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

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| 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, | ) | Civil Action No. |
| v. | ) | 3:11-cv-03120-PMD-HFF-MBS |
| THE STATE OF SOUTH CAROLINA, NIKKI R. HALEY, in her capacity as Governor, KEN ARD, in his capacity as Lieutenant 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, JAMES H. HARRISON, in his capacity as Chairman of the House of Representatives' Judiciary Committee, ALAN D. CLEMMONS, in his capacity as Chairman of the House of Representatives' Elections Law Subcommittee, MARCI ANDINO, in her capacity as Executive Director of the Election Commission, JOHN H. HUDGENS, III, Chairman, CYNTHIA M. BENSCH, MARILYN BOWERS, PAMELLA B. PINSON, and THOMAS WARING, in their capacity as Commissioners of the Elections Commission, | ) | |
| Defendants. | ) | |

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**DEFENDANT GLENN F. MCCONNELL'S MOTION FOR SUMMARY JUDGMENT ON THE STATE SENATE DISTRICTS AND MEMORANDUM IN SUPPORT**

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## INTRODUCTION

Defendant Glenn F. McConnell hereby moves for summary judgment on all of Plaintiffs' claims concerning the Senate's redistricting plan, now that Plaintiffs have revealed (finally) which Senate districts they are actually challenging and the evidence they will offer in support. Plaintiffs' expert report shows that Plaintiffs are now attacking only two Senate districts and that they have completely abandoned their claim that Defendants diluted minority voting strength, or did so intentionally.[1] While it is unusual for a party to file a motion for summary judgment while a motion to dismiss is still pending and discovery has not yet closed, such a motion is appropriate here because the Court needs to be alerted, before trial, to Plaintiffs' abandonment of their claims and complete failure of proof. Due to the accelerated trial schedule, an unnecessary "intrusion on the most vital of local functions," *Miller v. Johnson*, 515 U.S. 900, 915 (1995), can be avoided only if Defendant's motion for summary judgment is filed before the close of discovery.

Plaintiffs' Complaint stakes their Section 2 claims and their constitutional claims on the theory that the enacted Plans dilute minority voting strength. *See* Am. Compl. ¶ 64(e) ("Defendant's purpose in passing Act 71, either in whole or in part, was to reduce the number of election districts where black voters could determine or could help determine the winner."); *id.* ¶ 75 ("The Senate Redistricting Plan, Act 71, dilutes minority voting strength by packing black voters . . . ."); *see also* Memorandum of Points and Authorities in Support of Defendant McConnell's Motion to Dismiss ("Def.'s Mem.) at 19-22. Plaintiffs' Memorandum of Law in Opposition to All Defendants' Motions to Dismiss ("Pls.' Opp.") likewise confirmed that Plaintiffs relied entirely on a theory of vote dilution. *See* Pls.' Opp. at 3 ("While historically

[1] Plaintiffs' expert report, authored by Dr. Michael P. McDonald, is attached as Exhibit A ("Pls.' Expert Report").

plaintiffs invoking Section 2 sought to undo a redistricting plan that fractured the minority community, this case presents the opposite problem of packing."); Pls.' Opp. at 6 ("Plaintiffs allege the only plausible explanation for adding more BVAP to an already performing majority-minority district was to deny black voters an opportunity to influence election outcomes in surrounding districts.").

While Plaintiffs' vote dilution claims were legally deficient—as Plaintiffs' Complaint made no attempt to satisfy the *Gingles* preconditions and did not offer any hypothetical alternative plans, *see* Def.'s Mem. at 9-17—now Plaintiffs have completely abandoned any such claim. Indeed, Plaintiffs' expert report reveals that Plaintiffs now pursue a completely different theory of liability. The report makes no allegations that Defendants' consideration of race had a dilutive effect or purpose. Rather, Plaintiffs now assert only that "[r]ace was a factor" in drawing the lines of two districts, without any hint that race was considered for the purpose of diluting minority voting strength. Plaintiffs have also severely limited their challenge to only two districts—District 21 with a black voting age population of 51.59% and District 25 with a black voting age population of 23.15%. This complete failure of proof demonstrates that Plaintiffs have abandoned their claim of vote dilution (and therefore any Section 2 "results" claim) or any claim of purposeful dilution (and therefore their constitutional challenge), and instead apparently pursue a new, but meritless, theory of constitutional liability.

