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**,** **v.** **THE STATE OF SOUTH CAROLINA**, **NIKKI R. HALEY**, in her capacity as Governor**, GLENN F. MCCONNELL**, in is 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, **NICOLE S. WHITE**, **MARILYN BOWERS**, **MARK BENSON**, and **THOMAS WARING**, in their capacity as Commissioners of the Election Commission, Defendants.	**Case No.: 3:11-cv-03120-HFF-MBS-PMD**

Plaintiffs Final Memorandum of Law in Support of a Judgment Declaring Act 72 of 2011, Drawing Election Districts for the South Carolina House of Representatives, and Act 75 of 2011, Drawing Election Districts for the United States Congress, Unconstitutional Racial Gerrymanders and Intentionally Discriminatory in Violation of the Constitution and the Voting Rights Act of 1965, as amended.

The General Assembly passed Act 72 of 2011, drawing election districts for the South Carolina House of Representatives and Act 75 of 2011, drawing election districts for the United States Congress. Plaintiffs, eight black voters, brought constitutional and Voting Rights Act claims alleging that race predominated race-neutral principles and that Defendants passed these laws in an intentional effort to discriminate and marginalize black voting power by packing them into majority-black districts. After a two-day trial, the uncontradicted evidence on the record is that the General Assembly considered race to the exclusion of all other principles, justified its conduct with a "perverse" interpretation of the Voting Rights Act, and subordinated traditional redistricting principles by further segregating South Carolina's communities and making the shape of election districts increasingly tortured. In light of the uncontradicted evidence and for the reasons set forth, the Court should strike down these illegal laws.

I. As targets of a statewide racial classification, Plaintiffs have standing to challenge the House and Congressional redistricting laws in their entirety and in the districts in which they reside.

To show standing, a plaintiff must have suffered an injury in fact that is causally connected to the defendant's conduct and capable of being redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37 (1992).[1] Racial classifications "stigmatize individuals by reason of their membership in a racial group," Shaw v. Reno, 509 U.S. 630, 643, 113 S. Ct. 2816, 2824-25 (1993) (Shaw I), and cause "fundamental injury to the individual rights of a person" Shaw v. Hunt, 517 U.S. 899, 908, 116 S. Ct. 1894, 1902 (1996) (Shaw II). Thus, a voter suffers an injury in fact when she is subjected to a racial classification that is not narrowly tailored to achieve a compelling state interest. Id. In addition to a stigmatic injury, the Shaw Doctrine also protects from "representational harms" caused when "a district obviously is created solely to effectuate the perceived common interest of one racial

[1] Causation and redressability are not at issue in this case.

group [because] elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." Shaw I, at 644, 113 S.Ct. at 2825.

In redistricting cases, a voter must be personally subjected to the racial scheme in order to suffer the stigmatic injury that gives rise to the Shaw Doctrine. U.S. v. Hays, 515 U.S. 737, 744, 115 S.Ct. 2431, 2436 (1995). In Hays, the Supreme Court held that white plaintiffs who resided outside the challenged majority-minority district suffered neither the stigma of being subjected to a racial classification, nor any representational harm, and therefore lacked standing. Hays, 515 U.S. at 744-45, 115 S.Ct. at 2436. On the other hand, "[w]here a plaintiff resides in a racially gerrymandered district . . . , the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." Id.

In Sinkfield v. Kelley, the Court further clarified the standing defect found in Hays. The Sinkfield plaintiffs, white voters in a majority-white district, argued they were entitled to a presumption of an injury-in-fact because their district was affected by the drawing of a majority-minority district adjacent to their own district. Sinkfield v. Kelley, 531 U.S. 28, 30, 121 S. Ct. 446, 447 (2000). The Court found the case indistinguishable from Hays and explained that the white plaintiffs produced no evidence that they had "personally been subjected to a racial classification." Id. While the decision to draw a majority-minority district might subject the voters within that district to a racial scheme, the white voters in the neighboring district had not been personally subjected to this classification. Additionally, the white voters in a majority-white district also do not suffer from any "representational harms" that might arise where a racial gerrymander subordinates race-neutral districting principles to move a white voter into a

majority-minority district.[2]

Here, the uncontradicted evidence establishes that Defendants subjected Plaintiffs, eight black voters, to a racial classification for the purpose of drawing state House and Congressional districts. This racial classification was pervasive and applied to the redistricting plans as a whole. The only evidence in the record is that race was the only factor considered by the House of Representatives in redrawing districts to achieve equal population. As discussed below, members of the General Assembly who provided testimony and affidavits all agreed that the House and Congressional Redistricting Plans considered race first and foremost, and to the exclusion of other, race-neutral, redistricting principles. Plaintiffs' expert, Dr. Michael McDonald, also corroborated this uncontradicted testimony. Dr. McDonald, an expert in political science, elections, redistricting, and statistics testified that race was the predominant factor in drawing 21 out of 124 House Districts and one of the seven Congressional Districts.[3] Trial Tr. Michael P. McDonald 56, 121. Dr. McDonald offered his opinion that because of the extent of the defects in the House and Congressional plan, the plans in their entirety were racial gerrymanders. Id.

