IN 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,	)	Civil Action No. 3:11-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.	)	

DEFENDANT GLENN F. MCCONNELL'S OPPOSITION TO PLAINTIFFS' JANUARY 26 RESPONSE TO THE COURT'S ORDER ISSUED ON JANUARY 19 AND REPLY IN SUPPORT OF DEFENDANT MCCONNELL'S MOTION FOR SUMMARY JUDGMENT

Defendant Glenn F. McConnell files this brief as a combined response in opposition to Plaintiffs' supplemental filing on January 26 ("Supplemental Filing") and as a reply to Plaintiffs' Response in Opposition to Defendant McConnell's motion for summary judgment. Plaintiffs have offered no substantive reasons why summary judgment is not appropriate. Instead, they merely suggest it is premature. But quite the opposite is true: summary judgment is not only appropriate at this point, it is *compelled*. Less than three weeks from trial, Plaintiffs have provided no indication that they have any cognizable theory or evidentiary support for their claims. And because Plaintiffs have not laid the necessary legal or factual predicates for their claims, any further discovery would be irrelevant. Simply put, now that Plaintiffs have finally revealed that they are challenging only Senate Districts 21 and 25, summary judgment is plainly warranted because, among other things, they have no standing in District 21 and they have not offered the basic proof essential to support their intentional "packing" and dilution claims, *i.e.*, some opinion testimony and facts purporting to show what black population is needed to elect their candidate of choice.

After months of motions practice, oral argument, the production of an expert report, and discovery, Plaintiffs have provided no valid argument or evidence that the Senate Plan violates the Voting Rights Act or the federal Constitution. In fact, Plaintiffs have now had at least four opportunities to make a cognizable claim and have failed each time. Following oral argument on Defendants' Motions to Dismiss, this Court graciously granted Plaintiffs one last chance to state a basis for their lawsuit. But once again they have failed. All that Plaintiffs' latest filings prove is they have not stated a valid claim, they have no evidence to support the claims they purport to advance, and they have no standing to bring their challenge. This meritless, speculative and

internally inconsistent suit should end now that it is crystal clear that no *material* fact is disputed. Summary judgment should be entered in favor of Defendant Glenn F. McConnell.

I. PLAINTIFFS HAVE REPEATEDLY CONCEDED THAT THEY CANNOT MAKE OUT A VALID VOTE DILUTION CLAIM

Plaintiffs have staked their entire case on the allegation that the Senate Plan "packs" black voters into districts to dilute their voting strength. Yet, Plaintiffs have failed to plead or offer any evidence to prove the elements necessary to support this allegation, and they have openly admitted as much. For that reason alone, all of their claims must fail. Yet even beyond these fatal threshold flaws, Plaintiffs' latest filings and expert report demonstrate that they have made *no* effort to prove vote dilution, however defined. In fact, under the metric they suggest, the Senate Plan contains *more* black "crossover" or "influence" districts than Plaintiffs' proposed alternative. Because Plaintiffs do not even attempt to provide facts establishing in any way, under *any* standard, that the Senate Plan dilutes or otherwise impairs black voting strength, it is quite impossible to show that the Legislature *intended* the Plan to have this undefined and unsupported effect. Thus, Plaintiffs have offered no cognizable theory or material facts to support any of their claims and summary judgment should be entered in favor of Defendant McConnell.

1. In two separate court filings, Plaintiffs have candidly admitted they cannot satisfy the "preconditions" necessary to state a valid vote dilution claim set out in *Gingles v. Thornburg*, 478 U.S. 30, 50 (1986). *See* Pls.' Opp. to Defs.' Mots. to Dismiss at 18 ("Defendants are correct that the Amended Complaint makes no attempt to satisfy the *Gingles* preconditions."); Supplemental Filing at 6 ("Plaintiffs cannot satisfy the *Gingles* preconditions . . . ."); *id.* ("Plaintiffs openly concede that Section 2 does not give Plaintiffs entitlement to the *creation* of majority black districts or crossover districts."). As established in Defendant McConnell's prior

briefing, these concessions that Plaintiffs cannot satisfy either the first (majority-in-a-district) or third (white bloc voting) of the *Gingles* preconditions means that their Section 2 claims must be dismissed. *See* Mem. of Points and Auths. in Support of Def. McConnell's Mot. to Dismiss at 9-17 ("Mot. to Dismiss"); Reply in Support of Def. McConnell's Mot. to Dismiss at 3-7. Plaintiffs nonetheless continue to insist that their allegation of a *purposeful* effort to dilute minority voting power somehow excuses their failure, and keeps alive their Section 2 and constitutional claims. But, as Defendant McConnell's prior filings plainly establish, this is clearly not true for either Section 2 or the Constitution. *See, e.g.*, Mot. to Dismiss at 23-26.

