THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA 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,**	)	**Case No.: 2:11-cv-03120-PMD-HFF-MBS**
v.	)	
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.**	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO ALL DEFENDANTS' MOTIONS TO DISMISS

INTRODUCTION

Plaintiffs submit this Memorandum of Law in Opposition to the motions to dismiss filed by all Defendants, and for the reasons set forth below, respectfully ask the Court to **DENY** all Defendants' motions.[1]

SUMMARY

Plaintiffs, all black voters in South Carolina, filed this lawsuit challenging Acts 71, 72 and 75 of 2011, which were enacted by the South Carolina General Assembly and signed into law by the Governor redrawing election districts for the South Carolina House of Representatives, South Carolina Senate and United States congressional districts. Plaintiffs sued the state of South Carolina, Speaker of the House, Chairman of the House Judiciary Committee, Chairman of the Elections Law Subcommittee (collectively "House Defendants"), President Pro Tempore and Chairman of the Senate Judiciary Committee, the Lieutenant Governor (collectively "Senate Defendants"), the Governor, and the State Elections Commissions' Executive Director and Commissioners, seeking declaratory and injunctive relief.

The amended complaint challenges the state's redistricting scheme which pursues a policy of drawing as many election districts with majority black voting age population (BVAP) as possible and manipulating BVAP to achieve arbitrary, predetermined percentages for election districts. Plaintiffs seek a declaration that these laws violate the Fourteenth and Fifteenth Amendments to the United States Constitution and the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended, and seek an order from this Court enjoining their enforcement.

Plaintiffs' Fourteenth Amendment challenge alleges these redistricting laws are unconstitutional because they use race as the predominant factor in including or excluding voters

[1] While the Court indicated it would decide these Motions on the memorandum submitted, if the Court decides oral argument would be helpful, Plaintiffs are prepared to offer oral argument within two days of receiving notice from the Court.

from election districts, and the laws are not narrowly tailored to achieve a compelling state interest. Miller v. Johnson, 515 U.S. 900, 904, 115 S. Ct. 2475, 2482 (1995). Further, in order to institute these race-based quotas, the redistricting laws abandon traditional race-neutral redistricting principles including compactness, keeping political subdivisions such as county lines intact, and keeping communities of interest together. See Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 637 (D.S.C. 2002).

Plaintiffs additionally allege the laws violate the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended, which Congress passed in an effort to give minority voters an equal opportunity to participate in the political process. Thornburg v. Gingles, 478 U.S. 30, 44, 106 S. Ct. 2752, 2763 (1986) (citing Senate Report on Voting Rights Act, U.S. Code Cong. & Admin. News 1982, p. 206). The dispositive question for the purpose of Section 2 of the Voting Rights Act is whether, based on the totality of circumstances, the redistricting scheme gives a minority community "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Id.; 42 U.S.C. § 1973(b). This provision has been interpreted to prohibit "dilution" of black voting power by either "fracturing" black voters into several election districts or by "packing" them into a few districts. Voinovich v. Quilter, 507 U.S. 146, 154, 113 S. Ct. 1149, 1155 (1993) (quoting Gingles, supra). While historically plaintiffs invoking Section 2 sought to undo a redistricting plan that fractured the minority community, this case presents the opposite problem of packing.

Plaintiffs are not asking for the creation of any majority-black districts—Defendants have created and maintained these districts contrary to race-neutral principles. Instead, Plaintiffs ask this Court whether redistricting laws that intentionally create majority-black districts and increase BVAP in those districts illegally deny black voters an opportunity to elect candidates of choice in the same manner that all other voters elect candidates of choice. Plaintiffs allege that

Defendants' system of racial quotas denies Plaintiffs and all other black voters an equal opportunity to participate in the political process by segregating them into "black districts" with no compelling reason to do so.

Finally, Plaintiffs maintain that even if the Voting Rights Act does not prohibit the particular type of discriminatory scheme challenged by this lawsuit, the Fifteenth Amendment unquestionably prohibits any denial or abridgment of the right to vote on account of race. U.S. Const. amend. XV. While the Supreme Court has "not decided whether the Fifteenth Amendment applies to vote-dilution claims," Voinovich, at 159, 113 S. Ct. at 1158, it has held unconstitutional state action singling out racial minorities for "special treatment." Gomillion v. Lightfoot, 364 U.S. 339, 346-47, 81 S. Ct. 125, 130 (1960). For these reasons, and those stated below, Defendants' motions should all be **DENIED**.

ARGUMENT

A motion to dismiss under Rule 12(b)(6) asks the court to decide whether the complaint alleges a valid cause of action. Bell Atlantic Corp. v. Twombley, 550 U.S. 544, 557, 127 S.Ct. 1955, 1966 (2007). A court reviewing a motion under Rule 12(b)(6) must construe the complaint liberally, see Kaltenbach v. Richards, 464 F.3d 524, 526-27 (5th Cir. 2006), and in the light most favorable to the non-moving party. See Skinner v. Switzer, __ U.S. __, 131 S. Ct. 1289, 1296-97 (2011); Twombley, at 555, 127 S.Ct. at 1965. A pleading need not "prove" that the plaintiff is entitled to legal relief—since requiring proof would defeat the purpose of a trial—but merely allege facts that, if taken as true, would give rise to the relief sought. Fowler v. UPMC Shadyside, 578 F.3d 203, 213 (3rd Cir. 2009) (evidentiary-level factual showing not required); see also, Ashcroft v. Iqbal, 556 U.S. 662, __, 129 S.Ct. 1937, 1949 (2009) ("detailed factual allegations" not required); Twombly, at 555, 127 S.Ct. at 1965. This inquiry requires the court to separate legal claims from factual allegations. See Iqbal, 556 U.S. at __, 129 S.Ct. at 1949-50.

The court must then assume that all factual allegations are true. Id. While a court may consider whether the factual allegations are plausible, id., the pleader still enjoys "the benefit of imagination," Bissessur v. Indiana Univ. Bd. of Trustees, 581 F.3d 599, 602-03 (7th Cir. 2009), because "plausibility" does not rise to the level of "probability." Iqbal, 556 U.S. at __, 129 S.Ct. at 1949-50. The purpose of this inquiry is merely to ensure that defendants have sufficient notice of plaintiff's claims and the basis for those claims. Twombly, at 554-55, 127 S. Ct. at 1964-65.

