IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Latasha Holloway, et al.,

Plaintiffs,

v.

City of Virginia Beach, et al.,

Defendants.

Case No. 2:18-cv-0069

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The Court lacks jurisdiction to try this case in October 2010 using data that will be obsolete before any election within this Court's remedial powers will occur. The illustrative districts Plaintiffs will present at trial will be invalid and unenforceable as of the November 2022 election and beyond. Hence, the parties cannot litigate over whether the injury they allege can be redressed, and Plaintiffs cannot establish Article III standing. A proposed remedy that might have worked in the past cannot be shown to work in future elections or to redress a concrete injury. Nor can Plaintiffs satisfy the liability standard under Section 2 of the Voting Rights Act, which requires Plaintiffs to prove that *effective* majority-minority districts can be fashioned to govern future elections.

Worse, Plaintiffs ask for this advisory opinion on behalf of a so-called "coalition" of three racial groups even though they are only members of *one* of the groups they seek to represent. No member of the other two groups is before the Court claiming injury or expressing a desire for the coalitional districts Plaintiffs seek to impose on the City. In order to prosecute this *coalitional* claim without members of that alleged *coalition*, Plaintiffs must satisfy the third-party standing requirements, and they do not. Their claims must be dismissed.

ARGUMENT

I. The Court Lacks Jurisdiction to Adjudicate Plaintiffs' Vote-Dilution Claim

Plaintiffs' response brief is an exercise in misdirection and evasion. It would be *their* burden at trial to establish "that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district," *Collins v. City of Norfolk*, 883 F.2d 1232, 1236 (4th Cir. 1989), that will perform in *real* elections as an effective opportunity district, *Abbott v. Perez*, 138 S. Ct. 2305, 2332 (2018). And it is *their* burden to establish "each element" of jurisdiction "with the manner and degree of evidence required at the successive stages of the

litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). But the alternative plans Plaintiffs will present at trial to establish these prerequisites will become outdated and legally worthless before any future election subject to court-ordered remediation can occur. *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003). Plaintiffs fail to explain how, given this basic reality, the parties can even begin to *litigate* whether Plaintiffs will be injured, whether the at-large scheme may cause the injury, or whether the injury can be redressed. Plaintiffs' arguments sidestep this fundamental problem and are unavailing.[1]

A. The Continued Existence of the At-Large Scheme Does Not Authorize the Court to Issue an Advisory Opinion on Its Legal Effects under Moot Conditions

Plaintiffs' principal argument is that the at-large scheme is not set to change after the 2020 census results are released and thus, they contend, the parties "are engaged in a live controversy over whether Virginia Beach's at-large system dilutes the voting strength of the City's HBA community." Pls' Mem. in Opp'n to Mot. to Dismiss ("Pls' Br.") 9. But this is exactly the "circular talk" the Fourth Circuit has condemned. *Hall v. Virginia*, 385 F.3d 421, 428 (4th Cir. 2004). The at-large scheme is not dilutive *unless* certain things are proven about (to quote Plaintiffs) "the current facts about the City's population." Pls' Br. 9. Plaintiffs concede that *they* must establish at trial "certain facts about the population of Virginia Beach by a preponderance of evidence." Pls' Br. 2. The Supreme Court agrees: "Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or

[1] This motion to dismiss for *mootness* is not "untimely." Pls' Br. 8; *see* Fed. R. Civ. P. 12(h)(3). A motion challenging subject-matter jurisdiction can be presented at any time. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). Further, standing requirements are "not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Lujan*, 504 U.S. at 561. In any event, the City could not have moved to dismiss for mootness before the case became moot.

practice, they cannot claim to have been injured by that structure or practice." *Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986).

But the parties are not engaged in a live controversy over whether the at-large scheme will be dilutive under circumstances that will exist as of the next election that this Court can impact via a remedy: the November 2022 election and beyond. There is no evidence in the record about what the 2020 Census results are likely to show, and Plaintiffs' suggestion that past increases in population among minority groups suggest a trend is pure assumption—and one that ignores that the feasibility of drawing a majority-minority district also depends on the *relative growth* of all demographic groups and the geographic dispersion of those groups. No evidence of these matters could be adduced at trial. Just as sports teams play the game to find out who will win, the Census Bureau takes an enumerated census to determine "the current facts about the City's population." Pls' Br. 9. Guessing in October 2020 what those facts will be *after* the 2020 Census is published next year is called speculation, and the Court lacks jurisdiction to do it.

