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**

Memorandum of Law in Support of Plaintiffs'
Motion for Relief from an Order and Judgment

The United States Supreme Court's recent decision in Shelby County, Alabama v. Holder, 570 U.S. __, 133 S. Ct. 2612 (2013), constitutes a monumental change in constitutional law with unmistakable and profound bearing on the earlier judgment in this case. In Shelby County, the Supreme Court held that the Voting Rights Act's (VRA) preclearance regime,

generally known as "Section 5," was unconstitutionally applied to the states, including South Carolina. The impact of Shelby County here is dispositive to the outcome of this case. Section 5's preclearance regime generally was thought to compel covered jurisdictions to engage in extraordinary racial districting in order to prevent the "retrogression" in the position of minority voters under newly adopted redistricting plans. In holding Section 5 unconstitutional, Shelby County precludes Section 5 from providing the compelling state interest that is constitutionally required any time race is intentionally used in the design of election districts.

Yet when the South Carolina General Assembly enacted Act 72 of 2011 to draw election districts for the South Carolina House of Representatives (House) it expressly relied on the State's obligation to comply with Section 5 to provide the necessary justification for the Act's intentional and systematic use of race to maximize the number of districts with a majority black voting age population (BVAP). In upholding Act 72, this Court explicitly recognized the State's racial districting policy, but nevertheless concluded that the Court was "satisfied that the General Assembly did not *overly* rely on race in a manner that runs afoul of the Fourteenth Amendment." Order, 16, ECF No. 214 (emphasis added). This Court reached its decision based upon the law as it believed it to exist at that time, noting 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*.

Order, 16 (emphasis added). Understandably, this Court's Order assumed that Act 72's affirmative use of race could be justified as necessary in order to comply with Section 5. In the wake of Shelby County, it cannot.

Plaintiffs respectfully move the Court for relief from its prior judgment pursuant to Rule 60(b)(5) and (b)(6) of the Federal Rules of Civil Procedure. Given the magnitude of the public's

interest in the constitutionality of the state's racial redistricting and the correctness of this Court's judgment, the change in law announced in Shelby County justifies Rule 60 relief. Absent Section 5's remedial mandate, what remains is the naked, intentional use of race by the General Assembly when engaging in one of *the most* delicate of legislative acts—the design of democratic institutions. Were this Court to decline to reexamine its judgment, South Carolina's election districts will remain racially defined for the balance of the decade without *any* constitutionally adequate justification. Candidates will run (or not run) for office cognizant of existing racial demographics; incumbents will become safely ensconced in racially homogeneous districts; substantives policies will be oriented along racial lines. In short, the entire democratic process in South Carolina will re-present an intentionally race-based districting scheme.

The Supreme Court has repeatedly indicated that the race-conscious design of public institutions is of the utmost constitutional concern. Just last term, the Court reminded that anytime government decision making "touch[es] upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." Fisher v. Univ. of Texas at Austin, __ U.S. __, __, 133 S. Ct. 2411, 2417 (2013) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 295 (1978). Even in its past decisions cautiously approving remedial racial districting, the Supreme Court has consistently reminded that it is most "aptly described as the 'politics of second best,'" Johnson v. De Grandy, 512 U.S. 997, 1020 (1994), the purpose of which is to "foster our transformation to a society that is no longer fixated on race." League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 433-34 (2006) ("LULAC") (quoting Georgia v. Ashcroft, 539 U.S. 461, 490 (2003)). Act 72 was conceived in the politics of second best and its authors embraced this politics from beginning to end. Post Shelby County, what remains is

the admitted, unjustified, and unjustifiable use of race to separate voters into largely black and white election districts.

STANDARD FOR RULE 60(b) RELIEF FROM JUDGMENT

This Court has authority to grant the relief sought pursuant to both Rule 60(b)(5) and (b)(6) of the Federal Rules of Civil Procedure. Rule 60(b)(5) empowers a district court to grant relief from a final judgment when the judgment "is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." Accordingly, the Rule "provides a means by which a party can ask a court to modify or vacate a judgment or order if a significant change either in factual conditions or in law renders continued enforcement detrimental to the public interest." Horne v. Flores, 557 U.S. 433, 447 (2009) (internal quotations omitted) (quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992)); see also United States v. Swift & Company, 286 U.S. 106 (1932). This rule has particular import to injunctions, but a court's power to modify a judgment is not limited as such and extends to any judgment with prospective effect. Wright & Miller, 11 Fed. Prac. & Proc. Civ. § 2863 (3d ed. West 2013). While the party seeking relief bears the initial burden, upon a showing of a change in law, a court's unwillingness to modify its earlier decree constitutes an abuse of discretion. See Horne, 557 U.S. at 447.