Further, "Rule 12(b)(6) dismissals are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development." Baker v. Cuomo, 58 F.3d 814, 818-19 (2d Cir. 1995), vacated in part on reh'g en banc sub nom. Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996) (citing Wright & Miller, 5A Federal Practice and Procedure: Civil 2d § 1357 at 341-43 (1990 & 1994 pocket part)). See also, Electrical Const. & Maint. Co., Inc. v. Maeda Pac. Corp., 764 F.2d 619, 623 (9th Cir. 1985) ("The court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel or extreme, since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader's suppositions.").[2]

Here, the Amended Complaint gives sufficient notice of the underlying facts that support Plaintiffs' legal claims. Plaintiffs allege Defendants intentionally drew nine new majority-black districts in the South Carolina House of Representatives without sufficient justification, added BVAP to districts where black voters were already able to elect candidates of choice, and reduced BVAP in districts where black voters, working together with the white community, could elect a candidate of choice. Am. Cmplt.¶ 43. Further, Plaintiffs allege the redistricting laws

[2] All three of Plaintiffs' grounds for legal relief apply to the same underlying facts and conduct. No additional discovery is required by allowing all of these claims to proceed beyond a motion to dismiss, nor will any time or judicial resources be saved in discovery by dismissing one of these claims now. Additionally, even assuming one of these claims could be dismissed, Summary Judgment is a more appropriate stage of the litigation to do so.

abandoned traditional redistricting principles in order to manipulate BVAP in preexisting majority-minority districts. Id.

Similarly, Plaintiffs allege the Senate plan abandoned traditional redistricting principles in order to maintain "artificially high" BVAP levels, in most cases above 50 percent. Id. ¶ 45. This also resulted in the reduction of BVAP in districts where black voters had an *opportunity* to elect candidates of choice. Id. Plaintiffs also allege that the U.S. congressional plan added BVAP to the state's only majority black district, in the absence of any compelling reason to do so, where the district overwhelmingly elected the black candidate of choice despite natural population shifts which actually *decreased* BVAP. Id. ¶ 47. As with the House and Senate plans, Plaintiffs allege the only plausible explanation for adding more BVAP to an already performing majority-minority district was to deny black voters an opportunity to influence election outcomes in surrounding districts. Id.

Plaintiffs further allege the redistricting plan diminishes the political power of small rural counties with majority or significant black populations by carving them up among several predominantly white districts, contrary to traditional redistricting principles. Id. ¶¶ 43, 45, 47. These counties are specifically identified. Id. ¶ 34, n.1 and 2.

Publically available information supports Plaintiffs' factual allegations and the legal conclusion that Defendants used race for the purpose of assigning voters to election districts. A court may take judicial notice of facts in the public record such as demographic and geographic information concerning the challenged laws and the legislative record created while passing these laws. See Hall v. Virginia, 385 F.3d 421, 424, n.3 (4th Cir. 2004); see also Papasan v. Allain, 478 U.S. 265, 268, n.1, 106 S.Ct. 2932, 2935, n.1 (1986).

I. Defendants predominant use of race to draw election districts denies Plaintiffs equal protection under the law.

Redistricting laws that distinguish between individuals on account of race fall within the core of equal protection. Shaw v. Reno, 509 U.S. 630, 642, 113 S. Ct. 2816, 2824, (1993) (hereinafter "Shaw I"). The Equal Protection Clause prohibits the "unnecessary and excessive governmental use and reinforcement of racial stereotypes." Bush v. Vera, 517 U.S. 952, 985-86, 116 S. Ct. 1941, 1964 (1996). Race-based discrimination is the most invidious form of government discrimination, see Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 228-29, 115 S. Ct. 2097, 2113-14 (1995), and causes "fundamental injury to the individual rights of the person. Shaw v. Hunt, 517 U.S. 899, 908, 116 S. Ct. 1894, 1902 (1996) (hereinafter "Shaw II") (internal quotations and citation omitted). Consequently race-based laws are inherently suspect and subject to strict scrutiny, Miller, 515 U.S. at 904, 115 S. Ct. at 2482, "regardless of the race of those burdened or benefited by a particular classification." Id. (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 494, 109 S.Ct. 706, 722 (1989) (plurality opinion; citations omitted). Even allegedly benign race-based discrimination "delay[s] the time when race will become truly irrelevant." Adarand, at 228-29, 115 S. Ct. at 2113-14 (citing, Croson, supra).

Because redistricting laws are facially neutral, a plaintiff must show that "legitimate districting principles were subordinated to race" in order to prove discrimination. Bush, at 958-59, 116 S. Ct. at 1951-52 (quoting, Miller, supra (internal citations omitted)). In other words, the plaintiff must show that race was the "predominant factor" behind the legislature's redistricting scheme. Id. A plaintiff may demonstrate that race was the predominant factor through the use of direct or circumstantial evidence. Miller, at 913, 115 S. Ct. at 2486. Direct evidence includes analysis of a plan's demographic data, express legislative purpose, or the method used in drawing a plan. Id., at 916, 115 S. Ct. at 2488; Bush at 959, 116 S. Ct. at 1952. Once a plaintiff proves a law discriminates based on race, strict scrutiny applies and it can only be upheld if *the state* can prove that the discriminatory law is narrowly tailored to achieve a compelling state

interest. Miller, at 904, 115 S. Ct. at 2482.

Even prior to discovery or trial, Plaintiffs are able to point to evidence in publically available sources that strongly suggests race was the predominant factor in shaping the Defendants' redistricting laws. First, a state's deliberate creation of majority-black districts evidences race-based redistricting requiring strict scrutiny. See Bush, at 961-62, 116 S. Ct. at 1953. Here the House and Senate plans committed at the outset to draw a predetermined number of majority-black seats, a decision that requires strict scrutiny. Id., at 1001, 116 S. Ct. at 1973 (Thomas and Scalia, JJ. concurring) ("intentional creation of a majority-minority district certainly means more than mere awareness").

A comparison of the demographic data provided by the House of Representatives illustrates how Defendants' racial gerrymander packs black voters into election districts where black voters were already electing candidates of choice. Under the benchmark plan, passed in 2003, the House of Representatives had twenty-nine majority-minority districts. See Exhibit 5, Spreadsheet containing demographic information for H3991 based upon 2000 Census data, House Preclearance Submission, available at http://redistricting.schouse.gov/PreclearanceSubmissionH3991.html. (Data included in "House BVAP Summary" attached as Exhibit A). "Because of demographic changes, as of 2011, the Benchmark Plan had a total of twenty-one majority-minority districts." Harrell Preclearance Cmplt. ¶ 26, Harrell v. United States, 1:11-cv-01454 (D.D.C. 2011) (hereinafter "Harrell Preclearance Cmplt.") (seeking judicial preclearance and dismissed as moot). Of the eight house seats that lost black majorities during this period, all but one either lost black population (House Districts 12, 23, 103, 111) or failed to keep pace with the states' overall population growth rate

(House Districts 64, 102, 122).[3] Despite these population shifts, all of these districts continued to elect black candidates of choice.

