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

VANDROTH BACKUS, **WILLIE HARRISON BROWN**, **CHARLESANN BUTTONE**, **BOOKER MANIGAULT**, **EDWARD MCKNIGHT**, **MOSES MIMS, JR, ROOSEVELT WALLACE**, and **WILLIAM G. WILDER**, on behalf of themselves and all other similarly situated persons, **Plaintiffs,**	**Case No.: 3:11-cv-03120-PMD-HFF-MBS**
v.	
THE STATE OF SOUTH CAROLINA, **NIKKI R. HALEY**, in her capacity as Governor, **GLENN F. MCCONNELL**, in his capacity as President Pro Tempore of the Senate and Chairman of the Senate Judiciary Committee, **ROBERT W. HARRELL, JR**, in his capacity as Speaker of the House of Representatives, **MARCI ANDINO**, in her capacity as Executive Director of the Election Commission, **JOHN H. HUDGENS, III**, Chairman, **MARK BENSON**, **MARILYN BOWERS**, **NICOLE S. WHITE**, and **THOMAS WARING**, in their capacity as Commissioners of the Elections Commission, **Defendants.**	

PLAINTIFFS' RESPONSE TO THE COURT'S ORDER ISSUED ON JANUARY 19, 2012, INSTRUCTING PLAINTIFFS TO CLARIFY DISTRICTS AT ISSUE AND SUBMIT DEMONSTRATIVE ALTERNATIVE REDISTRICTING PLANS

INTRODUCTION

Plaintiffs submit this Memorandum pursuant to the verbal Order of the Court issued on January 19, 2012. This Memorandum, first, briefly summarizes Plaintiffs' position with respect

to their Fourteenth Amendment and Voting Rights Act claims. Second, Plaintiffs' specifically address the Congressional, House, and Senate Districts at issue under each of their theories of liability. Third, Plaintiffs explain which Plaintiffs have standing under each theory and why. Lastly, Plaintiffs have attached demonstrative Congressional, House, and Senate redistricting plans as instructed by the Court and offer a brief explanation of the principles adhered to in drawing these plans, including the United States Supreme Court's recent decision in Perez v. Perry.[1]

RESPONSE

I. Plaintiffs' Fourteenth Amendment and Voting Rights Act claims are distinct theories of liability with different standards of proof.

Plaintiffs Fourteenth Amendment and Voting Rights Act claims are analytically distinct and separate basis for relief in this case each with its own standard of proof. Contrary to defense counsels' suggestions during the Motion hearing, Plaintiffs have alleged *both* equal protection and Voting Rights Claims,[2] the relevant Equal Protection analysis is Miller v. Johnson, and redistricting plans that intentionally reduce minority voting power are cognizable under Section 2 without meeting the Gingles preconditions.

A. Miller v. Johnson is the applicable standard for establishing race was the predominant factor in drawing election districts in violation of Equal Protection.

Redistricting laws are subject to strict scrutiny when race is used as the predominant factor in drawing election districts. Miller v. Johnson, 515 U.S. 900, 904, 115 S. Ct. 2475, 2482 (1995). Plaintiffs challenging a redistricting plan have the burden to show that race-neutral principles were subordinated to race. Id., at 916, 115 S. Ct. at 2488; Shaw v. Reno, 509 U.S. 630,

[1] 11-713, 2012 WL 162610 (Jan. 20, 2012) (Exhibit A).
[2] See Mot. Tr., 25-26 January 19, 2012, ECF No. 78 (Mr. Carvin claiming Plaintiffs have abandoned their equal protection claim).

686, 113 S. Ct. 2816, 2848 (1993) (Shaw I). Once a court decides that race was the predominant factor in drawing election districts, the burden shifts to the state to prove that the plan was narrowly tailored to achieve a compelling state interest. Miller, at 904, 115 S. Ct. at 2482.

