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

THE SOUTH CAROLINA STATE CONFERENCE OF THE NAACP,

and

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

Plaintiffs,

v.

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

Defendants.

Case No.: 3:21-cv-3302-JMC-TJH-RMG

GOVERNOR MCMASTER'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

COMES NOW Defendant Henry D. McMaster, in his official capacity as Governor of South Carolina ("Governor McMaster" or "Governor"), by and through the undersigned counsel, and hereby moves to dismiss Plaintiffs' First Amended Complaint for Injunctive and Declaratory

Relief (ECF No. 84) ("Amended Complaint") pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.[1]

INTRODUCTION

In what has become a decennial tradition, a group of plaintiffs has sued over redistricting. When this latest iteration of redistricting litigation began, Plaintiffs complained that the General Assembly had not passed legislation establishing new maps. Now that the General Assembly has passed, and the Governor has signed into law, legislation reapportioning the State's legislative districts, Plaintiffs have changed their focus. To be sure, their Amended Complaint still takes issue, albeit in a less prominent manner, with the General Assembly having not yet completed the process of developing a reapportionment plan for the State's congressional districts. And despite the fact that the State does not intend to hold any elections based on the 2010 maps, Plaintiffs continue to tilt at the proverbial windmill, quixotically asking the Court to enjoin and declare unconstitutional the current configuration of the State's congressional districts. Nevertheless, the focus of their Amended Complaint remains on the House of Representatives and, more specifically, on 28 recently reapportioned House districts.

Plaintiffs' Amended Complaint, however, suffers from several fatal flaws, two of which warrant dismissal at this preliminary stage: one involving who Plaintiffs have named as a defendant, and one involving their novel but implausible First Amendment association claim. As for the defendant, Plaintiffs have not stated—and cannot state—a plausible claim against the Governor. First, binding precedent establishes that the general authority of a State's chief executive is insufficient to make a governor a defendant in a case challenging the constitutionality

1. In accordance with Rule 7.04 of the Local Civil Rules (D.S.C.), a supporting memorandum is not required because this filing provides a full explanation of the Motion and a separate memorandum would serve no useful purpose.

of a law. Second, as the South Carolina Supreme Court has recognized, the Governor enjoys the unreviewable constitutional authority and discretion to call the General Assembly into an extra session on extraordinary occasions. Thus, Plaintiffs' unadorned assertion that the Governor could have and should have exercised that power cannot serve as the basis for any claim against him. Third, the Governor is protected by legislative immunity for signing a bill into law, so the fact that Governor McMaster signed H. 4493 into law likewise does not give rise to or support any claim against him. And fourth, Plaintiffs lack standing to pursue their claims against the Governor because Plaintiffs' claims are neither traceable to the Governor nor redressable by an injunction against him.

As for the First Amendment claim, Plaintiffs allege that the lack of new congressional map violates their right of association. Plaintiffs' contention, however, is foreclosed by history and Supreme Court precedent. At the time of the First Amendment's adoption, single-member districts were not even required, and by the time of the Fourteenth Amendment's ratification, no case law suggested that voters had a First Amendment right of association based on congressional districts. Additionally, the Supreme Court's decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), confirms that a redistricting plan does not involve any restrictions on the right to associate. The Court should therefore reject Plaintiffs' novel but implausible attempt to fashion a new constitutional right that is untethered from the Constitution's text, history, or tradition.

BACKGROUND

A. Plaintiffs' allegations and legislative action.

Every ten years, the State redraws congressional and legislative districts after the Census Bureau finalizes and releases the requisite census data. *See* S.C. Code Ann. § 7-19-50. Due in large part to COVID-19, the Census Bureau did not provide the data for the 2020 census in its final

format until September 16, 2021, months later than usual. *See* Press Release, U.S. Census Bureau, *Census Bureau Delivers 2020 Redistricting Data in Easier-to-Use Format* (Sept. 16, 2021), https://tinyurl.com/a7esca9v. Notwithstanding this delay, the redistricting process is now partially complete, with the remainder well underway.

Last month, the General Assembly passed, and the Governor signed into law, legislation reapportioning both houses of the state legislature. *See* 2021 S.C. Acts No. 117 ("H. 4493"). The General Assembly is currently considering congressional reapportionment plans. Both the House and Senate have proposed new congressional district maps. *E.g.*, *Congressional House Staff Plan*, S.C. House of Representatives Redistricting 2021, https://tinyurl.com/2p84j3pm; *2021 State Staff Congressional Plan*, S.C. Redistricting 2021 – Senate Judiciary Committee, https://tinyurl.com/24ejz9sx. The House Redistricting Ad Hoc Committee and the House Judiciary Committee have scheduled meetings on Monday, January 10, 2022, specifically to address congressional redistricting. *See Agenda*, House Redistricting Ad Hoc Committee (Jan. 10, 2022), https://tinyurl.com/caunbt8c; *Agenda*, House Judiciary Committee (Jan. 10, 2022), https://tinyurl.com/ycy983xp. And the General Assembly will reconvene in regular session at noon on January 11, 2022. *See* S.C. Const. art. III, § 9.

