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

VANDROTH BACKUS, WILLIE HARRISON BROWN, CHARLESANN BUTTONE, BOOKER MANIGAULT, EDWARD MCKNIGHT, MOSES MIMS, JR, ROOSEVELT WALLACE, and WILLIAM G. WILDER, on behalf of themselves and all other similarly situated persons,	)	
Plaintiffs,	)	Civil Action No.
v.	)	2:11-cv-03120-PMD-HFF-MBS
THE STATE OF SOUTH CAROLINA, NIKKI R. HALEY, in her capacity as Governor, KEN ARD, in his capacity as Lieutenant Governor, GLENN F. MCCONNELL, in his capacity as President Pro Tempore of the Senate and Chairman of the Senate Judiciary Committee, ROBERT W. HARRELL, Jr., in his capacity as Speaker of the House of Representatives, JAMES H. HARRISON, in his capacity as Chairman of the House of Representatives' Judiciary Committee, ALAN D. CLEMMONS, in his capacity as Chairman of the House of Representatives' Elections Law Subcommittee, MARCI ANDINO, in her capacity as Executive Director of the Election Commission, JOHN H. HUDGENS, III, Chairman, CYNTHIA M. BENSCH, MARILYN BOWERS, PAMELLA B. PINSON, and THOMAS WARING, in their capacity as Commissioners of the Elections Commission,	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT GLENN F. MCCONNELL'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND FOR LACK OF STANDING

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For the first time in decades, South Carolina has successfully enacted legislation redrawing House, Senate, and Congressional Districts that were malapportioned according to the new Census, without that "unwelcome obligation" falling on this Court. Thus, unlike in past decades, there is no conceded constitutional violation to remedy, and the enacted plans enjoy a strong presumption of validity. As a result, Plaintiffs bear the heavy burden of alleging facts sufficient to show that the enacted legislation violates federal law, and they cannot carry that burden here.

Plaintiffs fail to state a claim on which relief can be granted because, most fundamentally, their case is directly at odds with the provisions of the Voting Rights Act and the Constitution that they purport to be enforcing. The Complaint consists of conclusory and inflammatory allegations that the Legislature engaged in a "racial gerrymander" for the purpose of diluting minority voting strength by "packing" black voters into majority-black districts. But, as this Court's decision in the last redistricting cycle reflects, and as a recent Supreme Court decision confirms, inclusion of black voters in majority-black districts cannot be vote-dilutive "packing" when it does not prevent the creation of an *additional* majority-black district. And if the Complaint makes anything clear, it is that Plaintiffs seek to compel the creation not of *more* majority-black districts but *fewer*. Indeed, Plaintiffs' claims of vote-dilutive purpose and effect are based on nothing more than the Legislature's preservation of majority-black districts—the core vehicle through which the Voting Rights Act has protected black voting strength for decades. Plaintiffs' claims of "racial gerrymandering" and "packing" by the Legislature are, in truth, a frontal assault on the Voting Rights Act itself, as the same conclusory allegations could be levied against any plan that complies with the statute by including majority-black districts.

Worse still, Plaintiffs seek to compel the sacrifice of majority-black districts for the sake of a partisan gerrymander, on the theory that creation of more districts for Democrats would benefit black voters, who "overwhelmingly prefer Democratic candidates in South Carolina." Am. Compl. ¶ 41. But, even when these so-called "crossover" districts—where black voters must depend on "help" from white voters, *id.* ¶ 80—can be created *without* weakening nearby majority-black districts, their creation affects black and white Democrats alike. At best, therefore, drawing Democratic "crossover" or "influence" districts is an inherently political choice that is in no way required by the Voting Rights Act or the Constitution. And, where they conflict with the preservation of majority-black districts, additional Democratic "crossover" districts are not only not *required*; they are *prohibited*. Thus, regardless of whether additional "crossover" districts could have been created instead, the preservation of black voting strength in majority-minority districts accomplishes *compliance* with the Voting Rights Act, and it certainly does not give rise to a claim of discriminatory purpose or effect.

This basic defect in Plaintiffs' theory defeats all of their claims. Absent failure to create an additional majority-black district, there can be no dilutive effect in violation of § 2 of the Voting Rights Act. Nor can there be *purposeful* vote dilution where there is not even dilutive *effect*. And because Plaintiffs' constitutional claims are predicated entirely on their invalid notion of purposeful vote dilution, those claims necessarily fail as well. This is true regardless of whether the injury is claimed to result from the (non-existent) vote dilution itself or, alternatively, from the alleged subordination of traditional redistricting principles to the (non-existent) racial purpose of diluting minority voting strength. Furthermore, Plaintiffs' failure to allege a cognizable injury means that they lack standing as well. Thus, pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1), the Complaint should be dismissed.

BACKGROUND

The Legislature enacted Act 71 of 2011 ("Senate Plan"), Act 72 of 2011 ("House Plan"), and Act 75 of 2011 ("Congressional Plan") to replace South Carolina's prior legislative and Congressional districts, which had become malapportioned due to population changes revealed by the 2010 Census. Am. Compl. ¶ 37. The prior plans themselves had been "enacted pursuant to litigation resulting from impasse and malpportionment." *Id.* ¶ 28. Specifically, this Court ten years ago took on the "unwelcome obligation" of devising plans in the face of an impasse arising from a gubernatorial veto of plans passed by the Legislature in 2001. *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 626 (D.S.C. 2002) (internal quotation marks omitted).[1]

The *Colleton County* case, like this one, centered on the effect of district configurations on minority voting strength. The *Colleton County* court observed that "[i]n exercising our equitable power to redistrict, we must also comply with the requirements imposed upon states by the racial-fairness mandates of § 2 of the Voting Rights Act and the purpose-or-effect standards of § 5 of the Voting Rights Act." *Id.* at 631 (internal citations omitted). With respect to § 2, the Court stated:

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[1] The historical and statistical facts set forth in this Memorandum are provided for purposes of background and context, and they are not necessary for the Court's resolution of the motion to dismiss. In any case, these facts are part of "the public record" and thus this Court is "not precluded in [its] review of the complaint from taking notice of" these facts. *Papasan v. Allain*, 478 U.S. 265, 269 n.1 (1986); *see also Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (taking judicial notice of population statistics in a redistricting case). In particular, facts regarding redistricting last decade in South Carolina are taken from this Court's opinion in *Colleton County*, and facts related to the enacted Plans' passage and demographics are part of the public record maintained by the South Carolina Senate and South Carolina House of Representatives on their respective websites dedicated to redistricting. *See* http://redistricting.scsenate.gov; http://redistricting.schouse.gov.

> [W]e pay particular attention to those areas of the state where a politically cohesive minority group is large enough to constitute the *majority* in a single-member district. In this way, we operate much like the state legislature should, taking steps to ensure that our plan will not have the effect, albeit unintended, of diluting the voting strength of that *majority*-minority population.

Id. at 634 (emphases added; internal quotation marks and alterations omitted). The Court also explained that "for purposes of § 5, we must consider race in redistricting where necessary to avoid retrogression." *Id.* at 646. Specifically, the Court "ensure[d]" that its plans did "not unfairly retrogress the overall position of minority voters by reducing the total number of *majority*-minority districts in the benchmark plan" and did "not unnecessarily reduce the opportunity of minority voters to elect their preferred candidate in a particular district." *Id.* (emphasis added).