Because redistricting laws are facially neutral, Bush v. Vera, 517 U.S. 952, 958, 116 S. Ct. 1941, 1951, (1996), the Court has recognized a number of ways plaintiffs may prove that race was the predominant factor motivating a redistricting plan. Plaintiffs have alleged something more than simply a claim under Shaw I. In Shaw I, the Supreme Court merely articulated one method by which a plaintiff might prove that race was the predominant factor: where "a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to segregate voters on the basis of race." Shaw I, at 646-47, 113 S. Ct. at 2826-27 (internal quotations and citations omitted). In Miller, the Supreme Court explained that the Shaw Doctrine is not limited to cases where the shape of a district is so tortured that the court can conclude merely by looking at it that race was the predominant factor. Miller explained that:

> Our observation in Shaw of the consequences of racial stereotyping was not meant to suggest that a district must be bizarre on its face before there is a constitutional violation. Nor was our conclusion in Shaw that in certain instances a district's appearance (or, to be more precise, its appearance in combination with certain demographic evidence) can give rise to an equal protection claim, a holding that bizarreness was a threshold showing, as appellants believe it to be. Our circumspect approach and narrow holding in Shaw did not erect an artificial rule barring accepted equal protection analysis in other redistricting cases. Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines. *The logical implication, as courts applying Shaw have recognized, is that parties may rely on evidence other than bizarreness to establish race-based districting.*

Miller, at 912-13, 115 S. Ct. at 2486 (emphasis added) (internal citations omitted). The Shaw Doctrine, in its totality, allows a court to look to the demographics of the redistricting plan, the

shape of the districts, expert and lay testimony, express legislative purpose, the methods used in drawing a plan, and abandonment or subordination of traditional redistricting principles like compactness, political boundaries and communities of interest when deciding whether race was the predominant factor in drawing election districts. Miller, at 913-916, 115 S. Ct. at 2486-88; See also, Bush, at 959, 116 S. Ct. at 1952.

Plaintiffs' Fourteenth Amendment claims do not rise or fall based on the presence or absence of any one factor. The Amended Complaint alleges that race was the predominant factor because the demographics of the plans show that Defendants packed additional black voters into districts contrary to natural population shift and contrary to traditional redistricting principles. Plaintiffs Am. Cmplt. ¶¶ 63-65. Plaintiffs have also pointed to publically available information supporting the inference that the Shaw Doctrine has been violated. Pls' Mem. Opp'n. Mot. Dismiss, 8-15, ECF No. 59. In addition to this publically available information that Plaintiffs may rely upon, below Plaintiffs explain how expert analysis of the Plans demographic data supports the conclusion that race was the predominant factor in drawing the challenged redistricting plans. Plaintiffs reserve the right to use additional, yet-to-be-discovered facts in order to prove that race was the predominant factor in drawing these districts consistent with the Shaw Doctrine as explained fully by the Court in Miller.

B. Plaintiffs' Section 2 claim is consistent with the Voting Rights Act and has not been addressed by the United States Supreme Court.

The Section 2 claim presented to this Court alleges a Voting Rights Act violation any time a redistricting plan intentionally discriminates on account of race or color. Section 2 of the Voting Rights Act of 1965 prohibits the denial of the right to vote on account of race or color. 42 U.S.C. §1973(a). Prior to the 1982 Amendment to the Voting Rights Act, the Act was interpreted as synonymous with the Fifteenth Amendment (also pled in this case) to require the intentional

denial of the right to vote on account of race or color. See City of Mobile, Alabama v. Bolden, 446 U.S. 55, 100 S.Ct. 1490 (1980), superceded by statute as recognized by, Thornburg v. Gingles, 478 U.S. 30, 106 S. Ct. 2752 (1986). Congress amended the Act to eliminate the intent requirement and replaced it with a totality or functional analysis. 42 U.S.C. §1973 § 1973(b); see also, Gingles, at 35-37, 106 S.Ct. at 2758-59. The Gingles Court imposed three preconditions that must be satisfied before proceeding to the totality analysis in Subsection (b). Id. The Gingles preconditions require a showing of numerosity and compactness, racial block voting, and racially polarized voting. Bartlett v. Strickland, 556 U.S. 1, 10-11, 129 S.Ct. 1231, 1241 (2009) (citing Gingles). However, where there is intentional discrimination on the part of the state, the relaxed standard of proof and the preconditions to that relaxed standard do not apply. See Garza v. County of Los Angeles, 918 F.2d 763, 766 (9th Cir. 1990) ("To the extent that a redistricting plan deliberately minimizes minority political power, it may violate both the Voting Rights Act and the Equal Protection Clause of the fourteenth amendment") and United States v. Brown, 561 F.3d 420, 432 (5th Cir.2009) (indicating discriminatory intent is sufficient for a Section 2 claim), but see Johnson v. DeSoto County Bd. of Commissioners, 72 F.3d 1556, 1561–63 (11th Cir. 1996) (citing Voinovich v. Quilter, 507 U.S. 146, 113 S. Ct. 1149 (1993)).

