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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EVAN MILLIGAN, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 2:21-cv-1530-AMM
	)	
Hon. WES ALLEN, in his official capacity as Secretary of State, *et al.*,	)	**THREE-JUDGE COURT**
	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

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The Voting Rights Act is considered by many to be "the most successful civil rights statute" in this nation's history. *Allen v. Milligan*, 599 U.S. 1, 10 (2023). Still, the VRA is a statute subject to the same interpretative principles as any other law, including when determining who can enforce it and what it means to violate it. When moving to dismiss, Defendants discussed at length a handful of Supreme Court decisions that shed light on these questions—namely, *City of Boerne v. Flores*, *South Carolina v. Katzenbach*, *Chisom v. Roemer*, *Whitcomb v. Chavis*, and *White v. Regester*. Plaintiffs either ignore these cases or suggest the decisions do not apply, but they are mistaken. Their Section 2 claim should be dismissed.

Plaintiffs' claim of intentional vote dilution, if anything, fares even worse. When challenging the 2021 Plan, Plaintiffs put on expert evidence that the *maximum* BVAP possible for District 2 in a "race-neutral plan" was 39.7% and that deviations beyond these maximum values constituted racial gerrymandering. Doc 68-4 ¶41. Now, after seeing that District 2's BVAP under the 2023 Plan is 39.93%, Doc. 329 ¶4, Plaintiffs allege intentional discrimination because it wasn't ten points higher. But by their own lights, such an "outlier" plan would have been a racial gerrymander. *See* Doc. 69 at 26-27 (Plaintiffs arguing that "outlier" BVAP "alone shows that HB1 used race as a predominant factor to crowd Black voters in District 7").

Plaintiffs likewise assert intentional discrimination by accusing the Alabama Legislature of "protecting white communities," based on a reference to "French and

Spanish colonial heritage" of Mobile and Baldwin Counties. Doc. 329 ¶187. Yet Plaintiff NAACP simultaneously (and successfully) argued in Louisiana that § 2 *justifies* districting together a "community… influenced by French colonialism," *Nairne v. Ardoin*, No. CV 22-178-SDD-SDJ, 2024 WL 492688, at *18 (M.D. La. Feb. 8, 2024), and argued to the Supreme Court that South Carolina racially gerrymandered by dividing a "coastal community" between two districts. Plaintiffs' dizzying reversals point out one of several obvious alternative explanations for the 2023 Legislature's action besides racial discrimination: the desire to avoid a racial gerrymandering claim. Plaintiffs' allegations, if true, would not rule out that and other obvious explanations, so their claim fails.

ARGUMENT

I. Section 2 Is Not Privately Enforceable.

A. *Morse* Is Inapposite.

The "search for Congress's intent" "to create a private right of action" to enforce Section 2 begins and ends with the "text and structure" of the Voting Rights Act. *Alexander v. Sandoval*, 532 U.S. 275, 288, 289 (2001). Plaintiffs turn first to a fractured Supreme Court decision employing an "abandoned" method of interpretation to find a *different statute* privately enforceable. *Id.* at 287. Five Supreme Court Justices have agreed that Section 10 of the VRA contains a private cause of action. *Morse v. Republican Party of Va.*, 517 U.S. 186, 234-35 (1996) (plurality opinion);

id. at 240 (Breyer, J., concurring in the judgment). When it comes to private plaintiffs suing under Section 10, *Morse* "directly controls," *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 484 (1989), and Defendants do not suggest that "more recent cases have, by implication, overruled" it, *Agostini v. Felton*, 521 U.S. 203, 237 (1997). *Contra* Doc. 337 ("Response") at 18. Instead, Defendants argue merely that legal or factual assumptions that "go beyond the case … may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. State of Virginia*, 19 U.S. 264, 399 (1821) (declining to recognize *dicta* in *Marbury v. Madison* as binding).