Significantly, the *Colleton County* Court addressed the position of then-Governor James H. Hodges, a Democrat, that the House and Senate plans passed by the Legislature in 2001 "should have created more so-called minority 'influence districts,' defined by the Governor as districts with a black voting age population ('BVAP') of between 25% and 50%." *Id.* at 624. The Court explained that these minority-black districts increase the electoral chances of white Democrats at the expense of black Democrats (as well as Republicans): "With the aid of a substantial (but not majority) black population that votes nearly exclusively for a Democratic candidate, a white Democrat can usually defeat a black Democrat in the primary election and then use the black vote to defeat any Republican challenger in the general election." *Id.* at 643 n.22. Accordingly, the Court concluded that purposeful creation of influence districts is "an inherently politically based policy." *Id.* The Court also noted that "the ACLU specifically denounced the Governor's advocation of 'influence districts' both as a policy matter and, given its partisan-based origin, as a valid consideration for this court in the draw." *Id.* at 651.

Relatedly, the Court rejected the opinion of the Governor's expert that black voters usually would be able to elect their candidates of choice in minority-black districts. In an effort to justify weakening and even eliminating majority-black districts (in order to "allow[] for the draw of influence districts"), the expert opined that "the point of equal opportunity for the state as a whole occurs at just over 47.11% BVAP." *Id.* at 643. But the Court, in addition to determining that it should not purposefully create influence districts, *see supra*, found that weakening or eliminating majority-minority districts would hinder the ability of black voters to elect black candidates in primaries: "[I]n order to give minority voters an equal opportunity to elect a minority candidate of choice as well as an equal opportunity to elect a white candidate of choice in a primary election in South Carolina, a majority-minority or very near majority-minority black voting population in each district remains a minimum requirement." *Id.* at 643. Accordingly, the Court's plans increased the number of majority-minority House districts to 29 from 25 under the then-benchmark plan, *id.* at 655-56, while maintaining the existing nine majority-minority Senate districts, *id.* at 662, and the sole majority-minority Congressional district under the benchmark plan, *id.* at 666.

In 2003, the General Assembly enacted legislation that "modified the Court's plan for the House and Senate." Am. Compl. ¶ 29. These enacted plans, and the *Colleton County* plan for Congress, were used through the 2010 elections. *Id.* ¶¶ 30-31.

After the 2010 Census, "[d]uring the debate and passage of" the Plans challenged here, "members of the General Assembly" affirmed that "they were drawing a redistricting plan motivated by traditional principles and mandates imposed by federal law." *Id.* ¶ 39. Since *Colleton County*, the Supreme Court and Congress had confirmed this Court's conclusions about the importance of maintaining majority-minority districts to comply with the Voting Rights Act.

The Supreme Court had made clear that § 2 requires creation only of *majority-minority* districts, not "influence" or "crossover" districts. *See Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231 (2009). And Congress had amended § 5 to specify that covered jurisdictions must preserve "the ability of [minority voters] . . . to elect their preferred candidates of choice," 42 U.S.C. § 1973c(b), explaining that covered jurisdictions are not "permitted to break up districts where minorities form a clear majority of voters and replace them with vague concepts such as influence, coalition, and opportunity," S. Rep. No. 109-295, at 19-20 (2006).

Consistent with these principles, the Senate passed plans that, just like this Court's plans in *Colleton County*, included nine majority-minority Senate Districts and one majority-minority Congressional District. *See* Exhibit 13, BVAP Comparison Chart, *available at* http://redistricting.scsenate.gov/PreclearanceExhibitsS815.html (Senate Plan); Exhibit 2, Plan Demographics, *available at* http://redistricting.scsenate.gov/PreClearanceExhibitsH3992.html (Congressional Plan). And, contrary to Plaintiffs' "packing" claim, the average BVAP in the Senate Plan's majority-minority districts is *lower* than the average BVAP in the corresponding districts set by this Court in *Colleton County*. The Senate Plan, moreover, received overwhelming bi-partisan and bi-racial support, passing by a 37-1 vote. *See* Exhibit 29, June 16, 2011 Senate Journal, at 129, *available at* http://redistricting.scsenate.gov/PreclearanceExhibitsS815.html.

After they were enacted by the Legislature and signed by the Governor, the State submitted the Plans to the United States Attorney General for preclearance under § 5. The Attorney General precleared all three Plans, Am. Compl. ¶¶ 53, 55, 57, meaning he determined that the Plans neither had the effect of diminishing minority voting strength relative to the benchmark plans nor had been adopted with "any discriminatory purpose." 42 U.S.C. § 1973c.

Notwithstanding the Attorney General's determination, Plaintiffs' Amended Complaint claims that all three Plans violate the Voting Rights Act and the United States Constitution. Like the then-Governor in *Colleton County*, Plaintiffs allege that the "influence" of black voters is "diluted" by the failure to create "crossover" districts, in which "white voters join together with black voters" but black voters *cannot* elect candidates on their own. Am. Compl. ¶¶ 2, 80. Plaintiffs also allege that in order to create these minority-black districts, the Constitution and § 2 required the Legislature to weaken or eliminate majority-black districts, where black voters *can* elect candidates on their own. *See, e.g.*, *id.* ¶¶ 63(b), 64(b), 77.

As demonstrated below, the Complaint rests on the notion that the Constitution and the Voting Rights Act *compelled* the Legislature to adopt what would have been a race-based gerrymander to elect more *white* Democrats, at the expense of majority-minority districts and black voters' ability to elect their candidates of choice. The Complaint's allegations are directly contrary to law, and they do not state a valid claim for relief.

ARGUMENT

A complaint must be dismissed if it "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). And "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim *showing* that the pleader is entitled to relief." *Id.* 8(a)(2) (emphasis added). Interpreting these Rules, the Supreme Court has explained that "[t]o survive a motion to dismiss, a 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, 129 S. Ct. 1937, 1949 (2009). Under this standard, "[a] pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Rather, Plaintiffs must plead "factual content that

allows the court to draw the reasonable inference that the [Defendants are] liable for the misconduct alleged." *Id.* at 1940. These pleading standards are especially important in redistricting cases, where "the good faith of a state legislature must be presumed" and courts are cautioned to recognize "the intrusive potential of judicial intervention into the legislative realm." *Miller v. Johnson*, 515 U.S. 900, 915-17 (1995).

Here, Plaintiffs have failed to state a claim. Plaintiffs' claims of vote dilution under § 2 of the Voting Rights Act fail because—contrary to clear Supreme Court precedent—they are predicated on the Legislature's alleged failure to create additional *minority*-black ("crossover") districts, rather than on any allegation that the Legislature should have created an additional *majority*-black district. This failure to allege vote dilution also necessarily defeats Plaintiffs' claims of *purposeful* vote dilution under the Constitution because, according to the Complaint's own allegations, the Legislature *maximized* black voting strength in majority-black districts. These claims thus can succeed only if § 2 and § 5 of the Voting Rights Act, which require creation and preservation of majority-black districts, are *themselves* unconstitutional—something Plaintiffs do not suggest. Because Plaintiffs' claims of racial purpose are invalid, they also cannot make the analytically distinct claim that a racial purpose predominated over traditional redistricting principles. And, in any event, Plaintiffs' conclusory allegations that traditional redistricting principles were violated are insufficient to state a claim.

In addition, a complaint must be dismissed if its allegations are insufficient to establish the court's subject-matter jurisdiction, Fed. R. Civ. P. 12(b)(1), including the plaintiffs' standing to assert their claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Here, Plaintiffs lack standing because they collectively reside in only a handful of districts and fail to allege any cognizable injury that is fairly traceable to the configuration of those districts.

