No. 17-1727

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RUSSELL WALKER
Plaintiff-Appellant
v.
HOKE COUNTY BOARD OF ELECTIONS
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

INFORMAL RESPONSE BRIEF OF APPELLEE HOKE COUNTY BOARD OF ELECTIONS

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STATEMENT OF THE CASE

Appellant is a resident of Hoke County who dislikes that the racial composition of the Hoke County Board of Commissioners does not proportionately reflect the racial composition of Hoke County. On January 31, 2017, Appellant filed a *pro se* complaint in the United States District Court for the Middle District of North Carolina against the North Carolina Board of Elections ("NCBOE") and Appellee Hoke County Board of Elections ("Complaint") alleging that this disproportionate representation constituted a violation of the Equal Protection Clause.

On March 17, 2017, the NCBOE moved to dismiss the Complaint under Rules 12(b)(1) (based on sovereign immunity) and Rule 12(b)(6). On April 17, 2017, Appellee moved to dismiss the Complaint under Rule 12(b)(6).

On May 15, 2017, the District Court granted the NCBOE's motion to dismiss based on sovereign immunity. On June 8, 2017, the District Court granted Appellee's motion to dismiss. On June 14, 2017, Appellant filed his notice of appeal of the District Court's June 8, 2017 order dismissing the Complaint against Appellee.

For the reasons explained below, the District Court's order should be affirmed.

STATEMENT OF FACTS

Appellant makes the following factual allegations in his Complaint:

Appellant 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.

Appellant 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. Appellant 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.

Appellant 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 Appellant 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.*

Appellant alleges that his right to vote has been "debased and diluted." *Id.* ¶ 17. Appellant asked the District 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

The standard of review for dismissal pursuant to Rule 12(b)(6) is de novo. *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991). A complaint survives a Rule 12(b)(6) motion only when the claims "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).

The Court should affirm the lower court's dismissal of the Complaint because Appellant fails to allege sufficient facts to state a vote-dilution claim upon which relief can be granted, and because Appellant raises a claim under the Voting Rights Act for the first time on appeal and fails to allege sufficient facts to state a claim.

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

The District Court properly dismissed Appellant's vote dilution claim under the Equal Protection Clause of the Fourteenth Amendment. In general, 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)).

To prevail on a vote-dilution claim under the Equal Protection Clause, this Court requires Appellant to 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." *Washington v. Finlay*, 664 F.2d 913, 919 (4th Cir. 1981); *see also Irby v. Va. State Bd. 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."). Appellant's Complaint fails to allege both discriminatory effect and discriminatory purpose.

A. Appellant does not allege discriminatory effect.

Appellant 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).

The first and most obvious impediments to equal participation range from "such direct impediments as poll taxes, literacy requirements, candidate qualifications and the like to more indirect technical forms such as majority voting and anti-single shot provisions, party primaries, and the like." *Finlay*, 664 F.2d at 920. There also may be more "subtle impediments traceable to the combined effects of an at-large electoral system interacting with various forces of continuing

social and economic disadvantage, also chargeable to the state, that have this effect." *Id.* at 921.

Here, Appellant makes no allegation of any technical or "subtle" impediments to the participation of white voters in the election of candidates to the Board of Commissioners traceable to the at-large election system or any other cause. Appellant 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.

Indeed, Appellant does not allege any facts that would establish any of the *Zimmer* factors that courts have considered in determining whether a challenged electoral system has a discriminatory effect:

- 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. E. Carroll Parish Sch. Bd. 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).

Even scouring the factual allegations in the Complaint, Appellant fails to allege the existence of a single one of the *Zimmer* factors.

- **Slating of candidates**. Appellant 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). Appellant 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, Appellant 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**. Appellant does not offer any facts that suggest that the at-large system in Hoke County was created out of animosity for white citizens or to deny white citizens the ability to participate in the electoral process.

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

In the end, the Complaint lacks even a suggestion—much less an allegation—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. There are, therefore, no factual allegations supporting the existence of any discriminatory effect from the at-large system.

B. Appellant does not allege discriminatory purpose.

In addition to failing to allege that the current system has a discriminatory effect, Appellant 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). "Viable vote dilution claims require proof that the districting scheme has a discriminatory effect and the legislature acted with a discriminatory purpose." *Backus v. South Carolina*, 857 F. Supp. 2d 553, 567 (D.S.C. 2012); *see also Perry-Bey v. City of Norfolk*, 679 F. Supp. 2d 655, 663 (E.D. Va. 2010) ("To prevail on a Fourteenth Amendment challenge to a facially neutral voting law, Plaintiff must show that the voting plan has a discriminatory impact on a protected class and that it was conceived or operated as a purposeful device to further racial discrimination.") (internal citations omitted).

"[I]n assessing attempted proof of discriminatory purpose in vote dilution cases where 'the character of a law is readily explainable on grounds apart from race . . ., disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose." *Finlay*, 664 F.2d at 924 (quoting *Mobile v. Bolden*, 446 U.S. 55, 70 (1980)); *see also Mobile*, 446 U.S. at 70 (finding the character of a law will nearly always be explainable on grounds apart from race where an entire system of local governance is brought into question).

"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.

Appellant makes no factual allegations of direct evidence of discriminatory purpose. Nor does the Complaint 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. *See Rogers v. Lodge*, 458 U.S. 613, 618 (1982).

First, Appellant 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).