Again, the claims of the plaintiffs in *Voinovich v. Quilter*, 507 U.S. 146 (1993), were *identical* to Plaintiffs' claims here. That is, the *Voinovich* plaintiffs alleged that Ohio had "*intentionally* diluted minority voting strength" by "packing" and "disregard[ing] the requirements of the Ohio Constitution" on neutral districting principles, thereby "depriv[ing] [minorities] of 'influence districts' in which they . . . could elect their candidate of choice if . . . their candidate attracts sufficient cross-over votes from white voters." *Id.* at 154, 158-159 (emphasis added). And the Supreme Court rejected their claims for failure to satisfy the third *Gingles* precondition. *See id.* at 158. Thus, it is clear as can be that the failure to satisfy the *Gingles* preconditions, particularly the third precondition for white bloc voting, is fatal to a Section 2 claim even if it is alleged that the dilution is purposeful. *See* Reply in Support of Def. McConnell's Mot. to Dismiss at 6-7. In short, the "clear holding in *Voinovich* forecloses . . . the plaintiffs' position, that discriminatory intent alone can violate § 2 even without discriminatory results." *Johnson v. DeSoto County Board of Commissioners*, 72 F.3d 1556, 1562 (11th Cir. 1996).

Plaintiffs' responses to this black letter law are meritless. First, Plaintiffs assert that *Voinovich* does not apply here "since Plaintiffs here do not seek the affirmative creation of a [sic] ability-to-elect district." Supplemental Filing at 5. To the contrary, Plaintiffs here seek precisely what the *Voinovich* plaintiffs sought (and obtained in district court); *i.e.*, the dismantling of state-created majority-black districts to "create" minority-black districts where blacks allegedly have the "ability to elect" candidates with the help of white crossover votes. *See, e.g.*, *Voinovich*, 507 U.S. at 150.

Second, Plaintiffs cite *Garza v. County of Los Angeles*, 918 F.2d 763, 766 (9th Cir. 1990) for the proposition that, "[t]o the extent that a redistricting plan deliberately minimizes minority political power, it may violate both the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment." But *Garza* was decided before *Voinovich* and, in any event, it is quite obviously true that deliberately diluting minority voting power "*may* violate" Section 2 or the Constitution, but only if Plaintiff establishes some evidentiary basis for concluding that the redistricting plan dilutes minority voting strength, *i.e.*, by satisfying the *Gingles*' preconditions, particularly the white bloc voting requirement. Thus, the Section 2 claims clearly must be dismissed.

2. On the constitutional question, it is true that the allegation of a deliberate effort to dilute minority voting strength is cognizable under the Fourteenth Amendment. The fatal flaw here is that Plaintiffs have simply offered *no proof* that could in any way support this allegation. Their supplemental filing consistently reaffirms that they are sticking to their original theory in alleging that "race was the predominant factor *because* the demographics of the plan show that Defendants *packed* additional black voters into districts contrary to natural population shift [sic] and contrary to traditional redistricting principles." Supplemental Filing at 4; *id.* at 7

("Defendants decided . . . to create as many majority black districts as possible . . . in an effort to reduce or eliminate the ability of black voters in bleached districts from influencing the outcome of those elections or deciding the outcome by joining together with members of the white community."); *id.* at 10 ("The Senate Plan [is] an intentional effort to marginalize black voting power by drawing the nine majority-minority Senate districts . . . to an arbitrary 50-percent BVAP standard.").

Thus, Plaintiffs are making only a purposeful *Voinovich* claim that majority black districts *harm* black voters by diluting their voting power through packing, and are not advancing the "analytically distinct" *Shaw* claim that the majority-black districts are unconstitutional because they "separate" or "segregate" black and white voters. *See* Mot. to Dismiss at 19-22. Indeed, although Defendant McConnell's Motion to Dismiss expressly argued that they cannot satisfy such a *Shaw* segregation claim, *id.* at 27-33, Plaintiffs do not in any way suggest that they could satisfy that standard or are advancing such a claim. Thus, having consciously decided to contend that the majority-black districts here deliberately harm black voters through "packing," in order to secure the closer judicial scrutiny afforded to such packing claims, Plaintiffs must now offer some proof to support this claim of intentional racist activity.