I. PLAINTIFFS' VOTE DILUTION CLAIMS UNDER § 2 OF THE VOTING RIGHTS ACT SHOULD BE DISMISSED BECAUSE THEY FAIL TO MEET THE THRESHOLD REQUIREMENTS FOR SUCH CLAIMS

Plaintiffs' Complaint does not allege a cognizable vote dilution claim under § 2 of the Voting Rights Act, 42 U.S.C. § 1973. Plaintiffs seek to compel not additional majority-black districts but, rather, additional "crossover" districts "where white voters join together with black voters to help them elect a candidate of choice." Am. Compl. ¶¶ 79-80. But the Supreme Court has squarely rejected this theory of vote dilution and held that an alleged failure to create additional "crossover" districts does not violate § 2. This is true regardless of whether the non-creation of "crossover" districts is alleged to result from "packing" of majority-black districts. A "packing" claim is cognizable only where it results in the failure to create additional *majority*-minority districts. And Plaintiffs fail to allege that there is a hypothetical "undiluted" plan—*i.e.*, a plan in which black voting strength would have been greater, in that there would have been more majority-black districts. In addition, even when a plaintiff claims that additional majority-minority districts can be drawn, a complaint must allege specific facts regarding the hypothetical "undiluted" plan. Furthermore, merely alleging a failure to adopt such a plan does not state a § 2 claim, and Plaintiffs allege none of the facts necessary to state a claim under § 2.

A. The legal framework for analyzing vote dilution claims under § 2

Section 2 prohibits government action "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). A violation "is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State . . . are not equally open to participation by" minority voters, "in that [minority voters] have less opportunity than other

members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 1973(b).

Claims of "vote dilution" are cognizable under § 2. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). A plaintiff alleging a § 2 vote dilution claim must make three threshold showings: "(1) The minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district, (2) the minority group must be politically cohesive, and (3) the majority must vote sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate." *Bartlett*, 129 S. Ct. at 1241 (quoting *Gingles*, 478 U.S. at 50-51) (internal quotation marks and alterations omitted). "[T]hese factors must be proven in each case." *Colleton Cnty.*, 201 F. Supp. 2d at 640. Most significantly for this case, "[o]nly when a geographically compact group of minority voters could form a *majority* in a single-member district has the first *Gingles* requirement been met." *Bartlett*, 129 S. Ct. at 1236 (emphasis added).

As the first of these preconditions reflects, there must be a hypothetical alternative plan containing a majority-minority district that a challenged plan does not include. This is because "the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) (*Bossier I*). Thus, "a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice." *Id.*; *see also Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) (*Bossier II*) ("[T]he

comparison must be with a hypothetical alternative . . . ."); *accord Colleton Cnty.*, 201 F. Supp. 2d at 635 (quoting *Bossier I* and *Bossier II*).[2]

When a plan already includes majority-minority districts, a hypothetical "undiluted" plan must contain *more* of these districts in order for a § 2 claim to be potentially viable. In other words, a plaintiff cannot merely present a hypothetical reconfiguration where the number of majority-minority districts is the same as in the challenged plan. *See League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 429-30 (2006) (opinion of Kennedy, J.) ("If the inclusion of the plaintiffs [in a majority-minority district] would necessitate the exclusion of others, then the State cannot be faulted for its choice."). Rather, the plaintiff must allege "the possibility of creating *more* than the existing number" of reasonably compact, majority-minority districts. *Id.* at 430 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994)) (emphasis added).

If a party meets all three threshold *Gingles* requirements, then the "court proceed[s] to analyze whether a violation has occurred based on the totality of the circumstances." *Bartlett*, 129 S. Ct. at 1241. Satisfaction of the three *Gingles* preconditions, therefore, is not dispositive. *De Grandy*, 512 U.S. at 1011 ("[I]f *Gingles* so clearly identified the three as generally necessary to prove a § 2 claim, it just as clearly declined to hold them sufficient in combination . . . ."). For example, even when the *Gingles* preconditions are met, the totality of circumstances may not permit a finding of vote dilution when minorities "constitute effective voting majorities in a

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[2] In 2006, Congress partially abrogated *Bossier II* by amending § 5 of the Voting Rights Act to prohibit "any discriminatory purpose," rather than prohibiting only retrogressive purpose. 42 U.S.C. § 1973c(c). This change to *§ 5* had no impact on *Bossier II*'s holding that *§ 2* requires the showing of a hypothetical undiluted alternative to a challenged plan.

number of . . . districts substantially proportional to their share of the population" and there is no evidence "otherwise indicating that . . . voters in the minority group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* at 1024 (internal quotation marks omitted).

B. Plaintiffs' claim based on failure to create "crossover" districts is squarely foreclosed by Supreme Court precedent

Plaintiffs do not allege that the Plans violate § 2 because they fail to create a sufficient number of majority-minority districts. Rather, Plaintiffs claim that the Plans violate § 2 because they unnecessarily "pack" black voters into certain districts, thereby "deliberately reduc[ing] the number of 'crossover' districts." Am. Compl. ¶ 79; *see Bartlett*, 129 S. Ct. at 1236 (defining a "crossover district" as one "in which the minority makes up less than a majority of the voting-age population, but is large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate"). But this is the very theory the Supreme Court squarely rejected only two years ago in *Bartlett*. *See id.* at 1243.[3] On this basis alone, Plaintiffs' § 2 claim (and, as explained *infra*, their constitutional claims) should be dismissed.

Bartlett explains that, in a crossover district, where African-Americans constitute a numerical minority, "African-Americans standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength." *Id.*

[3] Although the controlling opinion in *Bartlett* was a plurality opinion, authored by Justice Kennedy and joined by the Chief Justice and Justice Alito, the two concurring Justices, Justice Thomas and Justice Scalia, would have held that vote dilution claims are *never* available under § 2. *See Bartlett*, 129 S. Ct. at 1250 (Thomas, J., concurring in the judgment). Thus, a majority of the Court in *Bartlett* clearly held that vote dilution claims based on crossover districts are not cognizable under § 2.

Accordingly, the failure to create a crossover district does not give minorities "less opportunity than other members of the electorate . . . to elect representatives of their choice." *Id.* at 1251 (quoting 42 U.S.C. § 1973(b)). *Requiring* the creation of crossover districts thus would "grant[] special protection to a minority group's right to form political coalitions" and inherently would "entitle[] minority groups to the maximum possible voting strength"—an advantage the Voting Rights Act does not provide. *Id.* at 1243-44. The Court also found "support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration," since "determining whether potential districts could function as crossover districts" would "place courts in the untenable position of predicting many political variables and tying them to race-based assumptions." *Id.* at 1244. And, significantly, "[i]f § 2 were interpreted to require crossover districts throughout the Nation, 'it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.'" *Id.* at 1247 (quoting *LULAC*, 548 U.S. at 446). In particular, a requirement to create crossover districts under § 2 would result in "a substantial increase in the number of mandatory districts drawn with race as 'the predominant factor motivating the legislature's decision.'" *Id.* (quoting *Miller*, 515 U.S. at 916).

By failing to plead the availability of an additional *majority*-black district in *any* of the Plans, Plaintiffs ignore the Supreme Court's clear directions in *Bartlett* as to the preconditions for a vote dilution claim. In fact, their claims turn the *Bartlett* holding on its head. It is clear that Plaintiffs seek to employ § 2 as a mandate to *reduce*, not increase, the number of majority-minority districts, in direct contravention of *Bartlett*. Again, for this reason alone, Plaintiffs' claim should be dismissed.