Under Rule 60(b)(6), a district court can also grant relief from a final judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). "While this catchall reason includes few textual limitations, its context requires that it may be invoked in only 'extraordinary circumstances' when the reason for relief from judgment does not fall within the list of enumerated reasons given in Rule 60(b)(1)-(5)." Aikens v. Ingram, 652 F.3d 496, 500 (4th Cir. 2011) (quoting Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863 n.11 (1988)). In

recognition of these limitations, the Fourth Circuit requires that a meritorious Rule 60(b)(6) motion be filed within a reasonable time to avoid undue prejudice to the opposing party. Id. As with subsection (b)(5), Rule 60(b)(6) relief is not a substitute for an appeal and thus is properly a vehicle for reconsidering a judgment based on grounds other than those already adjudicated in the underlying action. Id.

ARGUMENT

There is no dispute that the South Carolina legislature affirmatively used race to design the House redistricting plan and that it justified this race-based action as an effort to comply with Section 5's remedial racial districting mandate. At trial, this Court considered uncontradicted evidence that the General Assembly adopted a "black maximization" strategy for the House redistricting plan in order to draw black voters back into the districts they were drawn into a decade earlier and create new majority-black districts where possible. Plaintiffs, themselves black voters and the alleged beneficiaries of this electoral segregation, challenged the statewide scheme as a violation of the Constitution's guarantee of equal protection. Plaintiffs argued that "[t]he essence of [their] equal protection claim [was] that 'the State has used race as a basis for separating voters into districts[,]'" and that "'[l]aws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieve a compelling state interest.'" Pls. Final Memorandum, 5-6, ECF No. 209 (quoting Miller v. Johnson, 515 U.S. 900, 904, 911 (1995)).

The record in this case clearly evidences the naked, intentional use of race by the General Assembly to draw election districts following the 2010 census. The record is also void of any compelling justification for the use of race other than the State's reliance on Section 5. Both the litigants and the Court wrongly assumed that Section 5 was constitutionally applied to

South Carolina when this case was decided. In concluded that the legislature did not "overly rely" on race in enacting Act 72, this Court did so believing that federal law did not just permit but *required* the State's express use of race. Order, 16. Respectfully, it does not, and this Court's reliance on Section 5 as a justification for the State's policy must now give way in light of Shelby County.

I. Act 72 relied on Section 5 to justify racial line drawing.

In defense of Act 72, Speaker of the House Robert W. Harrell, Jr., argued that the State's use of race was *required* by the VRA. The State argued that Section 5 prohibited it from reducing the number of majority-black districts as compared to the plan drawn a decade earlier. The State further construed its Section 5 mandate to require that once a district acquired majority-black status, the State is prohibited from reducing the percentage of BVAP in that district without running afoul of the prohibition against "retrogression." To be sure, Speaker Harrell championed not just Act 72's adherence to this rule, but its ability to create *more* majority-black districts than what was required a decade earlier. Speaker Harrell highlighted this fact in Act 72's Section 5 submission to the United States Attorney General as, in Speaker Harrell's view, demonstrative of the State's success in not just complying with Section 5's mandate, but exceeding it.[1]

[1] Act 72's Section 5 preclearance submission responds to the interrogatory seeking "[a] statement of the anticipated effect of the change on members of racial or language minority groups[,]" by stating that the plan has neither a discriminatory purpose nor will result in a retrogression in the position of racial minorities but "[t]o the contrary, [Act 72] *enhances* the position of racial minorities with respect to their effective exercise of the electoral franchise when compared to the redistricting plan currently in effect." Letter from Speaker Harrell to T. Christian Herren, Jr., Chief, DOJ Civil Rights Division, Voting Section, p. 4, August 9, 2011, RWH 028018 (citing Beer v. United States, 525 U.S. 130, 141 (1976) (emphasis added)).

