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**, JOHN E. COURSON**, in his capacity as President Pro Tempore of the Senate, **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.**	**Case No.: 3:11-cv-03120-PMD-HFF-MBS**

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

Speaker Harrell urges the Court to find that Plaintiffs have not met their burden under Rule 60 and that the Court should decline to reexamine this case because, even post Shelby County, redistricting schemes only violate Equal Protection when racial decision making predominates over all other considerations. Notably, Speaker Harrell's opposition to this motion

does not dispute the fact that the General Assembly expressly relied on Section 5 to justify racial action. As previously detailed, the record is replete with evidence of the General Assembly's expressly-stated *policy* to draw more majority-black districts than drawn a decade earlier and to do so by drawing those districts with the same or higher black voting age population (BVAP) percentages whenever possible. See Pls.' Mem., 5-11, ECF No. 223-1. Instead, Speaker Harrell stakes his defense of Act 72 on a misinterpretation of Shelby County in an effort to show that no change of law has occurred for the purpose of the Rule 60(b) analysis. To be sure, Shelby County constitutes a seismic shift in the constitutional landscape because it holds the central justification for Act 72's racial scheme unconstitutional. The State now bears the burden of persuading the Court that some other compelling justification can justify the racial gerrymander; a task in which the State is entitled to no deference by this Court. See e.g., Fisher v. Univ. of Texas at Austin, __ U.S. __, 133 S. Ct. 2411, 2420 (2013) (strict scrutiny review affords government no deference); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989).

Speaker Harrell's opposition also relies on the mistaken assertion that in redistricting cases the predominate-factor doctrine, recognized in Shaw v. Reno, 509 U.S. 630 (1993), and explained in Miller v. Johnson, 515 U.S. 900 (1995), displaces the ordinary strict scrutiny analysis used to review all other instances in which the government employs a racial classification. Such a rule cannot be correct since it would do precisely what the Shelby County Court said the Constitution would not allow—extend an onerous racial scheme without any justification. In all other contexts, this Court polices the implementation of racial classifications by requiring *the government* to identify a compelling state interest that can only be met by employing the suspect classification. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720-21 (2007); Croson, 488 U.S. at 493. Such as rule is also a drastic departure

from the Supreme Court's districting precedent which has *never* approved racial districting when the Voting Rights Act (VRA) did not require it. Instead, the predominant-factor doctrine, explained by Shaw and its progeny, merely asked whether districting conducted under the auspices of the VRA was truly remedial. Since the VRA only requires necessary racial districting, unnecessary racial districting evidences racial purpose above all else and required strict scrutiny. Bush v. Vera, 517 U.S. 952, 983 (1996) ("Nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral success[.]"); Shaw, 509 U.S. at 655 ("A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression.").

When this Court first considered this case, South Carolina was believed to be subject to the remedial redistricting obligations imposed by the VRA. Accordingly, this Court balanced the State's obligation to comply with the onerous racial districting mandate imposed by Section 5 with the limits imposed by the predominate-factor cases. This Court concluded that race did not predominate—in other words, race did not outweigh all other consideration because Section 5 required it. And while Plaintiffs respectfully urged this Court to reach a different conclusion, Plaintiffs accept this Court's determination *and do not contest it here*.

This motion presents an entirely different question. In the absence of Section 5, the question is not whether race predominates, but whether its use can be justified *at all*. Speaker Harrell's memorandum in opposition fails to address this question. Respectfully, it cannot, and these points are considered in turn below.[1]

[1] Like the Attorney General, Speaker Harrell is mistaken as to what claims are (and are not) at issue pursuant to this motion. Once again, Plaintiffs seek relief under one, and only one, theory: that the affirmative use of race in drafting Act 72 violates equal protection. See Pls.' Mot., 2, ECF No. 223 (asking the Court "to determine whether Act 72 denies equal protection guaranteed by the Fourteenth Amendment.") & Mem., 5-6.