Because the whole redistricting scheme was built around Defendants' efforts to pack black voters into majority-black districts, all Plaintiffs suffer from the stigmatic harm caused by the State's race-based laws. Because Plaintiffs are all black voters, and achieving arbitrary levels of black voting age population ("BVAP") in election districts was the uncontradicted intent of the General Assembly, the scheme targets all Plaintiffs by failing to "treat [South Carolina's

[2] The limits of the Shaw Doctrine imposed by Hays and Sinkfield must be read in light of the fact that Shaw plaintiffs are typically white voters complaining of majority-minority districts in which they reside. E.g., Shaw I, Miller v. Johnson, infra, Hays, Shaw II, Sinkfield. Plaintiffs are unaware of any redistricting challenge brought by black voters under the 14th Amendment.

[3] Dr. McDonald concluded that race predominated in drawing House Districts 12, 23, 25, 49, 57, 59, 64, 70, 74, 76, 77, 79, 82, 91, 102, 103, 109, 111, 113, 121, 122, and the Sixth Congressional District. (Dr. McDonald inadvertently omitted HD-12 from page one of his report but subsequently includes it in his analysis.)

black] citizens as individuals, not as simply components of a racial […] class." Miller v. Johnson, 515 U.S. 900, 911, 115 S. Ct. 2475, 2486 (1995) (internal quotations and citations omitted).[4]

This case is distinguishable from prior equal protection challenges because "[**w]hite voters obviously lack standing to complain of the other injury the Court has recognized under Shaw: the stigma blacks supposedly suffer when assigned to a district because of their race**." Miller, 515 U.S. 900, 931, 115 S. Ct. 2475, 2498, 132 L. Ed. 2d 762 (1995), citing Hays, 515 U.S. at 744, 115 S.Ct., at 2436. In Miller v. Johnson, the Court found that plaintiffs, as residents of one of the racially gerrymandered districts, had standing to challenge **the entire redistricting plan** on equal protection grounds. Id. As discussed below, the evidence establishes the same illegal conduct as in Miller. However, Plaintiffs in this case are in an even stronger position than those in Miller because, as black voters, they were also subjected to the stigma of the statewide scheme. Furthermore, there are practical limitations to bringing a challenge with a plaintiff in 124 districts.

In addition to the injury described above, Plaintiffs are also injured as a result of residing in a gerrymandered district or a neighboring district.[5] Clearly, Plaintiffs residing in racially

[4] The Court alluded to this type of case by reasoning that, "where a plaintiff does not live in such a district, he or she does not suffer those special harms, and *any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference*." United States v. Hays, 515 U.S. 737, 745, 115 S. Ct. 2431, 2436 (1995) (emphasis added).

[5] As to the Congressional Plan, Mr. McKnight has standing as a resident of the Sixth Congressional District. Mr. Manigault and Mr. Wilder have neighbor-district standing as residents of the First Congressional District; Mr. Mims has neighbor-district standing as a resident of the Second Congressional District; Mr. Brown has neighbor-district standing as a resident of the Fifth Congressional District; and Rev. Backus, Ms. Buttone, and Mr. Wallace have neighbor-district standing as residents of the Seventh Congressional District. As to the House Plan, Rev. Backus resided in House District 59; Ms. Buttone resides in House District 103; Mr. Manigault resides in House District 102; and Mr. Mims, resides in House District 82. Mr. Brown has neighbor-district standing as a resident of House District 67 (neighboring

gerrymandered districts have standing. Hays, 515 U.S. at 744-45, 115 S. Ct. at 2436. Plaintiffs who reside in districts adjacent to the 21 House Districts and the one Congressional District alleged to be racial gerrymanders also suffer representational harm. Like the white plaintiffs in Shaw I who resided in a majority-black gerrymander, Plaintiffs in a majority-white district that is bleached-out by an adjacent gerrymandered district are likely to be ignored by their elected leaders because their voting power is diminished as a result of packing the neighboring district. This threatens to "balkanize us into competing racial factions," Shaw I, 509 U.S. at 657, 113 S. Ct. at 2832. It also "prevents the plaintiff[s] from competing on an equal footing," Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211, 115 S. Ct. 2097, 2105, by doing the sort of "pull[ing], hall[ing], trad[ing] to find common political ground with other voters in the district." Johnson v. De Grandy, 512 U.S. 997, 1020, 114 S.Ct. 2647, 2661 (1994).

