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

THE CHRISTIAN MINISTERIAL ALLIANCE, *et al.*,

PLAINTIFFS,

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

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

DEFENDANTS.

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Arkansas Constitutional Provisions & Statutes

Other Authorities

INTRODUCTION

Plaintiffs' motion for partial summary judgment seeks to reduce the first *Gingles* precondition to a math problem. Although that precondition certainly has a mathematical component, it requires Plaintiffs to show more than that they have hit a numerical target. To obtain partial summary judgment, Plaintiffs must show that they have not ignored other important districting principles in pursuit of numbers. Chiefly, they must show that their proposed districts contain a reasonably compact minority population. Plaintiffs have not made this showing. By admission of their own demographer, William S. Cooper, their proposed districts combine distinct communities of interest; namely, black voters living in urban Central Arkansas, and black voters living in rural communities to the south and to the east. Additionally, Plaintiffs' proposed districts do not respect the traditional boundaries for appellate-court districts in Arkansas, because they split counties across multiple districts. Worst of all, Mr. Cooper acknowledged that voters' race was his only justification for combining distinct communities and disregarding traditional boundaries. At very least, these facts warrant denial of Plaintiffs' motion for partial summary judgment. Because these facts are undisputed, however, they actually entitle Defendants to summary judgment, a point already explained in support of Defendants' motion for summary judgment. (*See* Defs. MSJ Br., Doc. 92 at 22-34.)

In addition to Defendants' entitlement to summary judgment on the first *Gingles* precondition, they are also entitled to summary judgment on the other two *Gingles* preconditions. The undisputed facts prove that black voters in Arkansas are not politically cohesive in appellate-court elections (*Gingles*'s second precondition); and also that white voters do not vote as a bloc to defeat black voters' preferred candidates for appellate judgeships (*Gingles*'s third precondition). *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). The only evidence Plaintiffs offer on these preconditions is that Judge Wendell Griffen lost three elections over a decade ago. (*See*

Defs. MSJ Br. 48-60.) And this Court has already said that this evidence "alone would be insufficient proof of racially polarized voting." (MTD Order, Doc. 36 at 14.) Besides, the undisputed facts also prove that black voters' preferred appellate-court candidates *usually prevail*. (*See* Defs. MSJ Br. 34-48.)

These undisputed facts entitle Defendants to summary judgment. And no trial evidence could change them. Therefore, the Court should deny Plaintiffs' motion for partial summary judgment. Instead, it should grant Defendants' motion for summary judgment and render judgment in favor of Defendants.

BACKGROUND

For nearly a century-and-a-half, all members of the Arkansas Supreme Court have been elected in statewide, at-large elections. *See* Ark. Const. amend. 80, sec. 2(A); *see also* Ark. Const. art. VII, sec. 6 (1874), *repealed*, Ark. Const. amend. 80, sec. 22(A) (2001). On this point, Arkansas is within the mainstream for state judicial elections. (*See* Defs. MSJ Ex. B, Doc. 91-2 (establishing that over 80% of States with elected supreme courts elect them on statewide basis).)

The Arkansas Court of Appeals, an intermediate appellate court with statewide jurisdiction, was created in 1979. *See* Act 208, sec. 1, 1979 Ark. Acts 467, 468 (Feb. 23, 1979). Since its creation, judges of the Court of Appeals have been elected from districts. *See id.* The current districts were established in 2003. *See* Act 1812, sec. 2, 2003 Ark. Acts 6955, 6956-57 (May 6, 2003). Each district consists of a number of whole counties. *See* Ark. Code Ann. 16-12-201. Arkansas has a longstanding policy in favor of keeping counties whole within the districts for the Arkansas Court of Appeals. When Court of Appeals plans were proposed that would split counties between districts, "the legislators who represented those counties . . . kept rejecting" those

plans. (Reeves Depo. at 43:8-17.[1]) They "did not want any county split." (*Id.*; *see id.* at 73:1-4 (recalling that they "didn't want to approve the plans that split the counties").)

As a result, the commission that drew the current districts expressly set a policy of maintaining intact counties. (*See* Ct. of App. Apportionment Comm'n, *Report to the Arkansas General Assembly* (Jan. 13, 2003), Doc. 88-9 at ECF p.8 ("The members noted that, as a matter of public policy, an attempt should be made to maintain county lines and to keep districts as small as possible.").) In fact, this commission refused to consider "any plan which splits counties." (Minutes of July 17, 2002 Meeting, Ark. Ct. of Appeals Apportionment Comm'n, Ex. 56 to Depo. of Olan Reeves;[2] *see* Reeves Depo. at 113:13-114:11 (introducing exhibit).) And prior iterations of this commission had made the same commitment to "follow[] traditional political boundaries (existing county and congressional district lines)" in its recommendation to the Arkansas General Assembly. (Ct. of App. Apportionment Comm'n, DBV DRAFT 02-20-97, *Report to the Arkansas General Assembly* (draft of Feb. 20, 1997), Doc. 88-11 at ECF pp.11-12; *see* Humphries Depo. at 187:12-18, 195:3-8 (noting that this document is a draft that may not reflect the final version sent to the General Assembly).[3])

Plaintiffs have proposed plans, drawn by their demographer, William S. Cooper, for Arkansas's appellate courts that treat Little Rock and most of Arkansas to the east and the south as one homogenous community, and that do not honor Arkansas's policy against splitting counties. Mr. Cooper has proposed two illustrative majority-black Supreme Court districts. (Revised

[1] Excerpts from the transcript of the deposition of Olan Reeves are attached to this brief as Exhibit S.

[2] These meeting minutes are attached to this brief as Exhibit T.

[3] The transcript of the deposition of Tim Humphries is in the record as Doc. 88-7.