It is black letter law that plaintiffs advancing a "packing" dilution claim must prove that *too many* black voters have been included in *too few* districts. *See* Mot. to Dismiss at 14. But Plaintiffs have decided to offer *no* evidence of black and white voting patterns to even attempt to establish how much black population is needed to elect a black-preferred candidate or how much in excess of that ideal number constitutes "packing." Indeed, Plaintiffs' supplemental filing expressly admits that they "do not know exactly what percentage of BVAP is required in each district." Supplemental Filing at 15. And Plaintiffs' expert report offers no analysis on this

question. But if Plaintiffs do not know or seek to prove how much is *required* to elect a black candidate of choice, then they obviously cannot say that the percentages in the Senate Plan are *too much*. Thus, because Plaintiffs do not even attempt to show that black voters can elect their preferred candidates at lower BVAPs than there are in the Senate Plan, they cannot possibly show that any of the Senate Districts are "packed."

Plaintiffs must also show that the alleged "packed" black voters could have been redeployed elsewhere to create an additional electable district. *See* Mot. to Dismiss at 14; Reply in Support of Def. McConnell's Mot. to Dismiss at 10. But Plaintiffs have made absolutely no effort to make this showing either. Indeed, incredibly, Plaintiffs proposed plan provides *fewer* electable districts than the enacted Plan, even under *Plaintiffs' own* flawed idea of the extraordinarily low BVAP needed to elect. Though Plaintiffs have steadfastly refused to define the "crossover" districts they seek to create by dismantling the Senate Plan's majority-black districts, the lowest possible BVAP Plaintiffs mention anywhere is *33%*. *See* Supplemental Filing at 16. Even assuming that all districts could remain electable for blacks and thus avoid retrogression at this low BVAP level (which they plainly could not), the Senate Plan provides *more* districts above 33% BVAP than Plaintiffs would provide—specifically, fifteen districts in the Senate Plan to only fourteen in Plaintiffs' proposed alternative. *See* Exhibit A (BVAP Comparison Chart). Obviously, the Senate Plan cannot possibly be dilutive since it has more majority-black districts *plus* more allegedly "electable" 33% districts than Plaintiffs' alternative. When an enacted plan is *less* dilutive than a plaintiff's alternative under the plaintiff's *own* view of dilution, there is no material factual dispute. Since Plaintiffs have not even *tried* to prove their sole allegation in this case, summary judgment should be entered in favor of Defendant McConnell on all claims.

3. Plaintiffs seek to excuse their complete failure to offer any evidence even suggesting that the Senate Plan is dilutive by seeking to somehow switch the burden to *Defendants* to prove that the plan is *not* dilutive. Specifically, Plaintiffs argue that Defendants cannot justify the creation of "majority black districts *when they themselves cannot satisfy the Gingles preconditions*." Supplemental Filing at 7 (emphasis in original). But the notion that Defendants are somehow required to justify the creation of majority-black districts was, again, unequivocally and explicitly rejected in *Voinovich*, in words equally applicable to Plaintiffs' claim here:

> By requiring [Defendants] to justify the creation of majority-minority districts, the District Court placed the burden of justifying apportionment on the State. Section 2, however, places at least the initial burden of proving an apportionment's invalidity squarely on the Plaintiff's shoulders . . . The burden of "show[ing]" the prohibited effect, of course, is on the plaintiffs."

Voinovich, 507 U.S. at 155-56.

To be sure, if Plaintiffs establish a *prima facie* case, then the burden of justification shifts to the Defendant. *See, e.g.*, *id.* at 155; *Shaw v. Hunt*, 517 U.S. 899, 907-08 (1996) (*Shaw II*). But, again, Plaintiffs cannot establish a *prima facie* case of deliberate vote dilution (and have not even alleged the "analytically distinct" *Shaw* violation caused by "separating" voters). *See id.* at 905 ("The plaintiff bears the burden of proving the race-based motive.").