Plaintiffs' Amended Complaint challenges 28 of the 124 recently reapportioned districts in the House of Representatives as violating the Fourteenth and Fifteenth Amendments. *See* ECF No. 84, at 5 (¶ 9), 51–53 (¶¶ 160–73). Plaintiffs also raise a First Amendment freedom of association claim related to the fact that the General Assembly has not yet completed the ongoing process of developing a new congressional reapportionment plan. *See* ECF No. 84, at 53–54 (¶¶ 174–78). Plaintiffs seek, *inter alia*, various declaratory and injunctive relief. ECF No. 84, at 54–55.

B. Procedural history.

Unsatisfied with the General Assembly's prompt action following the Census Bureau's significant delay in releasing key data, Plaintiffs sued. *See* ECF No. 1. They contended that the redistricting process was not moving quickly enough and asserted that the new maps would not be finalized in time for them to challenge them before the 2022 election cycle. They initially wanted both a declaration that the 2010 maps were now malapportioned and an injunction prohibiting those maps from being used in the 2022 election cycle. *See* ECF No. 1, at 24–27. Plaintiffs also asserted a freedom of association claim, alleging that without new maps, they cannot associate with others and advocate for candidates. *See* ECF No. 1, at 27. Plaintiffs finally demanded that this Court supervise the redistricting process itself and set deadlines Defendants must adhere to while this work remained ongoing. *See* ECF No. 1, at 28.

This case quickly developed a peculiar procedural history. Plaintiffs moved for a three-judge court under 28 U.S.C. § 2284. *See* ECF No. 17. Defendants opposed that premature request. *See* ECF Nos. 18, 45, 47. Additionally, the House Defendants moved to stay. *See* ECF No. 51. The Senate Defendants moved to dismiss or alternatively to stay, *see* ECF No. 57, and the Governor moved to dismiss, *see* ECF No. 61. Then, on November 9, 2021, nearly a month after filing their Complaint, Plaintiffs moved for a preliminary injunction based solely on their freedom of association claim. *See* ECF No. 59.

On November 12, 2021, before Plaintiffs' Motion for Preliminary Injunction was fully briefed, and despite expressly finding Plaintiffs' allegations and claims were "speculative" and "not yet ripe," the Court stayed the case and denied the Senate Defendants' Motion. ECF No. 63, at 12–13. After noting that the General Assembly would reconvene in regular session on January 11, 2022, the Court stayed the case, "giv[ing] the Legislature until the following Tuesday, January

18, 2022, to enact new district maps." ECF No. 63, at 12–13. At that point, the Court indicated, it would consider whether Plaintiffs' claims had "become ripe." ECF No. 63, at 12.

While the case was stayed, the Court granted Plaintiffs' Request for a Three-Judge Court Pursuant to 28 U.S.C. § 2284(a). *See* ECF No. 70; *see also* ECF No. 76 (Order appointing three-judge court). And the Court ordered the parties to finish briefing Plaintiffs' Motion for Preliminary Injunction and the Governor's Motion to Dismiss. *See* ECF No. 69.

After Plaintiffs noted they intended to amend their Complaint based on the then-recent reapportionment of the State's legislative districts, the parties asked the Court to extend the existing briefing deadlines because any such amendment would moot the pending motions. *See* ECF Nos. 73, 77. The Court ultimately adopted the current schedule and convened an informational session and status conference on December 22, 2021. *See* ECF Nos. 80–83. The following day, Plaintiffs filed their Amended Complaint, which principally challenges 28 of the 124 recently reapportioned House districts under the Fourteenth and Fifteenth Amendments and claims that the lack of a congressional redistricting plan has violated Plaintiffs' First Amendment associational rights. *See* ECF No. 84. Governor McMaster now moves to dismiss Plaintiffs' Amended Complaint.

C. Allegations related to Governor McMaster.

For all 178 paragraphs in their Amended Complaint, Plaintiffs actually allege very little related to the Governor. Plaintiffs allege that the Governor has the authority to sign or veto any reapportionment plan passed by the General Assembly. ECF No. 84, at 9 (¶ 23). They also allege that the Governor has the constitutional power to convene the General Assembly for extra sessions. ECF No. 84, at 20 (¶ 66). The only other allegation pertaining to the Governor is that he signed into law the legislation reapportioning the House and Senate districts. *See* ECF No. 84, at 1 (¶ 2),

9 (¶ 23), 11 (¶ 36), & 29 (¶ 95). Plaintiffs' Amended Complaint is devoid of any other allegations related to Governor McMaster.

LEGAL STANDARDS

"A Rule 12(b)(1) motion for lack of subject matter jurisdiction raises the fundamental question of whether a court has jurisdiction to adjudicate the matter before it." *Career Counseling, Inc. v. Amerifactors Fin. Grp., LLC*, 509 F. Supp. 3d 547, 553 (D.S.C. 2020). A Rule 12(b)(1) motion to dismiss should be granted whenever "the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.* (internal quotation marks omitted). Under Rule 12(b)(1), "[t]he plaintiff has the burden of establishing standing." *Somers v. S.C. State Elec. Comm'n*, 871 F. Supp. 2d 490, 496 (D.S.C. 2012). The Court may consider jurisdictional evidence outside the pleadings without converting the motion into one for summary judgment. *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005).

A motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted "challenges the legal sufficiency of a complaint." *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009) (citation omitted). The Court should grant a motion to dismiss whenever a complaint fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To state a claim, "a plaintiff must plead enough factual allegations 'to state a claim to relief that is plausible on its face.'" *Bing v. Brivo Sys., LLC*, 959 F.3d 605, 616 (4th Cir. 2020) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A court must accept only "well-pleaded allegations" "as true and draw all reasonable factual inferences from those facts in the plaintiff's favor." *Harrell v. Freedom Mortg. Corp.*, 976 F.3d 434, 439 n.5 (4th Cir. 2020) (internal alteration omitted). But the Court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). Plaintiffs must "allege

facts sufficient to state all the elements of [their] claim." *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003).

ARGUMENT

I. The Governor is not a proper defendant in this action.

All of Plaintiffs' claims against the Governor are premised upon the Governor's authority to convene, on extraordinary occasions, an extra session of the General Assembly and to sign or veto legislation presented to him. For at least four reasons, Plaintiffs' attempt to assert claims against the Governor on these bases fail as a matter of law.

First, Governor McMaster is the State's "Chief Magistrate," S.C. Const. art. IV, § 1, but that does not, without more, make him a proper defendant subject to being sued about any and every state law that a plaintiff does not like. When a governor "lack[s] the power to enforce, or direct the enforcement of, [a law]," a plaintiff "cannot sue the Governor" about it. *Doyle v. Hogan*, 1 F.4th 249, 255 (4th Cir. 2021); *see also Charleston Cty. Sch. Dist. v. Harrell*, 393 S.C. 552, 561, 713 S.E.2d 604, 609 (2011) ("[W]e affirm the dismissal of the Governor as a party to this action. Nothing in School District's complaint demonstrates a nexus between Governor or his authority and Act 189. Instead, School District only alleges that the Governor's ample executive powers render him an appropriate defendant in any suit where the constitutionality of a statute is challenged. This is an insufficient reason to name the Governor as a party defendant."). Plaintiffs never allege any particular duty or obligation the Governor has when it comes to the recently reapportioned House districts separate and apart from the legislative process of adopting them. Therefore, *Doyle* requires the Governor's dismissal as a defendant here.

The Fourth Circuit's recent opinion in *Doyle*, however, is not alone in compelling this outcome. *Ex parte Young*, 209 U.S. 123 (1908), further illustrates the flaws in Plaintiffs' effort to

reach the Governor. The Supreme Court has just reaffirmed black-letter law that an official who is not charged with enforcing a state law cannot be enjoined regarding that law. *See Whole Women's Health v. Jackson*, 142 S. Ct. 522, 534–36 (2021) (refusing to permit injunctive relief against the state attorney general who was not charged with enforcing Texas's new abortion statute). Only when an official has "some connection with the enforcement of the act" does *Ex parte Young* provide an exception to sovereign immunity to permit a federal court to enjoin a state official. 209 U.S. at 157. In this case, the Governor does not administer these elections, so there is no basis to enjoin him, just as the Supreme Court held there was no basis to enjoin the Texas attorney general.

Second, the state constitution provides that the "Governor may on extraordinary occasions convene the General Assembly in extra session." S.C. Const. art. IV, § 19. The South Carolina Supreme Court has held that because "what constitutes an 'extraordinary occasion'" is not defined by the constitution, deciding what is an "extraordinary occasion" "must be left to the discretion of the Governor," free from any judicial review.[2] *McConnell v. Haley*, 393 S.C. 136, 138, 711 S.E.2d

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2. For almost two centuries, other States have interpreted similar constitutional provisions the same way. *See, e.g.*, *In re State Census*, 21 P. 477, 477 (Colo. 1886) ("Whether or not an occasion exists of such extraordinary character as demands a convention of the general assembly in special session . . . is a matter resting entirely in the judgment of the executive."); *Whiteman v. Wilmington & S.R. Co.*, 2 Del. 514, 525 (Del. Super. Ct. 1839) ("This is a power, the exercise of which the framers of the constitution have seen fit to entrust to the chief executive officer of the state alone. As they have not defined what shall be deemed an extraordinary occasion for this purpose, nor referred the settlement of the question to any other department or power of the government; the governor must necessarily be himself the judge, or he cannot exercise the power. He may err, but this court has no jurisdiction to review his decision or correct his error."); *Bunger v. Georgia*, 92 S.E. 72, 73 (Ga. 1917) ("The Governor is thus invested with extraordinary powers [including convening the legislature], and in the exercise of such powers and prerogatives neither the legislative nor the judicial department of the government has any power to call him to account, nor can they or either of them review his action in connection therewith."); *Farrelly v. Cole*, 56 P. 492, 494 (Kan. 1899) ("The sole power is thus deposited in the governor to convene the legislature on extraordinary occasions; and it has been uniformly held that he cannot be compelled by mandamus to act, should he refuse for any reason to exercise the power, nor be restrained by injunction in an

886, 887 (2011). Of course, the South Carolina Supreme Court gets the final word on state law. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("the views of the state's highest court with respect to state law are binding on the federal courts"). Thus, Plaintiffs' conclusory assertion that the Governor could have and should have, at some unspecified point, convened the General Assembly in extra session is insufficient to support any claim against the Governor.