The State's official public explanation of the redistricting process also touted the plan's success in drawing black voters back into the districts they were drawn into a decade earlier, explaining:

> With respect to the impact of [Act 72] on minorities, the plan passed by the South Carolina House of Representatives complies with Section 5 of the VRA and is not retrogressive. As compared to the 29 majority-minority districts which existed following the adoption of the current House plan in 2003 and as compared to the 21 districts which existed in the Benchmark plan following the 2010 Census, [Act 72] contains 30 districts with majority black voting age and non-Hispanic black voting age populations. In order to achieve population equality while maintaining these majority-minority districts, the South Carolina House of Representatives modified district lines by adding population from adjoining areas. As a result, of the 29 majority-minority districts in existence in 2000, the House was able to maintain 28 majority-minority districts. The only exception was District 116, which had naturally retrogressed into a NHBVAP of 42.03% but was within the acceptable population deviation. Although efforts were made to reestablish District 116 as a majority-minority district, the House concluded that it could not be drawn in a way that it would include compact minority population communities comprising a majority of the district.
>
> However, the House did elevate two other districts to majority-minority status: District 79 and District 103. […] Thus the House plan in [Act 72] increases the number of majority-minority districts from 29 to 30.
>
> […] Moreover, the plan does not decrease the absolute the absolute [sic] number of representatives which a minority group has a fair chance to elect.

Explanation of Redistricting Process, 36-37, RWH002043-44 (**Exhibit A**).

At trial, this Court heard audio recordings of legislative meetings of the House Election Law Subcommittee and the House Judiciary Committee[2] in which the white, Republican leadership marshaled opposition to amendments that reduced the black population in districts targeted for majority-black status by relying on Section 5. Subcommittee Chair, Representative (Rep.) Alan Clemmons explained that, "the majority of this Subcommittee has adopted a *policy*

[2] The House Election Law Subcommittee was responsible for drafting the initial House plan (also called "Amendment No. 1") that then went to the House Judiciary Committee and then to the full House.

position that we will not reduce black voting age population unless population absolutely demands it." Pls. Ex. 66, RWH022017, at 00:48:00-49:10 (emphasis added). This was further underscored by House Judiciary Chairman, Rep. James Harrison, who urged his Committee to reject an amendment that would reduce District 82's BVAP from 52.74% to 51.43%. Rep. Harrison explained that this reduction was "unacceptable under the VRA" and that he would "vote against *any change* that would decrease black voting age population in a majority-minority district." Pls.' Ex. 66, RWH02018, at 00:25:50-27:25 (emphasis added).

These recorded, public statements by the white Republican leadership were consistent with the uncontradicted testimony this Court heard from Rep. Bakari Sellers—a black Democrat and the only member of the five-member House Election Law Subcommittee who declined to hide behind legislative privilege. Rep. Sellers testified that his view of what Section 5 did and did not require was at odds with, and ultimately rejected by, the white Republicans that dominated the subcommittee and full committee. Sellers Trial Tr., 29:20-32:23. Rep. Sellers testified that amendments that lowered BVAP below the level ultimately adopted by Act 72 were a "nonstarter." Id. at 26:17. (Excerpts attached as **Exhibit B**).

It is no surprise that the public and sworn statements by the elected leaders most closely involved in the legislative process evidence the intentional use of race in pursuit of the State's black maximization policy. Indeed, the State's own pleadings filed with this Court demonstrate South Carolina's view that Section 5's retrogression standard prohibited *any* diminution in a district's BVAP as compared to the districts drawn a decade earlier *and* any reduction in the number of majority-black districts. In his motion to dismiss on behalf of the Senate plan, then-

Senator Glenn McConnell[3] argued that the 2006 Reauthorization of Section 5 *required* covered jurisdictions to "maintain minority voting strength in that district at the same level in order to avoid retrogression." McConnell Mem. Supp. Mot. Dismiss, 25, ECF No. 55-1. The State argued further that under the 2006 Reauthorization, "[a] redistricting plan has a retrogressive effect, *by definition*, if minority voting strength is reduced to levels where minority voters would have to depend on crossover voting by the majority group." Id. at 26. In other words, black voters and white voters working together to elect a candidate of choice violated Section 5 and required remedial racial districting.

In his filings with this Court, Speaker Harrell likewise explained away the public comments of his lieutenants as the State's effort to comply with Section 5. Moreover Speaker Harrell argued that Section 5 compliance provided the State with the necessary justification to do what equal protection otherwise forbids.

