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

THE CHRISTIAN MINISTERIAL ALLIANCE, *et al.*,

PLAINTIFFS,

v. **Case No. 4:19-CV-00402-JM**

ASA HUTCHINSON, in his official capacity as Governor of the State of Arkansas, *et al.*

DEFENDANTS.

DEFENDANTS' POST-TRIAL BRIEF

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INTRODUCTION

After a five-day trial, Plaintiffs merely proved what the Court already knew: that although black voters voted for most of the current members of Arkansas's Supreme Court and Court of Appeals, "a Black candidate has never been elected to the Arkansas Supreme Court," or "to the Court of Appeals when facing a white opponent." (Pls.' Post-Trial Br., Doc. 186 at 1.) "[T]o correct this injustice" (*id.* at 2), they ask this Court to racially gerrymander Arkansas's highest courts in order to engineer the racial composition Plaintiffs prefer. But neither that remedy nor Plaintiffs' theory of liability is authorized by the Voting Rights Act.

Starting with racial gerrymandering, Eighth Circuit precedent holds a Voting Rights Act plaintiff must prove it is possible to draw remedial single-member majority-minority districts *without* racially gerrymandering—that is, without drawing significant numbers of voters into or out of the districts on the basis of race. Plaintiffs' mapdrawer, however, repeatedly admitted that it's impossible to draw remedial single-member districts without violating that stricture here, and that the basis for his own illustrative remedies was racial gerrymandering. His maps split some of the State's largest population centers on what he admitted were purely racial lines. That alone ends this case.

As for Plaintiffs' view that they are entitled to representation by black judges, circuit precedent again rejects their view. It says the relevant question is whether minority voters are able to vote for winning candidates. And it says that even if a Section 2 plaintiff proves the minority candidates he supports are usually defeated, he still loses if he fails to prove that the candidates he supports of all races, minority and white, are usually defeated. Plaintiffs didn't prove that the candidates they support usually lose; they merely proved that 14 to 18 years ago, one lost, Judge Griffen. And Defendants, in uncontroverted evidence, showed that black voters usually *do* support the candidates that are elected to the Supreme Court and Court of Appeals.

Yet even if the relevant question were whether Plaintiffs can elect black judges, Plaintiffs failed to prove they can't. The only minority-preferred black judicial candidate that Plaintiffs showed white voters opposed was Judge Griffen, two decades ago. That is hardly sufficient evidence of white antipathy to black judicial candidates two decades later. In the same time span, no less than four black judges have been elected to the Court of Appeals from majority-white districts without even drawing a white opponent, seriously undermining the claim that white voters demand to be represented by white judges. And though Plaintiffs try desperately to keep the Court from considering it, local and federal elections show that in the Court of Appeals district Plaintiffs particularly attack as vote-dilutive, District 6, which is centered in Little Rock, black candidates can win. So even on Plaintiffs' misunderstanding of the law, their Court of Appeals claim, at minimum, fails the *Gingles* preconditions.

Finally, if the Court concludes Plaintiffs' Supreme Court claim barely satisfies the *Gingles* preconditions, it would fail at the totality of the circumstances. At that stage, the Court weighs the strength of the State's interest in its existing method of election against the strength of Plaintiffs' case. Plaintiffs' case on the Supreme Court is simply that one minority-preferred candidate, Judge Griffen, once lost two Supreme Court elections. On the other side of the balance, the State's interest is in ensuring that parties before the Supreme Court have a say in electing all of the Justices who decide their case, not just one of seven. Of the 22 States that elect their state supreme courts, 18, recognizing that interest, elect their state supreme courts at-large. And no court has ever ordered a State to district its state supreme court—particularly not on the basis of race. This Court should not be the first. Judgment should be entered for Defendants.

I. The Governor and Attorney General are entitled to judgment, because they are not proper defendants.

Plaintiffs seek injunctive relief against three defendants, the Governor of Arkansas, the Arkansas Attorney General, and the Arkansas Secretary of State. They do so under the exception to sovereign immunity announced in *Ex parte Young*, 209 U.S. 123, 155-57 (1908), which allows citizens of a State to sue officials of that State if they allege an ongoing violation of federal law and seek prospective relief. As Defendants explained in their summary-judgment briefing (*see* Br. in Support of Defs.' MSJ, Doc. 92 ("Defs.' MSJ Br.") at 16-17, Reply in Supp. of Defs' MSJ, Doc. 117 ("Defs.' MSJ Reply") at 2-3, 6), that exception applies only where an official has some connection with the enforcement of the laws a plaintiff challenges. And here, the Governor and Attorney General have no connection to enforcing the laws Plaintiffs challenge—the laws governing how Arkansas's appellate judges and justices are elected. Plaintiffs offered no evidence at trial to prove otherwise. So the Court should enter judgment in favor of the Governor and Attorney General.

In opposing summary judgment on this issue, Plaintiffs principally relied on the role the Governor's and Attorney General's predecessors played in *writing* the laws they challenge, and conversations the Governor has had with state legislators on judicial-selection methods. (*See* Defs.' MSJ Reply at 4-5 (discussing Plaintiffs' theories).) That role in legislation is irrelevant; what *Ex parte Young* requires is a role in enforcement. Otherwise, plaintiffs could simply sue state legislatures and seek injunctions commanding them to modify invalid laws. (*See id.*)

Plaintiffs also suggested, however, that there was at least "a factual dispute about these Defendants' involvement." (Pls.' Resp. in Opp'n to Defs.' MSJ, Doc. 103 ("Pls.' MSJ Resp.") at 8 n.2.) But at trial, Plaintiffs put on no evidence about these Defendants' involvement in enforcing Arkansas's appellate judicial-election laws. Nor does their post-trial brief point to any new

evidence on the subject, or even address it. The Governor and Attorney General have no connection to the enforcement of the laws Plaintiffs challenge, and are entitled to judgment.

II. Plaintiffs failed to satisfy the first *Gingles* precondition.

The first *Gingles* precondition requires Plaintiffs to show that the population of black voters in Arkansas "is sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). In essence, it requires Plaintiffs to "demonstrate a proper and workable remedy exists"—even though the districts Section 2 plaintiffs propose to satisfy *Gingles* need not be the districts a state or court ultimately adopts at a remedial stage. *Cottier v. City of Martin*, 445 F.3d 1113, 1117 (8th Cir. 2006) ("*Cottier I*"), *overruled on other grounds*, *Cottier v. City of Martin*, 604 F.3d 553 (8th Cir. 2010) (en banc) ("*Cottier III*"). Plaintiffs failed to prove a proper remedy exists for their claims because they were unable to create illustrative majority-black districts without—by their mapdrawer's own admission—racially gerrymandering to hit their population targets. And Plaintiffs failed to prove a workable remedy exists for their claims, because they were unable to create illustrative majority-black districts without combining geographically disparate black populations that lack common interests. For either or both of these reasons, Defendants are entitled to judgment.