Because Plaintiffs are black voters subjected to a statewide racial districting scheme, they have suffered a personal injury as described by Hays, Sinkfield, and the Shaw line of cases. Additionally, Plaintiffs in both the racially gerrymandered districts and adjacent districts have standing as a result of the stigmatic and representational harms described in Hays and Shaw I. None of the plaintiffs in Hays or Sinkfield lived in gerrymandered districts, and none could show any representational harm as a result of living in a predominantly white district. Since Plaintiffs in this case are black voters, their injury in fact is clearly distinguishable from Hays and Sinkfield.

II. Defendants' House and Congressional redistricting schemes deny Plaintiffs equal protection under the law.

The essence of Plaintiffs' equal protection claim is that "the State has used race as a basis

---

Districts 64 and 70); Mr. McKnight has neighbor-district standing as a resident of House District 101 (neighboring Districts 64 and 103); and Mr. Wallace has neighbor district standing as a resident of House District 62 (neighboring District 59).

for separating voters into districts." Miller v. Johnson, 515 U.S. 900, 911, 115 S. Ct. 2475, 2485-86 (1995). "Laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieving a compelling state interest." Id., at 904, 115 S. Ct. at 2482. "This prohibition extends not just to explicit racial classifications, but also to laws neutral on their face but unexplainable on grounds other than race." Id., at 905, 115 S. Ct. at 2483 (internal quotations and citations omitted). Since electoral district lines are facially neutral, "plaintiffs must prove that other, legitimate districting principles were subordinated to race." Bush v. Vera, 517 U.S. 952, 958-59, 116 S. Ct. 1941, 1951-52 (1996). This means that race was "*the predominant* factor motivating the legislature's [redistricting] decision." Id.

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Miller, 515 U.S. at 916, 115 S. Ct. at 2488. As set forth below, the *only* evidence offered in this case proves by a preponderance of the evidence, *or any other evidentiary standard*, that the House and Congressional redistricting plans used race as the predominant factor in drawing election lines.

A. The only direct evidence of the General Assembly's intent is that the House and Congressional Redistricting Plans used race as the predominant factor.

The uncontradicted evidence offered from members of the General Assembly is that race was the predominant factor used to draw the House and Congressional election districts. Representative Bakari Sellers, one of five members of the Election Law Subcommittee and a member of the full Judiciary Committee, testified that the entire House and Congressional redistricting process was an effort to resegregate election districts along racial lines. Trial Tr.

Sellers 14-17, ECF No. 208. The original House proposal created 28 majority-black districts, seven more than in the Benchmark House plan. During the legislative process, the House created two additional majority-black districts for a total of thirty.

Rep. Sellers testified the only criteria used to determine whether an amendment would be approved or tabled was its effect on the black voting age population (BVAP) of the affected district, as compared to the Original House Proposal. Id. at 22. Amendments that lowered BVAP for one of the majority-black districts were "tabled" by the Republican-controlled committees, even if this reduction in BVAP percentage was *de minimus*. Id. at 14, 24. Rep. Sellers also testified that the committee received substantial public comment but virtually all of it was ignored in favor of race-based decision making. Id. at 14-15. Rep. Sellers testified that race predominated over other considerations, like whether an amendment would make a community of interest or political subdivision, such as a county, whole. Rep. Sellers testified that for each amendment considered by the subcommittee and full committee, Judiciary Committee staff would point to the proposed change in BVAP on Rep. Clemmons' demographic summary to show him how the proposal would change BVAP; in response to this information, Rep. Clemmons would move to table any amendment that reduced BVAP in majority-black districts. Id. at 11.

The Court also heard two excerpts from the subcommittee meeting on May 23, 2011. During this meeting Rep. Clemmons explained that the "policy position" of the subcommittee used to draw Amendment #1 was "that we will not reduce [BVAP] unless population absolutely demands it. This meant it was a "non-starter" to take a district with a 52.33% BVAP under the 2003 plan and 53.05% BVAP under the original proposal to 50.67% BVAP. Rep. Sellers testified these audio clips reflected the policy and tenor of the entire legislative process in the subcommittee and full committee. See id. at 30. He also testified Rep. Clemmons justified this

race-based "policy position" as required by the Voting Rights Act. Rep. Sellers further testified he believed this was wrong and asked legal counsel for the House to clarify the correct standard, but counsel for the House refused to provide any information confirming or denying the accuracy of the "policy position" of the House, as recited by Rep. Clemmons. Id. at 16-17.