This matters because the "current facts" will not be legally relevant as of the next election Plaintiffs will vote in, i.e., November 2022.[2] This "change in factual circumstances" moots the controversy over the dilutive impact, *Williams v. Ozmint*, 716 F.3d 801, 809 (4th Cir. 2013), and the question whether the at-large scheme will be dilutive under circumstances yet to have materialized is not ripe. *See, e.g.*, *Harris v. Quinn*, 573 U.S. 616, 657 n.30 (2014) (rejecting as unripe claim based on future circumstances yet to materialize); *Gasner v. Bd. of Supervisors of the Cty. of Dinwiddie, Va.*, 103 F.3d 351, 360–61 (4th Cir. 1996). Plaintiffs are therefore wrong in arguing (at 10) that "Section 2 claims are not brought 'under' a set of data." Whatever Plaintiffs think they bring their claim "under," there is no injury, causation or redressability

[2] The totally speculative possibility of a special election is addressed below, § I.D.

except in the context of "facts about the City's population" as of the next election. Pls' Br. 9. Changes in those factual circumstances moot the case.

Plaintiffs are also wrong to contend (at 18) that there is a live dispute over whether the "at-large system deprives the HBA community of equal opportunity to elect candidates of choice *right now*." This case cannot impact the November 3, 2020 general election (*see infra, §* 1.F.), and no election is scheduled thereafter until November 2022, which means there is no current, redressable injury. *Harris*, 573 U.S. at 657 n.30 (finding unripe a dispute over an election that was not yet scheduled); *Lopez v. City of Houston*, 617 F.3d 336, 340–42 (5th Cir. 2010) (scheduled release of census data prior to next election rendered Voting Rights Act challenge case moot and unripe). It is currently unknowable whether the at-large scheme will result in a redressable injury at a future date. Plaintiffs' claim is both "moot and not ripe." *Lopez*, 617 F.3d at 340.

Finally, it is not true that dismissing this case would pose an "unacceptable hardship for Plaintiffs." Pls' Br. 22. "[N]ew census figures will be available prior to the next election," affording Plaintiffs and the Court time to assess the relevant inquiries under that data. *Lopez*, 617 F.3d at 342. If Plaintiffs believe they are injured under the new census results, they can re-file their case then and potentially have a remedy in place before November 2022. Their speculation to the contrary (at 22–23) is just that: speculation.

B. Plaintiffs' ACS Data Does Not Create a Live Dispute About Conditions in Future Elections

Equally unavailing is Plaintiffs' contention that "multiple sets of ACS data" can overcome their jurisdictional defect. Pls' Br. 11. That data, just like the 2010 census data, will be rendered obsolete by the release of the 2020 results. *Ashcroft*, 539 U.S. at 488 n.2. Plaintiffs' ACS data consists of "2014-2018 ACS 5-year estimates," Pls' Br. 11, but, when the 2020 results

are issued, districts correctly apportioned under 2014–2018 ACS data, just like those correctly apportioned under the 2011 enumerated results, must be redrawn. *Ashcroft*, 539 U.S. at 488 n.2.

Yet Plaintiffs ask the Court to believe that a jurisdiction can adopt or maintain (or a court can impose) districts malapportioned under the current decade's census results (here, 2020) because the districts are properly apportioned under ACS estimates from the *prior* decade (here, 2014–2018). That is wrong. Compliance with the constitutionally required "one-person, one-vote" test is measured by the decennial census, not the ACS. Defs' Mem. of Law ISO Mot. to Dismiss ("Defs' Br.") 2–3. Plaintiffs do not, and cannot, deny this. *See* Va. Code § 24.2-304.1(C) (requiring the use of the most recent decennial census data). Plaintiffs respond that the census only creates a "presumption," which is "rebuttable," Pls' Br. 11 n.10, but they cannot seriously claim to rebut the accuracy of 2020 Census results that do not yet exist with *older* ACS data from the prior decade. That data would be both less accurate and older than the 2020 results. That is no basis upon which to contend that a map governing the 2022 election would satisfy the Constitutional one-person, one-vote requirement if apportioned under 2014–2018 ACS data. Thus, there is no basis to believe a remedy crafted now sheds any light on what might be crafted for future elections subject to this Court's remedial powers. Tellingly, Plaintiffs have no response to Defendants' argument that no remedial phase can occur at this time. There is none. They also do not—and cannot—deny that the redistricting required by law to take place before the next election will be, by law, governed by the 2020 Census results, not by older ACS data.

