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, **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, **MARCI ANDINO**, in her capacity as Executive Director of the Election Commission, **JOHN H. HUDGENS, III**, Chairman, **MARK BENSON**, **MARILYN BOWERS**, **NICOLE S. WHITE**, and **THOMAS WARING**, in their capacity as Commissioners of the Elections Commission, **Defendants.**	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT GLENN F. MCCONNELL'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs respectfully submit the following memorandum in opposition to Defendant **MCCONNELL'S** motion for summary judgment and, pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, submit with it a declaration that Plaintiffs are unable to present facts

essential to justify their opposition to Defendant's motion because the discovery ordered by the Court in this case has not occurred.

Plaintiffs respectfully request that the Court deny Defendant **MCCONNELL'S** motion for summary judgment and instruct Defendant **MCCONNELL** not to file duplicative motions that merely distract Plaintiffs from the preparation of their case for trial. Additionally, Plaintiffs request that the Court instruct all Defendants to refrain from filing motions for summary judgment until after trial since some evidence will be unavailable prior to trial due to the expedited nature of this case.

FACTUAL BACKGROUND

Plaintiffs filed suit against the **STATE OF SOUTH CAROLINA**, Defendant **MCCONNELL**, and other state actors alleging violations of their constitutional rights under the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965, 42 U.S.C. §§ 1973, et seq. On December 19, 2011, Defendant **MCCONNELL** brought motions to dismiss for lack of jurisdiction and failure to state a claim and requested oral argument. ECF No. 55. Plaintiffs filed a timely response and the Court agreed to hear oral argument on January 19, 2012. Notice of Hearing, ECF 65. On January 17, 2012, prior to the hearing on Defendant's motion to dismiss, Defendant **MCCONNELL** filed this motion for summary judgment. ECF No. 73. The Court denied Defendant **MCCONNELL'S** motion to dismiss on January 19. Minute Entry, Jan. 20, 2012, ECF No. 76.

Pursuant to this Court's Scheduling Order, the only discovery conducted at this point has been the identification of the parties' expert witnesses and the exchange of their reports. ECF No. 66. The parties have not exchanged written discovery, nor have they deposed any witnesses.

ARGUMENT

Defendant **MCCONNELL'S** motion for summary judgment should be denied as premature pursuant to Rule 56(d) of the Federal Rules of Civil Procedure and controlling case law.

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552 (1986), U.S. ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co., 612 F.3d 724, 728 (4th Cir. 2010). Once a motion for summary judgment is filed, the nonmoving party may defeat it by showing that a genuine and material factual dispute exists by offering "depositions, answers to interrogatories, and admissions on file, [and] designate specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324, 106 S. Ct. at 2553 (internal citations omitted). Summary judgment is inappropriate where discovery has barely begun, Gay v. Wall, 761 F.2d 175, 177 (4th Cir. 1985), and where "the nonmoving party has not had the opportunity to discover information that is essential to his opposition." Evans v. Technologies Applications & Service Co., 80 F.3d 954, 961 (4th Cir. 1996). A party opposing summary judgment must have "a fair opportunity to discover essential information" necessary to defend against a motion for summary judgment. Evans, 80 F.3d at 961, see also Gay, 761 F.2d at 178 (district court abused its discretion by converting a 12(b)(6) motion into a motion for summary judgment where defendants only partially responded to interrogatories and claimed that much requested discovery was privileged). This result is mandated by the "plain language" of the rule that requires "adequate time for discovery" to the party with the burden at trial. Celotex, 477 U.S. at 322, 106 S.Ct. at 2552.

This Rule 56(d) declaration allows the Court to deny Defendant **MCCONNELL'S** motion for summary judgment. Fed. R. Civ. P. 56(d).[1] See Am. Chiropractic Ass'n v. Trigon Healthcare, Inc., 367 F.3d 212, 237 (4th Cir. 2004); Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 244 (4th Cir.2002). Normally a Rule 56(d) motion requires (1) a description of the particular discovery the movant intends to seek; (2) an explanation showing how that discovery would preclude the entry of summary judgment; and (3) a statement justifying why this discovery has not been obtained earlier. See Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd., 616 F.3d 1086, 1096 (10th Cir. 2010).

Here, since no discovery has occurred other than the exchange of expert reports, Plaintiffs seek the discovery they have already requested and the depositions already noticed for the days the Court ordered. Second, Plaintiffs believe the discovery sought will support the claims they have raised through a showing that race was the predominant factor in drawing Senate districts, thus invoking strict scrutiny review under equal protection, or that the plan is an intentional discriminatory effort to segregate voters. Third, Plaintiffs are proceeding with discovery in accordance with the Court's Scheduling Order. Defendant **MCCONNELL'S** motion for summary judgment is also duplicative and merely restates objections raised by his motion to dismiss, while also launching a preemptive attack on Plaintiffs' expert report (which was provided in the only discovery completed thus far).

This duplicative motion, filed before this Court even ruled on Defendant **MCCONNELL'S** motion to dismiss, is merely an effort to impede Plaintiffs' ability to prepare their case for trial. This Court has set an aggressive Scheduling Order for discovery and trial in this matter that is both reasonable and achievable. Procedural efforts to frustrate or delay the

[1] Prior to the 2010 amendments, Rule 56(d) was codified at Rule 56(f). It was recodified with no substantial changes. See Fed R. Civ. P. 56(d) committee note to 2010 Amendments.

progress of the case in the expeditious manner ordered by the Court should not be allowed and therefore this motion should be denied. Additionally, Plaintiffs respectfully request that the Court instruct Defendant **MCCONNELL** and all other Defendants not to file duplicative motions like this one. Plaintiffs also respectfully request an Order instructing Defendants to postpone all subsequent motions for summary judgment until the completion of trial. This is appropriate since it will be impossible to discover all relevant information prior to trial and Plaintiffs plan to present relevant information at trial that cannot be obtained during discovery.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request the Court deny Defendant **MCCONNELL'S** motion for summary judgment and instruct all other parties accordingly.

Respectfully submitted by:

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Columbia, South Carolina
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