IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

HAROLD HARRIS; PASTOR ROBERT TIPTON, JR.; DELTA SIGMA THETA SORORITY, INC.; AND DESOTO COUNTY MS NAACP UNIT 5574 **PLAINTIFFS**

VS. **CIVIL NO.: 3:24-CV-00289-GHD-RP**

DESOTO COUNTY, MISSISSIPPI; DESOTO COUNTY BOARD OF SUPERVISORS; DESOTO COUNTY ELECTION COMMISSION; AND DALE THOMPSON IN HER OFFICIAL CAPACITY AS DESOTO COUNTY CIRCUIT CLERK **DEFENDANTS**

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Like their complaint, Plaintiffs' oppositional memorandum lacks substance. Culled down, Plaintiffs simply have failed to plead facts sufficient to establish two key requirements for standing as to Defendant Dale Thompson—causality and redressability. And careful reading of their opposition to Defendants' 12(b)(6) challenge similarly underscores Plaintiffs have failed to sufficiently plead facts related to the preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986) for purposes of their Section 2 claim.

Rebuttal Arguments

On December 6, 2024, Plaintiffs filed their [44] Response in Opposition to Defendants' Motion to Dismiss. Plaintiffs' arguments in opposition to Defendants' dismissal motion, however, lack merit. Each are addressed in turn.

I. Plaintiffs Do Not Have Standing to Sue Thompson

Plaintiffs fail to allege facts satisfying causality and redressability. It bears repeating that, at the pleading stage, ***Plaintiffs*** bear the burden of clearly alleging "facts demonstrating each element" of standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quotations and citations

omitted). Plaintiffs fail to satisfy that burden. Plaintiffs' conclusory description of Thompson's clerical duties, which are not tied in any way to the redistricting cause of action in this case, do not support with specificity the role Thompson played in causing the alleged violation of the Voting Rights Act ("VRA"), 52 U.S.C. §§ 10101 to 10702, or explain how Thompson could play a role in redressing such a violation. Nothing about Plaintiffs' barebones allegations related to Thompson or her duties alter the fact that, if and when the Board of Supervisors is ordered to redraw the County's district lines, Thompson will carry out her election-related duties without regard to how the lines ultimately are drawn. *See generally Terrebonne Parish NAACP v. Jindal*, 154 F. Supp. 3d 354, 363 (M.D. La. 2015) (rejecting argument that secretary of state was necessary party without whom complete relief could not be afforded where plaintiffs sued governor and attorney general, secretary's election-related duties were established by the legislature and secretary carried "out election laws without regard to how election districts are formed or election methods are established").

Plaintiffs' alleged injury is that, through the County's redistricting map, they are "being subject to racial vote dilution in violation of Section 2 of the VRA." Compl. [1] at ¶ 239. Plaintiffs' opposition fails to address how this alleged injury informs the causal element of standing analysis as to Thompson. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (noting the touchstone for determining causation in standing analysis is the "concrete and particularized" alleged injury). According to the complaint, the alleged injury here was caused by the "redistricting scheme" adopted by "DeSoto County's electoral districts." Compl. [1] at ¶¶ 232, 237. To redress that harm allegedly caused by the redistricting scheme, Plaintiffs ask that "a remedial map [be] adopted." *Id.* at ¶ 239.

Neither the complaint nor Plaintiffs' response identify any role Thompson played in causing the alleged Section 2 violation or how she could help redress it. Plaintiffs argue the injury is traceable to Thompson because "she is responsible for implementing and administering elections under the 2022 Plan." Opp'n [45] at 10. Further, according to Plaintiffs, the injury is redressable by Thompson "because an injunction against the 2022 plan will bar her . . . from administering any future elections using the 2022 Plan." *Id*. at 12. Neither assertion is tied to the actual injury and redress sought in this case. Ultimately, Thompson's clerical duties in administering elections have no bearing on which maps the County chose, or chooses, to adopt.

The complaint confirms Thompson has no role in DeSoto County's redistricting process. Plaintiffs admit her only role as "the Circuit Clerk of DeSoto County" is to administer and supervise "voter registration, preparing and holding elections, archiving election results, and performing other election functions." Compl. [1] at ¶ 54. Plaintiffs' opposition further clarifies that, under Mississippi law, her duties are triggered only "once the Board of Supervisors adopts a redistricting plan." Opp'n [45] at 10. Plaintiffs' opposition focuses exclusively on Thompson's role in preparing and holding elections. *Id*. at 10–12. But the complaint only alleges an injury related to voter dilution following the County's adoption of the redistricting maps, not the method and clerical execution of elections. *See, e.g.*, Compl. [1] at ¶ 232 (alleging only that "DeSoto County's electoral districts do not afford Black Mississippians . . . an equal opportunity to participate in the political process").