Significantly, Plaintiffs' generic allegations of "packing" cannot save their claims. The concept of "packing" necessarily requires that excess black voters are "wasted" in a majority-black district. This occurs only if the black voters are not needed in the majority-black district and could have contributed to the creation of an *additional* majority-minority district elsewhere. Thus, the Supreme Court has given the example that "packing" occurs when a minority group has "sufficient numbers to constitute a majority in three districts" but is "packed into two districts in which it constitutes a super-majority." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). Under *Bartlett*, no vote dilution—"packing" or otherwise—occurs through failure to place minority voters in a district where they would *not* have the ability to elect candidates on their own. *See Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004) (rejecting § 2 claim based on failure to remove BVAP from majority-minority district to create adjacent crossover district). Thus, Plaintiffs' failure to allege the possibility of an additional majority-minority district renders their "packing" rhetoric irrelevant.

And to the extent Plaintiffs' Complaint is actually seeking the creation of additional "influence" districts, it is equally invalid. Unlike crossover districts, in which minority-preferred candidates potentially can be elected, influence districts are those "in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected." *Bartlett*, 129 S. Ct. at 1242. In such districts, black voters cannot elect their candidates of choice—not even with the help of white "crossover" voters. As this Court explained in *Colleton County*: "With the aid of a substantial (but not majority) black population that votes nearly exclusively for a Democratic candidate, a white Democrat can usually defeat a black Democrat in the primary election and then use the black vote to defeat any Republican challenger in the general election." 201 F. Supp. 2d at 643 n.22. That black voters may prefer a white Democrat to the

Republican candidate does not mean that the white Democrat is their "candidate of choice." *See LULAC*, 548 U.S. at 445-46 (opinion of Kennedy, J.). [4]

Because influence districts, *by definition*, do not provide black voters the ability to elect their candidates of choice, § 2 claims seeking to compel creation of such districts are invalid, and even more clearly so, for all of the same reasons that claims seeking to compel creation of crossover districts were rejected in *Bartlett*. Indeed, in *Colleton County*, this Court recognized that creation of influence districts is "an inherently politically based policy" that—as all parties ultimately acknowledged—is not mandated by § 2. 201 F. Supp. 2d at 643 n.22. And the Supreme Court again agreed with this conclusion, holding that "§ 2 does not require the creation of influence districts." *Bartlett*, 129 S. Ct. at 1242 (opinion of Kennedy, J.); *accord LULAC*, 548 U.S. at 446 (opinion of Kennedy, J.) (Section 2 "requires more than the ability to influence the outcome between some candidates, none of whom is [the minority's] candidate of choice."). Thus, regardless of whether Plaintiffs actually are seeking crossover districts or influence districts, they fail to state a claim under § 2.

C. The Complaint would fail to state a § 2 vote dilution claim even if "crossover" claims were permissible

Beyond failing to allege that an additional majority-black district could have been drawn, Plaintiffs provide no specificity regarding a hypothetical alternative to *any* of the three Plans they challenge. They generically claim that these Plans "pack" black voters, but they do not describe hypothetical plans in which these districts are "unpacked." Even more important, Plaintiffs do not describe the hypothetical "crossover" districts that the challenged Plans allegedly lack. The

[4] Justice Kennedy's plurality opinion on this issue was controlling in *LULAC* for the same reason as in *Bartlett*. *See supra* n.3.

Complaint does not even provide BVAP percentages for hypothetical crossover districts, much less any other facts to support the bare assertion that black voters would be able to elect their candidates of choice with help from white voters. Thus, Plaintiffs fail to allege the existence of the black voting strength that supposedly has been diluted by the challenged Plans. And their vague, general allegations on this subject do not suffice. *See Iqbal*, 129 S. Ct. at 1949.

If anything, the Amended Complaint seems to make an irrelevant comparison of the challenged Plans to the *prior* plans used from 2002 to 2010. Plaintiffs, for example, allege "packing" where the BVAP of a district is higher than in the preceding plan. And where the BVAP of a district is lower than in the preceding plan, they allege dilution by "maintaining artificially high black VAP percentages." Am. Compl. ¶¶ 74-75. Similarly, the Complaint compares the specific BVAPs of certain Congressional Districts to those under the prior plans. *Id.* ¶ 47(a). But Plaintiffs admit, as they must, that "[p]ursuant to the results of the 2010 Census, all of the Benchmark Plans were malapportioned and needed to be redrawn." *Id.* ¶ 37.

Thus, because the prior plans can no longer be used, they do not provide appropriate examples of what minority voting strength "*ought to be*" in a plan to be implemented after the 2010 Census. *Bossier II*, 528 U.S. at 334; *see also Colleton Cnty.*, 201 F. Supp. 2d at 646 (prior plan "only represents the current BVAP in a malapportioned district"). Instead, "the comparison must be made to a hypothetical alternative." *Bossier II*, 528 U.S. at 635. And because "the very concept of vote dilution . . . *necessitates*" this showing of undiluted voting strength in a hypothetical alternative, *Bossier I*, 520 U.S. at 480, Plaintiffs' failure to allege such alternatives with any specificity would be fatal to their claims, which are in any case foreclosed by *Bartlett*'s rejection of their "crossover" vote dilution theory.

Even if the Complaint adequately pled the first *Gingles* precondition (an alternative plan with an additional majority-black district), the § 2 claim would still fail. That is because the Complaint does not contain even the most conclusory allegation, much less sufficiently pled facts, regarding the remaining *Gingles* preconditions (minority political cohesion and majority bloc voting) or the "totality of circumstances" analysis. If anything, Plaintiffs' Complaint affirmatively contradicts the third *Gingles* factor, which requires a showing of bloc voting by the majority to *defeat* minority candidates. The Complaint maintains that the State could have created districts in which white voters would have "crossed over" in sufficient numbers to *elect* minority-preferred candidates. As the Supreme Court has explained, however, "[i]t [is] difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate." *Bartlett*, 129 S. Ct. at 1244. And Plaintiffs' lack of allegations regarding "rough proportionality" and other factors relevant to the ultimate dilution inquiry likewise would defeat their claim even if the *Gingles* preconditions were met. *See De Grandy*, 512 U.S. at 1016 ("Attaching the labels 'packing' and 'fragmenting' . . . , without more, does not make the result vote dilution when the minority group enjoys substantial proportionality.").

Thus, at every turn, Plaintiffs fail to make out a vote dilution claim under § 2. Accordingly, Count II of their Complaint should be dismissed.

II. PLAINTIFFS' FOURTEENTH AMENDMENT CLAIMS SHOULD BE DISMISSED BECAUSE THE COMPLAINT FAILS TO MAKE COGNIZABLE ALLEGATIONS OF RACIALLY DISCRIMINATORY PURPOSE

Unable to state a claim that § 2 *compels* the creation of the additional Democratic districts they seek, Plaintiffs pursue the same result by claiming that the failure to create those districts violated the Equal Protection Clause of the Fourteenth Amendment. In redistricting

cases, there are two forms of Equal Protection claims. Both types require a showing of purposeful race discrimination, but they involve one of two different forms of injury: (1) dilution of minority voting strength, *White v. Regester*, 412 U.S. 755, 765-66 (1973), or (2) separation of voters on racial lines that "stigmatize[s] individuals by reason of their membership in a racial group," *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (*Shaw I*). Here, Plaintiffs have attempted to allege the former type of injury, but they have failed to state a claim under that theory because their allegations of purposeful vote dilution are invalid as a matter of law. Moreover, even assuming *arguendo* that Plaintiffs have attempted to allege a *Shaw* "stigmatizing" effect apart from dilution, their allegations fail to state a claim.

