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 his capacity as President Pro Tempore of the Senate and Chairman of the Senate Judiciary Committee, Robert W. Harrell, Jr., in his capacity as Speaker of the House of Representatives, Marci Andino, in her capacity as Executive Director of the Election Commission, John H. Hudgens, III, Chairman, Nicole S. White, Marilyn Bowers, Mark Benson, and Thomas Waring, in their capacity as Commissioners of the Elections Commission, Defendants.	3:11-cv-03120-PMD-HFF-MBS

Robert W. Harrell, Jr.'s Memorandum of Law in Opposition to Plaintiffs' Motion for Relief from a Judgment and Order

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Robert W. Harrell, Jr. ("Harrell") opposes the Motion for Relief from a Judgment and Order because Plaintiffs do not qualify for relief under Federal Rule of Civil Procedure 60(b). Plaintiff's request for relief is not based on a change in the facts, but rather on their argument that the Supreme Court's decision in *Shelby*

County v. *Holder*, 570 U.S. ___, 133 S. Ct. 2612 (2013), changed the law applicable to their challenge to the redistricting plan for elections to the South Carolina House of Representatives as enacted by the South Carolina General Assembly ("General Assembly") in Act 72 of 2011 (the "Redistricting Plan").[1] Pls. Mem. Law in Supp. Pls.' Mot. Relief from an Order and J. 1-3, ECF No. 223-1 ("Pls.' Mem."). Plaintiffs fail to establish both the threshold requirements for proceeding under Rule 60(b) and the elements for obtaining relief under Rules 60(b)(5) and (6).

Argument

In their original action,[2] Plaintiffs presented four claims for relief: an allegation of racial gerrymandering in violation of the Fourteenth Amendment; an allegation that the Redistricting Plan violated Section 2 of the Voting Rights Act; a somewhat-unclear allegation of vote dilution in violation of the Fourteenth Amendment; and an allegation of vote dilution and racial gerrymandering in violation of the Fifteenth Amendment. *Backus v. South Carolina*, 857 F. Supp. 2d 553, 558 (D.S.C. 2012) (three-judge panel). After a trial on the merits, this Court

[1] In addition to the House Redistricting Plan, Plaintiffs originally challenged the redistricting plans for the South Carolina Congressional election districts adopted by the General Assembly in Act 75 of 2011 ("Congressional Redistricting Plan"). Plaintiffs' motion omits any reference to the Congressional Redistricting Plan and does not seek to set aside the Court's Order in this regard.

[2] Because this case was extensively briefed and then tried before this three-judge panel, following which this Court issued a written order rejecting all of Plaintiffs' claims, Harrell relies on the procedural and factual recitations set forth in the order and the memoranda previously filed with this Court.

found that Plaintiffs failed to prove the required elements of each of their claims. *Id.* at 560, 565 (failed to prove Fourteenth Amendment racial gerrymandering claim), 567 (failed to prove elements of Section 2 claim), 568 (failed to prove discriminatory purpose or effect for Fourteenth Amendment vote-dilution claim), 569-70 (failed to prove Fifteenth Amendment vote-dilution and racial gerrymandering claims). Contending that *Shelby County* overrules this Court's analysis in *Backus* and forgives their complete failures of proof, Plaintiffs now request that the Court allow further briefing and argument to determine whether the Redistricting Plan violates the Fourteenth Amendment. For the reasons explained below, Plaintiffs are wrong: *Shelby County* does not give them a second bite at the apple.

1. Plaintiffs have failed to comply with the threshold requirements of Rule 60(b).

Reconsideration of a judgment pursuant to Rule 60(b) is an extraordinary remedy that should be used sparingly and only in exceptional circumstances. *E.g.*, *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing*, 674 F.3d 369, 376 (4th Cir. 2012). "A party seeking relief from a final judgment under Rule 60(b) faces a heavy burden." *U.S. ex rel. Abou-Hussein v. Sci. Applications Int'l Corp.*, No. 2:09-1858-RMG, 2012 WL 6892716, at *2 (D.S.C. May 3, 2012), *aff'd*, 475 F. App'x 851 (4th Cir. 2012); *see also Thompson v. United States*, 220 F.3d 241, 248 (4th Cir. 2000). A movant under Rule 60(b) must first cross an "initial threshold" of proving each of the following elements: (1) timeliness; (2) a meritorious

defense or claim; (3) a lack of unfair prejudice to the opposing party; and (4) exceptional circumstances. *Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993). Failure to establish any one of the above elements is fatal to a Rule 60(b) motion. *Id.*; *see U.S. ex rel. Abou-Hussein*, 2012 WL 6892716, at *2.