The question whether Section 2 contains a private right of action has never been presented to the Supreme Court. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring). "Lower courts have treated this as an open question." *Id.* And Defendants respectfully submit that Justices Stevens's and Breyer's assumptions about Section 2 in *Morse* went "beyond the case" and have not settled the question here. *Cohens*, 19 U.S. at 399. Given both opinions' reliance upon "congressional purposes" and "contemporary legal context," *Sandoval*, 532 U.S. at 287, *Morse* is appropriately understood as a "moribund," "discredited," and "gravely wounded" decision outside the context of its Section 10 holding,

Jefferson County v. Acker, 210 F.3d 1317, 1320 (11th Cir. 2000). It should not be extended. *Id.*[1]

Plaintiffs' reliance on *Morse* echoes many of the unavailing arguments made by the plaintiffs in *Sandoval*. *Compare, e.g.*, Response at 13 ("The Supreme Court has consistently read the VRA to authorize a private right of action and recognized Congress's codification of this right," *with* Brief for Appellees at 14, 23, *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), 1999 WL 33619019 ("The Supreme Court has consistently indicated that a private right of action is available to enforce regulations issued pursuant to Title VI" and "Congress … ratified private enforcement of disparate impact regulations."). There, the plaintiffs relied on *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983)—a "fragmented" decision—and several others building upon it for the proposition that "a private right of action was available to enforce" Title VI's disparate impact regulations. *See id.* at 15-16. They also argued that the "regulations were uniformly viewed as privately enforceable," and Congress could have changed that view when amending Title VI, but it did not. *Id.* at 26; *see also* Brief for Respondents at 32-37, *Sandoval*, 532 U.S. 275, 2000 WL 1846068.

[1] There is currently no directly controlling circuit precedent. Plaintiffs cite one vacated Eleventh Circuit opinion and *dictum* from one unpublished opinion. *See* Response at 15; *see also Los Angeles Cnty. v. Davis*, 440 U.S. 625, 634 n.6 (1979) (A vacated opinion has no "precedential effect.").

The Supreme Court in *Sandoval* rejected these arguments. Noting that it is "bound by holdings, not language," the Court refused to give precedential weight to *dicta* from earlier Title VI cases. *Sandoval*, 532 U.S. at 282. The Court also rejected the "congressional ratification" argument by noting that none of its decisions had actually decided the issue before Congress amended Title VI. *Id.* at 291. And even if Congress was on notice of the prevailing view, it would be "impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation." *Id.* at 292.

Like the *Sandoval* plaintiffs, the *Milligan* Plaintiffs argue that: (1) *dicta* from a fragmented decision controls; (2) private plaintiffs have been bringing these suits for decades; (3) and the "ball is in Congress's court." These arguments fell short in *Sandoval*; they should here as well.

B. Plaintiffs' Textual Arguments Fail.

Plaintiffs' approach to the VRA's text likewise fails. *See Ark. State Conf. NAACP v. Ark. Bd. of Apportionment ("Arkansas NAACP")*, 86 F.4th 1204 (8th Cir. 2023). Their textual argument hinges on Section 3, which recognizes certain remedies in proceedings instituted by "the Attorney General or an aggrieved person" in actions brought "under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10302. Because Section 2 enforces the Fifteenth Amendment, Plaintiffs jump to the conclusion that a private right of action

for that provision must exist. But that reading begs the question by assuming that actions may be instituted under Section 2 in the first instance. Instead, the phrase "a proceeding under any statute" "most reasonably refers to statutes that already allow for private suits," like Section 5 and 42 U.S.C. § 1983, because "instituting a proceeding requires the underlying cause of action to exist first." *Arkansas NAACP*, 86 F.4th at 1211; *see also Morse*, 517 U.S. at 289 (Thomas, J., dissenting).

Even more troubling, Plaintiffs would read Section 3 as creating "new private rights of action for every voting-rights statute that did not have one, including § 2." *Id.* at 1212; Response at 21. In other words, Plaintiffs posit that Congress, by adding the phrase "or an aggrieved person" when amending Section 3 in 1975, intended to "transform the enforcement of 'one of the most substantial' statues in history by the subtlest of implications." *Arkansas NAACP*, 86 F.4th at 1213. "Congress typically does not 'hide elephants in mouseholes,'" *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 274 (2023), or stealthily "alter sensitive federal-state relationships" in "areas of traditional state responsibility," *Bond v. United States*, 572 U.S. 844, 858 (2014). Plaintiffs' interpretation is implausible.