At bottom, Plaintiffs do not meet their burden to show that anything in Thompson's role is relevant to either drafting or adopting district maps—the causal element here. *Lujan*, 504 U.S. at 560 (to prove causality, "the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court"

(cleaned up)). Moreover, Plaintiffs have pointed to nothing in Thompson's job description that would allow her to play a role in redressing the alleged violation by drafting or adopting a remedial map. *Id.* at 561. While there are numerous theories on which voting rights cases can be predicated, Plaintiffs' Section 2 claim is squarely predicated on the district lines in DeSoto County. *See* Compl. [1] at ¶¶ 4, 5, 9, 10, 11, 12, 13, 20, 27, 60, 81, 95, & 232; p. 35 ¶A. Should Plaintiffs obtain injunctive relief requiring the districts to be redrawn, nothing about Plaintiffs' allegations related to Thompson (or Thompson's statutory duties) suggests she would or could have any role in redressing Plaintiffs' purported injuries through that redistricting process. Thus, Plaintiffs do not have standing to sue Thompson, and the complaint against her should be dismissed pursuant to Rule 12(b)(1). *Moore v. Bryant*, 853 F.3d 245, 248 n.2 (5th Cir. 2017).

II. Plaintiffs Fail to Plausibly State a Section 2 Vote Dilution Claim[1]

Plaintiffs misunderstand and conflate the legal framework and federal pleading standards against which their Section 2 vote dilution claim is analyzed. The Court need not "presume true . . . legal conclusions; mere labels; threadbare recitals of the elements of a cause of action; conclusory statements; and naked assertions devoid of further factual enhancement." *Armstrong v. Ashley*, 60 F.4th 262, 270 (5th Cir. 2023). Rather, Plaintiffs are required to provide sufficient factual allegations that nudge their claim from speculative to plausible. *Colony Ins. Co. v. Peachtree Constr. Ltd.*, 647 F.3d 248, 253 (5th Cir. 2011) ("Factual allegations must be sufficient to raise a non-speculative right to relief.").

[1] Plaintiffs' cart-before-the-horse-style suggestion that Defendants do not dispute their allegations related to the "totality of circumstances" is as incorrect as it is irrelevant. *See* Opp'n [45] at 14. Plaintiffs failed to sufficiently plead facts supporting any of the three *Gingles* preconditions. Without those preconditions being demonstrated, neither the parties nor the Court need reach the "totality of circumstances" analysis, and Plaintiffs know it. *See, e.g.*, *Allen v. Milligan*, 599 U.S. 1, 18 (2023) ("[A] plaintiff who demonstrates the three preconditions must also show, under the "totality of circumstances," that the political process is not "equally open" to minority voters.").

Applying these standards in this case, Plaintiffs' fail to sufficiently allege any one of the *Gingles* preconditions and this forecloses their Section 2 claim. Nothing in their oppositional memorandum supports the plausibility of their Section 2 claim under any of the *Gingles* preconditions.

A. The complaint does not sufficiently allege facts necessary to satisfy the first Gingles precondition.

Plaintiffs seek to circumvent their deficient allegations for the first *Gingles* precondition by positing that "[t]he term 'majority-Black district' can refer to either a majority as measured by BVAP or as measured by total population (or both)" and that the allegations they point to satisfy this precondition regardless of this admitted ambiguity underlying a critical distinction. Opp'n [45] at 15. This assertion is at odds with decades long Fifth Circuit precedent.

In the Fifth Circuit, the first *Gingles* precondition requires Plaintiffs to show a majority of the ***voting age population*** in a single-member district, as opposed to a majority of the total population. *See e.g., Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1117 n. 7 (5th Cir. 1991); *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1206 n. 4 (5th Cir. 1989); *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989); Campos *v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997); *Overton v. City of Austin*, 871 F.2d 529, 535–36 (5th Cir. 1989); *Sensley v. Albritton*, 385 F.3d 591, 596 (5th Cir. 2004); *Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 668 n. 3 (5th Cir. 2009); *Gonzalez v. Harris Cnty., Tex.*, 601 F. App's 255, 258 (5th Cir. 2015); *Robinson*, 86 F.4th 574, 590 (5th Cir. 2023); *Pettaway v. Galveston Cnty.*, 11 F.4th 596, 610 (5th Cir. 2024).