This heavy burden requires that the moving party establish the grounds for relief to the satisfaction of the court through clear and convincing evidence. *In re Burnley*, 988 F.2d 1, 3 (4th Cir. 1992); *see Buffalo Wings Factory, Inc. v. Mohd*, No. 1:07-cv-612-JCC, 2008 WL 2557999, at *3 (E.D. Va. June 23, 2008) (finding that the "balance of case law tips in favor of applying" clear and convincing evidence standard to all Rule 60(b) motions). Because Plaintiffs have not shown that they have a meritorious defense or claim and have not proven exceptional circumstances, they cannot cross this "initial threshold" for Rule 60(b) relief.

A. Plaintiffs have not alleged a meritorious claim should their motion be granted.

To present a legitimate claim for relief pursuant to Rule 60(b), a moving party must establish that they have meritorious arguments that could defeat the opposing party's claims or defense if they are given another opportunity to litigate the underlying issues. *Boyd v. Bulala*, 905 F.2d 764, 769 (4th Cir. 1990); *Evans v. Legislative Affairs Div.*, No. 6:12-cv-00641-JMC, 2013 WL 2635933, at *2 (D.S.C. Jun. 11, 2013). This threshold requirement is necessary to ensure that granting the Rule 60(b) relief "will not in the end have been a futile gesture."

Boyd, 905 F.2d at 769. A simple request for the district court to "change its mind" is not a meritorious claim or defense. *U.S. v. Williams*, 674 F.2d 310, 313 (4th Cir. 1982) (holding that "Rule 60(b) does not authorize a motion merely for reconsideration of a legal issue"); *see CNF Constructors, Inc. v. Donohoe Const. Co.*, 57 F.3d 395, 401 (4th Cir. 1995) ("A Rule 60(b) motion may not be used to request 'reconsideration of legal issues already addressed in an earlier ruling.'"); *see also Aikens v. Ingram*, 652 F.3d 496, 501 (4th Cir. 2011) (citing *In re Burnley*, 988 F.2d at 3) ("A Rule 60(b) motion is not a substitute for an appeal"). Because *Shelby County* does not support Plaintiffs' request for relief under Rule 60(b), their motion does nothing more than ask this Court to change its mind.

(1) *Plaintiffs misapprehend the holding and analysis of* Shelby County.

Plaintiffs' sole basis for their motion is the *Shelby County* decision. *Shelby County* addresses whether the formula established in Section 4(b) of the Voting Rights Act, which determines what jurisdictions are covered by Section 5 and its preclearance requirements, infringes upon the principle of equal sovereignty of the states. *Shelby County*, 133 S. Ct. at 2622-23. Analyzing Supreme Court precedent regarding the relationships between the states and the federal government, *see, e.g.*, *id.* at 2623-24,[3] the Court determined that the Section 4 formula did infringe on the states' equal sovereignty, and held Section 4(b) unconstitutional. *Id.* at 2629

[3] Even when the Court did consider its Section 5 precedent regarding redistricting plans, it did so only in the context of considering whether Congress improperly expanded the coverage of Section 5 in 2006. *Shelby County*, 133 S. Ct. at 2626-27.

("Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions."). Importantly, however, *Shelby County* did not involve a challenge to a specific redistricting plan and the Court therefore did not consider the applicable burdens of proof for challenges to legislative districting plans under the Fourteenth or Fifteenth Amendment, or Section 2 of the Voting Rights Act.

Plaintiffs misapprehend all of this, contending that *Shelby County* "constitutes a monumental change in constitutional law" and that "Shelby County changed the substantive law applicable in this case." Pls.' Mem. 1, 12. That contention is wrong: *Shelby County* did not change the substantial body of law that must be applied by a Court when evaluating a legal challenge to a legislative redistricting plan. Plaintiffs ignore the fact the Supreme Court in *Shelby County* did not review, consider, modify, or overrule existing precedent that requires proof that race predominated in the redistricting decisions in order to overturn a plan. Thus, the analytical framework applied by this Court to each of Plaintiffs' claims based on existing legal precedent remains unchanged by *Shelby County*.