Plaintiffs' cases are not to the contrary. They show only that a litigant might supplement *older* enumerated census results with *newer* ACS estimates, not that a jurisdiction or a court may use *older* ACS instead of *newer* enumerated census results. *See Johnson v. DeSoto Cty. Bd. of Comm'rs*, 204 F.3d 1335, 1341 (11th Cir. 2000) (permitting consideration of 1998 non-census

data to challenge accuracy of 1990 Census data); *Garza v. County of Los Angeles*, 918 F.2d 763, 772–73 (9th Cir. 1990) (permitting use of post-1980 Census Bureau Population Estimates Program ("PEPS") data to supplement 1980 Census data); *Terrebonne Par. Branch NAACP v. Edwards*, 399 F. Supp. 3d 608, 614 (M.D. La. 2019) (using Census Bureau's American Community Survey ("ACS") to supplement older 2010 Census data); *Benavidez v. City of Irving, Tex.*, 638 F. Supp. 2d 709, 714–15 (N.D. Tex. 2009) (permitting use of 2006 ACS data to supplement 2000 Census data); *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 745 (N.D. Ohio 2009) (using 2005–2007 ACS data to supplement 2000 Census data); *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 424 (S.D.N.Y. 2010) (relying on 2000 Census data but using 2006 expert estimates to understand population trends). One other case shows only that a litigant may supplement enumerated census results creating the one-person, one-vote measure with ACS *citizenship* data to establish the minority voting-age population of an otherwise properly apportioned district. *Terrebonne Branch NAACP v. Jindal*, No. 3:14-CV-69, 2019 WL 4398509, at *3 (M.D. La. Apr. 29, 2019), *report and recommendation adopted sub nom. Terrebonne Par. Branch NAACP v. Edwards*, 399 F. Supp. 3d 608 (M.D. La. 2019). Plaintiffs have no basis to claim that districts drawn to equal population under 2014–2018 ACS results can satisfy the Constitution (and, hence, establish the *Gingles* factors) for purposes of the November 2022 election and beyond.

Accordingly, Plaintiffs' effort to recast (at 21–22) this dispute as one of fact requiring a trial is misguided. Plaintiffs will not have 2020 Census data by the time of trial, and they are wrong that Defendants are simply "speculating that…2020 Census theoretically *could* later contradict their evidence" under ACS data. Pls' Br. 22 (emphasis in original). As the Supreme Court has recognized, it is a *virtual certainty* that districts drawn under older data will be

rendered obsolete at the time of the 2020 census. *Ashcroft*, 539 U.S. at 488 n.2. Plaintiffs do not identify a single jurisdiction in the nation over the past 40 years at least the size of Virginia Beach that did *not* have to redistrict at the beginning of the decade. Quite the opposite, they *concede* this point, calling it "uncontroversial" that "existing redistricting plans typically must be redrawn after new decennial census data are released." Pls' Br. 13. Thus, their remedial maps will have no practical meaning after that date—and thus cannot constitute the basis of an effective remedy.

Thus, the only question of fact here is whether Plaintiffs can present at trial illustrative districts apportioned to an acceptable equal-population range under 2020 census results (i.e., which will redress their supposed injury in November 2022). And there is no material dispute on that question: they cannot. Their plans were drawn with obsolete information to address circumstances that will no longer exist by the next relevant election. Their expert reports do not opine that their illustrative maps will continue to be properly apportioned under the 2020 Census results, and no expert can competently testify to such unknowable facts. There is no issue of fact to try, and the Court lacks jurisdiction to reach the merits.

C. Plaintiffs' Arguments About the Role of Illustrative Districts Identify No Live Controversy About the Section 2 Factors Under 2022 Conditions

Defendants' arguments do not rest "on a misunderstanding of the role of illustrative remedial districts in VRA litigation." Pls' Br. 15. The Court only need read *Plaintiffs'* brief to see that both sides *agree* (as they must) that *Plaintiffs* must (at a minimum) "demonstrate that [the HBA population] is sufficiently large and compact to constitute a majority in a single member district." Pls' Br. 9 (quoting *Hall v. Virginia*, 385 F.3d 421, 426 (4th Cir. 2004)). Plaintiffs must establish that their illustrative single-member districts are *correctly apportioned*; a party cannot draw a malapportioned district to satisfy the first *Gingles* prong. *See, e.g.*,

Houston v. Haley, 663 F. Supp. 346, 348 (N.D. Miss. 1987) (observing that illustrative plan must "adhere to the one person-one vote principle"); *Reed v. Town of Babylon*, 914 F. Supp. 843, 870 (E.D.N.Y. 1996) (finding that an illustrative district cannot establish the first *Gingles* prong unless it meets "the population deviation rule applicable to legislative plans"); *Benavidez v. Irving Indep. Sch. Dist.*, No. 3:13-CV-0087, 2014 WL 4055366, at *20 (N.D. Tex. Aug. 15, 2014) (finding that an illustrative plan cannot establish the first *Gingles* prong if it has "a population deviation that would violate the 'one person, one vote' requirement of the Equal Protection Clause"). It is beyond dispute that Plaintiffs cannot show that their illustrative districts will be correctly apportioned under 2020 Census data, the data that matters for the next relevant election. There is no "misunderstanding"—Plaintiffs' illustrative districts cannot establish vote dilution under unknown circumstances that will exist in November 2022.

