UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

THE CHRISTIAN MINISTERIAL ALLIANCE, et al., Plaintiffs, v. ASA HUTCHINSON, et al., Defendants.	Civil Case No. 4:19-cv-402-JM

PLAINTIFFS' POST-TRIAL REPLY BRIEF

July 8, 2022

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PRELIMINARY STATEMENT

This is a straightforward Section 2 case that simply requires this Court to apply the established *Gingles* test to an extensive and largely unrebutted factual record, in the manner laid out in Plaintiffs' opening post-trial brief. After declining to introduce any record evidence or advance any legal argument on many issues, Defendants have now conceded: almost all of the *Gingles I* reasonable compactness inquiry; the crucial facts supporting a conclusion of racially polarized voting under *Gingles II* and *III*; and all but a few of the Senate Factors. To obscure the extent of those concessions, much of their brief is devoted to red herrings and assumptions based on facts not in the record before the Court. Among these are their misplaced claims of "racial gerrymandering" and the new election results that they want the Court to consider, despite never raising these elections during the nearly three years they defended this case, nor introducing them during trial. Defendants' arguments also repeatedly do not engage with contrary authority and rely on legal and factual inaccuracies. For all the reasons explained in Plaintiff's opening post-trial brief and below, the Court should find that Defendants have violated Section 2 of the Voting Rights Act and proceed to identifying a remedy for that unlawful vote dilution.

ARGUMENT

Plaintiffs begin by addressing each part of the *Gingles* test. Plaintiffs will then briefly address the proper-defendants issue.

I. Plaintiffs have satisfied *Gingles I*.

On *Gingles I*, it is telling how little Defendants even try to dispute. They do not dispute the ample qualifications or methodology of the sole expert witness to testify to this issue at trial, Plaintiffs' expert demographer Bill Cooper. They do not dispute that Plaintiffs' illustrative districts all satisfy the numerosity requirement. And they do not dispute that Plaintiffs' illustrative districts, on their face, reflect an appropriate balance among Arkansas's own

traditional redistricting principles. They *cannot* dispute any of this and did not introduce any evidence of their own at trial. *See* Pls' Post-Trial Br. 3, ECF No. 186 ("Pls' Opening Br.").

In fact, the universe of disputed issues has been narrowed even further post-trial. In their post-trial brief, Defendants have abandoned their previous arguments that Arkansas's traditional redistricting principles forbid splitting counties. *See, e.g.*, Defs' Post-Trial Br. 9, ECF No. 187 ("Defs' Br.") (not disputing that Plaintiffs' maps comply with traditional redistricting principles). That concession was unavoidable in light of the uncontested record evidence showing that maintaining county lines is a very low priority in Arkansas judicial districting. *See* Pltfs' Post-Trial Br. at 7–9.[1]

Defendants instead rehash two baseless legal arguments that this Court already rejected in denying summary judgment. Principally, Defendants renew their assertion that Plaintiffs' illustrative districts cannot satisfy *Gingles I* because they are all "racial gerrymanders." Defendants also half-heartedly renew their argument that Plaintiffs have not satisfied *Gingles I* because the Black communities encompassed by their illustrative districts lack common interests. Both of these arguments are meritless.

A. Plaintiffs' illustrative maps are not racial gerrymanders.

Defendants mainly argue that Plaintiffs' illustrative districts cannot satisfy *Gingles I* because they are "racial gerrymanders." *See* ECF No. 187 at 4–10. Defendants advanced a version of this argument as a basis for granting summary judgment, and the Court correctly

[1] As Defendants' own redistricting expert, former Assistant Attorney General Tim Humphries, testified: maintaining county lines "was not a priority at all," and splitting counties "wouldn't be a problem" "as long as you split them on precinct lines," which Plaintiffs' illustrative districts do. PTX 467 (Humphries Dep. Tr.) at 194:21–195:2, 289:9-10; *see* Pls' Opening Br. 8,. Further, Plaintiffs' illustrative maps split only a few counties, and do so in ways that mirror Arkansas's legislature's own recent handiwork. *See id.*

rejected that argument. *See* Defs' Br. in Supp. of Mot. Summ. J. 22–27, ECF No. 92; Defs' Reply in Supp. of Mot. Summ. J. 7–12, ECF No. 117; ECF No. 163. For any one of three independent reasons, this argument remains meritless post-trial.

"Racial gerrymandering" concepts do not apply here. First, and most importantly, the "racial gerrymandering" case law that Defendants rely on does not apply to Plaintiffs' burden under *Gingles I*. Only governmental *state action* implicates the Equal Protection Clause, and thus faces scrutiny for potential unlawful racial gerrymandering. *See Bethune Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 798 (2017) ("The constitutional violation in racial gerrymandering cases stems from the racial purpose *of state action*.") (emphasis added). The racial gerrymandering standard that Defendants say should apply here comes from cases where plaintiffs challenged districting plans that were *enacted* into law—that is, created and enforced by state legislatures. *See Miller v. Johnson*, 515 U.S. 900 (1995); *see also Bethune-Hill v. Va. State Bd. of Elecs.*, 137 S.Ct. 788, 797–99 (2017); *Cooper v. Harris*, 137 S.Ct. 1455, 1473–81 (2017); *Ala. Black Legislative Caucus v. Alabama*, 575 U.S. 254, 271–75 (2015). By contrast, under Section 2, the illustrative maps offered to satisfy the first *Gingles* precondition are created and proposed by private parties, and serve a merely *illustrative* purpose in the litigation. There is no state action.

This straightforward distinction between the *Gingles I* inquiry and equal protection "racial gerrymandering" claims is well established. The Supreme Court has emphasized that the *Gingles I* inquiry "embraces different considerations" than equal protection racial gerrymandering case law. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433–34 (2006) ("*LULAC*"). And the *en banc* Eighth Circuit case that Defendants principally rely upon *expressly forecloses* their position that racial gerrymandering doctrine should apply to Plaintiffs'

Section 2 claim. *See Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1391 (8th Cir. 1995) (en banc) ("*Harvell I*") ("*Miller* does not alter our analysis of the *Gingles* factors . . . . *Miller* analyzed the equal protection problems involved in drawing voting districts along race-based lines, but did not purport to alter our inquiry into the vote-dilution claim" under Section 2). Other courts of appeals have reached the same conclusion and explained at greater length why racial gerrymandering concepts are inapposite to the *Gingles* framework. *See Clark v. Calhoun Cnty., Miss.*, 88 F.3d 1393, 1406–07 (5th Cir. 1996) (holding that *Miller* and its progeny do not change the *Gingles I* inquiry); *Davis v. Chiles*, 139 F.3d 1414, 1425 (11th Cir. 1998) (holding that the "*Miller* and *Gingles* . . . lines [of cases] address very different contexts").