(2) Shelby County *does not retroactively change Plaintiffs' failures of proof regarding their Fourteenth Amendment claims.*

Plaintiffs appear to challenge only the Court's Order with respect to their racial gerrymandering claim alleging a violation of the Equal Protection Clause of the Fourteenth Amendment. *See, e.g.*, Pls.' Mem. 17-18 ("[T]his Court should re-examine the constitutionally significant question as to whether Act 72 denies equal

protection in the absence of Section 5's exceptional racial districting mandate."). It is unclear whether they also challenge this Court's ruling on their Fourteenth Amendment vote dilution claim. Regardless, a review of this Court's analysis of each of Plaintiffs' Fourteenth Amendment claims demonstrates that *Shelby County* does not now entitle Plaintiffs to Rule 60(b) relief.

(a) *Fourteenth Amendment racial gerrymandering claim*.

This Court found that Plaintiffs did not establish that race was a predominant factor in drawing the Redistricting Plans because they did not prove that the plans contained bizarre or highly irregular district lines, that the legislature subordinated traditional redistricting principles to race, or that there was any legislative purpose indicating that race was the predominant factor. *Backus*, 857 F. Supp.2d at 560. This Court also found that Defendants "were able to disprove that race was the predominant factor by demonstrating that their decisions adhered to traditional race-neutral principles." *Id.*

Nothing in Plaintiffs' motion changes any of this analysis. Much, if not all, of their argument is based upon this Court's correct statement that "[f]or South Carolina, a covered jurisdiction under the Voting Rights Act, federal law requires that race be a consideration" and that "[t]he General Assembly had to consider race to create districts that complied with federal law, which it did." *Id.* at 565; *see* Pls.' Mem. 11 ("This Court upheld Act 72 in reliance on the State's Section 5 mandate."). But that argument ignores the next sentence in which the Court properly framed the issue: "The Court's task is to ensure that, in drawing the

districts, the General Assembly did not rely on race at the expense of traditional race-neutral principles." *Backus*, 857 F. Supp.2d at 565. Plaintiffs also do not address the Court's conclusion: "Because Plaintiffs have failed to demonstrate that race predominated over traditional race-neutral principles, the Court is satisfied that the General Assembly did not overly rely on race in a manner that runs afoul of the Fourteenth Amendment." *Id.* As this Court fully explained, the General Assembly adopted and applied race-neutral traditional redistricting principles in adopting the Redistricting Plan. *Id.* at 560-61. In their most-recent court filing, Plaintiffs continue to ignore this Court's findings with respect to the race-neutral factors and their failure of proof in the initial proceedings, instead solely—and erroneously—contending that *Shelby County*, in effect, cures their failures of proof. *See* Pls.' Reply to Defs. State of South Carolina, Haley, Andino, and Election Comm'rs' Opp'n 3, ECF No. 228 ("Pls.' Reply").

Plaintiffs' also argue that the General Assembly's consideration of race as *a* factor in an effort to comply with the then-applicable Section 5 preclearance requirements renders the Redistricting Plan invalid. This simplistic analysis ignores the fact that Plaintiffs failed to prove that race predominated in the General Assembly's redistricting decisions. Although "[t]he General Assembly had to consider race to create districts that complied with federal law," *id.* at 565, the Court concluded that race was not the predominant consideration in developing the Redistricting Plan based on the General Assembly's use of traditional race-neutral principles, the shapes of the districts, and other indicators

of legislative purpose. Instead, the Court specifically recognized that the General Assembly "illustrated race-neutral reasons for the irregular looking shapes in the challenged districts" including "respecting existing political boundaries where possible," and the irregular shape of census blocs. *Id.* at 563. *See, e.g,. id.* at 564 (citing testimony of Plaintiffs' witness that the General Assembly abided by a number of specific race-neutral criteria such as incumbency protection and public testimony).

