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

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

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Defendants' opposition to Plaintiffs' motion for partial summary judgment does nothing to rebut Plaintiffs' evidence in support of the first *Gingles* precondition. Instead, it conflates the *Gingles* I legal standard with issues to be addressed at the remedy stage and, in turn, inappropriately asks this court to make determinations that are unnecessary at this stage. Put simply, at this stage the Court need not decide what an optimal district should look like, but rather to find only that Plaintiffs have shown that a reasonably compact majority-Black district is *possible*.

Plaintiffs have presented undisputed facts to show that their illustrative plans satisfy the requirements of *Gingles I*. Accordingly, Plaintiffs are entitled to partial summary judgment. Furthermore, for the reasons stated in Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment, Defendants are not entitled to summary judgment on *Gingles II* and *III*.

ARGUMENT

I. PLAINTIFFS' ILLUSTRATIVE PLANS SATISFY *GINGLES I*

Plaintiffs' illustrative plans satisfy the first *Gingles* precondition, which requires a Plaintiff to show the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district" ("*Gingles I*"). *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). *Gingles I* sets a minimum threshold requirement that is a much less demanding standard than Defendants' opposition suggests. The purpose of the requirement is to distinguish between colorable § 2 claims and those that have no chance of success. *See Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) ("[T]he *Gingles* requirements are preconditions, consistent with the text and purpose of § 2, to help courts determine which claims could meet the totality-of-the-circumstances standard for a § 2 violation.").

Plaintiffs' illustrative plans include reasonably compact majority-Black districts for both the Supreme Court and the Court of Appeals, to which Defendants have offered no meaningful rebuttal. In fact, Defendants' own expert demographer did not contest the plans' compactness. *See* Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts (dated Oct. 7, 2021) ("Defs.' Resp. SUMF") at ¶ 19, ECF. No. 101 (stating that Dr. Morrison provided "no opinions" on whether Plaintiffs' proposed plans for the Supreme Court were reasonably compact); Defs.' Resp. SUMF ¶ 20 (stating that Dr. Morrison provided "no opinions" on whether Plaintiffs' proposed plans for the Court of Appeals were reasonably compact). Plaintiffs' plans generally follow traditional boundaries, including existing county lines where possible and, when splitting counties, relying on "administrative boundaries as established in the 2010 [C]ensus" for precincts. Plaintiffs' Statement of Undisputed Material Facts (dated Sept. 16, 2021) ("SUMF") at ¶ 44, ECFNo. 90. Defendants have presented no facts that create a genuine dispute on this point.

Similarly, Defendants have no facts to dispute that Plaintiffs' plans meet *Gingles I*'s "numerosity requirement." *Bartlett*, 556 U.S. at 19-20 ("[A] party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). Plaintiffs' expert Mr. Cooper prepared two illustrative plans for the Supreme Court, with majority-Black districts containing 53.59% and 51.55% Black Voting Age Populations (BVAPs), respectively. Plaintiffs' Motion for Partial Summary Judgment (dated Sept. 16, 2021) ("Pls.' Mot. Summ. J.") at 5, ECF. No. 89. Defendants' expert did "not dispute" Mr. Cooper's analysis, finding that "creating a single district that is majority Black" was "doable one way or another." Defs.' Resp. SUMF ¶ 19. Mr. Cooper similarly prepared illustrative plans for the Court of Appeals, each demonstrating the feasibility of two majority-Black Districts that satisfy the numerosity requirement. His first plan features two majority-Black districts, with BVAPs of

50.80% and 51.12% respectively. Pls.' Mot. Summ. J. at 6. His second plan contains two districts with BVAPs of 50.17% and 50.58%, respectively. *Id*. Defendants again offer no evidence to rebut this proposition. Rather, Defendants' expert Dr. Morrison only testified that he had questions regarding Mr. Cooper's plans, which is insufficient to create a genuine issue of fact. *See 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").