A. Plaintiffs' illustrative remedial districts are confessed racial gerrymanders.

As Defendants explained in detail in their summary-judgment briefing (*see* Defs.' MSJ Br. at 29-30; Defs.' MSJ Reply at 7-9, 11), in the Eighth Circuit, *Gingles* One districts must "steer clear of the type of racial gerrymandering proscribed in *Miller* [*v. Johnson*.]" *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1391 (8th Cir. 1995) (en banc). The Eighth Circuit

has repeatedly made clear that that rule applies at *Gingles* One just as much as it does at the remedial stage.[1] *Miller v. Johnson*, in turn, held that the Equal Protection Clause forbids states from drawing districts where "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." 515 U.S. 900, 916 (1995).

Plaintiffs respond that compliance with Section 2 can justify what would otherwise be an unconstitutional racial gerrymander. (Pls.' MSJ Resp. at 23.) But even if that were correct as a matter of constitutional law, the Eighth Circuit has made clear that racial gerrymanders as defined in *Miller* do *not* comply with Section 2. Plaintiffs' burden, then, was to prove it is possible to create remedial majority-black districts without race's being the predominant factor motivating the placement of even a significant number of voters in those districts. Their expert admitted that it is impossible to do so, and that his own attempts to satisfy *Gingles* One racially gerrymandered significant numbers of voters.

William Cooper, the witness who drew Plaintiffs' illustrative remedial maps, drew only one illustrative plan for the Court of Appeals and one illustrative plan for the Supreme Court that used current census data. (PTX 076 at 5, 7.) His two illustrative Court of Appeals districts split Pulaski, Jefferson, and Mississippi Counties, with District 8 containing half of Pulaski and half of Jefferson, and District 7 containing half of Jefferson and half of Mississippi. (*Id.*) His one illustrative Supreme Court district split Pulaski County in half, along a line nearly identical to his Court of Appeals plan's split of Pulaski. (*Id.* at 5.) Mr. Cooper admitted in cross-examination

[1] *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006); *Cottier I*, 445 F.3d at 1117-18; *Stabler v. Cnty. of Thurston*, 129 F.3d 1015, 1024-25 (8th Cir. 1997).

that these splits, which determined the placement of a large percentage of the voters in his illustrative districts, were motivated solely by race. And he admitted that absent those splits, creating two majority-black Court of Appeals districts or one majority-black Supreme Court district was not impossible.

1. Plaintiffs' illustrative Court of Appeals districts are confessed racial gerrymanders.

Beginning with Mr. Cooper's illustrative Court of Appeals districts, Mr. Cooper admitted that his illustrative District 8 split Pulaski County where it did because "Central Pulaski [C]ounty and to the south"—which he included in the district—"is significantly African-American," while "the northwest part of the county"—which he excluded from the district—is "significantly white." (Trial Tr., vol. 1, 185:22-186:5.) He admitted that his proposed District 7 split Mississippi County for no other reason than to "put the predominantly black part of that county in a majority black district" (*id.*, 198:15-19), while leaving "the white population of Mississippi County out (*id.*, 200:12-13). And Mr. Cooper had no non-race justification for splitting off the western more densely white-populated half of Mississippi County. (*Id.*, 196-200). He admitted that his proposed Districts 7 and 8 "split Jefferson because there was no way to get two single-member majority black districts in a 12-district plan without doing that." (*Id.*, 202:16-21.) More generally, he repeatedly admitted that "in order to get two majority minority districts in a 12-district single-member plan, it's necessary to split both Jefferson [as he did in Districts 7 and 8] and Pulaski [C]ounty [as he did in District 8]." (*Id.*, 185:10-17; *see also id.* at 202:3-23.) The only way he saw "to avoid that split" was "if you just reverted back to two-member districts." (*Id.*, 202:22-23.) In sum, Mr. Cooper admitted that he split Jefferson, Mississippi, and Pulaski Counties for solely—not just predominantly—racial reasons, and that absent those splits it would be

impossible to increase the existing number of majority-black Court of Appeals districts from one to two.

These splits, whose predominant and indeed sole motive was race, determined the placement of significant numbers of voters within and without Plaintiffs' illustrative remedial Court of Appeals districts. And significant is putting it mildly. Plaintiffs' illustrative District 8 has a population of 239,820. (PTX 076 at 8.) Pulaski County alone, which District 8 splits, had a population of 391,911 as of 2019, while Jefferson County, also split by District 8, had a population in 2019 of 66,824, for a total of 458,735. (PTX 073, Ex. H, at 2.) Plaintiffs' illustrative District 7 has a population of 239,151. (PTX 076 at 8.) Jefferson County again, which District 7 splits, had a 2019 population of 66,824, while Mississippi County had a population of 40,651 (PTX 073, Ex. H, at 2.), for a total of 107,475. Those populations, more than significant relative to the districts that split them, were placed inside or outside the districts for solely racial reasons.

Of course, not all of these counties' populations were included within Plaintiffs' illustrative remedial districts; they were split. But the test for whether a district is a racial gerrymander is whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or *without* a particular district." *Miller*, 515 U.S. at 916 (emphasis added). Here, race was so predominant a consideration that in District 8's case, it motivated Mr. Cooper's inclusion or exclusion of almost two times the number of voters he placed in District 8—the voters in Pulaski and Jefferson Counties—and in District 7's case, over 40% of the voters placed in District 7—the voters in Jefferson and Mississippi Counties. Plaintiffs' illustrative remedial Court of Appeals districts carve up significant numbers of voters—indeed, a significant share of the population of the entire state—along what the witness who drew them admitted were solely racial lines. They are racial gerrymanders, and fail to satisfy *Gingles* One.