I. Speaker Harrell's Rule 60(b) argument turns on a misunderstanding of Shelby County and its impact on this case.

The parties agree that a Rule 60(b) movant must show "timeliness, a meritorious defense, a lack of unfair prejudice to the opposing party, and exceptional circumstances" as well as the applicability of one of Rule 60(b)'s six subsections. See Harrell Mem., 3-4 (citing Dowell v. State Farm Fire & Cas. Auto. Ins. Co., 993 F.2d 46 (4th Cir. 1993)). With respect to timeliness and prejudice, Plaintiffs note that Speaker Harrell's opposition does not dispute that Plaintiffs have carried their burden. Instead, Speaker Harrell's contention that Plaintiffs have not met their burden turns squarely on whether this motion raises a meritorious claim occasioned by extraordinary circumstances. See Harrell Mem., 4. Both factors are met here.

Speaker Harrell contends that, "[b]ecause 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." Harrell Mem., 5. In support of this flawed premise, Speaker Harrell argues that Shelby County merely stands for the proposition that the VRA's coverage formula "infringes upon the principle of equal sovereignty of the states." Id. Moreover, Speaker Harrell attempts to distinguish Shelby County's application to this case by noting that "Shelby County did not involve a challenge to a specific redistricting plan and […] did not consider the applicable burdens of proof for challenges to legislative districting plans[.]" Id. at 6. Notably, like the Attorney General before him, Speaker Harrell argues that "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." Id. These assertions are unsupported by any analysis or authority and should be rejected.

Simply put, Shelby County changes the substantive law because it eliminates the predicate for VRA-authorized racial districting. This is clear from the Supreme Court's own description of the case.

> Shelby County is located in Alabama, a covered jurisdiction. It has not sought bailout, as the Attorney General has recently objected to voting changes proposed from within the county. See App. 87a–92a. Instead, in 2010, the county sued the Attorney General in Federal District Court in Washington, D.C., seeking a declaratory judgment that sections 4(b) and 5 of the Voting Rights Act are *facially unconstitutional, as well as a permanent injunction against their enforcement.* The District Court ruled against the county and upheld the Act. 811 F.Supp.2d 424, 508 (2011). The court found that the evidence before Congress in 2006 was sufficient to justify reauthorizing § 5 and continuing the § 4(b) coverage formula.

Shelby Cnty., Ala. v. Holder, __ U.S.__, 133 S. Ct. 2612, 2621-22 (2013) (emphasis added).[3] In holding Section 4's coverage formula facially unconstitutional, the Supreme Court rejected the notion that Congress justified Section 4's 2006 Reauthorization in light of current needs. Id. at

[3] Likewise, the Shelby County district court explained that the county had mounted a facial challenge of the VRA's 2006 Reauthorization:

> Shelby County does not challenge any specific application of Section 5 to one of its proposed voting changes; rather, it seeks a declaration that Section 5 and Section 4(b) are facially unconstitutional, as well as a permanent injunction prohibiting the Attorney General from enforcing these provisions. See Compl. ¶¶ 1, 44(a)-(b). In Count I, Shelby County alleges that in reauthorizing Section 5 "for another twenty-five years in 2006, Congress lacked the evidence of intentional discrimination that warranted the enactment of the VRA in 1965 and its extensions in 1970, 1975, and 1982." Id. ¶ 38(c). Hence, Shelby County argues, because there is neither "'congruence and proportionality' ... nor even a 'rational relationship' between the evidence compiled in support of the latest extension of Section 5 and the burdens imposed by that provision ... Section 5 ... exceeds Congress's authority under the Fourteenth and Fifteenth Amendments," id. ¶ 38(d) (internal citations omitted), "and, therefore, violates the Tenth Amendment and Article IV of the Constitution," id. ¶ 37. In Count II, Shelby County similarly challenges the constitutionality of the 2006 reauthorization of Section 4(b)'s coverage formula, arguing that "Congress's reliance ... on voting practices, voter registration data, and presidential election data from 1964, 1968, and 1972 as the trigger for the preclearance obligation of Section 5 is not an 'appropriate' means of enforcing the Fifteenth Amendment." Id. ¶ 42(a).

Shelby Cnty., Ala. v. Holder, 811 F. Supp. 2d 424, 443-44 (D.D.C. 2011), aff'd, 679 F.3d 848 (D.C. Cir. 2012), cert. granted in part, 133 S. Ct. 594 (2012) and rev'd, __ U.S. __, 133 S. Ct. 2612.