Rep. Sellers also testified there was an intentional effort to "pack" House District 79. Sellers 35. This district was not drawn as a majority-black district in Amendment #1—one of only two districts that were not drawn as majority-black districts under the original plan but were subsequently amended to be made majority-black. Rep. Mia Butler-Garrick, who represents House District 79, submitted affidavit testimony that she met with Rep. Harrison and others and agreed that removing the Kershaw County portion of her district was the best way to bring the district within the proper population range and draw a district that included all of the Lake Carolina community of interest. Butler-Garrick Aff. 2-4, ECF No. 184. Rep. Butler-Garrick testified that she was later approached by Rep. Clemmons who told her he was "working to get [her] BVAP up." Id. at 4. She further testified that she told both Rep. Clemmons and Rep. Harrison that she was opposed to this change. Id. Rep. Harrison told her that "the lawyers" said the change was required but would not tell her why or which lawyers were requiring this change. Id. at 4, 6. Rep. Butler-Garrick also testified that Amendment #35 in the full Judiciary Committee made House District 79 a majority-black district by splitting her neighborhood in half in a manner that "makes no sense" and puts the split portion in a district that "shares no common interest." Id. at 5. She testified that the only explanation for dividing her neighborhood in this "arbitrary" manner was to exclude white voters and add predominantly black neighborhoods to "'bump up' the District's BVAP to 52% and create a majority-minority district." Based on her experience, Rep. Butler-Garrick described the House Redistricting plan as an effort to "segregate our state along racial lines." Id. at 8-9.

Finally, Senator C. Bradley Hutto submitted affidavit testimony that "the General Assembly used race as the primary consideration in drawing new Congressional Districts" and "[i]n doing so, [it] ignored race-neutral factors like keeping counties whole where possible, compactness, and respecting communities of interest…." Hutto Aff. 15, ECF No. 185. Sen. Hutto testified that there was "no word more frequently used in the General Assembly during the redistricting debate than the word 'BVAP,'" and "the first question asked about any amendment was what it would do to the district's BVAP." Id. at 3. Sen. Hutto also testified that all members of the General Assembly "understood that in order to receive Section 5 preclearance [… they] could not pass a 'retrogressive' plan" but that the retrogression principle "was used to justify using race as the primary criteria in drawing election districts." Id. at 3.[6] Sen. Hutto testified the Congressional Redistricting Plan debated by the Senate was a product of the House of Representatives and that this map split a number of counties, including Berkeley, Charleston, Florence, Sumter, and Orangeburg in "what can only be interpreted as an effort to shed black vote into the Sixth [District] in exchange for white voters." Id. at 5. Sen. Hutto described the House Plan, the basis for the Congressional Redistricting Plan, as a "packing plan" that Democrats and ten Republicans attempted to stop by adopting an entirely new plan in the Senate. Id. at 5-6. Republican Senators Tom Davis and Larry Grooms warned their colleagues against supporting the House plan because it "split communities along racial lines." Id. at 7. Sen. Hutto further testified the bipartisan coalition preventing the House packing plan eventually eroded and a final version of the House Plan was adopted that raised the BVAP of the Sixth District to its highest level with 55% BVAP, three percentage points higher than the Benchmark District. Id. at 8. The final vote in the Senate was largely along party lines with all voting members of the Black

[6] Sen. Hutto testified that out of comity and limited time, the House and Senate did not make substantive amendments to the other body's respective plans. Hutto Affidavit, 2, ECF No. 185.

Caucus voting against the plan. Id. Sen. Hutto also testified that although the Senate received considerable public comment about the Pee Dee community of interest it excluded Williamsburg County, a predominantly black county, from the new Pee Dee congressional district and split Florence County largely along racial lines, placing these black voters into the Sixth District. Id. at 8, 10.

Reps. Sellers and Butler-Garrick and Sen. Hutto all also testified the black community's candidates of choice and black candidates are capable of being elected in districts with BVAP percentages of less than 50% and that the General Assembly's race-based policy was unnecessary and an intentional effort to marginalize the voting power of black voters by packing them into majority-black districts in contravention of traditional race-neutral redistricting principles. The evidence in the record is unrefuted and establishes the General Assembly's use of race was its predominant consideration.

B. The only expert analyzing the House and Congressional demography, statistics, and districting principles concluded race predominated over race-neutral principles.