Defendants grapple with none of these cases, even though Plaintiffs have highlighted this law in prior briefing. *See, e.g.*, Pls' Mot. Partial Summ. J. Reply 7–9, ECF No. 116. Instead, Defendants selectively quote a handful of cases where the Eighth Circuit has mentioned equal protection "racial gerrymandering" doctrine in Section 2 cases—but only to determine whether plaintiffs' plans were effective and viable *as remedies*.[2] In those very same cases cited by Defendants, the Eighth Circuit has repeatedly reaffirmed that the *Gingles I* precondition analysis and subsequent remedial-stage proceedings are distinct, while explaining that racial gerrymandering concepts apply only at the latter stage of a Section 2 case. *See Harvell I*, 71 F.3d at 1386, 1391 (affirming liability-stage satisfaction of *Gingles I* without any racial

[2] *See Bone Shirt*, 461 F.3d 1011, 1017, 1019 (8th Cir. 2006) (applying equal protection doctrine to only the one of five plans that the district court ultimately adopted in subsequent remedial proceedings); *Harvell v. Blytheville Sch. Dist. No. 5*, 126 F.3d 1038, 1040–1041 (8th Cir. 1997) ("*Harvell II*") (reviewing only the district court's remedial order on remand from the *Harvell I* decision, which had declined to apply racial gerrymandering doctrine at the liability stage); *Stabler v. Cnty. of Thurston*, 129 F.3d 1015, 1020, 1025 (1997) (on appeal from final judgment after remedial proceedings, holding that an irregularly shaped plan offered by plaintiffs both "failed to prove that Native Americans are geographically compact . . . as required under *Gingles*" and, in the alternative, would have been a racial gerrymander if imposed as a remedy).

gerrymandering analysis, then advising the district court to "steer clear of" racial gerrymandering in subsequent remedial proceedings "on remand"); *Cottier v. City of Martin*, 445 F.3d 1113, 1117 (8th Cir. 2006) ("*Cottier I*"), *overruled on other grounds*, 604 F.3d 553 (8th Cir. 2010) ("The ultimate viability and effectiveness of a remedy is considered at the remedial stage of litigation and not during analysis of the *Gingles* preconditions.").

In conflating these two distinct bodies of law, Defendants ignore the purpose of the threshold *Gingles I* inquiry, which is incompatible with racial gerrymandering analysis. A *Gingles I* illustrative map is offered as *evidence* of liability, specifically to show that the existing electoral plan actually causes a dilution of voting power that minority voters could otherwise wield. *See Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986). To do this, plaintiffs must demonstrate—"with objective, numerical precision"—that a reasonably compact "election district could be drawn in which minority voters form a majority." *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009). That is a hypothetical inquiry that "necessarily classifies voters by their race." *Clark*, 88 F.3d at 1406. So it makes no sense "[t]o penalize [plaintiffs] … for attempting to make the very showing that *Gingles*" demands. *Davis*, 139 F.3d at 1425. For this reason, the *Gingles I* inquiry constrains the role of race only by requiring plaintiffs' plans to be reasonably compact and "take into account traditional districting principles." *LULAC*, 548 U.S. at 433 (internal quotation marks omitted). This standard appropriately allows courts to assess how proffered illustrative districts stack up against familiar, objective criteria. Moreover, illustrative maps do not pre-commit the defendant or the court to any particular remedy, so any genuine concerns about racial gerrymandering can be addressed later, at the remedial stage when the parties or independent expert submits their proposals. *See Harvell I*, 71 F.3d at 1391; *Bone Shirt*, 461 F.3d

at 1019 ("[A]t the initial stage of the *Gingles* precondition analysis, the plaintiffs are only required to produce a *potentially* viable and stable solution." (emphasis in original)).

For all these reasons, Defendants' protracted exploration of Mr. Cooper's motivation for drawing particular lines in particular places is ultimately irrelevant to the "straightforward," "objective" *Gingles I* inquiry. *Bartlett*, 556 U.S. at 18. All that matters is that the illustrative districts before the Court are reasonably compact and fully comport with traditional redistricting principles, as the uncontested trial record confirms. *See* Pls' Opening Br. 3–4.[3]

Race did not predominate in the illustrative plans. Second, even if this Court were to apply racial gerrymandering standards to assess *Gingles I* reasonable compactness—which would be error for the reasons just discussed—Plaintiffs' illustrative plans would still pass muster because race is not predominant in their design.

In the equal protection cases that Defendants rely upon, the Supreme Court has held that a legislative redistricting plan triggers strict scrutiny as a potential racial gerrymander if "[r]ace was . . . the predominant, overriding factor" in the overall design of a district. *Miller*, 515 U.S. at 920; *see Bethune-Hill*, 137 S.Ct. at 800 (explaining "racial predominance" standard examines "the legislature's predominant motive for the design of the district as a whole"). Because some degree of race-consciousness is always permissible in the redistricting context, *id.* at 797, the standard is notoriously "demanding," *Cooper*, 137 S.Ct. at 1479 (internal quotation marks

[3] Defendants argue that a legislature's compliance with traditional redistricting principles does not foreclose a private plaintiff from bringing an equal protection claim, citing the Supreme Court's decisions in *Bethune-Hill* and *Cooper*. *See* Defs' Post-Trial Br. at 9–10. That is irrelevant for the reason discussed above: those cases concerned equal protection claims brought against state legislatures, and therefore do not apply to *Gingles I*. *Harvell I*, 71 F.3d at 1391; *Clark*, 88 F.3d at 1406–07; *Davis*, 139 F.3d at 1425. If anything, *Bethune-Hill* and *Cooper* illustrate how fundamentally distinct the racial gerrymandering standard is from the *Gingles I* reasonable compactness standard. *See LULAC*, 548 U.S. at 433.

omitted). It ultimately requires an equal protection plaintiff to "prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Bethune-Hill*, 137 S.Ct. at 797; *see Cooper*, 137 S.Ct. at 1463–64. So only in the rarest cases can the standard be satisfied "without evidence that some district lines deviated from traditional principles." *Bethune-Hill*, 137 S.Ct. at 799.

Plaintiffs' illustrative plans meet this standard. As Mr. Cooper explained, Plaintiffs' illustrative plans reflect careful "balancing" of traditional redistricting principles as Arkansas itself has defined them. Trial Tr. vol. 1 at 143:20-25 (Cooper Direct); *see* Pls' Opening Br. 7–8. Mr. Cooper of course was "cognizant of" racial demographics in drawing the plans. Trial Tr. vol. 1, 143:3 (Cooper Direct). He had to be, because his role under *Gingles* was to determine whether Arkansas's racial demographics permit two reasonably compact majority-Black Court of Appeals districts and one reasonably compact majority-Black Supreme Court district to be drawn. *See* Trial Tr. vol. 1, 96:17–97:8 (Cooper Direct); PTX 076 (Cooper Suppl. Decl.) at ¶ 5; *Clark*, 88 F.3d at 1406; *Davis*, 139 F.3d at 1425. But race did not predominate over other traditional redistricting principles in his methodology. Trial Tr. vol. 1, 143:3-12 (Cooper Direct).[4]

If Mr. Cooper had employed the race-above-all approach that Defendants suggest, the resulting maps would have looked very different. As he explained, a mapdrawer who was willing to subordinate traditional redistricting principles to race would have produced districts with "significantly" larger Black populations, which would have entailed "split[ting] precincts willy-nilly" and splitting many more counties. *Id.* at 143:3–12. Defendants have offered no evidence

[4] *See also, e.g.*, *id.* at 145:18–23 (Cooper Cross) ("I . . . intended to determine whether or not it was possible [to draw the relevant majority-Black districts] while at the same time adhering to traditional redistricting principles."); *id.* at 159:9–13 ("I believe I produced balanced plans.").

that the illustrative plans reflect such an approach, either in the split counties that they cross-examined Mr. Cooper about or anywhere else. That is because race did not predominate in the creation of these maps.

In arguing otherwise, Defendants distort the record. Having decided not to present any expert analysis of *Gingles I*, they rely instead on improvised math to assert that Mr. Cooper "carved up" hundreds of thousands of voters on "solely racial lines." ." *See* Defs' Br. 7. This language evokes the kind of surgical targeting and single-minded focus on race that is often at issue in true cases of racial gerrymandering. *See, e.g.*, *Ala. Legislative Black Caucus*, 575 U.S. at 273–74 (evidence of racial predominance where only 36 out of 15,785 individuals added to a district were white, and legislators abandoned traditional redistricting principles by splitting multiple *precincts* that were "clearly divided on racial lines"). But that is not at all what occurred here. Mr. Cooper simply explained that he permissibly split Pulaski, Jefferson, or Mississippi counties in ways that generally followed demographic trend lines within those counties—and that doing so helped to ensure that the resulting districts fully encompassed a large and compact population of Black voters as prescribed by *Gingles*. *Cf. LULAC*, 548 U.S. at 433 (explaining that *Gingles I* focuses on "the compactness of the minority population, not . . . the compactness of the contested district" (internal quotation marks omitted)).

