IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

JAMILA JOHNSON, et al. Plaintiffs, v. KYLE ARDOIN, in his official capacity as the Acting Secretary of State of Louisiana, Defendant	Case No. 18-625-SDD-EWD

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs brought the instant suit under § 2 of the Voting Rights Act ("VRA") to enjoin the dilution of their votes for U.S. Representative. Rather than address the merits of these Louisiana voters' claims, the chief elections officer of Louisiana seeks dismissal of their suit on a myriad of baseless grounds, all of which should be rejected. Defendant's contention that this claim is improperly before a single district judge ignores the plain language of 28 U.S.C. § 2284, which limits the jurisdiction of three-judge panels to constitutional claims, not VRA claims. Defendant's challenge to Plaintiffs' standing, moreover, fails to recognize the legal standard for § 2 claims and ignores the Secretary's duties and responsibilities to implement election laws across the state. And the contention that the Complaint fails to state a claim ignores numerous allegations that, taken as true, prove the claims asserted. Finally, Defendant fails to even approximate satisfying his burden to establish the affirmative defense of laches. Accordingly, Defendant's motion should be denied.

II. LEGAL STANDARD

A Rule 12(b)(1) attack on subject matter jurisdiction requires the court to accept the

sufficiency of the allegations as true. Fed. R. Civ. P. 12(b)(1). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [the court] 'presum[es] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted).

A motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. A complaint does not require detailed factual allegations; it simply must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

III. ARGUMENT

A. Defendant's Jurisdictional Challenges Under Rule 12(b)(1) Fail

1. This case is properly before a single district judge

Defendant recognizes Plaintiffs "have not brought a racial gerrymandering claim [under the Fourteenth Amendment to the U.S. Constitution] and have instead brought a claim solely under § 2 of the [VRA]." Mot. at 9; *see also id.* at 10. He contends, however, that this objective fact is a design of "artful pleading" by Plaintiffs in an apparent effort to "skirt the provisions of 28 U.S.C. § 2284" and "avoid[] a three-judge panel" by "not *expressly* mentioning constitutional claims." *Id.* at 2, 3 n.1. Defendant's rhetoric far outstrips reality. The reason Plaintiffs do not "mention[] constitutional claims," expressly or otherwise, is because their claim falls squarely within—and is brought solely under—§ 2 of the VRA. Indeed, it is Defendant who "artfully" avoids any discussion or analysis of either the plain language of 28 U.S.C. § 2284 or the significant legal and practical differences between constitutional and statutory redistricting claims.

Pursuant to 28 U.S.C. § 2284, "[a] district court of three judges shall be convened when

otherwise required by Act of Congress, or when an action is filed *challenging the constitutionality* of the apportionment of congressional districts or the apportionment of any statewide legislative body" (emphasis added). Under the plain language of the statute, therefore, three-judge courts are convened only where plaintiffs raise constitutional claims, not statutory claims as alleged here.

Defendant does not argue otherwise. Rather, he pivots from the unambiguous statutory language to the purported reasons the statute cannot possibly mean what it says. But Defendant's attempt to leapfrog over the text of the statute finds no basis in the cannons of statutory interpretation. *See, e.g., United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of [the statute] begins where all such inquiries must begin: with the language of the statute itself. In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms.") (citation omitted); *In re Matter of Hammers*, 988 F.2d 32, 34 (5th Cir. 1993) ("The most certain expression of legislative intent in nearly every instance is the words of the subject statute. We may not look beyond them when, taken as a whole, they are rational and unambiguous."). The fact that Defendant's novel jurisdictional argument is "an issue of first impression," Mot. at 2, is hardly remarkable since the plain language of the 70-year-old statute provides no basis for dispute on this point.

Defendant's effort to conflate Plaintiffs' statutory § 2 claim with a constitutional redistricting claim is similarly meritless. The Supreme Court has repeatedly made clear that § 2 vote dilution claims are separate and distinct from racial gerrymandering claims brought under the Constitution. *See Miller v. Johnson*, 515 U.S. 900, 911 (1995) (a claim of racial gerrymandering is "analytically distinct" from a vote dilution claim); *Bethune-Hill v. Va. State Bd. of Elections*, 141 F.Supp.3d 505, 512 (E.D. Va. 2015) (same), *aff'd in part and vacated in part*,137 S.Ct. 788 (2017);

Ala. Legislative Black Caucus, 989 F. Supp. 2d 1227, 1290 (M.D. Al. 2013) (same); *see also LULAC v. Perry*, 548 U.S. 399, 432-33 (2006) (district court's analysis of compactness "for equal protection purposes" is "inapposite" "[u]nder § 2," which "embraces different considerations"). Plaintiffs here allege vote dilution under § 2. "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). In *Gingles*, the Court identified three necessary preconditions for a § 2 claim of vote dilution: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group must be "politically cohesive"; and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 50-51. Once these are established, the statute directs courts to consider whether, under the totality of the circumstances, members of a racial group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. 52 U.S.C. § 10301(b). The Senate Report on the 1982 amendments to the VRA identifies several non-exclusive factors that courts should consider when determining if, under the totality of the circumstances, the operation of the electoral device being challenged violates § 2.