2. Plaintiffs' illustrative remedial Supreme Court district is a confessed racial gerrymander.

Mr. Cooper's sole illustrative Supreme Court plan that used current Census data split Pulaski County (PTX 076 at 5), as did both of his earlier illustrative Supreme Court plans using 2019 Census data (PTX 075 at 30, 32). On the stand, Mr. Cooper testified as to the reason for this choice; he "d[id]n't think you can" draw a majority-black district in a seven-district plan without splitting Pulaski County. (Trial Tr., vol. 1, 216:1; *see id.*, 215:18-216:4.) Further, he admitted that the reason he split Pulaski County in the "place [he] picked" is that "[t]he black population lives mostly in South Pulaski County . . . and some parts of . . . North Little Rock." (*Id.*, 218:1-9.) And he admitted that aside from population equality, he had no other reason but race for splitting Pulaski County along the line he did. (*Id.*, 218:17-219:7.) In fact, his only quarrel with the question was to ask "What's wrong" with splitting a county on solely racial lines. (*Id.*, 219:1.)

Here too, then, Mr. Cooper both admitted that his illustrative remedial district placed significant numbers of voters inside and outside the district *solely* because of race, and that he believed it was impossible to create a remedial single-member district without purposefully placing significant numbers of voters on one side or another of a racial boundary. And here too, to call the numbers of voters who were racially gerrymandered significant badly understates matters. The population of Mr. Cooper's illustrative majority-black Supreme Court district, District 7, is 433,097. (PTX 076 at 6.) The population of Pulaski County, in 2019 Census figures, was 391,911. (PTX 073, Ex. H, at 2.) That is, a number of voters equal to approximately 90% of the illustrative district's population were either placed inside or outside the district for solely racial reasons. Race wasn't merely the predominant motive for the placement of a significant number of voters inside or outside the district; it predominated the design of the entire district. Plaintiffs'

illustrative remedial Supreme Court district is a racial gerrymander and fails to satisfy *Gingles* One.

3. Plaintiffs' likely counterarguments fail.

There is little Plaintiffs can say to rebut Mr. Cooper's unambiguous admissions that his illustrative remedial districts are racial gerrymanders. Aside from fighting circuit precedent forbidding racial gerrymandering as a means of satisfying *Gingles* One, Plaintiffs could make two conceivable arguments. The first is that race was not the sole or predominant motive for Mr. Cooper's county splits because they were also motivated by population equality. That defense of racial gerrymandering, however, has been squarely rejected by the Supreme Court. Population equality, it has said, "is a background rule," "not a factor to be treated like other nonracial factors when a court determines whether race predominated over other, 'traditional' factors in the drawing of district boundaries." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 273 (2015). Moreover, with the exception of Pulaski County in a 12-member Court of Appeals plan, population equality did not necessitate the splitting of any county, and it certainly did not necessitate splitting any county, including Pulaski in a 12-member plan, along the particular and admittedly racial line Mr. Cooper chose.

The second argument Plaintiffs may make is that their proposed districts do not flout traditional districting principles, are reasonably compact, are not (so) oddly shaped, and so forth, and therefore are not racial gerrymanders. Even if that characterization of their proposed districts were correct, it's irrelevant. A district needn't be oddly shaped, non-compact, or flout any traditional districting principle to be a racial gerrymander. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) (holding "a conflict . . . between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order . .

. to establish a claim of racial gerrymandering"). Rather, if a district appears to comply with traditional districting principles, which are "numerous and malleable," *id.*, it's still a racial gerrymander if race is "the overriding reason for choosing one map over others. *Id.* This makes sense, for the point of the anti-racial-gerrymandering principle isn't to "prohibit misshapen districts." *Id.* at 798. The point is to prohibit "racial classifications." *Id.* Odd shapes make a racial gerrymander more obvious, but there's no need to show odd shapes when Plaintiffs' own map-drawer admits his sole purpose for placing massive numbers of voters was racial. *See Cooper v. Harris*, 137 S. Ct. 1455, 1479 (2017) (holding "substantial direct evidence of . . . racial motivations" is enough to prove racial gerrymandering).

B. Plaintiffs' proposed districts are not reasonably compact.

In past briefing, Defendants explained that Plaintiffs' proposed districts were not reasonably compact because the minority populations in them were not. (Defs.' MSJ Br. at 22-29; Defs.' MSJ Reply at 12-17.) Instead, they connected disparate minority populations in Little Rock and the Delta, the Delta and Pine Bluff, and Pulaski County and a series of rural counties well to its south. (*See* Tr. At 36:9-13) (Humphrey) (testifying that "Fordyce, Dallas County, and Grant County" are not considered in the Delta area).) In response, Plaintiffs offered testimony at trial that black communities in these geographically and socioeconomically different parts of the State have "shared . . . cultural and historic experiences" (Pls. Post-Trial Br. at 5), a shared history of migration from rural communities to Little Rock (*id.*), and sometimes travel to attend the same churches (*id.* at 6). They say that proves that their illustrative districts are reasonably compact, despite their geography.

It was Plaintiffs' burden to prove their illustrative districts were reasonably compact, and they failed to meet it. If all that was necessary to prove that geographically disparate minority

populations shared common interests was a set of shared cultural and historic experiences, migration away from one of those disparate populations to others, and some church and "ancestral ties" (*id.*), the requirement of reasonable compactness would have virtually no meaning. The same could be said of "black Arkansans anywhere in the state." (Trial Tr., vol. 1, 209:20-25 (Cooper) (acknowledging that the supposed commonality of attendance at historically black colleges linked not just the black populations he drew together, but any Arkansan black populations); *id.* 211:22-25 (acknowledging that a "shared history" of "Jim Crow" applied throughout the state).) On Plaintiffs' view, the reasonable-compactness requirement could never be violated in Arkansas. That shows their interpretation of the law is wrong and that more is required than a common history and a thin set of social ties. For this reason too, Plaintiffs failed to satisfy *Gingles* One.

III. Under any test, Plaintiffs failed to satisfy the second and third *Gingles* preconditions.

A. Considering all endogenous elections as Eighth Circuit precedent requires, black voters do not vote cohesively and their preferred candidates usually prevail.

At bottom, the dispute between the parties on *Gingles* Two and Three largely comes down to a difference of opinion about the law. The problem for Plaintiffs is that they also have a difference of opinion with the Eighth Circuit. Defendants have maintained throughout this case that the question Section 2 asks is whether or not minority voters have the opportunity to vote for a winning candidate. Plaintiffs have maintained throughout this case that the question Section 2 asks is whether minority voters can elect their "true preferences" (Pls.' Post-Trial Br. at 13), who they presume are minority candidates, refusing to even entertain the possibility that minority voters could have a "true preference" between two candidates who are white. In short, Plaintiffs

maintain *Gingles* Two and Three ask whether they have the opportunity to elect the *black* candidates of their cohesive choice—and that Section 2 guarantees that opportunity.

