UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

THE CHRISTIAN MINISTERIAL ALLIANCE, et al.,

Plaintiffs,

v.

STATE OF ARKANSAS, et al.,

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO STAY DISCOVERY

Civil No. 4:19-cv-402-JM

INTRODUCTION

On June 21, 2019, Plaintiffs the Christian Ministerial Alliance, Arkansas Community Institute, Marion Humphrey, Olly Neal, and Kymara H. Seals (together as "Plaintiffs") filed their Amended Complaint, detailing how Defendants' methods of electing judges to the Arkansas Supreme Court and Court of Appeals violate Section 2 of the Voting Rights Act ("VRA"). ECF No. 9.

The Court issued a Final Scheduling Order on October 22, 2019, in which it set the discovery deadline and trial date. ECF No. 32. Yet, Defendants now seek to bring the entire litigation to a halt based on the meritless defense of sovereign immunity raised by *some* Defendants. The Court should not grant Defendants' request to halt ongoing discovery against *all* Defendants for an indefinite period of time. *First*, a stay of discovery is the exception, not the rule, and Defendants have not met their burden of establishing the need for a stay here. In particular, the sovereign immunity defense raised by three Defendants as the only basis for staying discovery is without merit and unlikely to succeed. *Second*, as

three Defendants have not raised a sovereign immunity defense, at a minimum, discovery for those Defendants should continue to proceed.

I. Defendants Fail to Meet Their Burden to Justify Staying Discovery.

It is a "well-settled rule that courts require the party seeking to limit discovery to establish grounds for not providing the discovery that are specific and factual." *Vallejo v. Amgen, Inc.*, 903 F.3d 733, 743 (8th Cir. 2018) (internal quotation marks omitted); *see also De Rossitte v. Correct Care Sols., Inc.*, No. 6:17-cv-06043, 2018 WL 5904496, at *3 (W.D. Ark. Nov. 9, 2018) ("The burden is generally on the party resisting discovery to show why discovery should be limited."); *Sturgeon v. Faughn*, No. 3:18-CV-214-BD, 2019 WL 2488123, at *2 (E.D. Ark. June 13, 2019) ("[M]oving parties[] bear the burden to demonstrate the need for a stay.").

Courts consider various factors when determining whether to stay discovery because of a pending motion to dismiss, including: "(1) whether the movant has shown a likelihood of success on the merits of the dispositive motion; (2) hardship or inequity to the moving party if the matter is not stayed; (3) prejudice to the non-moving party [if the matter is stayed]; and (4) the conservation of judicial resources." *Physicians Home Health Infusion, P.C. v. United Healthcare of the Midwest, Inc.*, No. 4:18cv01959 PLC, 2019 WL 4644021, at *3 (E.D. Mo. Sept. 24, 2019) (citing *Dufrene v. ConAgra Foods, Inc.*, No. 15-cv-3796 (WMW/LIB), 2016 WL 10651947, at *2 (D. Minn. Apr. 7, 2016)); *see also Vilonia School District v. M.S.*, No. 4:18-cv-00219-KGB, 2018 WL 8733057, at *4 (E.D. Ark. Apr. 23, 2018) (considering similar factors in addressing stay of discovery pending determination of a related proceeding). "[S]tays of litigation are the exception, not the rule." *Ung v. Universal Acceptance Corp.*, No. 15–127 (RHK/FLN), 2016 WL 9307090,

at *1 (D. Minn. June 15, 2016). As discussed below, each factor weighs against a stay in this case.

First, the sovereign immunity defense raised by three Defendants—the State of Arkansas, the Board of Election Commissioners, and the Board of Apportionment (together "Arkansas")—is without merit and unlikely to succeed.[1] As Plaintiffs have made clear, ECF No. 26 at 5-9, federal courts in and outside of this Circuit have consistently held that Arkansas' sovereign immunity defense against this VRA suit is wholly without merit.

The VRA forbids "any *State* or *political subdivision*" from imposing a "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race." 52 U.S.C. § 10301 (emphasis added). This language is an "unmistakably clear" statement of Congress' intent to abrogate state sovereign immunity for claims arising under the VRA. *Mixon v. Ohio*, 193 F.3d 389, 398 (6th Cir. 1999); *Terrebonne Parish NAACP v. Jindal*, 154 F. Supp. 3d 354, 359 (M.D. La. 2015). Given the clear language of the VRA, the Fifth and Sixth Circuit Courts of Appeals have held that Congress validly abrogated state sovereign immunity in enacting the VRA, and therefore, plaintiffs are not barred from bringing such a claim against the state or arms of the state. *Mixon*, 193 F.3d at 398; *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017) ("The VRA, which Congress

[1] As fully briefed in Plaintiffs' Opposition to Defendants' Motion to Dismiss, ECF No. 26, Defendants' Motion to Dismiss should be denied in its entirety because Plaintiffs' allegations in their Amended Complaint are more than adequate to support a reasonable inference that Defendants are liable for violating the VRA. However, because Defendants move to stay discovery solely on the basis of sovereign immunity, ECF No. 34, Plaintiffs address Defendants' likelihood of success solely on the basis of sovereign immunity.

passed pursuant to its Fifteenth Amendment enforcement power, validly abrogated state sovereign immunity.").[2]

Similarly, district courts have repeatedly held that the VRA lawfully abrogates state sovereign immunity. *See, e.g., Ga. State Conference of the NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1275 (N.D. Ga. 2017) (three-judge court); *Terrebonne Parish NAACP*, 154 F. Supp. 3d 354 at 359.[3]