Because they did not establish that race was the "'dominant and controlling' consideration," *Shaw v. Hunt*, 517 U.S. 899, 905 (1996), Plaintiffs did not meet the threshold requirements for a strict scrutiny analysis. A redistricting scheme will be subjected to strict scrutiny and the burden shifted to the State to prove that the plan is narrowly tailored to achieve a compelling governmental interest only if a plaintiff first proves that the legislature subordinated traditional race-neutral principles in favor of using race as the primary consideration for drawing lines. *Backus*, 857 F. Supp.2d at 565; *see Easley v. Cromartie*, 532 U.S. 234, 241 (2001); *Miller v. Johnson*, 515 U.S. 900, 920 (1995). *Shelby County* does not relieve Plaintiffs of this obligation and, accordingly, their request for the Court to conduct a strict scrutiny analysis of the Redistricting Plan similarly fails.

At bottom, *Shelby County* does not invalidate the Court's determination that "the General Assembly did not overly rely on race in a manner that runs afoul of the Fourteenth Amendment." *Backus*, 857 F. Supp.2d at 565. Plaintiffs' ongoing effort to transform the consideration of Section 5 from one of several factors into

the predominant consideration is not supported by the existing law or by the evidence in this case. Plaintiffs simply repeat their mantra that the legislature cannot consider race at all, and now assert that *Shelby County* supports that argument. But as this Court recognized, "[l]egislatures are almost always cognizant of race when drawing district lines, and simply being aware of race poses no constitutional violation." *Id.* at 559. Consideration of race as one factor among many is not precluded. Because *Shelby County* does not change that principle, it does not impact this case. Plaintiffs are not entitled to relief.

(b) *Fourteenth Amendment Vote Dilution Claim*.

With respect to their Fourteenth Amendment vote dilution claim, Plaintiffs were required to prove both a discriminatory intent in the enactment of the Redistricting Plan and a discriminatory effect of that plan. *Id.* at 567-68. *Shelby County* does not pertain to either of these elements, and cannot have any effect on the Court's conclusion that Plaintiffs offered "no convincing evidence indicating that the General Assembly drew the district lines for the purpose of diluting Plaintiffs' voting strength" or "demonstrating how the House … plan[] dilute[s] their votes." *Id.* at 568. *Shelby County* in no way forgives Plaintiffs' failure of proof.

(3) Plaintiffs' failures of proof also render any non-Fourteenth Amendment claims meritless.

Plaintiffs acknowledge that their Motion does not seek to set aside the portions of this Court's Order rejecting their Section 2 and Fifteenth Amendment

claims. Pls.' Reply 2 ("[T]he Attorney General incorrectly contends that this motion asks the Court to reexamine Fifteenth Amendment and Voting Rights Act claims. This is simply incorrect.") (citations omitted).

Even so, and without conceding that they have raised any such challenge in the motion, Harrell contends that *Shelby County* in no way impacts this Court's analysis of Plaintiffs' Section 2 claim or their Fifteenth Amendment vote dilution and racial gerrymandering claims. *See id.* at 567 (Plaintiffs' did not show "that the General Assembly intended to pack African-American voters into districts to prevent the creation or preservation of crossover districts."); *id.* (Plaintiffs did not show "that minority voters would form a majority in a potential election district but for the challenged districting practice" as required by *Thornburg v. Gingles*, 478 U.S. 30 (1986)); *id.* at 569 (Plaintiffs' Fifteenth Amendment vote-dilution claims are congruent with Fourteenth Amendment vote-dilution claims and fail for the same reasons that their Fourteenth Amendment claims fail); *id.* at 570 (Plaintiffs' Fifteenth Amendment racial gerrymandering claim fail because they did not prove that any Plaintiff was denied the right to vote). Although Plaintiffs concede that their request for relief does not encompass a reevaluation of these claims, *Shelby County* in no way alleviates their failures of proof during the trial of this case and does not remotely support granting relief from the Court's decisions on these claims now.

B. Plaintiffs fail to assert any exceptional circumstances that warrant reconsideration of this case.

Plaintiffs fail to establish "exceptional circumstances" warranting Rule 60(b) relief for the same reasons they fail to assert a meritorious claim. Because nothing pertinent to this Court's analysis and findings in its Final Order has changed, there are no circumstances—let alone "exceptional" circumstances—that justify reconsidering the Final Order.

