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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION AND PRELIMINARY STATEMENT 1

LEGAL STANDARD 2

ARGUMENT 3

I. Plaintiffs Have Satisfied the First Precondition of *Thornburg v. Gingles* 3

II. Arkansas' Black Population Is Sufficiently Large to Allow for a Single-Member Majority-Black District (In A 7-District Plan) for the Arkansas Supreme Court and Two Single-Member Majority-Black Districts for the Arkansas Court of Appeals 4

A. Plaintiffs' Illustrative Plans for the Arkansas Supreme Court Satisfy the Numerosity Requirement 5

B. Plaintiffs' Illustrative Plans for the Arkansas Court of Appeals Satisfy the Numerosity Requirement 6

III. Plaintiffs' Illustrative Plans for the Arkansas Court of Appeals and the Arkansas Supreme Court are Sufficiently Compact and Otherwise Comply with Traditional Redistricting Principles 7

A. Geographical Compactness/Shape 8

B. Contiguity 9

C. One Person, One Vote (Population Equality) 9

D. Maintaining Communities of Interest 10

E. Plaintiffs' Proposed Remedy Complies with Section 2 11

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 2

Bartlett v. Strickland, 556 U.S. 1 (2009) 4, 5, 7

Bone Shirt v. Hazeltine, 461 F.3d 1011 (8th Cir. 2006) 4, 8

Brown v. Thomson, 462 U.S. 835 (1983) 9

Chisom v. Roemer, 501 U.S. 380 (1991) 3, 9

Cottier v. City of Martin, 445 F.3d 1113 (8th Cir. 2006) 8

Doe v. Univ. of St. Thomas, 972 F.3d 1014 (8th Cir. 2020) 2

Golden v. Stein, No. 4:18-CV-00331-JAJ-CFB, 2020 WL 6480932 (S.D. Iowa Sept. 10, 2020) 3

Harris v. City of Texarkana, No. 4:11-CV-4124, 2015 WL 128576 (W.D. Ark. Jan. 9, 2015) 7

Larry v. Arkansas, No. 4:18-CV-00116-KGB, 2018 WL 4858956 (E.D. Ark. Aug. 3, 2018) 4

League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) 8

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 7

Missouri State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist., 894 F.3d 924 (8th Cir. 2018) 3

Thornburg v. Gingles, 478 U.S. 30 (1986) 2, 3, 4

White v. Regester, 412 U.S. 755 (1973) 9, 10

Woods v. DaimlerChrysler Corp., 409 F.3d 984 (8th Cir. 2005) 2

Statutes & Rules

52 U.S.C. § 10301 3

Fed. R. Civ. P. 56(a) 2, 3

Ark. Laws Act 889 § 5(e)(2) (1999) 1

Ark. Laws Act 1085 § 4(b) (1993).....1

Ark. Laws Act 1323 § 1 (1995).....1

Other Authorities

Redistricting Standards and Requirements, ARK. BD. OF APPORTIONMENT, https://arkansasredistricting.org/about-the-process/redistricting-criteria-2/.....8

INTRODUCTION AND PRELIMINARY STATEMENT

Plaintiffs, Christian Ministerial Alliance, Arkansas Community Institute, Marion Humphrey, and Kymara Hill Seals (collectively, "Plaintiffs") have brought this lawsuit, pursuant to Section 2 of the Voting Rights Act, to obtain an equal opportunity to elect the candidates of their choice to the Arkansas Supreme Court and Arkansas Court of Appeals. For decades, the methods of election for the Arkansas Supreme Court and the Arkansas Court of Appeals have had the impermissible effect of diluting the voting strength of Arkansas' Black voters. Arkansas is aware of this effect, at least with respect to the Court of Appeals. Since 1994, the Arkansas General Assembly has created a dedicated Apportionment Commission, advised by the Attorney General's Office, on no less than three occasions.[1] Each iteration of the Commission not only discussed a need to create a majority-Black district, but also contemplated or created a plan with such a district. Yet, Arkansas has failed to create a majority-Black district to remedy this long-standing violation of Black Arkansans' voting rights. Overwhelming evidence shows that district-based voting for the Arkansas Supreme Court and revised districts for the Arkansas Court of Appeals would help undo the dilution of Black Arkansans' voting strength and provide Black voters in Arkansas with the equal electoral opportunity to which they are entitled.