In sum, Plaintiffs have created illustrative plans that satisfy traditional redistricting principles such that summary judgment should be awarded to Plaintiffs on *Gingles I*, and Defendants have presented no genuine factual rebuttal to the contrary.

II. DEFENDANTS' ARGUMENTS AGAINST PLAINTIFFS' ILLUSTRATIVE PLANS SHOULD BE ADDRESSED AT THE REMEDY STAGE.

It is premature at this stage and, moreover, misleading for Defendants to suggest that Plaintiffs' plans do not satisfy *Gingles I* because they purportedly do not comply with traditional redistricting principles. First, Plaintiffs are not required to comply with every conceivable redistricting principle to satisfy *Gingles I*. However, as Defendants' own expert recognized, Plaintiffs' plans do "go beyond what's necessary" for a *Gingles I* analysis. SUMF ¶ 37. For example, Plaintiffs complied with the principles of contiguity, as all portions of the district are physically connected, and the one person, one vote principle. SUMF ¶¶ 49, 50.

A. Plaintiffs' illustrative plans respect communities of interest.

Contrary to Defendants' claims, Mr. Cooper maintained communities of interest in the illustrative districts. Pls.' Mot. Summ. J. at 10-11. In creating the plans, Mr. Cooper considered shared characteristics between the Black communities in the Delta and Lower Arkansas, as well as in Jefferson and Pulaski Counties, including poverty rates, level of education, unemployment

rates, lack of home ownership, access to health insurance, and access to transportation. SUMF ¶ 54; Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts (dated Oct. 7, 2021) ("Resp. SUMF") at ¶ 109, ECF. No. 104. For example, the twelve counties in District 7 of illustrative plan 2 for the Court of Appeals ("AC Plan" 2) share similar educational attainment[1] and median household incomes.[2] Although Defendants argue that the AC plans' inclusion of both Little Rock and the more rural Delta is evidence that Mr. Cooper has ignored communities of

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[1] The percentage of individuals who were high school graduates over the age of 25 in District 7 of Mr. Cooper's AC Plan 2 from 2015-2019 are as follows: Mississippi County: 81.1%; Bradley County: 81.0%; Drew County: 86.9%; Chicot County: 80.8%; Desha County: 81.1%; Lincoln County: 81.1%; Monroe County: 78.9%; Phillips County: 80.3%; Lee County: 75.8%; St. Francis County: 81.9%; Crittenden County: 82.6%; Jefferson County: 86.1%. *Quick Facts: Mississippi County, Arkansas; Bradley County, Arkansas; Drew County, Arkansas; Chicot County Arkansas; Desha County, Arkansas; Lincoln County Arkansas*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/mississippicountyarkansas,bradleycountyarkansas,drewcountyarkansas,chicotcountyarkansas,deshacountyarkansas,lincolncountyarkansas/PST045219 (last accessed Oct. 14, 2021); *Monroe County, Arkansas*; *Phillips County, Arkansas; Lee County, Arkansas; St. Francis County, Arkansas; Crittenden County, Arkansas; Jefferson County, Arkansas*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/monroecountyarkansas,phillipscountyarkansas,leecountyarkansas,stfranciscountyarkansas,crittendencountyarkansas,jeffersoncountyarkansas/PST045219 (last accessed Oct. 14, 2021).