Plaintiffs confuse this simple test by contending that they need merely show "*the possibility*" of meeting the first *Gingles* factor and that a subsequent remedial phase can make up the deficiency. Pls' Br. 15 (quotation marks omitted) (emphasis in original). This is false. The first *Gingles* factor does not allow a plaintiff to get "close enough" to a majority in a correctly apportioned district and then punt the issue to a later remedial phase. The plaintiff must meet, at the *liability* phase, "an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?" *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009). This is elementary Voting Rights Act law, and Plaintiffs fail to reckon with it.[3] Although the illustrative plans need not provide the precise remedy adopted by the Court (if it finds

[3] Plaintiffs' contrary contention (at 15) takes one word, "possibility," out of context in *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994). *Johnson* did not hold (or even address the prospect) that a plaintiff unable to present an alternative districting plan under relevant conditions meeting the 50% test can still establish the first *Gingles* factor on the hope or aspiration that a possible plan may emerge at a later remedial phase.

liability), those plans must prove what is feasible in future elections—not simply what was possible for past elections.

Indeed, the only misunderstanding about the relevance of remedial plans and phases is on Plaintiffs' part. It is not true that 2020 enumerated results would simply "affect the remedy [that] is expected to emerge after the adjudication of liability." Pls' Br. 14. The flaw here goes to even the possibility of establishing *liability*. The first *Gingles* element "focus[es] up front on whether there is an *effective* remedy for the claimed injury." *Hines v. Mayor & Town Council of Ahoskie*, 998 F.2d 1266, 1273 (4th Cir. 1993) (quoted source omitted) (emphasis added). This motion does not concern what "is expected to emerge" later, but what Plaintiffs are unable to show at trial as an essential element of their claim. Indeed, unless Plaintiffs *prove Gingles* prong one, no remedy can be "expected to emerge" later. This case is not analogous to one in which an employee suing her employer under the Americans with Disabilities Act visits a physician for new information. Pls' Br. 14–15. Rather, it is analogous to one where the plaintiff has no evidence that she has a disability and rests her claim on the possibility that she might in November 2022 succumb to one. *See Hall*, 385 F.3d at 428. That claim would not be ripe.

D. Contingent Possibilities and Potential Impacts of an Advisory Opinion Do Not Establish Jurisdiction

Plaintiffs wax at length about the potential practical impact of a Section 2 claim they have no ability to prove and cite precedent with not even remote relevance here. These efforts fall well short of the jurisdictional mark.

1. The Possibility That Officials *Might* Take Guidance from an Advisory Opinion Does Not Establish a Live Controversy

Plaintiffs' reliance on *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), is nothing but an attempt to confuse. Pls' Br. 13. The case involved the preclearance requirement under Section 5 of the Voting Rights Act and has zero relevance here. *Reno* involved a Louisiana

Parish that was subject to the requirement of Section 5 of the Voting Rights Act to obtain preclearance from the Department of Justice before enacting a new redistricting plan. 528 U.S. at 322–23. Section 5 forbade retrogression as compared to a so-called benchmark plan, which is the last legally operative plan of the jurisdiction. *Id.* at 327, 329, 333. Although a Section 5 case lasted past the final election of the 1990s decade, the Supreme Court found the case was not moot because the plan under adjudication, if upheld, "will serve as the baseline against which appellee's next voting plan will be evaluated for the purposes of preclearance." *Id.* at 328. That legally binding purpose served a practical function: "Whether (and precisely how) [a] future plan represents a change from the baseline, and, if so, whether it is retrogressive in effect, will depend on whether preclearance of the 1992 plan was proper." *Id.*

There is no analogy to *Reno* here. Virginia Beach is not subject to a preclearance requirement, *see Shelby County v. Holder*, 570 U.S. 529 (2013) (disabling the preclearance requirement), and there is no significance to litigating over a benchmark plan.[4] Plaintiffs, however, cite the *free will* of the City of Virginia Beach (and the Virginia General Assembly), positing that it *might choose* to prepare districts in 2021 based on the Court's ruling. Pls' Br. 13 n.12. Perhaps, but it also might choose not to do so. Unlike in *Reno*, Section 5 does not require it to consider any "benchmark"; the City can disregard any benchmark at will.