The Court should dismiss all claims in Plaintiffs' Complaint, for all of the reasons stated in Defendant's prior pleadings. Failing that, the Court should take cognizance of these new developments and grant Defendant's motion for summary judgment on all of Plaintiffs' claims concerning the Senate's redistricting plan.

## ARGUMENT

"Summary judgment is appropriate if 'there is no genuine issue as to any material fact' and [the movant] 'is entitled to judgment as a matter of law.'" *United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 728 (4th Cir. 2010) (quoting Fed. R. Civ. P. 56(c)). Defendant is entitled to summary judgment here because 1) all claims concerning Districts 21 and 25 should be dismissed on procedural grounds for lack of standing and failure to plead the theory of liability, 2) Plaintiffs' expert report reveals that Plaintiffs have abandoned their claims of dilutive effect and purpose, and 3) Plaintiffs' expert report fails to allege a cognizable racial gerrymandering claim.

### I. ALL CLAIMS RELATED TO DISTRICTS 21 AND 25 SHOULD BE DISMISSED FOR LACK OF STANDING AND FAILURE TO PLEAD THE THEORY OF LIABILITY

Plaintiffs' expert report reveals that Plaintiffs have dropped their claims related to all Senate Districts except Districts 21 and 25. Plaintiffs' expert, Dr. Michael P. McDonald, offers no opinions about any Senate district other than those districts. *See* Pls.' Expert Report at 28-29, 34-35. In particular, Dr. McDonald alleges that "[r]ace was a factor" and "[t]raditional redistricting principles were ignored" in the drawing of Districts 21 and 25. Pls.' Expert Report at 28, 34-35. But all claims related to Districts 21 and 25 should be dismissed on procedural grounds for lack of standing and failure to plead the theory of liability.

Plaintiffs cannot mount a credible claim against District 21 for two reasons. *First*, Plaintiffs lack standing to challenge District 21, *see* Def.'s Mem. at 33-35; Def.'s Reply at 14-15, because no plaintiff lives in District 21, *see* Am. Compl. ¶¶ 8-15. *Second*, Plaintiffs did not allege in their Complaint that District 21 was irregularly shaped. While Plaintiffs claimed that this District "maintain[ed] an artificially high black VAP percentage[]," Am. Compl. ¶¶ 64(b),

75, Plaintiffs never alleged that the Legislature shaped the District in an irregular manner to maintain such a VAP percentage. And to the extent there was ever any ambiguity about what Plaintiffs were claiming, this ambiguity was eliminated in Plaintiffs' Opposition, where Plaintiffs specifically *omitted* District 21 from the list of districts that Plaintiffs identified as "irregular[ly] shape[d]." Pls. Opp. at 12. Thus, because Plaintiffs did not specifically plead a racial gerrymandering claim involving District 21 in their Complaint or even their Opposition, Plaintiffs are precluded from pursuing this new theory of liability. *See* 5 Wright & Miller, *Federal Practice & Procedure* § 1215 (3d ed. 2011) ("[T]he federal rules require the complaint to give the defendant 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957))).

The grounds for dismissing Plaintiffs' claims concerning District 25 are equally strong. Plaintiffs' Complaint did not even identify District 25 as a district they were challenging. *See* Am. Compl. ¶¶ 64(b), 75. District 25 certainly was not a "pack[ed]" district or a district that "maintain[ed] an artificially high black VAP percentage[], *id.*—the enacted plan *reduced* the black voting age population percentage from 34.64% down to 23.15%. *See* Senate Preclearance Exhibit 13, BVAP Comparison (Exhibit B). And while Plaintiffs subsequently identified District 25 as an "irregular[ly] shape[d]" district in their Opposition, Pls. Opp. at 12, "[i]t is . . . well-settled that a complaint cannot be amended by the plaintiff's briefs in opposition to a motion to dismiss." *Bessinger v. Food Lion, Inc.*, 305 F. Supp. 2d 574, 581 (D.S.C. 2003), *aff'd*, 115 Fed. Appx. 636 (4th Cir. 2004); *see also, e.g.*, *Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988) ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745

F.2d 1101, 1107 (7th Cir. 1984))). Because Plaintiffs failed to identify District 25 in their Complaint, they are now foreclosed from pursuing any claims related to this District.