[2] The median household incomes in District 7 of Mr. Cooper's AC Plan 2 from 2015-2019 are as follows: Mississippi County: $39,962; Bradley County: $43,184; Drew County: $46,997; Chicot County: $34,147; Desha County: $31,893; Lincoln County: $46,596; Monroe County: $38,468; Phillips County: $29,320; Lee County: $29,681; St. Francis County: $35,348; Crittenden County: $40,161; Jefferson County: $40,726. *Quick Facts: Mississippi County, Arkansas; Bradley County, Arkansas; Drew County, Arkansas; Chicot County Arkansas; Desha County, Arkansas; Lincoln County Arkansas*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/mississippicountyarkansas,bradleycountyarkansas,drewcountyarkansas,chicotcountyarkansas,deshacountyarkansas,lincolncountyarkansas/PST045219 (last accessed Oct. 14, 2021); *Quick Facts: Monroe County, Arkansas*; *Phillips County, Arkansas; Lee County, Arkansas; St. Francis County, Arkansas; Crittenden County, Arkansas; Jefferson County, Arkansas*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/monroecountyarkansas,phillipscountyarkansas,leecountyarkansas,stfranciscountyarkansas,crittendencountyarkansas,jeffersoncountyarkansas/PST045219 (last accessed Oct. 14, 2021).

interest, the Defendants offer no *facts* in support of this position. Defendants simply assume that rural and urban communities necessarily lack shared interests as a matter of law. That assumption not only is refuted by the record in this case, but also is inconsistent with the precedent Defendants themselves cite.

Little Rock and the Delta *do* share communities of interest; for example, Arkansans living in the Delta commute daily to Pulaski County for employment.[3] Moreover, Defendants' position that urban and rural counties should not be combined conflicts with Arkansas's own current United States congressional map, drawn by its own legislature, which combines Little Rock with rural Perry, Conway, and Van Buren counties for U.S. House District 2. *See Rural Profile of Arkansas*, University of Arkansas System Division of Agriculture (2021) at 2, 7 (indicating that Perry, Conway, and Van Buren counties comprise the Highlands region and stating the Highlands region is one of "[t]he three Rural regions of Arkansas"); *Arkansas: Map of Congressional Districts*, GOVTRACK, https://www.govtrack.us/congress/members/AR#map (last accessed Oct. 15, 2021).

Defendants also inaptly rely on *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) ("LULAC"), (Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (dated Oct. 7, 2021) ("Pls.' Opp'n to Defs.' Mot. Summ. J.") at 22-24, Dkt. No. 103), to argue that an illustrative district that includes both rural and urban Black communities is per se noncompact. *LULAC* does not create this bright-line rule. In fact, the *LULAC* Court explained that "members of a racial group in different areas—for example, rural and urban communities—could share similar interests and therefore form a compact district." *LULAC*, 548 U.S. at 435. What rendered the district at issue in *LULAC* noncompact was "the enormous [300-mile] geographical distance

[3] For example, Plaintiff Kymara Seals lives in Pine Bluff but works at the Arkansas Public Policy Panel, which is located in Little Rock. Seals Dep. Tr. 22:17; Seals Dep. Tr. 49:10-11; AR. PUB. POLICY, https://arpanel.org/ (last accessed Oct. 14, 2021).

separating the Austin and Mexican-border communities, *coupled with* the disparate needs and interests of these populations." *Id*. (emphasis added). Neither of those coupled facts exist in the instant case. *See* Pls.' Opp'n to Defs.' Mot. Summ. J.at 23-24 (citing Mr. Cooper's testimony concerning the shared characteristics (and thus shared interests) of the Black communities in the illustrative districts) and *id*. at 24 (explaining that, for example, in AC Plan 2, the Black communities in the illustrative district are only 68 miles apart).

Moreover, contrary to Defendants' claims, the feasibility of Plaintiffs' plans does not hinge on whether the plans satisfy every community of interest. *See Luna v. Cnty. of Kern*, 291 F. Supp. 3d 1088, 1110 (E.D. Cal. 2018) ("Plaintiffs are [] not required to accommodate every conceivable community of interest [] in order to draw a sufficient illustrative map that satisfies the first *Gingles* precondition."). Neither the Court nor the Plaintiffs are bound by the precise lines drawn in Plaintiffs' illustrative maps. Indeed, a perfect districting plan is not required to satisfy the first *Gingles* precondition. *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1399 (E.D. Wash. 2014) (holding that *Gingles I* does not require a "perfectly harmonized districting plan," as such a requirement "would put the cart before the horse"). Plaintiffs' burden is to show that a remedy is feasible, not to provide the ultimate plan that will go into effect. *Fairley v. Hattiesburg*, 584 F.3d 660, 671 n.14 (5th Cir. 2009) (citing *Gingles*, 478 U.S. at 50 n.17, 106 S.Ct. 2752 and *Houston v. Lafayette Cnty.*, 56 F.3d 606, 611 (5th Cir. 1995) ("[I]t is sufficient that a plaintiff show that a workable plan for another minority-controlled voting district is possible; the plaintiff's plan need not be an ultimate solution.").