Notably, § 2 does not require proof of intentional discrimination (or any intent at all); rather, "[u]nlike discrimination claims brought pursuant to the Fourteenth Amendment, Congress has clarified that violations of Section 2(a) can 'be proved by showing discriminatory effect alone.'" *Veasey v. Abbott*, 830 F.3d 216, 243 (5th Cir. 2016) (quoting *Gingles*, 478 U.S. at 35)), *cert. denied*, 137 S. Ct. 612, 197 L. Ed. 2d 78 (2017).[1] The remedy for a § 2 vote dilution claim is the

[1] In 1982, Congress specifically amended § 2 to clarify that there was no discriminatory intent requirement, superseding the Supreme Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55, 61-62 (1980), which held that

creation of one or more additional districts in which minority voters have the opportunity to elect their preferred candidates. *See Bush v. Vera*, 517 U.S. 952, 993 (1996) (principles underlying § 2 "may require a State to create a majority-minority district where the three *Gingles* factors are present") (O'Connor, J., concurring).

By contrast, none of these issues are elements of a racial gerrymandering claim. Constitutional racial gerrymandering claims are adjudicated under a different legal standard, address a different legal harm, and provide a different legal remedy. Racial gerrymandering claims are "district-specific," *Ala. Leg. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015), and plaintiffs who bring them under the Equal Protection Clause of the Fourteenth Amendment must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," *Bethune-Hill*, 137 S. Ct. at 794; *see also Vieth v. Juberlirer*, 541 U.S. 267, 285(2004) ("In the racial gerrymandering context, the predominant intent test has been applied to the challenged district in which the plaintiffs voted."). Once plaintiffs have shown that a given district was drawn with race as the predominant purpose, the burden shifts to the State to demonstrate that its districting legislation is narrowly tailored to achieve a compelling state interest. *Bethune-Hill*, 137 S. Ct. at 801. In other words, racial gerrymandering plaintiffs must satisfy a "demanding" standard to establish racial predominance, *Miller*, 515 U.S. at 928 (O'Connor, J., concurring); *see also id.* at 916 (noting "evidentiary difficulty" of proving legislature was "motivated by" racial considerations), and states must satisfy strict scrutiny, the "most rigorous and exacting standard of constitutional review," to justify their race-based line-drawing, *id.* at 920.

---

both the Fifteenth Amendment and § 2 of the VRA require proof of intentional discrimination. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1196 & n.18 (1999). Today, unlike § 2 claims, claims brought under the Fifteenth Amendment must establish discriminatory purpose or motivation. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991).

Critically, the remedy for a racial gerrymandering claim is *not* the creation of an additional majority-minority district (as Plaintiffs request here); it is the creation of a map that remedies the legislature's unjustified sorting of voters based on race. *See Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 565 (E.D. Va. 2016) (adopting remedial map based on neutral, traditional criteria). Plaintiffs' § 2 claim is thus analytically and practically distinct from a constitutional claim. Defendant's attempt to strongarm Plaintiffs into a claim they are not making—or into proving allegations they do not need pursuant to an inapplicable standard —is unavailing.[2]

The Third Circuit in *Page v. Bartels*, 248 F.3d 175 (3d Cir. 2001), does not support Defendant's novel theory that § 2 claims are the equivalent of constitutional claims for jurisdictional purposes.[3] In *Page*, plaintiffs challenged a districting map on both § 2 *and* constitutional grounds, with their claim "rest[ing] principally" on the state's dismantling of existing majority-minority districts. Appellants' Br. in Supp. of Mot. to Stay Pending Appeal, 2001 WL 34554549, at *24-25 (3d Cir. April 19, 2001). The *Page* court thus set out to determine whether the plaintiffs' lawsuit, alleging both statutory and constitutional violations, "constitutes 'an action . . . challenging the constitutionality of . . . the apportionment of any statewide legislative body' within the meaning of § 2284(a)." 248 F.3d at 186. The court concluded that because the two claims attacking the legislative map were "inextricably intertwined," "those claims should be considered a single 'action' within the meaning of § 2284(a)." *Id.* at 190. "Thus, *when a single district judge is presented with both types of claims*, he or she may not resolve the [VRA] issues in isolation while

[2] Defendant's suggestion that § 2 claims are interchangeable and interdependent with constitutional claims is undermined by numerous standalone § 2 cases, *see, e.g.*, *Luna v. Cty. Of Kern*, 291 F. Supp. 3d 1088 (E.D. Cal. 2018); *Ga State Conference of NAACP v. Gwinnett Cty. Bd. of Registrations and Elections*, No. 1:16-cv-02852-AT, 2017 WL 4250535 (N.D.Ga. May 12, 2017), as well as cases bringing solely constitutional claims, *see, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, No. 3:14-cv-852, 2018 WL 3133819 (E.D. Va. June 26, 2018); *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017).