Plaintiffs have pled a Section 2 violation as a result of Defendants "deliberately reduce[ing] the number of crossover districts or precent[ing] the from emerging over time through natural population shifts. Am. Cmplt ¶¶ 79, ECF No. 6. In other words, Plaintiffs have alleged an *intentional* effort to diminish black voting power in violation of the Voting Rights Act. Contrary to defense counsels assertions,[3] Voinovich does not apply since Plaintiffs here do not seek the affirmative creation of a ability-to-elect district, Voinovich presented a case of no

[3] See Mot. Tr., 25, 27 January 19, 2012, ECF No. 78 (Mr. Carvin claiming Plaintiffs have made a "Voinovich claim").

meaningful racially polarized voting, Voinovich, at 158, 113 S.Ct. at 1157-1158, and the Court found that there was no intentional discrimination by the state. Id. Furthermore, the Court expressly declined to address this precise issue in Bartlett. 556 U.S. at 19-20, 129 S. Ct. at 1246 ("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." (internal citations omitted)). Contrary to efforts by defense counsel to divert the Court's attention, Bartlett v. Strickland settled a question *not at issue in this case*, namely, whether a plaintiff could assert an entitlement to a minority ability-to-elect district when the number of minority voters in the compact area in question constituted less than fifty percent of the voters for the hypothetical district. Id. at 6, 129 S.Ct. at 1238. Plaintiffs openly concede that Section 2 does not give Plaintiffs entitlement to the *creation* of majority black districts or crossover districts. Plaintiffs' claim merely alleges that Section 2 protects minority voters from Defendants' *intentional* acts to *destroy* naturally evolving, biracial electoral coalitions that the Voting Rights Act and federal courts have assumed will evolve over time. See Georgia v. Ashcroft, 539 U.S. 461, 490, 123 S. Ct. 2498, 2517 (2003) ("The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race."). House Defendants Reply Memorandum cited a case from the Northern District of Illinois that also recognizes that this issue remains undecided. House Def. Reply Mem., ECF No. 13, citing Comm. for a Fair & Balanced Map v. Illinois Bd. of Elections, 1:11-CV-5065, 2011 WL 5185567 (N.D. Ill. Nov. 1, 2011) (noting Circuit split) (Exhibit B). Plaintiffs cannot satisfy the Gingles preconditions because the gravamen of the Section 2 violation in this case is the deliberate re-segregation of black voters into majority black districts when it is unnecessary to give these voters an equal opportunity to elect candidates of choice. Stated

differently, Defendants have created majority black districts *when they themselves cannot satisfy the Gingles preconditions* like compactness of the minority community and sufficient racially polarized voting by the majority white community to justify race-based redistricting.

Since "the essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives," Gingles, at 47, 106 S. Ct. at 2764, and since "[a] problem under § 2 arises whenever any person is moved from one district to another to minimize the value of his vote and give an advantage to someone else," Gonzalez v. City of Aurora, Illinois, 535 F.3d 59, 598 (7th Cir. 2008), Plaintiffs allege that Section 2 *must* still protect from intentional discriminatory action and that where intent is present, the Gingles preconditions need not be met to invoke the protection of the Voting Rights Act.

II. Plaintiffs object to the Congressional, House, and Senate Districts in whole and, in the alternative, to specific districts that are the target of race-based gerrymandering and effected by race-based gerrymandering.

A. Basis for challenging the Congressional, House and Senate Plans in their entirety.

Plaintiffs challenge the Congressional, House, and Senate Redistricting Plans in their entirety on two separate theories of liability. First, Plaintiffs believe that the leadership in the General Assembly intentionally drafted and passed redistricting plans that would pack black voters into majority black districts. Plaintiffs believe that Defendants decided at the outset of the redistricting process to create as many majority black districts as possible and unnecessarily raise the Black Voting Age Population (BVAP) of existing majority black districts in an effort to reduce or eliminate the ability of black voters in bleached districts from influencing the outcome of those elections or deciding the outcome by joining together with members of the white community. Plaintiffs also believe that Defendants did no analysis prior deciding whether this

race-based policy was necessary to allow black voters to continue to have an equal opportunity to elect candidates of choice. Many of the districts where Defendants packed BVAP or manipulated district lines to keep BVAP artificially high already elect the black community's candidate of choice. This makes the Defendants' race-based line drawing unnecessary to satisfy any countervailing federal interest. Plaintiffs also believe that Defendants planned in advance to justify this action with an incorrect interpretation of Section 5 of the Voting Rights Act.