Elsewhere, Defendants incorrectly assert that "population equality did not necessitate the splitting of any county" other than Pulaski, implying that Mr. Cooper split counties *only* when there was a race-related reason for doing so. *See* Defs' Br. 9. But that ignores Mr. Cooper's testimony that he split Benton County to equalize population between districts, not for any race-related reason. *See* Trial Tr. vol. 1, 106:20–24 (Cooper Direct); *id.* at 168:25–169:6 (Cooper Cross). Defendants also neglect to mention that the splits of Mississippi County and Pulaski

County in Plaintiffs' illustrative plans mirror ways the Arkansas legislature has divided the same counties in its own recent redistricting plans. *See* Pls' Opening Br. 7–8.

Those parallels with recently enacted plans underscore the more fundamental point that there is nothing wrong with Mr. Cooper's splitting a county or two to begin with. *See id*. at 7–9. Defendants have no response on this point, which undermines the entire premise of their argument that redistricting principles were somehow "subordinated" here. *See Cooper*, 137 S.Ct. at 1463–64; *Bethune-Hill*, 137 S.Ct. at 797. Mr. Cooper's testimony is clear that the illustrative district boundaries track the racial demographics of certain counties *only to an extent that* was consistent with traditional redistricting principles, and did not seek to maximize the Black population of any district at all costs. *See* Trial Tr. vol. 1, 143:3-25 (Cooper Direct). That is not a racial gerrymander. *See Bethune-Hill*, 137 S.Ct. at 799 (explaining that "in the absence of a conflict with traditional principles," racial gerrymandering cannot generally be proven without evidence that "neutral considerations [were] cast aside").

Even if race predominated, the illustrative plans would survive strict scrutiny. Finally, even if "racial gerrymandering" doctrine applied here (which it does not), and even if race predominated in Mr. Cooper's methodology (which it did not), Plaintiffs' illustrative maps would *still* not be impermissible racial gerrymanders because they would satisfy strict scrutiny. Even when a district is drawn for predominantly racial reasons, "a State can satisfy strict scrutiny if it proves that its race-based sorting of voters is narrowly tailored to comply with the VRA." *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022). Where a plaintiff's illustrative plan would establish a Section 2 violation, that compelling justification plainly exists, and narrow tailoring is satisfied. *See, e.g.*, *Bethune-Hill*, 137 S. Ct. at 800–01 (upholding a challenged district as narrowly tailored to comply with the VRA); *Ala. Black Legislative Caucus*,

575 U.S. at 278 (narrow tailoring is met by "a strong basis in evidence" to conclude that race-based districting was required by the VRA); *Cooper*, 137 S.Ct. at 1463–64 (same).

For all of these reasons, Defendants' protracted cross-examination and the "racial gerrymander" argument they have constructed upon it are a red herring, meant to distract from Defendants' complete failure to meaningfully contest *Gingles I*. If anything, Mr. Cooper's candid responses during several hours of cross-examination underscore his credibility—and provide additional reason for this Court to adopt Mr. Cooper's unrebutted expert conclusion that Plaintiffs' claims satisfy *Gingles I*.

B. Plaintiffs' illustrative maps unite legitimate communities of interest.

Besides their flawed accusations of racial gerrymandering, Defendants' only remaining argument is that Plaintiffs' illustrative plans are noncompact because they encompass disparate communities of urban and rural Black voters who purportedly lack common interests. *See* Defs' Br. 10–11. For essentially the same reasons previously briefed, this argument remains meritless. *See* Pls' Resp. Opp'n to Defs' Mot. Summ. J. 14–18, ECF No. 103; ECF No. 116 at 3–7.

Plaintiffs put on extensive testimony by multiple fact witnesses showing the common interests and longstanding civic, educational, religious, and familial connections within the Black communities encompassed by Plaintiffs' illustrative districts. *See* Pls' Opening Br. 5–6. That was in addition to Mr. Cooper's unrebutted expert testimony, with extensive supporting statistical evidence, that Black voters in these districts have common socioeconomic characteristics and experience similar racial disparities compared to white Arkansans. *See* PTX 073 (Cooper Decl.) at ¶¶ 70-72 & Ex. G; Trial Tr. vol. 1, 126:9–127:18 (Cooper Direct). Taken together, all of this evidence established that the communities united by Plaintiffs' illustrative districts are genuine communities of interest.

This evidence thoroughly refutes Defendants' prior arguments that the only commonality among these voters was race, and that Mr. Cooper's expert testimony alone was insufficient. *See, e.g.*, ECF No. 117 at 11–12. And Defendants did not rebut or cast doubt on any of it. Instead, they simply assert, without any supporting legal authority, that all of Plaintiffs' evidence and witness testimony does not matter. But it does. Relying on the *LULAC* case, Defendants' argument all along has been that Plaintiffs' illustrative districts are noncompact because they mix rural and urban voters who have little contact with one another and essentially nothing in common. *See* ECF No. 103 at 14–15; ECF No. 116 at 5–6. The trial record clearly refutes that premise.

Defendants now argue, without any supporting authority, that the Court cannot recognize these Black voters as a legitimate community of interest under *Gingles I* because certain commonalities among the relevant voters would *also* apply to Black voters elsewhere in the state. *See* Defs' Br. 10–11. But that argument fails for at least two reasons. First, it ignores testimony that was plainly specific to these parts of the state, such as Retired Judge Marion Humphrey's testimony about widespread migration and familial ties within these specific areas, or Reverend Maxine Allen's testimony that congregations in Little Rock and Pine Bluff draw members from throughout the rural Delta. *See* Pls' Opening Br. 5–6. Second, even as to more widely shared bonds like common history, common socioeconomic challenges, and common experiences of discrimination, the mere fact that Black Arkansans throughout the state might have the same experiences does not make those common interests any less real or worthy of recognition. Defendants suggest that honoring these communal bonds would mean that "the reasonable-compactness requirement could never be violated in Arkansas." Defs' Br. 11. This argument is without merit. If an illustrative district attempted to unite far-flung Black voters in

Blytheville, Bentonville, and Texarkana, it might fail for lack of contiguity, irregular shape, or any number of other reasons. It does not follow that Black Arkansans who share common history, interests, and experiences cannot qualify as a community of interest when combined in a district that is geographically compact.

Defendants' arguments mischaracterize the *Gingles I* standard and are foreclosed by the unrebutted evidence that Plaintiffs' illustrative plans are reasonably compact and comport with traditional redistricting principles.

II. Plaintiffs have satisfied *Gingles II* and *III*.

Plaintiffs have carried their burden to show racially polarized voting in Arkansas as defined by *Gingles II* and *III* for all the reasons explained in Plaintiffs' opening brief. *See* Pls' Opening Br. 9–15. Indeed, the decisive facts here are uncontested: Plaintiffs' expert evidence at trial demonstrated that in the eleven most probative elections over the past two decades in Arkansas, the Black-preferred candidate lost nine times. *See* Pls' Opening Br. 9–10. In other words, "9 out of 11" of the most probative elections "show . . . very large, very significant racially polarized voting." Trial Tr. vol. 3, 463:22–23 (Liu Direct). The Court need look no further in assessing whether Plaintiffs have satisfied the second and third *Gingles* conditions.