Cooper Decl. at 30, 32 (Figure 15 & Figure 17).)[4] They only differ in that one contains Mississippi County and the other does not. Both are "anchored in the Delta and Little Rock," the two areas of the State with the largest population of black Arkansans. (*Id.* ¶ 65.) Mr. Cooper connects Little Rock with the Delta via Jefferson County. (*Id.*) Similarly, for the Arkansas Court of Appeals, both of Mr. Cooper's illustrative plans propose a District 7 that connects Pine Bluff to the Delta. (*Id.* at 20, 25 (Figure 8 & Figure 12).) And, in the second illustrative plan, another majority-black district, District 8, connects a piece of Pulaski County to a series of rural counties—Calhoun, Cleveland, Dallas, Ouachita—via a narrow land bridge through Jefferson County. (*Id.* at 25 (Figure 12).)

Mr. Cooper's proposed districts would combine distinct communities on the basis of their race. Little Rock is Arkansas's urban capital city. (*See, e.g.*, Cooper Depo. at 71:8-16.[5]) But the Delta is one of "[t]he three Rural regions of Arkansas." University of Arkansas System Division of Agriculture, *Rural Profile of Arkansas* 7 (2021).[6] Jefferson County is sometimes considered together with Little Rock as part of urban Central Arkansas, other times as part of the Delta. *See*

[4] The revised declaration of Mr. Cooper is in the record as Doc. 88-2.

Plaintiffs note that Mr. Cooper submitted a third declaration, his "supplemental" declaration, three days before the dispositive-motion deadline in this case and over three months after the deadline for case-in-chief expert disclosures. (*See* Pls. MSJ Br. 5 & n.3.) Plaintiffs did not even mention the possibility of a supplemental declaration from Mr. Cooper until September 9, just one week before the dispositive-motion deadline. Defendants had no opportunity to question Mr. Cooper regarding this supplemental declaration, nor time to coordinate with an expert who could review it. Therefore, the Court should not allow Plaintiffs to rely on this untimely declaration at the summary-judgment stage. *See Dorchester Mins., LP v. Chesapeake Expl., LLC*, No. 4:12-CV-00461-JLH, 2017 WL 743743, at *1 (E.D. Ark. Feb. 24, 2017) (excluding expert report served "[n]early two months after the deadline for expert reports had passed and only a month before trial was to commence"); *see also Garrison v. New Fashion Pork LLP*, No. 18-CV-3073, 2020 WL 1318806, at *2 (N.D. Iowa Jan. 23, 2020) (same, supplemental report served "literally on the eve of the discovery deadline, and about two weeks before the dispositive motion deadline"); *Nunez v. Dolgencorp, LLC*, No. 2:12-CV-630, 2013 WL 2458736, at *3 (W.D. La. June 6, 2013) (same, new material in supplemental report served "[o]n the eve of summary judgment, far past the expert report deadline").

[5] The transcript of Mr. Cooper's deposition is in the record as Doc. 88-5.

[6] https://www.uaex.edu/publications/pdf/MP564.pdf.

id. at 2. (*See also* Humphries Depo. at 102:21-25.) At least some people who live in and around Jefferson County consider this area as part of an entirely different region, called the Grand Prairie. (Humphries Depo. at 103:6-12.) And some counties that Mr. Cooper combines into his proposed majority-minority districts (*e.g.*, Dallas and Cleveland Counties) receive still different regional labels, like the Coastal Plains or the Highlands. *See Rural Profile of Arkansas*, *supra*, at 2. (*See also* Cooper Depo. at 71:22-72:5 (acknowledging these counties are rural).)

Mr. Cooper made no effort to justify combining these distinct communities into a single Arkansas Supreme Court district. For example, when asked what black voters in Little Rock had in common with those in the Delta, Mr. Cooper could come up with nothing other than the fact they live in Arkansas and are generally familiar with each other:

> Q: What do the voters in Little Rock that you've included in District 7 have in common with the voters in Dallas, Chicot or Crittenden Counties?
>
> A: Well, the[y']re Arkansans and they live in the South and they are familiar even in Pulaski County with the Delta and its traditions and vice versa. Most people who live in the Delta realize that Little Rock is the capital and probably visit it, have family there because it's a big county, populous county. So there are bound to be multiple avenues of communication between people who live along the Mississippi River and the traditional Delta with people who live in Jefferson and Pulaski Counties. There's just nothing unusual or absurd about dividing up the state of Arkansas in the way I have, but certainly there would be many other options, many other configurations that one could conjure up. This is just an illustrative plan, demonstrative plan, not intended to be a remedial plan.

(*See* Cooper Depo. at 90:17-91:9.) In other words, Mr. Cooper claims that, because black voters in the Delta and Little Rock are familiar with each other, their interests are sufficiently aligned to justify placing them in the same district, despite the differences he acknowledged between these two regions.

Along with combining voters from distinct communities of interest to hit his desired numerical targets, Mr. Cooper also disregards the principles that have traditionally guided Arkansas

in appellate-court districting (which it has only historically done for the Arkansas Court of Appeals). As already discussed, Arkansas has not traditionally split counties between different appellate-court districts. Yet all of Mr. Cooper's proposed districting plans would split counties. His proposals for the Arkansas Supreme Court would both split Pulaski County along a jagged line northwest to southeast, with the southeastern half of Pulaski County placed in Plaintiffs' proposed District 7, his illustrative majority-minority district. (Revised Cooper Decl. at 30, 32 (Figure 15 & Figure 17).) As before, Mr. Cooper offered no justification other than the race of the voters in these areas for this county split. Indeed, his stated purpose was that "in order to have a majority Black Supreme Court district, you must include the Black population in Little Rock as well as adjacent areas in the south and central part of Pulaski County," while leaving white voters in the county out. (Cooper Depo. at 85:10-13.)