2. Even assuming that Plaintiffs clear the hurdle of meeting the threshold requirements for Rule 60(b) relief, their motion should be denied because they fail to allege adequate grounds justifying relief pursuant to Rule 60(b)(5) or Rule 60(b)(6).

Plaintiffs seek relief under the last two factors in Rule 60(b): the "inequitable-prospective" provision of Rule 60(b)(5) and the catchall provision of Rule 60(b)(6). *See* Pls.' Mem. 16-21. The "inequitable-prospective" provision of Rule 60(b)(5) states that relief will be granted if the moving party proves that "applying [the judgment] prospectively is no longer equitable." Rule 60(b)(6), on the other hand, allows a party can ask for relief for "any other reason that justifies relief." *Aikens*, 652 F.3d at 500. In either event, Plaintiffs fail to establish sufficient grounds to warrant setting aside this Court's Order.

A. Plaintiffs are not entitled to relief under Rule 60(b)(5) because it is inapplicable to the relief they seek.

(1) *The Court's Final Order does not have "prospective application" for purposes of Rule 60(b)(5).*

By definition, the "inequitable-prospective" provision of Rule 60(b)(5) only applies to final orders or judgments with "prospective" application or effect. Fed.

R. Civ. P. 60(b)(5) ("applying [judgment] prospectively is no longer equitable"); *see Twelve John Does v. Dist. of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988) ("[A]n order or judgment may be modified under this portion of Rule 60(b)(5) only to the extent it has 'prospective application.'"); *see also Schwartz v. U.S.*, 976 F.2d 213, 218 (4th Cir. 1992) (citing *Gibbs v. Maxwell House*, 738 F.2d 1153, 1155-56 (11th Cir. 1984)). To be prospective, a judgment must be "'executory' or involve[] the supervision of changing conduct or conditions." *Twelve John Does*, 841 F.2d at 1138.

Plaintiffs' request for Rule 60(b) relief hinges on their mistaken contention that the Supreme Court's decision was such a significant change of circumstances that "***continued enforcement***" of the Final Order would be "detrimental to the public interest." Pls.' Mem. 17 (citing *Horne v. Flores*, 557 U.S. 433, 447 (2009)) (emphasis added). However, the Court's order is not an injunction and does not grant any continuing relief. This argument fails because there was nothing for the Court to ***continue to enforce*** after it denied Plaintiffs' challenge to the Redistricting Plan.

Perhaps recognizing this problem with their claim for relief, Plaintiffs contend that Rule 60(b) should be "liberally construed" in favor of granting relief. Pls.' Mem. 16-17. This "liberal construction" view is only appropriate—if at all—in the default judgment setting. *See id.* (citing decisions discussing Rule 60(b) relief in the context of default judgments). However, when a full hearing on the merits has been conducted and the appeals process has been exhausted, the finality of the

judgment must be respected absent "exceptional" and "extraordinary" circumstances. *See Universal Film Exchanges, Inc. v. Lust*, 479 F.2d 573, 576 n.1 (4th Cir.1973) (distinguishing cases involving default judgments from those involving summary judgment on the merits); *see also Mayfield*, 674 F.3d at 376; *Compton v. Alton Steamship Co.*, 608 F.2d 96, 102 (4th Cir. 1979). Notably, the very cases Plaintiffs cite in favor of their "liberal construction" view discuss the difference between default judgments and judgments on the merits. *See, e.g.*, *Holliday v. Duo-Fast Maryland Co.*, 905 F.2d 1529, at *1 (4th Cir. 1990).

Moreover, this Court's Final Order denying Plaintiffs' challenges to the Redistricting Plans is not prospective for purposes of Rule 60(b)(5) and Plaintiffs fail to make any credible argument about why this Court's dismissal of their challenge has "prospective effect." Although "virtually every court order causes at least some reverberations into the future, and has, in that literal sense, some prospective effect," that does not mean that every court order has "prospective application" for purposes of Rule 60(b)(5). *Twelve John Does*, 841 F.2d at 1138. Because the Court's Final Order did not enjoin or restrict the General Assembly in any way,[4] had nothing to do with "institutional reform," was not executory, and

[4] Indeed, conclusively demonstrating that the Court's Final Order does ***not*** have "prospective application" for purposes of Rule 60(b)(5) is the fact that the General Assembly could have enacted a new redistricting plan the very day the Court issued its Final Order. And the Final Order does not prevent the General Assembly from enacting a new redistricting plan today or any time in the future.

did not require the Court's supervision of changing conduct, Rule 60(b)(5) is inapplicable.