1. Section 2's text and Eighth Circuit precedent bar Plaintiffs' approach.

As Defendants have explained often before, Plaintiffs' reading of the law is simply contrary to the plain language of Section 2 and flatly rejected by a long line of Eighth Circuit decisions. In brief, Section 2 plainly states that minority voters *do* have the right to equal "opportunity . . . to elect their representatives of choice," but do *not* have "a right to have members of a protected class elected" in proportion to their numbers. 52 U.S.C. 10301(b). In other words, minority voters have a right to elect the candidates they choose as often as other voters, but don't have a right to elect even a proportionate number of minority candidates. Yet the entire theory of Plaintiffs' case is that Arkansas must organize its judicial elections so as to ensure the election of one black Justice of seven and two black Court of Appeals judges of 12—in other words, proportionate representation by black judges. That theory is rejected by Section 2's text.

As for Eighth Circuit precedent, it holds that the "definition of minority preferred candidate" is simply "the candidates receiving the highest number of African-American votes." *Clay v. Bd. of Ed. of City of St. Louis*, 90 F.3d 1357, 1361-62 (8th Cir. 1996). Because that is so, every election has a minority-preferred candidate whose success or failure matters to *Gingles* Three. Eighth Circuit precedent presumes that minority voters "stat[e] a preference" in all elections, and do not go years without having one. *Harvell*, 71 F.3d at 1387. That means, again, that all elections must be considered. It "reject[s] the presumption . . . that only African-American candidates can be preferred by African-American voters," *Clay*, 90 F.3d at 1361—a presumption

Plaintiffs implicitly make by discarding all elections between white candidates and presuming black voters can only state a "true preference" if a black candidate is on the ballot.[2]

Finally and most critically, the en banc Eighth Circuit has held that even where plaintiffs prove that minority-preferred minority candidates are usually defeated, but counting all elections minority-preferred candidates prevail as often as not, plaintiffs lose at Gingles 3. *See Cottier III*, 604 F.3d at 560 (holding that six losses and zero wins for Indian-preferred Indian candidates were outweighed by 16 wins in 28 elections for Indian-preferred white candidates). The only distinction Plaintiffs have ever offered of *Cottier* through three rounds of briefing is that it followed a trial and Defendants sought to prevail at summary judgment. Pls.' MSJ Resp. at 32 n.11. Plaintiffs have had their trial now, and have shown far fewer losses for minority-preferred minority candidates—*three*—than the plaintiffs did in *Cottier*, while Defendants have shown evidence of more wins for minority-preferred candidates than the defendants did in *Cottier*. Making matters worse for them, the most recent of the three elections they ask the Court to give exclusive weight to is 14 years old, while Defendants rely on high-quality data from the last election. Make no mistake about it: Plaintiffs' proposed weighing of the evidence is reversible error in this Circuit.

2. On the correct approach, Plaintiffs lose resoundingly at *Gingles* Two and Three.

Once Plaintiffs' position that only elections involving black candidates receive evidentiary weight is rejected, Plaintiffs have no case. Defendants' *Gingles* Two and Three expert, Dr. John Alford, agreed that all things being equal, elections involving black candidates are *more*

[2] Even Plaintiffs' own witnesses reject that presumption. Kymara Seals, who is black, testified that in some elections between white candidates there was no candidate she supported, but that she supported Justice Goodson, whom she affectionately called "Judge Courtney," in both of her elections. (Trial Tr., vol. 2, 289:11-12.)

probative than elections that do not.[3] (Trial Tr., vol. 5., 772:19-20.) But not everything, he explained, was equal. There was only "a very small, very old set of racially-contested elections" to analyze (*id.*, 773:5-6), most "involving the same candidate" (*id.*, 786:19). By contrast, there was a very large and recent set of elections contested between white candidates to analyze. (*See* DTX 001 at 15, 19 (analyzing a total of 30 Supreme Court and Court of Appeals elections between 2004 and 2020, only four of which involved black candidates).) To even conclude that the two sets of elections had *equal* weight, Dr. Alford would have needed to believe that an election involving a minority candidate from over a decade ago is seven times as probative as an election that didn't involve a minority candidate from the last few election cycles.

Given the scarcity and age of biracial elections to analyze, and the breadth and recency of non-biracial elections to analyze, Dr. Alford proceeded to analyze both, neither docking the biracial elections for their age or giving them extra weight because of their candidates' race. In analyzing both types of elections, Dr. Alford found there were "lots of elections where it doesn't look like anybody's voting cohesive" (Trial Tr., vol. 5, 801:17-18), and that in some elections it was "difficult to tell if there is even a preferred candidate of black voters" (*id.*, 802:7-8). But even if one were to assume that bare majority support satisfied *Gingles* 2, he concluded that "most often," over all elections, including those relied on by Plaintiffs, minority-preferred candidates were also white voters' preferred candidates, and won. (*Id.*, 802:12.) In sum, "[i]n the broader set of contested elections for [the two courts at issue], more often than not, the preferred

[3] Defendants don't disagree. The text of Section 2 says that the success of minority candidates in particular is "one circumstance which may be considered" above and beyond the success of minority-preferred candidates generally, 52 U.S.C. 10301(b), and the extent to which minority candidates are elected is also an important Senate factor. Accordingly, an election that involves minority candidates will generally receive somewhat more weight, since it goes to that Senate factor as well as *Gingles* Two and Three, than an election that doesn't. But it doesn't follow that elections lacking minority candidates have no probative value, or that four elections involving minority candidates from 2004-08 can outweigh 26 elections without minority candidates from 2004-20.

candidate of black voters is also the preferred candidate of white voters." (*Id.*, 771:20-23.) Voting in Arkansas appellate judicial elections is not racially polarized. The only evidence that suggests it ever has been is a set of three elections involving the same candidate 14 to 18 years ago.

Plaintiffs' only evidentiary quibble with Dr. Alford's analysis—which covered 10 more years and 26 more judicial elections than Plaintiffs' expert's—is that because of the limitations of Arkansas precinct-level voting data, Dr. Alford could not say with 95% confidence that a number of the candidates he determined were supported by black voters were necessarily supported by those voters. (*See* Pls.' Post-Trial Br. at 12; Trial Tr., vol. 5, 852:25 (suggesting "we can cross that [election] out" as relevant because Dr. Alford could not say with 95% certainty that the winner was the black-preferred candidate).)

