IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CASE NO. 1:17-CV-78

RUSSELL F. WALKER, Plaintiff, vs. NORTH CAROLINA BOARD OF ELECTIONS and HOKE COUNTY BOARD OF ELECTIONS, Defendants.	)	**HOKE COUNTY BOARD OF ELECTIONS' BRIEF IN SUPPORT OF MOTION TO DISMISS Rule 12(b)(6); LR7.3**

Defendant the Hoke County Board of Elections submits this brief in support of its Motion to Dismiss Plaintiff's Complaint in its entirety pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

Plaintiff has filed suit against the Hoke County Board of Elections and the North Carolina Board of Elections alleging a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Equal Protection Clause of the North Carolina Constitution. Plaintiff argues that the at-large system of election of the Hoke County Board of Commissioners (the "Board of Commissioners") dilutes Plaintiff's vote. The facts underlying Plaintiff's vote-dilution claim are that the racial composition of the Board of Commissioners does not reflect the racial composition of Hoke County, and that Plaintiff disagrees with two recent decisions made by the Board of

Commissioners. As explained below, Plaintiff's Complaint should be dismissed for failure to state a claim upon which relief can be granted.

FACTUAL ALLEGATIONS

Plaintiff makes the following factual allegations in his Complaint:

Plaintiff is a resident of Hoke County. Compl. ¶ 1. Hoke County is governed by five Commissioners who are elected through an at-large election system. *Id.* ¶¶ 8–9. The Board of Commissioners is currently comprised of four minority ("non-white") representatives and one majority ("white") representative. *Id.* ¶ 12. Based on the 2015 Census estimate, 51% of the population of Hoke County is white and 49% of the population is "non-white." *Id.* ¶¶ 10–11. African-Americans comprise 33.5% of Hoke County's population. *Id.* ¶ 11.

Plaintiff alleges that "[t]he composition of the Board of Commissioners is racially skewed due to racial block voting in the City of Raeford and political organizations deriving their power and influence from several [African-American] Church congregations." *Id.* ¶ 15. The racial composition of the Board of Commissioners "differs significantly" from the racial composition of the county because of "weighted influence of voters especially in the City of Raeford." *Id.* ¶ 16. Plaintiff is a resident of Quewhiffle Township in the western portion of Hoke County. *Id.* ¶ 14. None of the current Commissioners are residents of Quewhiffle Township. *Id.* ¶ 13.

Plaintiff further alleges the Board of Commissioners has approved projects that are "economically ridiculous and only serve a limited portion of the county's residents." *Id.*

¶ 18. Examples of projects cited by Plaintiff include a $3.8 million "give away of 500 acres of land to private interests" and a "splash area" in the City of Raeford that cost approximately $150,000. *Id.*

Plaintiff's alleges that his right to vote has been "debased and diluted." *Id.* ¶ 17. Plaintiff asks the Court to declare that the current at-large election system constitutes a "racial gerrymander" in violation of the Equal Protection Clause and to order the creation of five single-member districts. *Id.* ¶¶ 21, 27.

ARGUMENT

A plaintiff may survive a Rule 12(b)(6) motion only when the claims in his complaint "are justified by both law and fact." *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009). The complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In evaluating the complaint, the court need not consider "legal conclusions, elements of a cause of action, . . . bare assertions devoid of further factual enhancement[,] . . . unwarranted inferences, unreasonable conclusions, or arguments." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (citations omitted).

Here, Plaintiff's Complaint should be dismissed because he fails—both legally and factually—to state a claim for vote dilution under either the Federal Equal Protection Clause or the North Carolina Equal Protection Clause.

I. Plaintiff Fails to State a Claim for Vote Dilution under the Federal Equal Protection Clause.

A vote-dilution claim contends that the government "has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities.'" *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (plurality opinion)). Racially discriminatory vote dilution is a violation of the Equal Protection Clause of the Fourteenth Amendment. *Washington v. Finlay*, 664 F.2d 913, 919 (4th Cir. 1981).

To prevail on a vote-dilution claim under the Equal Protection Clause, the plaintiff must establish both "(a) that vote dilution, as a special form of discriminatory effect, exists and (b) that it results from a racially discriminatory purpose chargeable to the state." *Id.* at 919; *see also Irby v. Va. State Board of Elections*, 889 F.2d 1352, 1355 (4th Cir. 1989) ("To establish an equal protection violation, a plaintiff must show discriminatory intent as well as disparate effect."). Plaintiff's Complaint fails to allege both discriminatory effect and discriminatory purpose.