Plaintiffs' citations to *Horne* and *Agostini v. Felton*, 521 U.S. 203 (1997), provide no support for their request for Rule 60(b)(5) relief. In each of these cases, the district court entered an injunction with respect to the conduct of governmental officials. *Horne*, 557 U.S. 433 (state officials challenged order requiring them to take certain actions to comply with Equal Educational Opportunities Act); *Agostini*, 521 U.S. 203 (city officials challenged order enjoining them from sending public school teachers into parochial schools). Again, this case did not result in the issuance of an injunction and, contrary to Plaintiffs' suggestion, *see* Pls.' Mem. 19, does not involve "institutional reform" like that at issue in *Horne* and *Agostini*. *See Perry-Bey v. City of Norfolk, Va.*, 678 F. Supp. 2d 348, 380 (E.D. Va. 2009) ("[N]o institutional reform prospective effect for election orders"); *see also Jackson v. DeSoto Parish Sch. Bd.*, 585 F.2d 726, 730 n.1 (5th Cir. 1978) (noting that with respect to election plans, "unlike school desegregation and institutional reform cases, the court's jurisdiction is not continuing, and the plan, once adopted and acted upon, does not require further judicial supervision"). By contrast, the Court's decision in this case was a final decision resolving all of Plaintiffs' claims against them and there is no ongoing decision for this Court to revise under Rule 60(b). *See Gibbs*, 738 F.2d at 1155 ("That plaintiff remains bound by the dismissal is not a 'prospective effect' within the meaning of Rule 60(b)(5) any more than if plaintiff were continuing to feel the effects of a money

judgment against him"); *see also Schwartz*, 976 F.2d at 218 (holding that a construction of Rule 60(b)(5) "that a judgment has prospective effect so long as the parties are bound by it, would read the word 'prospective' out of the rule").

Plaintiffs' claim for relief is also wholly inconsistent with the underlying reason why the Supreme Court in *Horne* held that Rule 60(b)(5) relief was appropriate with respect to orders enjoining government officials. Although certain situations may arise that require a court to impose the harsh remedy of enjoining elected officials with respect to the performance of their duties, the imposition of this remedy must be carefully scrutinized as it deprives both current and future officials of their designated legislative and executive powers. *See Horne*, 557 U.S. at 447-50. Because of this, the Supreme Court requires courts to take a "flexible approach" when examining orders that ***restrict*** elected officials' powers so as to "ensure that responsibility for discharging the State's obligations is returned promptly to the State and its officials when the circumstances warrant." *Id*. at 450 (internal quotations and citations omitted). Plaintiffs touch on this significant rule of law, *see* Pls.' Mem. 19-20, but then completely turn it on its head by arguing that this rule, which is to be used to ensure that elected officials are entitled to the full powers designated to them by the citizens absent exceptional circumstances, somehow supports Plaintiffs' effort to use Rule 60(b)(5) and this case to strip from the General Assembly the powers given to them by the citizens of the State of South Carolina. This illogical interpretation must be rejected.

(2) ***Even assuming the Court's Final Order has "prospective application," Plaintiffs fail to allege that the facts and law relevant to the Court's Final Order have changed so drastically that Rule 60(b)(5) relief is warranted.***

Even assuming—without at all conceding—that the Court's Final Order has "prospective application," Plaintiffs are not entitled to Rule 60(b) relief because they have not established that *Shelby County* changed—let alone "significantly" changed—the circumstances since the Court's Final Order. To meet this burden, Plaintiffs must show that the circumstances have so drastically changed since the Final Order that maintaining the status quo would be "detrimental to the public interest." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992) (holding, with respect to an institutional reform consent decree, that party seeking relief from judgment "bears the burden of establishing a significant change in circumstances warrants" relief because "enforcement of the decree without modification would be detrimental to the public interest");[5] *Board of Ed. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 249 (1991) (party moving for relief from judgment must make a "sufficient showing" of change in circumstances).