[3] Indeed, although Defendant's argument calling for a three-judge court is based entirely on this case, even Defendant recognizes (as he must) that "the holding and underlying facts in *Page* are not entirely on point." Mot. at 3 n.2.

reserving the constitutional claims to a three-judge district court; rather, the single district judge should adhere to the limitations on his [or her] authority imposed by § 2284(b)(3)." *Id*. (emphasis added). Where the legal "action" consists of only one claim, however, and that claim is statutory—as is the case here—then it is properly decided by a single district court judge. The *Page* holding thus has no bearing on this case.[4]

In response, Defendant contends that when 28 U.S.C. § 2284 was narrowed in 1976 to require that three-judge courts hear challenges to the "constitutionality" of apportionment plans, there was no cause of action for apportionment plans under § 2 because the 1982 amendments to the VRA had not yet been passed. Mot. at 4-5. But even if apportionment plans were not commonly challenged under § 2 until after the 1982 amendments to the VRA,[5] Congress has had more than three decades to amend either § 2 or 28 U.S.C. § 2284 to mandate that § 2 claims be decided by a three-judge court, including in 1984 when it made other amendments to 28 U.S.C. § 2284.[6] It has not done so. Accordingly, the plain language of § 2 and the three-judge statute must govern.

Defendant requests an immediate certification of interlocutory appeal of this issue under 28 U.S.C. 1292(b), stating that the question of whether a three-judge panel is required is "significantly important" and "vital to the judicial economy of this matter." Mot. at 5. Defendant's desire to throw sand in the gears of this litigation with a baseless interlocutory appeal, however, does not render his unsupported legal theory "significantly important." As demonstrated, there can be no genuine

[4] Further, as the *Page* court pointed out, certain sections of the VRA specifically require a three-judge panel to be convened. *See* 52 U.S.C. § 10304 ("Any action under this section [5] shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 . . . ."); *id.* § 10306 (same, with respect to the statutory prohibition on the payment of poll taxes). Section 2 does not contain similar language.

[5] Defendant's claim that Section 2 was not available for reapportionment challenges prior to 1982 is dubious at best. *See, e.g.*, *United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 553 (5th Cir. 1980) (finding complaint stated cause of action because § 2 "was intended to provide the Attorney General with a means of combatting the use of at-large districting plans to dilute the [minority] vote").

[6] *See* 28 U.S.C. § 2284 (amended in 1984, Pub. L. 98-620, striking out provision that the hearing had to be given precedence and held at the earliest practicable day).

dispute as to the meaning of 28 U.S.C. 2284.[7] Undoubtedly, the reason why this issue has not come up before is because the language of the statute is clear: § 2 claims are statutory, and thus 28 U.S.C. § 2284 does not apply. *See, e.g.*, *Singh v. Daimler-Benz*, AG, 800 F. Supp. 260, 263 (E.D. Pa. 1992) (finding insufficient grounds to grant interlocutory appeal of jurisdictional question where plain language of statute supported the court's jurisdiction), *aff'd* 9 F.3d 303 (3d Cir. 1993).

2. Plaintiffs have standing to bring their claims

i. All Plaintiffs have standing because their votes are diluted by Louisiana's 2011 Congressional Plan ("the Plan")

Defendant contends that Plaintiffs lack standing because they have not alleged—and in the case of the Plaintiffs residing in CD 2, cannot allege—that they "would actually live" in the second majority African-American congressional district that Plaintiffs seek as a remedy for the § 2 violation. Mot. at 10. Defendant's argument, however, fails to cite the proper standard for establishing standing to bring a § 2 claim.

Voters who live in "cracked" (CDs 5 and 6) and "packed" (CD 2) districts, like Plaintiffs, have standing to bring a § 2 challenge. *Gingles*, 478 U.S. at 46 n.11 (vote dilution "may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority"). To establish standing, a § 2 plaintiff must "show that he or she (1) is registered to vote and resides in the district where the discriminatory dilution occurred; and (2) is a member of the minority group whose voting strength was diluted." *Comm. for a Fair & Balanced Map v. Illinois Bd. of Elections*,

[7] Notably, the test under 28 U.S.C. 1292(b) is not one of "significant[] importan[ce]." Mot. at 5. Rather, the court must evaluate whether: (1) there is a controlling question or law at issue, and (2) "substantial ground for difference of opinion." 26 U.S.C. 1292(b). Although Defendant bears the burden of demonstrating these grounds, he has not made any argument supporting either. *See, e.g.*, *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). Moreover, given that Defendant has not presented even one case indicating that a standalone § 2 claim must be heard before a three-judge panel, and the plain language of 28 U.S.C. § 2284 states otherwise, there is simply no ground supporting a purported difference of opinion, must less a substantial one. Thus, this question should not be certified for appeal.

