *Chisom v. Roemer*—along with basic principles of statutory construction—indicate that *Chisom v. Roemer*'s holding on this point is no longer good law, this precedent should be revisited. However, the State recognized that "[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."

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Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989). Consequently, the State raises this argument to preserve it for the Supreme Court, should it choose to reevaluate its contradictory precedents.

D. Section 2 of the VRA Does Not Contain a Right of Action.

Section 2 of the VRA contains neither an express nor implied private right of action. Consequently, Plaintiffs lack authority to bring their Section 2 claim. Similarly, Plaintiffs' attempt (FAC at ¶¶ 71–77) to evade that foundational flaw by asserting their VRA arguments as §1983 claims similarly fails because it unlawfully circumvents Congress's deliberate choice not to permit private enforcement of § 2. *See*, *e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002) (holding that when Congress has refrained in a statute from creating "new individual rights, there is no basis for suit, whether under § 1983 or under an implied right of action.").

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The Fifth Circuit has made clear that the § 2 does not contain an *express* private right of action. *See Robinson v. Ardoin*, 86 F.4th 574, 588 (5th Cir. 2023) ("There is no cause of action expressly created in the text of Section 2."). And the text and structure of § 2 demonstrate that Congress did not intend to create an implied private right of action for § 2. *See generally Ark. State Conference NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204 (2023) (analyzing whether § 2 contains an implied private right of action and concluding that it does not).

The State acknowledges that the Fifth Circuit has held otherwise. *See Robinson*, 86 F.4th 588–90 (concluding that § 2 contains a private right of action). But it preserves this argument for additional review by the Fifth Circuit and the U.S. Supreme Court.

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION.

When a jurisdictional defect is raised, the party asserting jurisdiction has the burden of proof. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001); *see also Montez v. Dep't of*

the Navy, 392 F. 3d 147, 149 (5th Cir. 2004). Plaintiffs' FAC is facially and factually deficient in many respects. However, the principal defects are jurisdictional in nature and require this Court's immediate dismissal.

A. Plaintiffs Lack Standing.

Plaintiffs' FAC should also be dismissed for lack of standing. To maintain standing, the plaintiff must establish (1) injury-in-fact, (2) traceability, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). When reviewing a motion to dismiss for lack of subject matter jurisdiction under 12(b)(1), "a court may evaluate (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Den Norske Stats Oljeselskap As v. HeereMac V.O.F.*, 241 F.3d 420, 424 (5th Cir. 2001). A complainant receives no presumption of truthfulness when determining questions of jurisdiction, especially when "matter outside the complaint is the basis of the [factual] attack." *See Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981). *See also Montez*, 392 F. 3d at 149. "The unique power of the district courts to make factual findings which are decisive of jurisdiction is . . . not disputed." *Tucker*, 645 F.2d at 413 (collecting cases).

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1. The Louisiana NAACP Lacks Organizational and Associational Standing.

The Louisiana NAACP asserts both organizational standing on behalf of itself and standing on behalf of its individual members. *See* ECF No. 178 ¶¶ 11–12. The Louisiana NAACP Complaint fails in both respects. "The harm of vote dilution . . . is 'individual and personal in nature.'" *See Gill v. Whitford*, 138 S. Ct. 1916, 1935 (2018) (citing and quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). Only "voters who allege facts showing disadvantage to themselves as individuals have standing to sue." *See Gill*, 138 S. Ct. at 1929 (quoting *Baker v. Carr*, 369 U.S.

186, 206 (1962)). The injury from a § 2 claim is to the dilution of an individual's vote. *Gingles*, 478 U.S. at 50-51.

The Louisiana NAACP cannot maintain organizational standing post-*Gill v. Whitford*. The harms of *vote dilution*, as opposed to intentional discrimination on the basis of race under the Fifteenth and Fourteenth Amendments, are to an *individual* voter's right to vote and by definition cannot belong to an organization as a whole. *Cf. Gill*, 138 S. Ct. at 1929, 1935. Plaintiffs here have not brought a claim under the U.S. Constitution, and instead have claimed vote-dilution under the VRA as their sole cause of action. Because the Louisiana NAACP, as an organization, lacks the right to vote, the Louisiana NAACP, as an organization, cannot maintain standing.

Plaintiffs also have not adequately alleged associational standing. "[A]n association has standing to bring suit on behalf of its members when: (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." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *see also SFFA*, 600 U.S. at 199 (same). "[F]or associational standing, members must independently meet the Article III standing requirements." *NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010). There is simply no evidence or facts as to the first element of associational standing and Plaintiffs cannot meet the third element on a singular claim of vote dilution.

To maintain associational standing there must be something on the face of the complaint showing harm to a *specific member* of the organization. *See NAACP v. City of Kyle*, 626 F.3d at 237. Allegations in the abstract to "some minority members" who are not specifically identified do not suffice. *Id.*; *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (holding that

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"plaintiff-organizations … [must] make specific allegations establishing that *at least one identified member* had suffered or would suffer harm." (emphasis added)); *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1249 (11th Cir. 2020) (organization lacked associational standing in election case where it "failed to identify any of its members"). But that is all that Plaintiffs offer here.