Recently, the Fifth Circuit, sitting *en banc*, reiterated that the relevant inquiry for the first precondition is the objective, numerical test set forth in *Bartlett v. Strickland*: "Do minorities make

up more than 50 percent of the voting-age population in the relevant geographic area?" *Pettaway v. Galveston County*, 11 F.4th at 610 (citing *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009)).

As Judge Edith Jones aptly noted in *Overton v. City of Austin*:

> [T]he raison d'etre of [*Gingles*] and of amended § 2 is to facilitate participation by minorities in our political processes, by preventing dilution of their votes. Only voting age persons can vote. It would be a Pyrrhic victory for a court to create a single-member district in which a minority population dominant in absolute, but not in voting age numbers, continued to be defeated at the polls.

871 F.2d at 542. This is consistent with *Gingles*' recognition that "[u]nless minority voters possess the ***potential*** to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that practice." 478 U.S. at 50–51 n. 17 (emphasis in original).

Accordingly, Plaintiffs are required to sufficiently plead facts "that their minority group constitutes a majority of the voting-age population in a geographical area that could be configured as a new single-member district, but is presently . . . split into two or more districts in each of which their group is a numerical minority." *See Magnolia Bar Ass'n, Inc. v. Lee*, 793 F. Supp. 1386, 1398 (S.D. Miss. 1992), *aff'd*, 994 F.2d 1143 (5th Cir. 1993).

Plaintiffs attempt to satisfy this requirement by pointing to allegations that their purported district would include large portions of Horn Lake, Walls, and Nesbit, along with other allegations relating to traditional districting principles. *See* Opp'n [45] at 15 (citing Compl. [1] at ¶¶ 91, 83, 88, 92, and 93). But understanding where Plaintiffs' district would be drawn does not alone satisfy the first *Gingles* precondition. Plaintiffs must also allege that there are enough Black voters in some reasonably configured hypothetical district to constitute a majority. These allegations that Plaintiffs press fail to provide any factual matter about the size of the population of ***Black voters***. Plaintiffs, therefore, fail to plead sufficient facts that would allow the Court to conclude Black voters constitute a numerical majority in a reasonably configured district. *See City of Clinton v.*

Pilgrim's Pride Corp., 632 F.3d 148, 152–53 (5th Cir. 2010) (recognizing that a complaint "must allege facts that support the elements of the cause of action in order to make out a valid claim.").

Moreover, Plaintiffs' frequent use of the term "majority-Black district" used in the allegations they press without specifying whether they are referring to total population or BVAP—which Plaintiffs contend (as they must to keep the complaint afloat) "doesn't matter"—creates an ambiguity that further undermines the purported plausibility of their Section 2 claim. Plaintiffs must present factual allegations "sufficient to raise a non-speculative right to relief." *Colony Ins.*, 647 F.3d at 253. Here, pleading a non-speculative right to relief requires Plaintiffs to plead unambiguous facts that Blacks "constitute[] a majority of the voting-age population in a geographical area that could be configured as a new single-member district, but is presently . . . split into two or more districts in each of which their group is a numerical minority." *Magnolia Bar*, 793 F. Supp. at 1398. Without clarifying whether the proposed district achieves a BVAP majority, Plaintiffs' allegations are insufficient to establish the plausibility of their claim under the first *Gingles* precondition.

In a last-ditch effort to save their claim from dismissal, Plaintiffs resort to contending that inferences should be drawn for their allegations, *see* Compl. [1] at ¶¶ 91–94, to mean "a majority-Black [voting age-population] district" rather than "a majority-Black [total population] district," *see* Resp. [45] at 16. This is nothing more than an improper attempt to amend the complaint through their response to avoid dismissal. Substantive deficiencies in their complaint cannot be cured or overlooked by resolving ambiguities in a way that inserts missing material allegations into the complaint under the guise of "reasonable construction" since courts "will not 'strain to find inferences favorable to the plaintiff.'" *Southland Sec. Corp. v. Inspire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004) (quoted case omitted); *see also White v. U.S. Corrs., L.L.C.*, 996 F.3d 302,

306 (5th Cir. 2021) (citations omitted). This is especially true in Section 2 claims where the Supreme Court mandates that "[c]ourts cannot find [Section] 2 violations on the basis of uncertainty." *Harding v. Cnty. of Dallas, Tex.*, 948 F.3d 302, 310 (5th Cir. 2020) (quoting *Abbott v. Perez*, 585 U.S. 579, 609 (2018)). As to the first *Gingles* precondition, Plaintiffs' complaint presents just the sort of uncertainty from which a Section 2 violation cannot be found.

B. The complaint similarly does not sufficiently allege the facts necessary to satisfy the second and third Gingles preconditions.