No. 1:11-CV-5065, 2011 WL 5185567, at *1 n.1 (N.D. Ill. Nov. 1, 2011). Courts have held that § 2 plaintiffs satisfy standing requirements where they allege that they "reside in a reasonably compact area that could support additional [majority-minority districts]." *Pope v. Cty. of Albany*, No. 1:11-CV-0736, 2014 WL 316703, at *5 (N.D.N.Y. Jan. 28, 2014). This "includ[es] those in existing [majority-minority districts]." *Id.* The "personalized injury" that § 2 plaintiffs face is dilution of their "individual voting power" by the creation of fewer majority-minority districts for the "sufficiently numerous and geographically compact minority population." *Id.*

Defendant's standing challenge, by contrast, rests on the rule established for racial gerrymandering claims, not § 2. *See* Mot. at 9 (citing *United States v. Hays*, 515 U.S. 737 (1995)); *see Pope*, 2014 WL 316703, at *6 (rejecting d reliance on *Hays* because "*Hays* was not a Section 2 case, but a challenge to a redistricting plan on Equal Protection grounds"). Defendant's failure to even cite a § 2 case in support of his argument, let alone articulate the proper bases for §2 standing, reveals the fundamental flaws in his argument.[8]

Moreover, Defendant asserts that the Complaint does not state sufficient facts to demonstrate that CD 5 and 6 Plaintiffs would be included in a new majority-minority district, as many districts split parishes when they are drawn. Mot. at 10-11. As set forth above, Plaintiffs' allegations that they reside in a parish that would support an additional majority-minority district, *see* Compl. ⁋⁋ 19-23, are sufficient to satisfy standing. *Pope*, 2014 WL 316703, at *5. Nonetheless, Plaintiffs' Complaint further discusses the two maps that were proposed during the 2011 legislative session, Compl. ¶ 33, which demonstrate that the entirety of East and West Feliciana and St. Helena

[8] Defendant also asserts that Plaintiff Johnson does not have standing because she has not yet voted in an election in CD 2. Mot. at 8 n.4. This argument misunderstands the standing requirement. Where Plaintiff Johnson is a registered voter, intends to vote, and her vote will certainly be diluted, she has standing to bring this action as the harm she faces is imminent, rather than hypothetical or skeptical. *Lujan*, 504 U.S. at 561.

Parishes[9]—all parishes in which the Plaintiffs in CDs 5 and 6 reside—could be included in a new majority-minority district.[10] Taken as a whole, the Complaint alleges ample facts to demonstrate Plaintiffs' standing.

In any event, Plaintiffs have now filed an Amended Complaint which clearly alleges that they live in geographic areas that could constitute part of a new majority African-American congressional district in Louisiana as a remedy for the § 2 violation. *See* Am. Compl. ¶¶ 9, 19-25, 35, 93. Accordingly, Defendant's standing argument on these grounds is now moot. *See* Fed. R. Civ. P. 15(a)(1)(B); *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994) (amended complaint "supersedes the original complaint").

ii. The Secretary of State is the proper defendant as the harm is fairly traceable to him and he is necessary to redress Plaintiffs' harm

Defendant's standing arguments with respect to traceability (i.e., causation) and redressability are contrary to decades of precedent and do not support dismissal. To have Article III standing at the pleading stage, plaintiffs must allege "an injury-in-fact caused by a defendant's challenged conduct that is redressable by a court." *K.P. v. LeBlanc*, 627 F.3d 115, 122 (5th Cir. 2010) (citing *Lujan*, 504 U.S. at 560–61). Causation and redressability "will exist when a defendant has 'definite responsibilities relating to the application of' the challenged law." *Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816, 828-32 (S.D. Tex. 2012) (quoting *K.P. v. LeBlanc*, 627 F.3d at 124), *rev'd and remanded sub nom. on other grounds, Voting for Am., Inc. v. Steen*,

[9] While the original Complaint does not include a Plaintiff from St. Helena, the Amended Complaint, discussed herein and filed at the same time as this response, does. *See* Fed. R. Civ. P. 15(a)(1)(B) (allowing amendment as a matter of course within 21 days after service of Rule 12(b) motion).

[10] *See* SFAHB6 DIXONY 438, Senate Floor Amend. to HB 6 (2011), available at: http://www.legis.la.gov/legis/ViewDocument.aspx?d=739707 (last visited, Aug. 15, 2018); HFAHB6 2549 339, House Floor Amend. to HB 6 (2011), available at: http://www.legis.la.gov/legis/ViewDocument.aspx?d=735947 (last visited, Aug. 15, 2018); *Bynane v. Bank of New York Mellon for CWMBS, Inc. Asset-Backed Certificates Series 2006-24*, 866 F.3d 351, 361 n.8 (5th Cir. 2017) ("In deciding a motion to dismiss the court may consider documents attached to or incorporated in the complaint and matters of which judicial notice may be taken.").

732 F.3d 382 (5th Cir. 2013). This is because "[u]nder United States Supreme Court precedent, when a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant." *Am. Civil Liberties Union v. Fla. Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993) (citing *Diamond v. Charles*, 476 U.S. 54, 64 (1986) ("The conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic 'case' or 'controversy' within the meaning of Art. III.")). This rule is grounded in the principle that "a suit against a state officer in his official capacity is, of course, a suit against the State." *Diamond*, 476 U.S. at 57 n.2. Thus, when a plaintiff sues a state official in his official capacity, "a controversy exists not because the state official is himself a source of injury, but because the official represents the state whose statute is being challenged as the source of injury." *Wilson v. Stocker*, 819 F.2d 943, 946-47 (10th Cir. 1987).