Thus, because Plaintiffs now only challenge Districts 21 and 25 and these claims cannot proceed to trial, Defendant is entitled to summary judgment on all of Plaintiffs' claims related to the Senate plan.

## II. PLAINTIFFS' EXPERT REPORT DEMONSTRATES THAT PLAINTIFFS HAVE ABANDONED THEIR VOTE DILUTION CLAIMS

Even if these procedural failures were not fatal, Defendant is still entitled to summary judgment because Plaintiffs' Section 2 and constitutional claims are entirely premised on a now-abandoned allegation of purposeful vote dilution. *See* Def.'s Mem. at 19-22. In Defendant's prior filings, Defendant has shown that Plaintiffs' vote dilution claims are facially deficient, as Plaintiffs admittedly made no attempt to satisfy the *Gingles* preconditions and did not propose any hypothetical alternatives to the challenged plans. *See* Def.'s Mem. at 9-17; Def.'s Reply at 3-12. So, up until now, while Plaintiffs had a vote dilution case, they did not allege it properly.

With the filing of Dr. McDonald's report, Plaintiffs abandon any pretense that they are pursuing a vote dilution theory of liability. Plaintiffs' expert report provides absolutely no suggestion that District 21 has a dilutive effect on minority voters (and no such suggestion is possible). Plaintiffs never dispute that Section 5 required the Legislature to avoid retrogression in this majority-minority District. *See* Pls.' Opp. at 21 (acknowledging that "Section 5 'prevents ... backsliding' in the position of the minority community."). Nor have they suggested that the Legislature could have complied with Section 5 by converting this majority-minority district into a majority-white district. *See also* Def.'s Reply at 12 n.2. Thus, the sum total of Plaintiffs' "packing" or "artificial enhancement" dilution claim used to be that District 21's BVAP

increased by *0.87%*, from 50.72% to 51.59%. *See* Senate Preclearance Exhibit 13, BVAP Comparison. But they have now abandoned this meritless allegation, since their voting rights expert does not hint that this miniscule increase somehow packed District 21 or reduced black's electoral opportunities in surrounding districts, although that was the gravamen of Plaintiffs' Complaint.

Plaintiffs' failure to offer any testimony opining that this mere 0.9% increase harms minority voters forecloses Plaintiffs' vote dilution claims concerning District 21. A vote dilution claim cannot be proven without expert testimony. *See Barnett v. City of Chicago*, 969 F. Supp. 1359, 1369 n.4 (N.D. Ill. 1997), *vacated in part on other grounds*, 141 F.3d 699 (7th Cir. 1998); *LULAC v. Roscoe Indep. Sch. Dist.*, 123 F.3d 843, 846 (5th Cir. 1997); J. Gerald Hebert et al., *The Realist's Guide To Redistricting*, 45-47 (American Bar Association, 2d ed. 2010) (Exhibit C). Plaintiffs' failure to provide any opinion testimony on vote dilution related to District 21, therefore, means that Plaintiffs cannot proceed under this theory of liability. *See generally Disher v. Synthes (U.S.A.)*, 371 F. Supp. 2d 764, 769 (D.S.C. 2005) (granting summary judgment where "Plaintiff has failed to proffer the expert testimony that is required to" establish liability).

Likewise, Plaintiffs' expert report provides absolutely no suggestion that District 25's change in BVAP deprives black voters of any opportunity to elect their preferred candidate. The new redistricting plan decreased the black voting age population in District 25 (which is represented by a white Republican incumbent) from 34.64% to 23.15% and increased the black voting age population in District 26 (which is represented by a white Democrat incumbent) from

21.07% to 28.46%.[2] Plaintiffs' expert report provides no hint that such change—which presumably improved the electability of two incumbents from opposite parties—somehow dilutes minority voting strength. Plaintiffs' failure to provide any expert testimony on this issue therefore means that Plaintiffs' vote dilution claims related to District 25 must similarly be dismissed.

Because Plaintiffs cannot prove vote dilution, and Plaintiffs' allegations of purposeful race discrimination are based entirely on the notion that the challenged plans deliberately dilute minority voting strength, Defendant is entitled to summary judgment on all of Plaintiffs' claims. *See* Def.'s Reply at 9-11.