In contrast with their own motion for summary judgment, Defendants now assert "at [the] very least" there could be a "material fact question for trial about whether the proposed districts span distinct communities of interest." Defendants' Opposition to Plaintiffs' Motion for Summary

Judgment (dated Oct. 7, 2021) ("Defs.' Opp'n to Pls.' Mot. Summ. J.") at 12, ECF. No. 100. But if an illustrative district's inclusion of communities with some distinct interests was fatal to a *Gingles I* claim, then no claims would survive. As the *Kern* court stated, "[P]laintiffs' burden under *Gingles* [] cannot be one that requires plaintiffs to establish there are no identifiable differences . . . It is simply too easy to identify at least some differences between any two communities." *Kern*, 291 F. Supp. 32 at 1116.

Additionally, contrary to Defendants' assertions, Plaintiffs' expert's consideration of where Black voters are located does not mean he has engaged in an unconstitutional racial gerrymander. Defs.' Opp'n to Pls.' Mot. Summ. J. at 16-17. As Plaintiffs explained in their Opposition Brief, Defendants' argument fundamentally misapprehends the *Gingles I* inquiry. Pls.' Opp'n to Defs.' Mot. Summ. J. at 21-23. Further, Defendants rely in large part on cases that did not involve Section 2 claims at all, but instead concerned racial gerrymandering challenges under the Equal Protection Clause. *See* Defs.' Opp'n to Pls.' Mot. Summ. J. at 17 (citing *Miller v. Johnson*, 515 U.S. 900 (1995) and *Cooper v. Harris*, 137 S. Ct. 1455 (2017)). But such Equal Protection cases are "analytically distinct" from the compactness analysis relevant to the *Gingles I*, and Defendants err by asking this Court to conflate the two. *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1385 n.3, 1391 (8th Cir. 1995) (en banc); *accord LULAC*, 548 U.S. at 433 (explaining that the *Gingles* "compactness inquiry embraces different considerations" from constitutional racial gerrymandering doctrine); *Clark v. Calhoun Cnty., Miss.*, 88 F.3d 1393, 1406-07 (5th Cir. 1996); *Davis v. Chiles*, 139 F.3d 1414, 1425 (11th Cir. 1998).

At bottom, Defendants effectively ask this Court to conclude that simply because an expert considered the impact of different possible boundary lines on the racial composition of an illustrative district, the resulting proposed district is somehow constitutionally invalid. But it is

impossible to meaningfully evaluate racial vote dilution without considering the race of voters. Specifically, *Gingles I* requires minority voters to show that a challenged electoral scheme has actually caused a diminution of electoral power they would otherwise have the potential to exercise. *See Gingles*, 478 U.S. at 50 n.17; *Cottier v. City of Martin*, 445 F.3d 1113, 1117 (8th Cir. 2006). And it directs plaintiffs to make that showing by demonstrating—with "objective, numerical" precision—that "an election district could be drawn in which minority voters form a majority." *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009). That "is an inquiry into causation that *necessarily* classifies voters by their race." *Clark v. Calhoun Cnty., Miss*., 88 F.3d 1393, 1406 (5th Cir. 1996) (emphasis added). Consistent with this, the Eighth Circuit has explained that an illustrative district whose ultimate shape is consistent with "traditional, non-racial districting criteria" can satisfy *Gingles I*, even when it is "clear beyond question" that the proposal "takes race into account." *Harvell v. Blytheville Sch. Dist. No. 5*, 126 F.3d 1038, 1041 (8th Cir. 1997).