This has been recognized for decades by numerous courts, including the Supreme Court, that have allowed cases with claims centering on the actions of the legislature—as Defendant characterizes the claim here, Mot. at 11-12—to proceed against the state officials enforcing the law. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Supreme Court reversed a dismissal of plaintiffs' Fifteenth Amendment claims, which plaintiffs had lodged against the local officials charged with enforcing an allegedly discriminatory map, even though it was the state legislature that allegedly passed the act with the intent to disenfranchise African-American voters. *Id.* at 340-41, 348. Notably, the Court did not even address standing, let alone suggest that the decision to name local officials (not the legislature) undermined plaintiffs' standing.

Likewise, redistricting cases challenging maps drawn by state legislatures routinely name as defendants the state officials responsible for enforcement of the electoral maps. *See, e.g.*, *Bethune-Hill*, 2018 WL 3133819 (racial gerrymandering case against members of Virginia State

Board of Elections); *Page*, No. 13-678, 2015 WL 3604029 (same); *League of Women Voters of Michigan v. Johnson*, No. 17-14148, (E.D. Mich. 2017) (suit against Secretary of State asserting that 2011 state legislative and congressional maps are unconstitutional partisan gerrymanders). Indeed, the Secretary of State of Louisiana has been expressly named as and found to be a proper defendant in similar VRA cases. *See, e.g.*, *Hall v. Louisiana*, 974 F. Supp. 2d 978, 990, 992–93 (M.D. La. 2013) (Secretary of State proper defendant in a VRA case where he "has some connection with the enforcement of the [] Plan" and "as the chief election officer in the state [ ] it c[ould] not be said that he would not be required to comply with the orders of th[e] Court in th[e] matter, or that he would not be involved in providing, implementing, and/or enforcing whatever injunctive or prospective relief may be granted"); *Clark v. Marx*, No. CIV.A. 11-2149, 2012 WL 41926, at *5 (W.D. La. Jan. 9, 2012) (claims against Secretary of State properly asserted).

The instant case is no different. The Secretary is the State's chief election officer. LA Const. art. 4, § 7. In that capacity, he is responsible for preparing and certifying the ballots for all elections, promulgating all election returns, and administering the election laws. *Id.* This includes the administration of and enforcement of all congressional elections taking place under the Plan.[11] Plaintiffs have alleged that they are injured by the Plan because elections administered and enforced by the Secretary are held under the Plan. Because the Secretary enforces the map, not only is he the proper defendant in this case, but also Plaintiffs' injuries are fairly traceable to him as he "represents the state whose statute is being challenged as the source of [Plaintiffs'] injuries." *Wilson*, 819 F.2d at 946-47.

Likewise, it is precisely because the Secretary enforces the Plan that he can redress Plaintiffs' claim as he has "some" connection to the challenged law. *Voting for Am., Inc.*, 888 F.

[11] For example, candidates seeking to qualify to run for U.S. Representative must qualify with the Secretary of State or his designee. La. R.S. §§ 18:452, 18:462.

Supp. 2d at 828-32. Indeed, were this Court to find the Plan to be in violation of § 2, it would *have* to enjoin the Secretary from holding elections under the map as there is no other person who would be able to stop such elections from taking place or to hold elections under a new, VRA-compliant map. Accordingly, not only is this action redressable by the Secretary, but his inclusion in this suit is necessary.[12]

B. Defendant's Rule 12(b)(6) Challenge Also Fails

1. Defendant's 12(b)(6) argument regarding "eligible voters" is both incorrect and moot

Defendant wrongly contends that Plaintiffs' assertion that African Americans in Louisiana can "constitute a majority of eligible voters in two congressional districts[,]" is insufficient to plead the first *Gingles* precondition, i.e., that "citizens of voting age" could form a majority. Mot. at 14. Courts routinely use the phrase "majority of eligible voters" when discussing the first *Gingles* precondition. *See* Am. Compl. at 3 n.1. To avoid unnecessary argument, however, Plaintiffs have filed an Amended Complaint to clarify the term's usage consistent with the first *Gingles* precondition, *see id.*, mooting Defendant's claim.

2. Plaintiffs have sufficiently alleged that African-American voters can constitute a reasonably compact majority

Defendant's argument that Plaintiffs fail to sufficiently allege that African-American voters can constitute a reasonably compact majority in two districts misunderstands the § 2 compactness inquiry and, if adopted, would require a heightened standard of pleading well beyond Rule 8's requirements. Read as a whole and with a proper understanding of the law, Plaintiffs' Complaint

[12] Were this Court to find otherwise, it would effectively force Plaintiffs in this suit (as well as plaintiffs in future litigations) to sue the state legislature and legislators, who are often protected from suit under the Eleventh Amendment and, in some cases, legislative immunity. *Compare Hall v. La.*, No. 12-00657-BAJ-RLB, 2015 WL 1475062, at *4 (M.D. La. Mar. 31, 2015) (Secretary of State is a proper party in case involving apportionment system for city judges), *with Hall v. La.*, 974 F. Supp. 2d at 954-55 (suit against legislature barred under 11th Amendment; legislature had no enforcement power; and legislature had absolute legislative immunity).

provides more than sufficient facts to demonstrate compactness.