Plaintiffs do not and cannot make this significant showing because there has been no change in the circumstances. There is no continuing violation of the Equal Protection Clause of the Fourteenth Amendment or any other principle of law that is detrimental to the public. They acknowledge as much, stating that they do not

[5] Notably, the Supreme Court developed this standard under the "flexible approach" appropriate in "institutional reform" cases.

seek relief on the basis that there has been a change in the facts underlying the Court's Final Order. *See* Pls.' Mem. 20 ("Plaintiffs believe this matter can and should be resolved expeditiously with no additional discovery or evidentiary hearings…."). Instead, Plaintiffs' only seek relief on the basis that "the change in constitutional law announced in *Shelby County* calls into question the prospective appropriateness of this Court's Order and the continued viability of the House redistricting plan." *Id*. at 16.

Because there is no ongoing injunction for this Court to consider, Plaintiffs' attempted invocation of relief based on *Agostini*, 521 U.S. at 238-39, is meritless. Moreover, as explained above, *Shelby County* does not change the law regarding a private party challenge to a redistricting, let alone do so in a manner that completely reverses the analytical factors. *Cf. id.* (complete reversal of Establishment Clause precedent). And even if *Shelby County* did, by implication, overrule the earlier precedent in effect at the time of the Final Order, the Court would remain bound by the precedent in effect at that time. *See id.* at 237-238 (reaffirming that lower courts must abide by precedent directly applicable in a case and cannot conclude that "more recent cases have, by implication, overruled earlier precedent"). To conclude otherwise would be to conclude that final orders are never actually final.

B. Rule 60(b)(6) is inapplicable.

Plaintiffs' base their claim for Rule 60(b)(6) relief on the erroneous assertion that "this case presents the sort of 'extraordinary circumstances' contemplated by

Fourth Circuit precedent." *See* Pls.' Mem. 20. Plaintiffs are correct that Rule 60(b)(6) relief is only granted under "extraordinary circumstances."[6] *Ackermann v. U.S.*, 340 U.S. 193 (1950); *Aikens*, 652 F.3d at 500-02. However, Plaintiffs completely ignore the well-settled Fourth Circuit precedent that a mere "change in decisional law subsequent to a final judgment provides ***no basis for relief under Rule 60(b)(6)***." *Dowell*, 993 F.2d at 48 (citing *Hall v. Warden, Md. Penitentiary*, 364 F.2d 495, 496 (4th Cir.1966)) (emphasis added); *Hendricks v. Galloway*, No. 3:03-CV-740-DCN, 2011 WL 585970, at *2 (D.S.C. Feb. 9, 2011) ("A change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance which justifies such relief") (citing *Collins*, 245 F.2d at 839), *aff'd*, 431 F. App'x 219 (4th Cir. 2011), *cert. dismissed*, 132 S. Ct. 1048 (2012).[7] Thus, Plaintiffs are not entitled to Rule 60(b)(6) relief as a matter of law.

[6] Additionally, Rule 60(b)(6) may be invoked only when the grounds set forth by the moving party do not fit within the other Rule 60(b) factors. *Aikens*, 652 F.3d at 500; *see Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 n.11 (1988) (suggesting that clause (6) of Rule 60(b) and clauses (1) through (5) are mutually exclusive) (citing *Klapprott v. United States*, 335 U.S. 601, 613 (1949)).

[7] Other circuits agree. *See Biggins v. Hazen Paper Co.*, 111 F.3d 205, 212 (1st Cir. 1997); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272-73 (2d Cir. 1994); *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 749 (5th Cir. 1995); *Berryhill v. United States*, 199 F.2d 217, 218-19 (6th Cir. 1952); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv.*, 131 F.3d 625, 629 (7th Cir. 1997); *Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Assocs.*, 194 F.3d 922 (8th Cir. 1999); *Collins v. City of Wichita*, 254 F.2d 837, 839 (10th Cir. 1958).

Conclusion

This Court should deny Plaintiffs' motion for relief under Rule 60(b) because they do not meet the requirements for obtaining relief under that rule.

Respectfully submitted,

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