In any event, Senator McConnell is still entitled to summary judgment even if he bears the burden on whether majority-black districts dilute black voting strength or satisfy *Shaw* because such districts are necessary to comply with Section 5, since there is literally no dispute on these questions. *See* Mot. to Dismiss at 24-26. It is black-letter law that summary judgment should be denied only when "a jury *applying th[e applicable] evidentiary standard* could reasonably find for either the plaintiff or the defendant." *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 255 (1986) (emphasis added). Plaintiffs offer *no* evidence to support their packing allegations or to show that the Legislature had any chance of proving no retrogression under Section 5 if they had dismantled the majority-black districts as Plaintiffs suggest. The enacted Senate Plan, meanwhile, received preclearance from the Justice Department and thus we *know* it satisfies Section 5 by avoiding retrogression. As a result, no rational fact-finder could conclude, even if Defendants have the burden, that the majority-black districts are "packed" or unnecessary for Section 5 preclearance. Indeed, the Supreme Court has long held that a defendant moving for summary judgment does not bear the burden of "*negating* the opponent's claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Rather, a defendant is entitled to summary judgment any time the plaintiff "has failed to make a sufficient showing on an essential element of her case." *Id.* Here, since Plaintiffs have expressly stated that they do not even attempt to prove the essential elements of their case, summary judgment is warranted.

This is particularly true because the applicable evidentiary standard under *Shaw* is whether there is "a strong basis in evidence to support" the conclusion that the Voting Rights Act required the districts to be drawn as enacted. *Shaw II*, 517 U.S. at 915. Given the complete absence of evidence that lower BVAP districts would satisfy Section 5 and Dr. Engstrom's *uncontested* finding (in his Section 5 report) that there is "pervasive and persistent racial bloc voting" in South Carolina, Defendants necessarily had a strong evidentiary basis for concluding that preserving the majority-black districts in their plan was needed to comply with Section 5. Exhibit B (Engstrom Section 5 Report) at 6. And this is especially true given the 2006 amendments to Section 5, which require states to preserve minority voters' "ability . . . to elect their preferred candidates of choice." 24 U.S.C. § 1973c. Thus, it is *undisputed* that the Senate

Plan is not dilutive and that Section 5 required the Legislature to maintain the BVAP levels it did. Summary judgment is therefore required.

If the rule were somehow otherwise, every jurisdiction covered by Section 5 would be forced to stand trial based solely on the sort of ever-shifting and unsupported allegations levied by Plaintiffs here. Clearly that is not what the Supreme Court had in mind when it warned that "courts must 'exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race.'" *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)) (emphasis in original). There is simply no dispute over a material fact for this court to resolve.

II. PLAINTIFFS HAVE NOW FOCUSED THEIR CLAIMS ON ONLY TWO DISTRICTS THAT THEY LACK STANDING TO CHALLENGE, AND THAT DO NOT VIOLATE THE VOTING RIGHTS ACT OR CONSTITUTION

Plaintiffs' supplemental filing makes explicitly clear that their suit is aimed solely at Senate Districts 21 and 25. Supplemental Filing at 10. But even this now-narrowed attack is deeply and irreparably flawed for a host of reasons in addition to those identified above. As to District 21, Plaintiffs clearly lack standing, and in any event Plaintiffs have presented no cognizable argument or competent evidence to support their "packing" claim. As to District 25, there is no *allegation*, much less proof, that this district was intentionally designed to either dilute black voting strength through "packing" or to "separate" voters in violation of *Shaw*. District 25 cannot be packed because it contains only *23.15%* BVAP in the Senate Plan and Plaintiffs' proposed alternative would *raise* the BVAP to 30.44%.

Thus, there is *no* evidence to support either of the two constitutionally cognizable injuries that can potentially stem from race-based redistricting—minority dilution under *Voinovich* or racial separation under *Shaw*. Consequently, it is undisputed that race was considered only to

avoid vote dilution to comply with Section 2 and to avoid retrogression in compliance with Section 5. Since state compliance with "federal" law "does not raise an inference of intentional discrimination[, but rather] demonstrates obedience to the Supremacy Clause of the United States Constitution," there are no facts to establish a potential constitutional violation. *Voinovich*, 507 U.S. at 159.