And by Plaintiffs' own logic, if "an aggrieved person" can sue under every voting-rights statute, then so can the Attorney General, who is named first in Section 3. But that's not right. Private parties may vindicate their constitutional voting rights under statutes like § 1983, but the Attorney General cannot do so on their

behalf. *Cf. Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 711-12 (2003). Section 3 should not be read in a way that would create such inconsistencies. The better interpretation is that "Private plaintiffs can sue under statutes like 42 U.S.C. § 1983, where appropriate, and the Attorney General can do the same under statutes like § 12. And then § 3 sets the ground rules in the types of lawsuits each can bring." *Arkansas NAACP*, 86 F.4th at 1213.[2]

C. The Voting Rights Act Only Enforces Preexisting Rights.

Plaintiffs' opening salvo avoids the big question—whether Section 2 creates privately enforceable federal rights. Nowhere do they identify "with particularity" the new right Congress supposedly created. *Blessing v. Freestone*, 520 U.S. 329, 342 (1997). Instead, they confuse the "fundamental" "distinction between rights and remedies," *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384 (1918), by asserting that Congress created rights when it passed this "remedial, preventative legislation" to enforce the Reconstruction Amendments, *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). Because Plaintiffs have not shown that Section 2 confers "new individual rights" "in clear and unambiguous terms," the basis for their private suit evaporates. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286, 290 (2002).

[2] Plaintiffs' reliance on Sections 12(f) and 14(e) is misplaced for essentially the same reasons as their reliance on Section 3. *See* Response at 22-26; *see also Arkansas NAACP*, 86 F.4th at 1210, 1213 n.4.

Plaintiffs turn the law on its head by suggesting that when it comes to the VRA, "a violation of a federal *law*," not the "violation of a federal *right*," is enough to get into court through the § 1983 door. *Id.* at 282; Response at 30, 32 (whether Section 2 creates rights or remedies is "irrelevant"). That is patently incorrect. The critical question for private enforcement under § 1983 is "whether Congress *intended to create a federal right.*" *Gonzaga*, 536 U.S. at 283.

Plaintiffs have not successfully identified any new right Congress created in Section 2. They note that Section 2 protects the "right to an undiluted vote." Response at 31 (quoting *Shaw v. Hunt*, 517 U.S. 899, 917 (1996)). But protecting an existing right is not creating a new one, and the right to be free from racial vote dilution is a constitutional right recognized by the Supreme Court before the VRA was enacted. *See Reynolds v. Sims*, 377 U.S. 533, 558 (1964). Also, there is no presumption of § 1983 enforceability just because a statute "speaks in terms of 'rights.'" *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 18-20 (1981). To enjoy the presumption, the statute must unambiguously *create* rights.

Plaintiffs also accuse Defendants of "mistak[ing] the creation of a prophylactic right of individuals to be free from racial vote dilution in service of the Fifteenth Amendment with a remedy." Response at 32. They suggest Section 2 created a right to be free from dilutive *effects*, a new right distinct from the underlying constitutional one. *Id.* But the Court in *South Carolina v. Katzenbach* described over and over the

"new remedies" Congress created in the VRA to protect the constitutional right to vote free from discrimination. 383 U.S. 301, 308 (1966). Nowhere did the Court hint at new rights.[3] And even after "Congress amended the Act in 1982 in order to relieve plaintiffs of the burden of proving discriminatory intent," *Chisom v. Roemer*, 501 U.S. 380, 403 (1991), the Voting Rights Act remains a statute to enforce the rights guaranteed by the Constitution, not new rights guaranteed by the Voting Rights Act.