Mr. Cooper's proposals for the Arkansas Court of Appeals hinge on similar county splits. Both include a proposed District 8 that would be majority-minority and splits Pulaski County while also splitting Jefferson County in such a way as to include Pine Bluff within proposed majority-black District 7 and leaving essentially the rest of the county out. (Revised Cooper Decl. at 20, 22, 24, 25 (Figure 8, Figure 10, Figure 11, & Figure 12).) One of the two proposals for District 7, meanwhile, also splits Mississippi County. (*Id.* ¶ 56.) And again, Mr. Cooper acknowledged that voters' race motivated his decision to split these counties. "[M]ost of the population that lives in the North Central, West Central, and Western part of Pulaski County are white and most of the population in the areas around Little Rock and further South and East is Black, so the county is divided in that fashion." (Cooper Depo. at 51:12-20.) Similarly, "if you don't include Jefferson County in District 7, then there's not enough population to create a majority Black District 7, so Jefferson County will have to be split in order to create two majority

Black districts." (*Id.* at 52:11-15.) And the purpose of splitting Mississippi County in the second proposed District 7, too, was "[p]rimarily to ensure that District 7 is majority black of the voting age population," by dividing Mississippi County between its "majority black" precincts, and "areas that are overwhelmingly white." (*Id.* at 54:13-55:1.)

Thus, according to Mr. Cooper's plan, voters are largely placed within or without a given district based on their race. He has combined distinct regions of Arkansas on the basis of race. And he has also split voters within particular counties on the basis of race. There can be no question, therefore, that race was the predominant factor guiding Mr. Cooper when he drew Plaintiffs' proposed maps.

SUMMARY-JUDGMENT STANDARD

Plaintiffs have not proved that the undisputed facts entitle them to partial judgment as a matter of law. *See* Fed. R. Civ. P. 56. To the contrary, the undisputed facts demonstrate, as a matter of law, that Plaintiffs' proposed districts for the Arkansas Supreme Court and the Arkansas Court of Appeals are not "reasonably compact" and thus fail *Gingles*'s first precondition. *See LULAC v. Perry*, 548 U.S. 399, 430 (2006). (*See also* Defs. MSJ Br. 22-33 (detailing why Defendants are entitled to judgment as a matter of law on this point.) At very least, the undisputed material facts demonstrate that a rational trier of fact could find that Plaintiffs have failed to satisfy the first *Gingles* precondition, by combining distinct communities of interest and ignoring traditional redistricting principles. And that suffices to defeat Plaintiffs' motion for partial summary judgment, particularly because this Court must view the facts in the light most favorable to Defendants. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc).

In any event, nothing in Plaintiffs' motion for partial summary judgment changes the undisputed fact that black voters' preferred candidates usually win elections for the Arkansas Supreme Court and Arkansas Court of Appeals. (*See, e.g.*, Defs. MSJ Br. 47 (summarizing the undisputed statistics regarding the success of black voters' preferred candidates).)

ARGUMENT

I. Plaintiffs' motion must be denied as to the Governor and the Attorney General, because they are not proper defendants.

Defendants have already explained why Plaintiffs can obtain no relief from the Governor and the Attorney General, neither of whom are proper defendants to this lawsuit. (*See* Defs. MSJ Br. 16-20.) That is because neither the Governor nor the Attorney General has any connection to enforcing the laws that Plaintiffs challenge. Thus, *Ex parte Young*, 209 U.S. 123, 155-56 (1908), does not apply, and sovereign immunity bars Plaintiffs from suing these two Defendants. For the same reason—the lack of any connection between enforcement of the challenged laws, on the one hand, and the Governor and the Attorney General, on the other hand—Plaintiffs' alleged injury was not even allegedly caused by these Defendants, and Plaintiffs therefore lack standing to sue either of them.

With no connection to enforcement of the challenged laws, the Governor and the Attorney General have been "sued merely 'as a representative of the state' in an impermissible attempt to 'make the state a party.'" *Dig. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 960 (8th Cir. 2015) (quoting *Ex parte Young*, 209 U.S. at 157); *see Church v. Missouri*, 913 F.3d 736, 749 (8th Cir. 2019) (noting that a "governor's general-enforcement authority is not 'some connection' to enforcement" of a particular law, unless "that authority gives the governor *methods* of enforcement" for that law); *Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017) (requiring "some connection to the enforcement of the challenged laws"). Plaintiffs do not even allege

a connection between the Governor, the Attorney General, and enforcement of any election law. (*See, e.g.*, Second Am. Compl., Doc. 37 ¶ 12 (citing only the Governor's general duty to execute Arkansas law and power to sign legislation); *id.* ¶ 14 (citing only the Attorney General's law-enforcement duties and oath to support the Constitution).) In a different lawsuit against the Arkansas Governor and Attorney General, the Eighth Circuit has expressly held that allegations such as these do not suffice to make these two officials proper defendants under *Ex parte Young*. *See Dig. Recognition Network*, 803 F.3d at 960-62. And there is no evidence here of any connection beyond the insufficient allegations in the complaint.

The standing analysis is essentially the same. *See id.* at 957 ("In a case like this one, the questions of Article III jurisdiction and Eleventh Amendment immunity are related."). Absent a connection to enforcement of the challenged laws, there is no "'causal connection' between the injury and the defendant[s'] conduct." *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Similarly, "the injury of which [Plaintiffs] complain[] is not 'fairly traceable' to either official." *Id.* Nor is it "likely that [Plaintiffs'] injury would be 'redressed by a favorable decision.'" *Id.* at 958 (quoting *Lujan*, 504 U.S. at 561).

The undisputed fact is that neither the Governor nor the Attorney General has any connection with enforcement of the laws that Plaintiffs challenge. This fact is a fatal problem for Plaintiffs' claims against them, whether conceived of as a sovereign-immunity problem or a standing problem. Therefore, as to these two Defendants, the Court should deny Plaintiffs' motion for partial summary judgment and grant Defendants' own motion.

II. Because Plaintiffs have not proposed any reasonably compact majority-minority districts, their plans do not satisfy the first *Gingles* precondition.

Plaintiffs have failed, as a matter of law, to prove the second and third *Gingles* preconditions. (*See* Defs. MSJ Br. 34-53.) Their arguments on the first *Gingles* precondition are, therefore, irrelevant. Even so, they have also failed, as a matter of law, to prove this precondition. The question whether "minorities make up more than 50 percent of the voting-age population in" Plaintiffs' proposed districts is only the beginning. *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009) (plurality op.); *see LULAC v. Perry*, 548 U.S. 399, 435 (2006) ("The mathematical possibility of a racial bloc does not make a district compact."). Plaintiffs must also show that their districts are "reasonably compact." *LULAC*, 548 U.S. at 430.