This quibble fails for a multitude of reasons. Most fundamental, it isn't Defendants' burden to disprove racially polarized voting beyond a reasonable doubt, as Plaintiffs' demands for 95% statistical certainty suggest. Rather, it's Plaintiffs' burden to prove racially polarized voting by a preponderance. Dr. Alford's estimates, even those lacking 95% confidence, *dis*prove racially polarized voting by a preponderance. In every instance, he testified, his "point estimate" of the level of black support for a given candidate is "the most likely to be the true" level of black support (*id.*, 841:7-8), while it's "far less" likely that the numbers at the ends of the confidence intervals he reported are the correct number (*id.*, 872:23-24). That reality of basic statistics, which Dr. Alford is far from the first to observe, is why courts universally decline to disregard ecological-inference estimates with wide confidence intervals in Section 2 cases. (*See* Defs.' MSJ Reply at 30-31 (collecting cases, including one instance where Plaintiffs' own expert failed to even report confidence intervals).)

Moreover, Dr. Alford explained that his estimates tend to validate one another. That is, in the case of any one election with a wide confidence interval, one could reasonably doubt the reliability of his point estimate. But when, as was the case here, his point estimates were "fairly clearly located" in the same range and showed a consistent trend of black and white voters preferring the same candidates, the chance that his analysis misjudged the entire trend is far lower. (Trial Tr., vol. 5, 873:5-9.) Finally, Dr. Alford testified that even if he had only considered the elections where he could say with 95% confidence who the black-preferred candidate was (which included five of the most recent elections he analyzed, in 2018 and 2020, and just two of the four elections Plaintiffs analyzed), he would have reached the same conclusions. (*Id.*, 873:18-23.) Taking all endogenous elections into account, Plaintiffs failed to satisfy *Gingles* Two and Three.

B. Even if only biracial elections count, Plaintiffs still failed to satisfy *Gingles* Two and Three.

1. Plaintiffs lose under the biracial elections addressed at trial.

If Plaintiffs are right about the law, they need only prove that when given a choice, black voters will cohesively prefer black candidates in appellate judicial elections, and that white voters will usually vote as a bloc to defeat that preference in non-partisan, judicial elections. Even if that were all Plaintiffs needed to prove, Plaintiffs' evidence from biracial elections fell far short of that.

Beginning with *Gingles* Two, the biracial judicial elections in evidence "involve[ed] only two candidates"—Wendell Griffen and Evelyn Moorehead. (Trial Tr., vol. 5, 809:14.) Black voters tended to cohesively support Judge Griffen. They did not cohesively support—or even support—Moorehead, as both experts testified. Thus, all that Plaintiffs established is that black voters cohesively preferred Judge Griffen over a decade ago, not that they usually cohesively

support black judicial candidates cohesively when given the option to vote for one. Plaintiffs make much of the fact that the black-preferred candidate was defeated in three out the four biracial judicial elections. (Pls.' Post-Trial Br. at 12.) But that doesn't show that black voters usually cohesively prefer black judicial candidates; it just reflects that Judge Griffen, whom black voters supported, was the black candidate in three out of those four elections.

As for *Gingles* Three, the small number and age of biracial elections makes it impossible for Plaintiffs to satisfy that precondition too, even on an only-biracial-elections-count theory of the law. Plaintiffs showed that white voters declined to support just two judicial candidates. One, Moorehead, was not supported by black voters either. The other, in elections from 14 to 18 years ago, was Judge Griffen. Even if Judge Griffen were a candidate like any other, there simply isn't "enough information there to reach the conclusion" that Plaintiffs reach from those elections—that close to two decades later, white voters will reject black judicial candidates in non-partisan elections. (Trial. Tr., vol. 5, 809:18-19 (Alford testimony).)

And Judge Griffen was not a typical candidate. Atypically for a candidate for judicial office, especially in Arkansas, he publicly identified himself as pro-choice (Trial Tr., vol. 2, 287:24-288:1), which Plaintiffs' witness Kymara Seals, a seasoned political consultant, agreed could "influence the way voters view[ed]" him (*id.*, 288:8). Further, while he was running for the Supreme Court and Court of Appeals, there were pending judicial ethics investigations that "were in the media" and that Seals recalled reading about over a decade later. (*Id.*, 288:16.) She agreed it "is true" that those investigations, whether "validated or not," could "affect the way voters viewed" Judge Griffen. (*Id.*, 288:17-20.) And these are far from the most controversial aspects of Judge Griffen's candidacies. Shortly before his first run for the Supreme Court, he "called upon the [state] legislators to engage in economic retaliation" against the University of

Arkansas for firing Nolan Richardson. *Griffen v. Ark. Jud. Discipline & Disability Comm'n*, 130 S.W.3d 524, 526 (Ark. 2003). Before his next election, in a widely publicized speech, he criticized the sitting President, Vice President, and Justice Thomas, and referred to prominent evangelical leaders as "pimps." (Defs.' MSJ Br. at 55 (citing article in Arkansas Democrat-Gazette).) Whether or not the Court concludes that special circumstances marred Judge Griffen's defeats, his over decade-old losses are an extremely tenuous basis on which to conclude that white voters will usually reject black judicial candidates.

Plaintiffs try to fill this gap in their evidence of racially polarized voting in two ways. One is reliance on biracial exogenous elections for partisan offices. These show, they say, that in Arkansas, when black voters prefer a black candidate, he invariably loses to white bloc voting. The problem with that argument is that by ignoring contests between white candidates, it fails to show if black candidates' race has anything to do with those results. When one also considers partisan contests between white candidates, one discovers that in any given year, white voters give the same level of support to Democrats and Republicans "whether the [D]emocrat is black or white, and . . . whether the [R]epublican is black or white." (Trial Tr., vol. 5, 804:21-23 (Alford).) Even Plaintiffs' expert agreed that whether a candidate was black or white, white voting between candidates of the same party was "very similar." (Trial Tr., vol. 3, 535:22, 537:18.) So partisan elections don't reveal any preference by white voters for white candidates or black voters for black candidates.