__, 133 S. Ct. at 2631 ("The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance."). While the Court did not hold that Section 5 could never again be a constitutionally-applied remedy, any future re-imposition of that remedy requires the "initial prerequisite" of a constitutionally-enacted coverage formula passed pursuant to Congress's determination that "exceptional conditions" exist capable of justifying the preclearance regime. Id. Congress failed to meet this burden in 2006 and thus the states, including South Carolina, were unconstitutionally subject to the preclearance regime and its unique racial burdens when Act 72 was passed in 2011.

To be sure, part of what made Section 5's preclearance regime so onerous to states (and their citizens) was the fact that the non-retrogression principle required *continuous* racial districting even where other legal protections of the electoral franchise would neither require, nor allow the same. This is most clearly illustrated in relation to Section 2 of the VRA (which was neither at issue in Shelby County, nor here). Section 2 bans any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen [...] to vote on account of race or color[.]" 42 U.S.C. § 1973(a). Section 2 provides a cause of action when a racial group is (1) "sufficiently large and geographically compact to constitute a majority in a single-member district[;]" (2) is "politically cohesive[;]" and (3) the racial majority engages in bloc voting such that it is usually able to defeat the minority's preferred candidate." League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 425 (2006) (hereinafter, "LULAC"). When these three conditions are satisfied, typically referred to as the "Gingles requirements,"[5] then a court must consider whether the totality of the circumstances is such that the racial minority has less opportunity than other members of the electorate to elect a preferred candidate. Id. at 426. If

[5] Thornburg v. Gingles, 478 U.S. 30 (1986).

this fact-intensive inquiry is satisfied, then a court must order a redraw of the districts in order to accommodate a majority-minority district where a state failed to provide one.

But by comparison, Section 5 imposed a far more onerous racial burden. As initially, enacted, Section 5 prohibited any diminution or "retrogression" of the minority community's electoral power as compared to the benchmark plan. See Beer v. United States, 425 U.S. 130 (1976); Riley v. Kennedy, 553 U.S. 406 (2008). While the non-retrogression principle did not at the outset mandate a certain number of majority-minority seats, it did ensure that as minority voters gained access to the political process, either through Section 2 actions or ordinary politics, their position was not eroded by discriminatory efforts in the covered jurisdictions. See Georgia v. Ashcroft, 539 U.S. 461, 477 (2003) ("§ 5 affirms nothing but the absence of backsliding.") (quoting Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 341 (2000)). Significantly, this meant that once a Section 2 district was created, Section 5 *prohibited* its undoing, even if the threshold Gingles factors that justified remedial districting to begin with were no longer present. In other words, if decades of integration lessened racially polarized voting such that a present-day Section 2 plaintiff would be unable to prevail, the preclearance regime still mandated that a state protect that district's remedial status. Moreover, the 2006 Reauthorization *raised* the preclearance bar further by deeming *any* diminution in a district's BVAP to be retrogressive. See 42 U.S.C. § 1973c(b); see generally, Pls.' Mem., 12-16 (discussing at length).

Speaker Harrell charges that "Plaintiffs ignore the fact that the Supreme Court in Shelby County did not review, consider, modify, or overrule existing precedent that requires proof that race predominated in the districting decisions in order to overturn a plan." Harrell Mem., 6. But to the contrary, the State's adherence to the non-retrogression principle was the predicate for the racial gerrymander employed during the drafting of Act 72. The un-contradicted record

demonstrates a policy of black maximization driven by the State's own professed intent to abide by the non-retrogression principle.[6] This resulted in 30 majority-BVAP districts: one *more* than was deemed necessary a decade earlier.

Act 72 also ignores the fact that even though the Benchmark plan only included 21 majority-black districts, black representatives were being elected in nine non-majority districts with BVAP's as low as 34%. Had private litigants brought Section 2 claims seeking the creation of nine majority-black districts, they surely would have failed to meet their burden under Gingles to show sufficient racially-polarized voting to warrant creating majority-black districts. But Section 5 seemed to mandate that the State do what Section 2 would never allow. As such, Shelby County's decision to enjoin Section 5 and its retrogression standard as unconstitutionally applied has the profound impact of removing the predicate that the litigants and the Court previously thought capable of justifying overtly racial districting. Plaintiffs respectfully submit that this profound change in voting rights law gives rise to a meritorious claim and constitutes exceptional circumstances.