In any event, this purported basis for a claim against the Governor is practically moot now and will be officially moot in five days. To ensure "that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved," "an actual controversy must be extant at all stages of review." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (internal quotation marks omitted). "If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Id.* at 72 (internal quotation marks omitted); *see also S.C. Coastal Conservation League v. U.S. Army Corps of Eng'rs*, 789 F.3d 475, 482 (4th Cir. 2015) ("When a case or controversy ceases to exist, the litigation is moot, and the court's subject matter jurisdiction ceases to exist also."). Even assuming a federal court could order a governor to call his State's legislature back into session (itself a drastic assumption), by the time this issue is briefed and a decision rendered, the General Assembly will be back in session. *See* S.C. Const. art. III, § 9 (annual session begins "the second Tuesday of January each year"). Accordingly, the Court need not resolve any dispute about the Governor's power to call the General Assembly into extra session

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attempt to exercise it."); *Washington v. Fair*, 76 P. 731, 732 (Wash. 1904) ("It was the exclusive province of the governor, under the Constitution, to determine whether an occasion existed of sufficient gravity to require an extra session of the Legislature, and his conclusion in that regard is not subject to review by the courts.").

because the General Assembly will be back in Columbia in less than a week.

Third, Plaintiffs fare no better by pointing to the Governor's power to sign or veto legislation. *See* S.C. Const. art. IV, § 21. Although an executive branch official, a governor is nevertheless protected by legislative immunity when he takes an action that is an "integral step[] in the legislative process." *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998). Presentment of an act approved by the General Assembly to the Governor for his signature or veto is a constitutionally required (and thus integral) part of the legislative process. *See* S.C. Const. art. IV, § 21. Indeed, both the United States Supreme Court and the South Carolina Supreme Court have said as much. *See Smiley v. Holm*, 285 U.S. 355, 372–73 (1932) (recognizing that a governor's signing or vetoing of a bill constitutes part of the legislative process); *Williams v. Morris*, 320 S.C. 196, 206, 464 S.E.2d 97, 102 (1995) (noting that the state constitution "clearly envisions gubernatorial participation in the legislative process" and "require[es] the Governor's participation in enacting statutes"); *Parker v. Bates*, 216 S.C. 52, 58, 56 S.E.2d 723, 725 (1949) ("The veto power is a part of the legislative process." (citing *Doran v. Robertson*, 203 S.C. 434, 27 S.E.2d 714 (1943)); *cf. I.N.S. v. Chadha*, 462 U.S. 919, 946–51 (1983) (discussing the role of the President in the lawmaking process, describing the "important purpose" of the Presentment Clauses of the Constitution, and noting that "the Framers were acutely conscious that . . . the Presentment Clauses would serve [an] essential constitutional function[]").

In recognition of the fact that the chief executive plays an integral role in the legislative process, courts have consistently and unsurprisingly held that legislative immunity applies to gubernatorial decisions to sign or veto legislation. *See, e.g.*, *Bagley v. Blagojevich*, 646 F.3d 378, 391 (7th Cir. 2011) ("Legislative acts include signing and vetoing bills because they are integral steps in the legislative process." (internal quotation mark omitted)); *Torres Rivera v. Calderon*

Serra, 412 F.3d 205, 213 (1st Cir. 2005) ("a governor who signs into law or vetoes legislation passed by the legislature is also entitled to absolute legislative immunity for that act"); *Women's Emergency Network v. Bush*, 323 F.3d 937, 950 (11th Cir. 2003) ("Under the doctrine of absolute legislative immunity, a governor cannot be sued for signing a bill into law."); *Cates v. Baltimore City Cir. Ct.*, No. CV ELH-18-1398, 2018 WL 2321121, at *3 (D. Md. May 22, 2018) ("Governor Hogan is entitled to absolute legislative immunity for any constitutionally authorized activities as whether to sign or veto a particular bill . . . ."), *aff'd*, 735 F. App'x 101 (4th Cir. 2018); *cf. Peter B. v. Sanford*, No. 6:10-cv-767-TMC, 2012 WL 2149784, at *8 (D.S.C. June 13, 2012) (granting legislative immunity to Governor Sanford in a § 1983 claim involving allocation of state funds). This well-established case law precludes Plaintiffs from relying on the Governor's decision to sign H. 4493 as the basis for any claims against the Governor.

Moreover, Supreme Court precedent requires the Governor be dismissed now—not after trial. Under the doctrine of legislative immunity, a person "should be protected not only from the consequences of litigation's results but also from the burden of defending [himself]." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). Thus, when legislative immunity protects a defendant, that defendant is entitled "to summary dismissal." *Crawford v. S.C. Dep't of Corr.*, No. 9:18-cv-1408-TLW-BM, 2018 WL 9662788, at *4 (D.S.C. Oct. 16, 2018), *report and recommendation adopted*, 2019 WL 4640970 (D.S.C. Sept. 24, 2019).

