IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS CENTRAL DIVISION

JACKIE WILLIAMS SIMPSON, REPRESENTATIVE DENISE ENNETT, WANDA KING, CHARLES E. BOLDEN, SENATOR LINDA CHESTERFIELD, And DR. ANIKA WHITFIELD Plaintiffs,	**CIVIL ACTION**
	Case No: 4:22-cv-213
v.	
JOHN THURSTON, in his official capacity as the Arkansas Secretary of State, and the STATE OF ARKANSAS Defendants.	**REQUEST FOR THREE-JUDGE PANEL (28 U.S.C. §2284)**

PLAINTIFFS' ANALYSIS OF THE EFFECT OF *ALEXANDER V. SOUTH CAROLINA STATE CONFERENCE OF THE NAACP* ON THE PROCEEDINGS HEREIN

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The Three-Judge Panel ("the Panel", or the "District Court") assigned to this case has requested that the parties submit their perspectives on the issues that will be presented in further proceedings in this case in view of the decision of the United States Supreme Court in *Alexander v. South Carolina State Conference of the NAACP*, 602 U.S. __, 144 S.Ct. 1221, 218 L.Ed.2d 512 (2024) (the "*Alexander* Decision", or simply "*Alexander*").

Procedural Background

The original Complaint was filed in this case on March 7, 2022. Plaintiffs requested the appointment of a three-judge panel to hear the case pursuant to 28 U.S.C. §2284. That panel was appointed by the Chief Judge of the Eighth Circuit on March 29, 2022. The State of Arkansas filed a Motion to Dismiss the defendants and the case, and on October 24, 2022, the Panel entered a Memorandum Opinion and Order dismissing three counts in the original Complaint, but allowed the Plaintiff leave to amend the Complaint to plead facts addressing the remaining counts of the original Complaint to plausibly show that the Legislature *intended* to dilute the voting power of Blacks, and that such intent was the predominant factor for such dilution, rather than merely demonstrating that was merely the *impact* of such legislation.

The Plaintiffs, after filing a Motion for Extension of Time to file the amended complaint and obtaining an Order allowing such extension to December

2, 2022, filed a First Amended Complaint on December 2, 2022. On May 25, 2023, the Panel entered a *per curium* Memorandum Opinion and Order dismissing the entire Complaint.

Plaintiffs thereafter filed on August 11, 2023, a Jurisdictional Statement with the Supreme Court of the United States ("Supreme Court") stating, among other things, that the District Court erred in finding that the Plaintiffs failed to allege facts stating claims against the Defendant by:

1. Failing to give consideration to the irregular and inexplicable configuration of the intrusions into the Second District from the First and Fourth Districts by which over 20,000 Blacks in the Second District were "cracked" to the First and Fourth Districts, as prohibited by *Shaw v. Reno*, 509 U.S. 630 at 649, 113 S.Ct. 2816 125 L.Ed.2d 511 (1993);

2. Failing to give adequate and correct consideration to the statements of members of the Arkansas General Assembly supporting a "plausible inference" that the majority of the General Assembly was motivated by racial considerations in adopting the Reapportionment Law;

3. Considering only the intent of the Legislature, but not the impact of the legislation on the affected Black population.

4. Plaintiffs asserted in their appeal that the burden on the Plaintiffs to allege intent should be less at the early pleading stage of the litigation in order to allow the Plaintiffs to gain the benefit of discovery, particularly in view of the judicially-recognized problem of distinguishing between political gerrymandering and racially-motivated gerrymandering.

On May 23, 2024, the Supreme Court issued its *Alexander* decision, and subsequently, on June 3, 2024, entered an Order which provided, *inter alia*:

> **ON CONSIDERATION WHEREOF**, it is ordered and adjudged by this Court that the judgment of the above court is vacated with costs, and the case is remanded to the United States District Court for the Eastern District of Arkansas for further consideration in light of *Alexander* v. *South Carolina State Conference of the NAACP*, 602 U. S. ___ (2024).