Plaintiffs' response throughout this case has been that a partisan pattern of racial polarization still may be caused by race. But Defendants' and Dr. Alford's point isn't that voters' race doesn't influence racially polarized voting in partisan elections. It's that whatever the cause, the diverging partisan preferences in those elections "do not tell you anything of any use at all"

about whether black voters are likely to support non-partisan black candidates or white voters are likely to oppose them. (*Id.*, 806:22-23 (Alford).) More simply, the fact that voters of different races systematically prefer candidates of different parties, who sometimes happen to be of different races, doesn't mean that voters of different races will prefer non-partisan candidates of different races. To the extent the exogenous elections show anything about how voters are likely to react to candidate race in isolation, they suggest voters don't care very much about it.

Plaintiffs also attempt to fill the hole in their case by relying on elected black judges' testimony that they didn't believe they could win in majority-white districts. (Pls.' Post-Trial Br. 11-12.) Those assessments may have been sound when they were made, in 2006 (Trial. Tr., vol. 3, 421:9, 422:5-6) and 2008 (Trial Tr., vol. 4, 671:8-9, 672:4-13). But they are not evidence that black candidates cannot win in majority-white districts today. And they are belied by the reality that the two witnesses who offered them, Judge Waymond Brown and Judge Eugene Hunt, ran against each other in a majority-white district without even drawing a white opponent. (Trial Tr., vol. 3, 425:9-426:8.) If white voters were as reluctant to vote for black judicial candidates as Judges Brown and Hunt believed they were, an election in a "40 to 45 percent black" district (*id.*, 425:14) featuring two black candidates would have been an ideal opportunity for a third white candidate to sail to victory. But that did not happen. Nor has a white candidate ever attempted to unseat Judge Brown in what has become a narrowly majority-black district. Judges Brown's and Hunt's over-decade-old assessments of the difficulty of winning in majority-white districts don't prove that voting in biracial judicial elections would likely be racially polarized today.

2. Plaintiffs' Court of Appeals claim also fails, on a biracial-election-only standard, given additional elections within the challenged districts.

At trial, the Court asked the parties to address whether "the scope of [its] analysis" is "different geographically" at *Gingles* Two and Three for Plaintiffs' Court of Appeals claim than

it is for their Supreme Court claim. The answer, as Plaintiffs concede in theory if not in practice, is yes. (Pls.' Post-Trial Br. at 13-14.) When addressing Plaintiffs' Supreme Court claim, the question is whether voting is racially polarized in what are currently statewide Supreme Court elections; the presence or absence of racially polarized voting in any sub-geography of the State is immaterial (at least until the remedial stage). (*See id.* at 13.)

On the other hand, as Plaintiffs write, when addressing their Court of Appeals claim, "the relevant frame of reference" is the "geographic area in which vote dilution is alleged to have occurred"—there, particular Court of Appeals districts. (*Id.* at 14.) And though the Court is not prohibited from considering elections that "reflect a broader electorate than that of the position in question" (*id.*), the analysis is ultimately district-specific. Indeed, the Supreme Court recently summarily reversed the Wisconsin Supreme Court for ordering an additional majority-black district in Milwaukee after finding racially polarized voting "in the Milwaukee area," but making "no effort to parse that data at the district level." *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1250 (2022). It explained that answering "whether . . . not add[ing] a seventh majority-black district would deny black voters equal electoral opportunity . . . requires an intensely local appraisal of the challenged district." *Id.* at 1250-51 (quotation marks omitted); *see also Cooper*, 137 S. Ct. at 1471 n.5 (explaining that "the relevant local question" in deciding whether Section 2 requires the creation of a majority-black district is ***not*** whether voting is racially polarized statewide, but whether, in the district a remedial district would replace, white bloc voting would prevent black voters from electing the candidates of their choice).

Though the Court's suggestion that the relevant scope of analysis differs between Plaintiffs' claims is correct, there is one narrow but important distinction Defendants would draw.

The Court asked whether it should analyze racially polarized voting within the illustrative districts Plaintiffs seek, illustrative "District 7 and District 8" of their illustrative Court of Appeals plan. (Trial Tr., vol. 3, 608:23-24.) The correct approach is to analyze racially polarized voting in the districts Plaintiffs *attack* and seek to replace with those districts. Plaintiffs' illustrative District 7 essentially maintains, with expansions, the existing majority-black Court of Appeals District 7. The gravamen of their claim is their request to draw a *second* majority-black district, essentially by cutting the existing two-member District 6 (which includes all of Pulaski County plus Perry and Saline Counties) in half through Pulaski County and turning it into their proposed single-member District 8. The question the Court must answer is whether black voters lack an opportunity to elect their preferred candidates in District 6 as it stands. If not, Section 2 does not require breaking District 6 up. *See Wis. Legislature*, 142 S. Ct. at 1250 (requiring "an intensely local appraisal of the challenged district"); *Cooper*, 137 S. Ct. at 1471 n.5 (asking whether, in a "version of District 1 created without a focus on race," white bloc voting would "cancel" black voters' ability to elect their candidates of choice).

Until the election of last month, which happened post-trial, there had not been a contested election in District 6 since 2008—the election involving Judge Griffen. That one election is hardly a sufficient basis on which to predict a consistent pattern of white bloc voting in District 6, even assuming elections involving black candidates are paramount. So the Court was quite rightly interested in exogenous elections in Pulaski County and the surrounding area. (*See* Trial Tr., vol. 2, 293-97 (questioning Kymara Seals about them).)

Plaintiffs, knowing what those elections show, attempt to head the Court's curiosity off, insisting that what happens in "small political subdivisions" of a district "says nothing" about ability to elect in the district as a whole. (Pls.' Post-Trial Br. at 14-15.) Instead, illogically,

Plaintiffs would have the Court forecast elections in Pulaski County and two smaller counties on its border by reviewing statewide elections that involve a statewide electorate with vastly different demographics and political leanings. (*See id.* at 14.) But Pulaski County is hardly a small subdivision of District 6; it comprises the bulk of District 6. What happens in Pulaski County is far more predictive of what happens in Pulaski, Perry and Saline than what happens in the state as a whole. More damaging to Plaintiffs' position still, they overlook the possibility of considering just the results of statewide or congressional elections in the three relevant counties, which completely answers their concerns about considering results in Pulaski County alone.