## III. PLAINTIFFS' EXPERT REPORT FAILS TO ALLEGE A COGNIZABLE RACIAL GERRYMANDERING CLAIM

Even assuming Plaintiffs are allowed to proceed to trial on a theory of liability that was never articulated in their Complaint, without notice to Defendants other than conclusory allegations in an expert report, these allegations nevertheless do not establish a cognizable racial gerrymandering claim, and therefore Defendant is entitled to summary judgment. Specifically, Plaintiffs have apparently decided, at the eleventh hour, to replace their claim that Defendants considered race for the purpose of impairing minorities' voting strength with a new claim resembling a claim under *Shaw v. Reno*, 509 U.S. 630 (1993), since they now contend that "[r]ace was a factor" in the drawing of Districts 25 and 21, and that "[t]raditional redistricting principles were ignored" for these districts. Pls.' Expert Report at 28, 34-35. But even if it were not fundamentally unfair to allow Plaintiffs to alter their theory of the case a month before trial,

[2] *See* Senate Preclearance Exhibit 13, BVAP Comparison; *see also* Profiles of Senator A. Shane Massey (District 25) and Senator Nikki G. Setzler (District 26), attached as Exhibit D.

their newly minted "gerrymander" allegation fails to state a claim under *Shaw* and its progeny. This is because there is no allegation that Defendants *subordinated* traditional districting principles to race or that any such subordination was designed to "*segregate* voters into *separate* voting districts." *Shaw*, 509 U.S. at 658 (emphasis added).

The "essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for *separating* voters into districts." *Miller*, 515 U.S. at 911 (emphasis added). *See id.* ("[We] recognize[d] in *Shaw* that it may not *separate* its citizens into different voting districts on the basis of race." (emphasis added)); *see also Shaw*, 509 U.S. at 650 ("reapportionment legislation that cannot be understood as anything other than an effort to classify and *separate* voters by race." (emphasis added)). The theory of *Shaw* is that if a state has "*concentrated* a dispersed minority population into a single district" in a manner such that it can be "understood only as an effort to *segregate* voters by race," *Shaw*, 509 U.S. at 647, 650 (emphasis added), this is akin to "segregat[ing] citizens on the basis of race in its public parks ... beaches ... and schools." *Miller*, 515 U.S. at 911. And the "[a]nalytically distinct," 509 U.S. at 652, *Shaw* injury exists only if race-conscious redistricting causes such segregation. Only such segregation "bears an uncomfortable resemblance to political apartheid," signals to "elected officials that they represent a particular racial group rather than their constituency as whole" and "may balkanize us into competing racial factions." *Shaw*, 509 U.S. at 649-650, 658.

Moreover, given that redistricting legislatures are "almost always ... aware of racial demographics" *Miller*, 515 U.S. at 916, Plaintiffs "must prove that the legislature *subordinated traditional* race-neutral districting principles ... to racial considerations." *Id*. (emphasis added). In short, contrary to Plaintiffs' apparent belief, it is not enough to say that race was a factor and districting principles were ignored. Rather, *Shaw* plaintiffs must allege and prove that traditional

districting principles were *subordinated* to race for the purpose of *separating* or *segregating* voters. Since Plaintiffs' new "gerrymander" argument makes neither allegation, it fails to satisfy the requirements of *Shaw*.

*First,* for both Districts 25 and 21, Plaintiffs' expert Dr. McDonald alleges that "[r]ace was a factor in the drawing of the district." Pls.' Expert Report at 28, 34. Dr. McDonald also alleges that "[t]raditional redistricting principles were ignored." *Id.* at 28, 35. But Dr. McDonald never alleges traditional redistricting principles were ignored *because* race was a factor in the drawing of the district, such that traditional principles were *subordinated* to race. Thus, Plaintiffs' expert does not even attempt to satisfy the burden required for Plaintiffs to make out a valid *Shaw* claim.