It has long since been settled that a future choice of persons not within plaintiffs' control—particularly, *defendants*—is a contingency that does not present a ripe controversy. *Rizzo v. Goode*, 423 U.S. 362, 372 (1976) (discussing *O'Shea v. Littleton*, 414 U.S. 488, 496–97

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[4] *Lopez v. City of Houston*, 617 F.3d 336 (5th Cir. 2010), illustrates this point. A challenge under Section 5 of the Voting Rights Act was rendered moot at the end of a decade, and *Reno* did not apply for the apparent reason that the mechanisms at issue would not have served as a benchmark for preclearance proceedings. *See id.* at 339 (discussing challenge to city's determination of population).

(1974)); *Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (internal quotes omitted)). And even if Plaintiffs are right that the City has considered prior plans previously in drawing new ones, Pls' Br. 13 n.12, the simple fact that a defendant took an action in the past does not allow a case to proceed on the assumption that a defendant will take similar action again. *See Rizzo*, 423 U.S. at 372.

The fact that Virginia Beach would be free to choose a different path and ignore any "benchmark" renders this a contingency that cannot establish jurisdiction. *Lopez*, 617 F.3d at 342 (finding Section 2 claim unripe where it depended on the defendant's future action, "an event that 'may not occur as anticipated, or indeed may not occur at all,' which means that the claim [was] merely abstract or hypothetical, and thus too speculative to be fit for judicial review" (citation omitted)); *A/S J. Ludwig Mowinckles Rederi v. Tidewater Const. Co.*, 559 F.2d 928, 932 (4th Cir. 1977) ("An important factor in considering ripeness is whether resolution of the tendered issue is based upon events or determinations which may not occur as anticipated." (citation omitted)); 13B Charles A. Wright, et al., Fed. Prac. & Proc. Juris. § 3532.2 (3d ed.).

Undeterred, Plaintiffs double down on their request for an advisory opinion, contending that a decision "would put councilmembers on notice that the Council will soon include one or more majority-HBA districts." Pls' Br. 17. That, indeed, is *all* the ruling could do, and that is exactly why it is advisory. An advisory opinion consists of "advance expressions of legal judgment upon issues which remain unfocused…." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). The power to tell a legislative body how to enact *future* legislation is forbidden to Article III courts like this one. *See, e.g.*, *Hillblom v. United States*, 896 F.2d 426, 431 (9th Cir. 1990) (finding proposed "declaration outlining the permissible scope of future Congressional actions"

to be an impermissible advisory opinion); *Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.3d 411, 421 (6th Cir. 1999) (finding order enjoining city from enacting future preference legislation—and retaining jurisdiction to review such legislation—to be "an advisory opinion as to the constitutionality of future legislative action"). What's more, an order of this nature would be "too vague to be understood," *Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967), amounting to a command simply "to obey" Section 2 in the future, and it therefore could not "describe in reasonable detail…the act or acts restrained or required" as required by Federal Rule of Civil Procedure 65(d). *See, e.g.*, *Burton v. City of Belle Glade*, 178 F.3d 1175, 1200–01 (11th Cir. 1999) (finding a proposed order that a city not discriminate in future annexation decisions incompatible with the Rule's specificity requirement); *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 897–98 (5th Cir. 1978) (finding an order forbidding discrimination in employment practices incompatible with the Rule's specificity requirement). There is no live controversy on how to comply with Section 2 in 2022 or whether its requirements are triggered.

2. Contingencies Like Possible Special Elections Do Not Present a Ripe Controversy

Plaintiffs proceed with their parade of future possibilities, opining: "If the Court rules for Plaintiffs on liability, and [if] a City Council vacancy subsequently opens before the 2020 Census data arrive, Plaintiffs would benefit from the ability to seek an emergency remedy for the special election without needing to prove liability from scratch." Pls' Br. 17 (underlining added). A response is hardly necessary: a City Council vacancy will only open up *if* a member elected in November 2020 or earlier resigned or became disqualified, and the vacancy would only be relevant to Plaintiff's supposed injury *if* that person were the representative of a segment of the city where a majority-minority district could be drawn. As discussed, a future act within the free

will of a person not within Plaintiffs' control is contingent and not live. *Texas v. United States*, 523 U.S. at 300; *see Devia v. Nuclear Reg. Comm'n*., 492 F.3d 421, 425 (D.C. Cir. 2007) (a case is not ripe if predicated on contingencies that "will not arise until some action is taken by third parties who are not involved in the review proceeding." (quoting *Suburban Trails, Inc. v. New Jersey Transit Corp*., 800 F.2d 361, 367 (3d Cir.1986)). And, if that person turned out to reside in a (future) remedial single-member district lacking a substantial minority population, the special election would be for an overwhelmingly white seat. The Court can see from Plaintiffs' own arguments that this case is moot and not ripe.

