UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

Anthony Allen, *et al.* Plaintiffs, v. State of Louisiana, *et al.* Defendants.	NO. 19-479-JWD-EWD

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

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Defendant, the State of Louisiana, hereby moves that Plaintiffs' Complaint be dismissed.

On July 23, 2019, Plaintiffs Louisiana State Conference of the National Association for the Advancement of Colored People ("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 Section 2 of the Voting Rights Act of 1965. *See* ECF No. 1 at ¶¶ 66-70. This action was brought against the State of Louisiana and Secretary of State of Louisiana Kyle Ardoin in his official capacity. *See* ECF No. 1 at ¶¶ 14-15. Both the State of Louisiana and Secretary of State Ardoin filed motions for an extension of time to file responsive briefing. *See* ECF Nos. 6, 12, 18. Each motion was subsequently granted. ECF Nos. 11, 13, 23.

INTRODUCTION

Litigation over Louisiana's Supreme Court districts has a sordid history which spans over 33 years. Prior to the original *Chisom* litigation, 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 were single member. *Id.* The First Supreme Court District was comprised of four

parishes and elected two justices on an at-large basis, bringing the total number of justices to seven. *Id*.

In 1986, several plaintiffs brought suit alleging violations of the U.S. Constitution and Section 2 of the Voting Rights Act. *Chisom v. Edwards*, 659 F. Supp. 183 (E.D. La. 1987); *see also Chisom v. Jindal*, 890 F. Supp. 2d at 702.[1] After a number of appeals to the Fifth Circuit, *see, e.g.*, *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), and an appeal to the United States Supreme Court, *Chisom v. Roemer*, 501 U.S. 380 (1991), a Consent Decree was entered on August 21, 1992 ("Consent Decree"). *See* 1992 Consent Decree (attached as Ex. A).

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." Ex. A at 3. The 1992 Consent Decree went on to affirm that there would be legislation enacted in 1998 to provide for reapportionment of the now seven Louisiana Supreme Court districts. *Id*. at 6. 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 on July 10, 1997. Act 776 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

[1] 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).

"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*. The request was granted, and Act 776 was made part of the Consent Decree. *Id*; *see also* 2000 Consent Decree Modification (attached as Ex. B).

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 be the Chief Justice of the Louisiana Supreme Court—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 court flatly rejected that argument and asserted that only the Eastern District of Louisiana 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" does that court lose jurisdiction. *Id*. at 711. Subsequent to the 2012 litigation, Defendant is unaware of any further pertinent litigation over Louisiana's Supreme Court districts.

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I. 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' Complaint is facially and factually deficient in nearly every respect. However, the principal defects are jurisdictional in nature and require this Court's immediate dismissal.

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

Plaintiffs' claims must fail as the United States District Court for the Middle District of Louisiana simply lacks subject matter jurisdiction over cases involving Louisiana's Supreme Court districts. In 1992—as modified in 2000—the United States District Court for the Eastern District of Louisiana entered a Consent Decree establishing, *inter alia*, a majority-minority district for the Louisiana State Supreme Court. *See* 1992 Consent Decree, Ex. A; 2000 Consent Decree Modification, Ex. B; *see also Chisom v. Jindal*, 890 F. Supp. 2d at 702-708 (explaining the history of the *Chisom* litigation and Consent Decree up until 2012). Under the 1992 Consent Decree, the Eastern District "retain[ed] jurisdiction over this case until the complete implementation of the final remedy [is] accomplished." Ex. A at 8. The Eastern District specifically retained jurisdiction over the subject matter of this complaint and therefore jurisdiction lies with that court.