Analysis of the Alexander Decision
As It Relates To This Case

Providing an objective analysis of the effect of the *Alexander* decision on this case is not a simple task. For a number of years, the Supreme Court has made voting rights law a very fluid subject, with the requirements for proving violations of the Fourteenth Amendment and the Voting Rights Act changing frequently.

A relatively minor but timely example of this is the issue of whether it is mandatory that a Plaintiff produce a map that is an alternative to the redistricting plan developed by a state in order to prevail in a challenge to the adopted map. In *Cooper v. Harris*, 581 U.S. 285, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017), a challenge to a North Carolina redistricting plan, the majority opinion stated very plainly:

> An alternative map is merely an evidentiary tool to show that such a substantive violation has occurred; neither its presence nor its absence can itself resolve a racial gerrymandering claim.

Justice Alito dissented to that part of the majority opinion in *Cooper v. Harris*, stating that "A precedent of this Court should not be treated like a

disposable household item …" and that "The Court junks a rule adopted in a prior, remarkably similar challenge to this same congressional district," referring to the Supreme Court's earlier opinion in *Easley v. Cromartie*, 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001).

Flashing forward to the Supreme Court's *Alexander* decision of May 23, 2024, Justice Alito, writing for the majority, "junked" the Court's decision in *Cooper v. Harris* on the issue of the necessity of a challenger to a reapportionment plan producing an alternative map, stating:

> A plaintiff's failure to submit an alternative map – precisely because it can be designed with ease – should be interpreted by district courts as an implicit concession that the plaintiff cannot draw a map that undermines the legislature's defense that the districting lines were 'based on a permissible, rather than a prohibited, ground.'" (citing Cooper, 581 U.S. at 317, 137 S.Ct. 1455). (Underlining added)

The *Alexander* decision, with this and other highly restrictive mandates and requirements (*e.g.*, the presumption of good faith of the state legislature in adopting a gerrymandering plan) imposes excessive burdens on persons attempting to protect their constitutional rights under the Fourteenth Amendment and the Voting Rights Act -- rights that are being diminished by the Supreme Court with each new opinion.

Plaintiffs will endeavor to provide their analysis of the effect of the Alexander decision on this case, and provide their recommendation on proceeding herein.

Basic Elements of the Alexander Decision

The Alexander opinion provides numerous guidelines for the evidence that a challenger to a redistricting law or in a voter dilution claim must provide in order to prevail. Based upon Plaintiffs' analysis, those guidelines are[1]:

1. In a racial-gerrymandering claim, the overall question is whether race predominated in the drawing of a district, regardless of the motivations for use of race (citing *Shaw v.* Reno, 509 U.S. at 645). (*Alexander*, p. 1233)
2. It is not unconstitutional for a legislature to pursue partisan ends when it engages in redistricting. However, if a legislature gives race a predominant role in redistricting decisions, the resulting map is subjected to strict scrutiny and may be held unconstitutional. (*Alexander,* p. 1233, 1235)
3. Partisan and racial gerrymanders are capable of yielding similar oddities in a district's boundaries when there is a high correlation between race and partisan preference. (*Alexander*, p. 1234)

[1] All references are to Supreme Court Reporter page numbers in the *Alexander* opinion.

4. In assessing a legislature's work, there is a presumption that the legislature acted in good faith. (*Alexander,* p. 1233, 1235-6)
5. A plaintiff challenging a map's constitutionality must "disentangle" race and politics to prove that the legislature was motivated by race as opposed to partisanship. (*Alexander,* p. 1235)
6. To "untangle" race from other permissible considerations, the plaintiff must show that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. (*Alexander*, p. 1235)
7. To make the showing that race was the predominant factor, a plaintiff must prove that the State "subordinated" race-neutral districting criteria such as compactness, contiguity, and core preservation to "racial considerations." Otherwise, it may be difficult for challengers to find other evidence sufficient to show that race was the overriding factor causing neutral considerations to be cast aside. (*Alexander*, p. 1234)
8. Racial considerations predominate when "[r]ace was the criterion that, in the State's view, could not be compromised" in the drawing of district lines. (*Alexander,* p. 1234)
9. The predominance of racial considerations can be made through some combination of direct and circumstantial evidence. (Citing *Cooper v. Harris*,