Despite the unambiguous and consistent interpretation of the VRA by the vast majority of courts, Arkansas insists its sovereign immunity defense is "colorable." ECF No. 34 at 2. It is not. Arkansas simply hopes that this Court will credit its unsupported defense. The baselessness of Arkansas' argument is also apparent given that this Court previously adjudicated a similar VRA challenge to the method of election for Arkansas' trial courts. In that case, Black Arkansan voters, similar to those here, argued that the electoral method for the state's trial courts diluted their vote. The State did not raise a sovereign immunity defense, rather, it admitted liability under the VRA. This Court entered a consent order that for the first time gave Black voters an opportunity to elect candidates of their choice. *Hunt v. Arkansas*, No. PB-C-89-406, 1991 WL 12009081, at *1-2 (E.D. Ark. Nov. 7, 1991).

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[2] *See also Lewis v. Governor of Alabama*, 896 F.3d 1282, 1294 (11th Cir. 2018), *reh'g en banc granted on other grounds*, 914 F.3d 1291 (11th Cir. 2019) ("Congress validly abrogated state sovereign immunity in § 2 of the Voting Rights Act; therefore, the Eleventh Amendment does not prohibit the plaintiffs' claim against the State of Alabama.").

[3] *See also Hall v. Louisiana*, 983 F. Supp. 2d 820, 829-30 (M.D. La. 2013); *Verity v. Scott*, No. 2:12-CV-609-FTM-38, 2014 WL 3053171, at *6 (M.D. Fla. July 7, 2014); *Reaves v. United States DOJ*, 355 F. Supp. 2d 510, 515 (D.D.C. 2005) (three-judge court); *Dekom v. New York*, No. 12-cv-1318, 2013 WL 3095010, at *10 (E.D.N.Y. Jun. 18, 2013), *aff'd*, 583 F. App'x 15 (2d Cir. 2014).

Second, Defendants' conclusory statement that Plaintiffs' requests for production are "extraordinarily burdensome" and overly broad (ECF No. 34 at 2) is insufficient to demonstrate hardship to the Defendants. Defendants make no argument concerning the time or expense that fulfilling the request would require, and their conclusory allegations regarding the burdensomeness of the requests are insufficient to stay discovery. *See Vallejo*, 903 F.3d at 743 ("A party claiming requests are unduly burdensome cannot make conclusory allegations, but must provide some evidence regarding the time or expense required.") (citation omitted).

Plaintiffs' discovery requests are well within the scope of discovery permitted under Federal Rule of Civil Procedure 26(b)(1): Plaintiffs "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Importantly, Defendants do not challenge the relevancy of the requests, *see* ECF No. 34, which are narrowly tailored to gather information regarding liability under the VRA as delineated in *Thornburg v. Gingles*, 478 U.S. 30 (1986). *See Sys. Spray-Cooled, Inc. v. FCH Tech, LLC*, No. 1:16-cv-1085, 2017 WL 10154222, at *2 (W.D. Ark. May 8, 2017) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)) (explaining that "[r]elevance under Rule 26 has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter[s] that could bear on any issue that is or may be in the case.").

Plaintiffs' requests are also "proportional to the needs of the case." FRCP 26(b)(1). Courts determine proportionality by considering, among other things, "the importance of the issues at stake in the action," "the parties' relative access to relevant information," "the

importance of the discovery in resolving the issues," and "whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id*.

Here, the right to vote—"'a fundamental political right, because [it is] preservative of all rights'"—is at stake. *Lendall v. Jernigan*, 424 F. Supp. 951, 956 (E.D. Ark. 1977) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). As the Eighth Circuit has acknowledged, "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Libertarian Party of North Dakota v. Jaegar*, 659 F.3d 687, 694 (8th Cir. 2011) (citation omitted). Moreover, the voting rights of Black Arkansans are at stake— a constitutional right, *see* U.S. Const. amend. XV, that required enactment of the VRA to be fully realized and with which Arkansas has struggled. *See, e.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009) (explaining that "[t]he first century of congressional enforcement of the [Fifteenth] Amendment . . . can only be regarded as a failure" and that "[e]arly enforcement Acts were inconsistently applied and repealed with the rise of Jim Crow.") (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966)); *Taylor v. Howe*, 225 F.3d 993, 1003 (8th Cir. 2000) ("There has been a 'long history of racial discrimination in the electoral process in Arkansas.'") (citing *Harvell v. Bytheville School District*, 71 F.3d 1382, 1390 (8th Cir. 1995). Accordingly, the importance of the rights at stake weighs strongly in favor of proceeding with discovery.

Further, Plaintiffs' discovery requests to Arkansas for documents, which are overwhelmingly in its possession, are critical to Plaintiffs establishing their burden under *Gingles*. For example, Plaintiffs request documents concerning racially polarized voting and redistricting plans for the Arkansas judiciary. *See, e.g.*, Pls.' First Reqs. for Prod. of Docs. to Def. John Thurston, attached as Ex. A. at 11-12. The importance of this discovery

is evinced by Defendants' focus on the *Gingles* preconditions in their Motion to Dismiss. *See* ECF No. 22 at 7-19. Though Plaintiffs' requests are targeted to discovery necessary to satisfy their burden, Defendants cite a single request as an example of "obvious overbreadth" and the need to stay all discovery. ECF No. 34 at 2. However, this request—seeking communications regarding the challenged courts and *Gingles* preconditions—goes to the heart of the case. [4]

Given the voting rights at stake and the asymmetry of access to critical information between Plaintiffs and Defendants, the benefit of proceeding with discovery far outweighs any burden on Defendants—a burden that Defendants have not specified in either their pending motion to stay or in their Response to Plaintiffs First Set of RFPS. *See, e.g.*, Secretary of State John Thurston's Objections to Pls.' First Set of Reqs. For Prod. of Docs., attached as Ex. B.[5] This is especially true given the weakness of Arkansas' sovereign immunity defense.