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"Implementation of and continued compliance with [a] consent decree[] is under the supervision of the district court that entered the decree[]." *Thaggard v. Jackson,* 687 F.2d 66, 68 (5th Cir. 1982). "[O]nly the district court supervising implementation of the decree [has] subject matter jurisdiction to modify the decree[] . . . ." *Id*. at 69 n.3 (quoting *Culbreath v. Dikakis*, 630 F.2d 15, 22 (1st Cir. 1980). "It is settled that a consent decree is not subject to collateral attack." *Thaggard*, 687 F.2d at 68 (quoting *Dennison v. City of L.A.*, 658 F.2d 694, 695 (9th Cir. 1981); *see also Goins v. Bethlehem Steel Corp*., 657 F.2d 62, 64 (4th Cir. 1981) ("[B]asic considerations of comity bar" any attempt to "appeal from one district judge to another." (quoting, in part, *Ellicott Machine Corp. v. Modern Welding Co.*, 502 F.2d 178, 181 (4th Cir. 1974)). "So long as the final remedy under a consent decree has not been achieved, the court entering the decree retains subject matter jurisdiction to interpret and enforce the decree's terms." *Chisom v. Jindal*, 890 F. Supp. 2d at 710. The Eastern District of Louisiana continues to have subject matter jurisdiction because it

has ruled that the "final remedy under the consent decree has not been achieved." *Id.* "[W]hen a federal court concludes that it lacks subject matter jurisdiction, the court must dismiss the complaint in its entirety." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). Therefore, because this Court lacks subject matter jurisdiction, the Court's only course of action is dismissal.

In *Chisom v. Jindal*, 890 F. Supp. 2d 696, plaintiffs—including the original *Chisom* plaintiffs—moved to interpret the Consent Decree.[2] *Id.* at 701. Defendants moved to dismiss partially on the grounds that the Court no longer had jurisdiction under the Consent Decree. The State argued that "implementation of the final remedy . . . was accomplished on October 7, 2000," and as such, the court's jurisdiction ended under the terms of the Consent Decree. *Id.* at 709. The district court flatly rejected that interpretation.

"So long as the final remedy under a consent decree has not been achieved, the court entering the decree retains subject matter jurisdiction to interpret and enforce the decree's terms." *Chisom v. Jindal*, 890 F. Supp. 2d at 710. Under the Eastern District's holding, only when there is an "affirmative ruling by [the] Court that the Consent Judgment has been completely satisfied and thus has been vacated or terminated" does the Eastern District lose jurisdiction. *Id.* at 711. As there has yet to be an "affirmative ruling" by the Court, and because "there [has not] been any request that this be done," jurisdiction lies with the Eastern District of Louisiana. *Id.* ("Because the Court finds that the 'final remedy' under the Consent Judgment has not yet been accomplished, the Court has continuing jurisdiction and power to interpret the Consent Judgment . . . ."). To this day, the Eastern District of Louisiana has yet to issue an "affirmative ruling that the Consent Judgment has

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[2] Plaintiffs actually moved to "reopen" the case, but the district court considered the motions as motions to interpret.

been completely satisfied . . . ." *Id*. The Consent Decree is still in full force and effect.[3] As such, jurisdiction lies with the District Court for the Eastern District of Louisiana, and nowhere else.

b. Plaintiffs Lack Standing.

Article III jurisdiction is limited to "cases" or "controversies." *See* U.S. Const. art. III, § 2; *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559-60 (1992). The determination of whether a case or controversy exists is jurisdictional. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-241 (1937). Of the doctrines limiting the Court's jurisdiction under Article III, standing "is perhaps the most important . . . ." *Allen v. Wright*, 468 U.S. 737, 750 (1984). To maintain standing, the plaintiff must establish (1) injury-in-fact, (2) traceability, and (3) redressability. *Lujan*, 504 U.S. at 560-61. "Since [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561.

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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

[3] For example, if the State of Louisiana were to reapportion the State's Supreme Court districts, there is little question that the State would need to seek leave from the Eastern District of Louisiana before doing so. The State was bound by the Consent Decree in 2012, *see Chisom v. Jindal*, 890 F. Supp. at 709, and remains bound today.