The only expert analyzing the House and Congressional Redistricting Plans offered the opinion that race predominated over race-neutral districting principles like maintaining district cores, compactness and respect for political subdivisions. Dr. McDonald, an expert in redistricting, political science, and statistics, used several generally accepted mapping and statistical techniques to infer the role that race played in drawing the House and Congressional plans. Dr. McDonald identified twenty-one House Districts and one Congressional District (See n.3) where race was clearly a factor in drawing the district based on the manner in which the adopted district added BVAP or kept BVAP "artificially high." See e.g., id. at 83-84 (discussing HD-25). Dr. McDonald testified that these districts demonstrated a "pattern" of trading higher density BVAP for lower density BVAP with a net affect of shifting more BVAP into the district.

Dr. McDonald also testified that these sorts of trades are highly suspect since bringing a district within population deviation only requires adding or subtracting, not trading. Dr. McDonald testified that many of the districts were making one-way population trades with neighboring districts with the same net effect of increasing BVAP. He also testified that there were three clusters of districts where there were complex trades of population between several districts.[7] Id. at 109-10.

After concluding that race was clearly *a* factor in drawing these districts, Dr. McDonald explained how these "choices" by the General Assembly subordinated race-neutral principles and made race *the predominant* factor. Specifically, Dr. McDonald demonstrated how the General Assembly consistently split political subdivisions like counties and cities along racial lines, e.g., Id. at 85 ("the City of Florence is being further segregated along racial lines"), 93 ("as we're going to see, segregating the City of Aiken"), 118 ("But these districts aren't respecting the [City of Charleston] boundaries at all, these are choices to actually segregate the city."), and violated the core constituency of the gerrymandered districts by trading white voters for black voters. Dr. McDonald also demonstrated how all of these choices reduced the compactness of the districts and made their shapes more tortured. E.g., id. at 83 ("a narrow neck that's been created…. And we have some other protuberances up on the northern part that are not only affecting District 25 but also negatively affecting the compactness of District 24."). His visual inspection was aided by an overlay of the census blocks shaded for racial composition. This graphically demonstrated how, as the shape of the districts became more tortured, there was an unmistakable pattern of using a questionable shape to include or exclude voters on the basis of race. For example, Dr. McDonald demonstrated how House District 49, a district within

[7] These three district clusters in Greenville (gerrymandered House Districts 23 and 25), Richland (gerrymandered House Districts 74, 76, 77, and 79), and Charleston (gerrymandered House Districts 109, 111, and 113) counties.

population deviation under the Benchmark Plan, gave up white geography between the cities of York and Rock Hill leaving a narrower neck connecting the two cities, while adding predominantly black downtown neighborhoods, further dividing these cities along racial lines. Id. at 23-25, 28-30. Despite defense counsel's suggestion that this visual analysis is not probative, the Supreme Court has explained that, "reapportionment is one area in which appearances do matter." Shaw I, 509 U.S. at 647, 113 S. Ct. at 2827.[8]

C. Defendant Harrell's purportedly race-neutral explanations for the choices made by the General Assembly strengthen the conclusion that race predominated over legitimate districting goals.

During cross-examination, counsel for Defendant Harrell's counsel attempted to suggest that because the state complied *in some instances*, with the redistricting guidelines adopted by the House, their selective compliance with some of the House's adopted principles was sufficient to show race did not predominate. However, as Dr. McDonald explained, the General Assembly's selective enforcement of their adopted principles in the very examples offered by counsel to undermine Dr. McDonald's testimony only strengthened his opinion that race was the driving motivation behind the legislature's choices. Trial Tr. McDonald 226-27, 243-44. Defendant Harrell's cherry-picking of the record to find coincidental respect for precinct or other geographic boundary is merely a post-textual explanation insufficient to avoid strict scrutiny. Shaw II, 517 U.S. at 949, n.3, 116 S. Ct. at 1922, n.3. "Although a legislature's compliance with traditional districting principles […] may well suffice to refute a claim of racial gerrymandering,

[8] Defense counsel's characterization of Dr. McDonald's opinion as objecting to any change on BVAP percentages is contrary to his opinion and Plaintiff's theory in this case. Dr. McDonald's identified 21 districts in the House plan as racial gerrymanders, leaving nine majority-black districts where, in his expert opinion, race did not predominate over traditional districting principles. This is consistent with Plaintiffs' consistent view that there is nothing inherently objectionable about a majority-minority district that is compact and keeps political subdivisions and other communities of interest intact.

appellants cannot make such a refutation where, as here, those factors were subordinated to racial objectives." Miller, 515 U.S. at 919, 115 S. Ct. at 2489. The post-hoc explanation by defense counsel for the legislature's choices is contrary to the only testimony offered by any expert witness in this case.[9] Defendant Harrell's expert did no similar analysis to refute Dr. McDonald's analysis. Furthermore, he would likely be unqualified to offer such an opinion since he testified that he has never drawn a redistricting map for any court, DOJ, or any redistricting authority. Finally, counsel's suggestion is also contrary to the testimony of the only members of the General Assembly offering testimony in this case.