Plaintiffs' proposed districts are not reasonably compact, because their demographer, William Cooper, built these districts solely on the basis of voters' race. This is evident from two aspects of his districts. First, Mr. Cooper proposed combining different communities of interest, for no other reason than their shared race. Second, he split counties into different appellate-court districts—something Arkansas has traditionally avoided—and he admitted that he split these counties because of the race of the voters within them. On the basis of similar errors by Mr. Cooper, in a case about Alabama's appellate-court system, the district court concluded that a proposal of his could not satisfy the first *Gingles* precondition. *See Ala. State Conf. of NAACP v. Alabama*, — F. Supp. 3d —, No. 2:16-CV-731, 2020 WL 583803, at *21-25 (M.D. Ala. Feb. 5, 2020). The Court should reach the same conclusion here.

A. By combining distinct communities of interest on the basis of race, Plaintiffs' proposed districts fail to show group compactness under *Gingles*.

The first *Gingles* precondition refers not just "to the compactness of the contested district" but also "to the compactness of the *minority population*" within the district. *LULAC*, 548 U.S. at 433 (quotation marks omitted) (emphasis added). When a proposed district "combines

two farflung segments of a racial group with disparate interests" (often called "communities of interest"), such a district does contain a reasonably compact minority population. *Id.* The proposed district in *LULAC* exemplifies this. It combined "the Latino community near the Mexican border and the one in and around Austin," Texas—two communities with "different characteristics, needs, and interests" that could "not be disregarded in the interest of race." *Id.* at 434. Because it combined different communities of interest, the minority population in the *LULAC* district was not reasonably compact. *Id.* at 435.

Like the proposed districts in *LULAC*, Plaintiffs' proposed districts for the Arkansas Supreme Court and the Arkansas Court of Appeals, drawn by Mr. Cooper, combine distinct minority communities and disregard their different characteristics in the interest of race. To create majority-minority districts, Mr. Cooper proposes combining black voters in urban Central Arkansas with black voters in rural southern and eastern Arkansas, especially the Delta region. (*See* Revised Cooper Decl. at 20, 25 (Figure 8 & Figure 12) (proposed districts for Arkansas Court of Appeals); *id.* at 30, 32 (Figure 15 & Figure 17) (same, Arkansas Supreme Court).) Throughout his deposition, Mr. Cooper acknowledged the important differences between these regions. Describing "the role of agriculture" in the Delta counties, for example, he said: "I don't know what else people would necessarily do in some of these Mississippi River counties other than light industry or agriculture." (Cooper Depo. at 89:15-21; *see id.* at 88:13-90:2.) By contrast, Mr. Cooper agreed that there would not be "much in the way of agriculture within the city of Little Rock." (*Id.* at 88:7-8.)

Other witnesses agreed that Little Rock is a different community of interest from the Delta. Most importantly, Tim Humphries, who was for years Arkansas's lead election lawyer, distinguished Central Arkansas from the Delta. (Humphries Depo. at 102:16-103:22.) And even

within the Delta, Humphries testified that people in Jefferson County and other parts of eastern Arkansas consider themselves a distinct region from the Delta, sometimes called the Grand Prairie region. (*Id.*)

Mr. Cooper's proposed districts thus join at least two, and perhaps three, distinct communities of interest. At very least, Mr. Cooper's and Mr. Humphries's testimony leaves a material fact question for trial about whether the proposed districts span distinct communities of interest. That makes this case similar to *Luna v. County of Kern*, No. 1:16-CV-00568, 2017 WL 2379934 (E.D. Cal. June 1, 2017), in which the district court denied the plaintiffs' motion for partial summary judgment on the first *Gingles* precondition. There, the plaintiffs had offered testimony suggesting that all Latinos in their proposed district "face[d] similar issues." *Id.* at *7. But the defendants "point[ed] to evidence tending to distinguish the communities in" the district. *Id.* Defendants here have, at least, presented sufficient evidence that black voters in Little Rock, Jefferson County, the Delta, and the Grand Prairie are part of distinct communities of interest to defeat Plaintiffs' motion for partial summary judgment. *See id.* (denying plaintiffs' motion for partial summary judgment, "[b]ecause the evidence presented by the parties on summary judgment reveals a material dispute about whether a hypothetical second majority-Latino district would encompass a single community of interest").

To be clear, Defendants in fact have shown that the undisputed evidence actually entitles them to summary judgment on the first *Gingles* precondition. Regardless of the precise contours of the Delta or the Grand Prairie—or any other community of interest in Arkansas—Mr. Cooper could offer no justification for combining voters who live in urban Little Rock with voters who live in the rural counties to the south and east of Little Rock. He was asked what black voters in Little Rock "have in common with the voters in Dallas, Chicot, or Crittenden Counties."

(Cooper Depo. at 90:17-19.) He answered: "Well, the[y']re Arkansans and they live in the South and they are familiar even in Pulaski County with the Delta and its traditions and vice versa." (*Id.* at 90:20-22.) He added that "[m]ost people who live in the Delta realize that Little Rock is the capital and probably visit it, have family there because it's a big county, populous county," and that people in the Delta have "multiple avenues of communication" with "Jefferson and Pulaski Counties." (*Id.* at 90:22-91:4.) Thus, according to Mr. Cooper, all that black voters in the Delta have in common with black voters in Central Arkansas is that they are generally familiar with each other. Mr. Cooper never explained any shared "economic, social, cultural, [or] religious" interests that bind these communities together—the sorts of interests Mr. Humphries testified were traditionally considered for redistricting in Arkansas. (Humphries Depo. at 101:14-102:6.)