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).

i. Plaintiffs Have not Pled an Injury-in-Fact that is Redressable.

Plaintiffs raise a claim solely under Section 2 of the Voting Rights Act of 1965. *See* Compl., ECF No. 1 at ¶¶ 66-70; *see also* 52 U.S.C. § 10301. To bring a successful claim under Section 2 of the Voting Rights Act, 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* Section 2 claim and each factor must be met to prove a Section 2 claim.[4] *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017).

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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. Therefore, to meet the first *Gingles* precondition, there must be facts supporting a finding of redressability, which also tracks the requirement of the Court's jurisdiction under Article III.

1. *Failure to Plead Factual Matter Under Rule 8, Twombly, and Iqbal.*[5]

Initially, a *factual* inquiry into the Court's jurisdiction is not necessary because Plaintiffs have failed to allege any factual matter, if accepted as true, to invoke this Court's jurisdiction. *See HeereMac V.O.F.*, 241 F.3d at 424. "[T]he pleading standard Rule 8 announces does not require

[4] 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.

[5] If the Court feels that Plaintiffs have jurisdiction, then the failure to plead sufficient factual matter requires dismissal under Fed. R. Civ. P. 12(b)(6).

'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). As such, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id*. In the context of a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. A claim has facial plausibility when the complaint contains factual content that allows the court to draw a reasonable inference that the defendant is liable. *Id.* Although a district court must assume the veracity of well-pleaded facts, "a complaint that 'fail[s] to show more than mere conclusory allegations' is properly met with dismissal for failure to state a claim." *Smith v. Dep't of Health & Hosps. La.*, 581 Fed. Appx. 319, 321 (5th Cir 2014) (citing *City of Clinton v. Pilgrim's Pride Corp.,* 632 F. 3d 148, 155 (5th Cir. 2010) (alteration in original)).

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Plaintiffs present the exact type of "formulaic recitation of the elements of a cause of action," *Iqbal*, 556 U.S. 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.,* Compl., ECF No. 1 at ¶ 34. However, this merely restates the elements of a cause of action under *Gingles* one. *Compare* Compl., ECF No. 1 at ¶ 34, *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."). Further, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. *Id.*

Simply restating the elements of the cause of action is insufficient under the gatekeeping powers of *Twombly* and its progeny.

In the context of the *Gingles* factors, the only "factual matter" Plaintiffs introduce is demographic information for Louisiana as a whole under the 2000 and 2010 censuses. *See* Compl., ECF No. 1 at ¶¶ 17-18 (showing African American voting age population of 29.9% in 2010). First, this is insufficient under *Gingles*' compactness requirement in that there must be a showing of not just numerosity but also *compactness*. *See Gingles*, 478 U.S. at 50. Even assuming everything Plaintiffs have claimed is true, there is nothing in the Complaint to enable this court to reach a conclusion that the African American community of Louisiana is sufficiently compact to warrant a second majority-minority district.[6]

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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 of such import that the United States Court of Appeals for the Eleventh Circuit requires a map at the motion to dismiss stage. *See 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). While a map may not necessarily be required at the motion to dismiss stage, the plaintiff must present sufficient factual matter that, taken as true, would lead this Court to the

[6] 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 infra*.

reasonable conclusion that a *second compact* district could be drawn. *See Lujan*, 504 U.S. at 561. The Plaintiffs have failed to do so here.

Second, for Section 2 purposes, numerosity is not measured statewide. Section 2, 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, because even if it is taken as true, the mere existence of a 29.9% African American population does not make relief any more or less likely. Therefore, Plaintiffs have not pled facts to show a redressable injury sufficient to maintain standing.