As an initial matter, Defendant's compactness argument is premised on the assertion that at the pleading stage "[s]atisfying the first *Gingles* precondition—compactness—normally requires submitting as evidence hypothetical redistricting schemes in the form of illustrative plans." Mot. at 14-15. This premise is false. The Fifth Circuit cases that Defendant relies on for this do not evaluate the requirements for *pleading* compactness, but rather discuss the requirements for *proving* compactness—after a trial on the merits and a complete evidentiary record. *See id.* (citing *Gonzalez v. Harris County*, 601 Fed. Appx. 255, 258 (5th Cir. 2015) (per curium) (proof of compactness after four-day bench trial); *Fairley v. Hattiesburg*, 584 F.3d 660, 669 (5th Cir. 2009) (sufficiency of plaintiffs' proof of claims). To hold that an "illustrative plan," i.e., a proposed map, is required to sufficiently plead compactness would necessarily conflate the pleading standard for § 2 with an evidentiary standard. This is out of line with both the liberal pleading standards of Rule 8 and the Supreme Court's interpretation of the VRA. *See, e.g.*, *Chisom v. Roemer*, 501 U.S. at 403–04.

The one district court case that Defendant relies on for this proposition, *Broward Citizens for Fair Districts v. Broward County.*, No. 12-60317-CIV, 2012 WL 1110053 (S.D. Fla. Apr. 3, 2012), is an outlier. To Plaintiffs' knowledge, no other court has required an illustrative map at the pleading stage or cited *Broward* for this proposition. In fact, one court specifically rejected the *Broward* holding, finding that "requiring the submission of a proposed map with the complaint [extends] what is an evidentiary requirement for summary judgment to the pleading stage of litigation." *Luna v. County of Kern*, 2016 WL 4679723, at *5; *see also Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004) ("It is no accident that most cases under section 2 have been decided on summary judgment or after a verdict, and not on a motion to dismiss."). The court explained that such a requirement would necessarily force factual disputes and require expert analysis, effectively

requiring plaintiffs "to develop an unobjectionable map, before discovery even begins." *Luna*, 2016 WL 4679723, at *5.[13]

Defendant further assumes that because compactness could not be shown with respect to the majority-minority districts at issue in *Hays v. Louisiana*, 936 F. Supp. 360 (W.D. La. 1996)—a racial gerrymandering case from over two decades ago—there is little likelihood that Plaintiffs can demonstrate compactness here, effectively requiring a heightened pleading requirement. This argument fails. *First*, Defendant's bald assertion that "not much has changed in terms of population percentages" since *Hays*, Mot. at 16, ignores the facts. As alleged, in 2005 Louisiana experienced significant displacement of its population due to Hurricane Katrina, though its overall African-American population remained steady. Compl. ¶ 2. The inference that flows is obvious: as African Americans were displaced from the New Orleans area, their numbers grew more concentrated in other areas of the State, paving the way for a second majority-minority district in 2011 under a VRA-compliant map. Additionally, while population percentages, generally, might be similar, the second majority-minority district in *Hays* ignored traditional redistricting principles, cutting through contiguous parishes and carving out pockets of voters. 936 F. Supp. at 370. Plaintiffs here allege that a second majority-minority district can be drawn without doing so. Compl. ¶¶ 6-9.[14]

Second, Defendant's reliance on *Hays* to contend that any second majority-minority congressional district in Louisiana would constitute a racial gerrymander in violation of the Fourteenth Amendment, Mot. at 15-16, is both premature, *see Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1398-99, 1401 (E.D. Wa. 2014) ("If Defendants believe that the present proposal cannot

[13] In addition, the *Luna* court noted that the Eleventh Circuit case relied on in *Broward* for the proposition that a map is required at the pleading stage, *Burton*, 178 F.3d at 1199, was not, in fact, addressing a motion to dismiss. Rather, it was addressing the proof requirement at the summary judgment stage. *Luna*, 2016 WL 4679723, at *5.

[14] Notably, a simple comparison of the majority-minority maps proposed during the legislative session, *see supra* n.9, and the *Hays* maps demonstrates that a more compact district can be drawn. *Hays*, 936 F. Supp.at 373 (Appendix I).

pass muster under the Equal Protection Clause, they may raise that issue during the remedial phase of the proceedings."), and misunderstands the nature of racial gerrymandering claims, *see id.* at 1400-01.

Third, Defendant's argument reflects a fundamental misunderstanding of § 2's compactness requirement. In § 2 vote dilution cases, the focus is on "the compactness of the minority population," not a particular district. *LULAC v. Perry*, 548 U.S. at 433-34. "[T]he inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries." *Id.* (quotation marks and citations omitted). Under this framework, Plaintiffs have pleaded sufficient facts for the Court to infer a plausible § 2 claim. For example, the Complaint sets forth the substantial African-American voting age population residing in CDs 2, 5, and 6. Compl. ⁋ 8. It alleges that these districts include contiguous parishes, such as East and West Feliciana, St. Helena, Pointe Coupee, West Baton Rouge, and Avoyelles, fracturing the African-American voters within them across the districts, *id.* ⁋ 6; *see also id.* ⁋ 7 ("CD 6—which wraps almost entirely around CD 2—encompasses the remaining portions of the River Parishes that CD 2 left behind, while also including the African Americans that were excluded from CD 5."), and that "African Americans in Louisiana are sufficiently numerous and geographically compact to form a majority of eligible voters in a second congressional district—including but not limited to districts which track the current trajectory of CD 5 as well as districts respecting traditional North, Central, and South Louisiana divisions," *id.* ⁋ 9; *see also id.* ⁋ 91. Taken together, these facts are more than sufficient to infer that African Americans residing in a relatively compact area, and comprising traditional communities of interest (e.g., the Florida Parishes), are sufficiently numerous to form a second majority-minority district, and Plaintiffs plainly meet the requirements under Rule 8. *See Hall v. Louisiana*, 974 F. Supp. 2d at 992 (finding plaintiffs had successfully pleaded a § 2 claim based on

similar facts); *Luna*, 2016 WL 4679723 at *5 (same).[15]