Act 72 effectively negates the effect of these natural population shifts, at the expense of black voters, by creating nine new majority-minority districts and packing black voters into these districts. See Harrell Preclearance Cmplt., ¶ 26. Defendants' plan increased the BVAP in these nine majority-black districts and in five additional districts where the BVAP already exceeded fifty percent. Compare, Exhibit 6, Spreadsheet containing demographic information for H3991 based upon 2010 Census data, House Preclearance Submission, with, Exhibit 2, Spreadsheet containing the demographics for H3991, House Preclearance Submission, both available at http://redistricting.schouse.gov/PreclearanceSubmissionH3991.html. (Data included in Exhibit A).[4] One of the newly created majority-black districts, House District 79, was already represented by a black candidate with only a 34.7 percent BVAP under the benchmark plan. Act 72 raises the BVAP of these fourteen House Districts, scattered all across South Carolina, with no justification and no compelling need for the change.

Similarly, a review of demographic data provided by the Senate illustrates that Act 71 was enacted solely to ensure that certain districts met preset BVAP levels. A lawsuit filed by Defendant McConnell shortly after the Senate's preclearance submission to the Department of Justice demonstrates that the primary purpose in passing the redistricting plan was to ensure that the nine majority-black Senate seats remained majority black under Act 71. "Because of demographic changes as of 2011, the Benchmark Plan had a total of eight majority-black VAP districts in 2011. S. 815 *preserves majority-black VAP status in all eight of the districts and*

[3] House District 49 lost majority-minority status and slightly exceeded population growth, meaning that the new population was predominately white.

[4] Where this memorandum refers to exhibits by number, it references exhibits submitted pursuant to the House, Senate or Congressional Preclearance Submissions. Exhibits referred to by letter are attached by Plaintiffs to this memorandum.

restores majority-black VAP status in the ninth district—District 45."[5] McConnell Preclearance Cmplt. ¶ 17, McConnell v. United States, 1:11-cv-01794 (D.D.C. 2011) (hereinafter "McConnell Preclearance Cmplt.") (seeking judicial preclearance and dismissed as moot); see also, Exhibit 13, BVAP Comparison Chart-All Senate Districts, Senate Preclearance Submission, available at http://redistricting.scsenate.gov/PreclearanceExhibitsS815.html. (Attached as Exhibit B).

Finally, a review of demographic data provided by the General Assembly illustrates that Act 75 drew United States congressional districts to increase the BVAP percentage in the Sixth Congressional District, while decreasing BVAP percentages in the surrounding congressional districts.[6] When drawn in 2002, the Sixth District had a black VAP of 53.55 percent. Exhibit 5, Colleton County v McConnell Demographics 2000, Congressional Preclearance Submission, available at http://redistricting.scsenate.gov/PreClearanceExhibitsH3992.html. (Data included in Congressional BVAP Summary attached as Exhibit C). By 2011, BVAP had decreased to 52.08 percent due to natural population shifts. Exhibit 6, Colleton County v McConnell Demographics 2010, Congressional Preclearance Submission, available at http://redistricting.scsenate.gov/PreClearanceExhibitsH3992.html. (Data included in Exhibit C). This constituted the largest natural decrease in BVAP of any of the existing districts.[7] Id. By

[5] In Bush, the Court also found the following language in the state's preclearance submission indicative of race-based redistricting:

> [Districts] should be configured in such a way as to allow members of racial, ethnic, and language minorities to elect Congressional representatives. Accordingly, the three new districts include a predominantly black district drawn in the Dallas County area [District 30] and predominantly Hispanic districts in the Harris County area [District 29] and in the South Texas region. In addition to creating the three new minority districts, the proposed Congressional redistricting plan increases the black voting strength of the current District 18 (Harris County) by increasing the population to assure that the black community may continue to elect a candidate of its choice. Bush, at 960-61, 116 S. Ct. at 1952-53 (internal quotations omitted).

[6] There is a nominal increase of .04 percent BVAP in the Fourth Congressional District.

[7] The Sixth District also kept pace relative to population growth and was only 3.28 percent over an ideal population according to the 2011 Census.

comparison, the benchmark Second District saw the largest increase in black VAP from 23.95 percent to 25.43 percent and was overpopulated compared to an ideal district—necessary to comply with one person, one vote, Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964)—by 25 percent. Act 75 effectively nullifies these natural population shifts by packing BVAP into the Sixth District, which has a BVAP of 55.18 percent under the new plan, while reducing BVAP in the First, Second, Third, and Fifth Districts. Exhibit 2, H. 3992 Plan Demographics, Congressional Preclearance Submission,

available at http://redistricting.scsenate.gov/PreClearanceExhibitsH3992.html. (Data included in Exhibit C). Defendants offer no justification for raising the BVAP in the Sixth District, which already elects the black candidate of choice by an overwhelming margin.

Irregularly-shaped districts that violate traditional redistricting principles also support the conclusion that race was the predominant factor in these redistricting plans. Subordination or abandonment of traditional race-neutral principles is "persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." Miller, at 913, 115 S. Ct. at 2486; Shaw I, supra, at 646-47, 113 S. Ct. at 2826-27. Disregard of traditional redistricting principles is important evidence "not because they are constitutionally required—they are not—but because they are objective factors." Shaw I, at 646-47, 113 S. Ct. at 2826-27 (citations omitted). Where a plan draws districts with irregular shapes, a court need only look at the map to conclude the plan "can be viewed only as an effort to segregate the races for purposes of voting." Shaw I, at 646-47, 113 S. Ct. at 2826-27 (quoting Gomillion, at 341, 81 S.Ct. at 127 (internal quotations omitted)).

In addition to a review of Act 72's demographic data, the Court may also take judicial notice of the irregular shape necessary to draw election districts with 50 percent or more BVAP.

Plaintiffs have attached maps of House Districts 12, 23, 25, 49, 57, 62, 73, 101, 102, 103, 109, 111, and 113 as examples of election districts that have an irregular shape, are not compact, and fail to respect county and municipal boundaries. (Attached as Exhibit D). These maps were produced by the House of Representatives and posted on their Redistricting website (http://redistricting.schouse.gov/) for public review. While these districts have a particularly suspect shape, supporting the conclusion that race was the predominant factor used to draw them, Act 72 violates other traditional redistricting principles by failing to keep political subdivisions such as counties and municipalities intact. Colleton Co., at 648 ("We likewise recognize South Carolina's strong preference for minimizing the splits of counties within her borders."). Act 72 splits 37 counties into two or more districts for a total of 183 county splits. A "split" of a county is defined as the number of times a county is split by a district.