2. *Additional Facts Showing Plaintiffs Lack Standing.*

Even assuming, *arguendo*, that the Complaint contains factual matter sufficient under *Twombly* and its progeny, Plaintiffs lack subject matter jurisdiction due to the presence of additional facts that should lead this Court to conclude that it lacks jurisdiction. *HeereMac V.O.F.*, 241 F.3d at 424 (allowing the Court to consider both disputed and undisputed facts at the motion to dismiss stage). The federal courts have been faced with an attempt to draw two majority-minority districts out of seven total districts in Louisiana three times, and each time those attempts have been rebuffed as unconstitutional gerrymanders.

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, there were two districts that were drawn to be majority-minority districts. *Id.* Plaintiffs, various Louisiana citizens of various ethnicities, brought suit under, *inter alia*, Section 2 of the Voting Rights Act and the U.S.

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Constitution alleging that the plan impermissibly segregated the state based on race. *Id*. The district court found that the plan constituted a racial gerrymander that was not narrowly tailored. *Id*. at 1209.

While *Hays I* was on appeal at the United States 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 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 out of seven total districts and, once again, the district court found the map to be a racial gerrymander in violation of the U.S. Constitution. *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 Voting Rights Act *required* the creation of two majority-minority districts." *Id*. at 124 (emphasis in original). 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.[7]

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[7] As noted *supra*, 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.

The *Hays* cases are relevant in that the total African American population has changed very little since the 1990 census. If the African American population has remained constant, then there exists no reason to believe two *constitutional* majority-minority districts are possible in Louisiana. Table 1 shows that, as a percentage of the total population, the African American population has stayed flat since the 1990 census.[8] According to the census figures, the African American population in Louisiana has increased approximately 1.1% since the 1990 census.

TABLE 1:[9]

	1990 Total Pop.[10]		**2000 Total Pop.**		**2010 Total Pop.**	
White non-Hispanic	2,776,022	65.7%	2,794,391	62.5%	2,734,884	60.3%
Black or African American non-Hispanic[11]	1,299,281	30.7%	1,443,390	32.3%	1,442,420	31.8%
Hispanic	93,044	2.2%	107,738	2.4%	192,560	4.3%
Other	59,640	1.4%	123,457	2.8%	163,508	3.6%
Total	4,227,987		4,468,976		4,533,372	

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.

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[8] 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).

[9] Table 1 expands upon Plaintiffs' Table 1, *see* Compl., ECF No. 1 at 5, to add the census data from the 1990 census. Defendant simply recreated Plaintiffs' figures for 2000 and 2010 as stated in their Complaint. Defendant does not represent and does not concede that Plaintiffs' stated numbers are an accurate reflection of the data.

[10] *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.

[11] The 1990 census asked slightly different questions which makes data comparisons between the 1990, 2000, and 2010 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:[12]

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

According to the census figures, the African American voting-age population in Louisiana has increased approximately 2.1% since the 1990 census.

As stated *supra*, it is Plaintiffs' burden to invoke the Court's jurisdiction. The history of the legislature's unsuccessful attempts to create two majority-minority districts out of seven, coupled with the relatively unchanged African American voting-age population in Louisiana ought to lead this Court to the reasonable conclusion that Plaintiffs' facts as currently pled are insufficient to invoke this Court's subject matter jurisdiction.

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c. The NAACP Lacks Standing.

The NAACP asserts both organizational standing on behalf of itself and standing on behalf of its individual members. *See* Compl., ECF No. 1 at ¶¶ 10-11. The NAACP Complaint fails in both respects.

i. <u>NAACP Lacks Organizational and Associational Standing.</u>

"The harm of vote dilution . . . is 'individual and personal in nature.'" *See Gill v. Whitford*, 138 S. Ct. 1916, 1929 (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

[12] Table 2 expands upon Plaintiffs' Table 2, *see* Compl., ECF No. 1 at 5, to add the census data from the 1990 census. Defendant simply recreated Plaintiffs' figures for 2000 and 2010 as stated in their Complaint. Defendant does not represent and does not concede that Plaintiffs' stated numbers are an accurate reflection of the data.

sue." *See Gill*, 138 S. Ct. at 1929 (quoting *Baker v. Carr*, 369 U.S. 186, 206 (1962)). The injury from a Section 2 claim is to the dilution of an individual's vote. *Gingles*, 478 U.S. at 50-51.