Third, a stay of discovery in this case would unfairly prejudice Plaintiffs. It is undisputed that Plaintiffs have an interest in the timely vindication of their rights. *Cf. Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) ("Defendants may seek to stall because they gain from delay at plaintiffs' expense"). Plaintiffs' interest is of the utmost importance here, as this case concerns the voting rights of Black Arkansans, specifically their ability to elect candidates of their choice to courts that make rulings directly impacting

[4] Plaintiffs exclusively request "responsive documents" from Defendants, and it is unreasonable for Defendants to interpret this as a demand for the collection of documents from every single state employee. ECF No. 34 at 2. Nevertheless, Plaintiffs are amenable to conferring with Defendants regarding the scope of the requests.

[5] Defendants have made the same objection to each of Plaintiffs' requests for production of documents.

their lives. For example, under the at-large voting scheme for Supreme Court justices, Black voters are submerged by white bloc voting, resulting in no Black candidate having ever been elected to that court. Plaintiffs are prejudiced by an unnecessary stay that delays vindication of their voting rights. Further, given the weakness of their sovereign immunity defense, Defendants are not prejudiced by moving forward with discovery. Surely, the Defendants who have not raised immunity are not prejudiced by engaging in discovery that will be necessary notwithstanding resolution of the defense.

Last, Plaintiffs' discovery requests do not strain judicial resources. Plaintiffs' service of requests for production imposed no burden on this Court. Defendants' research and preparation of responses to those requests did not impose any burden on this Court. In fact, the only imposition on this Court with respect to discovery so far is Defendants' instant Motion, which seeks the exceptional relief of a stay of *all* discovery.

For the foregoing reasons, Arkansas has not met its burden for demonstrating a need to stay discovery.

II. The Secretary of State, Attorney General, and Governor Should Engage in Discovery.

Arkansas argues that the Court should also stay discovery for the Governor, Secretary of State ("SOS"), and Attorney General ("AG"), even though resolution of the sovereign immunity defense will not impact them. Contrary to Arkansas' characterization, a partial stay in which these three Defendants proceed with discovery would not result in a "piecemeal, two-stage discovery process." ECF No. 34 at 4. Defendants have been served requests for production to which each can respond individually in their official capacities. For example, Plaintiffs request certified election results for the Arkansas Supreme Court and Court of Appeals from the SOS. As the SOS, who oversees the certification of votes

for all Arkansas elections (Ark. Code Ann. § 7-5-203) and promulgates all election returns (*id.* at § 7-5-704(a)), the SOS can fulfill this request independent of Arkansas as a Defendant. Similarly, both the SOS and AG are capable of fulfilling Plaintiffs' request for documents concerning their responsibilities in conducting elections for the Arkansas Supreme Court and Court of Appeals independent of Arkansas.[6]

Arkansas next argues that a complete stay is necessary to protect Arkansas' sovereign immunity. ECF No. 34 at 4. This argument collapses on itself for three reasons. *First*, the examples above make clear that whether Arkansas is a Defendant or not, the SOS, AG, and Governor will engage in the same targeted discovery of relevant information before trial. Importantly, Arkansas does not argue that if it was not a Defendant, it would *not* monitor the discovery of these three remaining Defendants.[7] Arkansas' reason for monitoring the discovery of other parties (whatever it may be) remains even after adjudication of its sovereign immunity defense. Arkansas does not argue otherwise.

Second, even for Defendants that raise a sovereign immunity defense, discovery is not required to be stayed. Defendants misconstrue Plaintiffs' reference to *Guggenberger v. Minnesota*, No. 15-3439, 2016 U.S. Dist. LEXIS 3599 (D. Minn. Jan. 12, 2016), in the parties' Rule 26(f) report. *Guggenberger* identifies a straightforward and well-established principle: the Court "is *not* obligated to stay discovery pending Defendants' Motion to Dismiss, notwithstanding Defendants' sovereign immunity defense." *Id.* at *5 (emphasis

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[6] To the extent Defendants are unclear as to which requests they can respond to in their official capacities as SOS, AG, and Governor, Plaintiffs are willing to confer. To date, the parties have not conferred aside from Defendants representing their desire for a stay of all discovery pending resolution of their sovereign immunity defense.

[7] Further, since Defendants share the same counsel, the resources expended for the SOS, Governor, and AG are not wasted even if the Court credits Arkansas' alleged sovereign immunity defense.

added). *See also, e.g.*, *B.L. v. Schuhmann*, No. 3:18-CV-151-RGJ-CHL, 2019 WL 177940, at *5 (W.D. Ky. Jan. 11, 2019) (noting discovery may be appropriate even where a party has asserted sovereign immunity and such a defense "alone is . . . insufficient to justify a stay").