For all the reasons Plaintiffs have already explained, the evidence Plaintiffs have put forward to satisfy *Gingles I* is ample and unrebutted. Accordingly, Plaintiffs are entitled to partial summary judgment on *Gingles I*.

B. Plaintiffs' Illustrative Plans Do Not Fail as a Feasible Remedy Simply Because They Split County Lines.

Defendants also criticize Plaintiffs' illustrative maps because the proposals split counties on precise precinct lines. Yet, there is no requirement—statutory or otherwise—to maintain county lines. Defendants' insistence on defining appellate court districts by county boundaries cannot displace a Section 2 mandate to provide Black voters with an opportunity to elect their candidates of choice.

Plaintiffs presented evidence that splitting political boundary lines is not uncommon in Arkansas and does not upend adherence to other traditional redistricting principles. Indeed, the

Secretary of State's office testified that splitting precincts was a "normal course of business" and did not cause any challenges in administering elections. Response SUMF at ¶ 124. Further, former Assistant Attorney General Tim Humphries, testified that it "wouldn't be a problem" to split counties for redistricting judicial maps. *Id.* Plaintiffs thus create no challenges for redistricting nor election administration processes by splitting one to three counties on precinct lines.

Defendants have no evidence to rebut this undisputed and well documented fact. They instead rely on the irrelevant assertion that although county splits may be generally allowed in redistricting, the State "has never split counties across appellate-court districts." Defs.' Opp'n to Pls.' Mot. Summ. J. at 15. The Arkansas Court of Appeals has been redistricted only once nearly 20 years ago. Response SUMF ¶ 275. The fact that the General Assembly did not split counties then does not render Plaintiffs' proposals unsatisfactory with respect to *Gingles I*. And indeed, the Attorney General's Office presented the Court of Appeals Commission with multiple proposals with split counties to consider in redistricting. *See, e.g.*, Response SUMF ¶ 267; *see also* ECF No. 104-25 at SOS0967-78 (March 1, 1995 Court of Appeals Apportionment Commission Report). Importantly, there has been no evidence presented that the principles for redistricting the appellate courts would be any different than other redistricting, such as legislative redistricting. Indeed, based on his involvement in multiple redistricting efforts in the State, Mr. Humphries identified that the top two priority redistricting principles were Voting Rights Act compliance and maintaining equal populations. ECF. No. 88-7 at 281:6-285:8 (Tim Humphries Deposition Transcript). Maintaining traditional boundary lines was subordinate to several other principles. *Id*. When asked if different principles would apply to legislative and judicial maps, he said they would not. *Id*. Yet, Defendants ask this Court to prioritize this redistricting principle and accordingly, hold that Plaintiffs have not satisfied *Gingles I*.

Moreover, when questioned on this exact point as to how redistricting principles may differ, the Attorney General's Office was not even able to identify redistricting principles, and certainly not the office's priority principles. *See generally*, ECF No. 104-19 at 63:23-64:13; 65:12-68:20 (Elisabeth Walker Deposition Transcript).

Further, even if the Defendants were correct that the Commission prioritized not splitting county lines, there is no requirement that Plaintiffs prioritize this in the same manner. *See Bartlett v. Strickland*, 556 U.S. 1, 7 (2009) (noting that a state's election law requirements may be superseded by federal law); *see also Rodriguez v. Harris Cnty., Tex.*, 964 F. Supp. 2d 686, 745 (S.D. Tex. 2013), *aff'd sub nom*. *Gonzalez v. Harris Cnty., Tex.*, 601 F. App'x 255 (5th Cir. 2015) (stating it would be "unfair to require Plaintiffs to draw maps in strict accordance with the [a jurisdiction's] priorities"); *Luna v. Cnty. of Kern*, 291 F. Supp. 3d 1088, 1113 (E.D. Cal. 2018) (holding that plaintiffs need not prioritize redistricting principles in the same manner as a jurisdiction did when creating a challenged map).