1. Plaintiffs' latest filings conclusively establish that they have no standing to challenge District 21. In their supplemental filing, Plaintiffs candidly admit that Moses Mims, who they allege resides in Senate District 25, "is the only Plaintiff with in-district standing under the Senate Plan." Supplemental Filing at 14. And the Supreme Court has been clear that standing exists "only with respect to the district in which the plaintiff resides." *Shaw II*, 517 U.S. at 904. Thus, because none of them reside in District 21, Plaintiffs lack standing to challenge this district.

Even if they could challenge the district, Plaintiffs have provided no material facts to support their claim. Most important, Plaintiffs make no effort to show that District 21 could be drawn at the level they propose without retrogressing in violation of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Specifically, Plaintiffs' proposed changes to District 21 would reduce its BVAP to 45.23%, from 51.59% under the Senate Plan and 50.72% under the benchmark plan. Yet, by failing to offer any analysis suggesting that black voters' "ability to elect" would not be diminished by reducing the BVAP to 45%, Plaintiffs fail to establish a *prima facie* case that the Senate Plan included more black voters than necessary. Indeed, no one has suggested that District 21 could remain electable for black voters (as it must, under Section 5) at a BVAP below 50%. After all, this Court itself previously set the district's BVAP at

52.33%, for the express purpose of avoiding retrogression. *See Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 661-63 (D.S.C. 2002).

Even if Plaintiffs had produced evidence that *majority*-black districts are "packed," their challenge to District 25 would still fail. This *23.15%* district has no conceivable relation to Plaintiffs' (unsupported) theory of the case; *i.e.*, that "the Senate Plan [is] an intentional effort to marginalize black voting power by drawing the nine majority-minority Senate Districts described above to an arbitrary fifty-percent BVAP standard and intentionally adding BVAP to districts merely because they happen to elect black Senators." Supplemental Filing at 10. This 23% district, currently represented by a white Republican, cannot possibly be "packed" with more black voters than necessary to elect a black candidate of choice. And, in any event, Plaintiffs' plan *increases* the BVAP in this district to 30.44%. This proposed "remedy" is at odds with any "packing" claim and confirms what Defendant McConnell has predicted all along: there is no connection whatever between Plaintiffs' baseless accusations and the actual facts of this case.

2. On top of all this, Plaintiffs' proposal is itself race-conscious. Plaintiffs' proposed changes in District 25, for instance, actually *decrease* integration in Districts 25 and 26 by raising the BVAP in District 25 from 23.15% to 30.44% and lowering the BVAP in District 26 from 28.46% to 19.94%. Indeed, under the Senate Plan, District 25 and neighboring District 26 are precisely the types of districts Plaintiffs purport to desire in their Complaint because both contain nearly the exact black voting age demographic composition of South Carolina as a whole, 26.7%. *See* Def. McConnell's Mot. for Summary J. at 9. Yet, Plaintiffs' proposal would break up these "increasingly integrated" districts, Am. Compl. at ¶ 42, in an obviously race-conscious effort to increase the BVAP in District 25 and decrease the BVAP in District 26. Moreover, since Districts 25 and 26 under the Senate Plan are integrated, not "segregated,"

Plaintiffs cannot challenge them under *Shaw*, even if they had not already abandoned any such claim. As *Easley* holds, a *Shaw* plaintiff must propose a plan with "significantly greater *racial balance*," not the "significantly greater" racial *imbalance* proposed by Plaintiffs here. *Easley*, 532 U.S. at 258.

Plaintiffs' proposal in District 21 is no better. There, Plaintiffs would manipulate district lines for the sole purpose of lowering the BVAP in District 21 over 6% from the Senate Plan and nearly 5.5% from the benchmark plan. In tandem with these changes, Plaintiffs would also manipulate the lines of neighboring District 20 in a similarly race-conscious effort to raise that district's BVAP by over 10% from the benchmark. Not only would these clearly race-conscious maneuvers cause District 21 to retrogress in violation of Section 5, but they would do nothing to create any of the new crossover districts that Plaintiffs purportedly desire.