Specifically, Plaintiffs allege Defendants intentionally packed the Sixth Congressional District. Defendants also decided at the outset to create nine additional majority-black seats in the House—House Districts 12, 23, 49, 64, 79, 82, 102, 103, and 111— and unnecessarily add BVAP in other majority-black districts to minimize black voting power outside of majority black districts. This resulted in a total of thirty majority-black districts in the House, more than the number that existed under the Benchmark Plan when adopted eight years earlier. Plaintiffs also believe the Senate decided at the outset to draw nine majority-black Senate Districts 19, 21, 30, 32, 36, 39, 40, 42 and 45 and attempted to keep BVAP as high as possible in districts 7, 10 and 29 because these seats are represented by black Senators. Defendants conducted no analysis prior to passing any of these plans as to whether it was necessary to create majority-black districts or manipulate BVAP percentages in any district in order to give the black community an equal opportunity to elect a candidate of choice.

Alternatively, Plaintiffs challenge the Congressional, House, and Senate Redistricting Plans in their entirety because they believe race was the predominant factor in drafting so many districts that the plans as a whole are irreparably infected with racial discrimination. Defendants packed black voters into the Sixth Congressional District by trading or "swapping" higher density white areas out of the Sixth District in exchange for higher density black areas from the First, Second, and Fifth Congressional Districts. Plaintiffs plan to present demographic analysis

of Act 75 by Dr. Michael P. McDonald, an expert in American elections and statistical methods. Dr. McDonald has written an expert report (Exhibit C) that has been produced to Defendants. In his report, Dr. McDonald details this swapping practice. Dr. McDonald also concludes that these swaps were unnecessary to achieve population balance and decreased adherence to traditional redistricting principles. Pl. Exp. Rpt., 11.

Since Plaintiffs' investigation thus far has revealed that three of the seven congressional districts unnecessarily traded black voters for white voters with the Sixth Congressional District, and since a fourth district, the Seventh Congressional District, is largely drawn out of a region previously occupied by the First, Fifth, and Sixth Districts, the only aspect of the plan not unnecessarily infected by the use of race is the Third and Fourth Districts which have a significantly lower concentration of BVAP and only share a border with two other districts. Even at this early stage in the litigation there is compelling evidence that Defendants' use of race overwhelmingly impacted the number of voters as well as the geography in the Congressional Plan so as to call into question the entirety of the plan.

Plaintiffs also challenge the entirety of the House Plan as a race-based gerrymander. Like the Congressional Plan, Plaintiffs have identified so many districts where race was the predominant factor in drawing those districts that the plan in its entirety is infected. Dr. McDonald's demographic analysis of the House plan has identified twenty out of 124 House Districts where BVAP percentages were manipulated utilizing the swapping practice as described above and direct trades (sometimes between two or more districts) to the subordination of traditional redistricting principles. These twenty House Districts swapped population with each other and nineteen other Districts. They also directly traded population with each other and thirty additional districts (some also engaged in swaps with other districts). Because of the number of districts affected, Defendants' race-based redistricting practices are so extensive that

they infect the Plan as a whole and render it illegal.

Plaintiffs are only challenging the entirety of the Senate Plan as an intentional effort to marginalize black voting power by drawing the nine majority-minority Senate Districts described above to an arbitrary fifty-percent BVAP standard and intentionally adding BVAP to districts merely because they happen to elect black Senators in what Plaintiffs presume is an effort to meet Defendants' arbitrary fifty-percent standard. Dr. McDonald's demographic analysis only shows that race was the predominant factor in drawing Senate Districts 21 and 25. Plaintiffs plan to limit their equal protection claims to those districts and the affected neighboring districts. Plaintiffs believe there is likely additional discoverable evidence with respect to all three plans that may be offered and ultimately prove this claim.