The undisputed facts, therefore, make this case exactly like *LULAC*, where the Supreme Court considered a Texas district combining "the Latino community near the Mexican border and the one in and around Austin," the state capital. 548 U.S. at 434. The Court held there that it was error to combine those two Latino communities. *See id.* ("Legitimate yet differing communities of interest should not be disregarded in the interest of race."). Mr. Cooper has not made any attempt to show that the rural and urban populations he has combined would comprise a "shared community of interest." *See Ala. State Conf. of NAACP*, 2020 WL 583803, at *24 (criticizing Mr. Cooper for combining black voters in urban Birmingham, Alabama with "the Black Belt region," which "is decidedly rural"). Indeed, his tenuous "explanation" for combining these distinct regions "reveals that maintaining communities of interest, if considered at all, was subordinated to the necessity of creating an African-American, voting-age population in [his proposed districts] with a 50% plus one voting-age population." *Id.*

Contrary to Plaintiffs' claim, nothing in the deposition of Dr. Peter Morrison (Defendants' expert demographer) changes the undisputed fact that Mr. Cooper has combined distinct communities of interest, and done so with no justification other than that black voters in the Delta and Little Rock are familiar with each other. Dr. Morrison did not testify "that he has no 'quarrel' with the compactness of Mr. Cooper's districts or his application of redistricting principles." (Pls. MSJ Br. 8.) In his deposition, Dr. Morrison was asked whether he had "any quarrel with [Mr. Cooper's] *intent to apply* these principles." (Morrison Depo. at 54:5-7 (emphasis added).[7]) Plaintiffs' counsel never asked Dr. Morrison whether Mr. Cooper had *correctly applied* traditional redistricting principles. (*See id.* at 53:13-54:19.) Because Mr. Cooper has "fail[ed] to account for the differences between people of the same race," the minority population in his proposed districts is not reasonably compact. *LULAC*, 548 U.S. at 434.

B. By ignoring traditional boundaries in favor of race-based district lines, Plaintiffs' proposed districts are also not geographically compact under *Gingles*.

Gingles's first precondition also requires that the geography of Plaintiffs' proposed districts be compact. Although "no precise rule has emerged governing" the inquiry into geographical compactness, the Court should consider "traditional district principles" like "maintaining . . . traditional boundaries." *LULAC*, 548 U.S. at 433 (quotation marks omitted). Plaintiffs' proposed districts do not maintain Arkansas's traditional boundaries. Still worse, the districts violate the rule that "[a]ny remedy drawn in order to correct a § 2 violation should 'steer clear of the type of racial gerrymandering proscribed in *Miller* [*v. Johnson*, 515 U.S. 900 (1995)].'" *Stabler v. Cnty. of Thurston*, 129 F.3d 1015, 1025 (8th Cir. 1997) (quoting *Harvell v. Blytheville Sch.*

[7] The transcript of the deposition of Dr. Peter Morrison is in the record as Doc. 88-6.

Dist. No. 5, 71 F.3d 1382, 1391 (8th Cir. 1995) (en banc)). This is another reason to deny Plaintiffs' motion.

Plaintiffs' proposed districts violate the principle that traditional boundaries be maintained by splitting counties between appellate-court districts. They claim that "splitting counties is commonplace in Arkansas." (Pls. MSJ Br. 9.) But Arkansas has never split counties across appellate-court districts. (*See, e.g.*, Reeves Depo. at 43:8-17, 73:1-4; 2003 Report to General Assembly, *supra*, Doc. 88-9 at ECF p.8; Draft 1997 Report to General Assembly, *supra*, Doc. 88-11 at ECF pp.11-12.) Despite this well-established districting preference in Arkansas, every plan proposed by Mr. Cooper would require splitting at least one county across multiple appellate-court districts. Both plans for the Arkansas Supreme Court would split Pulaski County. (Revised Cooper Decl. at 30, 32 (Figure 15 & Figure 17).) And both plans for the Arkansas Court of Appeals would similarly split Pulaski County, while additionally splitting Jefferson County. (*Id.* at 20, 22, 24, 25 (Figure 8, Figure 10, Figure 11, & Figure 12).) One of Mr. Cooper's proposals would also split Mississippi County. (*Id.* ¶ 56.) Thus, it is undisputed that Plaintiffs have not maintained the traditional boundaries for Arkansas's appellate-court districts.

Because Arkansas's "local districting preferences are certainly relevant to consideration of the issue of compactness," *Luna*, 2017 WL 2379934, at *8, this undisputed fact should suffice to deny Plaintiffs' motion for partial summary judgment. Another court in this District treated it as important when it denied leave to amend after dismissing a complaint challenging Arkansas's congressional districts. *See Larry v. Arkansas*, No. 4:18-CV-00116-KGB, 2018 WL 4858956, at *5 (E.D. Ark. Aug. 3, 2018) (noting, among other problems, that the "proposed district appears to divide multiple counties"), *appeal dismissed for want of jurisdiction*, 139 S. Ct. 641 (Dec. 10, 2018).

Indeed, because Mr. Cooper "did not articulate any reasoned justification for splitting" these counties, which have not historically been split between multiple districts, the Court should grant Defendants' own motion for summary judgment. *Rodriguez v. Harris Cnty., Tex.*, 964 F. Supp. 2d 686, 753-54 (S.D. Tex. 2013), *aff'd sub nom. Gonzalez v. Harris Cnty., Tex.*, 601 F. App'x 255 (5th Cir. 2015). In *Rodriguez*, a witness's similar failure to explain the reasons for splitting a city between districts, led the court to find, after a bench trial, that the plaintiffs had failed to satisfy the first *Gingles* precondition. *See id.* at 746-47, 753-54. Indeed, the undisputed facts here are worse here than in *Rodriguez*. More than just failing to "explain the reason he split" counties, *id.* at 747, Mr. Cooper's testimony proves that "race was the predominant factor motivating [his] decision to place a significant number of voters within or without a particular district," *Miller v. Johnson*, 515 U.S. 900, 916 (1995). (*See, e.g.*, Cooper Depo. at 51:9-53:12, 54:13-55:24, 58:5-12.)