In short, Plaintiffs engage in precisely the same race-conscious redistricting they accuse Defendants of, and for the same avowed purpose: promoting minority voting strength. The Legislature made the sound policy judgment, based on evidence of "persistent and pervasive racially polarized voting," that BVAP levels could not be lowered as Plaintiffs now propose in districts where black voters are currently electing their candidates of choice. Exhibit B (Engstrom Section 5 Report) at 6. Plaintiffs, meanwhile, would lower BVAP levels, even in the face of racially polarized voting, in the hopes of spreading minority influence. Thus, even accepting Plaintiffs' allegations as entirely true, Plaintiffs' and Defendants' plans have the same methodology and goal: manipulating existing district lines to preserve and enhance minority voting strength. The difference is that Defendants' plan is entitled to a strong presumption of validity, complies with Section 5's non-retrogression requirement, has empirical evidence to

show that its districts enable black voters to elect their candidates of choice, and provides more "electable" districts under the only metric Plaintiffs even mention (33% BVAP).

III. PLAINTIFFS STILL HAVE NOT PROVIDED A VALID ALTERNATIVE TO THE SENATE PLAN

Even if all the foregoing were not fatal to Plaintiffs' case, Plaintiffs still have not offered a valid alternative proposal. Most important, Plaintiffs' submitted alternative does not comply with this Court's order to identify the specific districts they challenge and offer an alternative for those districts. In addition, under clear Supreme Court precedent, this Court literally *cannot* adopt Plaintiffs' proposed plan because it would exceed this Court's narrow authority to remedy only the districts challenged in this suit. And even if that were not true, Plaintiffs' proposed changes themselves subordinate traditional districting principles to deliberately harm minority voters by pairing black Democratic Senators with white Republican Senators in super-majority-white districts and dramatically reducing BVAP in 5 existing minority districts. While such "cracking" and "pairing" were the traditional tools used in the South's regrettable past to *suppress* black voting strength, they have never been accepted by any court anywhere, much less as a *remedy* for alleged minority vote dilution. Thus, because Plaintiffs have, again, failed to provide this Court with a valid alternative plan or remedy, summary judgment should be granted.

1. Most important, Plaintiffs have failed to comply with this Court's order to provide an alternative plan for the specific districts they challenge. At the January 19 Motion to Dismiss Hearing, this Court instructed Plaintiffs' counsel to "define your claim, the districts you challenge and provide the Defendants with an alternative remedy plan." Tr. 63:5-6. As explained above, Plaintiffs have finally narrowed their claims to Senate Districts 21 and 25. But the alternative plan they offer is not narrowed to these specific districts. Instead, they propose an alternative that would require this Court to redraw the *entire* Senate Plan.

First, the regional map that purportedly is designed to fix only Districts 21 and 25 does not just include those districts and adjacent districts, but *14 districts* stretching across the entire middle of the state. For example, it includes redraws of Districts 36 and 40, which do not need to be altered to "fix" either District 21 or 25. And, while the alternative regional plan decreases the BVAP in "packed" District 21 from 51.59% to 45.23%, it *increases* the BVAP in District 39 from 52.93% to *55.20%* and District 40 from 50.46% to *52.72%* and effectively maintains the BVAP in District 36 at *51.13%* (it is 51.15% in the Senate Plan), even though those districts (according to the Complaint) were also "packed." This, again, reveals the incoherence of Plaintiffs' theory and how their "remedy" does not solve the identified "problem."

Far worse, Plaintiffs' purportedly "regional" map is not a "regional fix" at all because it cannot fit into the existing Senate Districts surrounding the 14 districts in the "regional" map. A quick glance at the proposed "regional" map and the enacted Senate Plan demonstrates that this is true. For instance, the southeastern boundaries of District 39 in Plaintiffs' proposal do not match up with the northern boundaries of District 45 in the Senate Plan. Instead, proposed District 39 would actually bisect enacted District 45. Thus, for this Court to adopt Plaintiffs' proposed "regional fix" it would also need to redraw District 45's boundaries. And this same problem attends *all* of the boundary lines at the edges of Plaintiffs' "regional" map. The map attached as Exhibit C demonstrates this visually by indicating areas that are included in the fourteen "regional" districts in the Senate Plan but would be left out of those districts in Plaintiffs' "regional" plan, and other areas that are not within the fourteen "regional" districts in the Senate Plan but would be annexed into those districts in Plaintiffs' proposal. *See* Exhibit C (Comparison Map 1). And the map attached as Exhibit D illustrates how Plaintiffs' "regional fix" would render many districts outside the "region" grossly underpopulated, in violation of the

Constitution's one-person-one-vote mandate. *See* Exhibit D (Comparison Map 2). Thus, the districts *around* Plaintiffs' regional map would have to be extensively redrawn, either as the Plaintiffs propose or in some other way, but *cannot* be drawn as they are in the Senate Plan. From all this, it is clear that Plaintiffs have used their challenges to Districts 21 and 25 as a stalking horse to redraw the entire Senate Plan. Far from *narrowing* their remedial request, then, Plaintiffs' proposed alternative map has actually *broadened* the sweep of their claims. This can hardly be what the Court had in mind when it asked Plaintiffs to "define" their claims.