One of the few sovereign immunity cases upon which Arkansas relies to argue discovery should be stayed is *Jackson v. Riebold*, 815 F.3d 1114 (8th Cir. 2016), which does not concern the VRA. ECF No. 34 at 1. It is curious that Defendants rely on this case given that the court's decision focuses on whether the plaintiff needed more time for further discovery before the court ruled on summary judgment. *Id*. at 1121. There was a "substantial evidentiary record" and the defendant searched for *additional* responsive discovery before the court finally stayed discovery. *Id*. at 1118. This is different than the posture of this case where Defendants have failed to substantively respond to discovery requests, and have even refused to provide initial disclosures.

Defendants' reliance on *Van Wyhe v. Reisch*, 581 F.3d 639 (8th Cir. 2009), does not fare better. In *Van Wyhe*, the court held that an immediate appeal of the defendant's denial of immunity defense was warranted or its immunity "is effectively lost *if a case is erroneously permitted to go to trial*." *Van Wyhe*, 581 F.3d 639 at 647-48 (emphasis added) (internal quotation marks omitted). Immunity would not be lost simply because three defendants not implicated by a sovereign immunity defense proceed to engage in discovery while a sovereign immunity defense raised by three other defendants is pending, as Arkansas argues.

Given that the Court is not required to stay discovery for the Defendants that have raised a sovereign immunity defense, it surely is not required for those who have not.

The other cases upon which Arkansas relies to argue discovery must be stayed are similarly inapposite. For example, Defendants argue that in *Britton v. Thompson*, No. 7:08-CV-5008, 2009 WL 2365389 (D. Neb. July 29, 2009), the court stayed discovery as to all defendants pending resolution of a *single* defendant's qualified immunity defense. This is simply untrue. In *Britton*, each defendant raised either qualified immunity or state immunity.[8] By contrast, Plaintiffs' discovery requests to each Defendant are not so intertwined that no response can be provided without implicating the pending sovereign immunity defense for a portion of the Defendants. *See, e.g.*, *Infodeli v. W. Robidoux, Inc.*, No. 4:15-CV-00364-BCW, 2016 U.S. Dist. LEXIS 173175, at *8-9 (W.D. Mo. Feb. 22, 2016) (allowing partial discovery where overlap with remaining claims was non-dispositive and "progression of the case ha[d] been slowed by the parties' reluctance to participate in the discovery process").

Last, the Eighth Circuit has held that the "Eleventh Amendment [does not] shield[] government entities from discovery." *In re Missouri Dep't of Nat. Res.*, 105 F.3d 434 (1997) (holding Eleventh Amendment did not shield state agency from a third-party subpoena) ("*Missouri DNR*"). In *Missouri DNR*, the court denied the state agency's writ of mandamus and affirmed the lower court's finding that it must comply with Plaintiffs' subpoena requests, even after it was dismissed as a party based on its sovereign immunity. *Missouri DNR*, 105 F.3d at 436. Specifically, the court held that the Eleventh Amendment

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[8] Brief of Def. City of Crawford, in Support of Motion for Summary Judgment at 7-8, *Britton v. Thompson*, 2009 WL 2365389 (D. Neb. July 29, 2009) (No. 7:08-CV-5008), ECF No. 63; Brief of Def. Dan Kling's Motion for Summary Judgment at 10-11, *Thompson*, 2009 WL 2365389 (D. Neb. July 29, 2009) (No. 7:08-CV-5008), ECF No. 55; Brief of Def. Richard Thompson, in Support of Motion for Summary Judgment Based Upon Qualified Immunity at 3, *Thompson*, 2009 WL 2365389 (D. Neb. July 29, 2009) (No. 7:08-CV-5008), ECF No. 57.

did not shield the state agency from discovery, and further, that responding to a subpoena did not infringe on the state's autonomy. *Id*. Certainly, Arkansas' monitoring of other Defendants' discovery does not "infringe[ ] on State['s] autonomy." *Missouri DNR*, 105 F.3d at 436; *see also McGehee v. Nebraska Dep't of Corr. Services*, No. 4:18CV3092, 2019 WL 1227928, at *5 (D. Neb. Mar. 15, 2019) (holding state agency must respond to subpoena despite sovereign immunity because it did not infringe upon its autonomy).

This Court is not required to stay discovery simply because three of the six Defendants have raised a meritless sovereign immunity defense, and Defendants do not cite authority to the contrary. Furthermore, the SOS, AG, and Governor can proceed with relevant discovery while this court adjudicates Arkansas's alleged sovereign immunity.

CONCLUSION

For the reasons stated above, the Court should deny Defendants' motion to stay discovery. In the alternative, Plaintiffs request a partial stay that applies only to Arkansas.

Dated: November 27, 2019

Respectfully submitted,

/s/ Timothy J. Slattery

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CERTIFICATE OF SERVICE

I certify that on November 27, 2019, I filed the foregoing Response to Defendants' Motion to Stay Discovery electronically via the Court's CM/ECF system, which will send a copy to all counsel of record.

/s/ Timothy J. Slattery

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

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

PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT JOHN THURSTON, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF THE STATE OF ARKANSAS, MEMBER OF THE ARKANSAS BOARD OF APPORTIONMENT, AND CHAIRPERSON OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Plaintiffs the Christian Ministerial Alliance, Arkansas Community Institute, Marion Humphrey, Olly Neal, and Kymara Hill Seals (collectively, "Plaintiffs"), through their undersigned counsel, hereby request that Defendant John Thurston, the Secretary of State of the State of Arkansas, member of the Arkansas Board of Apportionment, and Chairperson of the Arkansas State Board of Election Commissioners, produce the documents described herein for inspection and copying and deliver copies by electronic or overnight mail to the offices of the NAACP Legal Defense & Educational Fund, Inc., 40 Rector St., Fifth Floor, New York, NY 10006 within thirty (30) days after service. Defendant also may comply with Plaintiffs' Request by transmitting documents described herein, within the same timeframe, in an electronic or computer-readable format or in the form of images

stored on CDs accompanied by all supporting documentation necessary to read the stored data, including documents necessary to understand the meaning of abbreviations, variables, and codes.