When asked to justify how he had split Pulaski County in his districts for the Arkansas Supreme Court, he testified that "in order to have a majority Black Supreme Court district, you must include the Black population in Little Rock as well as adjacent areas in the south and central part of Pulaski County," while leaving white voters in the county out. (Cooper Depo. at 85:10-13.) Mr. Cooper provided a similar justification for splitting Pulaski County in his proposed districts for the Arkansas Court of Appeals: "most of the population that lives in the North Central, West Central, and Western part of Pulaski County are white and most of the population in the areas around Little Rock and further South and East is Black, so the county is divided in that fashion." (*Id.* at 51:12-20.) Likewise, Mr. Cooper was "fairly certain" that "if you don't include Jefferson County in District 7, then there's not enough population to create a majority Black District 7, so Jefferson County will have to be split in order to create two majority Black

districts." (*Id.* at 52:11-23.) And he acknowledged that he divided Mississippi County between its "majority black" precincts" and its "areas that are overwhelmingly white." (*Id.* at 54:13-55:1.) He did this "[p]rimarily to ensure that District 7 is majority black of the voting age population." (*Id.*)

Because of Mr. Cooper's testimony, it is undisputed that race was the predominant (indeed, sole) factor motivating his choice to place a substantial number of voters within—and another substantial number of voters without—his proposed districts. *See Miller*, 515 U.S. at 916. Not only that, race motivated him in a way that violated traditional redistricting principles by splitting counties. *See Cooper v. Harris*, 137 S. Ct. 1455, 1469 n.3 (2017) (describing district that "*did* conflict with traditional redistricting principles—for example, by splitting numerous counties and precincts"). Therefore, the undisputed facts prove that Mr. Cooper's proposed districts amount to racial gerrymandering. *See id.* at 1469 (discussing "textbook example" of racial gerrymandering; namely, drawing district borders to "tak[e] in tens of thousands of additional African-American voters"). Therefore, Plaintiffs' proposed districts violate the Eighth Circuit's rule that "[a]ny remedy drawn in order to correct a § 2 violation should 'steer clear of the type of racial gerrymandering proscribed in *Miller*.'" *Stabler*, 129 F.3d at 1025 (quoting *Harvell*, 71 F.3d at 1391).

No evidence that Plaintiffs might present at trial can change these undisputed facts. Therefore, the Court should deny their motion for partial summary judgment and instead grant Defendants' own motion for summary judgment.

C. The one-person-one-vote principle does not compensate for Plaintiffs' failure to show reasonable compactness.

Plaintiffs argue that the one-person-one-vote (or "population equality") principle supports Mr. Cooper's proposed plans. (*See* Pls. MSJ Br. 9-10.) But this argument misunderstands the

role of the population-equality rule. For one thing, "the concept of one-man, one-vote apportionment does not apply to the judicial branch of the government." *Chisom v. Roemer*, 501 U.S. 380, 389 (1991) (quotation marks omitted). And it is undisputed that this principle has not traditionally guided Arkansas's creation of appellate-court districts. (*See* Pls. MSJ Br. 9-10 & n.5.) In the Alabama judicial-districting case, this same fact (among other compactness problems) drove the district court to reject a proposal by Mr. Cooper. There, Mr. Cooper failed to offer any "reasons peculiar to Alabama for configuring appellate judicial districts of roughly equal population," a failure he repeats in this case regarding Arkansas. *Ala. State Conf. of NAACP*, 2020 WL 583803, at *24. There and here, "Mr. Cooper's adherence to the principle of one-person, one-vote, without explanation for doing so, is problematic." *Id.*

Anyway, even in legislative districting, when population equality is required, it is "not a factor to be treated like other nonracial factors when a court determines whether race predominated over other, 'traditional' factors in the drawing of district boundaries." *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 273 (2015). That is because "the 'predominance' question concerns *which* voters [the proposed plan] decides to choose" when equalizing population, "and specifically whether [it] predominantly uses race as opposed to other, 'traditional' factors when doing so." *Id.* In other words, the person creating a plan will have to include some voters and exclude others to equalize population. When that person chooses whom to include and whom to exclude on the basis of voters' race, the result is a plan where "race was the predominant boundary-drawing consideration." *Id.* at 274.

Because the undisputed facts show that Mr. Cooper predominantly relied on race to draw his proposed districts, his proposal, as a matter of law, fails the first *Gingles* precondition. This

Court should, therefore, deny Plaintiffs' motion for partial summary judgment and instead grant summary judgment for Defendants.

CONCLUSION

For these reasons, Defendants respectfully request that the Court deny Plaintiffs' motion for partial summary judgment, grant Defendants' motion for summary judgment, and render judgment in favor of Defendants.

Dated: October 7, 2021

Respectfully submitted,

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

THE CHRISTIAN MINISTERIAL ALLIANCE, et al.,

Plaintiffs,

v. Case No. 4:19-cv-402-JM

ASA HUTCHINSON, et al.,

Defendants.

VIDEOTAPED ORAL DEPOSITION

OF

OLAN REEVES

(Taken June 30, 2021, at 9:11 a.m.)

REPORTED BY: Kristi Gray

EXHIBIT
S

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INDEX

EXHIBITS

CAPTION

ANSWERS AND VIDEOTAPED ORAL DEPOSITION OF OLAN REEVES, a witness produced at the request of the Plaintiffs, taken in the above-styled and numbered cause on the 30th day of June, 2021, before Kristina R. Gray, Arkansas Supreme Court Certified Court Reporter #725, at 9:11 a.m., at the offices of Mays, Byrd & Associates, P.A., 212 Center Street, Seventh Floor, Little Rock, Arkansas, pursuant to the agreement hereinafter set forth.

* * * * * * * * * *

STIPULATIONS

IT IS STIPULATED AND AGREED by and between the parties through their respective counsel that the videotaped oral deposition of OLAN REEVES may be taken for any and all purposes according to the Federal Rules of Civil Procedure.

P R O C E E D I N G S

THE VIDEOGRAPHER: We are on the record for the videotaped deposition of Olan Reeves taken in the case captioned Christian Administrative Alliance, et al, vs. Asa Hutchinson, et al, filed in the United States District Court for the Eastern District of Arkansas Central Division, case number 4:19-cv-402-JM. Today's date is June 30, 2021, and we're on the record at 9:11 a.m. Will counsel please state your appearances for the record?