II. Construing Rule 60(b) such that this case falls into an unreviewable black hole is inconsistent with the purpose of the rule and would leave a profound constitutional injury to the State's democratic institutions unaddressed for the balance of the decade.

Speaker Harrell argues that Rule 60(b) relief is not appropriate here because the Court's order and judgment "does not have prospective application[.]" Id. at 12-13 (citing Fed. R. Civ. P. 60(b)(5)). This argument would have the Court limit relief pursuant to Rule 60(b)(5) to cases where a party seeks to have an injunction dissolved. See id. at 13. Such a limitation is unsupported by plain language of the rule and should be rejected.

[6] See e.g., Pls' Mem., 6 n.1 (discussing Letter from Speaker Harrell to Herren, Chief, DOJ Civil Rights Division), 7 (discussing Explanation of Redistricting Process) & 7-8 (discussing statements and testimony of key legislators).

Respectfully, even prior to considering the parties' competing constructions of the rule as applied here, the Court should take care to note the dangers of concluding that there is no procedural remedy for the constitutional wrong at issue here. As one commentator has noted, the debate over the merits of remedial districting considers, on the one hand, the need to destabilize majoritarian control "to enhance the opportunity for representation of potentially exploitable and excludable groups" against the "distinctly and profoundly troubling" problem that arises when race is used "to design the fundamental democratic institutions of the State." Richard H. Pildes, Diffusion of Political Power and the Voting Rights Act, 24 Harv. J.L. & Pub. Pol'y 119, 120-21 (2000). But when democratic institutions are subjected to the self-conscious choice to make their component parts black, white, Hispanic, or Asian-majority districts, it cannot help but infect the body politic by encouraging We the People to define our political identities in racial terms. Id. (citing Shaw, 509 U.S. at 650 (noting that even remedial districting "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.")). Speaker Harrell would have the Court conclude that even assuming the existence of an unconstitutional racial gerrymander, Rule 60(b) should be construed to leave Act 72 in place for another seven years—at least four more racially-defined general elections and terms of the General Assembly. If the Court agrees that Act 72 denies equal protection, this would be a profoundly unjust result to the State and her citizens.

Fortuitously, Rule 60(b) authorizes this Court to grant relief. Rule 60(b)(5) allows relief from a judgment on the grounds that the "judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). By its plain language, the rule contemplates three

distinct circumstances giving rise to relief. Not surprisingly, cases discussing relief pursuant to subsection (b)(5) typically arise when a party seeks dissolution of an injunction. See Twelve John Does v. District of Columbia, 841 F.2d 1133, 1138 (D.C. Cir. 1988) (discussing United States v. Swift & Co., 286 U.S. 106 (1932) and Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856)). Nevertheless, the Court should decline to adopt the narrow reading urged by Speaker Harrell. Plaintiffs asked this Court for declaratory and injunctive relief. Backus v. South Carolina, 857 F. Supp. 2d 553, 558 (D.S.C. 2012). While this Court declined to enjoin Act 72's enforcement, it did enter a judgment concluding that "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. at 565. The correctness of this Court's Order and Judgment turns largely on the unconstitutional preclearance regime.

Limiting the rule to only allow relief from an injunction fails to comport with the rule's purpose to provide courts with a procedure to correct incorrect judgments with prospective effect. As Professor Miller explains:

> Although the principal significance of this portion of the rule is with regard to injunctions, it is not confined to that form of relief, nor even to relief that historically would have been granted in courts of equity. Any such restriction would be inconsistent with the merger of law and equity. Instead it applies to any judgment that has prospective effect. In contrast, judgments that offer a present remedy for a past wrong do not fall within the rule.