Plaintiffs ask the Court to take judicial notice of the irregular shape of many of Act 71's Senate districts, particularly Senate Districts 20, 22, 25, 26, 29, 30, 31, 35, and 36. A map of the districts established by Act 71 is posted on the Senate's Redistricting website (http://redistricting.scsenate.gov/PreclearanceSubmissionsS815.html) for public review. (Attached as Exhibit E). Plaintiffs allege that the shape of these districts evidences a determination by Defendants to draw these districts with predetermined levels of BVAP rather than following traditional redistricting principles. Act 71 splits 34 counties into two or more districts with a total of 109 county splits.

Finally, Plaintiffs ask the Court to take judicial notice of the irregular shape of the Sixth Congressional District as drawn by Act 75. A map of Act 75 is posted on the Senate Redistricting website (http://redistricting.scsenate.gov/PreClearanceExhibitsH3992.html) for public review. (Attached as Exhibit F). Plaintiffs allege that the shapes of the congressional districts, and the Sixth in particular, evidence a determination by Defendants to pack the Sixth

District with BVAP rather than following traditional redistricting principles. The Sixth District is the only existing district to add geography rather than lose geography. Act 75 splits 11 counties into two or more districts with a total of 22 county splits.

Motive and process are also important evidence that race was the predominant factor in a redistricting plan. Miller, at 919, 115 S. Ct. at 2489; see also, Bush, supra (applying strict scrutiny even though traditional redistricting principles were not entirely neglected). Public comments offered by members of the House responsible for crafting redistricting guidelines and drafting the plans considered by the full House support the conclusion that race was the predominant factor motivating House leadership. For example, Amendment 5, the "Frye Amendment," considered during a meeting of the House Judiciary Committee succinctly illustrates the approach Defendants took to drawing election districts. See Discussion beginning at 00:25:00, Exhibit 5, Full House Judiciary Committee Audio, June 6, 2011, House Preclearance Submission, available at http://redistricting.schouse.gov/PreclearanceSubmissionH3991.html. Defendant Harrison, chairman of the committee, opposed the amendment offered by Rep. Marion Frye (R-Lexington/Saluda), a Republican colleague. The amendment would affect House District 82, a 50.45 percent BVAP district under the benchmark plan, and Mr. Frye's neighboring district, District 39, a 22.53 percent BVAP district under the benchmark plan. District 82 is represented by a black Democrat, Rep. Bill Clyburn (D-Aiken/Edgefield). Mr. Frye is white. After introducing the Frye Amendment, Defendant Harrison explained his opposition by saying:

> With respect to this Amendment the key to understanding it is District 82, is a majority-minority district, currently represented by Mr. Clyburn. In order to comply with the Voting Rights Act, *and keep his BVAP at a percentage we felt it was required to be kept at*, District 82 had to go outside of Edgefield County … *and go into a neighboring county to pick up minority population.* Saluda County was the only county that would meet that requirement.

Id. at 00:25:50 (emphasis added). Describing the proposed additions, Defendant Harrison continued:

> Those areas that are currently circled … are areas that District 82 would encompass *in keeping its BVAP at an acceptable level*. Mr. Frye's amendment … takes much of that population away and in return it drop's Mr. Clyburn's, err, District 82's BVAP, from 52.74 to 51.43. We believe that's unacceptable under the Voting Rights Act and at some point I'll move to table the amendment.

Id. at 00:26:50 (emphasis added). Defendant Harrison then recognized the Elections Subcommittee Chair, Defendant Clemmons, who is also an architect of the illegal schemes challenged in this suit. Defendant Clemmons who summarized the purpose of the Frye Amendment by adding:

> Mr. Frye has spent a lot of time in the map room trying to resolve a problem that has been created by the population in South Carolina. That problem has resulted in a district for Mr. Frye that has less than a majority of Saluda County within his house district, certainly moving from where it has historically been. … *Unfortunately, for my vote, I must be consistent with my previous votes and vote against any change that that would decrease black voting age population in a majority-minority district.*"

Id. at 00:27:25 (emphasis added). These public statements demonstrate clearly that race, not traditional redistricting principles, was the predominant factor motivating leaders in the General Assembly who were responsible for drafting the laws at issue here.

Taken together, the facts pled in the Amended Complaint and publically available information created and made available by Defendants provide more than ample notice of the claims at issue. The facts set forth in the Amended Complaint demonstrate that it is at least *plausible* that race *could have* been the predominant factor in drawing election districts.

Alleging a plausible equal protection claim is a low threshold because much of the proof that properly supports a successful claim is circumstantial evidence that must be weighed by the court at trial. Miller, at 916, 115 S. Ct. at 2488 (adherence to race-neutral redistricting principles "informs the plaintiff's burden *at trial*") (emphasis added). The court must look beyond

pretextual explanations offered by the state and decide for itself whether race-based motivations controlled. Shaw II, at 949, n.3, 116 S. Ct. at 1922, n.3. This includes assertions by Defendants that the Voting Rights Act requires race-based action. "The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." Miller, at 922, 115 S. Ct. at 2491; Croson, at 501, 109 S.Ct., at 725. For the foregoing reasons, Plaintiffs submit they have carried their burden of alleging facts that make it plausible race was the predominant factor in drawing election districts.[8]

II. Defendants' use of race to pack voters into election districts violates Section 2 of the Voting Rights Act of 1965.

"The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." South Carolina v. Katzenbach, 383 U.S. 301, 308, 86 S. Ct. 803, 808 (1966). The primary way Congress seeks to accomplish this goal is through Section 2, which prohibits election laws that result in a denial of the right to vote on account of race or color. 42 U.S.C. §1973(a). Section 2 provides a test for what constitutes a denial of the right to vote. Id. § 1973(b). A violation exists if:

> [B]ased on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [minority voters] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. Congress's current test ensures that the protections of Section 2 are flexible enough to apply

[8] Plaintiffs plan to offer expert analysis of much of the data discussed here to support a conclusion that race was *the* predominant factor motivating these redistricting laws. While some written discovery and depositions will support Plaintiffs' claims, expansive and prolonged discovery is not necessary to present evidence that the primary motivation behind these laws was race. Plaintiffs plan to target their discovery requests at the dozen or so members of the General Assembly, and their staff, primarily responsible for the challenged laws.

when the result is discriminatory but intent is unclear. Chisom v. Roemer, 501 U.S. 380, 394-95, 111 S. Ct. 2354, 2364 (1991). The purpose of Section 2 is not merely to protect the right of minority voters to cast ballots, but to ensure *equal* participation in the political process. Gingles, 478 U.S. at 47, 106 S.Ct. at 2752.