A. Plaintiff does not allege discriminatory effect.

Plaintiff fails to allege any evidence that the at-large election system has a discriminatory effect. "Disproportionate representation and consistent electoral defeat, though traceable to the challenged system, do not alone constitute impermissible dilution." *Finlay*, 664 F.2d at 919–20. Rather, the plaintiff must show that "the voting potential of a racial minority has been minimized or cancelled out, or the political strength of such a group adversely affected." *Id.* at 919 (citation, quotations, and

alterations omitted). Stated differently, "[t]he plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White v. Regester*, 412 U.S. 755, 766 (1973).

Plaintiff makes no allegation that the at-large system for the election of Board of Commissioners minimizes the participation of white voters in the political process. Plaintiff merely complains that the racial composition of the Board of Commissioners does not reflect the racial composition of the county because of "several [African-American] Church congregations" organizing campaigns and energizing minority voters. *See* Compl. ¶¶ 15–16.[1] Plaintiff, although he objects to disproportionate representation on the Board of Commissioners, does not allege the disproportionate representation is traceable to the challenged system having a discriminatory effect on white voters. *Finlay*, 664 F.2d at 919–20. In the end, the Complaint lacks even a suggestion that the election system for the Board of Commissioners is "not equally open to participation" by Hoke County's white voters. *White*, 412 U.S. at 766.

Even scouring the factual allegations in the Complaint, there is no basis to conclude that the at-large system somehow minimizes the participation of the white

[1] Moreover, Plaintiff fails to allege that the minority candidates ran against majority candidates. The racial composition of the Board of Commissioners might reflect the fact that no majority candidates opposed the minority candidates.

voters in Hoke County. To determine if a challenged electoral system has a discriminatory effect, courts look for the existence of the "*Zimmer* factors":

- the racial minority's "lack of access to the process of slating candidates";
- "the unresponsiveness of legislators to the racial minority's particularized interests";
- "a tenuous state policy underlying the preference for at-large districting";
- "the existence of past discrimination in general precluding the effective participation in the election system"; and
- "such enhancing factors as large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistrict."

Finlay, 664 F.2d at 920 (quoting *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976)) (internal alternations and quotations omitted); *see Greater Houston Civic Counsel v. Mann*, 440 F. Supp. 696, 698 (S.D. Tex. 1977) (reciting *Zimmer* factors).

Here, Plaintiff fails to allege the existence of a single one of the *Zimmer* factors.

- **Slating of candidates**. Plaintiff does not allege any facts that show that the white voters in Hoke County lack an equal role in the selection of potential candidates for the Board of Commissioners.
- **Unresponsiveness to interests**. Unresponsiveness exists when a minority population's voting strength "has been so effectively cancelled out that its residual political strength is presently being disregarded with confident impunity by the [county's] governing body." *Finlay*, 664 F.2d at 923 (internal quotations omitted). Plaintiff merely objects to two "economically ridiculous" county decisions that "only serve a limited portion of the county's residents." Compl. ¶ 18. These two projects are not evidence of unresponsiveness. Moreover, Plaintiff does not allege

how these two projects are unfairly applied or otherwise discriminatory to the white voters in Hoke County.

- **Policy underlying at-large districting**. Plaintiff does not offer any facts that suggest that the at-large system in Hoke County was created out of animosity for white citizens.

- **Past discrimination**. Plaintiff does not allege that there has been a history of racial discrimination against white voters in Hoke County that would prevent white voters from participating in the election system.

- **Other enhancing factors**. Plaintiff does not allege the existence of any enhancing factors, such as majority-vote requirements or anti-single-shot-voting provisions.

In sum, Plaintiff does not allege facts that would establish any of the *Zimmer* factors. There are no factual allegations supporting the existence of any discriminatory effect from the at-large system.

B. Plaintiff does not allege discriminatory purpose.

In addition to failing to allege that the current system has a discriminatory effect, Plaintiff does not allege facts sufficient to show that the system "was conceived or operated as a purposeful device to further racial discrimination." *Finlay*, 664 F.2d at 920 (internal alterations and quotations omitted). "Discriminatory purpose" implies more than "intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' . . . its adverse effects upon an identifiable group." *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987). The Complaint, however, is devoid of any factual basis that even suggests that the current

system in Hoke County was conceived or operated "because of" its adverse impact on the white voters.