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[1] First, Act 1085 of 1993 created a Court of Appeals Apportionment Commission that met in 1994 and reported to the General Assembly on March 1, 1995. Ark. Laws Act 1085 § 4(b) (1993). *See also* SOS0949-SOS0980 (March 1, 1995 Court of Appeals Apportionment Commission Report to the General Assembly). Then, Act 1323 of the 1995 General Assembly created the second commission. Ark. Laws Act 1323 § 1 (1995). *See also* SOS0901-SOS0914 (March 1, 1997 Court of Appeals Apportionment Commission Report to the General Assembly). Finally, Act 889 of the 1999 General Assembly created the third and apparently final commission, which reported to the General Assembly in early 2003. Ark. Laws Act 889 § 5(e)(2) (1999). *See also* Gingerich Ex. #66 (January 13, 2003 Draft Court of Appeals Apportionment Commission Report to the General Assembly).

To succeed on a Section 2 claim, Plaintiffs must satisfy three preconditions as delineated in *Thornburg v. Gingles*, 478 U.S. 30, 49-51 (1986). The first precondition (*Gingles I*) is that the population of Black voters is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. Plaintiffs' expert demographer, Bill Cooper, will testify at trial that Arkansas' Black population is sufficiently large and geographically compact to allow for a single-member majority-Black district for the Arkansas Supreme Court and two single-member majority-Black districts for the Arkansas Court of Appeals. Defendants have no response. Their own expert demographer, Dr. Peter Morrison, has not disclosed a written opinion on the subject, and when pressed at deposition, he expressly conceded both that Mr. Cooper's application of redistricting principles was sound and that drawing a single-member majority-Black district for the Arkansas Supreme Court was possible. There is no genuine dispute of fact with respect to *Gingles I*. Accordingly, and for the reasons detailed below, partial summary judgment should be granted in Plaintiffs' favor on this element.

LEGAL STANDARD

Federal Rule of Civil Procedure Rule 56(a) provides that the Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The presence of factual disputes will preclude the granting of summary judgment only if the disputes are genuine and concern material facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* *See Doe v. Univ. of St. Thomas*, 972 F.3d 1014, 1016 (8th Cir. 2020); *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005).

A party can move for partial summary judgment under Rule 56(a), which states: "A party may move for summary judgment, identifying . . . the part of each claim . . .on which summary

judgment is sought." Fed. R. Civ. P. 56(a). In doing so, the party provides the Court with the opportunity to narrow the issues at trial and streamline the case both for the Court and the parties. *See Golden v. Stein*, No. 4:18-CV-00331-JAJ-CFB, 2020 WL 6480932, at *2 (S.D. Iowa Sept. 10, 2020) (noting motions for partial summary judgment would "narrow some of the issues to be presented to the jury and, perhaps, shorten the duration of the trial").

ARGUMENT

I. Plaintiffs Have Satisfied the First Precondition of *Thornburg v. Gingles*

A successful Section 2 vote-dilution claim has two components. First, Plaintiffs must satisfy three preconditions: (1) the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district" (*Gingles I*); (2) the minority group is "politically cohesive" (*Gingles II*); and (3) the "majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate" (*Gingles III*). *Gingles,* 478 U.S. at 50-51. Second, Plaintiffs must, under the totality of circumstances, "demonstrat[e] that a challenged election practice has resulted in the denial or abridgment of the right to vote based on color or race." *Chisom v. Roemer*, 501 U.S. 380, 394 (1991); *see* 52 U.S.C. § 10301(b).