Defendants nevertheless resist this conclusion by (A) misstating law and fact to argue that these conditions are not satisfied by Plaintiffs' expert evidence, and (B) improperly introducing new "evidence" they failed to put forward at trial. The Court should reject their arguments.

A. The trial record and governing law confirm racially polarized voting under *Gingles II* and *III*.

These issues have been thoroughly aired, and nothing that Defendants have argued justifies a different conclusion. In closing, several points warrant emphasis.

First, Defendants concede the key point: that the elections Dr. Liu analyzed are the most probative for purposes of evaluating a Section 2 claim. ECF No. 187 at 14 n.3. Defendants cannot dispute this, as the Eighth Circuit has definitively spoken on the issue. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1020-21 (8th Cir. 2006) ("Endogenous and *interracial* elections are the *best indicators* of whether the white majority usually defeats the minority candidate.") (emphases added). And in 9 out of 11 of the elections that "are the best indicators" of racially polarized voting, Defendants do not contest that the white majority defeated the minority-preferred candidate. *Id.*; *see* Trial Tr. vol. 5, 825:7-9 (Alford Cross) (agreeing that "as a cuing matter, biracial endogenous elections" can "provide a higher quality of information"). Rather, they attack the sufficiency of Plaintiffs' endogenous and exogenous elections separately. Neither attack succeeds.

Defendants' attacks on Dr. Liu's analysis of endogenous elections are meritless.

With respect to the endogenous elections, Defendants attempt to manufacture an issue by arguing that Judge Griffen was "controversial" and "not a typical candidate." Defs' Br. 17. But they cite no authority for the proposition that a court should speculate about the reasons why voters may or may not have voted for candidates in individual elections. And they neither produced at trial nor cite in their brief any admissible evidence of even a single voter who purported to vote against Judge Griffen because he was "controversial" or "atypical." *Cf. Harvell I*, 71 F.3d at 1388 (declining to disregard election results that evince racially polarized voting based on defendants' "denigration" of unsuccessful Black candidates "as militant fringe candidates").[5]

[5] Instead, Defendants point to testimony of Kymara Seals who agreed that hypothetically certain facts could influence a voter. Defs' Br. at 17. But Ms. Seals clearly stated that any such facts did

The legally salient fact is that Black voters overwhelmingly preferred Judge Griffen—for whatever reason—and white voters did not. *See id.*; *Goosby v. Town Bd. of Hempstead, N.Y.*, 180 F.3d 476, 493 (2d Cir. 1999) (holding that "inquiry into the *cause* of white bloc voting is not relevant to a consideration of the *Gingles* preconditions" (emphasis in original)). No amount of unfounded speculation can overcome that fact. Rather than speculate about the views of white voters, the Court should credit the testimony of multiple Black voters who stated their preference and support for Judge Griffen. Trial Tr., vol. 1 49: Trial Tr. vol. 1, 49:15-22 (Humphrey Direct); Trial Tr. vol. 2, 265:17-267:10 (Seals Direct); *id.* at 350:24-351:19 (Allen Direct).

Defendants also point to Dr. Liu's decision not to analyze uniracial endogenous elections, and the contrary conclusion that allegedly follows if he were to include them. But it would be error to rely on those unreliable data points to overcome the clear evidence of racial polarization in biracial elections, both as a factual matter and as a matter of law.

As a factual matter, Dr. Liu explained that "using uniracial elections would dilute the results and make misleading conclusions." Trial Tr. vol. 3, 502:23-25 (Liu Cross); *see also id.* at 450:17-24 (Liu Direct). And he explained why that is: using uniracial elections as data points would be like trying to determine travelers' preferred way to get from Point A to Point B while giving them an incomplete set of options. *See id.*, 450:13–452:2 (Liu Direct). Dr. Liu thus credibly and persuasively explained why his expert methodology, which focuses only on biracial

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not change *her* support for Judge Griffen, and that "the white community wasn't voting for [Judge Griffen] anyway." Trial Tr. Vol. 2, 290:6-16, 291:12-13. Ms. Seals testified to "[t]he qualities" she looks for in a typical judicial candidate—including their "values," their "qualifi[cations]," and their "character"—and stated that Judge Griffen possessed each of those qualities, in addition to a "passion for the people" and a "passion for justice." Trial Tr., vol. 2 265:17-267:10 (Seals Direct). The Court should credit this evidence over materials outside of the case record upon which Defendants rely, including their own summary judgment briefing and an untested news article attached thereto that they never introduced at trial. *See* Defs' Br. 18.

elections, is the most reliable way to accurately determine Black voters' preferences and the most statistically sound way to assess racially polarized voting given the data available in this case.

Moreover, as explained previously, Dr. Liu's analysis—unlike Dr. Alford's—is corroborated by extensive testimony from other witnesses concerning the prevalence and real-world impact of racially polarized voting in Arkansas. *See* Pls' Opening Br. 11–12 (citing, *e.g.*, Trial Tr. vol. 2, 268:7 (Seals Direct) (explaining that for the "at large positions, we don't stand a chance")). Dr. Liu's analysis is also corroborated by the relative lack of contested biracial elections for the Supreme Court and Court of Appeals in recent years. *See* Trial Tr. vol. 3, 592:2–4, 14–16 (McCrary Direct) (explaining that racially polarized voting can "affect the way that minority candidates view their chances of winning election. . . . And that would play into the calculations as to whether to run for office or not.").

Apart from pervasive racially polarized voting, Defendants have no viable explanation for the lack of Black candidates running against white candidates in recent years. Defendants' case depends on believing their theory that Black candidates have decided not to run simply "for lack of trying." ECF No. 92 at 64. There is no support for this explanation in the trial record, to say the least.[6] The better explanation, and the one supported by the trial record, is that Black

[6] For similar reasons, the Court should disregard Defendants' unsupported speculation that Judge Brown not facing a white challenger proves that voting is not racially polarized in Arkansas. Defs' Br. 19. "Coalition" or "crossover" districts wherein a cohesive bloc of minority voters forming just shy of a majority can elect a candidate of their choice are a commonplace phenomenon, and—although Section 2 does not require their creation—the existence of such a district is not inconsistent with racially polarized voting. *See* Gowri Ramachandran, *Math for the People: Reining in Gerrymandering While Protecting Minority Rights*, 98 N.C. L. Rev. 273, 284 nn. 57–58 (2020) (explaining the concept of "crossover" and "coalition" districts, wherein "minorities have an opportunity to elect candidates of their preference . . . , despite racially polarized voting").

candidates are being deterred by pervasive racially polarized voting—just as one would expect to see in a case of longstanding vote dilution.

As a legal matter, Defendants' proposed rule that trial courts *must* consider elections involving only white candidates cannot be squared with the case law. Any such rule would contravene the principle that "[v]ote dilution claims are 'peculiarly dependent upon the facts of each case.'" *Cottier v. City of Martin*, 604 F.3d 553, 559 (8th Cir. 2010) ("*Cottier II*") (quoting *Gingles*, 478 U.S. at 79). It would be inconsistent with *Gingles* itself, which relied exclusively on contests featuring Black candidates to determine whether the Black vote was diluted. *Gingles*, 478 U.S. at 52–53, 80–82 (expert's opinion on which the district court relied "collected and evaluated data from 53 General Assembly primary and general elections *involving black candidacies*" (emphasis added)).[7] And it would frustrate the purpose of Section 2 and work injustice in cases like this one, because the right to equal electoral opportunity under the Voting Rights Act is not satisfied where "[c]andidates favored by blacks can win, but only if the candidates are white." *Smith v. Clinton*, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988) (Arnold, J.). As the Fifth Circuit has explained, "plaintiffs may not be denied relief simply because the absence of black candidates has created a sparsity of data on racially polarized voting in purely [endogenous] elections." *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1208, 1209–10, n.9 (5th Cir. 1989). "To hold otherwise would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove." *Id.* For all these reasons, the law is clear: Section 2 plaintiffs are not "required to

[7] *See also Missouri State Conference of the NAACP v. Ferguson-Florissant School Distr.*, 201 F. Supp. 3d 1006, 1041 (E.D. Mo. 2016) (finding a Section 2 violation where "[l]ike the Court did in *Gingles*, [plaintiff's expert] focused on endogenous interracial contested elections"), *aff'd*, 894 F.3d 924 (8th Cir. 2018).

present evidence on w white versus white elections if they do not believe that those elections are probative." *Jenkins v. Red Clay Consol. Sch. Dist.*, 4 F.3d 1103, 1128 (3d Cir. 1993). Defendants do not acknowledge or engage with any of this law.