Considering, then, biracial elections within the geography of District 6, it's apparent that black candidates can win in that district. Begin with the 2020 election in the Second Congressional District between State Senator Joyce Elliott, a black Democrat who testified at trial, and Representative French Hill, a white Republican. The Second District at the time included all of Pulaski, Perry and Saline Counties. Senator Elliott received 118,661 votes in those counties to Representative Hill's 112,038, or 51.4% of the vote there. She carried Pulaski County 101,339 to 68,154, a 33,000-vote margin;[4] lost Saline County 16,256 votes to 40,612, a 24,000-vote margin;[5] and lost Perry County 1,066 votes to 3,542, about a 2,500-vote margin.[6]

Notably, given Plaintiffs' reliance on elections from the decade before last, black candidates' ability to carry this set of counties has improved over time. In 2012, Barack Obama, an incumbent president, could not do as well as Senator Elliott did against an incumbent congressman eight years later. He received 49.2% of the two-party vote in those three counties, or 101,304 votes to Mitt Romney's 104,528. He carried Pulaski County by 87,248 to 68,984, an

[4] https://results.enr.clarityelections.com/AR/Pulaski/106185/web.264614/#/summary?v=271869%2F

[5] https://results.enr.clarityelections.com/AR/Saline/106187/web.264614/#/summary?v=271536%2F

[6] https://results.enr.clarityelections.com/AR/Perry/106178/web.264614/#/summary?v=271442%2F

18,000-vote margin, just a little over half Senator Elliott's 2020 margin;[7] lost Saline County by 12,869 votes to 32,963, a 20,000-vote margin;[8] and lost Perry County by 1,187 to 2,581, a 1,400-vote margin.[9] Perhaps most tellingly regarding black candidates' improving political fortunes in the area in the past decade, Senator Elliott herself ran in the same congressional district in 2010 and performed notably worse, against a non-incumbent, Tim Griffin. In that election, she received only 43.98% of the two-party vote in Pulaski, Perry and Saline Counties, or 63,016 votes to Griffen's 80,257. She carried Pulaski County 53,761 votes to 53,250,[10] just a 500-vote margin compared to her 33,000-vote margin a decade later; lost Saline County 8,383 votes to 25,011, a 17,000-vote margin;[11] and lost Perry County 872 votes to 1,996, a 1,000-vote margin.[12]

Recent elections in Pulaski County underscore that today, a robust white crossover vote for black candidates could carry a black candidate to victory in District 6 as a whole. In 2018, for example, in the race for Pulaski County Circuit Clerk, Terri Hollingsworth, a black Democrat, defeated Steve Walden, a white Republican, 81,176 votes to 51,134, a 30,000-vote margin strikingly similar to Senator Elliott's 33,000-vote margin in Pulaski County two years later.[13] In 2020, Antwan Phillips, a black candidate, won a seven-candidate at-large race for Little Rock city director, receiving over 13,600 votes more than his closest competitor, David Alan Bubas, a

[7] https://results.enr.clarityelections.com/AR/Pulaski/42904/112897/en/summary.html

[8] https://results.enr.clarityelections.com/AR/Saline/42906/112983/en/summary.html

[9] https://results.enr.clarityelections.com/AR/Perry/42897/113082/en/summary.html

[10] https://www.ark.org/arelections/index.php?ac:show:contest_countywide=1&elecid=231&countyid=60&contestid=57

[11] https://www.ark.org/arelections/index.php?ac:show:contest_countywide=1&elecid=231&countyid=62&contestid=57

[12] https://www.ark.org/arelections/index.php?ac:show:contest_countywide=1&elecid=231&countyid=53&contestid=57

[13] https://results.enr.clarityelections.com/AR/Pulaski/92235/Web02.222263/#/

white candidate.[14] And another black candidate, Leron McAdoo, finished third, just 719 votes behind Bubas and over 8,000 votes ahead of the fourth-place finisher.[15] Together, Phillips and McAdoo received just shy of 30,000 votes more than Bubas, again illustrating Pulaski County's robust support for black candidates. And Kymara Seals testified to other recent wins for black candidates in Pulaski County, including Little Rock mayor and sheriff. (Trial Tr., vol. 2, 297.)

In sum, the margins black candidates have recently received over white candidates in Pulaski County are sufficient to offset support for their opponents in Perry and Saline Counties—as Senator Elliott's outpolling Representative Hill in those three counties demonstrates most clearly. And even these elections may understate the potential level of support for a black candidate in District 6. For Senator Elliott, President Obama, Circuit Clerk Hollingsworth, and others, had to contend with the effects of their Democratic party label—a distinct disadvantage in Perry and Saline Counties and even parts of Pulaski County. Absent that drawback, a black candidate running today in District 6 might well outperform the black candidates who recently ran in that area under the Democratic party standard.

Plaintiffs finally argue it is too late for the Court to consider these elections, suggesting they were "not timely disclosed." (Pls.' Post-Trial Br. at 15.) But the Secretary of State disclosed *all* election returns from 1998 onwards. Besides, they are judicially noticeable materials the Court can take notice of at any time, and Defendants ask that the Court do so. *See* Fed. R. Evid. 201(d). At best, Plaintiffs can only argue that Defendants failed to appreciate the relevance of elections within District 6 until the Court correctly pointed it out. That isn't a reason to ignore

[14] https://results.enr.clarityelections.com/AR/Pulaski/106185/web.264614/#/summary?v=271869%2F

[15] *Id.*

the most relevant exogenous elections to Plaintiffs' Court of Appeals claim. If anything, Plaintiffs should welcome the Court's consideration of them, as they cannot prevail unless the Court finds they established racially polarized voting through "an intensely local appraisal of the challenged district." *Wis. Legislature*, 142 S. Ct. at 1251.

Finally, Plaintiffs' suggestion that the Court cannot evaluate these elections "without the aid of expert testimony" (Pls.' Post-Trial Br. at 15) puts too little faith in the Court. No regression analysis is needed to see that Senator Elliott carried the counties that make up District 6, or that white bloc voting was insufficient to beat her in those counties. The same is true of the other elections discussed above. Ultimately, the *Gingles* Three question is whether white bloc voting usually defeats minority-preferred candidates, or in Plaintiffs' view minority candidates, in a district or at-large scheme plaintiffs challenge. It isn't precisely how big or small the bloc or crossover vote is. Even if only biracial elections matter, Plaintiffs lose at *Gingles* Three on their Court of Appeals claim given black electoral success in the one district Plaintiffs truly attack.

IV. Were the Court to reach the totality of the circumstances, Defendants would still be entitled to judgment.

Even if Section 2 plaintiffs satisfy each of the *Gingles* preconditions, they still do not automatically win. Rather, "plaintiffs must still show that the 'totality of the circumstances' demonstrates a section 2 violation." *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 937-38 (8th Cir. 2018). In the interest of concision, Defendants here will only address the State's interest in linkage and the Senate factors the Eighth Circuit has held "predominate the totality-of-the-circumstances analysis": Factor 2, the extent to which voting in the jurisdiction is racially polarized, and Factor 7, the extent to which members of the minority group have been elected to office in the jurisdiction. *Id.* at 938.