This is not just semantics; the "distinction between rights and remedies is fundamental." *Chelentis*, 247 U.S. at 384. Only federal *rights* are enforceable under § 1983. *Gonzaga*, 536 U.S. at 282. Because the VRA creates new remedies, not new rights, it should be no surprise that the VRA "lists only one plaintiff who can enforce § 2: the Attorney General." *Arkansas NAACP*, 86 F.4th at 1208. As the Court concluded in *Katzenbach*, "After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively." *Katzenbach*, 383 U.S. at 337. Consistent with Congress's remedial power, the

[3] The federal government states that Section 2, by virtue of its placement in the United States Code, "created a new individual *statutory* right." Statement of Interest at 13. But the United States never explains why Congress would bother to merely "codify the Fifteenth Amendment"—already enforceable under § 1983—in Section 2. *Id.* Commonsense and the VRA's structure suggest that it would be only to do something new, namely, allow the Attorney General to enforce the Fifteenth Amendment. *See Arkansas NAACP*, 86 F.4th at 1211. The United States' other arguments largely repeat those made by Plaintiffs.

VRA's text does not display a congressional intent to create privately enforceable rights. Plaintiffs Section 2 claim should be dismissed.

II. Plaintiffs Fail To State A Claim Under The Text Of Section 2.

Plaintiffs accuse Defendants of attempting to remake Section 2 jurisprudence anew. Response at 33. To the contrary, Defendants appropriately focus on the text of the statute they have allegedly violated and the two Supreme Court cases from which that text was pulled to elucidate its meaning. These arguments do not challenge *Gingles* or *Milligan*, and the Senate Factors still apply.

Defendants' point is that the Senate Factors, by themselves, neither define the phrase "less opportunity … to *participate* in the political process," nor state how much evidence is required to make such a showing. 52 U.S.C. § 10301(b) (emphasis added). Where the challenged electoral system is not "equally open," the Senate Factors, though "neither comprehensive nor exclusive," *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986), should "confirm liability," *Veasey v. Abbott*, 830 F.3d 216, 306 (5th Cir. 2016) (en banc) (Jones, J., concurring in part and dissenting in part).

Right off the bat, Plaintiffs question the relevance of *Whitcomb* and *White* to the Section 2 inquiry, going so far as to state that the results test applied in *Whitcomb* and *White* "is simply not the standard applied by the Supreme Court and circuit courts." Response at 35. This flies in the face of the Supreme Court's recognition in *Chisom v. Roemer* that Section 2's results test "is meant to restore the pre-*Mobile*

standard … employed in *Whitcomb* … and *White*." 501 U.S. 380, 394 n.21 (1991) (quoting S. Rep. No. 97-417, at 27 (1982), and *Thornburg v. Gingles*, 478 U.S. 30, 83-94 (1986) (O'Connor, J., concurring in judgement)); *see also id.* at 397-98. Plaintiffs do not address this conclusion from *Chisom*.[4]

Because the phrase "participate in the political process" "is obviously transplanted from another legal source," standard rules of statutory interpretation mandate that "it brings the old soil with it." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019). Thus, *Whitcomb* and *White* are far from irrelevant; they inform what the text means. The two decisions speak with a unified voice: "less opportunity … to participate in the political process" means "being denied access to the political system," *Whitcomb*, 403 U.S. 124, 155 (1971), in other words, being excluded "from effective participation in political life," *White*, 412 U.S. 755, 769 (1973).

In *White*, black voters of Dallas County, Texas, voted Democrat, but a combination of at-large elections and a "white-dominated organization … in effective control of Democratic Party candidate slating" shut them out. 412 U.S. at 766-67. Likewise, the Mexican-American residents of Bexar County were excluded from

[4] Also, the lower courts have widely acknowledged that Congress, when amending section 2, "scrap[ped] the 'intent' test imposed by *City of Mobile v. Bolden*" and "insert[ed] in its place the 'results' test earlier adumbrated in *White v. Regester* and *Whitcomb v. Chavis*." *Uno v. City of Holyoke*, 72 F.3d 973, 982 (1st Cir. 1995); *see also Johnson v. DeSoto Cnty. Bd. of Com'rs*, 204 F.3d 1335, 1346 n.23 (11th Cir. 2000); *Nipper v. Smith*, 39 F.3d 1494, 1517 (11th Cir. 1994) (en banc) (plurality opinion); *Chapman v. Nicholson*, 579 F. Supp. 1504, 1506-07 (N.D. Ala. 1984).