581 U.S. 285, 291, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017). (*Alexander,* p. 1252)

8(a) Direct evidence often comes in the form of a relevant state actor's express acknowledgment that race played a role in the drawing of district lines; of leaked e-mails from state officials, etc. (*Alexander,* p. 1252)

8(b) Circumstantial evidence – e.g., a district's shape is "so bizarre on its face that it discloses a racial design" absent any alternative explanation and ruling out the competing explanation that political considerations dominated the legislature's redistricting efforts. (*Alexander,* p. 1252)

10. Without an alternative map, it is difficult for plaintiffs to defeat the presumption that the legislature acted in good faith. (*Alexander*, p. 1252)

11. The Court has kept the door open for the possibility that a district's shape is so bizarre on its face that it discloses a racial design absent any alternative explanation. (*Alexander*, p. 1234, citing *Miller*, 515 U.S, at 914)

12. If a plaintiff can demonstrate that race was the motivating factor for the reapportionment of district lines, then the burden shifts to the State to prove that the map can overcome strict scrutiny. (*Alexander*, p. 1236)

13. Strict scrutiny first asks whether the State's decision to sort voters on the basis of race furthers a compelling governmental interest. *Cooper*, 581 U.S. at 292, 137 S.Ct. 1455. (*Alexander*, p. 1236)

14. If the State can show a compelling governmental interest in its redistricting decisions, then the Court must determine whether the State's use of race is "narrowly tailored"—*i.e.*, "necessary"—to achieve that interest. (*Alexander*, p. 1236)

15. A "voter-dilution" claim is "analytically distinct" from a racial-gerrymandering claim and follows a different analysis. (*Alexander*, 1252)

16. A plaintiff in a voter-dilution claim must show that the State enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities.(Citing *Miller v. Johnson*, 515 U.S. 900 at 911, 115 S.Ct. 2475) Plaintiff must show that the State's districting plan "has the purpose and effect of diluting the minority vote. (Citing *Shaw v. Reno*, 509 U.S. 630 at 649, 113 S.Ct. 2816 ("Shaw I")). (*Alexander,* p. 1252)

Plaintiffs' Proposed Procedure

As noted in the Procedural Background section of this Brief, this case was dismissed on a Motion to Dismiss the Second Amended Complaint by the State. At that early stage in the case, neither party had conducted any discovery. This Court

should find that the Second Amended Complaint states a claim, and allow the parties to proceed with discovery.

In its Second Amended Complaint, after describing facts regarding the actions of the Arkansas Legislature during the process of adopting the 2021 Reapportionment Act, and the effect that it had on the Plaintiffs, the Plaintiffs alleged, among other things, that:

> 81. The intent behind the division of the Black population in the southern area of Pulaski County under Acts 1114/1116 was to divide, or "crack," the Black voters, so that the impact of Black voting will be spread among three districts, rather than concentrated in one (the Second Congressional District), to discourage the incentive of the Black voters of the area to vote, and to reduce the significance of their votes.
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> …
>
> 170. The Arkansas General Assembly's 2021 Congressional Redistricting Plan had the discriminatory intent and effect of racially gerrymandering or "cracking" communities of Black voters in order to reduce, eliminate and impair the potential and effectiveness of such communities of voters to elect candidates and pass issues that they favor.
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> …
>
> 171. The adoption of such Plan resulted in the intended consistent and permanent impairment and marginalization of Black citizens in their participation in Federal congressional political process, and enhanced the consistent and permanent potential for continued success in electing White candidates to Congress from the Second Congressional District.

> 172. The adoption of the 2021 Plan intentionally deprived and denied the Plaintiffs and other Blacks in Arkansas the equal protection of the laws as guaranteed under the "Equal Protection Clause" of the Fourteenth Amendment.
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> 177. A state government may not with impunity divide politically cohesive, geographically compact minority population between two single-member districts in which the minority vote will be consistently minimized by white bloc voting merely because minority population does not exceed single district's population divided by two. *Armour v. State of Ohio,* 775 F.Supp. 1044 (N.D.Ohio 1991).
> …
> 179. The Arkansas General Assembly's 2021 Congressional Redistricting Plan had the intended and deliberately discriminatory purpose and effect of racially gerrymandering or "cracking" communities of Black voters in order to reduce or eliminate the potential and effectiveness of such communities of voters to elect candidates and pass issues that they favored.