Section 2 claims are commonly referred to as "dilution" claims. Both "packing" and "fracturing" are forms of dilution. Fracturing exists where a minority group is carved up in the redistricting process in a manner that prevents them from electing a candidate of choice. Gingles, at 46, 106 S.Ct. at 2752.

> Dividing the minority group among various districts so that it is a majority in none may prevent the group from electing its candidate of choice: If the majority in each district votes as a bloc against the minority candidate, the fragmented minority group will be unable to muster sufficient votes in any district to carry its candidate to victory.

Voinovich, supra, at 153, 113 S.Ct. 1149. Dilution also results from the concentration or packing of black voters into election districts for the purpose of minimizing their influence in adjacent districts. Id., at 154, 113 S. Ct. at 1155, (quoting, Gingles, at 46, n.11, 106 S.Ct. at 2764, n.11.)

The essence of a Section 2 claim is that an election law causes "an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Gingles, at 47, 106 S. Ct. at 2764. When the Supreme Court interpreted how to give this language affect, it assumed, correctly at that time, that no white person would ever vote for the black community's candidate of choice. Gingles, at 59, 106 S. Ct. at 2771 (citing the district court's finding "that a substantial majority of white voters would rarely, if ever, vote for a black candidate."). This racial "polarization" of the white community required that a district have a sufficient level of BVAP to allow the black community to elect a candidate without any white crossover support. Id. at 56, 106 S. Ct. at 2769. What constituted a sufficient level of BVAP to elect a candidate outright varied depending on the demographics of a particular district. For

example, a district where the minority population was under-registered to vote might require substantially more than 50 percent BVAP in order to give black voters an equal chance of electing a black candidate.

In Gingles, supra, the Supreme Court held that a plaintiff alleging a violation of Section of the Voting Rights Act must show: (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) the minority group is politically cohesive, and (3) the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. Bartlett, at __, 129 S. Ct. at 1241 (citing, Gingles, supra).

These preconditions ensured that the extreme race-based remedy sought by the plaintiffs in Gingles was absolutely necessary. For example, if the minority community did not vote as a block, then they were not denied an opportunity to elect a candidate on account of race. E.g., Voinovich, supra (no Section 2 violation where Ohio does not suffer from racial block voting). Recently in Bartlett v. Strickland, a plurality of the Court clarified that the Gingles' numerosity precondition requires a sufficient number of minority voters to constitute a majority in the remedial district. 556 U.S. 1, __, 129 S. Ct. at 1246. In clarifying this requirement, the Court explained that recognizing a Section 2 claim where the minority population could not elect a candidate outright "would grant minority voters a right to preserve their strength for the purposes of forging an advantageous political alliance." Bartlett, at __, 129 S. Ct. at 1243 (internal citations omitted). "Nothing in § 2 grants special protection to a minority group's right to form political coalitions. Minority voters are not immune from the obligation to pull, haul, and trade to find common political ground." Id. (citing De Grandy, at 1020, 114 S.Ct. at 2647) (internal citations omitted). In other words, the preconditions require a plaintiff to show that creation of a majority-minority district is *the only way* to give minority voters an opportunity.

In this case, Defendants have packed black voters into election districts, not fractured them, so creation of majority-black districts is the offense, not the remedy. Federal courts have always recognized that packing is one of the evils Section 2 was designed to remedy. Id. "A problem under § 2 arises whenever *any* person is moved from one district to another to minimize the value of his vote and give an advantage to someone else." Gonzalez v. City of Aurora, Illinois, 535 F.3d 594, 598 (7th Cir. 2008). Defendants are correct that the Amended Complaint makes no attempt to satisfy the Gingles preconditions, but this objection fails to understand the injury at issue in this case. Defendants, not Plaintiffs, insist on creating majority-black districts rather than following race-neutral redistricting principles. In so doing, the Defendants effectively and purposely minimize the value of the Plaintiffs' votes and deny them equal access to the political process.

Section 2 places the initial burden on plaintiffs to show a state practice has the effect of denying equal access. Voinovich, at 155-56, 113 S. Ct. at 1156, (citing, 42 U.S.C. § 1973(b)). However, this case "bears the mark of intentional discrimination," because Defendants' redistricting scheme intentionally resegregates Plaintiffs and interferes with bi-racial coalitions that have formed as a result of natural population shifts and greater societal tolerance for racial differences. Defendants have denied Plaintiffs access to a race-blind political system at precisely the moment it is more fully emerging and evolving. See League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 440, 126 S. Ct. 2594, 2622, 165 L. Ed. 2d 609 (2006) (recognizing that limiting power just as a minority group is able to exercise it is intentional discrimination). Furthermore, Plaintiff's Section 2 claim is not foreclosed by Bartlett v. Strickland, because this case involves intentional race-based discrimination which the Bartlett holding did not reach. 556 U.S. at __, 129 S. Ct. at 1246 ("Our holding does not apply to cases in which there is intentional discrimination against a racial minority."). Section 2 "focuses exclusively on the consequences

of apportionment," and "says nothing about majority-minority districts" Voinovich, at 155, 113 S.Ct. at 1156. States must have a "strong basis in evidence" for creating additional majority-minority districts under the auspices of Section 2. Bush, at 977, 116 S. Ct. at 1960 (quoting, Shaw I). As such, any intentional interference with bi-racial coalitions by creating majority minority district implicates Section 2 as well.

Section 2's remedial protection was never intended to be an institutionalized practice. South Carolina's black community has engaged in precisely the type of "pulling," "hauling" and "finding common political ground" with white voters to allow them to elect candidates of choice in districts with less than fifty percent BVAP. For example, Sen. Floyd Nicholson (D-Greenwood), a black candidate, was elected to Senate District 10 in 2008 with a 31.86 percent BVAP. Sen. Gerald Malloy (D-Darlington), also a black candidate, was elected to Senate District 29 in 2008 with a 39.32 percent BVAP. The Senate redistricting plan raises Sen. Malloy's BVAP to 46.07 percent. Rep. Mia Butler (D-Richland), also a black candidate, was elected to House District 79 in 2010 with a 34.7 percent BVAP. Prior to her election, another black candidate represented House District 79. House Districts 12, 23, 49, 64, 102, 103, 111 and 122 are all represented by black candidates who were elected by overwhelming margins in 2010. All of these districts have been redrawn with BVAP percentages at or above 50 percent.[9]

Furthermore, a Senate report by Dr. Richard Engstrom, commissioned to support the Senate's preclearance submission, supports the conclusion that Defendants' efforts to maintain BVAP at or above 50 percent is not necessary due to both white and black willingness to support opposite race candidates as their candidate of choice. See Exhibit 14, Report by Richard Engstrom, PhD, Senate Preclearance Submission,