C. Plaintiffs' Claim Is Not Barred By Laches

Defendant argues, in one paragraph without citation to the Complaint, that Plaintiffs' claim is barred by laches. It is not surprising Defendant gives this argument such short shrift. Because Plaintiffs seek prospective relief, laches does not apply. And even were that not so, Defendant fails to establish the essential elements of a laches defense.[16]

1. Laches Does Not Bar Claims for Prospective Relief

Defendant's argument fails because Plaintiffs seek prospective injunctive relief to protect their rights in future elections, and laches cannot bar such an action. *See Envtl. Def. Fund v. Marsh*, 651 F.2d 983, 1005, n.32 (5th Cir. 1981) ("laches may not be used as a shield for future, independent violations of the law" because "[t]he concept of undue prejudice, an essential element in a defense of laches, is normally inapplicable when the relief is prospective"); *see also Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1321 (11th Cir. 2008) ("[L]aches . . . bar[s] only . . . retrospective damages, not to prospective relief."). Thus, courts have not applied laches in voting rights cases, like this one, where plaintiffs seek prospective relief to address "ongoing" injury. *Garza v. Cty. of L.A.*, 918 F.2d 763, 772 (9th Cir. 1990); *Smith v. Clinton*, 687 F. Supp. 1310, 1312-13 (E.D. Ark. 1988) (action not barred by laches because "the injury alleged by the plaintiffs is continuing, suffered anew each time a State Representative election is held"). Here, Plaintiffs seek entirely prospective relief. *See* Compl. ¶ 95 (Secretary's actions represent ongoing violations under the VRA and "will continue to violate [Plaintiffs'] rights absent relief from this

[15] Although Plaintiffs submit that they have pleaded sufficient facts in their Complaint, Plaintiffs' Amended Complaint provides additional details regarding both districts proposed in the amendments to the Plan and the ability to create an even more compact majority-minority districts. Am. Compl. ¶¶ 9, 35.

[16] Because "laches is a *fact-intensive affirmative defense*, some courts consider it an 'unsuitable basis for dismissal at the pleading stage.'" *Spiral Direct, Inc. v. Basic Sports Apparel, Inc.*, 151 F. Supp. 3d 1268, 1280 (M.D. Fla. 2015) (emphasis added) (citation omitted). Thus, it is *only* where a "complaint on its face shows that . . . laches bars relief" that it may properly be dismissed under Rule 12(b)(6). *Id.* (citations omitted).

Court"). Thus, laches does not bar their claims.

2. Defendant Fails to Establish the Essential Elements of Laches

Even if laches could apply, it should not apply here. As Defendant recognizes, laches is only available when the party seeking to avoid liability establishes three essential elements: "(1) delay in asserting a right or claim; (2) that the delay was inexcusable; and (3) that undue prejudice resulted from the delay." *Elvis Presley Enters. v. Capece*, 141 F.3d 188, 205 (5th Cir. 1998) (quotations and alterations omitted). Defendant has the burden of establishing each element, *see La. Fish Fry Prods., Ltd. v. Bruce Foods Corp.*, No. 11-cv-557-JJB, 2012 WL 12930839, at *2 (M.D. La. June 15, 2012), and he fails to carry it.

i. Plaintiffs did not "inexcusably delay"

Defendant's assertion that Plaintiffs inexcusably delayed appears to center on the fact that a separate group of plaintiffs brought a separate redistricting action five years ago. *See* Mot. at 17 (citing *Buckley v. Schedler*, No. 3:13-cv-00763, (M.D. La. 2013)). Defendant is patently incorrect in asserting that "this claim" was previously filed. The *Buckley* case alleged racial gerrymandering against a single congressional district, *see* Compl., *Buckley, et al. v. Schedler*, No. 3:13-cv-763-SDD-RLB (M.D. La. 2013), ECF. No. 1 ¶ 32-33 (regarding Legislature's alleged racial motivations), while here Plaintiffs challenge the whole congressional plan as a violation of § 2 and seek the addition of a second majority-minority congressional district. Again, Defendant's argument is premised on a fundamental misunderstanding of Plaintiffs' § 2 claim.