"effective participation" due to "cultural incompatibility … conjoined with the poll tax and the most restrictive voter registration procedures in the nation." *Id.* at 768-69. This explained why their "voting registration remained very poor in the county" and why the county's "delegation in the House was insufficiently responsive to Mexican-American interest." *Id.* at 768.

In *Whitcomb*, black voters in Marion County, Indiana, faced electoral defeat year after year, but there was no evidence that they suffered an unequal "opportunity to participate and influence the selection of candidates and legislators." 403 U.S. at 149, 153. That's because nothing in the record suggested they were not "allowed" to register and vote, choose the party they desired to support, participate in its affairs, and have an equal vote when the party's candidates were chosen. *Id.* at 149-50.

All three minority groups—black voters in Dallas County, Mexican-Americans in Bexar County, and black residents in Marion County—experienced socioeconomic disparities and persistent political defeat. But the political process was closed to two and open to one. The difference was that the black residents in Marion County had access to those traditional means of political participation like registering, voting, and engaging in the activities of their preferred political party, while their Texas counterparts did not. Thus, plaintiffs alleging that an electoral system is not equally open must allege the bare minimum—that they face *more inequality* in

terms of those traditional methods of participation than did black Indianians in 1960s Marion County. If they cannot, then they necessarily fail to state a claim.

Plaintiffs' allegations do not show that the political system is more closed to black voters of 2020s Alabama than it was for black residents of 1960s Marion County. Thus, their Section 2 claim should be dismissed.

III. Plaintiffs Fail To State A Claim Of Intentional Vote Dilution.

Plaintiffs attempt to lower the standard for establishing intentional vote dilution. They misrepresent a recent decision from this Court. They refuse to acknowledge that the 2023 Plan bears the very same features as their own "race-neutral plan." They assume any opposition by Republicans to Democratic bills is because of race. And they deride as pretextual the Legislature's stated goal of keeping together the Gulf Coast community of interest. Simultaneously, other NAACP state chapters, represented by many of the same lawyers, argue that the Constitution and VRA *require* other States—namely, Louisiana, North Carolina, and South Carolina—to respect coastal communities of interest and communities "influenced by French colonialism." (Plaintiffs then accuse *Defendants* of "faux outrage.") Tapping the *Arlington Heights* bases with speculative, conclusory, and insufficient allegations does not relieve Plaintiffs of their burden to plead allegations sufficient to rule out obvious alternative explanations to intentional discrimination.

As an initial matter, Plaintiffs cite "*Milligan*" and "*Milligan II*" as "recent examples of discrimination by the State." Response at 42 n.10. There was no finding of "intentional discrimination" in those two decisions, so they are irrelevant for this inquiry. *League of Women Voters of Fla. Inc. v. Fla. Sec'y of State ("League")*, 66 F.4th 905, 922 (11th Cir. 2023). Far worse, Plaintiffs state that the court in *People First of Alabama v. Merrill* found that "some state officials were 'motivated by racial bias in enacting a witness requirement." Response at 42 n.10 (quoting *People First*, 491 F. Supp. 3d 1076, 1173-74 (N.D. Ala. 2020)). The quoted "finding" was actually that "some state officials still were" "motivated by racial bias" "*in the 1990s*." *People First*, 491 F. Supp. 3d at 1173 (emphasis added). The court, in what was a discriminatory *effects* case, acknowledged that these examples were "certainly 'outdated.'" *Id.* at 1174. Moreover, *People First* involved a limited challenge to certain voting laws "as applied" during a once-in-a-century pandemic. State laws that had previously been affirmed by the Eleventh Circuit were declared unconstitutional for 2020. *See, e.g.*, *id.* at 1151-52. And "the court emphasize[d] that its decision does not undermine the validity of the Challenged Provisions outside of the COVID-19 pandemic or beyond the November [2020] election." *Id.* at 1093. Thus, the decision is plainly insufficient as evidence of "discriminatory Alabama voting laws." Doc. 329 ¶135.