Second, the uncontroverted evidence in this case also demonstrates that *even assuming* the General Assembly was merely attempting to maximize a partisan advantage for Republicans, it did so through an illegal racial gerrymander. A state is free to use political data like election voting patterns or partisan performance to execute a constitutional political gerrymander. Bush v. Vera, 517 U.S. 952, 968, 116 S. Ct. 1941, 1956 (1996). However, Rep. Sellers and Sen. Hutto both testified that the respective House and Senate map rooms did not have partisan data available as part of the map drawing software. Trial Tr. Sellers 39-41; Hutto Aff. 10. Therefore, even if the General Assembly was attempting to execute a partisan gerrymander instead of a racial gerrymander, it lacked sufficient data to accomplish this task without using race as a proxy for political affiliation. "[T]o the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation." Bush v. Vera, 517 U.S. 952, 968-69,

[9] Dr. McDonald explained that, "even if there were these sort of neutral principles that were being applied here, and they are being violated in some cases, you can't escape from the fact that there's some trades that are being made here which are clearly of racial effect. And that's where I've come to the conclusion that race was a factor in the drawing of these districts. And then it's – the next stage is where these principles are being violated, that race predominates." Trial Tr. McDonald 245.

116 S. Ct. 1941, 1956 (1996).[10]

Since filing this case, Plaintiffs have consistently alleged that the Republican leadership in the General Assembly set out to segregate our State by making the Democratic party the "black party" and the Republican party the "white party." Am. Compel. ¶ 41, ECF No. 3. Astonishingly, Defendant Harrell's own expert witness, Thomas Brunell, effectively admitted that the most efficient way to determine a voter's party affiliation is to consider the race of the voter. "[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition, but it does not follow from this that individuals of the same race share a single political interest. The view that they do is based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens, the precise use of race as a proxy the Constitution prohibits." Miller, 515 U.S. at 914, 115 S. Ct. at 2487 (internal quotations and citations omitted).

III. Defendants have failed to demonstrate that their racial classification was narrowly tailored to achieve a compelling state interest.

To satisfy strict scrutiny, the *state* must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest. Miller v. Johnson, 515 U.S. 900, 920, 115 S. Ct. 2475, 2490 (1995) (emphasis added). While compliance with the Voting Rights Act is a compelling state interest, it does not:

> require the creation of a majority-minority district wherever it can be done; indeed, equal protection forbids such a course. Bizarrely shaped districts are not narrowly tailored to serve the State's interest in avoiding liability under § 2, because § 2 does not require a State to create, on predominately racial lines, a district that is not reasonably compact. Nor does § 5 compel the maximization of

[10] Other legitimate redistricting principles like incumbency protection also cannot be accomplished by using race as a proxy. See Bush v. Vera, 517 U.S. 952, 970, 116 S. Ct. 1941, 1957 (1996).

black voters in the district.

Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 639-640 (D.S.C. 2002) (citing Miller, 515 U.S. at 921, 115 S. Ct. at 2491 ("compliance with federal antidiscrimination laws cannot justify race-based districting […] not reasonably necessary under a constitutional reading and application of those laws") (internal quotation marks and citations omitted). To the extent Defendants attempt to justify their race-based redistricting by citing compliance with Section 2 or Section 5, the uncontradicted evidence proves the State applied the wrong Section 5 standard and failed to do any analysis that would justify drawing additional majority-minority districts.

Section 5 prevents backsliding in the position of the minority community. Beer v. U. S., 425 U.S. 130, 141, 96 S. Ct. 1357, 1364 (1976). "[P]roperly interpreted, [Section 5] should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." Georgia v. Ashcroft, 539 U.S. 461, 490-91, 123 S. Ct. 2498, 2517 (2003). A Section 5 analysis requires a comparison to the *Benchmark Plan*. Ashcroft, 539 U.S. at 466, 123 S. Ct. at 2503; see also Department of Justice, Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) (hereinafter "DOJ Guidance"). This comparison should be a "functional analysis of the electoral behavior within the particular jurisdiction" of the minority community's ability to elect candidates of choice under the proposed plan as compared to the Benchmark Plan. DOJ Guidance, 7471. "[E]lection history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information are very important to an assessment of the actual effect of a redistricting plan." Id. In making this functional analysis, "[the] ability to elect either exists or it does not in any particular circumstance." Id. If the proposed plan allows for the same or greater number of districts where the minority community has an ability to elect a candidate of choice, then the proposed plan

satisfies Section 5. Id. This does not require an inquiry into whether the Constitution or Section 2 have been violated. See Miller, 515 U.S. at 925-26, 115 S. Ct. at 2493 (precleared plan may still violate the Constitution) and Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 471, 117 S. Ct. 1491, 1494 (1997) (Section 5 and Section 2 are mutually exclusive).