The 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 1929-30. Plaintiffs here have not brought a claim under the U.S. Constitution, and instead have claimed vote-dilution under the Voting Rights Act as their sole cause of action. Because the NAACP, as an organization, lacks the right to vote, the NAACP, as an organization, cannot maintain standing.[13]

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Plaintiffs also do not have 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). "[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

[13] Any seemingly contrary pre-*Gill* authority is inapplicable in this instance because *Gill* fundamentally changed the law for invoking subject matter jurisdiction for vote dilution claims. Defendant acknowledges that there is pre-*Gill* authority for the proposition that organizational standing is possible for Voting Rights Act claims. *See, e.g., Veasey v. Perry*, 29 F. Supp. 3d 896, 906 (S.D. Tex. 2014) (collecting cases). However, the significant difference, in addition to being before *Gill*, is that in the instances in which organizational standing was found in the Voting Rights Act context there was a cognate constitutional claim under the Fourteenth and/or Fifteenth Amendments. *See, e.g., LULAC v. Perry*, 548 U.S. 399 (2006) (plaintiffs brought First and Fourteenth Amendment claims, as well as a Section 2 claim). While *Gill* was decided in the posture of partisan gerrymandering claims, the Court specifically broadened its holding to include *all* vote dilution claims. *See Gill*, 138 S. Ct. at 1929-30 (comparing the broad proposition for all individual voters to the specific example of partisan gerrymandering). This reading is confirmed by the *Gill* concurrence. *See id.* at 1938-39 (Kagan, J. concurring) (arguing that district-specific harm belongs to individual voter's yet associational harms can be held by organizations).

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" is insufficient because the injury alleged is neither concrete nor imminent. *Id*. Plaintiffs here again rely on threadbare allegations to maintain associational standing that must necessarily fail. The 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." Compl., ECF No. 1 at ¶ 11. Initially, 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 (requiring a showing "individual and personal in nature" for vote dilution claims). 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) (emphasis added).

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Finally, the singular claim of vote dilution is as destructive of 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 NAACP has failed to do so, they fail to maintain standing.

d. 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* Compl., ECF No. 1 ¶¶ 12-13. Second, and more importantly, there is no allegation or factual matter that a second majority-minority district could be drawn encompassing either individual Plaintiff. *See* Compl., ECF No. 1 ¶¶ 12-13 (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.

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e. Subsequent Decisions of the Supreme Court have Called into Question the Continued Applicability of the Voting Rights Act 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.").

Section 2 of the Voting Rights Act was amended in 1982 to include the word "representative[]." *See Chisom v. Roemer*, 501 U.S. at 383; *see also* 52 U.S.C. § 10301(b) ("A violation . . . is established if . . . it is shown that the political processes leading to nomination or election in the . . . political subdivision [is] not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect *representatives* of their choice.") (emphasis added). Moreover, when "[the] language [of a statute] is plain and unambiguous . . . . [the] enlargement of it by the court, so that what was omitted . . . may be included in its scope . . . transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 250-51 (1926); *see e.g.*, *Nichols v. United States*, 136 S. Ct. 1113, 1118 (2016); *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98-99 (1991); *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989); *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990); *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Federal Sav. & Loan Ins. Corp. v. Shelton*, 789 F. Supp. 1360, 1363 (M.D. La. 1992).