Wright & Miller, 11 Fed. Prac. & Proc. Civ. § 2863 (3d ed. West 2013) (footnotes omitted). This motion does not raise a question concerning a present remedy for a past wrong—this motion asks the to Court reexamine the ongoing wrong of subjecting South Carolina's voters to a racial classification. Were Plaintiffs seeking an "unscrambling of the past[,]" then Speaker Harrell's rigid approach to this remedial rule might carry some heft. But see, Bros. Inc. v. W. E. Grace Mfg. Co., 320 F.2d 594, 610 (5th Cir. 1963) (even though an award of

damages "sounds in the past," its "practical effect" was prospective). They are not. Instead, the continued efficacy of this Court's Order and Judgment that no equal protection violation has occurred will be given prospective effect by the State which will continue to conduct elections under this highly racialized scheme until 2020.

Even if the Court adopts the narrow construction of subsection (b)(5) urged by Speaker Harrell, it should still grant relief pursuant to Rule 60(b)(6). Subsection (b)(6) permits relief for "any other reason that justifies relief[,]" when the grounds for granting relief do not fall within the list of five enumerated reasons. Aikens v. Ingram, 652 F.3d 496, 500 (4th Cir. 2011). The unanimous body of Rule 60(b) precedent agrees that the purpose of the rule is to create an exception to finality in order to ensure that justice is done. See e.g., Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 864 (1988) (quoting Klapprott v. United States, 335 U.S. 601, 614–15 (1949)); see also Pls.' Mem., 16-17 & n.9 (detailing cases). The Fourth Circuit has noted specifically with respect to subsection (b)(6) that it provides "a grand reservoir of equitable power to do justice in a particular case" and "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice[.]" Eberhardt v. Integrated Design & Const., Inc., 167 F.3d 861, 872 (4th Cir. 1999) (citing Compton v. Alton S.S. Co., Inc., 608 F.2d 96, 102 (4th Cir. 1979)).

Speaker Harrell relies primarily on Dowell v. State Farm Fire & Cas. Auto. Ins. Co., 993 F.2d 46 (4th Cir. 1993), for the proposition that a "change in decisional law subsequent to a final judgment provides no basis for relief under Rule 60(b)(6)." Id. at 48. But the circumstances giving rise to that case demonstrate its inapplicability here. In Dowell, a father obtained a judgment in his favor on account of the death of his daughter in an automobile accident. Id. at 47. The father sued to recover uninsured motorist coverage and the action was removed to

district court where both the father and the insurer moved for judgment on the pleadings. Id. The district court held that the father's claim failed to meet the definition of an uninsured motorist under state law and dismissed the case with prejudice. Id. "Approximately five months after the district court's judgment[, the father] filed a Rule 60(b) motion requesting that the district court reconsider its decision in light of [a] subsequent West Virginia Supreme Court of Appeals decision[.]" Id. The Fourth Circuit affirmed the district court's decision not to grant Rule 60(b) relief on account of the change in decisional law.

This case is distinguishable from Dowell. First, unlike this case, the change in decisional law at issue in Dowell was the same issue decided by the Dowell Court: the proper construction of the state statute. Had the state court decision come down while Dowell was pending, or during an appeal, either the district court or the Fourth Circuit may well have ordered briefing on the impact of the state court decision. The Fourth Circuit was clearly mindful of this as it took care to note that the father failed to take appeal or to ask the district court to certify the state law question to the state supreme court. See id.

More importantly, the Dowell District Court and the West Virginia Supreme Court of Appeals were acting as coequals when they decided the same issue differently. The district court was properly vested with diversity jurisdiction and capable of deciding questions of state law. The fact that the state court came to a different conclusion, which it was entitled to do, makes the decisional change in Dowell not so much of a "change" as a disagreement between coequals. But here, this Court was in no position to overrule the United States Supreme Court's four earlier determinations that Section 5 was constitutionally applied. See Agostini v. Felton, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."). And to its credit, this

Court did not; it *assumed* Sections 4 and 5 to be constitutionally in effect in South Carolina. This assumption, which the litigants shared, incorrectly shaped every aspect of the litigation, the most significant being the standard of proof the Court would apply. See § III, infra. In this respect, Shelby County was not a change in decisional law, but a shift in the constitutional landscape. By comparison, the father's claim in Dowell was merely a substitute for an appeal, or the certification procedure, which the father failed to pursue. That is not the case here. Plaintiffs are not asking for a re-litigation of the same issue—the proverbial "second bite"—they are asking for a reexamination of a clearly novel issue raised by Shelby County: can Act 72 survive without Section 5?