Discriminatory purpose can be established by either direct or indirect evidence. *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). Plaintiff makes no factual allegations of direct evidence of discriminatory purpose. Therefore, the Complaint must include allegations from which it can be "inferred from the totality of the relevant facts" that the challenged system was conceived or operated with a discriminatory purpose. *Id.*

The Fourth Circuit has held that if the election system can be traced to racial motivations, then the Court is permitted to infer discriminatory purpose from the existence of a discriminatory effect (i.e., the satisfaction of the *Zimmer* factors). *Finlay*, 664 F.2d at 920. However, if the system's existence "is readily explainable on grounds apart from race," then the *Zimmer* factors "alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose." *Id.*; *see id.* at 924 (refusing to find discriminatory purpose where the evidence "was essentially confined to establishing a sufficient aggregate of the *Zimmer* factors").

First, Plaintiff makes no allegation that the existence of the current system is traceable to racial motivations. *See Rodgers*, 458 U.S. at 626 (finding that, although there was a neutral policy behind the challenged system's creation, the system was maintained to minimize minority participation); *see also Finlay*, 664 F.2d at 924 (finding at-large system was "readily explainable on grounds apart from race" because (i) the system was adopted in 1910 to remedy corruption of the prior "ward system" and (ii) at

the time of its adoption, "few, if any," minorities were even participating in the elections). Therefore, the Court cannot infer a discriminatory purpose from the satisfaction of the *Zimmer* factors (factors that, as explained above, Plaintiff has failed to establish).

Second, not only has Plaintiff failed to allege that the existence of the current system is traceable to racial motivations, Plaintiff has not alleged any "other evidence to support a finding of discriminatory purpose." *Finlay*, 664 F.2d at 920. Plaintiff has not alleged any facts from which it can be "inferred from the totality of the relevant facts" that the at-large system of election of the Board of Commissions was conceived or operated with the purpose of discriminating against the white voters of Hoke County.

In conclusion, the Complaint is utterly devoid of any allegations that would support the existence of a discriminatory purpose in the creation and maintenance of the at-large election system for the Hoke County Board of Commissioners.

II. Plaintiff Fails to State a Claim for Vote Dilution under the North Carolina Equal Protection Clause.

Plaintiff brings a claim for vote dilution under the North Carolina Equal Protection Clause. The Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution "prohibits the State from denying any person the equal protection of the laws." *Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E.2d 377, 393 (2002). The North Carolina Supreme Court's "analysis of the State Constitution's Equal Protection Clause generally follows the analysis of the Supreme Court of the United States in interpreting the corresponding federal clause." *Blankenship v. Bartlett*, 363 N.C. 518,

522, 681 S.E.2d 759, 762 (2009). Thus, "the only significant issue for [a court] when interpreting a provision of [the North Carolina] Constitution paralleling a provision of the United States Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision." *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103–04 (1997).

Here, there is no known North Carolina state-court decision that recognizes additional rights under the North Carolina Equal Protection Clause beyond those rights already afforded under the Federal Equal Protection Clause. Thus, if the Federal Equal Protection Clause does not recognize vote dilution here, then neither does the North Carolina Equal Protection Clause. To recognize Plaintiff's claim here, the Court would be expanding the protections offered under the North Carolina Constitution; however, when addressing matters of state law, federal courts "should not create or expand [the] State's public policy." *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 48 F.3d 778, 783 (4th Cir. 1995). Therefore, because Plaintiff's vote dilution claim fails under the Federal Equal Protection Clause, his claim must also fail under the North Carolina Equal Protection Clause.

CONCLUSION

Because Plaintiff has failed to allege facts sufficient to establish that the Hoke County at-large election system has a discriminatory effect or purpose, the Court should dismiss Plaintiff's Complaint for failure to state a claim.

Respectfully submitted, this the 17th day of April, 2017.

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The undersigned hereby certifies that the foregoing document has been filed with the Clerk of Court using the CM/ECF system, which pursuant to Local Civil Rule 5.3(b), constitutes service on counsel of record, and a copy has been deposited in the U.S. Mail, first-class postage prepaid, addressed as follows: RUSSELL F. WALKER, 176 QUEWHIFFLE ROAD, ABERDEEN, NC 28315.

This the 17th day of April, 2017.

/s/ Craig D. Schauer
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