E. Case Law Not Addressing Jurisdiction Does Not Meet Plaintiffs' Burden to Establish Jurisdiction

Plaintiffs seek to substitute their required jurisdictional showings with case law that does not address jurisdiction. The only case discussing jurisdiction was *Reno*, which, as discussed, is irrelevant beyond the unique context of the Section 5 inquiry in that case. The other decisions Plaintiffs cite for the proposition that a new census does not moot a prior decade's redistricting litigation do not discuss jurisdiction. *E. Jefferson Coal. for Leadership and Dev. v. Parish of Jefferson*, 706 F. Supp. 470, 471–72, 471 n.1 (E.D. La. 1989) (at 12, 13); *E. Jefferson Coal. for Leadership and Dev. v. Parish of Jefferson*, 926 F.2d 487, 494 (5th Cir. 1991) (at 12); *United States v. Blaine Cty.*, 157 F. Supp. 2d 1145 (D. Mont. 2001) (at 13 n.11); *see also United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 424 (S.D.N.Y. 2010) (at 20).[5] One case mentioned the coming census but did not address or consider any jurisdictional significance. *Parish of Jefferson*, 706 F. Supp. at 472. Another considered whether census data was obsolete but addressed a motion to dismiss for failure to state a claim, not any jurisdictional question. *United*

[5] Plaintiffs' cases on ripeness are equally perfunctory, at best. *Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618, 627 (D.S.C. 2002), *opinion clarified* (Apr. 18, 2002) (at 19); *Parish of Jefferson*, 706 F. Supp. at 472 (at 20); *Parish of Jefferson*, 926 F.2d at 494 (at 20).

States v. Town of Lake Park, Fla., No. 9:09-cv-80507, 2009 WL 3667071, at *3–4 (S.D. Fla. Oct. 23, 2009). The other cases say even less on point.

Plaintiffs do not suggest otherwise, but rather contend that *absence* of discussion on mootness creates precedential value. *See* Pls' Br. 12 ("If the district court and the Fifth Circuit thought the forthcoming 1990 Census data mooted the case, they would have said so."). That is not how United States courts create precedent. To the contrary, "the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996). The Supreme Court has "described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (quoting *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 91 (1998)). Hence, even Supreme Court decisions containing potential jurisdictional defects provide no authority for addressing those very jurisdictional questions. *United States v. Rivera Lopez*, 355 F. Supp. 3d 428, 437 n.14 (E.D. Va. 2018), *aff'd*, 800 Fed. Appx. 187 (4th Cir. 2020) (unpublished). The fact that some courts may have entertained moot claims, without considering whether they were moot, does not establish a basis for this Court to spurn its Article III limitations.[6]

F. Vague References to the November 2020 Election Do Not Establish Jurisdiction

An October 2020 trial cannot yield a result in time to impact a November 2020 election. Defs' Br. 10–12. There is no serious dispute to the contrary. Plaintiffs do not provide any reason for the Court to conclude that it can issue a ruling and fashion a remedy less than a month before

[6] Indeed, it is entirely unclear what the jurisdictional arguments would have been in the Plaintiffs' cited cases. For example, many cases they cite involved a Section 5-covered jurisdiction, and the cases likely would come within the argument *Reno* eventually approved regarding the practical significance of a Section 5 benchmark. There is no need to speculate on how those cases would have come out on jurisdictional issues because none were raised.

an election. Nor could they. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). Yet Plaintiffs repeatedly make vague references to the November 2020 election, hinting what the Court *might* do without showing that it may. This hand-waving comes nowhere close to meeting Plaintiffs' jurisdictional burden.

First, out of apparent desperation, Plaintiffs hint that "[t]he Court could potentially order an interim ranked-choice-voting remedy that takes effect as soon as the November 2020 election." Pls' Br. 17 n.14. This is not possible. Any election intervention is too late; the *Purcell* doctrine is not limited to single-member district remedies. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) (reversing because it was too late to enjoin a voter identification requirement). Further, there is no record evidence on ranked-choice voting, so there is no basis—not even the slightest *inference*—for Plaintiffs at trial to establish this as a viable remedy.

Second, Plaintiffs suggest that the mere existence of the November 2020 election creates jurisdiction, observing that, "[e]ven in cases where courts find that it is too close to an election to order relief, they do so in an exercise of discretion, not because the impending election presents a jurisdictional problem." Pls' Br. 17 n.14. But the case they cite declined to issue an order impacting *one* upcoming election during the decade where *more* elections were scheduled. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944–45 (2018). Naturally, the court in that case retained jurisdiction to adjudicate matters practically impacting those elections during the same decade. Here, the November 2020 election is the final scheduled election of the decade. The fact that the Court has no leeway to adjudicate a claim impacting that election *and* the fact that no further

elections will be held under the 2010 Census results leaves the Court no practical ability to adjudicate the claim or grant meaningful relief within its powers and the dictates of Section 2.[7]

