

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION**

VANDROTH BACKUS, et al.,	)	
	)	Civil Action No.: 3:11-cv-03120-HFF-MBS-PMD
Plaintiffs,	)	
	)	
v.	)	
	)	
The STATE OF SOUTH	)	
CAROLINA, et al.,	)	
	)	
Defendants.	)	
_____	)	

**Memorandum in Opposition to Plaintiffs’ Motion for Relief from Judgment and Order by  
Defendants State of South Carolina, Nikki R. Haley, Marci Andino and Election  
Commissioners**

Plaintiffs have filed a Motion for Relief from Judgment and Order in this case seeking relief from this Court’s March 2012 Order, upheld on appeal, denying Plaintiffs’ claims and dismissing the case. The Plaintiffs’ motion relies on the recent U.S. Supreme Court ruling in Shelby County v. Holder, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) and Rule 60 of the Federal Rules of Civil Procedure.

The Plaintiffs’ original case made claims for vote dilution and racial gerrymandering under the Fourteenth and Fifteenth Amendments to the U.S. Constitution and the Voting Rights Act of 1965, 42 U.S.C. § 1973, et seq. The Plaintiffs’ current motion seeks to re-open the case to re-litigate their racial discrimination claims under the Fourteenth and Fifteenth Amendments as well as their § 2 claims.<sup>1</sup> Defendants State of South Carolina, Nikki R. Haley, Marci Andino, and

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<sup>1</sup> As this Court noted, the U.S. Supreme Court has never explicitly recognized a Fifteenth Amendment claim for vote dilution but the Fourth Circuit has stated that a vote dilution claim under the Fifteenth Amendment would in any event be analyzed the same as a vote dilution claim under the Fourteenth Amendment. It is unclear if Plaintiffs intend to only re-pursue vote dilution or if they also intend to re-pursue racial gerrymandering.

the State Election Commission Commissioners<sup>2</sup> (hereinafter “Defendants”) request this Court deny Plaintiffs’ Motion in its entirety.

### **Argument**

#### **I. Rule 60**

For a Rule 60(b)(5) motion to succeed, a movant must show “a significant change either in factual conditions or in law.” Agostini v. Felton, 521 U.S. 203, 215, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *quoting* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384, 112 S.Ct. 748, 116 L.Ed.2d 687 (1992). In Agostini, the legal change in question concerned the validity of stare decisis in Establishment Clause law under recent U.S. Supreme Court cases. The Court then went through an analysis of its recent Establishment Clause law and if it qualified as a change for Rule 60 purposes in the Agostini case. Plaintiffs’ Motion claims the U.S. Supreme Court’s ruling in Shelby County v. Holder is a significant change in the law that requires the re-litigation of their original claims. However, for the reasons that follow, Plaintiffs’ Motion fails under an Agostini analysis.

Plaintiff also seeks relief under the catch-all “any other reason” provision in Rule 60(b)(6). However, since there has been no change in the law, there is no valid legal reason to grant Plaintiffs’ Motion other than they just want to re-litigate their case a year and half after it was tried originally.

#### **II. Shelby County**

Plaintiffs’ Motion declares that the U.S. Supreme Court declared § 5 of the Voting Rights Act unconstitutional. However, the Plaintiffs are simply mistaken. “Our decision in no way

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<sup>2</sup> In the original case members of the State Election Commission were named as Defendants in their official capacity. Since the dismissal of Plaintiffs’ case, the membership of the Election Commission has changed which would necessitate changes to the caption. However, for sake of convenience, the Defendant Election Commissioners will be referred to generically as Election Commissioners instead of their proper names. This in no way waives any defenses available to any former or current Commissioners.

affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula.” Shelby County v. Holder, 133 S.Ct. 2612, 2631, 186 L.Ed.2d 651 (2013). Only one justice, Justice Thomas, went so far as to issue any pronouncement on § 5. Justice Thomas wrote that he believed the Court did not go far enough in its decision and he would also declare § 5 unconstitutional in addition to § 4. “I join the Court’s opinion in full but write separately to explain that I would find § 5 of the Voting Rights Act unconstitutional as well.” Shelby County, 133 S.Ct. at 2631, (2013) (concurring opinion of Justice Thomas).