The Supreme Court has recognized that at-large voting, as used by Arkansas to elect Arkansas Supreme Court Justices, may "operate to minimize or cancel out the voting strength of racial minorities in the voting population." *Gingles*, 478 U.S. at 47. "The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Id.* at 48. *See Missouri State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 930 (8th Cir. 2018) ("One manner in which a violation may occur is when districts that elect several at-large representatives 'operate to impair [Black voters'] ability

to elect representatives of their choice'") (quoting *Gingles* 478 U.S. at 42; *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1017-18 (8th Cir. 2006)).

There is no genuine dispute that Arkansas' Black population is (1) sufficiently large and (2) geographically compact to constitute a majority in a single-member district for the Supreme Court and two single-member districts for the Court of Appeals. Plaintiffs' expert, William S. Cooper, has submitted several illustrative plans identifying such districts, and Defendants' expert, Dr. Peter Morrison, has ***offered no opinion in rebuttal***.[2] Plaintiffs' Statement of Undisputed Material Facts ("SUMF") ¶¶ 10, 34, 37.

II. Arkansas' Black Population Is Sufficiently Large to Allow for a Single-Member Majority-Black District (In A 7-District Plan) for the Arkansas Supreme Court and Two Single-Member Majority-Black Districts for the Arkansas Court of Appeals

Gingles I is often referred to as the "numerosity requirement." *Larry v. Arkansas,* No. 4:18-CV-00116-KGB, 2018 WL 4858956, at *4 (E.D. Ark. Aug. 3, 2018). The numerosity requirement is a strict "majority-minority rule [that] relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2." *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009). There is no genuine dispute that Plaintiffs have satisfied this requirement.

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[2] At deposition, Dr. Morrison testified that he intended to submit an additional report "no later than two weeks before trial" detailing his opinion on *Gingles I*. Exhibit F (Peter Morrison, Ph.D. Deposition Transcript (August 20, 2021) at 15:14-20. As described more fully in Plaintiffs' accompanying motion to exclude the testimony of Dr. Morrison, Defendants have failed to provide any basis for such an untimely disclosure, and he should not be permitted to testify at trial. *See* Pl's Mem. Law Supp. Mot. to Exclude Expert Report and Testimony.

A. Plaintiffs' Illustrative Plans for the Arkansas Supreme Court Satisfy the Numerosity Requirement

The Arkansas Supreme Court consists of seven Justices elected state-wide. SUMF ¶ 1. Plaintiffs have demonstrated that, with respect to the Arkansas Supreme Court, it is possible to create a single-member majority-Black district in a seven-district plan based on either the U.S. Census Bureau's 2010 decennial Census or the 2019 U.S. Census Bureau's population estimates. SUMF ¶¶ 11, 21. On September 13, 2021, Mr. Cooper submitted a supplemental declaration with illustrative plans based on the 2020 Census data, demonstrating that, based on the 2020 Census data, a twelve-district Court of Appeals plan could be drawn with two majority-Black districts and a seven-district Supreme Court plan could be drawn with one majority-Black district.[3] *Id*. In Mr. Cooper's first illustrative plan for the Arkansas Supreme Court based on the 2010 decennial Census ("SC Plan 1"), he shows that the non-Hispanic Black citizen voting-age population ("NH BCVAP") in majority-Black District 7 is approximately 53.59%. SUMF ¶ 12. The majority-Black District 7 in SC Plan 1 is anchored in the Delta and Little Rock and includes twelve whole counties and the southern part of Pulaski County. SUMF ¶ 13. In Mr. Cooper's second illustrative plan for the Arkansas Supreme Court based on the 2019 Census estimates ("SC Plan 2"), he shows that the NH BCVAP in majority-Black District 7 is approximately 51.55%. SUMF ¶ 14. The majority-Black District 7 in SC Plan 2 encompasses the same counties as SC Plan 1 plus Mississippi County. SUMF ¶ 15.