> For instance, Plaintiffs cite to statements by Defendants Harrison and Clemmons urging rejection of amendments affecting District 82, a majority-minority district, to avoid retrogression. Contrary to Plaintiffs' claims, these statements do not demonstrate that race predominated in drawing the plans, *but instead show that the House considered race in a narrowly tailored effort to achieve a compelling state interest: avoiding the retrogression prohibited by Section 5 of the Voting Rights Act.*

Harrell's Reply Supp. Mot. Dismiss, 7, ECF No. 63 (emphasis added). In his request for summary judgment on Plaintiffs' equal protection claims, Speaker Harrell *admitted* that the legislature used race "[i]n formulating the Redistricting Plan in accordance with the Voting Rights Act[.]" Harrell Mem. Supp. Sum. J., 7, ECF No. 110-1. Speaker Harrell reiterated the

[3] Senator John E. Courson and others have been substituted for their predecessors in office pursuant to Fed. R. Civ. P. 25(d). The Senate plan claims were subsequently dismissed from this litigation by consent of the parties and are not at issue in this motion.

State's view that the House was "required" to ensure that Act 72 "not contain fewer majority minority districts than the prior plan." Id. (citing Section 5).

Indeed, Plaintiffs argued that Act 72 gratuitously used race far in excess of what the VRA could be construed to require.[4] The most egregious example is House District 79. That district previously elected two different non-incumbent black representatives (instead of white Republican challengers) with a 34% BVAP in the three most recent elections. Act 72 destroyed this bi-racial constituency over the objection of the black incumbent, Rep. Mia Butler-Garrick., who testified that (1) it was unnecessary to raise the district's BVAP to 52% to allow her to compete fairly, (2) majority-black status was inconsistent with the constituency that elected her, and (3) that in order to maximize the district's BVAP, Act 72's split her own neighborhood in half so as to exclude her white neighbors from the district. Butler-Garrick Aff., ¶¶ 5-15, ECF Nos. 147 & 184.

This gratuitous use of race was evident in the remainder of the plan as well. *All* of the 30 majority-black districts drawn by Act 72 had been electing black representatives under the prior redistricting plans (the "benchmark plan" in the language of the now defunct Section 5 system)—including the nine districts *without* a majority-BVAP.[5] If the purpose of VRA-authorized racial districting was to ensure that black voters received an equal opportunity to elect

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[4] As Johnson v. De Grandy, 512 U.S. 997 (1994), explained, the availability of remedial districting

> should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice.

Id. at 1020.

[5] A chart summarizing the historical BVAP for the House plan's 30 majority-black districts is attached as **Exhibit C.**

candidates of their choosing, black voters were already doing just that in *at least* nine non-majority districts. But leaving aside whether the degree of remedial racial action was justified, there is simply no doubt that Act 72 repeatedly engaged in racial districting under the auspices of Section 5.

II. This Court upheld Act 72 in reliance on the State's Section 5 mandate.

On March 9, 2012, this Court entered an Order explicitly recognizing the General Assembly's racial districting policy, but nevertheless concluding that the Court was "satisfied that the General Assembly did not *overly* rely on race in a manner that runs afoul of the Fourteenth Amendment." Order, 16 (emphasis added). This Court expressly noted the centrality of Section 5 to its decision:

> 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*.

Order, 16 (emphasis added). Even though this Court found that Rep. Sellers' testimony "strongly suggested that race was a factor in drawing *many* district lines[,]" it nonetheless rejected Plaintiffs' claims because they "ignore[ ] that race can be—*and often must be*—a factor in redistricting." Order, 15-16 (emphasis added).

Believing that Section 5 compliance sufficed as a compelling state interest in the use of race, this Court did not engage in the kind of traditional equal protection analysis that would have been required had the Court known that Section 5 was unconstitutionally in force. Had Shelby County come down before this Court issued its Order, then the State would have borne the burden of demonstrating that its use of race was "narrowly tailored" to achieve a "compelling" government interest. See e.g., Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 720 (2007). Section 5 cannot provide that interest.

Since this Court's decision to uphold Act 72 turned on its belief that the uniquely demanding obligations of Section 5 satisfied the State's ordinary equal protection burden, the Supreme Court's decision to strike down the Section 5 regime requires this Court to reopen its prior judgment to examine the consequences of this dramatic change in law.