In this case, Defendants' contention that they were attempting to comply with Section 5 is without merit. First, Defendants conducted no functional "to-elect" analysis *prior* to adopting the House or Congressional Redistricting Plans. The record indicates the House only retained Mr. Brunell *after* litigation was initiated, not during the redistricting process. Second, the Brunell Declaration merely offers an opinion that "racially polarized voting is present in South Carolina and this is indicative of the need for majority-minority districts." Pl. Ex. 73, p. 6. Of course, this asks precisely the wrong question for Section 5 analysis. The proper question is not whether racial polarization exists, but whether the BVAP of the districts will elect the black community's candidate of choice.

Third, the standard adopted was entirely inconsistent with the actual Section 5 standard. The General Assembly adopted what Rep. Sellers described as a "hard, fast line" that districts with majority-black populations in 2003 could not reduce BVAP percentages. Trial Tr. Sellers 14. The audio recordings of the House subcommittee and full committee meetings played at trial also illustrated this rule, with Rep. Harrison rejecting an amendment by Rep. Karl Allen to unify a community of interest in Greenville because it would lower the BVAP percentage of Rep. Allen's district (HD-25) but 0.8%. By their own words, House Republicans were applying the wrong standard for deciding whether a district was retrogressive by equating any reduction in BVAP, even if through natural population shift, with a reduction in the ability of the minority community to elect a candidate of choice. The House applied this flawed standard even though the DOJ Guidance on Section 5 was provided to each member of the Election Law

Subcommittee in their Redistricting Notebook.

Plaintiffs acknowledge that a state may also anticipate a Section 2 challenge and draw a majority-minority district in order to avoid litigation. "Of course, to be narrowly tailored to achieve the compelling interest of § 2, there must be evidence that the Gingles test is met in the first instance." Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 639-40 (D.S.C. 2002). In other words, the state is not required to draw a majority-minority district unless there is a sufficiently numerous and compact minority population to allow the creation of a 50% majority-minority district, the presence of racial block voting, and racially polarized voting. Bartlett v. Strickland, 556 U.S. 1, 129 S.Ct. 1231 (2009). "Section 2 does not require a state to create, on predominately racial lines, a district that is not reasonably compact. And the § 2 compactness inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries." Colleton County, 201 F. Supp. 2d at 639-40 (internal quotations omitted) (citing Abrams v. Johnson, 521 U.S. 74, 91, 117 S.Ct. 1925, 1936 (1997); and Bush, 517 U.S. at 977, 116 S.Ct. 1941). Again, the state failed to do *any* analysis prior to taking the drastic remedy of creating additional majority-minority districts and maintaining artificially high BVAPs in existing majority-minority districts.

Although it is not their burden to prove the House and Congressional Plans were not narrowly tailored to serve a compelling state interest, Plaintiffs were the only party to put forward evidence demonstrating that it was unnecessary for Defendants to disregard traditional redistricting principles and use race as the predominate factor. Dr. McDonald testified that Defendant Harrell's expert witness failed to answer the relevant question by failing to calculate what percentage of BVAP a district must have in order to elect the black community's candidate of choice. Trial Tr. McDonald, 131-44. Dr. McDonald demonstrated though his supplemental report and testimony that assuming the Brunell Declaration is accurate, BVAP in all of the

gerrymandered districts could be left at the levels in the Benchmark Plan or even brought down further. Id. While Dr. McDonald took issue with Brunell's statistical methodology,[11] he also testified that if Brunell's analysis had been done properly, the BVAP levels necessary to elect a candidate of choice would likely be even lower than those set forth in his supplemental analysis. Id. at 144.

Defendants have taken the position that the mere presence of racial polarization, *any polarization whatsoever,* provides the legal justification to create majority black districts. Defendants contend that naturally occurring crossover districts, like the nine districts that existed under the Benchmark Plan, cannot be maintained so long as racial polarization exists. This position is contrary to the Supreme Court's explicit direction. "Crossover districts are, by definition, the result of white voters joining forces with minority voters to elect their preferred candidate. The Voting Rights Act was passed to foster this cooperation." Bartlett, 556 U.S. at 26, 129 S. Ct. at 1249. The cynical argument advanced by Defendants, if accepted by the Court, would ossify the role of race in our political process irrespective of the continued progress we have made since the Colleton Co. litigation ten years ago. "It would be an irony, however, if § 2 were interpreted to entrench racial differences by expanding a statute meant to hasten the waning of racism in American politics." Bartlett, 556 U.S. at 25, 129 S. Ct. at 1249 (citing De Grandy, 512 U.S. at 1020, 114 S.Ct. 2647).