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[3] Mr. Cooper's expert report was due on May 25, 2021, approximately three months prior to the release of the 2020 Census data. However, Mr. Cooper testified during his deposition that after reviewing the 2020 Census data released on August 12, 2021, any revised plans using that data would be "very similar" to the plans he drew based on the 2019 Census estimates. Mr. Cooper stated that, based on the 2020 Census data, he was "100 percent certain…that you can draw two majority Black appellate court districts…and that you can draw one out of seven Supreme Court districts." Exhibit E (William S. Cooper Deposition Transcript (August 17, 2021)) at 28:24-29:8.

Defendants offer no evidence in rebuttal. Dr. Morrison testified that with respect to SC Plan 1 and SC Plan 2, "it [was] not worth pursuing this any further to see whether [Mr. Cooper's] calculations are correct given the fact that my numbers came out with something in the same general vicinity of 51.55" percent. SUMF ¶ 20. Dr. Morrison further testified that he "would not dispute" Mr. Cooper's analysis and stated that "creating a single district that is majority Black appears to be doable one way or another." SUMF ¶ 19.

B. Plaintiffs' Illustrative Plans for the Arkansas Court of Appeals Satisfy the Numerosity Requirement

The Arkansas Court of Appeals currently has twelve judges elected from seven districts, two of which are single-member districts and five of which are multi-member districts. SUMF ¶¶ 2-3. Mr. Cooper's first illustrative plan for the Arkansas Court of Appeals based on the 2010 decennial Census ("AC Plan 1") features two majority-Black districts, Districts 7 and 8. SUMF ¶ 22. District 7 has a NH BCVAP population of 50.80% and consists of seven Delta counties as well as Lincoln County and a portion of Jefferson County. SUMF ¶ 23. District 8 has a NH BCVAP population of 51.12% and consists of portions of Little Rock, North Little Rock, and Jacksonville as well as a portion of Pulaski County and the portion of Jefferson County not included in District 7. SUMF ¶ 24.

Mr. Cooper's second illustrative plan for the Arkansas Court of Appeals based on the 2019 Census estimates ("AC Plan 2") features the same two majority-Black districts. SUMF ¶¶ 25-26. District 7 has a NH BCVAP of 50.17% and District 8 has a NH BCVAP of 50.58%. SUMF ¶ 26. In AC Plan 2, District 7 extends into Jefferson County and includes Drew and Bradley Counties as well as a portion of Mississippi County (unlike AC Plan 1 which includes Mississippi County in its entirety). SUMF ¶ 27. District 8 includes four more counties—Cleveland, Dallas, Calhoun, and Ouachita—under AC Plan 2 than it did in AC Plan 1. SUMF ¶

28. Under both AC Plan 1 and AC Plan 2, the Black voting-age populations in Districts 7 and 8 constitute a majority, whether the 2010 decennial Census data or the 2019 Census estimates are used.

Again, Defendants offer no evidence rebutting the data presented by Mr. Cooper. Although Dr. Morrison testified at deposition that he still had questions regarding Mr. Cooper's illustrative plans for the Arkansas Court of Appeals, he expressly disclaimed offering an opinion that the plans were not well drawn.[4] Mere questions concerning Mr. Cooper's plans are insufficient to create a genuine issue of fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (finding the issue of fact must be "genuine" and the movant's opponent "must do more than simply show that there is some metaphysical doubt as to the material facts").

III. Plaintiffs' Illustrative Plans for the Arkansas Court of Appeals and the Arkansas Supreme Court are Sufficiently Compact and Otherwise Comply with Traditional Redistricting Principles

In addition to the numerosity requirement, *Gingles I* requires that geographically compact districts be drawn (the "compactness requirement"). "[T]he first *Gingles* precondition requires a plaintiff to demonstrate that there is an effective and feasible remedy for the alleged vote dilution." *Harris v. City of Texarkana*, No. 4:11-CV-4124, 2015 WL 128576, at *5 (W.D. Ark. Jan. 9, 2015) (citing *Bartlett*, 556 U.S. at 19-20). "[A]t the initial stage of the *Gingles* precondition analysis, the plaintiffs are only required to produce a *potentially* viable and stable