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When considering the word "representative," "there is little doubt that the ordinary meaning . . . does not include judges." *Chisom v. Roemer*, 501 U.S. at 410 (Scalia, J. dissenting). Furthermore, the Court has evolved in its interpretation of the word "representative" since its holding in *Chisom v. Roemer*. *Republican Party of Minn.*, 536 U.S. at 806 (Ginsburg, J. dissenting) ("[Judges] *do not sit as representatives* of particular persons, communities, or parties; they serve no faction or constituency.") (emphasis added); *see also Williams-Yulee*, 135 S. Ct. at 1674

(Ginsburg, J., concurring) ("Unlike politicians, judges are not 'expected to be responsive to [the] concerns of' constituents.'") (quoting *McCutcheon v. FEC*, 572 U.S. 185 (2014) (alteration in original)). Justice Scalia noted the folly of statutory interpretation that relies on "a method that psychoanalyzes Congress rather than reads its laws[;] when we employ a tinkerer's toolbox, we do great harm . . . . [W]e reach the wrong result . . . ." *Chisom v. Roemer*, 501 U.S. at 417 (Scalia, J., dissenting).

In the context of Section 2, it is illogical to mandate that a judge serve a "politically cohesive" body—a threshold requirement under *Thornburg v. Gingles*—if such elected judge can serve no faction or constituency in the first instance. *See Gingles*, 478 U.S. at 50-51. Put another way, it would be a pointless exercise to elect a candidate of choice when that candidate is not expected, and in fact *should not*, represent the interests of the community that elected that candidate. La. Code Jud. Conduct Canon 2(B) ("A judge shall not allow family, social, political, or other relationships to influence judicial conduct or judgment."); *Id. at* 2(A) ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary . . . 'impartiality' or 'impartial' denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties. . . ."). In *Caperton*, the Court said, "[j]ust as no man is allowed to be a judge in his own cause, similar fears of bias can arise when--without the other parties' consent--a man chooses the judge in his own cause. Applying that principle to the judicial election process, there was here a serious, objective risk of actual bias[.]" *Caperton*, 556 U.S. at 870. Given these overarching principles, applying Section 2 of the Voting Rights Act is not only an incorrect reading of the statute in the first instance but is also fundamentally contrary to established concepts of judicial autonomy and ethics. *See also Hous. Lawyers' Ass'n v. Atty. Gen.*, 501 U.S. 419 (1991) (reversing and remanding case

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because, *inter alia*, the district court failed to properly consider Judge Higginbotham's opinion in *LULAC, No. 4434 v. Clements*, 914 F.2d 620, 649 (5th Cir. 1990) (opinion concurring in judgment) (distinguishing the election of state trial judges from the election of state supreme court justices)).

The Supreme Court's holdings since *Chisom v. Roemer* therefore compel the conclusion that Section 2 of the Voting Rights Act no longer applies to judicial elections because judges and judicial elections are so distinct from elections of other government officials who are representatives. 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.

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II. IN THE ALTERNATIVE, DEFENDANT REQUESTS PLAINTIFFS PROVIDE A MORE DEFINITE STATEMENT UNDER RULE 12(e).

Federal Rule of Civil Procedure 12(e) allows for a party to "move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(e). A 12(e) motion is warranted "[i]f a pleading fails to specify the allegations in a manner that provides sufficient notice[.]" *See Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 514 (2002). A motion for a more definite statement falls firmly within the district court's discretion. *Factor King, LLC v. Block Builders, LLC*, 2015 U.S. Dist. LEXIS 68489, *11 (M.D. La. 2015). The Middle District of Louisiana permits motions for a more definite statement in the alternative. *See id*. at *3, *8-11.

Defendant has attempted to frame a proper response to Plaintiffs' Complaint. However, there are so many ambiguities throughout the Complaint that, if dismissal is inappropriate, a more definite statement certainly is appropriate. Plaintiffs' various pleading failures, *see supra*, perfectly illustrate why a more definite statement is necessary, assuming dismissal is not. For instance, it is

unclear from the face of the Complaint if any remedy is possible, especially considering the previous history found in the various *Hays* cases.

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: October 4, 2019 RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I CERTIFY I have served the foregoing was filed electronically and served on counsel for the parties by electronic notification by CM/ECF on October 4, 2019.

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