Instead, Defendants rely on inapposite cases. The authorities they cite for their assertion that uniracial elections "must be considered"— *Clay*, *Harvell I*, and *Cottier II* — do not support any such rule. Defs' Br. 12–13 (citing *Cottier II*, 604 F.3d at 560; *Harvell I*, 71 F.3d at 1387; and *Clay v. Bd. of Ed. of City of St. Louis*, 90 F.3d 1357, 1361–62 (8th Cir. 1996)). None of these cases addresses what elections are more probative than others as a general matter (as *Bone Shirt* does, explaining that biracial elections are more probative, *see supra* at 13). Nor do any of these cases set forth a mandatory directive for district courts to consider any particular elections (much less *all* elections) when evaluating a Section 2 case.[8] To the contrary, they make clear that courts can and should accept well supported expert methodology like Dr. Liu's, and should disregard data when an expert witness has persuasively explained why that data is misleading. *See, e.g.*, *Harvell I*, 71 F.3d at 1386–87 (holding that the district court erroneously rejected the conclusions of a persuasive expert analysis); *Cottier II*, 604 F.3d at 559–60 (affirming the district court's decision to "give no weight" to proffered data that it reasonably determined was "unreliable"). Moreover, in two of those cases the Eighth Circuit cited approvingly to the Third Circuit's decision in *Jenkins*—which, as noted above, held that plaintiffs need not analyze uniracial

[8] In *Clay*, the court merely held that the plaintiffs had not proved racially polarized voting where their expert "did not explicitly identify who the minority's candidates of choice were or what methodology should be used to make such a determination." 90 F.3d at 1361. Similarly, in *Harvell*, the court had no occasion to consider what types of elections must be analyzed to determine whether voting is racially polarized. 71 F.3d at 1386. As noted above, *Cottier II* emphasized that "[v]ote dilution claims are 'peculiarly dependent upon the facts of each case.'" 604 F.3d at 559. And the court's narrow holding that the trial court had not committed "clear error" with respect to the *Gingles* factors underscores that the trial court must evaluate the parties' evidence and proffered expert methodologies on a case-by-case basis. *Id.* at 561.

elections if they do not believe they will be probative. *See Harvell I*, 71 F.3d at 1386 (citing *Jenkins*); *Clay*, 90 F.3d at 1361 (same).

Defendants' attack on Dr. Liu's analysis of exogenous elections is meritless.

With respect to the exogenous biracial elections analyzed by Dr. Liu, Defendants ask this Court to essentially ignore them because partisan preferences of white and Black voters might have played a role in the polarization that Dr. Liu observed. *See* Defs' Br. 18–19. However, Defendants cite no case that supports such an approach, and precedent forecloses it. As Plaintiffs explained at the summary judgment stage, the "Eighth Circuit has made clear that the 'reason' for voter 'cohesion is *irrelevant* in the threshold determination of whether the *Gingles* preconditions are met.'" ECF No. 103 at 39 (citing *Cottier I*, 445 F.3d at 1119 (emphasis added)). "To imply that party affiliation should negate political cohesion would have the effect of denying minority voters an equal opportunity to elect representatives of their choice regardless of the reason." *Id.* (internal citations omitted); *see Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1008 (D.S.D. 2004) ("[P]artisanship has no bearing on the *Gingles* factors.") (collecting cases). Simply put, "inquiry into the *cause* of white bloc voting is not relevant to a consideration of the *Gingles* preconditions." *Goosby*, 180 F.3d at 493 (emphasis in original). And in any event, witness testimony corroborates that race rather than party is the driving factor here. *See* Trial Tr. vol. 1, 78:2–79:2 (Humphrey Direct); Trial Tr. vol. 2, 292:6-13 (Seals Redirect) (when asked if race or party play a bigger role in Arkansas politics, she stated "Race is huge.").[9]

[9] In addition, Defendants' own expert conceded that he did no analysis to demonstrate that party was the cause of voter choices independent of race. Trial Tr., vol. 5 865:20–866:4 (Alford Cross). So even if Defendants are right that the exogenous elections are polarized by party, that party polarization could *itself* be caused in part by racial polarization. But in any event, "partisanship has no bearing on the *Gingles* factors." *Bone Shirt*, 336 F. Supp. 2d at 1008.

B. Defendants' new facts are improper and should be rejected.

With the trial record and the law squarely against them, Defendants make an after-the-buzzer attempt to introduce new facts, including cherry-picked results from "[r]ecent elections in Pulaski County." Defs' Br. 23. This gambit should be rejected for at least two reasons.

First, Defendants failed to introduce at trial the facts they now ask the Court to rely on, or provide notice that they intended to rely on them as evidence against racially polarized voting. Indeed, neither side's expert political scientist deemed this information relevant to an analysis of racially polarized voting, either at any point during expert discovery or at trial. As a result, Plaintiffs were denied the opportunity to present any evidence rebutting the relevance of these elections, including having Dr. Liu analyze their results. As noted previously, that is reason enough to reject these new facts as untimely and prejudicial. *See* Pls' Opening Br. 15 (citing Fed. R. Civ. P. 37(C)(1); *Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1008–09 (8th Cir. 2008)).

Defendants have no meaningful response. A failure to present evidence at trial is an appropriate ground to disregard that evidence. *See, e.g.*, *Hopman v. Union Pac. R.R.*, No. 4:18-cv-74, 2022 WL 963662, at *12 (E.D. Ark. Mar. 30, 2022). Defendants cannot gloss over their prejudicial omission by saying that they "failed to appreciate the relevance of elections within District 6" until sometime in the middle of Plaintiffs' case at trial Defs' Br. 24. Allowing Defendants to rely on an entirely new set of elections, untethered to any expert analysis and submitted well after the close of evidence, would insulate these facts from any sort of meaningful scrutiny by Plaintiffs or by this Court. The Eighth Circuit expressly rejected the same sort of maneuver in *Cottier II*: "[W]e decline through judicial notice to allow one party to augment its evidentiary presentation in a case involving extensive statistics that were the subject of complex analysis by experts for both parties." 604 F.3d at 561 n.4.

Allowing these facts into the record so late in the day would be particularly inappropriate here because the proposed new facts cannot be meaningfully evaluated without expert analysis. These election results are little more than raw data and, unlike the data the experts actually considered, these new election results are anecdotal and selectively cherry-picked by Defendants. Defendants argue that the Pulaski County elections demonstrate the ability of Black candidates to win local elections, but Defendants have *not* presented evidence (expert or otherwise) to show that the winning candidates were actually preferred by Black voters—the analysis *Gingles* requires—or the extent of any claimed white crossover vote.[10] Aside from Defendants' say-so and improvised arithmetic, there is no evidence at all about the voting behaviors of Black and white voters in these elections. Nor have Defendants made any effort to show how the isolated results they have put forward compare to other results over time.