B. Plaintiffs object to specific racially gerrymandered districts and those neighboring districts affected.

Alternatively, Plaintiffs challenge those districts identified by Dr. McDonald's Expert Report where race was the predominant factor in drawing the district and those additional districts affected by swapping population or one-way population trades (sometimes between two or more districts) with the target districts. In other words, Plaintiffs challenge both the target district and the affected neighboring districts.

In the Congressional Plan, the Sixth District is objectionable as targeted by the use of race as the predominant factor and the First, Second and Fifth Districts are objectionable as affected neighbor-districts. Plaintiffs believe that the Seventh District is affected since it is drawn from territory taken from the First, Fifth, and Sixth Districts.

In the House Plan, House Districts 12, 23, 25, 49, 57, 59, 64, 70, 74, 76, 77, 79, 82, 91, 102, 103, 109, 111, 113, 121, and 122 are objectionable as targeted by the use of race as the predominant factor. House Districts 13, 19, 24, 26, 28, 29, 39, 41, 46, 47, 52, 55, 58, 60, 61, 62,

67, 68, 72, 73, 76, 78, 80, 81, 83, 90, 93, 95, 97, 98, 100, 101, 106, 108, 110, 114, 116, 120, and 124 are all affected neighbor districts. All total, Plaintiffs allege the Defendants' illegal race-based plans affected sixty of the one hundred twenty-four House districts.

In the Senate Plan, Senate Districts 21 and 25 are objectionable as targeted by the use of race as the predominant factor. Senate District 21 swaps population with District 20. Senate District 25 swaps population with Districts 24 and 26 and engages in a one-way trade with Districts 10, 18, and 23. Districts 10, 18, 20, 23, 24, and 26 are all affected neighbor districts.

C. Plaintiffs object to specific racially gerrymandered districts.

Alternatively, Plaintiffs object to those districts identified in Dr. McDonald's Expert Report where race was the predominant factor. Those districts, previously named above, are: the Sixth Congressional District; Senate Districts 21 and 25; House Districts 12, 23, 25, 49, 57, 59, 64, 70, 74, 76, 77, 79, 82, 91, 102, 103, 109, 111, 113, 121, and 122.

III. Plaintiffs have standing to challenge the Congressional, House and Senate Redistricting Plans in their entirety and, in the alternative, the target districts and/or the neighbor districts in which they reside.

As explained above, Plaintiffs have alleged three (including their Fifteenth Amendment claim) theories of liability. While evidence offered in support of these theories may overlap, they are analytically distinct. First, Plaintiffs' equal protection claim requires Plaintiffs to show that race was the predominant factor in drawing election districts by offering the evidence that the Miller Court explained is relevant to equal protection analysis brought under the Shaw Doctrine. Second, Plaintiffs' Voting Rights Act and Fifteenth Amendment claims require evidence that Defendants intentionally adopted the challenged schemes in an effort to marginalize black voting power. Even without the benefit of discovery, Plaintiffs have explained why each of their theories of liability are sufficiently pled. Above, Plaintiffs also offer alternative theories applying the scope of liability to the challenged plans as a whole, the affected neighboring districts, and

target districts.

Standing requires the invasion of a legally protected interest held by a plaintiff that is concrete and actual, causally connected to the defendant's conduct, and redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37 (1992). Defendants do not challenge causation or redressability; rather, the sole issue with respect to standing raised by the Defendants is injury. In an equal protection case, a voter is injured by the racial classification itself because the racial classification stigmatizes voters by reducing their individual attributes and beliefs to prejudicial assumptions based solely on skin color. Shaw I, 509 U.S. 630, 657, 113 S. Ct. 2816, 2832. This stigmatization is an injury from which the Fourteenth Amendment protects citizens. Id., at 643, 113 S. Ct. at 2824. The stigma inherent in racial classifications is a well-established basis for Plaintiffs' injuries in this case. Plaintiffs residing in racially gerrymandered districts suffer a personal injury that gives them standing. United States v. Hays, 515 U.S. 737, 744-45, 115 S. Ct. 2431, 2436 (1995). Plaintiffs believe that residing "in" a gerrymandered district includes both the district where black voters are concentrated (referred to herein as the "target district") as well as the neighboring district where black voters are removed (referred to as the "neighbor district"). As Plaintiffs previously explained (See Pls' Mem. Opp'n. Mot. Dismiss, 25, ECF No. 59), the neighbor-district voter is also subjected to the racial classification and although she may not have been moved into the target district, she is still injured by being subjected to a racial classification. Finally, Plaintiffs who are not in a target district or neighbor district still having standing so long as Plaintiffs are able to justify "out-of-district" standing with "specific evidence" supporting the "inference" that the out-of-district plaintiff was also subjected to a racial classification. Hays, at 744-45, 115 S. Ct. 2431, 2436.