Regardless, "it cannot be that Alabama's history bans its legislature from ever enacting otherwise constitutional laws about voting." *Greater Birmingham Ministries v. Sec'y of State for State of Ala. ("GBM")*, 992 F.3d 1299, 1325 (11th Cir. 2021). That's because Plaintiffs' burden is to plausibly show that the *2023* Legislature, as a whole, was moved to act by "purposeful, invidious discrimination." *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009); *see also Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021). Clearing this hurdle is a "problematic and near-impossible challenge." *GBM*, 992 F.3d at 1324. Plaintiffs insist that they pleaded "ample" and "detailed facts implicating" the *Arlington Heights* factors, which, in their view, should be "more than enough at the pleading stage" to overcome the near-impossible. Response at 38-39. But *quality*, not *quantity*, is what matters. *See Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground [of improper legislative motive].").

Plaintiffs' allegations, if true, do not rule out "more likely explanations." *Iqbal*, 556 U.S. at 681. Plaintiffs say these are "issue[s] for trial." Response at 45. That's not the law—just look at *Iqbal*—and to push it down the road would ignore the presumption of good faith owed the Legislature at every stage of litigation. *See Simpson v. Hutchinson*, 636 F. Supp. 3d 951, 957 (E.D. Ark. 2022) (three-judge court) (noting alternatives and dismissing an intentional vote dilution claim on the

pleadings). Between the "obvious alternative explanations," which can be dispositive at the pleading stage, and "the purposeful, invidious discrimination [Plaintiffs'] ask [this Court] to infer, discrimination is not a plausible conclusion." *Iqbal*, 556 U.S. at 682.

Plaintiffs' own expert evidence from earlier in this case and the accusations their lawyers and related parties have leveled against other States' redistricting efforts, underscore the most likely explanation for the Legislature's actions: the desire to avoid a racial gerrymandering suit. *See Fusilier v. Landry*, 963 F.3d 447, 464-65 (5th Cir. 2020) ("The choice to evade claims of racial gerrymandering … does not reveal discriminatory intent."); *see also id.* at 264 ("[A]pplying the presumption of good faith, it seems perfectly reasonable for legislators to be concerned about traditional districting principles and the prejudicial effects of racial gerrymandering.").

Plaintiffs refuse to acknowledge that, when challenging the 2021 Plan as a racial gerrymander, they requested a map with three specific features to ensure "that Black voters are no longer artificially denied electoral influence in a second district." Doc. 69 at 36. This "race-neutral plan" would decrease District 7's BVAP to "around 50%," increase District 2's BVAP to "almost 40%," and would keep Montgomery County whole. *Id.* Their expert, Dr. Imai, ran 10,000 "race-blind simulated plans" and conducted an "outlier analysis of Districts 2 and 7." Doc 68-4 ¶¶25, 27. He concluded that based solely on District 7's high BVAP, "race was the predominant

factor in drawing the district." *Id.* ¶28. He also found that if he lowered District 7's BVAP to 50-51%, the average BVAP for District 2 in a race-blind simulation was 34.5% and the *maximum* was 39.7%. *Id.* ¶41.

Now Plaintiffs accuse the Legislature of intentionally discriminating against black Alabamians by failing to increase District 2's BVAP far beyond the maximum percentage a race-blind map could possibly contain. The much more likely, indeed the obvious, explanation for the Legislature's choice is the belief that it would violate our color-blind Constitution to do so, or at least that it would invite a racial gerry-mandering attack.