MR. GREENBLATT: This is Jonathan Greenblatt, retired partner from Shearman & Sterling for the plaintiff.

MS. BELL: This is Alicia Bell, associate at Shearman & Sterling for the plaintiffs.

MS. MERRITT: Jennifer Merritt, Arkansas Attorney General's Office for the defendants.

THE VIDEOGRAPHER: Court reporter will now swear the witness.

WHEREUPON,

OLAN REEVES,

Having been first duly sworn, was

impossible to draw such a plan in a manner that would comport with the constitutional prohibition against racial gerrymandering recently set out in Shaw vs. Reno, et cetera."

He concludes that legal portion of it on page 2 of the document and page ending 82 of the Bates stamp. I'll go through what the Bates stamps were in a minute for the record. This says, "There are certain cases that won't be decided until next year. Until then, the law in this area will be unclear as the courts are divided on the meaning of Shaw."

So is this another indication of where the commission is relying on Mr. Humphries' view of the law to be guided by what it can and can't propose to the legislature?

A I don't know. I'd like to know what they said when they got this.

Q Okay. We may have some more minutes.

A I don't remember that.

Q You don't know about it one way or the other?

A No. I don't remember that discussion.

Q If you go -- if we go back to Exhibit -- if we go back to Exhibit 46, you will see the section -- if you take a second, you'll see there's numerous plans being discussed here. And Plan G, which is discussed at the

bottom of 954, provides for ten single-judge districts and one two-district judge districts. The plan does not split any counties between districts. So this plan is not splitting counties. The implication being that some of the other plans do split counties. And are you aware at that time anyway whether there was any prohibition in the law against splitting counties?

A No, but the legislators who represented those counties and voted on the plans did not want any county split. I remember that. That's why they kept rejecting some of these. They didn't want counties split and they wanted certain counties in certain districts that wasn't going to work out. But yes, I remember. That was from the legislative pushback. I don't remember any legal thing dealing with that. It's not in the constitution, I'll tell you that, that they can't be split.

Q And it's not in the case law either that they can't be split?

A No, not that I'm aware of. No.

Q Okay. I think we've mostly -- there's a term, and it comes up by the way in the commission that you were involved in, too, but I'm going to show it to you in this document, Exhibit 46. And it's on 959 of that document. There's a term that pops up. You'll see it

A Yeah.
Q 2/20/97.
A Okay.
Q So do you agree that it appears that Exhibit 52 is the memo being referred to in Exhibit 51?
A I would think so just based on the dates.
Q And if you look at the first paragraph of Exhibit 52, it says, "This memo is to update the Court of Appeals Redistricting Commission on two recently decided US Supreme Court cases dealing with redistricting to analyze pending Court of Appeals redistricting proposals in light of those cases."
If you go to the third paragraph of Exhibit 52, you'll see that Mr. Humphries is saying, "In my opinion, Shaw II and Vera indicate it would be unconstitutional for the legislature to ignore county lines and other political subdivision boundaries to create any majority black districts unless the state can show such districts were necessary to avoid a violation of the voting rights act."
And then -- first of all, is that consistent with your understanding as well?
A Yes.
Q Okay. Is that an issue that you discussed at times with Mr. Humphries?

A I'm sure we did because that was the complaint we were getting from legislators as to why they didn't want to approve the plans that split the counties. That was their objection.

Q Their objection was what?

A They didn't want to split counties.

Q Right. They didn't want to split counties, not because the constitution or case law said you couldn't but for other reasons?

A Yeah, yeah. You know, and this says they don't have to ignore county lines.

Q You mean respect county lines?

A In my opinion, it would be unconstitutional to ignore county lines. See, they're saying we don't have to ignore them because it would be unconstitutional. We can -- we can consider them.

Q You don't have to ignore them, but you can redraw them if necessary to address a voting rights act. You agree with that?

A Yes, I would agree with that.

Q A voting rights act violation.

A Correct.

Q Okay. And do you know why the legislature was taking the view that it didn't want to change the county lines?

A They didn't give me the why. They just said they don't want to.

Q Do you remember any of the theys that said that?

A Oh, no. No.

Q No specific people?

A No, I couldn't tell you that.

Q Who -- do you remember anyone being particularly prominent at that time resisting redrawing county lines?

A No. By name, no. In my mind, it would be a rural -- the rural legislators. They don't like splitting counties, but who they are, I couldn't -- in '97, gosh, I couldn't tell you. In '97, we were fighting with them. We vetoed about 20 of their bills, and so they were not happy with --

Q "We," the governor's office?

A The governor. They were not happy with him.

Q And when they were resisting, did you ever sense they were resisting because it might lead to more black judges on the court?

A I never heard that.

Q Do you know one way or the other?

A No. No. I wouldn't -- I wouldn't even speculate that. I don't know. Nobody ever said that.

Q Now, if you go to the second page of Exhibit 52,

A No idea.
Q Do you know where they would be?
A Well, if Tim had them, they would have been left with the secretary of state's office, I would assume or with the -- with the Court of Appeals. There was some staffer from the Court of Appeals. It may have been in JD's office, JD Gingerich's office, who would have kept that stuff because they would have been the ones making copies to give to all the Court of Appeals judges on the commission or not. So if it's not at the Court of Appeals, JD -- and he's not there anymore -- I don't know where it is.
Q Okay. I'm going to ask that we mark as Exhibit 56 the minutes of the July 17, 2002, apportionment committee meeting. And if you take -- first of all, take a minute to familiarize yourself with these.
(WHEREUPON, a document was marked for identification as Exhibit No. 56.)
A Okay.
Q Have you seen these before?
A If I have, I don't remember them. Quite frankly, the only meeting I really, really remember is the very first one because there's a lot going on. Besides chief counsel and doing this, I was also the drug director and trying to run 22 drug courts and drug --

and task force around the state, so there was a lot going -- but no, I don't remember seeing these. I'm sure I did.