[9] The BVAP percentages for these districts ranged from 43.85 to 49.14 percent under the benchmark plan.

available at http://redistricting.scsenate.gov/PreclearanceExhibitsS815.html. (hereinafter "Engstrom Report"). The Engstrom Report found white support for black candidates as high as 31.5 percent, and concluded that there was sufficient crossover white voting to give an equal opportunity to elect a black candidate in a district with 33.3 percent BVAP. Engstrom Report, 5, 8. Without an opportunity to investigate further, Plaintiffs do not necessarily accept Dr. Engstrom's report as accurate. However, assuming for the sake of argument that it is accurate, the Engstrom Report suggests it is unnecessary to raise BVAP in districts represented by black candidates in light of significantly diminished racially polarized voting and an increased willingness by white voters to vote for black candidates.[10] The Engstrom Report also concludes that three white Senators have demonstrated themselves to be the black candidate of choice. Id. In short, the only analysis done by the state that *could* justify the need to race-based districts found that that three majority black districts prefer white candidates over black candidates and at two black candidates were elected, and continue to have an opportunity to be reelected in districts with BVAP as low as 33 percent.

In defending these racial gerrymanders, Defendants attempt to turn the Voting Rights Act on its head. "The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." Georgia v. Ashcroft, 539 U.S. 461, 490, 123 S. Ct. 2498, 2517 (2003) (citing De Grandy, at 1020, 114 S.Ct. at 2661; Shaw I, at 657, 113 S.Ct. at 2816). The House Defendants and Defendant McConnell claim that Section 5 of the Voting Rights Act requires the use of race to draw majority black districts and draw them as a certain percentage of BVAP.

[10] For example, Congressman Tim Scott is a black candidate who is not the black community's candidate of choice, but he is clearly the white community's candidate of choice having defeated three white challengers in a Republican primary, including the son of former governor Carroll Campbell and the son of Strom Thurmond.

Harrell Mem. Supp. Mot., 3; McConnell Mem. Supp. Mot. 24. Nothing in the Voting Rights Act requires this type of redistricting and this interpretation results in the unnecessary infusion of race rejected by the Supreme Court. See League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 445-46, 126 S. Ct. 2594, 2625 (2006); Ashcroft, 539 U.S., at 491, 123 S.Ct. at 2517 (Kennedy, J., concurring).

Section 5 "prevents nothing but backsliding" in the position of the minority community as compared to the minority community's position under the previous or "benchmark" plan. Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 335, 120 S. Ct. 866, 875 (2000). Congress assumed in passing the Voting Rights Act that racial prejudice would diminish over time and that the Voting Rights Act would "encourage the transition to a society where race no longer matters." See Ashcroft, 539 U.S. at 490-91, 123 S. Ct. at 2517. This would "at times require the drawing of district lines based on race" to prevent backsliding, Beer v. U. S., 425 U.S. 130, 144, 96 S. Ct. 1357, 1365 (1976), or correct a Section 2 violation. See Gingles, supra. A state cannot establish an arbitrary and predetermined percentage of what constitutes a BVAP necessary to maintain the minority community's ability to elect when attempting to comply with Section 5. See Bush v. Vera, 517 U.S. 952, 982-83, 116 S. Ct. 1941, 1963 (1996). Where a district's current BVAP under the benchmark plan is sufficient to afford black voters an *equal opportunity* to elect a candidate, a state may not augment that BVAP in order to create a guaranteed assurance for the minority community. Id. (State had no basis for increasing BVAP from 35.1% to 50.9%). "Nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success*." Bush v. Vera, 517 at 983, 116 S. Ct. at 1963. Ironically, the white Republican Speaker, the white Republican Senate President Pro Tempore, the white Republican Governor, and the other white Republican Defendants, attempt to position themselves in this litigation as the champions of Voting Rights Act while using it as a shield to defend their racial

gerrymander.

Defendants can point to no evidence for creating so many majority-minority districts, other than their pre-textual assertions that the Voting Rights Act compels a racial quota system.[11] "Racial gerrymandering, *even for remedial purposes*, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." Shaw I, at 657, 113 S. Ct. at 2832 (emphasis added).

Here, the Court has the unwelcome task of reviewing Defendants' redistricting plans to discern whether the plans give black voters less opportunity to elect candidates of choice by resegregating voters into election districts. Contrary to some Defendants' assertions, Plaintiffs claim no entitlement to the *creation* of crossover districts. Instead, Plaintiffs claim that Defendants' redistricting plans violate Section 2 because they "deliberately reduce the number of crossover districts," Am. Cmplt. ¶ 79, by ignoring traditional redistricting principles and using race to pack black voters into election districts. "Had Defendants followed traditional redistricting principles … they would have drawn racially integrated election districts that reflect the communities they represent." Am. Cmplt. ¶ 81. Defendants' race-based discrimination "prevents new crossover districts from naturally emerging through population shift." Am. Cmplt. ¶ 82. In short, crossover districts are creating themselves through natural population shifts and evolving societal attitudes toward race. Race-neutral redistricting principles would neither foreclose the existence of majority-black districts, nor compel their creation. The Supreme Court has long recognized the purpose of the Voting Rights Act, indeed the measure of its success, is its own increasing irrelevance as racial prejudices dissipate as a result of time and greater

[11] Speaker Harrell argues that, "Plaintiffs' challenge amounts to a claim that Section 2 … requires the State House and State Senate to eliminate or severely imperil the majority-minority districts contained within each of the Redistricting Plans…." Defendant Harrell Mot., 3.

integration. See Beer v. United States, 425 U.S. 130, 96 S. Ct. 1357 (1976).

III. The Fifteenth Amendment bars racially discriminatory redistricting laws.

The Fifteenth Amendment guarantees that "[t]he right of citizens of the United States to vote" shall not be "denied or abridged ... by any State on account of race, color, or previous condition of servitude." United States Const., Amend. 15, § 1. This protection is a "self-executing right" independent of any statutory cause of action created through the Fifteenth Amendment's remedial power. See Northwest Austin Mun. Utility Dist. No. One v. Holder, 557 U.S. 193, __, 129 S. Ct. 2504, 2508 (2009). Prior to the passage of the Voting Rights Act, the Supreme Court recognized that "[w]hen a legislature . . . singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment." Gomillion v. Lightfoot, 364 U.S. 339, 346-47, 81 S. Ct. 125, 130 (1960). Although courts have historically decided voting rights cases under the Fourteenth Amendment or the Voting Rights Act, the Fifteenth Amendment remains a means of redress in addition to the Voting Rights Act.