INSTRUCTIONS AND DEFINITIONS

In answering each Request:

1. The responsive documents should be produced in the manner prescribed by the Federal Rules of Civil Procedure. To the extent that an electronically stored information protocol is agreed to by the parties or entered by the Court, the responsive documents should be provided in accordance with any such protocol.
2. If any part of the request is objected to, the reason for the objection should be stated with particularity. If an objection is made to part of any item or category set forth in a request, that part should be specified.
3. Each request for production and subparagraphs or subdivisions thereof shall be construed independently, and no request shall be construed as creating a limitation upon any other request.
4. The documents produced in response to these requests are all responsive documents in your possession, custody, or control, or known to be available to you, regardless of whether such documents are possessed directly by you or your agents, advisors, employees, representatives, attorneys, consultants, successors-in-interest, or other persons or entities acting on your behalf or subject to your control, and whether they are maintained at any of your locations, offices, or in archives or in any other location (including back-up tapes or electronic mail) or with any persons related in any way to you.

5. Any reference in these document requests to an individual includes any and all agents, advisors, employees, representatives, attorneys, successors-in-interest, and all other persons or entities acting on his, her, or its behalf or under his, her, or its control.
6. Any reference in these document requests to any corporation, partnership, association, governmental entity or agency, or other entity includes the present and former officers, executives, partners, directors, trustees, employees, agents, representatives, attorneys, accountants and all other persons acting or purporting to act on behalf of such corporation, partnership, association, agency, or entity and any of their parent corporations, holding companies, subsidiaries, affiliates, divisions, departments, predecessors and/or successors-in-interest.
7. Where a request calls for information that is not available to you in the form requested, but is available in another form or can be obtained, in whole or in part, from other data in your possession or control, you must so state and either supply the information requested in the form in which it is available, or supply the data from which the information requested can be obtained.
8. In addition to the responsive document, you shall produce all non-identical copies, including all drafts, of each responsive document.
9. If any requested document is not or cannot be produced in full, you shall produce it to the extent possible, indicating what document or portion of such document is not or cannot be produced and the reason why it is not or cannot be produced.
10. Each document produced must include all attachments and enclosures.
11. Documents attached to each other shall not be separated.

12. Documents not otherwise responsive to a request for production shall be produced if such documents refer to, concern, or explain the documents called for by any request for production and constitute routing slips, transmittal memoranda or letters, comments, evaluations, or similar documents.
13. In accordance with Rule 34(b) of the Federal Rules Civil Procedure, all documents shall be produced as they are kept in the usual course of business or shall be organized and labeled to correspond with the categories in the requests, identifying the name of the person from whose files the documents were produced.
14. Each request shall be responded to separately. Nevertheless, a document that is responsive to more than one request may be produced for one request and incorporated by reference in another response, provided that the relevant, corresponding portion is so labeled or marked.
15. If any requested document or other document potentially relevant to this action is subject to destruction under any document retention or destruction program, the document(s) should be exempted from any scheduled destruction and should not be destroyed until the conclusion of this lawsuit or unless otherwise permitted by the Court.
16. If any document requested herein was at one time in existence, but has been lost, discarded, destroyed, transferred to others not subject to your control, or otherwise disposed of, you shall furnish a list identifying each such document and setting forth the following information with respect to each such document: its date, author(s), sender(s), addressee(s) and recipient(s), subject matter, length, attachments, and location in which it was maintained. In each instance, explain the circumstances of its loss, discarding, or

destruction, including the person(s) responsible for authorizing the disposition and the date thereof, and provide a description of your efforts to locate the document and copies of it.

17. No part of a document request may be left unanswered merely because an objection is interposed to another part of the document request. If you object to any document request or subpart thereof, you must state with specificity your objection and all grounds thereof. Any ground not stated will be waived.

18. If you contend that it would be unduly burdensome to obtain and provide all of the documents called for in response to these requests, or any portion thereof, then in response to each such request you shall:

    a. produce all documents and information available to you without undertaking what you contend to be an unreasonable burden; and

    b. set forth the particular grounds on which you contend that additional efforts to obtain such documents and information would be unduly burdensome.

19. If any document is withheld under any claim of privilege, including without limitation, the work-product doctrine, attorney-client privilege, or investigative or law enforcement privilege, your answer should provide the following with respect to such information:

    a. the type of document;

    b. the date of the document;

    c. the names of its author(s) or preparer(s) and an identification by employment and title of each such person;

    d. the name of each person who was sent or furnished with, received, viewed or has had custody of the document or a copy thereof together with an identification of each such person;

e. its title and reference, if any;

f. a description of the document sufficient to identify it without revealing the information for which privilege is claimed;

g. the type of privilege asserted;

h. a description of the subject matter of the document in sufficient detail to allow the Court to adjudicate the validity of the claim for privilege; and

i. the paragraph of this request to which the document relates.

20. Any attachment to an allegedly privileged document shall be produced unless you contend that the attachment is also privileged from disclosure, in which case the attachment should be identified pursuant to the instructions detailed above in instruction no. 19.