The opinion in Shelby County declared § 4 of the Voting Rights Act unconstitutional. This section provided what is commonly referred to as the “coverage map”. The coverage map was initially used to place six states under the Voting Rights Act remedial scheme as utilized under § 5 in 1965: South Carolina, Georgia, Alabama, Mississippi, Louisiana and Virginia. In 1975, after a Congressional re-authorization of the Voting Rights Act, three more states were brought in under the coverage map: Alaska, Arizona and Texas. The coverage map was based on data that Congress collected during the initial passage of the Voting Rights Act and during subsequent re-authorizations.<sup>3</sup> The Court in Shelby County found that the latest authorization of the Voting Rights Act in 2006 for an additional 25 years relied on data that was forty years old and thus the coverage map was being unconstitutionally applied to those jurisdictions under the map because the data used did not reflect the data from the present day. “Coverage today is based on decades-old data and eradicated practices.” Shelby County, 133 S.Ct. at 2627. In short, the Court found that current burdens must be justified by current needs and § 4 simply did not meet this justification. As noted by the Court, the wrongs identified under § 4 were known

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<sup>3</sup> The passage of the Voting Rights Act and its re-authorizations also included counties in several states under the coverage map including counties in North Carolina, California, New Hampshire, New York, Florida, Michigan and South Dakota.

as “first generation barriers” such as any use of a test or a device for voter registration and a low voter turnout in the 1964 presidential election obviously as a result of those barriers in place during that time. It was these “first generation barriers” as impediments to the casting of ballots that were identified by § 4 as fundamental constitutional violations to be prevented and corrected by the remedial scheme of § 5. The Court in Shelby County identified vote dilution as a “second generation barrier” which is an electoral arrangement that affects the weight of minority votes. These “second generation barriers” are subject to racial discrimination intent and effect claims such as vote dilution and racial gerrymandering and they are the exact type of claims to be brought under § 2 and the 14<sup>th</sup> Amendment and not as part of the preclearance requirements of § 5. “Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution.” Shelby County, 133 S.Ct. at 2629.

It is important to understand that § 5 was always a remedy. Shelby County simply found that there was no longer a wrong to be remedied, at least as a wrong identified under § 4 of the Voting Rights Act. In certain areas of the country § 5 still applies to specific jurisdictions as a remedy for specific Voting Rights Act violations. The Voting Rights Act has always had § 2 and § 3 which both have been used to bring jurisdictions under the remedial scheme of § 5. Under § 3, known as the “bail-in” provision, a jurisdiction may be sued by the Department of Justice or other interested parties to bail-in a jurisdiction under the remedial scheme of § 5. This particular portion of the Voting Rights Act is commonly referred to as the “pocket trigger” or “constitutional trigger”. It is used to punish jurisdictions that have engaged in intentional discrimination with regard to voting practices. Under the Voting Rights Act, two states have been “bailed-in” under § 3 to require them to submit to the remedial scheme of § 5: Arkansas and

New Mexico<sup>4</sup>. See Jeffers v. Clinton, 740 F. Supp. 585 (E.D. Ark. 1990) & Sanchez v. Anaya, No. 82-0067M, slip op. ¶8 (D.N.M., Dec. 17, 1984) (consent decree). None of the jurisdictions under § 5 that were brought in as a result of § 3 suits are effected by the holding in Shelby County. Furthermore, the Department of Justice also agrees with Defendants' position that the decision in Shelby County left unaffected the non-discrimination requirements of § 2 and the bail-in provisions of § 3 of the Voting Rights Act. The DOJ is currently seeking to bring Texas back under §5 via a § 3 lawsuit over Voter ID and intervening in a § 2 lawsuit in Texas. See U.S. v. Texas, C/A No.: 2:13-cv-00263 (S.D. Tex.); Perez v. Perry, C/A No.: AS-11-CA-360-OLG-JES-XR (W.D. Tex.); DOJ Press release, August 22, 2013 (Exhibit 1). According to media reports, the DOJ is also preparing a § 3 lawsuit against North Carolina based on its passage of a Voter ID law to bring North Carolina under the remedial scheme of § 5. See Washington Post article, August 22, 2013 (Exhibit 2).