Speaker Harrell's construction of Rule 60(b) affords it *no provision* under which this Court can reconsider its Order and Judgment. Such a construction cannot be correct and is plainly inconsistent with the rule's remedial purpose. Subsection (b)(6)'s catchall provision is designed to ensure that this Court has some mechanism to do justice in cases that fail to fit neatly into one of the other five grounds for relief. See Liljeberg, 486 U.S. at 863 n.11. Moreover, the liberal, remedial nature of the rule is further evidenced by subsection (d) which also provides this Court with "Other Powers to Grant Relief." This provision expressly notes that the rule does not limit a court's power to "entertain an independent action to relieve a party from a judgment, order, or proceeding[.]" Fed. R. Civ. P. 60(d). In other words, were this Court to deny this motion by relying on the formalistic restrictions urged by Speaker Harrell, nothing would prevent Plaintiffs from simply re-filing this as a new action advancing the same arguments (and relying on the same record) that Plaintiffs ask the Court to consider here.

While Plaintiffs acknowledge the legitimate interest our judicial system places on the finality of judgments, the State's interest in finality, standing alone, is unpersuasive when

considering a rule with the sole purpose of making an exception to finality. Gonzalez v. Crosby, 545 U.S. 524, 529 (2005). Speaker Harrell has failed to offer any substantive reason not to reexamine this case. Doing so will not unscramble the past; nor will it prejudice the State since Plaintiffs acknowledge that the General Assembly should be afforded the first opportunity to correct its error and pass a new race-neutral redistricting plan. Accordingly, Rule 60(b) relief is warranted and this motion should be granted.

III. The predominate-factor doctrine is the wrong standard of review for redistricting plans not subject to VRA-mandated districting.

Speaker Harrell also contends this Court correctly applied the predominate-factor doctrine when considering whether Act 72 violated equal protection because "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." Harrell Mem., 6. In other words, Speaker Harrell maintains that the predominant-factor doctrine remains the appropriate analytical framework notwithstanding Shelby County and Section 5's unconstitutional application. See id. at 6-8 (noting that the Court's Opinion correctly asks whether race predominated over race-neutral principles and citing the Court's conclusion that it was "satisfied that the General Assembly did not overly rely on race[.]"). This conclusion is deeply mistaken as it invites the Court to recognize the "Shaw doctrine" as the dispositive equal protection framework in all redistricting cases. To the contrary, what made the racially-designed districts unconstitutional in the Shaw cases was the fact that the VRA did not require the state to draw "highly irregular" districts. See e.g., Bush v. Vera, 517 U.S. 952, 979 (1996) (noting that even when voting is racially-polarized, the VRA only requires "reasonably compact majority-minority district[s]."). In other words, Shaw and its progeny merely stands for the proposition that race cannot be used unless the VRA required a state to do so.

A. The predominate factor doctrine is limited to cases arising from disputes over VRA-mandated districting.

This conclusion is obvious from an examination of the cases giving rise to the doctrine. For example, the Court's opinion in Shaw v. Reno, 509 U.S. 630 (1993), opens by explaining,

> This case involves two of the most complex and sensitive issues this Court has faced in recent years: the meaning of the constitutional "right" to vote, and the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups. As a result of the 1990 census, North Carolina became entitled to a 12th seat in the United States House of Representatives. The General Assembly enacted a reapportionment plan that included one majority-black congressional district. After the Attorney General of the United States objected to the plan pursuant to § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. § 1973c, the General Assembly passed new legislation creating a second majority-black district. Appellants allege that the revised plan, which contains district boundary lines of dramatically irregular shape, constitutes an unconstitutional racial gerrymander. The question before us is whether appellants have stated a cognizable claim.

Id. at 633-34. Notably, the three-judge panel below considered and explicitly rejected the Shaw plaintiffs' claim that race-based districting was *per se* unconstitutional. Id. at 638. The three-judge court reasoned that that argument had been foreclosed by the Supreme Court's cautious approval of remedial racial districting in United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977) ("UJO"). Id. After a lengthy discussion of the purpose of the VRA, the Court recognized that a facially-neutral redistricting scheme could, nonetheless, violate equal protection where the districts "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." Id. at 649.