21. Any requests propounded in the disjunctive shall also be read as if propounded in the conjunctive and vice versa. Any request propounded in the singular shall also be read as if propounded in the plural and vice versa. Any request propounded in the present tense shall also be read as if propounded in the past tense and vice versa.

22. These document requests cover the period from January 1, 1998 to the present, unless otherwise indicated. The document requests set forth below encompass all documents and information concerning this period, even though dated, prepared, generated or received prior to this period.

23. These document requests are continuing in nature. Pursuant to Rule 26(e) of the Federal Rules of Civil Procedure, Defendant's attorneys are under a continuing duty to supplement the production with documents obtained subsequent to the preparation and service of a response to each Request. Supplemental responses shall be served and additional documents shall be made available promptly upon discovery of such information.

As used herein, the following terms have the following meanings:

1. "You," "Your," or "Defendant" refers to Defendant John Thurston, the Secretary of State of the State of Arkansas.
2. "Plaintiffs" means Plaintiffs Christian Ministerial Alliance, Arkansas Community Institute, Marion Humphrey, Olly Neal and Kymara H. Seals.
3. "Secretary of State" means Defendant John Thurston, in his official capacity as the Secretary of State of the State of Arkansas.
4. "Governor" means Defendant Asa Hutchinson, in his official capacity as the Governor of the State of Arkansas.
5. "Attorney General" means Defendant Leslie Rutledge, in her official capacity as Attorney General of the State of Arkansas.
6. "State Board of Apportionment" means the State of Arkansas apportionment board consisting of the Governor, Secretary of State, and Attorney General.
7. "State Board of Election Commissioners" means the State of Arkansas board consisting of seven members: the Secretary of State as Chairperson; two members appointed by the Governor; and one member each appointed by the chair of the state Democratic party, the chair of the state Republican party, the President Pro Tempore of the Arkansas Senate, and the Speaker of the Arkansas House of Representatives.
8. "Identify" or "Identity" means: (a) in connection with natural persons, to state their full names, titles and job descriptions, if applicable, and their present or last known business and home addresses; (b) in connection with firms, partnerships, corporations, proprietorships, associations or other entities, to state their name, and each of their present or last known addresses; (c) in connection with documents, to describe the

documents, setting forth their dates, titles, authors, addressees, parties thereto and the substance thereof, with such reasonable particularity as would be sufficient to permit them to be sought by subpoenas *duces tecum* or under the provisions of Rule 34 of the Federal Rules of Civil Procedure. Documents to be identified shall include both documents in your possession, custody and control and all other documents of which you have knowledge; (d) in connection with oral statements and communications, to (i) state when and where they were made; (ii) identify each of the makers and recipients thereof, in addition to all others present; (iii) indicate the medium of communication; and (iv) state their substance.

9. "Describe" or "explain" means to provide all knowledge or information about the subject.
10. "Document" is defined to be synonymous in meaning and the same in scope as the term "document" as used in Rule 34 of the Federal Rules of Civil Procedure and the phrase "writings and recordings" as defined by Rule 1001 of the Federal Rules of Evidence, and includes without limitation any kind of written, typewritten, printed, graphic, or recorded material whatsoever, including without limitation notes, memoranda, letters, reports, studies, electronic mail messages, telegrams, publications, contracts, manuals, business plans, proposals, licenses, drawings, designs, data sheets, diaries, logs, specifications, brochures, product or service descriptions, periodicals, schematics, blueprints, recordings, summaries, pamphlets, books, prospectuses, interoffice and intra office communications, offers, notations of any sort of conversations, working papers, applications, permits, surveys, indices, telephone calls, meeting minutes, databases, electronic files, software, transcriptions of recordings, computer tapes, diskettes, or other magnetic media, bank checks, vouchers, charge slips, invoices, expense account reports, hotel charges, receipts,

freight bills, agreements, corporate resolutions, minutes, books, binders, accounts, photographs, and business records. This shall include all non-identical copies, no matter how prepared; all drafts prepared in connection with such documents, whether used or not; and any deleted or erased documents that may be retrieved from hard drives, floppy disks, electronic back-up files, or any other back-up systems, regardless of location, together with all attachments thereto or enclosures therewith, in your possession, custody or control or any of your attorneys, employees, agents, or representatives.

11. The term "communication" shall be construed in the broadest sense to mean the transmittal of information in the form of facts, ideas, inquiries, or otherwise, whether such information is transmitted orally or in writing or by any other method.
12. The term "concerning" shall be construed in the broadest sense to mean relating to, referring to, describing, reflecting, alluding to, responding to, connected with, commenting on, in respect of, about, regarding, discussing, showing, analyzing, constituting, and/or evidencing, in any manner, whether directly or indirectly, the subject matter of the Request.
13. The terms "relating" or "relate" or "related" shall be construed in the broadest sense to mean referring to, describing, reflecting, alluding to, responding to, connected with, commenting on, in respect of, about, regarding, discussing, showing, analyzing, constituting, and/or evidencing, in any manner, whether directly or indirectly, the subject matter of the Request.
14. Unless otherwise stated, for each Request below, please provide an answer that **covers the time period January 1, 1998 to the present**.