II. Plaintiffs Lack Standing Because They Cannot Establish at Trial the Possibility of Redress

Plaintiffs cannot show that a favorable ruling would redress their injury, and thus give them an equal opportunity to elect their preferred candidates in November 2022 and beyond. To try to show this, Plaintiffs will rely on "multiple illustrative majority-HBA districts based on population data from the 2010 Census and several years' worth of the Census Bureau's ACS statistics." Pls' Br. 24. Precisely. And not one of these districts—nor, for that matter, any of the countless more that might currently be drawn—can establish that even one workable district can be drawn that actually would govern a future election. Nor is there any material factual dispute in this regard. At trial, Plaintiffs would be required to prove by a preponderance of the evidence that districts governing *actual* elections—i.e. those subject to remediation based upon a putative ruling in the Plaintiffs' favor—can be drawn to include *them personally* in a majority-minority district. *See Lujan*, 504 U.S. at 561. They cannot show this with data that, for legal purposes, will be irrelevant before the next remediable election takes place. Va. Code § 24.2-304.1(C)

III. Plaintiffs Lack Standing to Assert the Rights of Third Parties

Plaintiffs lack standing to bring a Section 2 claim on behalf of a "coalition" including Hispanics and Asian-Americans. Plaintiffs assert that Hispanics and Asian-Americans suffer an injury that no Hispanic or Asian-American has claimed, and they ask that Hispanics and Asian-Americans be grouped into coalitional districts that no Hispanic or Asian-American has

[7] *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), from which Plaintiffs' take one out-of-context quote (at 2) and otherwise ignore is rightly not the basis of their position: the election procedures challenged were subject to a stay, perpetuating a live controversy. *Id.* at 777. That is not the case here and could not be the case.

requested. In opposing dismissal, Plaintiffs first conflate the "close requirement" standard for establishing third-party standing with "cohesion" inquiry under the merits of their Section 2 claim, and next deny that they rely on third-party standing at all. Neither contention has merit.

A. Plaintiffs' Standing Is Properly Before the Court

Plaintiffs first attempt (at 25–26) to dodge the question, wrongly conflating the *standing* question of whether they have a "close relationship" with Hispanic/Latino and Asian-American voters under *Kowalski* with the *merits* question of whether their so-called "coalition" votes cohesively under *Gingles.* But the two questions are distinct, and Plaintiffs' inability to muster any evidence of a "close relationship"—even after this case has been pending for *two years*—confirms the obvious: there is no such relationship. The case should be dismissed.

The *Gingles* "cohesion" requirement provides that "the minority group must be able to show that it is politically cohesive." 478 U.S. at 51. Political cohesion is, ultimately, a question of voting behavior – that members of the group usually vote for the same candidates. *See id.* at 56 (affirming that cohesion is commonly proven by a "showing that a significant number of minority group members usually vote for the same candidates.").

By contrast, the "close relationship" requirement recited in *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004), contemplates a direct, personal relationship, not merely shared political preferences. The Court looks to the "relationship of the litigant to the person whose right he seeks to assert." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). Hence, the Supreme Court has allowed third-party standing in cases where a doctor, who has a "confidential" relationship with his patients, asserted the privacy rights of the patients, *id.* at 115 (citing *Griswold v. Connecticut,* 381 U.S. 479, 481 (1965)), and in limited cases where the Court "recognized an attorney-client relationship as sufficient to confer third-party standing" on attorneys to assert claims of their clients, *Kowalski*, 543 U.S. at 130–31 (citing *Caplin & Drysdale, Chartered v. United States*,

491 U.S. 617 (1989) and *Dept. of Labor v. Triplett*, 494 U.S. 715 (1990)). Notably, in *Kowalski*, the Court held that attorneys who lacked an attorney-client relationship with indigent defendants lacked standing to bring a constitutional challenge to a counsel-appointment system on their behalf. 543 U.S. at 132. There must be a close, personal relationship between the party and the third-party to confer third-party standing.

The relevant question for the third-party standing doctrine, then, is whether Plaintiffs have a sufficiently "close relationship" with members of the Hispanic/Latino and Asian-American communities in order to assert claims on their behalf. Since it is possible to have a "close relationship" with (or without) similar voting behavior, the third-party standing question cannot be equated with the question of political cohesion under *Gingles*.[8]

Plaintiffs have not even attempted to answer that question. They are unable to point to one scintilla of evidence of such a close relationship, and do not even discuss whether they satisfy the other mandatory *Kowalski* factor, requiring that they show that Hispanic/Latino and Asian-American voters in Virginia Beach are hindered from asserting their own rights. *See Kowalski*, 543 U.S. at 133. They therefore lack third-party standing and their Section 2 claim must be dismissed.