Moreover, community-of-interest arguments used by other NAACP state chapters against other States underscore the no-win situation States face when navigating "competing hazards of liability" in redistricting and obvious alternative explanations for the 2023 Plan. *Abbott v. Perez*, 585 U.S. 579, 587 (2018). The Alabama NAACP (and other *Milligan* Plaintiffs) assail "the alleged Gulf Coast community," Doc. 329 ¶186, but had the Legislature split that coastal community comprising Alabama's two Gulf counties to increase the BVAP in District 2, the Legislature would have done precisely what Plaintiffs' lawyers argue in separate litigation violates the Constitution, the VRA, or both. Thus, the Legislature's decision not to split those communities further suggests the reason for the 2023 Plan was not intentional discrimination, but the desire to avoid a constitutional challenge.

Currently, the South Carolina NAACP is arguing in the United States Supreme Court that South Carolina's legislature racially gerrymandered its congressional map in part by "exiling many more residents—particularly in heavily Black North Charleston—from their economically integrated coastal community …. As a result, thousands more Black Charlestonians were reassigned to CD6, a district anchored more than 100 miles away in Columbia." Brief for Respondents at 16-17, *Alexander v. S.C. State Conf. of the NAACP* (No. 22-807). That sounds a lot like breaking up Mobile and Baldwin Counties to connect "the City of Mobile and the Black Belt." Doc. 329 ¶5.

And in Louisiana, the Louisiana NAACP put on expert evidence of one distinct community of interest among the Red River Parishes "influenced by French colonialism because early French settlement resulted in French being the dominant language and Catholicism becoming the dominant faith in the territory among White and Black people." *Nairne v. Ardoin*, 3:22-cv-178, 2024 WL 492688, at *18 (M.D. La. Feb. 8, 2024) (quoting Colton Report, ECF No. 198-208). Louisiana's failure to keep this community together contributed to a Section 2 violation, they argued. The court agreed. Yet in Alabama, the Alabama NAACP sees a reference to "French and Spanish colonial heritage" as an attempt to keep "counties together based on race." Doc. 329 ¶187.

Similarly, the North Carolina NAACP recently sued North Carolina, arguing that the split of the State's "coastal community" is evidence of intentional discrimination. *See* Complaint ¶140, *North Carolina State Conf. of NAACP v. Berger*, 1:23-cv-01104 (M.D.N.C. Dec. 19, 2023) ("In both Senate Districts 1 and 2, Black Belt counties are paired with coastal communities hundreds of miles away …. These coastal communities have different needs and interests from the Black Belt."); *see also id.* ¶191 ("The move itself also created unprecedented consequences, breaking up the coastal congressional district that, for the past three decades, had united Camden and Currituck with other coastal counties to elect a candidate to Congress."). So, again, in North Carolina (like in South Carolina), plaintiffs contend that dividing a coastal community between districts is viewed as evidence of an Equal Protection violation.

* * *

In sum, Plaintiffs are in the same shoes as Javaid Iqbal, whose "allegations [were] consistent with" the Attorney General and FBI Director "purposefully designating detainees 'of high interest' because of their race, religion, or national origin," but who still failed to "plausibly establish this purpose," in light of "more likely explanations." *Iqbal*, 556 U.S. at 681.[5] Particularly where Plaintiffs have already

[5] Indeed, Plaintiffs face an even tougher task because it is "near-impossible" to prove that secret discriminatory intent infects an entire legislature. *GBM*, 992 F.3d at 1324.

described a map like the 2023 Plan as "race-neutral" and where Plaintiff Alabama NAACP's other chapters (represented by many of Plaintiffs' lawyers) have told at least three other federal courts that splitting coastal communities or other communities united by "colonial heritage" violates the Constitution or VRA, the alternative explanations for the 2023 Plan are particularly obvious. Because Plaintiffs' allegations do not plausibly show that these legitimate reasons were pretextual, their intentional vote dilution claim should be dismissed.

CONCLUSION

The Amended Complaint should be dismissed.

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CERTIFICATE OF SERVICE

I certify that on March 21, 2024, I electronically filed the foregoing notice with the Clerk of the Court using the CM/ECF system, which will send notice to all counsel of record.

s/ Edmund G. LaCour Jr.
Counsel for Secretary Allen