Second, not only has Appellant failed to allege that the existence of the current system is traceable to racial motivations, Appellant has not alleged any "other evidence to support a finding of discriminatory purpose." *Finlay*, 664 F.2d at 920. Appellant 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 completely 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. Appellant Does Not Allege a Claim under the Voting Rights Act.

A. Appellant raises a claim under the Voting Rights Act for the first time on appeal.

Appellant's Complaint plainly sets forth a single claim for vote dilution in violation of the Equal Protection Clause. Appellant did not allege or argue that the at-large election system for the Board of Commissioners violated the Voting Rights Act. On appeal, however, Appellant argues, for the first time, that his Complaint should proceed because Section 2 of the Voting Rights Act protects both the majority and minority populations within a polity from racial gerrymandering.

"Issues raised for the first time on appeal are generally not considered absent exceptional circumstances." *Wheatley v. Wicomico Cnty.*, 390 F.3d 328, 334 (4th Cir. 2004) (internal quotation omitted); *see Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993). "Exceptions to this general rule are made only in very limited circumstances, such as where refusal to consider the newly-raised issue would be plain error or would result in a fundamental miscarriage of justice." *Muth*, 1 F.3d at 250. Here, there are no exceptional circumstances that justify a departure from this general rule because Appellant's Complaint fails to allege facts supporting a violation of Section 2 of the Voting Rights Act. *See id.*

B. Appellant fails to state a claim under the Voting Rights Act.

Even if the Court were to consider Appellant's Voting Rights Act argument for the first time on appeal, Appellant fails to state a claim upon which relief can be granted under Section 2 of the Voting Rights Act. Section 2 prohibits polities from diluting voting power based on race. 52 U.S.C. § 10301. The District Court correctly held that a claim under Section 2 arises only when a *minority* population is blocked by a majority population from electing the minority's candidates of choice. *See Bartlett v. Strickland*, 556 U.S. 1, 8-9, 26 (2009) (finding a violation of Section 2 can only exist where a group of minority voters could form a numerical majority of the population of the area under consideration); *Hall v. Virginia*, 385 F.3d 421, 428-29 (4th Cir 2004), *cert. denied*, 544 U.S. 961 (2005) ("Thus, under existing Supreme Court authority, a vote dilution claim under Section 2 must be cast solely in terms of an allegation that a particular practice impedes the ability of minority voters to elect representatives of their choice.") (internal quotations omitted). Appellant alleges that he is a member of the white majority population, and therefore he cannot assert a claim under Section 2 of the Voting Rights Act.

Moreover, the Supreme Court has established three preconditions must exist before a plaintiff can establish that a polity is in violation of Section 2. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1980).

- **Compactness**. "The minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.*

- **Political cohesiveness**. "The minority group must be able to show that it is politically cohesive." *Id.* at 51.

- **Majority bloc**. The majority must vote "sufficiently as a bloc to enable it—in the absence of special circumstances, such as a minority candidate running unopposed—usually to defeat the minority's preferred candidate." *Id.* (internal citations omitted).

As explained above, Appellant is not a member of a racial minority in Hoke County, thereby preventing him from establishing any of the three *Gingles* preconditions. Further, even if Appellant was a racial minority, he has not alleged the additional facts to establish any of the preconditions.

Additionally, the existence of the three preconditions does not necessarily result in a violation of Section 2. *Johnson v. De Grandy*, 512 U.S. 997, 1101 (1994). A violation occurs when, based on the totality of circumstances, a group has been denied the ability to effectively participate in the political process and elect their candidate of choice. *Gingles*, 478 U.S. at 44–45. Among the factors to be considered is whether the group enjoys proportional representation in the relevant body—this is a consideration, however, not a requirement. *De Grandy*, 512 U.S. at 1017–20. The Supreme Court has set out a host of other factors that must be considered in determining whether the totality of circumstances denied a group's ability to participate in the political process. *Gingles*, 478 U.S. at 44–45.

Appellant's Complaint does not sufficiently allege the necessary *Gingles* preconditions: compactness, political cohesiveness, and majority bloc. In addition, although Appellant alleges that the majority population in Hoke County does not enjoy proportional representation on the County Board of Commissioners, this lone factor is not controlling. The Complaint fails to address any of the other totality-of-the-circumstances factors.

Appellant did not assert a Section 2 claim and, even assuming he did, the Complaint does not allege sufficient facts to state such a claim.

CONCLUSION

For the foregoing reasons, Appellee Hoke County Board of Elections respectfully requests that the Court affirm the District Court's order granting the motion to dismiss.

This the 6th day of July, 2017.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3121 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14pt Times New Roman.

This the 6th day of July, 2017.

/s/ Charles F. Marshall III
Charles F. Marshall III

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this the 6th day of July, 2017, I caused this **INFORMAL RESPONSE BRIEF OF APPELLEE HOKE COUNTY BOARD OF ELECTIONS** to be filed electronically with the Clerk of the Court using the CM/ECF System.

I further certify that I have mailed the specified document by depositing in U.S. Mail, first-class postage prepaid, addressed as follows to the following: **RUSSELL F. WALKER**, 176 QUEWHIFFLE ROAD, ABERDEEN, NC 28315 and **JAMES BERNIER**, ASSISTANT ATTORNEY GENERAL, P.O. BOX 629, RALEIGH, NC 27602.

/s/ Charles F. Marshall
Charles F. Marshall