Defendants attempt to minimize the obvious prejudice from introducing undisclosed raw data after the close of trial by asserting that an insistence on expert analysis would "put[] too little faith in the Court." Defs' Br. 25. In other words, Defendants would have this Court believe that despite extensive expert testimony, all of the methodological safeguards undergirding those expert analyses — including how to construct a comprehensive data set of elections, how to statistically assess racially polarized voting within that data set, and what methods are appropriate to do so — could be displaced by defense counsel's untrained intuitions and

[10] Moreover, by merely looking to whether the Black *candidate* won in isolated elections without any further analysis, Defendants are making the same mistake the Eighth Circuit disapproved of in *Harvell* and *Clay*, and which they erroneously accuse Plaintiffs of making. *See Harvell*, 71 F.3d at 1386 ("[A] candidate is [not] the minority-preferred candidate simply because that candidate is a member of the minority."); *Clay*, 90 F.3d at 1361 (minority candidate not the minority-preferred candidate "simply because of that candidate's race").

unsupported assumptions about a handful of new cherry-picked election results. That cannot be right.

Second, and more fundamentally, even if these new facts could properly be considered, they would still be irrelevant to the *Gingles II* and *III* analysis. Defendants concede that their new facts are completely irrelevant to the analysis of Supreme Court elections in Arkansas, which currently take place statewide. *See* Defs' Br. 19 (arguing only that the "Court of Appeals claim" could be affected by these facts). And Defendants fail to offer any persuasive reason why these results should matter any more for the Courts of Appeals.

Defendants argue that the Pulaski County elections show "black candidates can win" in a single district, current District 6. Defs' Br. 22. But this argument ignores that Plaintiffs are challenging the districting of the Court of Appeals more broadly, and the failure to create not one but *two* majority-Black districts. . *See* Pls' Opening Br. 13–14 (clarifying the geographic scope of Plaintiffs' Court of Appeals claim). Put another way, regardless of how probative Defendants' new election results might be as to District 6 specifically, they say little about whether voting is racially polarized throughout the broader area where Plaintiffs have alleged that unlawful vote dilution is occurring.[11] That is why courts have consistently found that elections involving an electorate narrower than that of the position in question are misleading for purposes of analyzing racially polarized voting. *See* Pl. Br. at 14–15. Defendants do not address the cases Plaintiffs cited that establish this proposition, including the Supreme Court's decision in *Abbott v. Perez*,

[11] *Cf. LULAC*, 548 U.S. at 437–38 ("[T]he State's seven-district area is arbitrary. It just as easily could have included six or eight districts. Appellants have alleged statewide vote dilution based on a statewide plan, so the electoral opportunities of Latinos across the State can bear on whether the lack of electoral opportunity for Latinos in District 23 is a consequence of Plan 1374C's redrawing of lines . . . .").

138 S. Ct. 2305 (2018), which explained that it is the "wrong approach" to consider "only one, small part of" an illustrative district. *Id.* at 2331–32.

Defendants rely on the recent *Wisconsin Legislature* decision, but that case provides no support for their approach. *See* Defs' Br. 20–21, 25. To be sure, that case referred to "local" matters and "pars[ing]" data "at the district level," but it was *not* a Section 2 case. *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1250 (2022). Thus, the Court was not asked to decide what elections a trial court should weigh when assessing whether the *Gingles* factors are met as a precondition for proving a Section 2 claim. And the Court certainly did not address whether it is proper for the factfinder to rely on evidence (i) that both sides' experts did not rely on, (ii) that was not introduced at *all* at trial, (iii) and that concerns a single district in a case that alleges vote dilution on a much wider scale.[12]

For all these reasons, the Court can and should credit Plaintiffs' unrebutted expert testimony that in the most probative elections, there is compelling evidence that voting is racially polarized and that *Gingles II* and *III* have been satisfied.

III. Plaintiffs have established a Section 2 violation under the totality of the circumstances.

Plaintiffs introduced overwhelming evidence at trial that the totality of the circumstances reveals that Black Arkansans have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" to the Supreme Court and Court of Appeals. *See Gingles*, 478 U.S. at 43. Defendants did not even attempt to

[12] For essentially the same reasons, *Cooper v. Harris* does not support Defendants' position either. *See* Defs' Br. 20–21. That case also did not involve a Section 2 claim. The portions cited by Defendants addressed the circumstances under which a professed concern about avoiding hypothetical Section 2 liability could justify a state legislature's decision to draw *a specific district* in an otherwise unconstitutional manner. *See Cooper*, 137 S.Ct. at 1468–1472 (specifically assessing the constitutionality of a single challenged district, "District 1").

address the majority of this evidence at trial or in their brief, including entirely failing to rebut Senate Factors 1 (history of voting rights discrimination), 3 (practices and procedures that enhance opportunities for discrimination against Black voters), 4 (informal slating), 5 (discrimination in education, employment, health) and 6 (racial appeals). Instead, Defendants focus solely on Senate Factors 2 (racially polarized voting), 7 (record of successful elections of Black candidates), and linkage, often referred to as Senate Factor 9. However, each of those factors are in Plaintiffs' favor as well.

Senate Factor 2. As detailed in Plaintiffs' opening brief and above, the evidence in support of *Gingles II* and *III* shows that Arkansas's appellate judicial elections are racially polarized. *See* Pls' Opening Br. 9–15, 18; *supra* at 12–22. Defendants' argument on Senate Factor 2 seems to be: if you ignore the evidence of racially polarized voting, then there is no evidence of racially polarized voting. They say that three of the four biracial endogenous elections are "simply no evidence," Defs' Br. 26, even though their own expert agreed that the Black-preferred candidate lost in those elections. Trial Tr. vol. 5, 839:7-12 (Alford Cross). They further assert that there is no evidence "that white voters are reluctant to vote for Black judicial candidates," Defs' Br. 26, again ignoring not only the experts' analysis, but also the trial testimony of multiple Black voters and candidates about the lack of white voter support for Black candidates. *See, e.g.*, Pls' Opening Br. 11–12 (summarizing the testimony of Kymara Seals, Waymond Brown, and Eugene Hunt).

Senate Factor 7. Defendants argue—against the weight of the evidence—that "the extent to which members of the minority group have been elected" is in their favor. Defs' Br. 26 (quoting *Gingles*, 478 U.S. at 37). Their argument runs contrary to the facts and historical context. Since 1874, Arkansas has elected justices of the Arkansas Supreme Court statewide. *See*

Ark. Const. art. VII, § 6 (1874). For those nearly 150 years, *no* Black candidate has ever been elected at-large to that court. Trial Tr. vol. 3, 602:4-16 (McCrary Direct); PTX 466 (Casteel (Office of the Governor)) Dep. Tr.) at 86:5-7; PTX 467 (Humphries Dep. Tr.) at 164:16-24. And, at least since Reconstruction, *no* Black person has ever won any other statewide election in the state of Arkansas. *See, e.g.*, PTX 466 (Casteel (Office of the Governor) Dep. Tr.) at 86:5-7.