Fourth, Plaintiffs lack standing to pursue their claims against the Governor, and as such, this Court lacks jurisdiction to adjudicate them. It is axiomatic that federal courts may decide only "Cases" and "Controversies." U.S. Const. art. III, § 2. The case-and-controversy requirement means that a plaintiff must have standing. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). Standing requires a plaintiff to show "(i) that he suffered an injury in fact that is concrete,

particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *Id.* Traceability "means it must be likely that the injury was caused by the conduct complained of and not by the independent action of some third party not before the court." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000). And redressability means "that it must be likely, and not merely speculative, that a favorable decision will remedy the injury." *Id.*

Any harm alleged by Plaintiffs related to the recently reapportioned House districts or the General Assembly's ongoing, but not yet completed, redistricting process for the State's congressional districts is not traceable to the Governor or redressable by any injunction or judgment against him. And to the extent Plaintiffs principally take issue with the fact that the Governor signed H. 4493 into law, he enjoys legislative immunity for that act. *See Smiley*, 285 U.S. at 372–73. Likewise, the Governor cannot be ordered to sign or veto any congressional map that the General Assembly enacts, as such an order would violate both legislative immunity and the fundamental principles of federalism and the separation of powers. No possible injunction could be entered against him that would redress any of Plaintiffs' alleged harm. The Governor does not regulate, conduct, or oversee elections held based on the challenged districts; the State Election Commission and county boards of voter registration and elections do. *See* S.C. Code Ann. § 7-13-10 *et seq.* (establishing how elections are conducted in South Carolina). Nor does he make the rules for elections. *See* S.C. Const. art. II, § 10 ("The General Assembly shall provide for the nomination of candidates, regulate the time, place and manner of elections, provide for the administration of elections and for absentee voting, insure secrecy of voting, establish procedures for contested elections, and enact other provisions necessary to the fulfillment and integrity of the election process."). In other words, a decision in Plaintiffs' favor with respect to the Governor

would not address Plaintiffs' concerns. Plaintiffs therefore do not have standing to maintain this action against the Governor.

II. Plaintiffs' First Amendment association claim fails as a matter of law.

A. History and Supreme Court precedent foreclose Plaintiffs' claim.

As a separate flaw in Plaintiffs' Amended Complaint, their First Amendment association claim related to the State's congressional districts fails as a matter of law. Plaintiffs claim that "prolonged uncertainty about district boundaries impedes candidates' ability to effectively run for office" and that Plaintiff Taiwan Scott's right to association is infringed by restricting his ability "to assess candidate positions and qualifications, advocate for [his] preferred candidates, and associate with like-minded voters." ECF No. 84, at 53–54 (¶ 175). They say the NAACP's members are "harmed in the same ways." ECF No. 84, at 54 (¶ 176). In an apparent effort to underscore the urgency of their concerns, Plaintiffs complain that South Carolinians currently "do not know whether their current representatives will be eligible to run in their congressional districts in the upcoming election." ECF No. 84, at 5–6 (¶ 12).

The Supreme Court has repeatedly made clear that constitutional provisions must be given the meaning they were understood to have at the time they were enacted. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (Sixth Amendment right to jury trial); *Gamble v. United States*, 139 S. Ct. 1960 (2019) (Fifth Amendment protection from double jeopardy); *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (Eighth Amendment protection from cruel and unusual punishments); *Florida v. Jardines*, 569 U.S. 1 495 (2013) (Fourth Amendment right to be free from unreasonable searches); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (First Amendment right to free speech); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment right to keep and bear arms). History leaves no doubt that the law has never recognized the First

Amendment association claim Plaintiffs now assert. Plaintiffs' claim is premised on the idea that unless they know, for some sufficient period in advance, the congressional district in which they will reside for purposes of the next election, any short-term uncertainty will violate their First Amendment right of association.

But "[t]he Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, congressional representatives in many States were elected through at-large or 'general ticket' elections." *Rucho*, 139 S. Ct. at 2499; *see U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 822 (1995) ("The Framers deemed this principle critical when they discussed qualifications. For example, during the debates on residency requirements, Morris noted that in the House, '*the people at large,* not the *States,* are represented.'" (quoting 2 Records of the Federal Convention of 1787, p. 217 (M. Farrand ed. 1911)) (emphasis in original)). In fact, single-member districts were not required until 1842, when Congress provided that for States having more than one Representative in the House, "the number to which each State shall be entitled under this apportionment shall be elected by districts composed of contiguous territory equal in number to the number of Representatives to which said State may be entitled, no one district electing more than one Representative." Act of June 25, 1842, ch. 47, 5 Stat. 491, 491. Still, Congress required such districts "not out of a general sense of fairness," but rather out of "a (mis)calculation by the Whigs that such a change would improve their electoral prospects." *Rucho*, 139 S. Ct. at 2499. Thus, as an original matter, there is no plausible claim that the First Amendment protects any right of association based on current or future congressional districts.