Alternatively in LaRoque v. Holder, plaintiffs challenged the Department of Justices

decision to deny administrative preclearance to a non-partisan election scheme. (LaRoque v. Holder, CIV.A. 10-0561 JDB, 2011 WL 6413850 (D.D.C. Dec. 22, 2011) (Exhibit D). The District Court dismissed for lack of standing and the D.C. Circuit reversed. On remand, the District Court explained the injury plaintiffs suffered from the purported racial classification was not stigma, as described in Shaw I, but the denial of the benefit they sought in a non-partisan election. The court found this denial of a benefit was sufficiently concrete and particularized to confer standing. Id. Like the plaintiffs in LaRoque, Plaintiffs complain of being denied a benefit –the benefit of being able to form bi-racial electoral coalitions capable of increasing black voting power and political power. Am. Cmplt. ¶¶ 3, 79, 83-84, ECF No. 6. Defendants have interfered with this process by intentionally destroying these districts under the auspices of complying with the Voting Rights Act. The LaRoque plaintiffs also complained of government action – the denial of preclearance under Section 5 –that the government alleged was required by the Voting Rights Act. This scheme injures neighbor-district plaintiffs specifically.

If the Court agrees that the plans as a whole are either an intentional effort to marginalize black voters or so infected by the predominant use of race that the whole plan is constitutionally infirm, then all Plaintiffs have standing as a targeted member of a protected class under the Voting Rights Act and because they are subjected to a racial classification. Under the Congressional Plan, MR. MCKNIGHT would have standing because he resides in the Sixth Congressional District, a target district. MR. MANIGAULT and MR. WILDER would have standing as neighbor-district plaintiffs residing in the First District. MR. MIMS would have standing as a neighbor-district plaintiff residing in the Second District. MR. BROWN would have standing as a neighbor-district plaintiff residing in the Fifth District. Additionally, REV. BACKUS, MS. BUTTONE, and MR. WALLACE would have neighbor-district standing to challenge the Seventh District to the extent that it is also inextricably tied to the above-

mentioned affected districts. Plaintiffs with target-district standing under the House Plan are REV. BACKUS, residing in House District 59; MS. BUTTONE, residing in House District 103; MR. MANIGAULT, residing in House District 102; and MR. MIMS, residing in House District 82. Plaintiffs with neighbor-district standing under the House Plan are MR. BROWN, residing in House District 67, which is a neighbor-district to Districts 64 and 70; MR. MCKNIGHT, residing in House District 101, which is a neighbor-district to Districts 64 and 103; MR. WALLACE, residing in House District 62, which is a neighbor-district to District 59. MR. MIMS, residing in Senate District 25, is the only Plaintiff with in-district standing under the Senate Plan.

IV. Redistricting plans could have been drafted in a manner that did not subordinate traditional redistricting principles to the use of race.

Attached are alternative Congressional,[4] House,[5] and Senate redistricting plans that demonstrate how Defendants could have drawn districts that do not use race as the predominant factor. Plaintiffs have attached two Senate redistricting plans. The first Senate plan[6] demonstrates how Defendants could have drawn Senate Districts 21 and 25, and all affected neighbor districts in a manner that does not use race as the predominant factor. Plaintiffs' second statewide Senate plan[7] demonstrates how a plan could be drawn that does not use race as the predominant factor.

Plaintiffs' plans placed a premium on maintaining core constituencies when possible, improving the compactness of districts, and keeping or making counties and other communities of interest, like cities and towns, whole whenever possible. See Colleton County Council v.