Defendants cannot and do not rebut the lack of Black electoral success in at-large or statewide office. Their only response is that just two Black candidates have run for the Supreme Court. Defs' Br. 27. However, Courts have consistently held that a limited number of Black candidates running for office in the challenged electoral system is logically tied to the deterrent effects of the discriminatory system. *See, e.g.*, *Westwego*, 872 F. 2d at 1209 n.9 (noting that the Supreme Court has refused to preclude vote dilution claims "where few or no [B]lack candidates have sought offices in the challenged electoral system," because "[t]o hold otherwise would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove"). Testimony at trial showed the deterrent effects of Arkansas' appellate courts' discriminatory system and why few Black candidates have attempted to run. For example, Attorney Eugene Hunt stated that he never considered running for statewide office because it "would be just a total waste of money" to run in a district where Black voters didn't have sufficient population to elect a candidate of their choice. Trial Tr. vol. 4, 675:14-676:4 (Hunt Direct). Similarly, when fundraising for a congressional seat, Senator Joyce Elliott was told "You're a [B]lack woman in the south and in Arkansas, and you're not going to win, so I'm not just going to waste my money." Trial Tr. vol. 4, 716:13-22 (Elliott Direct). Accordingly, the fact that only two Black candidates have run for the Supreme Court and both lost to a white opponent does not cut in Defendant's favor.

Turning to Court of Appeals elections, it is undisputed that *no* Black candidate for the Court of Appeals has ever won a contested election against a white candidate. So Defendants argue that this fact does not matter, because (a) one Black candidate has defeated another Black candidate in the sole-majority Black district, and (b) three Black appointees were subsequently elected unopposed. Defs' Br. 26–27. To put this in context: in more than four decades since the Court of Appeals was established, with dozens of judges elected or appointed to the bench, *four* Black judges have been nominated and/or elected to the Court of Appeals. And not a single one of them won an election against a white judicial candidate.

Defendants nevertheless say that what matters is that any Black appellate judicial candidate has been elected at all. Defs' Br. 26. But this is an overly cramped understanding of Senate Factor 7 within the totality of the circumstances analysis, which calls for the court to "take account of the circumstances surrounding recent black electoral success in deciding its significance to appellees' claim," which can include incumbency and other special circumstances. *Gingles*, 478 U.S. at 60, 76. The fact that in Arkansas, the few Black candidates who were elected only won against either another Black candidate or unopposed is highly relevant to the totality of the circumstances in this case.

Defendants rely on counterfactuals and a selective and mistaken presentation of the facts in making their arguments about the few elected Black judges. With respect to Judge Waymond Brown's 2008 election to of the Court of Appeals against a Black opponent, Defendants claim that this election "would have been an ideal opportunity for a third white candidate to sail to victory," and that this speculative counterfactual somehow cuts in their favor. Defs' Br. 19. However, the trial record contradicts their argument: Judge Brown testified that he was told by a white member of the local chamber of commerce that "white folks won't care about" his election

because "[t]hat's the [B]lack folks' seat." Trial Tr., vol. 3, 428:15-429:15 (Brown Direct). *See, also,* Trial Tr. vol. 3, 417:3-20 (Brown Direct) (told by a white voter when knocking on doors that "I ain't voting for no n[-word]."); Trial Tr. vol. 2, 268:9-11 (Seals Direct) ("History shows time and time and time and time again that white voters are not going to vote for black candidates like they do white candidates.").

Moreover, Defendants fail to consider that Arkansas uses a system of runoffs and majority-vote requirements for the Court of Appeals, preventing the kind of plurality-support victory that they hypothesize. *See* Trial Tr., vol. 3 594:15–595:4 (McCrary Direct). This is a structural barrier that enhances opportunities for discrimination against Black voters, which is one reason why there is no dispute that Senate Factor 4 cuts strongly in favor of Plaintiffs here. *See* Pltfs' Post-Trial Br. at 19. In hypothesizing a rare instance when this might have disadvantaged a white candidate, Defendants actually highlight how this system would more routinely disadvantage Black candidates.

Defendants' argument about the three judges elected unopposed are no more persuasive. Defendants say it is "telling" that these candidates were subsequently elected unopposed. Defs' Br. 23. For context (omitted by Defendants), Judges Olly Neal, Andree Roaf, and Wendell Griffen were appointed by the Governor to the Court of Appeals in 1996 and 1997. Joint Stipulations ¶49, ECF No. 163. They were first "h[eld] over" in office after their appointment because the General Assembly did not make new districts in time for the 1998 election. PTX 62 (Op. No. 97-178, Ltr. fromWinston Bryant, Att'y Gen.'s Office to Sharon Priest, Sec'y of State) at AG0093. The legislature eventually acted, allowing for the appointed judges' election. At the next election in 2000, however, another Black candidate, Lavenski Smith, ran opposed for the Court of Appeals and lost to a white candidate. *See* Trial Tr., vol. 1 52:10–53:12 (Humphrey

Direct); PTX 164. And when Judge Griffen ran opposed for his second re-election to the Court of Appeals, he also lost to a white candidate. Defs' Br. 27. In claiming that the three unopposed elections are "more telling" about "black voters' political power," Defs' Br. 27, than the fact that no Black candidate has *ever* won a biracial election, Defendants ask the Court to make unfounded assumptions and go against the weight of the evidence. *See supra* at 12–22. They also fail to heed the Eighth Circuit's admonition that "[a] system that works for minorities only in the absence of white opposition is a system that fails to operate in accord with the law." *Harvell I*, 71 F.3d at 1389–90.

Senate Factor 9. Defendants assert a linkage interest in the Supreme Court, but the facts indicate that the interest in at-large elections is not as weighty as they claim. Defs' Br. 28. Both the Court of Appeals and Supreme Court exercise statewide jurisdiction. Yet the Court of Appeals judges are elected from districts, while the Supreme Court judges are elected at-large. Judges on the Court of Appeals are all eligible to hear cases from anywhere within the Court of Appeals' jurisdiction regardless of where the case arose or the district from which they are elected. Trial Tr. vol. 3, 434:14-15 (Brown Direct). Decisions of the Court of Appeals are also precedential in any court anywhere in the state, just like decisions of the Arkansas Supreme Court. *See* Ark. S. Ct. Rule 5-2I. In addition, merits decisions of the Court of Appeals are typically reached by three-judge panels that necessarily include judges elected only from certain districts and not others. Trial Tr. vol. 3, 606:8-607:6 (McCrary Direct). Therefore, judges on the Court of Appeals routinely make decisions that affect the entire state, including voters who did not vote for them.

However, Defendants have not provided any argument to distinguish the linkage concerns for the Supreme Court from the Court of Appeals; in fact they did not cite any evidence

of the weight of their linkage concerns. Defendants' claim it is "quite logical" to make "Supreme Court Justices accountable to each party, not just one of seven" "given that it takes just four Justices, not all seven to decide a case." Defs' Br. 28. Defendants do not attempt to explain why a different logic applies to a Court of Appeals decision, in which only three out of twelve judges can decide a case. *See also*, Trial Tr. vol. 3, 606:8-607:6 (McCrary Direct) ("since there's no single judge making a decision in the Court of Appeals or the Supreme Court, the linkage argument that's offered by the state seems to have less empirical advantage than at the trial court level"). This would indicate that the linkage interest is not so robust that it would outweigh the strength of the Section 2 violation Plaintiffs have established. *See, e.g., Prejean v. Foster*, 227 F.3d 504, 516–17 (5th Cir. 2000) (the Court must balance the linkage interest against the vote dilution evidence).

Defendants further argue, without supporting authority, that "[n]o court has ever ordered a state to district its state supreme court, or any court elected at-large." Defs' Br. 27. However, the U.S. Supreme Court has upheld judicial subdistricts, in a case involving Louisiana's method of electing state Supreme Court justices, as an appropriate and viable solution to ensure Black voters are not denied the opportunity to elect a candidate of their choice to a state's highest appellate court. *See Chisom v. Roemer*, 501 U.S. 380 (1991). Defendants cite no evidence that Louisiana's system has led to a lack of voter accountability that they claim to fear would happen in Arkansas.[13]

[13] Even if the Court finds that at-large boundaries are important to the Supreme Court, Plaintiffs' have proposed another remedy that would allow Arkansas to maintain an at-large system: cumulative voting. *See* Second Am. Compl., ECF No. 37 at 22; ECF No. 103 at 61–63. Defendants would be free to adopt cumulative voting at the remedy stage to maintain linkage, and they have provided no arguments against this system in their post-trial briefing.