III. Shelby County changed the substantive law applicable in this case.

When Congress passed the VRA in 1965, it contained two operative provisions: Section 2 and Section 5. Section 2 is a permanent, nationwide prohibition against any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Section 5, on the other hand, "suspends *all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C." Shelby Cnty., Ala., 570 U.S. at __, 133 S. Ct. at 2624 (quoting Northwest Austin Municipal Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)). Unlike Section 2, Section 5 only applied to certain "covered jurisdictions"—states, such as South Carolina, and certain political subdivisions. See id. at __, 133 S. Ct. at 2619 (discussing § 4(b), 79 Stat. 438).

Prior to Shelby County, a proposed voting change could only take effect upon determination by a three-judge federal court or the Attorney General that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, [or language minority status]." 42 U.S.C. § 1973c. This imposed *far more stringent* standards on covered jurisdictions than their sister states by requiring that they be even more race-conscious in the manner in which they drew election districts. Specifically, Section 5 prohibited South Carolina from making any change to election districts that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise

of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976). Under this standard, federal authorities compare any proposed redistricting plan to the last legally enforceable plan as it presently exists (also called the "benchmark plan"). Riley v. Kennedy, 553 U.S. 406 (2008); 28 C.F.R. 51.54(b)(1). A proposed plan was "retrogressive" under Section 5 if it diminished the minority community's "effective exercise of the electoral franchise" as compared to the benchmark plan. Beer, 425 U.S. at 141.

The 2006 Reauthorization of the VRA made Section 5's already stringent remedy even *more* onerous by "amend[ing] § 5 to prohibit more conduct than before."[6] Shelby Cnty., Ala., 570 U.S. at __, 133 S. Ct. at 2621. Specifically, Congress amended the statute to prohibit any change with the purpose or effect of diminishing minority voters' ability to elect candidates along racial lines. 42 U.S.C. § 1973c(b). These changes forced covered jurisdictions, such as South Carolina, to become even more race-conscious in their 2010 redistricting plans.

Prior to the 2006 Reauthorization, the Supreme Court held in Georgia v. Ashcroft, 539 U.S. 461 (2003) that covered jurisdictions did *not* have an obligation to design districts to maximize BVAP or the number of black candidates elected. See id. at 480 ("No single statistic provides courts with a shortcut to determine whether a voting change retrogresses from the benchmark." (quoting Johnson, 512 U.S. at 1020–1021) (internal quotations omitted)). To the contrary, the Court reasoned:

> minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

[6] Specifically, Congress added subsections (b) through (d) to Section 5 in an effort to overrule the Supreme Court's decisions in Reno v. Bossier Parish School Bd., 528 U.S. 320 (2000) (Bossier II) and Georgia v. Ashcroft, 539 U.S. 461 (2003). See The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, 120 Stat. 577 (2006) (codified, in relevant part, at 42 U.S.C. §§ 1973c(b)-(d)); see also H.R. Rep. No. 109-478 at 93-94 (2006) and S. Rep. No. 109-295 at 19-20.

Id. at 481 (quoting Johnson, 512 U.S. at 1020). The Court construed Section 5 to allow states to reduce minority populations in election districts when doing so would enhance the minority community's overall ability to participate in the political process. Id. at 482-82.

In short, Georgia v. Ashcroft sent a clear signal that Section 5's purpose, indeed, the very measure of its success, was its own increasing obsolescence. In reaching this conclusion, the Court was particularly moved by the testimony of Congressman John Lewis, who testified that unpacking black-maximization districts "will give real meaning to voting for African Americans" because "you have a greater chance of putting in office people that are going to be responsive."[7] Id. at 489. Moreover, construing Section 5 to support inter-racial political coalitions, where possible, comported with the VRA's purpose to "foster our transformation to a society that is no longer fixated on race[,]" not permanently enshrine race into the Nation's democratic institutions. Id. at 490.

In 2006, Congress responded by effectively overruling Georgia v. Ashcroft and codifying black maximization into federal law. As amended, Section 5 forbade *any* diminution in minority block voting power as retrogressive. 42 U.S.C. § 1973c(b). In other words, once a district was