As discussed at length above, voting in Arkansas's appellate judicial elections isn't racially polarized. The only occasions on which it ever was, as far as either party's expert could discern, were three elections 14 to 18 years ago involving Judge Griffen. Since then, black and white preferences in judicial elections have converged. Absent Judge Griffen's divisive presence on the ballot, there is simply no evidence that black and white voters prefer different judicial candidates; that white voters are reluctant to vote for black judicial candidates; or even that black voters prefer black judicial candidates. Plaintiffs tout the fact that a black candidate has never beaten a white candidate for the Supreme Court or Court of Appeals. (Pls.' Post-Trial Br. at 23.) Yet with the exception of Judge Griffen, black voters have never supported a black candidate over a white candidate for the Supreme Court or Court of Appeals. When given the option to do so in 2010 with Evelyn Moorehead, they declined. And the phenomenon of racially polarized voting in partisan elections, though clear, just shows that non-partisan judicial elections, where no such pattern is clear, are very different. In partisan elections, black and white voters prefer candidates of different parties irrespective of candidate race; in non-partisan judicial elections, there are no party labels to divide voters.

Turning to the record of successful election of black candidates, Plaintiffs rewrite Senate Factor 7. The question is simply "the extent to which members of the minority group have been elected," *Gingles*, 478 U.S. at 37, not whether they have "won a contested election against a white candidate" (Pls.' Post-Trial Br. at 23). A black candidate who defeats another black candidate or wins unopposed has still "been elected." And even if the Court could rewrite Senate Factor 7, Plaintiffs don't explain why unopposed wins for black candidates in majority-white districts, or elections where only black candidates run in majority-white districts, should count for less than defeats of white candidates. If black candidates can win, they can win—period. And

when white candidates don't even bother to run against black candidates in majority-white districts, in some respects that is even more telling of black voters' political power and the lack of white antipathy to black candidates than when white candidates do run against black candidates and lose.

Applying Senate Factor 7 as it is written, all three of the black appointees to the Court of Appeals were re-elected unopposed in majority-white districts; of those appointees, only Judge Griffen, in his second bid for re-election, was defeated. (Defs.' MSJ Br. at 64.) Outside of black appointees, Judge Brown won a majority-white Court of Appeals district against a black opponent, and was then reelected unopposed after his district became narrowly majority-white. Black candidates have not had the same success in Supreme Court elections, but there have only been two attempts: Evelyn Moorehead's candidacy, which wasn't supported by black voters, and Judge Griffen's. Senate Factor 7 doesn't cut in Plaintiffs' favor.

Finally, Plaintiffs cannot overcome Arkansas's interest in linking its highest court's statewide jurisdiction to a statewide electorate. Even if Plaintiffs would otherwise prevail on their Supreme Court claim, the Court must weigh the strength of their case against the State's linkage interest. *See, e.g.*, *Lopez v. Abbott*, 339 F. Supp. 3d 589, 619 (S.D Tex. 2018) (holding that though plaintiffs satisfied *Gingles*, they "did not overcome the State's interest in electing Supreme Court of Texas justices" statewide). No court has *ever* ordered a state to district its state supreme court, or any court elected at-large, given the linkage interest at stake, and this would be an exceptionally odd case to be the first. Even if Plaintiffs could overcome their mapdrawer's admissions that he racially gerrymandered, their reliance on just two Supreme Court elections from two decades ago involving the same controversial candidate, and the mountain of more recent elections suggesting Supreme Court voting is not racially polarized, Plaintiffs' showing of

vote dilution would be one of the weakest to satisfy *Gingles* ever assembled. If a state's interest in linkage could ever be overcome, it would be in a case where there was far stronger evidence that absent a districting remedy, minority voters could not elect their preferred candidates. Here, even if the Court were to ignore the reality that almost every Justice currently on the Supreme Court was supported by black voters and only consider the ability to elect black Justices, it is unclear at best that black voters prefer black judicial candidates over white candidates, and unclear at best that white voters oppose them.

Plaintiffs' only answer to Arkansas's linkage interest is that, in their view, it isn't as strong at the Supreme Court level as at the trial-court level; sub-districting trial courts would allow a judge to sit in judgment of parties who had no say in his election, but in a districted Supreme Court, any given party would have no say in electing only six of the seven justices deciding his case. (Trial Tr., vol. 3, 606:17-607:6 (McCrary) (advancing this argument).) That is a distinction of sorts, but it isn't much of one. It goes without saying that a State has a weighty interest in making *all* of its most powerful jurists accountable to each of the parties before them, rather than making just one-seventh of those judges accountable to any given party before them. If States didn't have that interest, whatever Plaintiffs might think of it, state supreme courts elected at-large wouldn't outnumber state supreme courts elected from districts 18 to 4. (Defs.' MSJ Br. at 3.)

The State's interest in making all Supreme Court Justices accountable to each party, not just one of seven Justices accountable to each party, is quite logical given that it takes just four Justices, not all seven, to decide a case. *See Lopez*, 339 F. Supp. 3d at 619 (noting that the fact appellate courts decide cases in groups doesn't prevent a majority from "running roughshod over any given minority of judges"). That makes it abundantly possible under a districting scheme for

a group of four, five or six Justices to make literally life-or-death decisions about parties who had no say in any of their elections. The ramifications of Plaintiffs' proposal are particularly troubling given that they would district the State on racial lines, drawing much of its black population into one district, while leaving the others with little to none. (*See* PTX 076 at 6 (proposing Supreme Court districts with voting-age black population of 1.72%, 4.71%, and 5.1%).) If race and the racial composition of a judge's electorate matters as much to judging as Plaintiffs think, how fair would such a court be—or at a minimum, be perceived to be—to black litigants? Under the current system, black voters make up 15% of each justice's electorate, and candidates for the Supreme Court would be foolish to ignore them. The State's interest in preserving that tie between all voters, black and white alike, and the highest judicial officers of the State is by itself sufficient to defeat Plaintiffs' Supreme Court claim.

CONCLUSION

For these reasons, the Court should enter a judgment dismissing the Governor and the Attorney General from this lawsuit as improper defendants, and enter a judgment for the Secretary of State on the merits of Plaintiffs' claims.

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Respectfully submitted,

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