Finally, Defendants ask whether a districted Supreme Court would be "fair" or "perceived to be fair" to Black litigants. Defs' Br. 29. The trial record answers that question. Plaintiffs presented extensive testimony about how *unfair* Black voters perceive the current system–and why relief in the form of a different method of electing Supreme Court justices would be transformative to change that longstanding experience of race-based unfairness and exclusion. For example, Kymara Seals said relief "would mean representation, it would mean I could see equity." Trial Tr. vol. 2, 277:2-3 (Seals Direct). Judge Marion Humphrey stated that relief is important for the courts to be seen as institutions "people perceive . . . as being places where justice is administered." Trial Tr. vol. 1, 83:24–84:2 (Humphrey Direct). Reverend Maxine Allen stated that on the current Supreme Court, which is all white, "there is no assurance that my vote, that my representation is honored in this state." rial Tr. vol. 2, 376:8-12 (Allen Direct).

Accordingly, the Defendants' linkage arguments—to the extent the Court credits them at all—do not outweigh the evidence Section 2 vote dilution.

* * *

Before leaving the totality of the circumstances, one final point warrants a brief response: Defendants incorrectly claim that Plaintiffs' "entire theory" is that Black voters "have a right to elect . . . a proportionate number of minority candidates." Defs' Br. 12. This distorts mischaracterizes Plaintiffs' argument, which is about the *opportunity* for Black voters to elect candidates of their choice, not proportionate representation of Black judges. And here, each and every Senate Factor reinforces Plaintiffs' argument that Black voters in Arkansas have less opportunity to participate in the political process and elect their candidate of choice. *See* Pls' Opening Br. 16–24.

That being said, evidence indicating whether minority voters form voting majorities in districts proportional to their share of the population is a relevant consideration in the totality of the circumstances. *Johnson v. De Grandy*, 512 U.S. 997, 1013– 17 (1994); *see also LULAC*, 548 U.S. at 436–37; *NAACP v. City of Columbia*, 33 F.3d 52 (4th Cir. 1994) (citing *De Grandy*, 512 U.S. at 1000). This is one more factor within a "comprehensive" analysis of whether minority voters have less opportunity than other members of the electorate to elect representatives of their choice. *De Grandy*, 512 U.S. at 1011–12. And it is yet another factor that would weigh in Plaintiffs' favor here, as Black people are underrepresented on the Court of Appeals and *not represented at all* on the Supreme Court.

For all these reasons and those discussed in Plaintiffs' opening post-trial brief, the totality of the circumstances—including the *Gingles* preconditions, evidence of a history of voting discrimination; racially polarized voting; enhancing factors; informal candidate slating; discrimination in education, employment, housing, and health; racial appeals; and the minimal record of successful elections of Black candidates—collectively show that Black voters do not have an equal opportunity to elect their candidates of choice to Arkansas appellate courts.

IV. All three Defendants are proper and should remain in the case.

Defendants rehash the issue of whether the Arkansas Governor and Attorney General are proper defendants. This issue has already been briefed extensively including during summary judgment. *See* ECF No. 92 at 16–20; ECF No. 103 at 4–11; ECF No. 117 at 2–7. Plaintiffs more recently addressed the legal and factual bases for Defendants' involvement in the case at length in their Proposed Findings of Fact and Conclusions of Law, which were submitted pretrial and will be resubmitted in updated form with trial record citations next week. This issue also continues to carry little practical consequence: given that there is no dispute that the Secretary of

State is a proper Defendant, the Court will need to decide the merits either way. Thus, Plaintiffs will not relitigate this peripheral issue in this brief.[14]

However, Plaintiffs must correct one point: It is simply untrue that Plaintiffs "put on no evidence" related to these issues. Defs' Br. 3–4. To the contrary, the trial record is replete with evidence of all three Defendants' roles in enacting and enforcing the challenged electoral methods.[15] As Plaintiffs' updated post-trial Proposed Findings of Fact and Conclusions of Law will spell out in greater detail, that evidence includes: designated deposition testimony of Defendants' Rule 30(b)(6) representatives and former Arkansas Assistant Attorney General Tim Humphries;[16] official records from all three iterations of the Court of Appeals Apportionment Commission reflecting Defendants' direct involvement;[17] and Defendants' own statements, records, and publications.[18] Also relevant to establishing Defendants' role are various legal authorities cited in the pre- and post-trial briefing on these issues (some of which were

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[14] Since Defendants have re-raised the issue, however, Plaintiffs will take the opportunity to highlight one important concession by Defendants in their summary judgment reply brief: Defendants acknowledged that the Attorney General *does* have some enforcement power over the composition of elected governmental bodies in Arkansas. *See* Defs' Reply in Supp. of Mot. Summ. J., ECF No. 117 at 5 (discussing the authority conferred by Ark. Code Ann. 16-118-105(b)(1) and *Drennen v. Bennett*, 322 S.W.2d 585 (Ark. 1959)).

[15] To be sure, Plaintiffs did not devote courtroom time to presenting live witness testimony on this peripheral issue, as doing so would have only prolonged the trial. But not presenting *live testimony* is different from not presenting *evidence*. Ironically, it is actually Defendants who failed to present any evidence on this issue—their entire affirmative case consisted of a single expert witness and his expert report, addressing only *Gingles II* and *III*.

[16] *See* PTX 465; PTX 466; PTX 467; PTX 468.

[17] *See, e.g.*, PTX 032 (1995 Commission Report); PTX 034; PTX 038 (1997 Commission Report); PTX 039; PTX 053 (2003 Commission Report); PTX 406; PTX 445; PTX 447; PTX 448.

[18] *See, e.g.*, PTX 001; PTX 002; PTX 003; PTX 004; PTX 005; PTX 011; PTX 061; PTX 077; PTX 398; PTX 401; PTX 403.

reproduced as exhibits for ease of reference).[19] Taken together, this record evidence and applicable legal provisions establish that all three Defendants, including the Governor and Attorney General, have at least "some connection" to the state's ongoing maintenance and enforcement of the challenged electoral processes. *See McDaniel v. Precythe*, 897 F.3d 946, 952 (8th Cir. 2018). They can therefore appropriately be held to account for the state's ongoing violation of the Voting Rights Act.

At the same time, these record materials also provide illuminating context for how this trial came to be necessary in the first place. The record shows that Defendants have for decades been aware of the need to increase Black voters' representation on the state's white-dominated appellate benches.[20] The record shows Defendants' inaction and failure to address that need.[21] And that track record of inertia and indifference in turn makes plain why it has fallen to this Court to take action and ensure that Plaintiffs can finally enjoy what federal law guarantees them: an equal opportunity to participate in elections for their state's highest courts.

CONCLUSION

For the foregoing reasons and based on the facts adduced at trial, the Court should declare the current systems of electing judges for the Arkansas Supreme Court and Court of Appeals to be in violation of Section 2 of the Voting Rights Act and proceed to determining a remedy that will afford Black voters in Arkansas a meaningful opportunity to elect their preferred candidates.

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[19] *See, e.g.*, PTX 031; PTX 062; PTX 093; PTX 387; and provisions of the Arkansas Constitution and Arkansas Code.

[20] *See, e.g.*, PTX 032 (1995 Commission Report) at SOC 0951–52; PTX 053 (2003 Commission Report) at AOC_0000010; PTX 53A.

[21] *See, e.g.*, PTX 053 (2003 Commission Report) at AOC_0000010.

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Respectfully submitted,

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