Plaintiffs' racially gerrymandering claim involving District 25 also necessarily fails because there is no allegation that race was used to "separate" or "segregate" voters into racially identifiable "minority" districts. Nor could there be any such allegation since the undisputed statistics demonstrate conclusively that any use of race in District 25 had an *integrative* effect: it did not separate or segregate voters. Under the existing benchmark plan, District 25 had a BVAP of 34.6% and the neighboring District 26 had a BVAP of 21%. Senate Preclearance Exhibit 13, BVAP Comparison. As a result of the precinct changes criticized by Plaintiffs' expert, District 25 now has a BVAP of 23.2% and District 26 has a BVAP of 28.5%. Thus, the result of the challenged race-consciousness is not to separate voters, but to better integrate them, by better reflecting South Carolina's overall black voting age population of 26.7%. *See* U.S. Census Bureau, Population by Race Alone or in Combination and Hispanic or Latino Origin, for All Ages and for 18 Years and Over, for South Carolina: 2000 and 2010, Table 3 (Exhibit E). (And District 25 in isolation is itself now closer to the statewide representation of blacks than it

previously was; the "gap" between District 25 and statewide BVAP has been closed from 7.9% to 3.5%).

Consequently, there can be no *Shaw* "analytically distinct" injury attributable to voter separation into racially identifiable minority districts and thus (having abandoned any alleged dilutive injury) no cognizable equal protection injury stemming from the Defendants' alleged use of race. A *Shaw* claim here would be analogous to plaintiffs in a school desegregation case complaining because the district has created schools that are *less* racially identifiable because their population *better* mirrors the district-wide minority population. Thus, since any such claim would be at war with *Shaw*'s analysis and any cognizable equal protection principle, it is not surprising that, to Defendant's knowledge, no successful *Shaw* claim has ever been brought against a district with demographics even similar to that of District 25.

Indeed, Plaintiffs' challenge to integrated districts that "look like South Carolina" not only turns *Shaw* on its head, but is utterly irreconcilable with the Complaint's and Opposition's allegations of what the Legislature should have done. The major thesis of the Complaint and the Opposition was that, by creating majority black districts, the Legislature "created a system of electoral apartheid" and "resegregat[ed] voters into election districts," rather than pursuing the preferred alternative of drawing "racially integrated election districts that reflect the communities they represent." *See* Am. Compl. ¶¶ 42, 81; Pls.' Opp. at 22-23. But here the Legislature has created such integrated districts reflecting the population of the relevant community, and Plaintiffs nonetheless condemn this integrative effort as a *Shaw* violation. Surely Plaintiffs cannot be allowed to pursue a theory on the eve of trial that not only was never mentioned in the Complaint but also is *contrary to* the general and specific allegations of the Complaint.

Finally, Plaintiffs' expert completely ignores the most obvious non-racial explanation for the precinct changes between Districts 25 and 26. Both parties concede that African Americans in South Carolina overwhelmingly prefer Democrats. *See* Def.'s Mem. at 32. Thus, the precinct changes that had the effect of lowering the black voting age population of District 25 and increasing the black voting age population of District 26 resulted in a more Republican district for a Republican incumbent and a more Democratic district for a Democratic incumbent. *See supra* pp. 6-7. Due to the starkly beneficial impact these changes had for both incumbents, the most obvious explanation for it is incumbency protection and politics, not race—an explanation Plaintiffs' expert does not even acknowledge. *See Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (holding that when "racial identification is highly correlated with political affiliation," plaintiffs must demonstrate that race, rather than politics, predominated over traditional redistricting principles).

Indeed, just recently, a three-judge panel considering Maryland's redistricting, per Judge Niemeyer, rejected a similar *Shaw* claim in a more compelling circumstance. *See Fletcher v. Lamone*, No. RWT–11cv3220, 2011 WL 6740169 (D. Md. Dec. 23, 2011) (Exhibit F). At issue in this *Shaw* claim was, among other districts, a district "reminiscent of a broken-winged pterodactyl, lying prostrate across the center of the State." *Id.* at *13 n.5. The court rejected Plaintiffs' *Shaw* claim even though the ugly shape was attributable to shifting racially-identifiable precincts, precisely because the race-conscious precinct swaps could have been attributable to the *political affiliation* of the black voters being moved. As the court explained, "mov[ing] African-Americans in and out of districts . . . . for *partisan* purposes does not establish a violation of the Fourteenth Amendment under *Shaw*." 2011 WL 6740169, at *12 (emphasis added). Thus, no matter how irregular the shape and obvious the racial the impact, a

plaintiff must still prove the district was drawn for racial, not political, purposes—again, a burden Plaintiffs' expert report ignores and Plaintiffs have not otherwise attempted to make.