While Plaintiffs insist that the complaint alleges sufficient facts to satisfy the second and third *Gingles* preconditions, their arguments are similarly flawed. For both, Plaintiffs argue, at great length, about the differences between the probative value of endogenous and exogenous elections. *See* Opp'n [45] at 16–20. In their response, the only factual allegations they reference are that at least twelve Black candidates have run against white candidates in the County offices, and that the Black voters' preferred candidate was defeated by white bloc voting in each of those elections. Opp'n [45] at 16; *but see* Compl. [1] at ¶ 101. This, however, does not indicate how unified (*i.e.*, politically cohesive) Black voters are in supporting those candidates. These allegations alone, therefore, make it, at most, merely conceivable that the second *Gingles* precondition has been met for the County offices at issue.

Likewise, these allegations do not to satisfy the third *Gingles* precondition. The third precondition requires Plaintiffs to sufficiently plead facts supporting that "the white majority votes sufficiently as a bloc to enable it . . . *usually* to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51 (emphasis added). But Plaintiffs have not pointed to any allegation that could explain how a minority of white voters could usually defeat Black-preferred candidates in a district that is majority Black as measured by BVAP. Accordingly, the Court is left only with legally irrelevant conclusions, threadbare recitals of the elements of the claim, and naked assertions devoid

of further factual enhancement. *See* Compl. [1] at ¶¶ 96–99, 102–104. As the Fifth Circuit has underscored, "allegations that are merely consistent with a claim provide anemic notice that cannot be seen as sufficient." *Harding*, 948 F.3d at 315.

Lastly, Defendants reiterate that the *Gingles* preconditions are a "brightline test," *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852 (5th Cir. 1999), and failure to establish any one of these threshold requirements is fatal," *Harding*, 948 F.3d at 308. Defendants, therefore, need not consider the totality of the circumstances when, as here, a plaintiff fails to establish any one of the preconditions. *Robinson*, 86 F.4th 574 at 590 (citing *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 425 (2006)).

III. Section 2 Does Not Contain a Private Right of Action

As the County conceded in its opening brief, and as Plaintiffs highlight in opposition, current Fifth Circuit precedent established in *Robinson v. Ardoin* forecloses the County's argument that there is no private right of action to sue under Section 2 of the VRA. 86 F.4th at 588. But *Robinson*'s conclusory holding on that matter stands on shaky ground. *See Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1209 (8th Cir. 2023); *see also Ala. State Conf. of NAACP v. Alabama*, 949 F.3d 647, 662 (11th Cir. 2020) (Branch, J., dissenting) (explaining, in the context of a later-vacated decision, that *OCA-Greater Houston* is profoundly wrong because "nothing" in the VRA's text "abrogates state sovereign immunity such that private individuals can sue the State in federal court"). By way of preservation, the County re-urges this defense, a question that remains a live controversy potentially going before the Fifth Circuit *en banc* court as soon as next year. *See Nairne v. Landry*, CA5 No. 24-30115.

Plaintiffs' opposition does nothing to shore up the illusory foundation on which *Robinson* stands, even by tacking on reference to 42 U.S.C. § 1983. *See Planned Parenthood of Greater Tex.*

Fam. Planning & Preventative Health Servs., Inc. v. Kauffman, 981 F.3d 347, 374 (5th Cir. 2020) (Elrod, J., concurring) (emphasizing that "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action" (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285–86 (2002))). As explained in Defendants' opening memorandum, *see* Mem. [37] at 14, the text and structure of Section 2 make clear Congress did not intend to create new individual rights in Section 2, and Plaintiffs' resort to Section 1983 will not get them where they want to go.

Conclusion

For these reasons, Defendants request an order dismissing the complaint with prejudice.

Dated: December 20, 2024.

Respectfully submitted,

PHELPS DUNBAR LLP

BY: */s/ Nicholas F. Morisani*

David Michael Hurst, Jr., MB #99990
W. Thomas Siler, Jr., MS #6791
Nicholas F. Morsani, MB #104970
1905 Community Bank Way
Suite 200
Flowood, Mississippi 39232
Telephone: 601-352-2300
Telecopier: 601-360-9777
mike.hurst@phelps.com
tommy.siler@phelps.com
nicholas.morasani@phelps.com

And

Andrew W. Coffman, MB#106207
105 East Main Street, Suite 201
Tupelo, Mississippi 38804
Telephone: 662-842-7907
Telecopier: 662-842-3873
andrew.coffman@phelps.com
Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that on December 20, 2024, I electronically filed this document with the Clerk of the Court using the ECF system, which sent notification of such filing to all ECF counsel of record in this action.

/s/ Nicholas F. Morisani
Nicholas F. Morisani