This historical analysis holds true even if 1868, rather than 1791, is the relevant time period. Single-member districts were a statutory requirement around the time of the Fourteenth

Amendment's ratification. *See* Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28, 28 ("That in each State entitled under this law to more than one Representative, the number to which said States may be entitled in the forty-third, and each subsequent Congress, shall be elected by districts composed of contiguous territory, and containing as nearly as practicable an equal number of inhabitants, and equal in number to the number of Representatives to which said States may be entitled in Congress, no one district electing more than one Representative"); *see also, e.g.*, Act of Feb. 7, 1891, ch. 116, § 3, 26 Stat. 735, 735 (substantially identical). This requirement continued into the early 1900s, at which point Congress also required that districts be compact. *See, e.g.*, Act of Aug. 8, 1911, ch. 5, § 3, 37 Stat. 13, 14 ("That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative."); *see also* Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 733, 734 (substantially identical). But Congress "did not carry forward those requirements" for contiguous and compact single-member districts in future apportionment legislation, so those requirements "expired by their own limitation" ahead of the 1930 reapportionment. *Wood v. Broom*, 287 U.S. 1, 6–7 (1932); *see, e.g.*, Act of June 28, 1929, ch. 28, 46 Stat. 21 (providing for the 1930 census and for apportionment for Congress). Despite an Amended Complaint full of various legal cites, Plaintiffs offer nothing to suggest that any of these statutes were ever understood to give rise to a First Amendment association claim against the States, through the Fourteenth Amendment, based on congressional districts.

Plaintiffs fare no better by looking beyond statutes to other constitutional provisions. Constitutional rules for congressional districts arose only in the 1960s when the Supreme Court first held that the Constitution requires congressional districts in a State to be "nearly as is practicable" to the exact same population. *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964). For almost two centuries then, there was no constitutional right regarding congressional districts that could have underlaid a First Amendment association claim (even putting aside the lack of incorporation for more than a century). Accordingly, that means that no one who ratified the Fourteenth Amendment could have thought the First Amendment gave rise to an association claim based on congressional districts.[3]

Bolstering this history is the Supreme Court's decision in *Rucho*. That case involved political gerrymandering claims arising out of two cases in North Carolina and Maryland following the 2010 census. *See* 139 S. Ct. at 2491. Among the claims those plaintiffs asserted was a First Amendment cause of action, alleging that the politically motivated maps retaliated against them "on the basis of their political beliefs" and "burden[ed] their associational rights." *Id.* at 2492, 2493. Both three-judge courts held for the plaintiffs on the First Amendment claims. *Id.*

The Supreme Court disagreed, concluding that First Amendment claims based on partisan gerrymandering were not justiciable. *Id.* at 2505. The Court explained that "there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue." *Id.* at 2504. That is because people "are free to engage in those activities no matter what the effect of a plan may be on their district." *Id.* Of course, experience teaches us that this is true.

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3. In fact, the United States Constitution does not even require Representatives to reside in a specific congressional district. Article I requires only that a Representative in Congress be 25 years old, a citizen for seven years, and "an Inhabitant *of that State* in which he shall be chosen." U.S. Const. Art. I, § 2, cl. 2 (emphasis added).

People campaign for and donate to candidates in other districts every election cycle. Political groups coordinate across districts, races, and States. No matter what the maps are, people—including Plaintiffs—are free to exercise all of their First Amendment rights. At bottom, Plaintiffs' argument that any prolonged uncertainty regarding the State's congressional districts interferes with their right to associate and advocate is too speculative and tenuous to serve as the basis for a cognizable First Amendment claim. *Cf. Baten v. McMaster*, 967 F.3d 345, 359 (4th Cir. 2020) ("[T]he plaintiffs' suggestion that the winner-take-all system serves as a disincentive for political candidates to campaign in South Carolina, thereby impeding their ability to participate effectively in the political process, is too tenuous to support their freedom of association claim.").

The distinctions in this case and *Rucho* that the Court drew in its Order staying the case do not warrant keeping Plaintiffs' First Amendment claim alive any longer. *See* ECF No. 63, at 8 n.2. As an initial matter, the bar Plaintiffs had to clear there to have the case referred to a three-judge court was much lower than to survive a motion to dismiss. *See Shapiro v. McManus*, 577 U.S. 39, 45 (2015) (holding that "only wholly insubstantial and frivolous claims" can be dismissed without being referred to a three-judge panel and contrasting this standard with the 12(b)(6) standard (internal quotation marks omitted)). Next, no Plaintiff here has alleged to be a candidate, so the fact that *Rucho* does not address candidates is legally and factually irrelevant. Additionally, the "at issue" language in *Rucho* does not limit that case to only the maps challenged in North Carolina and Maryland. Like those maps, none of the maps that South Carolina has enacted or that the General Assembly has proposed involve any "restrictions on speech, association, or any other First Amendment activities." *Rucho*, 139 S. Ct. at 2504. For purposes of the legal analysis applicable to an association claim, that makes the maps here exactly like the maps in *Rucho*.

To be sure, the political process is—as it should be—well protected by the First Amendment. No one disputes that principle or seeks to discount its significance. But history and *Rucho* teach that *every* aspect of, or complaint about, the political process does not necessarily fall within the scope of the First Amendment or give rise to a cognizable or justiciable claim in federal court. Plaintiffs' First Amendment cause of action therefore fails as a matter of law.

B. None of Plaintiffs' arguments are persuasive.

Plaintiffs have already briefed this issue once, in their now-moot Motion for a Preliminary Injunction. *See* ECF No. 59; *see also* ECF No. 87 (denying as moot Plaintiffs' Motion for Preliminary Injunction). Thus, their flawed arguments on this claim can be addressed now.