The State will claim that these allegations are legal conclusions, and while the allegations by themselves may be just that, they are supported by numerous paragraphs in the Amended Complaint alleging facts from which those conclusions are drawn.

The Amended Complaint alleges that this redistricting produced the most extreme and bizarre instance of racial gerrymandering in Arkansas history, being the first time that a sizeable, cohesive minority community was split among, not two, but *three* congressional districts. The expressed goal of the Legislature was originally not to split any counties – due to the unhappiness of counties that had

been split in previous redistricting – while meeting population-equality goals, and a number of such plans were filed. However, on the morning the house and senate committees were to choose among all the plans that had been introduced, the chairmen of the committees announced that a new plan had been received overnight, and it was the one to be adopted. The source of the new plan was never identified in committee hearings or in the final debates, in which the racial consequences of the plan were openly discussed, but throughout the discussions, the rationale for that particular plan was never articulated. Analysis of racial and ethnic composition of the four districts produced many maps that would achieve closer population balance while preserving overwhelming Republican party domination in each of the districts. This, coupled with the simultaneous gerrymandering of 22,000 White Cleburne County voters from the First District into the Second District, is a clear indication of intent to racially gerrymander Blacks from the Second Congressional District, and balance their population loss with the infusion of the White Cleburne County voters.

These factual allegations in the Second Amended Complaint support the allegations of deliberate racial discriminatory purpose and intent in the Arkansas Legislature's adoption of its 2021 Reapportionment Act, and are sufficient to provide facial plausibility at this stage of the case for Plaintiffs' claim for violation of the Equal Protection Clause and the Voting Rights Act.

In *Shaw v. Reno*, 509 U.S. 630, 658, the Supreme Court held that the "[A]ppellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." In the present case, the Plaintiffs have gone far beyond merely alleging that the Arkansas legislature deliberately and with intent gerrymandered the three congressional districts to dilute the Plaintiffs' votes, and have alleged facts that raise serious questions about the plan and the motivations of the Legislature.

Further, while the allegations in this case must be, and are, sufficient to provide facial plausibility, they must also be viewed in light of the Supreme Court's acknowledgment in the *Alexander, Cooper*, and other cases regarding racial discrimination in reapportionment and voter-dilution claims that direct evidence of such discrimination is often difficult to obtain and must require intensive discovery efforts. Even so, the allegations of the First Amended Complaint, taken as a whole, are far more than "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" that do not suffice. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 at 555, 127 S.Ct. 1955, 167

L.Ed.2d 929 (2007) The Three-Judge District Court should allow the Plaintiffs to move to the next phase of this litigation and gain the benefit of discovery.

Finally, while the Supreme Court's Order of June 3, 2024 was brief, it reversed the decision of the Panel to dismiss the First Amended Complaint, and ordered the case to be remanded to this Panel with instructions to proceed with the case in light of its decision in the *Alexander* case. Dismissal of the case without enabling the Plaintiffs the opportunity to pursue their claims within the limits of that decision would be contrary to those instructions. If the Supreme Court had felt that the Amended Complaint did not state cognizable claims, it would have been easy enough for the Court to simply affirm the District Court's Order of Dismissal.

Plaintiffs propose that the Panel establish a Scheduling Order setting deadlines for (i) the parties to conduct written and oral discovery; (ii) the submission of motions including but not limited to motions for summary judgment; (iii) dates for hearing on motions for summary judgment; (iv) final hearing dates in the event that motions for summary judgment are not granted.

WHEREFORE, Plaintiffs pray that the Panel establish a Scheduling Order setting deadlines for discovery and further proceedings as proposed above; and for all other legal, equitable and proper relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the above and foregoing document has been served upon counsel of record for the Defendants by the Court's ECF system. Counsel for Plaintiffs is unaware of any attorney or party to this action who require service by other means.

Dated: August 21 2024.

/s/ Richard H. Mays
Richard H. Mays