[7] The Court also relied on a number of studies concluding that black maximization had actually resulted in a *diminution* of black voters' political power. Id. at 482-83 (citing David Lublin, Racial Redistricting and African–American Representation: A Critique of "Do Majority–Minority Districts Maximize Substantive Black Representation in Congress?" 93 Am. Pol. Sci. Rev. 183, 185 (1999) (creation of more majority-minority districts, made Congress "less likely to adopt initiatives supported by blacks"); Cameron, et al., Do Majority–Minority Districts Maximize Substantive Black Representation in Congress? 90 Am. Pol. Sci. Rev. 794, 808 (1996) (concluding that maximizing the number of minority representatives does not necessarily maximize substantive minority representation); Carol Miller Swain, Black Faces, Black Interests 193–234 (1995); Richard H. Pildes, Is Voting-Rights Law Now at War with Itself?, 80 N.C. L. Rev. 1517, 1573 (2002) (noting that a formalistic approach to the VRA would "entrench a now crude structure for ensuring fair representation that abandons integrated electoral politics, even where effective"); Grofman, et al., Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence, 79 N.C.L.Rev. 1383 (2001)).

"elevated" (to borrow Speaker Harrell's term) to majority-black status, Section 5's retrogression standard barred the state from eliminating its majority-black status *or even reducing* its *BVAP*.[8] In other words, instead of spurring the creation of the "truly interracial democracy in the South," that Congressman Lewis testified was the whole purpose of the civil rights movement, see Georgia, 539 U.S. at 490, Congress's 2006 Reauthorization codified and accentuated the role of race in redistricting. .

In Shelby County, the Supreme Court repudiated the notion that this extraordinary race-conscious remedy was justified by present-day circumstances. Shelby Cnty., Ala., 570 U.S. at __, 133 S. Ct. at 2629 (Congress's factual justification has "no logical relation to the present day."). For example, the Court cited Congress's data comparing voter registration in 1965 and 2004. In South Carolina, what was initially a 38.4 percent voter registration gap between white and black voters (75.7% versus 37.3%, respectively) has been reduced to a 3.3 percent gap as of 2004. Id. at __, 133 S. Ct. at 2625-26. Other covered jurisdictions have similarly closed the racial registration gap with black registration *exceeding* white registration in at least two of the previously covered states. Id.

The Shelby County Court concluded, just as Congressman Lewis suggested a decade earlier in Georgia v. Ashcroft, that:

> things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.

Shelby Cnty., Ala., 570 U.S. at __, 133 S. Ct. at 2621 (internal quotations omitted)). While "[t]here is no doubt that these improvements are in large part *because* of the Voting Rights Act[,]" id. at __, 133 S. Ct. at 2626 (emphasis original), Section 5's extraordinary remedy was

[8] See n.6, supra.

intended as a temporary bridge across which minority voters would be able to compete on equal terms. As Congressman James E. Clyburn testified to this Court, having made great progress in "level[ing] the playing field" and securing ballot access, fully equal participation in the political process for South Carolina's black voters requires something more than remedial Section 5 districting allowed.

> In order for black voters to get the issues they care about addressed by their elected leaders, they must, at some point, work together with white voters to elect representatives that both white and black voters agree will represent their interests.

Clyburn Aff. ¶16, ECF Nos. 145 & 183. , Shelby County is a monumental shift in constitutional law. . The continued imposition of federally mandated race-based districting through Section 5 is no longer justified. South Carolina cannot defend Act 72 on that unconstitutional basis.

IV. The change in law announced in Shelby County requires reexamination of this Court's Order and Judgment.

The Court should set aside its Order and Judgment pursuant to Rule 60(b)(5) or (b)(6) of the Federal Rules of Civil Procedure because 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. The purpose of Rule 60 is to ensure that judgments reflect the true merits of a case. 11 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Fed. Prac. & Proc. Civ. § 2852 (3d ed. West 2013); see also Kinnear Corp. v. Crawford Door Sales Co., 49 F.R.D. 3, 7 (D.S.C. 1970). Accordingly, virtually all courts have construed the rule liberally to "prevent the judgment from becoming a vehicle of injustice."[9]

[9] See Holliday v. Duo-Fast Maryland Co., 905 F.2d 1529 (4th Cir. 1990) (quoting with approval Solaroll Shade and Shutter Corp. v. Bio–Energy Sys., Inc., 803 F.2d 1130, 1132 (11th Cir.1986) ("courts are supposed to construe liberally the requirements of Rule 60(b) when reviewing default judgments.")) and Kinnear Corp., 49 F.R.D. at 7; see also, Barber v. Turberville, 218 F.2d 34, 36 (D.C. Cir. 1954) (Rule 60(b) must be construed liberally); Fackelman v. Bell, 564

United States v. Walus, 616 F.2d 283, 288 (7th Cir. 1980). Rule 60(b)(5) requires relief when the prospective application of an order or judgment is no longer equitable. This arises, as it has here, when there is "a significant change either in factual conditions or in law [that] renders continued enforcement detrimental to the public interest." Horne, 557 U.S. at 447 (internal quotations and citation omitted).