The Supreme Court has cautioned that federal courts should exercise "extraordinary caution" in reviewing claims challenging redistricting plans under the Fourteenth Amendment:

> Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions. . . . Although race-based decision making is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed. . . . The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.

Miller, 515 U.S. at 915-16 (internal quotation marks and citations omitted). Courts, moreover, "must . . . recognize these principles" in deciding a motion to dismiss. *Id.* at 917. And the importance of applying these standards at the pleading stage is reinforced by the Court's more recent decision in *Iqbal*, which (as here) involved allegations of discrimination by government officials. *See* 129 S. Ct. at 1949. The application of these principles here requires dismissal of Plaintiffs' claims.

A. Plaintiffs' Complaint improperly conflates "analytically distinct" vote dilution and racial gerrymander claims

Plaintiffs' allegations of purposeful race discrimination are predicated *solely* on the notion that the challenged plans purposefully dilute minority voting strength. *See* Am. Compl. ¶¶ 63-65. As explained above, however, Plaintiffs have failed to allege that the challenged Plans even have the *effect* of diluting black voting strength. And as explained below, the absence of dilutive effect precludes not only Plaintiffs' § 2 claims but also their Fourteenth Amendment claims of purposeful vote dilution, which require a showing of dilutive effect *as well as* a showing that this effect was the product of purposeful discrimination. *City of Mobile v. Bolden*, 446 U.S. 55, 69 (1980). After all, there can be no *purpose* to dilute minority voting strength when there is not even a dilutive *effect*. *See Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990). In other words, because Plaintiffs do not claim the challenged Plans should have included *more* majority-minority districts, in which minorities have the ability to elect candidates of their *own* choice, they cannot allege there was a purpose to harm minority voters.

Since purposeful vote dilution is the *only* discriminatory purpose alleged in the Complaint, Plaintiffs have *no* claim of any type under the Fourteenth Amendment. Plaintiffs toss around the labels associated with "analytically distinct" *Shaw* claims. *Shaw I*, 509 U.S. at 652. They assert, for instance, that unspecified districts in each of the Plans have "irregular shape[s] . . . that ignore traditional redistricting principles" and that those shapes "are so irrational that they can only be explained as a race-based gerrymander." Am. Compl. ¶¶ 63(c) & (f), 64(c) & (f), and 65(c) & (f). These assertions are unavailing, however, because Plaintiffs claim that the *purpose* of the "racial gerrymander" causing the "irregular shapes" was to dilute statewide black voting strength. In other words, Plaintiffs make no attempt to establish a claim other than purposeful vote dilution. In *Shaw* cases, in contrast, the allegation is not that race was

deliberately used to *harm* minority voting strength; rather, it is conceded that race was used to *help* minority voting strength by creating majority-minority districts. *See Shaw I*, 509 U.S. at 637; *Miller v. Johnson*, 515 U.S. at 907-08; *Shaw v. Hunt*, 517 U.S. 899, 902 (1996) (*Shaw II*). The issue in *Shaw* cases, therefore, is not whether the challenged plan *decreased* minority voting strength, but instead whether the plan went *too far* in seeking to *increase* minority voting strength. In contrast, Plaintiffs here allege that the purpose behind the enacted Plans was to systematically dilute black voting strength through the creation of majority-black (or excessively black) districts. *See* Am. Compl. ¶¶ 63-65.

Because the racial purpose alleged by Plaintiffs is that race was used as a weapon to dilute black voting strength by "packing" and "bleaching" districts, they must credibly allege that the redistricting scheme had such a dilutive purpose. Unlike *Shaw* cases, then, the "purpose" question here is not the conceded issue of whether the majority-minority districts were purposefully created. Instead, because the only racial purpose that Plaintiffs allege is a purpose to dilute minority voting strength, the issue is whether the majority-minority districts were created for the purpose of diminishing black voting strength statewide, as compared to some "race-neutral" alternative. But Plaintiffs have not provided such an alternative to demonstrate that such a dilutive purpose is even minimally plausible or conceivable, and thus have not stated a purposeful dilution claim.

Moreover, the general (unspecified) desire of Plaintiffs here (again unlike *Shaw* plaintiffs) is not for a race-blind plan but, instead, for an equally race-conscious plan that creates other racially-drawn "crossover" districts for the avowed racial purpose of better enhancing one racial group's relative voting strength. *Cf. Bartlett*, 129 S. Ct. at 1247 (recognizing that intentional creation of crossover and influence districts requires race-conscious line-drawing).

Obviously, the *Shaw* line of cases does not support a cause of action seeking to *eliminate* race-conscious majority-minority districts and replace them with a *greater* number of similarly race-conscious districts—*i.e.*, crossover districts drawn on the basis of race for the avowed purpose of enhancing minority voting strength. That is a *vote dilution* claim, which can be supported only by allegations that the Legislature rejected an "undiluted" alternative for racial reasons. Plaintiffs cannot make such allegations because they have not posited an undiluted alternative and because *any* allegedly undiluted alternative necessarily would rely on a dismantling of majority-minority districts, which would conflict directly with the Voting Rights Act.

In short, because Plaintiffs here, unlike plaintiffs in *Shaw* cases, allege that the Legislature's purpose was to dilute minority voting strength, they must allege facts showing that such a purpose is plausible (which is not possible absent an alternative race-neutral plan that enhances such strength). *Shaw* plaintiffs need not produce such a non-dilutive alternative because they are not alleging that race was used to dilute minority voting strength. *Shaw* plaintiffs allege, rather, that the use of race to create majority-minority districts, while beneficial to minority voting strength, went *too far* and thus has a "stigmatiz[ing]" effect. *Shaw I*, 509 U.S. at 643. Plaintiffs' invocation of the *Shaw* terminology cannot obviate the normal requirement to show that vote dilution is plausible when purposeful vote dilution is alleged. Just as *minority* plaintiffs challenging an affirmative action plan would (unlike typical *non-minority* plaintiffs challenging such plans) have to support the counter-intuitive notion that the plans somehow *harm* minorities, so too must Plaintiffs make similar allegations here.

In any event, Plaintiffs fail to adequately allege the essential elements of a *Shaw* claim. As explained below, *infra* Part II.C, Plaintiffs allege no stigmatic effect, point to no specific district lines that are the product of alleged racial gerrymandering, and have not even attempted

to explain how race predominated over traditional redistricting principles in the three Plans. To the contrary, they affirmatively allege that race coincides with politics, meaning they have the burden of showing that any violation of traditional redistricting principles was *not* attributable to politics—something they do not even purport to allege. Moreover, Plaintiffs' suggested alternative is not race-neutral. It is an equally race-conscious system that, according to Plaintiffs, should be required because it is a more *effective* gerrymander in that it consciously "spreads" black voting strength to more "crossover" or "influence" districts. *See, e.g.*, Am. Compl. ¶ 49.

Failure to dismiss this Complaint would open the door to similar challenges to majority-minority districts everywhere. Whenever a majority-minority district is created to comply with § 2 and/or § 5 of the Voting Rights Act, a plaintiff seeking more Democratic-leaning districts could make the bare allegations that are found in the Complaint here. Such a plaintiff always could allege that the Legislature "purposefully" discriminated against minority voters by placing more of them in the majority-minority district and fewer of them in neighboring districts where they could have joined with white voters to elect Democrats. Likewise, such a plaintiff always could make a conclusory allegation that the majority-minority district does not perfectly comply with traditional redistricting principles.