[4] Exhibit B, ¶¶ 9, 14 ("I cannot yet conclude with scientific certainty that Black voting-age citizens are sufficiently numerous and geographically compact, consistent with the *Gingles 1* precondition, to comprise a majority of the citizen voting-age population in at least one Supreme Court district under a 7-district plan and two Court of Appeals districts under a 12-district plan."); Exhibit F at 12:22-13:12 ("I don't think I can say that I have formed a final opinion on [Mr. Cooper's] work."; "I have not completed my analysis.").

solution." *Bone Shirt*, 461 F.3d at 1019 (citing *Cottier v. City of Martin*, 445 F.3d 1113, 1117 (8th Cir. 2006) (emphasis in original)).

There is no rule requiring that in order to satisfy *Gingles I*, all traditional districting criteria must be satisfied. Nevertheless, traditional districting principles should be appropriately taken into account. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006) ("While no precise rule has emerged governing § 2 compactness, the inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries." (internal quotation marks and citations omitted)). Traditional redistricting principles include one-person one-vote, non-dilution of minority voting strength, contiguity, and respect for communities of interest. *See Redistricting Standards and Requirements*, ARK. BD. OF APPORTIONMENT, https://arkansasredistricting.org/about-the-process/redistricting-criteria-2/ (last visited Sept. 14, 2021); *see also* SUMF ¶ 35.

There is no genuine dispute that Plaintiffs' illustrative plans are sufficiently compact, or that they comply with traditional redistricting principles. Dr. Morrison specifically testified that he has no "quarrel" with the compactness of Mr. Cooper's districts or his application of redistricting principles. SUMF ¶ 37.

A. Geographical Compactness/Shape

Statistical measures of compactness and a visual comparison confirm that the majority-Black districts in Plaintiffs' illustrative plans are geographically compact. SUMF ¶ 38. Plaintiffs' illustrative plans also generally follow traditional boundaries, including existing county lines where possible. SUMF ¶ 39. For split counties, Mr. Cooper relied on "administrative boundaries as established in the 2010 [C]ensus" for precincts. SUMF ¶ 44. Mr. Cooper relied on existing precinct boundaries when splitting counties, splitting only a small number of counties, and did not split precincts. SUMF ¶¶ 39, 44.

Importantly, this method of splitting counties is commonplace in Arkansas. SUMF ¶ 42; *see also* Exhibit G (Timothy Humphries Deposition Transcript) at 194:21-195:2 (testifying that "as long as you split [counties] on precinct lines and as long as everybody…agreed that the precinct lines were correct,…that wouldn't be a problem."); Exhibit H (Leslie Bellamy Deposition Transcript) at 115:7-24 (testifying that even precinct splits were "normal course of business for election people."). Plaintiffs here have demonstrated that not one, but two sufficiently compact Court of Appeals districts are entirely feasible.

B. Contiguity

The districts proposed in Plaintiffs' illustrative plans are contiguous, meaning all portions of the district are physically connected. SUMF ¶ 49.

C. One Person, One Vote (Population Equality)

Plaintiffs' illustrative plans adhere to the one person, one vote, or population equality, principle. While judicial districts are not required to comply with this principle as a matter of constitutional law, *see Chisom,* 501 U.S. at 402-403 (1991), population equality is an important consideration in the judicial redistricting context. SUMF ¶ 51. The Supreme Court's "decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10%" is consistent with the principle of one person, one vote. *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *see also White v. Regester,* 412 U.S. 755, 761-64 (1973).

Plaintiffs' illustrative plans satisfy this criterion as the population deviation for each plan falls under 10%. For AC Plan 1 and AC Plan 2, the total population deviation is 8.50% (2010) and 9.28% (2019), respectively. SUMF ¶ 31. The current Court of Appeals Plan, adopted in 2003, has a total population deviation of 70.78%, according to 2019 Census estimates, resulting in an "extreme[] imbalance[]" that would constitute "an extreme malapportionment in non-judicial election plans." SUMF ¶ 32; *see also* Exhibit B (Revised Declaration of William S.