Even if this were the same claim, Defendant cites no authority—nor are Plaintiffs aware of any—supporting his argument that because some Louisiana voter could have brought this claim earlier, these Louisiana voters may not do so now.[17] Defendant does not explain how a previous,

[17] *Buckley* was voluntarily dismissed three weeks after it was filed, before the court even considered the merits, much less rendered any decisions that could potentially bind future plaintiffs.

unrelated lawsuit bars future, unaffiliated plaintiffs from bringing suit. Courts may not impute knowledge of voting rights violations from one citizen to another.[18] *See Nader 2000 Primary Comm., Inc. v. Hechler*, 112 F. Supp. 2d 575, 579 n.2 (S.D.W.Va. 2000) (political candidate's delay in asserting First Amendment challenge did not apply to registered-voter co-plaintiffs).

Ultimately, Defendant's only argument regarding "inexcusable delay" is a lack of explanation from Plaintiffs. Mot. at 17. But Defendant's idle curiosity as to why Plaintiffs filed the present litigation does not satisfy his burden on this point, and his laches argument fails. *See, e.g.*, *Johnson v. Crown Enters., Inc.*, 398 F.3d 339, 344 (5th Cir. 2005) ("All that [appellees] argue is that [the appellant] waited too long [to file]. This argument does not satisfy their burden [of proving laches].").

3. Defendant has not suffered prejudice

Defendant also fails to establish prejudice. *See Law v. Royal Palm Beach Colony, Inc.*, 578 F.2d 98, 101 (5th Cir. 1978) (laches "depends on inexcusable delay causing undue prejudice to the party against whom the claim is asserted"). To establish prejudice, a party "must show a delay which has subjected him to a disadvantage in asserting and establishing his claimed right or defense, or other damage caused by his detrimental reliance on his adversary's conduct." *Id.*

Defendant asserts no such thing. Instead, he claims that both he ("and [the] people of Louisiana") are prejudiced by the purported delay because relief at this juncture would "throw[] the election machinery into disarray for the benefit of a single election." Mot. at 17. But any purported "disarray" would not be caused by the timing of Plaintiffs' suit; it would be merely the routine

[18] This is all the more true with respect to Plaintiffs Johnson, Rogers, Smith, and Hart, all of whom are new residents of their respective districts and, thus, cannot be charged with delay in asserting claims that did not even exist. *See Sinkfield v. Kelley*, 531 U.S. 28, 29 (2000) (plaintiffs who did not reside in majority-minority districts lacked standing to challenge district as unconstitutional gerrymander); *cf. Correll v. Herring*, 212 F. Supp. 3d 584, 617 (E.D. Va. 2016) ("[Plaintiff] could not have challenged a statute that allegedly impinges on the First Amendment rights of delegates when he was not a delegate.").

consequence of an adverse ruling on the merits. *See Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1058 (5th Cir. 1985) (rejecting laches where "prejudice would arise essentially from a decision on the merits . . . rather than from [] delay in bringing suit."); *Matter of Bohart*, 743 F.2d 313, 327 (5th Cir. 1984) ("Nor is there prejudicial harm merely because one loses what otherwise he would have kept; there must be a delay which causes a disadvantage in asserting and establishing a claimed right or defense."). He does not explain how any delay "puts him at a disadvantage" in asserting his defense, nor does he claim to have detrimentally relied upon Plaintiffs' inaction. Without explaining how he is prejudiced, Defendant cannot establish a laches defense. *Vineberg v. Bissonnette*, 548 F.3d 50, 58 (1st Cir. 2008) ("Proving prejudice requires more than the frenzied brandishing of a cardboard sword[.]").

Finally, Defendant waves away the alleged voting rights injury as relevant to only "a single election." Mot. at 17. But his indifference to Plaintiffs' asserted injury fails to appreciate the continuing nature of the § 2 violation. Plaintiffs are harmed anew with every election. *See, e.g.*, *League of Women Voters of N. C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress."). Every ballot cast under an unlawful plan threatens Plaintiffs' fundamental voting rights. That the chief elections officer views such harm as trivial because it is only incurred for "a single election" does not bode well for Louisiana's African-American voters, whose votes are diluted every time they cast their ballots.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's Motion to Dismiss.

Dated: August 21, 2018

Respectfully submitted,

s/Darrel J. Papillion
Darrel J. Papillion (Bar Roll No. 23243)
Renee C. Crasto (Bar Roll No. 31657)
Jennifer Wise Moroux (Bar Roll No. 31368)
WALTERS, PAPILLION,
THOMAS, CULLENS, LLC
12345 Perkins Road, Building One
Baton Rouge, LA 70810
Phone: (225) 236-3636
Fax: (225) 236-3650
Email: Papillion@lawbr.net
Email: crasto@lawbr.net
Email: jmoroux@lawbr.net

Marc Erik Elias (admitted pro hac vice)
Bruce V. Spiva (admitted pro hac vice)
Amanda R. Callais (admitted pro hac vice)
Perkins Coie, LLP
700 13th St. N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 654-6338
Fax: (202) 654-9106
Email: MElias@perkinscoie.com
Email: BSpiva@perkinscoie.com
Email: ACallais@perkinscoie.com

Abha Khanna (admitted pro hac vice)
Perkins Coie, LLP
1201 Third Avenue, Ste. 4900
Seattle, WA 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000
Email: AKhanna@perkinscoie.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2018, Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss was filed electronically with the Clerk of Court using the CM/ECF system.

s/ Jennifer Wise Moroux
Jennifer Wise Moroux