Were such allegations legally sufficient, then every jurisdiction could be vulnerable to highly intrusive and burdensome litigation simply because it has complied with its obligations under the Voting Rights Act. Because such allegations cannot be sufficient to proceed on a Fourteenth Amendment claim, and because Plaintiffs allege nothing more here, their constitutional claims should be dismissed along with the rest of their Complaint.

B. Plaintiffs have not adequately alleged vote dilution and thus cannot show the purposeful vote dilution that is the basis for their constitutional claims

Plaintiffs simply fail to state a cognizable claim of purposeful race discrimination. The threshold, fundamental questions when such a claim is raised are: *who* has been discriminated against, and for *what* purpose? Here, the Complaint claims that the challenged Plans discriminate against minority voters for the purpose of diluting their voting strength. Plaintiffs' burden in asserting such a claim is to show (1) vote dilution, *see White*, 412 U.S. at 766, and (2) that this dilutive effect can "ultimately be traced to a racially discriminatory purpose," *Bolden*, 446 U.S. at 69 (quoting *Washington v. Davis*, 426 U.S. 229, 240 (1976)). As explained below, Plaintiffs clearly have failed to allege facts sufficient to meet this standard. Thus, their claims should be dismissed.

Plaintiffs' inability to make out a vote dilution claim under § 2, *see supra* Part I, necessarily forecloses their Fourteenth Amendment claim. Plaintiffs cannot argue *purposeful* vote dilution, after all, unless they first show the *existence* of vote dilution. *See Garza*, 918 at 771 ("[P]laintiffs must show that they have been injured as a result" of the allegedly "intentional discrimination."). Under both the Constitution and § 2, vote dilution exists where "the political processes leading to nomination and election [a]re not equally open to participation by the group in question—[*i.e.*,] its members ha[ve] less opportunity than d[o] other residents in the district to participate in the political processes and to elect legislators of their choice." *White*, 412 U.S. at 766. Indeed, this standard was articulated by the Supreme Court in the context of a constitutional challenge and later adopted by Congress when it amended § 2 of the Voting Rights Act. *See Gingles*, 478 U.S. at 35. The only difference between the two claims is that under § 2 "a violation c[an] be proved by showing discriminatory effect alone," *id.*, while, under the

Constitution, "discriminatory intent or purpose" must be shown as well. *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977).

Plaintiffs' failure to allege a dilutive *effect* also means that they cannot carry the "inordinately difficult" burden of proving discriminatory *purpose*. *Gingles*, 478 U.S. at 44 (quoting S. Rep. No. 97-417, at 36 (1982)). As explained above, the Complaint fails to "postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice." *Bossier I*, 520 U.S. at 480. More important, Plaintiffs do not allege that the Legislature failed to create the maximum possible number of majority-minority districts. Therefore, Plaintiffs obviously do not, and cannot, contend that the Legislature *purposefully* failed to create additional majority-minority districts. And, since the only way minority voting strength can even *potentially* be diluted is through failure to create additional majority-minority districts, *see supra* Part I, which Plaintiffs do not allege, they simply cannot argue that the Legislature had the discriminatory purpose of *diluting* minority voting strength.

Plaintiffs' claims are particularly absurd given that both § 2 and § 5 of the Voting Rights Act *require* this supposed discrimination against black voters. As explained above, liability under § 2 of the Voting Rights Act can be imposed only for failure to create *majority-minority* districts, not "crossover" or "influence" districts. *See Bartlett*, 129 S. Ct. at 1248 ("Majority-minority districts are . . . required if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances."). Similarly, compliance with § 5 of the Voting Rights Act requires preservation of minority voting strength in majority-minority districts. To satisfy § 5, and thus be able to administer its redistricting plan, a covered jurisdiction must show that the plan "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a). Section 5's dictate sets forth a non-

retrogression principle that prevents "backsliding" as compared to the benchmark—*i.e.*, the most recent—redistricting plan. *Bossier II*, 528 U.S. at 320. And in its 2006 amendments to § 5, Congress made clear that this standard requires the preservation of majority-minority districts, by specifying that covered jurisdictions must preserve "the *ability* of [minority voters] . . . to *elect* their *preferred candidates of choice*." 42 U.S.C. § 1973c(b) (emphases added).

Indeed, the 2006 amendments were expressly aimed at overruling the Supreme Court's holding in *Georgia v. Ashcroft*, 539 U.S. 461, 480-81 (2003). *See* H.R. Rep. No. 109-478, at 93-94 (2006). In that case, the Supreme Court held that covered jurisdictions had the *option* (although they certainly were not required) to satisfy § 5 by doing what Plaintiffs seek to compel here—substituting crossover and influence districts in place of majority-minority districts. Congress resoundingly rejected this view, explaining that the flexibility allowed in *Ashcroft* risked fostering purposeful discrimination against minorities:

> If covered jurisdictions are permitted to break up districts where minorities form a clear majority of voters and replace them with vague concepts such as influence, coalition, and opportunity—a standard under which no one factor or specific combination of factors is determinative—this may actually facilitate racial discrimination against minority voters.

S. Rep. No. 109-295, at 19-20. Thus, under the amended statute, when minority voters possess the ability to elect their preferred candidates of choice, as is the case in majority-minority districts, the covered jurisdiction *must* maintain minority voting strength in that district at the same level in order to avoid retrogression.[5]

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[5] Indeed, this Court adopted a similar approach in *Colleton County*—even before Congress's 2006 amendments to § 5. This Court held that, in complying with § 5, its "ultimate goal" was "avoiding a draw that causes an unnecessary diminution of the effectiveness of a *majority-minority* district." 201 F. Supp. 2d at 646 (emphasis added); *accord id.* at 646. In

A redistricting plan has a retrogressive effect, by definition, if minority voting strength is reduced to levels where minority voters would have to depend on crossover voting by the majority group. Accordingly, if allegations that the Legislature preserved the maximum number of majority-minority districts were sufficient to make out a claim of purposeful discrimination—*i.e.*, if Plaintiffs' claims here could succeed—then both § 2 and § 5 of the Voting Rights Act *themselves* would violate the Fourteenth Amendment. Indeed, Plaintiffs' claims attack the use of majority-minority districts *simpliciter*. But Congress has made the legislative choice, through § 2 and § 5, that the use of majority-minority districts is the best way to preserve minority voting strength. By persisting to suggest otherwise, Plaintiffs mount a full frontal attack on Congress's legislative choice. And that attack can succeed only if this Court holds that the Voting Rights Act compels unconstitutional action, something Plaintiffs do not themselves allege.

Finally, the broad bipartisan and biracial support for the Senate Plan, and the Justice Department's preclearance of the challenged Plans, *see* Am. Compl. ¶¶ 53, 55, 57, confirm that the Plans did not have the alleged purpose of discriminating against minority voters. In order to obtain preclearance, after all, it was the State's burden to prove the absence of "*any* discriminatory purpose." 42 U.S.C. § 1973c(c) (emphasis added). Thus, preclearance, while not legally precluding a private challenge, certainly demonstrates that the Complaint's allegations

(continued…)

Ashcroft, the Supreme Court recognized that "a State *may* choose to create . . . a certain number of 'safe' districts" to satisfy § 5," which confirms that the *Colleton County* court was correct in holding, even before Congress's revisions to the statute, that maintaining the BVAP percentages in majority-minority districts achieves compliance with the statute. 539 U.S. at 480 (emphasis added).

regarding the Legislature's creation of majority-minority districts are insufficient to support a claim of purposeful minority vote dilution.