Two years later, in Miller v. Johnson, 515 U.S. 900 (1995), the Court again considered whether equal protection imposed a limit to racial districting and explained that bizarre shape was not the threshold requirement of the claim recognized in Shaw, but that,

> 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.

Id. at 913 (emphasis added). Moreover, the Court acknowledged that its unusually-restrained equal protection analysis arose from the fact that Georgia was subject to Section 5's mandate. See e.g., id. at 905 (explaining that Shaw applied equal protection analysis "in the voting rights context" and that Miller required the same) & 912 (quoting Shaw, 509 U.S. at 657 ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions.")). As in Shaw, the Miller Court weighed clear evidence that Georgia had employed a black maximization policy, id. at 906-10, against the "inherently suspect" and pernicious nature of racial decision-making. Id. at 904. The balance tipped against racial districting because it was "not required under the [VRA]" and because the Department of Justice ("DOJ") had "no reasonable basis" to conclude that Georgia's earlier enacted plans violated Section 5 and needed to be redrawn to maximize the number of black districts. Id. at 923.

Similarly, in Shaw v. Hunt, 517 U.S. 899 (1996), the Court concluded that the same black maximization policy at issue in Miller had also been thrust onto North Carolina by DOJ. Id. at 913. As in Georgia, DOJ's policy, and North Carolina's acquiescence to it, was not require by Section 5, thus leading the Court to conclude that race predominated. Id. In Bush v. Vera, 517 U.S. 952 (1996), the Court had to weigh whether race predominated in light of "substantial direct evidence of the legislature's racial motivations" as evidenced by the State's Section 5 preclearance submission to DOJ and "testimony of individual state officials [that] confirmed that the decision to create the […] majority-minority districts was made at the outset of the process

and never seriously questioned." Id. at 960-61. Notably, all of the Shaw cases arise in covered jurisdictions: North Carolina, Georgia, and Texas.[7]

In light of the foregoing, the predominate-factor doctrine is most aptly understood as limiting remedial-VRA districting where it was not required. In recognition of the fact that covered jurisdictions were required to consider the effect of their districting schemes on racial minorities, the predominate factor test asks whether racial considerations subordinated race-neutral districting principles *before* applying strict scrutiny. See Miller, 515 U.S. at 916-17. This understanding not only comports with the Shaw precedents, but also with this Court's understanding that,

> For South Carolina, a covered jurisdiction under the Voting Rights Act, federal law requires that race be a consideration. The General Assembly had to consider race to create districts that complied with federal law, which it did. 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. Since race-conscious districting was not just permitted but *necessary* in order for states like South Carolina to comply with Section 5, the predominant-factor doctrine affords states substantial room in which to engage in racial decision-making before triggering strict scrutiny. Indeed, the term "predominant" suggests an allowance for racial action up to the point when racial action exceeds non-racial action. In other words, anything less than a majority would suffice.

As such, the burden a Shaw plaintiff bore under this doctrine was a "demanding one." Easley v. Cromartie, 532 U.S. 234, 241-42 (2001). It required that a plaintiff not only show that the legislature subordinate race-neutral districting principles to racial considerations, but also to prove that motivation to be the predominate factor motivating the legislature which is

[7] Plaintiffs are unaware of, and Speaker Harrell has not cited, *any* case applying the predominate-factor doctrine outside of a covered jurisdiction.

"unexplainable on grounds other than race." Id. In short, the doctrine placed the burden of production and persuasion on the plaintiff and required him to meet an exceedingly high threshold of proof. This drastic departure from ordinary equal protection doctrine can only be justified within the confines of Section 5. But since South Carolina was not a constitutionally covered jurisdiction when Act 72 was passed, the Court should reexamine the record in this case under the ordinary equal protection framework.

B. The Court should now place the burden of justifying Act 72's racial action on the State.

Whenever government employs race as a factor in decision making, *the government* bears the burden of showing a genuinely remedial purpose advanced through the least restrictive means. See e.g., Croson, 488 U.S. at 493; Parents Involved, 551 U.S. at 720-21; Fisher, __ U.S. __, 133 S. Ct. at 2420.