Starting with the First Amendment cases Plaintiffs cite in arguing their freedom of association claim, *see* ECF No. 59, at 10–15, none of them is a redistricting case focusing on this type of First Amendment association theory. *See Branch v. Smith*, 538 U.S. 254 (2003) (state's failure to complete redistricting); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (state-law requirement of blanket primary); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (state-law requirement of open primaries); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (deadline for independent candidates to file for office); *Elrod v. Burns*, 427 U.S. 347 (1976) (public employees fired for not supporting the current sheriff); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (campaign finance laws); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (one-person, one-vote challenge on congressional redistricting); *Reynolds v. Sims*, 377 U.S. 533 (1964) (one-person, one-vote challenge on state legislatures); *Gray v. Sanders*, 372 U.S. 368 (1963) (challenge to county-unit system for apportioning state legislature); *Nat'l Ass'n for Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958) (disclosure requirements for private organizations); *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393 (4th Cir. 2019) (statute establishing

method for party nomination involving incumbents); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996) (one-person, one-vote challenge to county commissioners and school board); *Garza v. Cty. of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) (Voting Rights Act challenge to county supervisor districts); *City of Greensboro v. Guilford Cty. Bd. of Elections*, 120 F. Supp. 3d 479 (M.D.N.C. 2015) (equal protection challenge to restructured local elections and municipal government); *Perez v. Texas*, 970 F. Supp. 2d 593 (W.D. Tex. 2013) (three-judge court) (constitutional and Voting Rights Act challenge to enacted maps). This confirms that Plaintiffs' Amended Complaint again asks this Court to endorse their novel claim of constitutional injury.

Next, Plaintiffs take issue with the extent of the public's involvement in the General Assembly's redistricting process, insisting much of it happened too early, before the Census Bureau released the final data. *See, e.g.*, ECF Nos. 59, at 9–10, 11; 84, at 4 (¶ 7), 20–21 (¶ 67). This argument has several flaws. First, Plaintiffs' complaint has nothing to do with whether the fact that the legislative process of developing new maps remains ongoing actually impacts the right of association. Second, Plaintiffs' assertion presents the proverbial "damned-if-you-do-damned-if-you-don't" scenario. Plaintiffs say the General Assembly is not moving fast enough, but at the same time, they insist the process started too early and has moved too fast. *See, e.g.*, ECF No. 84, at 23 (¶ 74). They cannot have it both ways. Third, and similarly, as to the timing of committee hearings, the process is moving quickly (which Plaintiffs should like), and Plaintiffs do not dispute that the General Assembly provided notice as required by South Carolina law. *See* S.C. Code Ann. § 30-480 (24-hour notice requirement). Taking more time would only delay the process, which presumably is antithetical to Plaintiffs' aim.[4] Fourth, Plaintiffs ignore that the public has been free

4. Curiously, while Plaintiffs seek to speed up the legislative process and ask this Court to establish a deadline for the General Assembly to complete its work, Plaintiffs' counsel and members of the NAACP have been demanding the General Assembly slow down with

to submit (and individuals and groups, including the NAACP, have submitted) maps for an extended period after the public hearings. *See Plan Proposal*, Senate Judiciary Committee, https://tinyurl.com/8a3dsx44; *2021 Public Submissions*, House Judiciary Committee, https://tinyurl.com/3puw79rj. And fifth, Plaintiffs' claim here is actually likely to delay the General Assembly's adoption of new congressional maps because of the uncertainty of litigation, thereby creating the very First Amendment problem they purportedly seek to solve. *Cf.* ECF No. 84, at 53–54 (¶¶ 175, 177) (complaining about "[u]nduly prolonged uncertainty about district boundaries" and "the imminent risk of confusion" ahead of filing deadlines and primaries).

Plaintiffs then put great emphasis on district-level party organizing and advocacy, asserting that cannot happen until the General Assembly maps are finalized. *See* ECF Nos. 59, at 11–12; 84, at 30. Such associations may occur and still can, but in America's political system, organizational and associational efforts of this nature typically exist at the national, state, and county levels. *See* ECF No. 84, at 7 (¶¶ 16–17) (alleging that the South Carolina NAACP has members and branches in each of the State's 46 counties). Redistricting does not impact the ability to associate on those levels. And every decade presents this challenge to associating on a district level. *See Growe v. Emison*, 507 U.S. 25, 35 (1993) (noting that "States must often redistrict in the most exigent circumstances" after receiving census data). This redistricting cycle started later than normal, when the Census Bureau finally released the 2020 data on August 12, 2021, due in part to COVID-19. *See* Press Release, U.S. Census Bureau, *Census Bureau Delivers 2020*

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redistricting. For example, after Plaintiffs filed their Complaint, Plaintiffs' counsel testified before the House committee and insisted that the General Assembly should allow additional time for the public to study the proposed maps. *See* Nov. 10, 2021 Hr'g, House Judiciary Committee, Redistricting Ad Hoc Committee 2:01:12–2:06:14, https://tinyurl.com/hrufz9mu (testimony of Somil Trivedi).