Q It indicates that you were one of the members present in the first paragraph.

A Yes.

Q Do you have any reason to think that's wrong?

A No. I'm sure I was there. I'm sure I was there.

Q I mean, do you have any reason to believe these aren't the minutes of the meeting?

A No. I wouldn't doubt that at all.

Q So there's -- you introduced the newest member of the commission, it says -- this is in the first paragraph -- recently appointed by the governor, Mr. James Smith. Do you have any recollection of that now?

A I'm trying to remember who he was, and I really -- I don't remember this.

Q But you understand him to be the minority representative?

A Yeah, yeah. To replace Craig Banks, yes.

Q This doesn't help you remember any of the process by which the governor chose Mr. Smith or why he chose Mr. Smith?

A No, no. Sorry.

CERTIFICATE

STATE OF ARKANSAS)

)ss

COUNTY OF PULASKI)

I, Kristina R. Gray, Arkansas Certified Court Reporter #725, do hereby certify that the facts stated by me in the caption on the foregoing proceedings are true; and that the foregoing proceedings were reported verbatim through the use of the voice-writing method and thereafter transcribed by me or under my direct supervision to the best of my ability, taken at the time and place set out on the caption hereto.

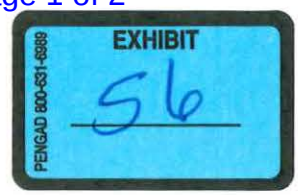
I FURTHER CERTIFY that in accordance with Rule 30(e) of the Rules of Civil Procedure, review of the transcript was not requested.

I FURTHER CERTIFY that I am not a relative or employee of any attorney or employed by the parties hereto, nor financially interested, or otherwise, in the outcome of this action, and that I have no contract with the parties, attorneys, or persons with an interest in the action that affects or has a substantial tendency to affect impartiality, that requires me to relinquish control of an original deposition transcript or copies of the transcript before it is certified and delivered to the custodial attorney, or that requires me to provide any service not made available to all parties to the action.

WITNESS MY HAND AND SEAL this 9th day of July, 2021.

_____

Kristina R. Gray
Arkansas State Supreme Court
Certified Court Reporter #725



Arkansas Court of Appeals Apportionment Commission
July 17, 2002
Little Rock, Arkansas

The meeting of the Arkansas Court of Appeals Apportionment Commission was called to order at 10:00 a.m. on Wednesday, July 17, 2002 in Room 101 of the Arkansas Justice Building in Little Rock. Members present included Chairman Sam Ledbetter, Chief Judge John Stroud, Mr. Butch Reeves, Senator Cliff Hoofman, Representative Mike Hathorn, and Senator Mike Everett. Mr. Reeves introduced the newest member of the Commission recently appointed by the Governor, Mr. James Smith. Chairman Ledbetter noted the presence of Tim Humphries of the Secretary of State, Jeff Priebe of the Attorney General and J. D. Gingerich of the Administrative Office of the Courts. Also present were Court of Appeals Judges Olly Neal, Karen Baker and Wendell Griffen.

Chairman Ledbetter turned the meeting over to Mr. Humphrey and Mr. Reeves to review all of the plans currently under consideration (attached as exhibits A - L).

Plans A and B were discussed. It was noted that they protected current office holders. In response to a question about what constituted a minority influence district, Mr. Humphrey indicated that there was no set minimum percentage. In response to other questions he noted that it was proper for the state to consider race as a factor in redistricting so long as it was not at the expense of other districting principles.

In review of Plan C it was noted that it created higher minority percentages in Districts 6 and 7 but that it placed an extra judge in each of these districts. Plan D creates two minority-majority districts but fails for lack of compactness. Plans E, F and G are further examples of attempts to create minority-majority districts.

The remaining maps were then distributed. Plan H was submitted by Judge Robins and proposed six two-person districts. Plans I and J were proposed by Judge Baker and Representative Hathorn. Plan K was proposed by Judges Hart and Baker. Each of these plans maintain county lines. Plan L was proposed by chairman Ledbetter and was an attempt to create a minority influence district.

After further discussion it was agreed that the goal of the meeting should be to narrow the list of proposals to four or five choices for the public hearing and eventually recommend one plan to the General Assembly.

Senator Hoofman moved to eliminate from consideration any plan requiring judges to run state-wide. The motion was seconded by Senator Everett and approved.

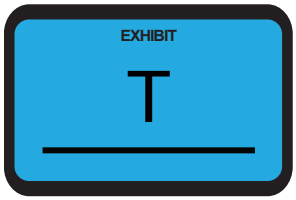
Senator Hoofman moved to eliminate Plan D. The motion was seconded by Senator Everett and approved.

Judge Stroud moved to eliminate any plan which splits counties (Plans E, F and G). The motion was seconded by Senator Hoofman and approved.

Senator Hoofman noted that Plans H and K were the remaining plans for six two-member districts and moved to retain both. The motion was seconded by Judge Stroud and approved.

Senator Hoofman moved to retain Plan I. The motion was seconded by Senator Everett and approved.

Judge Stroud noted that Plans C and L eliminate any opportunity for Judges Neal and



Vaught from running for office and moved to delete them. The motion was seconded by Senator Everett and approved.

Senator Everett moved to eliminate Plan B. The motion was seconded by Senator Hoofman and approved.

Senator Hoofman moved to retain Plan J. The motion was seconded by Judge Stroud and approved.

Senator Hoofman moved to eliminate Plan A. The motion was seconded by Representative Hathorn and approved.

The remaining Plans to be submitted to the public hearing are Plans H, I, J and K.

The need for the presence of a court reporter at the public hearing was then discussed. It was decided that one was needed and funds would be requested from the Joint Judiciary Committees or, in the alternative, the Governor's Emergency Fund. The proposed plans will be placed on the Website of the Secretary of State. The hearing will take place at 10:00 a.m. on August 29, 2002 at the UALR Law School.

The next meeting of the Commission was set for September 12, 2002 at 10:00 a.m. With no further business the meeting was adjourned.