The Louisiana NAACP's associational standing hinges on the following statement: "The Louisiana NAACP has members throughout the State, including members whose votes are unlawfully diluted by the current Supreme Court districts and whose injury would be redressed by the creation of a second majority-black district in the State." ECF No. 178 ¶ 12. First, there is no allegation of harm to any *specific* member, which is required under Fifth Circuit and Supreme Court precedent. *See id*. *See also Gill*, 138 S. Ct. at 1929–30 (requiring a showing "individual and personal" in nature for vote dilution claims).

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Second, there is no allegation as to where any second majority-minority district would be located and, more importantly, there is no allegation that any individual member would live in remedial district. Vote-dilution, which Plaintiffs singularly allege, cannot be remedied "by creating a safe majority-black district somewhere else in the State." *Shaw v. Hunt*, 517 U.S. 899, 917 (1996).

Third, in the recent trial regarding Louisiana's state legislative maps, *Niarne v. Ardoin*, the President of the Louisiana NAACP, Mr. McClanahan, conceded that Louisiana NAACP does not itself have individual members. Day One Trial Transcript, *Niarne v. Ardoin*, No. 3:22cv178 (M.D. La. 2023) (ECF No. 206-1 at 135:15–17). Instead, Mr. McClanahan attempted to satisfy the Louisiana NAACP's associational standing by identifying members of *affiliated NAACP branches*—though he is not president of any affiliate branch, (*id.* at 135:22–136:1), and the NAACP's affiliate branches are separate legal entities with their own officers, (*id.* at 136:2–7), electing "delegates" to attend state conventions and selecting Louisiana NAACP officers. (*Id*. at

125:4–126:1). In short, the Louisiana NAACP cannot assert standing *on behalf* of its individual members because it *does not have* individual members.

Finally, the singular claim of vote dilution is as destructive of Louisiana NAACP's associational standing as it was to their organizational standing. There must be a showing of individualized district-specific harm to maintain standing post-*Gill*. As the Louisiana NAACP has failed to do so, they fail to maintain standing.

2. *The Individual Plaintiffs Do Not Have Standing.*

Injury-in-fact "requires that the party seeking review be himself among the injured." *Lujan*, 504 U.S. at 562-63. The available information contained on the face of the complaint as to the individual Plaintiffs—Mr. Allen and Ms. Anthony—is insufficient to show injury-in-fact. First, while the Complaint states that both individual Plaintiffs reside in East Baton Rouge Parish, there is no indication as to what Supreme Court district they currently reside in. *See* ECF No. 178 ¶¶ 13-14. Second, and more importantly, there is no allegation or factual matter that a reasonably compact second majority-minority district that maintains parish boundaries could be drawn encompassing either individual Plaintiff. *See id.* (stating that Plaintiffs "could" live within a majority-minority district but not alleging if either (a) they would live in such a district, or (b) that two such districts could be drawn, one of which would encompass each Plaintiff). Both of these defects deprive the Plaintiffs of standing, and therefore, the Court of subject matter jurisdiction. *See Gill*, 138 S. Ct. at 1933 (explaining that "[b]y all accounts, Act 43 has not affected [the Plaintiff's] individual vote for his Assembly representative—even plaintiffs' own demonstration map resulted in a virtually identical district for him," and a finding that Plaintiffs lacked standing).

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B. The United States District Court for the Eastern District of Louisiana has Exclusive Jurisdiction Under the *Chisom* Consent Decree.

The State notes at the outset that, "[i]n *Anthony Allen, et al. v. State of Louisiana, et al.*, [the Fifth Circuit] held that the Eastern District [of Louisiana] did not enjoy exclusive jurisdiction over election-districting matters contemplated by the Consent Decree." *Chisom v. Louisiana*, 85 F.4th at 294 (citing *Allen v. Louisiana*, 14 F.4th 366, 368 (5th Cir. 2021)).

However *Chisom v. Louisiana* may still be reheard en banc, *see supra* p. 4, and this issue is intertwined in that matter. Specifically, it remains an open question whether the Consent Decrees' final remedy has been accomplished. *Chisom v. Louisiana*, 85 F.4th at 294 ("In dicta, [the Fifth Circuit] stated that it was unsure that the Consent Judgment was still in force because its final remedy might have been implemented when Johnson became Chief Justice of the Louisiana Supreme Court. [But it] declined to answer that question . . . ."). And if it has not, and the Consent Decree remains in effect, it is not clear how this Court could issue a remedy map that would not necessarily conflict with the Eastern District's Consent Decree or somehow require the Eastern District's approval for the modification—which is a truly novel notion.

These are all issues that the Fifth Circuit must wrestle with soon. Thus, although the State acknowledged that this Court is powerless to accept this argument, it nevertheless raises the argument to preserve it on appeal.

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CONCLUSION

For the aforementioned reasons, this Court should either dismiss for lack of subject matter jurisdiction, dismiss for failure to state a claim, or order Plaintiffs to amend their Complaint and file a more definite statement.

Dated: January 16, 2024 RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I do hereby certify that, on this 16th day of January 2024, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which gives notice of filing to all counsel of record.

/s/ Carey Tom Jones
Carey Tom Jones

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