IV. The uncontradicted evidences proves an intentional scheme to diminish the political power of black voters.

The uncontradicted evidence from members of the General Assembly also proves by a preponderance of the evidence that the legislative leadership intentionally applied their racially

[11] For example, Dr. McDonald testified that Brunell assumed that all absentee voters voted the same proportionally as election-day voters. He also excluded a significant portion of the precincts in some of the districts he looked at, resulting in as many as half of the voters in the district not being counted. See Trial Tr. McDonald 131-44.

discriminatory scheme to marginalize black voting power. The 1982 Amendment to the Voting Rights Act replaced the intent test with a functional or effects test because intent had proved to be too difficult a burden for Section 2 plaintiffs. Gingles, 478 U.S. at 44, 106 S. Ct. at 2763. The Court has subsequently interpreted this functional test to require a showing of numerosity and compactness, racial block voting, and racially polarized voting. Bartlett, 556 U.S. at 11, 129 S. Ct. at 1241 (citing Thornburg v. Gingles, 478 U.S. 30106 S.Ct. 2752 (1986)). Here Plaintiffs admittedly are not proceeding under the functional test as most recently explained in Bartlett.

Instead, Plaintiffs have shown an intentional scheme to marginalize black voting power by reseggregating black voters into majority-minority districts, contrary to any compelling need or traditional districting principles. In Bartlett the Court contemplates Section 2 covering precisely this circumstance, explaining that:

> Nor does this case involve allegations of intentional and wrongful conduct. We therefore need not consider whether intentional discrimination affects the Gingles analysis. Our holding does not apply to cases in which there is intentional discrimination against a racial minority.

Bartlett, 556 U.S. at 20, 129 S. Ct. at 1246. Additionally, the Fifteenth Amendment has always prohibited intentionally discriminatory voting schemes Gomillion v. Lightfoot, 364 U.S. 339, 346-47, 81 S. Ct. 125, 130 (1960) (the Constitution forbids special discriminatory treatment in voting). Under either standard, the Defendants' scheme fails.

V. Conclusion.

Faced with the uncontradicted record that Defendants' House and Congressional Redistricting Plans were an intentional scheme to pass race-based gerrymanders, Defendants continue to justify their discriminatory conduct with an unfounded interpretation of the Voting Rights Act. The Supreme Court's conclusion in Miller is directly on point in this case:

> The [Voting Rights] Act, and its grant of authority to the federal courts to uncover official efforts to abridge minorities' right to vote, has been of vital importance in

> eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions. Only if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race. As a Nation we share both the obligation and the aspiration of working toward this end. The end is neither assured nor well served, however, by carving electorates into racial blocs. If our society is to continue to progress as a multi-racial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury. It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.

Miller, 515 U.S. at 927-28, 115 S. Ct. at 2494. The only competent evidence before the Court is that the General Assembly used the Voting Rights Act to draw as many majority-black districts as possible in the House plan and pack the Sixth Congressional District. Maintaining or increasing BVAP in majority-black districts and those districts represented by a black representative was the only factor the legislature considered. Plaintiffs demonstrated repeatedly how lines were drawn to include and exclude voters on account of race. Plaintiffs also offered evidence that this race-based line drawing was unnecessary based on the level of white crossover voting identified by Defendant Harrell's own expert. Plaintiffs also submitted uncontradicted proof that leaders in the General Assembly used an incorrect interpretation of the Voting Right Act, as described in their own words on the legislative audio record. The Voting Rights Act, which has long been a shield against discriminatory state action, cannot be used as a sword to perpetuate the conduct it was designed to eradicate. Where the entire redistricting plans for the South Carolina House of Representatives and the United States Congress were infected by the discriminatory use of race, they should be vacated and the Court should order new plans consistent with the guarantee of equal protection, the Fifteenth Amendment, and the Voting Rights Act of 1965, as amended.

Respectfully submitted,

s/Richard A. Harpootlian
Richard A. Harpootlian (Fed. ID # 1730)
rah@harpootlianlaw.com
Graham L. Newman (Fed. ID # 9746)
gln@harpootlianlaw.com
M. David Scott (Fed. ID # 8000)
mds@harpootlianlaw.com
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Post Office Box 1090
Columbia, SC 29202
Telephone: (803) 252-4848
Facsimile: (803) 252-4810

ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina
March 5, 2012