This distinction between the racial discrimination claims brought under § 2 and the 14<sup>th</sup> Amendment, such as vote dilution and racial gerrymandering, and the retrogressive prohibition in § 5 is the fundamental characteristic that is fatal to Plaintiffs' motion in this case. Those racial prohibitions found in §2 and the 14<sup>th</sup> Amendment were present before Shelby County and they are still present after Shelby County. In fact, the Court noted the type of claims § 2 intended to forbid and that § 2 and its recognizable claims simply were not at issue. "Section 2 was enacted to forbid, in all 50 States, any 'standard, practice, or procedure ... imposed or applied ... to deny or abridge the right of any citizen of the United States to vote on account of race or color.' ... Section 2 is permanent, applies nationwide, and is not at issue in this case." Shelby County 133 S.Ct. at 2619. Plaintiffs' were able to fully present their racial discrimination claims under § 2

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<sup>4</sup> Some counties, cities and other jurisdictions have been brought under § 5 pursuant to § 3 "bail-in" suits across the country, including but not limited to, Los Angeles County, California and the city of Chattanooga, Tennessee.

and the 14<sup>th</sup> and 15<sup>th</sup> Amendments during the trial of this case in March 2012. This Court's order dismissing the case fully analyzed all of Plaintiffs' racial claims, including vote dilution and racial gerrymandering. There has been no change in the law with respect to the availability of § 5 as a remedy for Voting Rights Act violations. The only change that occurred is that South Carolina is no longer a covered jurisdiction under § 4 and thus there is no requirement to go through the preclearance requirements of § 5. The lack of preclearance requirements do not qualify as a sufficient change in the law or facts that would warrant re-opening this case because as noted above, Shelby County did not change any law regarding vote dilution or racial gerrymandering claims as those claims are properly under § 2 and § 3 of the Voting Rights Act.

Plaintiffs argue the House Defendants description of the effects of Act 72 on black voting age population in their § 5 preclearance lawsuit with the Department of Justice somehow acted as a barrier to their ability to succeed with their § 2 claims and their 14<sup>th</sup> and 15<sup>th</sup> Amendment claims. They then go on to argue that since South Carolina is no longer required to go through the preclearance requirements of § 5, incorrectly stating the holding of Shelby County, they are now entitled to re-litigate claims they originally brought under § 2 and the 14<sup>th</sup> and 15<sup>th</sup> Amendments. However, § 5 approval or denial of a redistricting plan does not impact the analysis a court applies to a § 2 lawsuit as they both require separate and distinct analyses. *See Reno v. Bossier Parish School Bd.*, (*Reno I*) 520 U.S. 471, 485, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997). In any event, this Court gave a full and expansive analysis to all of Plaintiffs' claims in this lawsuit and only mentioned the § 5 preclearance requirement as a tool to analyze race as a factor compared to traditional race-neutral factors. All of the evidence presented by Plaintiffs in their Motion was evidence already considered and rejected as unpersuasive by this Court in its March 2012 Order.

**Conclusion**

Therefore, for all of the reasons stated above, Defendants request this Court deny Plaintiffs' Motion for Relief from Order and Judgment and dismiss this case with prejudice.

Respectfully submitted,

s/ J.C. Nicholson, III

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STATE ELECTION COMMISSION, IN THEIR OFFICIAL  
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September 16, 2013.