[4] Plaintiffs' Congressional Block Equivalency Files (Exhibit E); Plaintiffs' Congressional Maps (Exhibit F); Plaintiffs Congressional Demographic Summary (Exhibit G)
[5] Plaintiffs' House Block Equivalency Files (Exhibit H); House Maps (Exhibit I); House Demographic Summary (Exhibit J).
[6] Plaintiffs' Senate 21 & 25 Fix Block Equivalency Files (Exhibit K); Senate 21 & 25 Fix Maps (Exhibit L); Senate 21 & 25 Fix Demographic Summary (Exhibit M)
[7] Plaintiffs' Senate Full Plan Block Equivalency Files (Exhibit N); Senate Full Plan Maps (Exhibit O); Senate Full Plan Demographic Summary (Exhibit P).

McConnell, 201 F. Supp. 2d 618, 647 (D.S.C. 2002) (discussing traditional redistricting principles). In recognition of the Supreme Court's recent instruction, these plans also attempted to show deference to the General Assembly's judgment about policy to the extent they do not conflict with a countervailing federal interest. Perry, supra. For example, Plaintiffs' Congressional plan follows the judgment of the General Assembly in locating the new Seventh Congressional District in the Pee Dee Region anchored in Horry County.

These plans are merely demonstrative of how Defendants could have adhered to race neutral redistricting principles while also continuing to give black voters an equal opportunity to elect candidates in the racially gerrymandered districts. Like the Defendants, Plaintiffs did not conduct a racial block voting or racially polarized voting analysis prior to drawing these plans and therefore do not know exactly what percentage of BVAP is required in each district. Once Defendants use race as the predominant factor in drawing election districts, they have the burden to show that their action is narrowly tailored to achieve a compelling state interest. The fact that many of the target districts at issue already elect candidates of choice suggests that Defendants' action is neither narrowly tailored nor does it serve a compelling state interest.

When drawing demonstrative Congressional and House plans, Plaintiffs did refer to the Senate report by Dr. Richard Engstrom, commissioned to support the Senate's preclearance submission. See Exhibit 14, Report by Richard Engstrom, PhD, Senate Preclearance Submission, available at http://redistricting.scsenate.gov/PreclearanceExhibitsS815.html (Hereinafter "Engstrom Report") (Exhibit Q). While the Engstrom Report fails to articulate any specific percentage of BVAP necessary to allow black voters an equal opportunity to elect a candidate of choice, it does conclude that the BVAP in the districts drawn by the Senate are not retrogressive,

meaning they are sufficient to elect candidates of choice.[8] Without accepting the Engstrom Report as accurate (since Plaintiffs have had no opportunity to depose Dr. Engstrom or review his data), Plaintiffs assumed that the Engstrom Report is accurate and that the BVAP levels in the 12 districts discussed in the Report (nine majority-black and three non-majority districts occupied by black Senators) are sufficient to elect candidates of choice in those districts. Since these twelve Senate Districts overlap with many of the House Districts, Plaintiffs were able to infer that BVAP levels well below what those in the House Plan would give black voters an equal opportunity to elect a candidate of choice. The Engstrom Report offered less guidance to Plaintiffs in drawing their Congressional and Senate plan, other than the Report's conclusion that non-majority-minority Districts 7, 10, and 29 were not retrogressive. Engstrom Report, 5, 9. These BVAP levels in the adopted Senate Plan are 43, 33 and 46 percent, respectively. While Plaintiffs acknowledge that the BVAP percentage necessary to give an equal opportunity to elect likely varies in different regions of the state, these three districts support the inference that this percentage is less than fifty percent.

CONCLUSION

Plaintiff respectfully submits this memorandum pursuant to the courts order of January 19, 2012 clarifying the allegations and claims set forth in the complaint as well as providing proposals for alternative plans.

Respectfully submitted by:

[8] All Section 5 prevents is backsliding in the minority community's position compared to the benchmark plan. Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 335, 120 S. Ct. 866, 875 (2000) (Bossier Parish II) (citing Bossier Parish I, 520 U.S. 471, 478, 117 S.Ct. 1491, 1497 (1997); Miller, at 926, 115 S.Ct. at 2493; Beer v. United States, 425 U.S. 130, 141, 96 S.Ct. 1357, 1363 (1976). Consequently, the Engstrom Report, to the extent it is accurate, merely says that the adopted BVAP is sufficient to elect a minority candidate of choice. The same would be true if BVAP levels were five, ten, or twenty percent higher than the adopted plan.

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