B. Plaintiffs' Coalition Theory Depends on Their Asserting the Rights of Third-Parties, Without Standing to Do So.

Plaintiffs alternatively insist that they are not relying on third-party standing at all, and that they have individual standing as "members" of a multiracial coalition to assert claims on

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[8] In this respect, *Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013) and related cases are distinguishable from this case. In *Cooksey*, appellees contended that a First Amendment challenge was not justiciable because the claims were barred by the professional speech doctrine, an analysis the court concluded "put the merits cart before the standing horse" by violating the requirement that for purposes of assessing standing, courts "must assume the Plaintiffs' claim has legal validity." 721 F.3d at 239. Defendants' standing challenge is not grounded in the legal validity of the claim, but rather the standing of the parties seeking to assert the claim.

behalf of the entire coalition. Pls' Br. at 27–28. This argument, however, is the argument that puts the "merits cart before the standing horse." *Cooksey*, 721 F.3d at 239.

Plaintiffs cite *Kumar v. Frisco Independent School District*, No. 4:19-cv-284, 2020 WL 1083770 (E.D. Tex. Mar. 6, 2020), correctly pointing out that after dismissing Mr. Kumar's complaint, the district court granted the plaintiff leave to amend his complaint, that he amended his complaint to proceed solely as an individual aggrieved voter, and that the case proceeded. But that subsequent history does not save Plaintiffs' Amended Complaint here.

Kumar rejected the theory that a plaintiff could represent the interests of minority groups of which he was not a member. *Id.* at *12–13. The court contemplated that the plaintiff might be able, however, to assert only his personal interests and to demonstrate how those personal interests "have been harmed by using statistical evidence of a particular minority group to establish that the *Gingles* factors have been met." *Id.* at *12. But it distinguished that limited scenario from the kind of sweeping language found throughout that plaintiff's Amended Complaint seeking to vindicate the rights held by multiple different racial groups that the plaintiff did not belong to. *See id.* at *7–8 (finding allegations like "FISD's at-large electoral system for electing its Board unconstitutionally dilutes the voting strength of African Americans, Hispanics, Asians, and other minority voting populations and is not equally open to participation by FISD's voters of color" indicative of a claim to represent those groups).

Plaintiffs' Amended Complaint is littered with that same broad, sweeping language that *Kumar* condemned. In their Amended Complaint, Plaintiffs unambiguously seek to vindicate the rights of three different racial groups they bundle into a "coalition," using the defined term "Minority Voters:" specifically, "Black, Hispanic or Latino, and Asian American voters." Amend. Compl., ECF No. 62, at ¶ 1. The Amended Complaint uses the term "Minority Voters"

more than 30 times, including in connection with the key allegations of their Section 2 claim. *See, e.g.*, *id.* at ¶ 28 ("The at-large method for the City council violates Section 2 because it denies Virginia Beach's Minority Voters an equal opportunity..."); *id*. at ¶ 29 ("It also violates Section 2 because it dilutes the vote of all Virginia Beach Minority Voters."); *id*. at ¶¶ 84–85 (reciting elements of Section 2 claim with reference to "Minority Voters"). Plaintiffs continued this theme in opposition to Defendants' earlier motion for summary judgment, proclaiming that "Virginia Beach's at-large system for electing city councilmembers dilutes the political power of Hispanic, Black, and Asian citizens, in violation of Section 2 of the Voting Rights Act." Opp'n to Defs' Mot. for Summ. J., ECF No. 118 at 1. Plaintiffs went on to argue that Virginia Beach's at-large council system "dilutes the *combined voting strength* of Hispanic, Black, and Asian voters." *Id.* at 7 (emphasis added) (capitalization edited).

In the end, Plaintiffs' argument that they can individually assert the rights of all three racial groups contained within their proposed "coalition," despite being members of only one group, is a distinction without a difference. As *Kumar* noted:

> [A court] would be hard-pressed to adjudicate a case where legal rights and interests of third parties are in question and those parties are not present to discuss the intricacies of how, if to any extent, the electoral process has impeded their voting rights. This would be especially true if the Court was pressed to determine whether a minority coalition exists and [the Plaintiff] was then permitted to speak on behalf of all minority groups absent even some tacit form of consent.

Id. at *12. Whether they do so explicitly or implicitly, in the end, Plaintiffs must demonstrate that the voting rights of Hispanic/Latino and Asian-American voters are diluted on account of race, despite the fact they are not members of those groups and lack the third-party standing to represent those groups in court.

CONCLUSION

For these reasons, this case should be dismissed.

DATE: July 20, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2020, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of the filing to:

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