C. Plaintiffs do not allege a cognizable Shaw racial gerrymander claim

Nor do Plaintiffs coherently advance a *Shaw* claim under the Fourteenth Amendment. As explained above, Plaintiffs have not adequately alleged *any* discriminatory purpose and thus cannot state *any* claim under the Fourteenth Amendment. And even assuming *arguendo* that Plaintiffs *did* validly allege a discriminatory purpose, they still fail to allege any of the other essential elements of a racial gerrymander claim under the Fourteenth Amendment.

In racial gerrymander claims, strict scrutiny applies only if a plaintiff proves that the challenged plans "threaten to stigmatize individuals by reason of their membership in a racial group [or to] incite racial hostility," *Shaw I*, 509 U.S. at 643, because "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," *Miller*, 515 U.S. at 916. For a plaintiff to succeed, "[r]ace must not simply have been *a* motivation for the drawing of a majority-minority district." *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (internal quotation marks omitted). Rather, strict scrutiny applies only where "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Id*. (internal quotation marks omitted). Plaintiffs bear the burden to make this showing, and it "is a demanding one." *Id.* (internal quotation marks omitted).

Moreover, even if the demographics and shape of a district suggest that race may have predominated, that inference is negated if "racial identification is highly correlated with political affiliation." *Id.* at 243. In such circumstances, the plaintiff must then prove "that race *rather than* politics *predominantly* explains" the district's configuration. *Id.*; *accord Colleton Cnty.*, 201 F. Supp. 2d at n.16. "After all, the Constitution does not place an *affirmative* obligation

upon the legislature to avoid creating districts that turn out to be heavily, even majority, minority. It simply imposes an obligation not to create such districts for predominantly racial, as opposed to political or traditional, districting motivations." *Easley*, 532 U.S. at 249.

To meet its burden, "the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional redistricting principles . . . [and that] would have brought about significantly greater racial balance." *Id*. at 258. The relevant political objectives—*i.e.*, those over which racial motives must be shown to predominate—include not just achieving a particular partisan makeup (*e.g.*, "a safely Democratic district") but also "the legislature's *other* nonracial political goals." *Id.* at 249 (emphasis added).

Even if Plaintiffs could meet the exacting standards outlined above, that alone would not establish their unconstitutional racial gerrymander claims. Rather, the showing would trigger strict scrutiny—an inquiry into whether the predominant use of race was a narrowly tailored effort to achieve a compelling state interest. *See, e.g.*, *Shaw II*, 517 U.S. at 908. And "compliance with the Voting Rights Act is a compelling state interest." *Colleton Cnty.*, 201 F. Supp. 2d at 639 (citing opinions in *Bush v. Vera*, 517 U.S. 952 (1996)). Thus, the Constitution is not violated, even where a racial purpose is the predominant factor, if it is used as needed for "compliance with the reasonably perceived requirements" of the Voting Rights Act. *Id*. at 638 n.15 (quoting *Vera*, 517 U.S. at 993 (O'Connor, J., concurring)). As explained above, a plaintiff can *only* claim a § 2 violation for failure to create a majority-minority district, and covered jurisdictions *must* preserve majority-minority districts under § 5. Thus, avoiding vote dilution and retrogression by preserving black voting strength in majority-black districts is not a

racially *discriminatory* action—to suggest otherwise is to suggest that the Voting Rights Act itself *compels* purposeful discrimination against minorities.

Due to population shifts from census to census, moreover, it often is not easy to maintain black voting strength in majority-black districts. In *Colleton County* this Court observed that "increased residential integration . . . makes it more difficult for courts and state legislatures to add the concentrations of black population necessary to replace the concentrations lost in predominately black areas to avoid retrogression without engaging in bizarre draws." 201 F. Supp. 2d at 646. Accordingly, this Court did not "arbitrarily strive to achieve any benchmark BVAP." *Id.* But this Court also noted the Justice Department's conclusion that "compliance with § 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain of its redistricting criteria." *Id.* at 645 (quoting Guidance Concerning Redistricting & Retrogression Under § 5 of the Voting Rights Act, 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001)); *accord* Guidance Concerning Redistricting & Retrogression Under § 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011). Where this is the case, the covered jurisdiction *must* make the necessary departure from traditional redistricting criteria to achieve the compelling interest in § 5 compliance.

Here, Plaintiffs fail to allege facts that make out a racial gerrymander claim as defined by the Supreme Court in the cases described above. As a threshold matter, Plaintiffs do not allege that the Plans at issue "threaten to stigmatize individuals by reason of their membership in a racial group [or to] incite racial hostility." *Shaw I*, 509 U.S. at 643. As a result, they have failed to allege the very injury that racial gerrymander claims are aimed at remedying. The only allegation Plaintiffs advance that even approaches this threshold requirement is that the General Assembly sought to "mak[e] political party synonymous with race." Am. Compl. ¶ 41. But this

merely alleges a *political* motivation, and thus alleges only a *political* harm. And the Supreme Court has squarely held that plaintiffs cannot make out a racial gerrymander claim when a districting plan was drawn with political motivations. *Easley*, 532 U.S. at 258.

Nor does Plaintiffs' Complaint allege *any* of the other essential elements of a racial gerrymander claim. The Complaint alleges no facts from which to infer that racial considerations *predominated* over traditional redistricting principles and other non-racial considerations in the drawing of the House, Senate, and Congressional Plans. Instead, Plaintiffs make conclusory assertions that merely repeat some of the legal elements of a *Shaw* claim. *See, e.g.*, Am. Compl. ¶¶ 63(c) & (f), 64(c) & (f), 65(c) & (f), and 66. But this Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555. Thus, Plaintiffs' "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949. Simply put, Plaintiffs have not pled "factual content that allows the court to draw the reasonable inference" that the challenged plans are the product of unconstitutional racial gerrymandering. *Id.*

Indeed, Plaintiffs do not suggest the existence of any direct evidence supporting the conclusory assertion that race predominated in the redistricting process. To the contrary, the Complaint alleges that "[d]uring the debate and passage of all of these plans, members of the General Assembly claimed they were drawing a redistricting plan motivated by traditional redistricting principles and mandates imposed by federal law." Am. Compl. ¶ 39. Thus, the only well-pled fact going to legislative purpose *contradicts* Plaintiffs' claims.

In terms of circumstantial evidence, Plaintiffs' Complaint is equally empty. The Plans' inclusion of majority-minority districts suggests only that the need to comply with § 2 and § 5 made race *a* factor in the challenged Plans. It does not suggest that race *predominated* over non-

racial considerations. Rather, the challenged Plans, like the *Colleton County* plan, complied with the Voting Rights Act by avoiding "*unnecessary* reduction of BVAP in [the] effective majority-minority districts." 201 F. Supp. 2d at 646 (emphasis added).[6]

Plaintiffs also allege no specific facts suggesting that traditional redistricting principles were subordinated. Tellingly, Plaintiffs fail to point to any specific "uncouth" lines. *Shaw I*, 509 U.S. at 644 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)). The Complaint is not even clear as to *which* "particular district[s]" supposedly have an "irrational" shape. *Miller*, 515 U.S. at 916; Am. Compl. ¶¶ 63(f), 64(f) & 65(f). The generic references to "shape" also do not sufficiently identify the particular redistricting principles that allegedly were violated. Nor does the Complaint assert facts from which it reasonably can be inferred that the alleged violation of traditional principles resulted from their subordination *to race*. That is, despite vague allegations of "artificially high black VAP percentages," Am. Compl. ¶¶ 63(b), 64(b), the Complaint does not allege with any specificity a correlation between the (unidentified) departures from traditional principles and the inclusion of more black voters in a given district. In other words, Plaintiffs have given no concrete indication—either during the legislative process or in their Complaint now—of specific alternatives in which greater adherence to traditional principles would result in smaller racial differences between adjoining districts.