In Horne v. Flores, students sued a state and its board of education seeking a declaration that the state had violated the Equal Educational Opportunities Act of 1974 (EEOA) which required that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin," because the state failed to take appropriate action to overcome a language barrier preventing equal student instruction. Id. at 440 (quoting 20 U.S.C. § 1703). The district court determined that the state violated the EEOA and ordered relief. After years of procedural wrangling, the state legislature intervened and moved for relief pursuant to, *inter alia*, Rule 60(b)(5), arguing that a change in circumstances merited reexamination of the earlier order. Id. at 444. The district court denied relief without ruling on the Rule 60(b)(5) request and the Ninth Circuit affirmed. Id. at 444-45. The Supreme Court reversed, holding that the district court erred by refusing to reconsider its earlier order in light of present circumstances. Id. at 450. Like the district court in Horne, this Court could not have anticipated the impact of future events, namely, the decision in Shelby County, on this case. Accordingly, this Court should re-examine the constitutionally significant question as to whether

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F.2d 734, 735 (5th Cir. 1977) (same); Graham by Graham v. Wyeth Laboratories, Div. of Am. Home Products Corp., 906 F.2d 1399, 1418 (10th Cir. 1990) (same) (quoting Walus, supra); but see, Davila-Alvarez v. Escuela de Medicina Universidad Cent. del Caribe, 257 F.3d 58, 64 (1st Cir. 2001) (even in taking a stricter approach, "[t]he rule must be applied so as to recognize the desirability of deciding disputes on their merits[.]"(internal quotations omitted)).

Act 72 denies equal protection in the absence of Section 5's exceptional racial districting mandate.

A court's duty to reexamine a prior judgment is particularly strong when the need for rehearing arises from a substantial change in law. For example, in Agostini v. Felton, 521 U.S. 203 (1997), the Court held that a change in Establishment Clause precedent was grounds to reexamine its earlier decision that the First Amendment barred a city from sending public school teachers into private schools as part of a remedial education program. Id. at 215 (citing Fed. R. Civ. P. 60(b)(5)). In vacating the district court injunction, the Supreme Court observed:

> Our general practice is to apply the rule of law we announce in a case to the parties before us. We adhere to this practice even when we overrule a case. In Adarand Constructors, Inc. v. Peña, 515 U.S. 200[ ] (1995), for example, the District Court and Court of Appeals rejected the argument that racial classifications in federal programs should be evaluated under strict scrutiny, relying upon our decision in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547[ ] (1990). When we granted certiorari and overruled Metro Broadcasting, we did not hesitate to vacate the judgments of the lower courts. In doing so, we necessarily concluded that those courts relied on a legal principle that had not withstood the test of time.
>
> 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. We reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions. Adherence to this teaching by the District Court and Court of Appeals in this litigation does not insulate a legal principle on which they relied from our review to determine its continued vitality. The trial court acted within its discretion in entertaining the motion with supporting allegations, but it was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.

Id. at 237-38 (internal quotations and citations omitted). This Court adhered to this instruction by not questioning Section 5's continued efficacy but instead undertook the problematic task of trying to reconcile Section 5's black-maximization mandate with Act 72's equal protection

concerns.[10] See Order, 15-16. However, Shelby County provides the sort of clear departure from precedent that now requires a reexamination of the merits of this case in light of that precedent.

Granting Rule 60(b) relief here also serves important public interests. In Horne, the Court was particularly concerned that a district court's failure to revisit its decision also denied current policymakers the opportunity to remedy the errors of their predecessors. See Horne, 557 U.S. at 449. The Court's conclusion was also motivated by its concern that the persistence of erroneous federal court orders in institutional reform litigation has a deleterious effect on public officials who may "consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law." Id. at 448-49. These concerns are powerfully present here. Horne suggested that some local officials might prefer continued federal oversight in lieu of ordinary avenues of political change if the federally-imposed policy, rightly or wrongly, was consistent with their personal policy preference. See id. Similarly, were this Court to decline to revisit its Order, it would only perpetuate the erroneous belief that Act 72's racial districting survives constitutional scrutiny notwithstanding Shelby County.[11] This would merely postpone the

[10] This is a paradox and judicial quagmire that had not gone unnoticed. See Georgia v. Ashcroft, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) ("considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 [of the VRA] seem to be what save it under § 5").