15. "Arkansas Supreme Court" refers to the highest court in Arkansas comprised of seven judges all elected at-large.
16. "Arkansas Court of Appeals" refers to the intermediate appellate court in Arkansas consisting of twelve judges elected from a mix of single-member and multimember districts.
17. "Arkansas Judiciary" refers to the Supreme Court, Court of Appeals, Circuit Courts, District Courts, and Specialty Courts in Arkansas.
18. "VRA," "Voting Rights Act," or "Section 2" refers to Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, which prohibits Defendant from applying or imposing any "voting qualification or prerequisite to voting or standard, practice, or procedure," such as an at-large method of election, that results in a denial or abridgment of the right to vote "on account of race or color."
19. "Section 3(c)" refers to that part of the Voting Rights Act, 52 U.S.C. § 10302, under which a state or political subdivision may be required to seek court approval for the implementation of voting qualifications or prerequisites to voting or standards, practices, or procedures following a finding of a violation of the Fourteenth or Fifteenth Amendment of the United States Constitution having occurred within the territory of such state or political subdivision.
20. "Racially polarized voting" refers to circumstances in which different races or minority language groups vote in blocs for different candidates.
21. Pursuant to Rule 26(e) of the Federal Rules of Civil Procedure, Defendant's attorneys are under a continuing duty to supplement the production with documents obtained subsequent to the preparation and service of a response to each Request.

REQUESTS FOR PRODUCTION

1. Please produce any and all documents concerning Defendant's responsibilities in conducting elections for the Arkansas Supreme Court and the Arkansas Court of Appeals.
2. Please produce any and all documents concerning complaints or legal challenges against any jurisdiction in Arkansas for conducting elections using (a) at-large voting and/or (b) multimember districts since January 1, 1990.
3. Please produce any and all documents related to the electoral success of Black candidates in Arkansas.
4. Please produce any and all official, complete, and certified election results for all elections for the Arkansas Supreme Court, including precinct-level and county-level results, and any related statistical analysis, in Excel spreadsheet format or comparable format.
5. Please produce any and all official, complete, and certified election results for all elections for the Arkansas Court of Appeals, including precinct-level and county-level results, and any related analysis, in Excel spreadsheet format or comparable format.
6. Please produce any and all official, complete, and certified election results for all statewide elections between candidates of different races or ethnicity since January 1, 1998, including precinct-level and county-level results, and any related statistical analysis, in Excel spreadsheet format or comparable format.
7. Please produce any and all documents concerning any changes made to Arkansas election precincts, including, but not limited to, closing, combining, renaming or creating precincts.
8. Please produce any and all documents relating to the analysis of racially polarized voting

in Arkansas elections whether the analyses were conducted by any Defendant, state employee, agent, consultant or other representative, since January 1, 1998 to the present.

9. Please produce any and all communication by and between you and any attorneys or other persons acting on behalf of Defendant and any third party, including but not limited to any other defendant in the instant litigation, the Arkansas Court of Appeal, Arkansas Supreme Court and the Court of Appeals Apportionment Commission, relating to:
    a. the creation, change, alteration, elimination, or maintenance of judicial districts for the Arkansas Court of Appeals;
    b. the creation of judicial districts, the method of election, and any alterations to the system of at-large voting for the Arkansas Supreme Court;
    c. racially polarized voting;
    d. judicial disciplinary actions considered, recommended, or taken;
    e. judicial candidates for the Arkansas Court of Appeals and Arkansas Supreme Court; and
    f. Arkansas Court of Appeals judges and Arkansas Supreme Court justices.
10. Please produce any and all documents relating to communication by and between you and any attorneys or other persons acting on behalf of Defendant and any third party, including but not limited to any other defendant in the instant litigation, the Arkansas Court of Appeals, the Arkansas Supreme Court, and the Arkansas Judicial Council, relating to the creation, change, alteration, elimination, or maintenance of Arkansas Circuit Courts since January 1, 2016.

Dated: October 23, 2019

/s/ *Natasha Merle*

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CERTIFICATE OF SERVICE

I certify that on October 23, 2019, I electronically sent a true and correct copy of the foregoing document to all counsel of record.

/s/ *Natasha Merle*
Natasha Merle

EXHIBIT B

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

THE CHRISTIAN MINISTERIAL ALLIANCE*, et al.*, PLAINTIFFS,

v. Case No. 4:19-cv-00402-JM

STATE OF ARKANSAS*, et al.*, DEFENDANTS.

SECRETARY OF STATE JOHN THURSTON'S OBJECTIONS TO PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

Secretary of State John Thurston, in his official capacity, makes the following objections to Plaintiffs' First Set of Requests for Production of Documents.

Request For Production No. 1: Please produce any and all documents concerning Defendant's responsibilities in conducting elections for the Arkansas Supreme Court and the Arkansas Court of Appeals.

Response No. 1: Objection. Plaintiffs' claims against the State of Arkansas, the Board of Election Commissioners, and the Board of Apportionment are barred by sovereign immunity. As to the other Defendants, Plaintiffs have failed to state a claim upon which relief can be granted. In addition, Plaintiffs' proposed remedies for restructuring Arkansas Supreme Court elections are impermissible as a matter of law. Defendants filed a motion to dismiss on these bases on August 19, 2019; and a motion to stay all discovery in this case pending resolution of the sovereign-immunity questions on November 15, 2019.