Redistricting Data in Easier-to-Use Format (Sept. 16, 2021), https://tinyurl.com/a7esca9v. Thus, the entire cycle has been delayed to some degree through no fault of Defendants.

Plaintiffs have also sought to invoke the right to petition the government, insisting that that right is harmed in two ways. *See* ECF No. 59, at 12–13. But the Amended Complaint (like the original Complaint) mentions only the right of association; the word "petition" appears nowhere in the Amended Complaint. *See* ECF No. 84. "When a plaintiff seeks injunctive relief based on claims not pled in the complaint, the court does not have the authority to issue an injunction." *White v. Phelps*, No. 8:20-cv-03668-MGL, 2021 WL 2433964, at *2 (D.S.C. June 14, 2021) (quoting *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 633 (9th Cir. 2015)).

Even if Plaintiffs could somehow skirt their failure to plead a petition-based theory, their arguments in this regard still fail. Their first argument is that without the new maps, Plaintiffs "cannot effectively hold their representatives accountable." ECF No. 59, at 12; *see also* ECF No. 84, at 30 (¶ 101). Plaintiffs can, of course, do that. They—like all other South Carolinians—have representatives currently holding office in the General Assembly and in Congress. Plaintiffs are free to petition their current representatives as long as they hold office. To petition the government now, Plaintiffs do not need to know, much less have a constitutional right to know, if their current representative might seek reelection in 2022. Accepting Plaintiffs' implausible argument would lead to an illogical conclusion. If Plaintiffs' theory were true, no citizen could petition or hold accountable a representative who announced plans to retire at the end of their current term or otherwise did not intend to stand for reelection. No one thinks that is the case. If it were, that would mean citizens in at least 37 congressional districts across the country could not petition their Representative right now. *See House Retirement Tracker*, NPR (updated Jan. 4, 2022),

https://tinyurl.com/2jmd8hbr (identifying 37 members of Congress who are not seeking reelection in 2022).

Plaintiffs' second petition-related argument is actually a recasting of the two claims in the original Complaint based on malapportionment. *Compare* ECF No. 1, at 24–27; ECF No. 59, at 13–15; *with* ECF No. 84, at 30 (¶¶ 100–03). Plaintiffs repeatedly suggest the General Assembly and the Governor have not provided timeframes for each step of the redistricting process, implying that by not doing so, the only conclusion is that redistricting will not be finished for some significant period of time, at which point it will be far too close to the 2022 elections for them to be utilized. *See, e.g.*, ECF Nos. 59, at 10; 59-2, at 5; 59-3 at 3–4; 60, at 2; 84, at 30–31, 53–54. This gets it backward. Plaintiffs bear the burden of producing "evidence" making it "apparent" that redistricting will not be completed in time. *Growe*, 507 U.S. at 34, 36. Yet Plaintiffs have not offered any evidence on that front. Without it, there is no reason to usurp the "primary responsibility for apportionment" the State enjoys in redistricting. *Id.* at 34. And none of that has anything to do with the First Amendment.

Finally, Plaintiffs point to previous redistricting processes to insist that the General Assembly must pass, or the Court must impose, a redistricting plan and reapportion the State's congressional districts in time to allow for judicial review and adjudication of (the apparently inevitable) legal challenges. *See* ECF Nos. 59, at 15; 84, at 2–3 (¶¶ 1–3), 14 (¶¶ 43–44), 30 (¶¶ 101, 103). As with Plaintiffs' other arguments, this one suffers from at least two shortcomings. For one, the Supreme Court specifically rejected the idea that a State must finish its redistricting work in time for litigation over new maps to conclude. *See Growe*, 507 U.S. at 35. The Supreme Court noted that imposing "such a requirement would ignore the reality that States must often redistrict in the most exigent circumstances—during the brief interval between completion of the

decennial federal census and the primary season for the general elections in the next even-numbered year." *Id.* No principle of law requires parties, much less States or state officials, to allocate or set aside time for lawsuits. For the other, Plaintiffs ignore that three of the previous South Carolina redistricting cases involved situations in which the General Assembly admittedly could not adopt new maps through the political process. *See Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618, 623 (D.S.C. 2002) (addressing instance in which new maps were passed "[a]fter a lengthy period" but were vetoed by the Governor, and the General Assembly "failed in its attempt to override the veto"); *Burton on Behalf of Republican Party v. Sheheen*, 793 F. Supp. 1329, 1336 (D.S.C. 1992) (involving circumstance where new maps were vetoed, but the veto was not overridden, and after "no compromise was reached," a lawsuit was filed "to break the legislative impasse"); *S.C. State Conf. of Branches of Nat'l Ass'n for Advancement of Colored People, Inc. v. Riley*, 533 F. Supp. 1178, 1179 (D.S.C. 1982) (dealing with occasion when after "many months" of trying to enact new maps, the General Assembly was "hopelessly deadlocked" and "abandoned" its efforts). Nothing here suggests such a stalemate will occur in connection with the General Assembly's ongoing work to develop a reapportionment plan for the State's congressional districts.

CONCLUSION

For the foregoing reasons, Governor McMaster respectfully submits that the Court should grant this Motion to Dismiss and dispose of Plaintiffs' claims against him pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

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January 6, 2022
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