Likewise, for District 21, Plaintiffs' *Shaw* claim fails as a matter of law because a *Shaw* claim cannot be based on a *de minimis* shift in population. As explained above, Plaintiffs only take issue with District 21's 0.9% increase in black voting age population, not the maintenance of the benchmark's 50.72% black voting age population, which was required by Section 5 of the Voting Rights Act. *See supra* pp. 5-6. But when "the population shifts that are the subject of plaintiffs' *Shaw* claims represent a relatively minor portion of the district[] at issue,"—which is certainly the case here—such changes "do not signal that" race was the "*predominant* criterion" in drawing the district. *Cano v. Davis*, 211 F. Supp. 2d 1208, 1220 (C.D. Cal. 2002).

In other words, because they have abandoned their apparent claim that replacing the existing 50.7% BVAP District 21 with a *white majority* district would somehow comply with Section 5, Plaintiffs now concede that *maintaining* 50.7% BVAP is "reasonably necessary to avoid retrogression," *Shaw*, 509 U.S. at 655, and thus cannot constitute racial gerrymandering under *Shaw*. Def.'s Mem. at 28-29; Def.'s Reply at 12. Having conceded that, they cannot possibly argue that the 0.9% "excess" somehow was responsible, much less the predominant motivation, for whatever irregular shape Plaintiffs perceive. This 0.9% BVAP obviously cannot be artificially disentangled from the 50.7% BVAP concededly needed under Section 5 and Plaintiffs' expert in no way suggests that the district would look any different *without* the 0.9% "excess."

Surely this Court will not devote scarce judicial resources to the metaphysical, unanswerable question of what effect the "excessive" 0.9% BVAP had on the District 21. Such judicial scrutiny serves absolutely no beneficial purpose since the only "remedy" would be to

eliminate the 0.9% "excess" BVAP, which will have no cognizable effect on the racial identifiability of District 21 or its shape. It will, however, have profoundly negative consequences on covered Section 5 jurisdictions and their minority voters. If such jurisdictions can be dragged into trials simply because they exceed the benchmark population by less than 1%, this means Section 5 will serve as an absolute strait-jacket where any deviation from current percentages will be met with costly litigation. This is particularly obvious because the old District 21 was drawn by a *federal court* at a *higher* BVAP than that challenged here (52.3% under the 2000 census), *see* Senate Preclearance Exhibit 13, BVAP Comparison, and this 2010 redistricting legislation received the overwhelming support of the black community, including that of all but one black Senator. *See* Senate Preclearance Cover Letter at 1-2 (Exhibit G). If a 1% deviation can subject jurisdictions to a full-blown trial notwithstanding this compelling evidence that District 21 could not plausibly be motivated by impermissible considerations of race, then *every* upward deviation from the benchmark, no matter how small, will subject jurisdictions to lengthy and expensive trials.

The Supreme Court has explicitly warned against such unnecessary trials, admonishing lower courts "to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race," given the "difficult" "distinction between being aware of racial considerations and being motivated by them ... together with the sensitive nature of redistricting and the presumption of good faith" afforded legislatures in redistricting. *Miller*, 515 U.S. at 916. Here, since Plaintiffs' new *Shaw* claim was never alleged, is contrary to the basic precepts of the *Shaw* opinion and Plaintiffs' own Complaint, and has been reduced to complete minutiae, any basic regard for the Legislature's difficult redistricting choices and their need to

comply with Section 5 requires that this suit be dismissed before the Senate must bear any additional expense, inconvenience, and invasion of its legislative prerogatives.

## CONCLUSION

For the foregoing reasons, Defendant McConnell is entitled to summary judgment on all claims concerning the Senate's redistricting plan.

*Signature Page Follows*

Respectfully submitted,

/s/ William W. Wilkins
William W. Wilkins Fed ID No. 4662
Kirsten E. Small Fed ID No. 10005
Andrew A. Mathias Fed ID No. 10166
NEXSEN PRUET, LLC
55 East Camperdown Way (29601)
Post Office Drawer 10648
Greenville, SC 29603-0648
PHONE: 864.370.2211
BWilkins@nexsenpruet.com

Michael A. Carvin (admitted *pro hac vice*)
Louis K. Fisher (admitted *pro hac vice*)
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001-2113
PHONE: 202.879.3637
macarvin@jonesday.com

*Attorneys for Defendant Glenn F. McConnell*

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Greenville, South Carolina