Defendant objects to any discovery prior to the resolution of: (1) the sovereign-immunity questions raised in his motion to dismiss; and (2) his motion to stay discovery. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Discovery should not proceed as to any Defendants to preserve the sovereign immunity of Arkansas and its agencies. Piecemeal discovery against fewer than all Defendants would waste the Court's and the parties' resources. *See, e.g.*,

Sundquist v. Nebraska, No. 8:14-CV-220, 2015 WL 6118515, at *2–3 (D. Neb. Oct. 16, 2015) (staying discovery as to all defendants pending decision on qualified immunity where only some defendants asserted qualified immunity); *Britton v. Thompson*, No. 7:08-CV-5008, 2009 WL 2365389, at *1 (D. Neb. July 29, 2009) (staying discovery as to all defendants pending decision on qualified immunity where only one defendant asserted qualified immunity); *c.f. Gard v. Dooley*, No. 4:14-CV-04023-LLP, 2015 WL 632097, at *3 (D.S.D. Feb. 13, 2015) (staying discovery as to all claims where defendants only asserted qualified immunity as to some claims where the claims "substantially overlap[ped] factually"); Order, *Stanley v. Finnegan*, No. 6:17-CV-06008-PKH (W.D. Ark. July 18, 2017), ECF#37 (staying discovery pending interlocutory immunity appeal).

Subject to and without waiving the foregoing objections, Defendant also objects to this Request to the extent to the extent it purports to impose upon him duties greater than or different from the duties imposed by the Federal Rules of Civil Procedure. Defendant objects to this Request to the extent it seeks information protected from discovery by the attorney-client privilege, the attorney work-product doctrine, executive privilege, legislative privilege, or any other privilege, doctrine, immunity, or rule. Defendant objects to this Request to the extent that compliance with it would be unduly burdensome, expensive, annoying, or oppressive. Defendant objects to this Request to the extent it seeks production of documents which are not relevant to the claims or defenses in this action. Defendant also objects to this Request to the extent it seeks documents that are not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in

resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Defendant reserves all other objections to this Request.

Request For Production No. 2: Please produce any and all documents concerning complaints or legal challenges against any jurisdiction in Arkansas for conducting elections using (a) at-large voting and/or (b) multimember districts since January 1, 1990.

Response No. 2: See Response to Request for Production No. 1, which Defendant adopts and incorporates by reference.

Request For Production No. 3: Please produce any and all documents related to the electoral success of Black candidates in Arkansas.

Response No. 3: See Response to Request for Production No. 1, which Defendant adopts and incorporates by reference.

Request For Production No. 4: Please produce any and all official, complete, and certified election results for all elections for the Arkansas Supreme Court, including precinct-level and county-level results, and any related statistical analysis, in Excel spreadsheet format or comparable format.

Response No. 4: See Response to Request for Production No. 1, which Defendant adopts and incorporates by reference.

Request For Production No. 5: Please produce any and all official, complete, and certified election results for all elections for the Arkansas Court of Appeals, including precinct-level and county-level results, and any related analysis, in Excel spreadsheet format or comparable format.

Response No. 5: See Response to Request for Production No. 1, which Defendant adopts and incorporates by reference.

Request For Production No. 6: Please produce any and all official, complete, and certified election results for all statewide elections between candidates of different races or ethnicity since January 1, 1998, including precinct-level and county-level results, and any related statistical analysis, in Excel spreadsheet format or comparable format.

Response No. 6: See Response to Request for Production No. 1, which Defendant adopts and incorporates by reference.

Request For Production No. 7: Please produce any and all documents concerning any changes made to Arkansas election precincts, including, but not limited to, closing, combining, renaming or creating precincts.

Response No. 7: See Response to Request for Production No. 1, which Defendant adopts and incorporates by reference.

Request For Production No. 8: Please produce any and all documents relating to the analysis of racially polarized voting in Arkansas elections whether the analyses were conducted by any Defendant, state employee, agent, consultant or other representative, since January 1, 1998 to the present.

Response No. 8: See Response to Request for Production No. 1, which Defendant adopts and incorporates by reference.

Request For Production No. 9: Please produce any and all communication by and between you and any attorneys or other persons acting on behalf of Defendant and any third party, including but not limited to any other defendant in the instant litigation, the Arkansas Court of Appeal, Arkansas Supreme Court and the Court of Appeals Apportionment Commission, relating to:

a. the creation, change, alteration, elimination, or maintenance of judicial districts for the Arkansas Court of Appeals;

b. the creation of judicial districts, the method of election, and any alterations to the system of at-large voting for the Arkansas Supreme Court;

c. racially polarized voting;

d. judicial disciplinary actions considered, recommended, or taken;

e. judicial candidates for the Arkansas Court of Appeals and Arkansas Supreme Court; and

f. Arkansas Court of Appeals judges and Arkansas Supreme Court justices.

Response No. 9: See Response to Request for Production No. 1, which Defendant adopts and incorporates by reference.

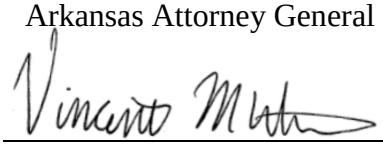
Request For Production No. 10: Please produce any and all documents relating to communication by and between you and any attorneys or other persons acting on behalf of Defendant and any third party, including but not limited to any other defendant in the instant litigation, the Arkansas Court of Appeals, the Arkansas Supreme Court, and the Arkansas Judicial Council, relating to the creation, change, alteration, elimination, or maintenance of Arkansas Circuit Courts since January 1, 2016.

Response No. 10: See Response to Request for Production No. 1, which Defendant adopts and incorporates by reference.

Dated: November 22, 2019

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General



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CERTIFICATE OF SERVICE

I certify that on November 22, 2019, I served a copy of this document by email on the following:

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