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[6] The result would be no different if subordination of traditional redistricting principles had been needed to satisfy the statute's mandate to preserve minority voting strength in majority-minority districts. In that event, compliance with the Voting Rights Act would be a compelling interest precluding the racial gerrymander claim. Otherwise, a plaintiff would be able to allege a valid racial gerrymander claim whenever compliance with the Voting Rights Act necessitated anything less than perfect adherence to traditional redistricting principles.

Furthermore, even if Plaintiffs adequately had alleged a correlation between the violation of traditional redistricting principles and the racial composition of districts, this would not suffice. Plaintiffs themselves allege that "black voters continue to overwhelmingly prefer Democratic candidates in South Carolina." Am. Compl. ¶ 41. As explained above, this admission that "racial identification correlates highly with political affiliation" means Plaintiffs must show that traditional redistricting principles were subordinated to race *rather than politics*. *See Easley*, 532 U.S. at 258; *Hunt v. Cromartie*, 526 U.S. 541, 551-52 (1999) ("Evidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference."). To do so, they must show that the Legislature could have adopted plans with "significantly greater racial balance" while satisfying traditional redistricting principles *and legitimate political objectives* to the same degree as in the challenged plans. *Easley*, 532 U.S. at 258. Plaintiffs, however, do not plead even conclusory facts on these points, much less facts from which these conclusions reasonably can be drawn. If anything, Plaintiffs plead the contrary, suggesting that "Republican leaders in the General Assembly" did in fact carry out an alleged desire for "pack[ed]" Democratic districts to increase the amount of districts where Republicans could achieve electoral success, Am. Compl. ¶ 41, such that greater racial balance would have been at odds with partisan goals. Thus, Plaintiffs' Complaint not only fails to satisfy *any* of the elements of a *Shaw* claim; its own assertions actually *foreclose* their claims.

For the same reasons, Plaintiffs' claims under the Fifteenth Amendment necessarily fail as well. The Supreme Court has explained that the Fifteenth Amendment adds nothing to the Fourteenth Amendment gerrymander analysis. *See Shaw I*, 509 U.S. at 645. In fact, the

Fifteenth Amendment itself does not reach anything beyond "access to the ballot." *Nw. Austin Mun. Util. Dist. v. Holder*, 557 U.S. 193, 129 S. Ct. 2504, 2520 (2009). And Plaintiffs do not allege that the challenged Plans outright deny them or anyone else the right to vote.

If Plaintiffs' purely conclusory assertions were sufficient to proceed to discovery, then every jurisdiction across the country could easily be subject to the "serious intrusion" of judicial review. Instead, the exercise of "extraordinary caution" should lead to dismissal of claims, like those presented here, where *specific* facts supporting a reasonable inference of unconstitutional racial discrimination have not been alleged. Thus, Counts I and III of the Complaint should be dismissed.

III. IN ANY EVENT, PLAINTIFFS LACK STANDING BECAUSE THEY HAVE FAILED TO ALLEGE ANY COGNIZABLE INJURY TRACEABLE TO THE DISTRICTS IN WHICH THEY RESIDE

Plaintiffs also have failed to allege specific facts that, if true, would give them standing. First, Plaintiffs undeniably lack standing to challenge districts in which they do not reside. With respect to the districts in which Plaintiffs do reside, moreover, the Amended Complaint expressly references only a few. And, for the same reasons that the Complaint fails to state a claim, it fails to make even a threshold showing that *any* district has caused cognizable injury to *any* Plaintiff.

To have standing, a plaintiff must satisfy three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

United States v. Hays, 515 U.S. 737, 742-43 (1995) (internal quotation marks omitted). Consistent with these principles, the Supreme Court has "repeatedly refused to recognize a generalized grievance against allegedly illegal government conduct as sufficient for standing to

invoke the federal judicial power." *Id*. at 743. And the burden rests with a plaintiff "clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of a dispute." *Id.*

In *Hays*, the Supreme Court held that "[w]here a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." *Id.* at 745. That standing, however, exists "only with respect to the district in which the plaintiff resides." *Shaw II*, 517 U.S. at 904. Where, on the other hand, a plaintiff resides outside an allegedly gerrymandered district, he lacks standing unless he can show that he "has personally been subjected to a racial classification." *Hays*, 515 U.S. at 745. It is "irrelevant" whether plaintiffs couch their claims as a challenge to the redistricting legislation "in its entirety." *Id.* at 746. And the rationale of *Hays*, articulated in a case involving racial gerrymander claims, applies with equal force to vote dilution claims. *See Hall v. Virginia*, 276 F. Supp. 2d 528, 531 (E.D. Va. 2003), *aff'd*, 385 F.3d 421. For only when a plaintiff can show that minority voting strength was diluted in *his* district can he show that *he* suffered any cognizable injury.

According to their First Amended Complaint, the eight Plaintiffs reside in only eight of the 124 House Districts, seven of the forty-six Senate Districts, and five of the seven Congressional Districts. Am. Compl. ¶¶ 8-15. At most, Plaintiffs can challenge only these specific districts, and not other districts or the Plans as a whole.

Plaintiffs cannot challenge any other district because they have failed to allege facts sufficient to show that the configuration of any other district "has personally . . . subjected [them] to a racial classification." *Hays*, 515 U.S. at 745. For each Plaintiff here, the Complaint makes a conclusory allegation that the challenged Plans harm him or her "by discriminating against him [or her] on the basis of race for the purpose of including or excluding him [or her]

from election districts." Am. Compl. ¶¶ 8-15. Similarly, the Complaint makes a general and equally conclusory allegation that all Plaintiffs "are personally injured by being subjected to an illegal racial classification and by being placed into election districts in accordance with this race-based scheme." *Id.* ¶ 16. But these conclusory statements alone are insufficient to establish standing for any of Plaintiffs' claims. *See Hays*, 515 U.S. at 746.

Furthermore, there is not a sufficiently pled injury even as to the districts in which Plaintiffs reside. Plaintiffs' Complaint refers to only thirty-two specific districts across all three Plans. *See, e.g.*, Am. Compl. ¶¶ 63(b), 64(b), 65(b). Plaintiffs reside in only three of the House Districts (Districts 82, 102, 103) and three of the Senate Districts (Districts 29, 30, 32), as well as the five referenced Congressional Districts. The Complaint does not even reference, much less allege injury for, any of the *other* House and Senate Districts in which Plaintiffs reside.

Even as to the handful of districts that are both home to a Plaintiff and at least referenced in the Complaint, the allegations do not allege a cognizable injury. As explained above, the Complaint gives no specifics regarding how the districts allegedly were gerrymandered. *See supra* Part II. And, because the Complaint fails to describe any hypothetical alternative plan in which Plaintiffs even *allegedly* would have enjoyed "undiluted" voting strength, it lacks any cognizable allegation that Plaintiffs were injured by adoption of the challenged Plans instead. In short, Plaintiffs have made no showing that they would be better off under any (unspecified) alternatives to the House, Senate, and Congressional Plans. *A fortiori*, they have made no showing that they are *worse off* under the three duly enacted Plans. Thus, without a cognizable injury, Plaintiffs lack standing to challenge *any* districts in *any* of the enacted Plans.

CONCLUSION

Defendant McConnell's motion to dismiss should be **GRANTED**.

Respectfully submitted,

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December 19, 2011
Greenville, South Carolina