2. In fact, because Plaintiffs' proposal would require this Court to redraw the entire Senate map, clear Supreme Court precedent actually *forbids* this Court from adopting their plan. Under *Upham v. Seamon*, 456 U.S. 37 (1982), this Court has authority to modify the Senate Plan only as "necessary to cure any constitutional or statutory defect." *Id.* at 43. Thus, even if this Court accepts Plaintiffs legally flawed and factually unsupported claims, it can redraw only District 21 and District 25. This is because "reapportionment is primarily a matter for legislative consideration and determination" and "judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites." *Id.* at 41 (quoting *White v. Weiser*, 412 U.S. 783, 794-95 (1973)). Thus, out of respect for the Legislature's "primary jurisdiction" over redistricting, when adjusting a validly enacted plan, federal courts must take great caution to avoid "intrud[ing] upon state policy any more than necessary." *Id.* at 42 (quoting *White*, 412 U.S. at 795). And just recently the Supreme Court reaffirmed this rule in *Perry v. Perez*, -- S. Ct. --, 2012 WL 162610 at *4 (Jan. 20, 2012) ("Where a State's plan faces challenges under the Constitution or § 2 of the Voting Rights Act, a district court should still be guided by that plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits.").

Plaintiffs' sweeping re-draw of the entire Senate Plan squarely ignores this unambiguous Supreme Court precedent. Thus, in addition to ignoring this Court's explicit directions, Plaintiffs' proposal is patently improper and thus *cannot* be adopted by this Court.

3. Plaintiffs allege that the Senate Plan ignores traditional redistricting principles, but their proposal violates many firmly-rooted traditions. For example, it pairs incumbents. Within their "regional" plan, Plaintiffs would pit Senator Nicholson, a black Democrat, against Senator O'Dell, a white Republican. *See* Exhibit E (Incumbent Pairings Map); Exhibit F (Incumbent Pairings Chart). And this is not the only place Plaintiffs would pair a black Senator against a white incumbent: Plaintiffs' proposed District 41 would pit Senator Ford, a black Democrat, against Senator McConnell, a white Republican and President Pro Tempore of the Senate, in a district containing only 26.56% BVAP, less than half the BVAP in Senator Ford's benchmark district. *See* Exhibit A (BVAP Comparison Chart). Certainly, the Legislature cannot be faulted for refusing to expose two black Senators to defeat for the sake of lowering the BVAP by 6% in District 21 (and thereby exposing yet another black Senator to defeat).

Moreover, as explained above, Plaintiffs' statewide proposal provides *fewer* districts over 33% BVAP, the lowest level at which Plaintiffs suggest minority voters might be able to elect their candidates of choice, than the enacted plan they challenge. *See supra* p. 7. (Plaintiffs, as noted, provide no evidence to suggest minority voters in every district actually *could* elect their candidates of choice at this low BVAP level.) But Plaintiffs' "packing" claims, require them to show how the allegedly "packed" minority population could have been placed elsewhere to create *additional* electable districts. Plaintiffs' proposal here, however, does just the opposite: it dismantles majority-minority districts *and* creates *fewer* "electable" districts.

And Plaintiffs' proposal would also cause starkly retrogressive ripple effects throughout the state. It would dismantle benchmark majority-black districts 30, 32, and 45 (and 45.8% BVAP District 29) to districts with BVAP between 35.2% and 43.5%. *See* Exhibit A (BVAP Comparison Chart). Needless to say, dismantling roughly half the "electable" black districts is at war with South Carolina's traditional principle of Section 5 *compliance* and would doom the plan because there is no evidence to rebut the obvious point that such dramatic reductions greatly diminish minorities' ability to elect.

* * *

For the foregoing reasons, as well as those set forth in Defendant McConnell's opening brief, summary judgment should be entered in favor of Defendant McConnell.

Signature page follows.

Respectfully submitted,

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