Recent decisions demonstrate that the Fifteenth Amendment remains a viable alternative to remedy racial gerrymanders, since the purpose of the Fourteenth and Fifteenth Amendments is to prohibit racial gerrymanders that threaten to "balkanize us into competing racial factions" and "carry us further from the goal of a political system in which race no longer matters." Shaw I, at 657, 113 S. Ct. at 2832. In Bartlett v. Strickland, the Court said that "a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, . . . would raise serious questions under both the Fourteenth and Fifteenth Amendments." Bartlett, 556 U.S. 1, 129 S. Ct. at 1249.[12] This is precisely the conduct complained of in Plaintiffs Amended Complaint.

[12] Additionally, the Amendment may redress injuries not prohibited by the Voting Rights Act since the Amendment's power must be at least equal that of a statute it authorizes.

IV. Plaintiffs have standing to challenge these laws in their entirety because the predominant factor motivating them is a racially-discriminatory scheme.

A plaintiff must have standing in order to ensure that the litigant has a sufficient stake in the controversy, Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992), and has not merely suffered a generalized grievance. See e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 102 S.Ct. 752, 758 (1982). This requires a plaintiff to allege an invasion of a legally protected interest held by a plaintiff that is concrete and actual, causally connected to the defendant's conduct, and redressed by a favorable decision. Lujan, at 560-561, 112 S.Ct. at 2136-37. See also United States v. Hays, 515 U.S. 737, 115 S. Ct. 2431, (1995).

A plaintiff may demonstrate individualized harm in two ways. First, because "[d]emonstrating the individualized harm our standing doctrine requires may not be easy in the racial gerrymandering context," a plaintiff may demonstrate individualized harm by merely residing in the district. Hays, at 744-45, 115 S. Ct. at 2436. Clearly, Mr. Backus, Mr. Brown, Ms. Buttone, Mr. Manigault, Mr. McKnight, Mr. Mims, Mr. Wallace, and Mr. Wilder have standing to challenge the redrawing of the districts in which they reside. Thus, they have standing to challenge House Districts 59, 67, 103, 102, 101, 82, 62 and 119, Senate Districts 29, 30, 32, 35, 37, and 43, and congressional districts 1, 2, 5, 6, and 7 by virtue of their residency. See Am. Complt. ¶¶ 8-15.

In this case, however, an exception to the general in-district rule also applies. All persons have a legal interest in not being subjected to race-based discrimination. United States Const. amends. XIV and XV; 42 U.S.C. § 1973. A plaintiff is harmed by the entire redistricting law if the predominant factor in drafting the law is race. See e.g., Miller, supra. A plaintiff challenging a redistricting plan in its entirety must show "specific evidence tending to support [the]

inference" that the plan as a whole is racially discriminatory. Id., at 744-45, 115 S. Ct. at 2436. In other words, a voter outside of a gerrymandered district must show they were subjected to a racial classification with evidence supporting that inference.

Plaintiffs have alleged that these laws are a statewide scheme that uses race to pack black voters into a few districts for the purpose of limiting their voting power to those districts. This conduct directly affects at least the seventeen House districts, three Senate districts, and one congressional district identified in the Amended Complaint. Am. Complt. ¶¶ 73-75. By packing these districts with BVAP, this scheme also impacts all districts neighboring the packed or manipulated districts. Black voters in neighboring districts see their vote devalued where BVAP is reduced and packed into preexisting majority-minority districts. Common sense dictates that increasing BVAP in a district that already elects a black candidate of choice does not enhance those voters' ability to cast a meaningful ballot. But minority voters in those neighboring districts in which BVAP is reduced, and packed into the majority-minority district, effectively forfeit their ability to enter into coalitions to elect a preferred candidate or to even influence an election. Consequently, those districts surrounding the manipulated or packed districts are the actual targets of Defendants' race-based conduct.

Plaintiffs allege the Defendants enacted this plan for the purpose of making race synonymous with political party and ensuring there would only be two types of districts: white and black. Am. Cmplt. ¶ 41. "[D]eliberate segregation of voters into separate districts on the basis of race" violates a litigant's "constitutional right to participate in a 'color-blind' electoral process." Shaw v. Reno, 509 U.S. 630, 641-42, 113 S. Ct. 2816, 2824 (1993). Where the state has applied a racial classification to the state as a whole, it threatens to do the sort of "lasting harm to our society," id. at 657, 113 S. Ct. at 2832, that injures plaintiffs inside and outside of the districts that were packed. Because the amended complaint challenges the legality of the

redistricting laws in their entirety and alleges harm that is not contained within a single district or two, Plaintiffs have standing to challenge the entire scheme.

V. Defendants' have no Eleventh Amendment immunity from suit under the Fourteenth or Fifteenth Amendments or from the Voting Rights Act.

Several Defendants claim they are entitled to immunity under the Eleventh Amendment. State of South Carolina Mot., 2-3; Haley Mem. Supp. Mot., 2-3; Ard Answer ¶ 37-38 (without citing basis for immunity). While the Eleventh Amendment entitles states to some immunity, no state or state official acting under the color of state law is immune from suits arising from the Fourteenth Amendment, the Fifteenth Amendment, or the Voting Rights Act. Whatever immunity a state may have under the Eleventh Amendment "does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with constitutional design." Alden v. Maine, 527 U.S. 706, 755, 119 S.Ct. 2240, 2265 (1999). The Fourteenth, Fifteenth, and Sixteenth Amendments were passed specifically to limit the power of states and prevent them from denying black citizens their constitutional rights. See Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666 (1976).

Eleventh Amendment immunity may also be abrogated by statute so long as Congress expresses its clear intent to abrogate state immunity, Green v. Mansour, 474 U.S. 64, 68, 106 S.Ct. 423, 426 (1985), and acts pursuant to a valid exercise of power. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55, 116 S. Ct. 1114, 1123 (1996). Congressional acts passed pursuant to the remedial sections of the Civil War Amendments abrogate state immunity because when Congress passes laws pursuant to these sections it also exercises the authority of a constitutional amendment designed to limit state power. Fitzpatrick, supra, at 456, 96 S.Ct. at 2671. Consequently states and their officials are subject to suit arising out of violations of statutes

passed pursuant to Section 5 of the Fourteenth Amendment, id., and Section 2 of the Fifteenth Amendment. Katzenbach, at 308, 86 S. Ct. at 808 (Voting Rights Act is constitutional exercise of power under the Fifteenth Amendment); see also City of Rome v. United States, 446 U.S. 156, 100 S.Ct. 1548 (1980) (holding Congress had authority to regulate state and local voting under Voting Rights Act), superseded on other grounds in, Northwest Austin Mun. Utility Dist. No. One, supra.