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.

Croson, 488 U.S. at 493. Moreover, this county's history of employing suspect racial classifications "suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." Id. at 501. Here, the record is void of *any* legitimate remedial purpose post Shelby County.

At trial, the State's *only* witness, Dr. Thomas Brunell, proffered one—and only one—explanation for the use of race: avoiding retrogression.

> Mr. Stepp: With that preface, can you tell [the] court what you have concluded, please, with respect to whether race was a predominant factor in drawing the districts in South Carolina.

> Dr. Brunell: Right. So, I mean, there's not enough evidence to conclude that anything was the predominant factor in drawing the district. *So although race may have been a factor in changing some precincts, its consideration was appropriate, of course, and necessary to comply with one person one vote standards and avoid retrogression*.
>
> Mr. Stepp: And that is your opinion --
>
> Dr. Brunell: *Absolutely*.

Brunell Tr. Tran. 91:2-91:12, ECF No. 213 (emphasis added); see also id. at 104:7-105:17 (testifying that the VRA required majority districting in South Carolina); 121:8-121:15 (conceding that no racial bloc voting or racially polarized voting analysis was conducted prior to Act 72's passage); 126:10-27:15 (speculating that Section 5 would allow drawing districts with 50% or higher BVAP) (excepts attached as **Exhibit A**).[8] Not surprisingly, this testimony is entirely consistent with the written position of the General Assembly and the public statements of key legislators. See Pls.' Mem., 5-10. Again, the record is un-contradicted. On reexamination, the State must now put forward some other justification to pass constitutional muster.

At a minimum, the State must now demonstrate that the legislature would have made the same choices without Section 5's racial mandate. Even viewing this case in the light most favorable to the State, this case is *at least* a case of mixed motive. This Court concluded as much when it acknowledged that the General Assembly had considered race in order to comply with the VRA and that a key legislator's testimony "strongly suggested that race was a factor in drawing many districts lines," but that the plan nevertheless "did not *overly* rely on race[.]"

[8] Dr. Brunell also suggested on direct examination that the General Assembly used race as a proxy for party affiliation. Brunell Tr. Tran. 116:10-118:25. Notably, this justification was rejected in Vera as immediately triggering strict scrutiny because race can never be used as a proxy for other characteristics without meeting the requirements of strict scrutiny. See e.g., Vera, 517 U.S. at 968 ("to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is appropriate").

Backus, 857 F. Supp. 2d at 565 (emphasis added). Under these circumstances, Plaintiffs do not have the burden to rebut or disprove every possible race-neutral explanation before the burden shifts to the State.

To the contrary, when a plaintiff makes a threshold showing of racial decision making, equal protection requires the government to come forward to rebut the assertion. A plaintiff's "[p]roof that the [governmental] decision […] was motivated *in part* by a racially discriminatory purpose" normally "shift[s] to the [government] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270 n.21 (1977) (emphasis added); see also, Mt. Healthy City Sch. Bd. v. Doyle, 429 U.S. 274, 285-87 (1977). Once the burden shifts, the government must prove by a preponderance of the evidence that its race-neutral reason would have sufficed to motivate the challenged decision even absent the racial motive. See Mt. Healthy, 429 U.S. at 285-87. In other words, the State can evade strict scrutiny by *proving* that it could have made the same decision—in this case to maximize the number of black-majority districts—for a racially neutral reason. However, if the State is unable to meet this burden, then the Court must treat the allegedly facially-neutral law as a suspect racial classification. Id.

Plaintiffs respectfully submit that the State cannot possibly meet this burden for the reasons previously discussed. Nevertheless, this Court should grant this motion and apply the traditional equal protection burden shifting analysis to determine whether the State can either demonstrate that absent Section 5 the State would have made the exact same choices for race-neutral reasons *or* point to some other compelling state interest in the use of race.

CONCLUSION

For these reasons and the reasons set forth more fully in Plaintiffs' memorandum in support of this motion, the Court should grant this motion, set aside its Order and Judgment, and order briefing on whether Act 72 denies equal protection.

Respectfully submitted by,

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