[11] Significantly, this Court was presented with evidence that the Republican leaderships' interpretation that Section 5 required black-maximization was motivated by political expediency and an effort to make the Democratic Party the "black party." See Aff. Butler-Garrick, ¶¶ 9-13, 16, ECF No. 147 & 184. Even while cautiously approving the use of remedial racial districting, Justice Brennan warned over 35 years ago that "[a]n effort to achieve proportional representation… might be a 'contrivance to segregate' the group, thereby frustrating its potentially successful efforts at coalition building across racial lines…." United Jewish Organizations v. Carey, 430 U.S. 144, 173 (1977) (Brennan, J., concurring). Notably, the only three members of the General Assembly willing to offer testimony concerning legislative intent all offered testimony that Justice Brennan's prediction had in fact come to pass. See also Ari Berman, How the GOP is Resegregating the South, The Nation, Jan. 31, 2012, available at: http:// www.thenation.com/article/165976/how-gop-resegregating-south. While this Court need not investigate the legislature's motivation or find a discriminatory intent in order for Plaintiffs

inevitable and risk misleading future General Assemblies as to the present state of the law. This in turn might also result in needless litigation over future redistricting plans using Act 72 as a starting point.

This motion is also the most appropriate procedural vehicle through which to address the issues raised here. As a matter of judicial economy, this Court is already familiar with the record. 11 Wright, et al., Fed. Prac. & Proc. Civ. § 2863 ("Other courts should refuse to entertain an independent action seeking relief from the judgment on this ground, so long as it is apparent that a remedy by motion is available in the court that gave judgment."). Moreover, Plaintiffs believe this matter can and should be resolved expeditiously with no additional discovery or evidentiary hearings since the record already demonstrates the State's reliance on Section 5 to justify racial districting. Furthermore, upon entry of an order granting Plaintiffs relief, the General Assembly would have ample time in which to enact a new House districting plan for the 2014 election. Upon adoption, a new, constitutional and non-discriminatory plan can be enacted *immediately*, without the delay previously imposed by the preclearance regime.

Alternatively, if the Court decides it lacks authority pursuant to subsection (b)(5), it should grant Plaintiffs relief pursuant to Rule 60(b)(6) which allows the Court to grant relief from a final judgment for "any other reason that justifies relief." For the same reasons set forth above, this case presents the sort of "extraordinary circumstances" contemplated by Fourth Circuit precedent. See Aikens, 652 F.3d at 500. Additionally, rehearing of this matter will not prejudice any party involved. Plaintiffs seek only prospective relief from the judgment and are not asking the Court for an "unscrambling of the past" by the overturning of any popular election

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to prevail, it is nonetheless probative of the Horne Court's concerns requiring a reexamination of an earlier ruling *particularly* when failure to do so might serve as a welcome obstacle to positive change by some political leaders.

previously conducted under Act 72. See id. (citing Bros. Inc. v. W. E. Grace Mfg. Co., 320 F.2d 594, 610 (5th Cir. 1963), and noting a greater proclivity toward granting relief in these circumstances).

In consideration of the foregoing, relief pursuant to Rule 60(b) is merited.

CONCLUSION

"It is a sordid business, this divvying us up by race." LULAC, 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting). This Court was presented with uncontradicted evidence that the legislature's primary concern in the drafting of Act 72 was "[r]ace, race, and more race." Sellers Trial Tr., 32:2-3. The State admitted to using race, but maintained that this extensive use of race was justified and required by Section 5. This Court accepted that argument as the basis for its Order and Judgment. Shelby County holds that Section 5 can no longer justify imposition of that extraordinary remedy. Since this Court's decision turned on the understanding that the legislature's racial decision making was *necessary* in order to comply with Section 5, it should be set aside and reexamined in light of Shelby County.

Plaintiffs respectfully request a hearing on this motion; an order setting aside the Court's earlier Order and Judgment; and a scheduling order for the submission of briefing and argument to determine whether Act 72 can survive strict scrutiny. Plaintiffs submit it cannot and its future enforcement should be enjoined pursuant to the Fourteenth Amendment's promise of equal protection.

Respectfully submitted by,

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