Finally, Plaintiffs have requested attorneys' fees pursuant to 42 U.S.C. § 1983. Pursuant to Section 1983, plaintiffs are entitled to recover their attorneys' fees if they are a prevailing party. 42 U.S.C. § 1988(b). An award of attorneys' fees is not prohibited by the Eleventh Amendment because they are a permissible form of ancillary relief that Congress may authorize. Hutto v. Finney, 437 U.S. 678, 689, 98 S. Ct. 2565, 2572 (1978); Missouri v. Jenkins, 491 U.S. 274, 284, 109 S.Ct. 2463, 2469 (1989) ("We reaffirm our holding in Hutto v. Finney that the Eleventh Amendment has no application to an award of attorneys' fees … against a state.").

VI. Defendants Haley, Harrison and Clemmons are not entitled to Legislative Immunity.

Defendant Haley and Defendants Harrison and Clemmons claim legislative immunity from suit. Haley Mem. Supp. Mot., 4; Harrison and Clemmons Mem. Supp. Mot., 2. However, legislative immunity merely protects members of a legislative body from personal liability resulting from the exercise of their official duty. See e.g., U.S. v. Johnson, 383 U.S. 16986 S.Ct. 749 (floor speech could not give rise to criminal liability); Tenney v. Branhove, 341 U.S. 367, 71 S.Ct. 783 (1951) (no civil liability for committee members examining witness).

A state official may be sued in their official capacity in order to enjoin enforcement of an unconstitutional statute. Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, (1908); Waste Management Holdings, Inc. v. Gilmore, 252 F.3d 316, 329 (4th Cir. 2001) (citing Alden, supra,

at 727–28, 119 S.Ct. at 2240). As explained above, Plaintiffs' claims are explicitly authorized by the Constitution and statutes abrogating state immunity. Furthermore, Defendants Haley, Harrison, and Clemmons have a "special relationship" to the challenged laws. Waste Management Holdings, Inc. v. Gilmore, 252 F.3d 316, 329 (4th Cir. 2001) (citing Ex parte Young, 209 U.S. at 157, 28 S.Ct. 441). As explained below, Defendant Haley is an essential party in this litigation because of her ability to sign bills into law or veto them. Defendants Harrison and Clemmons are architects of the laws at issue here. Their respective Committee and Subcommittee are responsible for drafting the redistricting plans eventually adopted by the full House with relatively minor changes to the overall scheme as originally drafted by Defendants Harrison's and Clemmons' committees.

Finally, because these Defendants are sued in their official, and not personal, capacities, the need to insulate them from liability and the justification for doing so does not apply. Legislators engaged in legislative activity "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." Dombrowski v. Eastland, 387 U.S. 82, 85 (1967). Here, there are no personal consequences to these Defendants that would chill their future legislative speech or conduct and the House is providing their defense as the real party in interest. For these reasons, they are not entitled to legislative immunity and should not be dismissed.

VII. Defendants Haley, Andino, and State Election Commissioners are necessary parties.

Defendants Haley, State Election Commission Executive Director Andino, and Commissioners Hudgens, Bensch, Bowers, Pinson, and Waring[13] have all been sued in their

[13] The State Election Commission Defendants indicated in their Local Rule 26.01 Answers to Interrogatories that Ms. Pinson and Ms. Bensch are no longer serving on the State Election Commission and have been replaced by Mr. Mark Benson and Ms. Nicole S. White. The State

official capacity and are necessary parties to this lawsuit. Rule 19 of the Federal Rules of Civil Procedure requires joinder of a party when "in that person's absence, the court cannot accord complete relief among existing parties" or "that person claims an interest relating to the subject of the action" and their absence would impair that person's ability to protect their interest. Fed. R. Civ. P. 19(a)(1)(A)-(B)(i).

Defendant Haley is the state's Chief Executive responsible for executing the laws of the state, including the laws at issue here. S.C. Const. art. IV, § 15. The State Election Commission Defendants' duties include conducting elections. State Election Commission Defendants Mem. Supp. Mot., 4. The Court should retain jurisdiction over Defendant Haley and the State Election Commission Defendants in order to ensure its ability to grant complete relief. Plaintiffs seek an injunction preventing the state from conducting elections under Acts 71, 72, and 75. Am. Complt. ¶ 94.

Defendant Haley is also responsible for signing the legislation at issue here. S.C. Const. art. IV, § 21. Any order striking down the redistricting laws may require new legislation, passed by the General Assembly and signed by the Governor. Defendant Haley cites Colleton Co. in support of her assertion that "primary responsibility" for the laws at issue in this case rests with the General Assembly, Haley Mem. Supp. Mot., 4. However, the Colleton Co. litigation arose as a result of then-Governor Hodges's refusal to sign redistricting legislation and the resulting legislative impasse. 201 F. Supp. 2d 618 (D.S.C. 2002). Defendant Haley's role and interest in the challenged laws and in any subsequent laws required as a result of an order issued by this Court is more than merely "ministerial." Haley Mem. Supp. Mot., 4. Rule 19 requires that Defendant Haley remain a party in this suit.

Election Commission Defendants have suggested, and Plaintiffs agree and consent, that the Court substitute Mr. Benson and Ms. White pursuant to Rules 17(d) and 25(d) of the Federal Rules of Civil Procedure.

VIII. This Court has personal jurisdiction over Defendant Ard.

Defendant Ard alleges that this Court lacks personal jurisdiction over him. Ard Answer ¶ 40. Plaintiffs are unaware of any facts that support a claim that this Court's exercise of personal jurisdiction over South Carolina's Lieutenant Governor. Plaintiffs demand strict proof supporting this claim.

CONCLUSION

When the factual assertions set forth in the Amended Complaint are accepted as true they state a facially plausible claim for relief. Furthermore, the facts alleged permit the court to draw the reasonable inference that the Defendants are liable for the misconduct alleged. In addition, Plaintiffs have standing as black voters both targeted by a statewide racial gerrymander and residing in districts that are both packed and affected by packed districts. No Defendant is entitled to dismissal for any alleged immunity or privilege and all are necessary by virtue of either their conduct or necessity to grant complete relief. For these reasons, as well as those additional reasons set forth more fully above, Plaintiffs submit all of the Defendants' motions to dismiss should be **DENIED**.

Respectfully submitted by:

s/ Richard A. Harpootlian
Richard A. Harpootlian (Fed. ID # 1730)
rah@harpootlianlaw.com
Graham L. Newman (Fed. ID # 9746)
gln@harpootlianlaw.com
M. David Scott (Fed. ID # 8000)
mds@harpootlianlaw.com
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Post Office Box 1090
Columbia, SC 29202
Telephone: (803) 252-4848

Facsimile: (803) 252-4810

ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina
December 28, 2011