Cooper (June 15, 2021)), ¶ 12, 26 n. 6.[5] For SC Plan 1 and SC Plan 2, the total population deviation is even lower at 6.68% (2010) and 6.09% (2019), respectively. SUMF ¶ 18.

D. Maintaining Communities of Interest

Plaintiffs' illustrative plans respect communities of interest. Mr. Humphries stated that communities of interest was one of the redistricting principles that the Attorney General's Office considered when providing advice to the Court of Appeals Commission. SUMF ¶ 53. Mr. Humphries agreed that "interest" would include the economic, social, cultural, and religious interests of a community, whether that was a neighborhood or a larger area. *Id.*

Arkansas' Black population is "concentrated in an area extending from rural counties in the river-adjacent Delta and Lower Arkansas into Jefferson County and Little Rock (Pulaski County)." SUMF ¶ 7; *see also* Exhibit L (Excerpt from SOS0831-5006) at SOS2696 (testifying that a "lawyer of color who runs for a judicial position in the delta under one of the single district plans would be able to run, hypothetically, in the situation where he or she would be able to garner support from a contiguous block of voters of similar interests.").

Census data shows that Black Arkansans share similar socioeconomic characteristics in terms of poverty rates, level of education, unemployment rates, lack of homeownership, access to health insurance, and access to transportation. SUMF ¶ 54; *see also* Exhibit E (Williams S. Cooper Deposition Transcript) at 34:19-35:12 ("[N]on-Hispanic whites outperform African-Americans in Arkansas across most key measures of socioeconomic well-being.").

[5] The current imbalance is beyond even the thresholds set by Defendants in the last redistricting of judicial districts. Timothy Humphries testified that the Attorney General's Office made a "sort of formal decision" to "stick to that 15 percent" population deviation for judicial electoral plans, rather than the 10 percent applied to non-judicial election plans. Exhibit G at 45:12-22; *see also* Exhibit I (Excerpt from James Gingerich Deposition Exhibit 66) at 9 ("[A] decision was made to strive for no more than a fifteen percent deviation from an equal population distribution in the creation of the new districts.").

In his deposition, Mr. Humphries also identified geographic regions defined by common topographic features and industries as communities of interest historically considered during Arkansas' redistricting processes. SUMF ¶ 54. Mr. Humphries cited the "row crop agricultural" identity of the state's eastern Mississippi Delta and Grand Prairie regions compared to, for example, the "Southwest Arkansas timberland." *Id*. Plaintiffs' illustrative maps largely maintain the compositions of these regions, and therefore do little to disrupt relevant communities of interest therein.

E. Plaintiffs' Proposed Remedy Complies with Section 2

Finally, there is no question that Mr. Cooper developed Plaintiffs' illustrative plans to comply with Section 2 and provide a potential remedy for vote dilution under the current at-large system for the Arkansas Supreme Court and the current grossly unbalanced Court of Appeals Plan. The illustrative plans include two single-member majority-Black districts for the Arkansas Court of Appeals and a single-member majority-Black district for the Arkansas Supreme Court that could provide Black voters in Arkansas with an equal opportunity to elect Justices and judges of their choice. SUMF ¶¶ 11, 21.

The expert declaration and testimony of Dr. Morrison does not create a genuine dispute as to whether Plaintiffs' illustrative plans comply with Section 2 because Dr. Morrison offers no opinions on compliance with Section 2 or any redistricting principles. SUMF ¶¶ 10, 34, 37. As previously mentioned, Dr. Morrison testified that he has no "quarrel" with Mr. Cooper's application of redistricting principles. SUMF ¶ 37.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Partial Summary Judgment.

Dated: September 16, 2021

Respectfully submitted,

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