Where, as here, the splitting of counties may be necessary to create a reasonably compact district and provide Black voters the opportunity to elect their candidate of choice, the maintenance of county lines cannot predominate compliance with Section 2 of the Voting Rights Act. *See, e.g.*, *Perez v. Abbott*, 250 F. Supp. 3d 123, 142 (W.D. Tex. 2017) (holding that states cannot "claim that a single traditional districting principle . . . allows them to avoid drawing districts required by § 2 under the totality of circumstances"). Defendants' desire to maintain county lines cannot "effectively override any finding of § 2 liability." *Luna*, 291 F. Supp. 3d at 1113 (citing *Rodriguez* 964 F. Supp. 2d at 745).

Defendants claim that *Larry v. Arkansas*, No. 4:18-cv-116, 2018 WL 4858956, at *5 (E.D. Ark. Aug. 3, 2018), supports their theory that an illustrative remedial plan in Arkansas fails *Gingles*

I for lack of "compactness" if it splits even one county. But *Larry* said nothing of the sort. To be sure, while describing the proposed majority-minority district, the court mentioned that it "appear[ed] to divide multiple counties," *id.* at *5, but nothing in the opinion suggests that the mere fact of dividing counties was fatal to the district. Rather, the court emphasized the bizarre shape and vast distances covered by the proposed majority-minority district. The illustrative majority-minority Congressional district "stretche[d] from the northeast to the southwest corner of Arkansas," "with portions of the proposed district extending towards central Arkansas." *Id.* at *4, *5. The contortions necessary to stitch the proposed district together, the court emphasized, left it "vanishingly thin" in multiple places. *Id.* at *5.

Far from the proposed maps in *Larry*, the districts in Plaintiffs' illustrative plans are "regularly shaped." SUMF at ¶¶ 38, 42-45. Plaintiffs' proposed districts do not stretch across opposite corners of the state, nor disappear into thin margins. And contrary to Defendants' argument, the maps do not split counties in furtherance of a race-based gerrymander. *See supra*, Part II.A. Mr. Cooper relied on racial data for the *limited purpose* of achieving VRA compliance, the top priority Mr. Humphries cited, and split counties specifically to achieve balanced populations across districts, the second-highest ranked priority. Resp. SUMF ¶ 115; *see also* ECF No. 104-10 at 50:11-17 (Bill Cooper Deposition Transcript); ECF. No. 88-7 at 281:6-285:8 (Tim Humphries Deposition Transcript).

C. Plaintiffs' consideration of the population equality principle does not make their illustrative plans unviable.

Defendants argue that the redistricting principle of one-person, one-vote is not constitutionally required by *Chisom v. Roemer,* 501 U.S.380 at 402-403 (1991) in judicial redistricting, and thus population equality should not have been considered by Mr. Cooper in developing his illustrative plans. However, Plaintiffs' consideration of this redistricting principle

is not a basis to deny Plaintiffs' motion. Indeed, it directly refutes Defendants' argument that race was the sole factor Plaintiffs considered in creating majority Black districts.

First, contrary to Defendants' argument, population equality previously guided the creation of the very appellate court districts that exist in Arkansas today. Every single Court of Appeals Apportionment Commission—created with the specific and exclusive purpose of redistricting the Court of Appeals—stated at the outset of their reports to the General Assembly that the goal of the Commission was to create districts of "approximately equal population." *See* SUMF ¶ 56 ("Act 208 of the 1979 General Assembly created a six-judge Court of Appeals and named a board to apportion the state into six Court of Appeals districts of approximately equal population using existing judicial district boundaries."); *see also* SUMF ¶ 57 and SUMF ¶ 58 (same). Indeed, the very Act that created the second Court of Appeals Apportionment Commission instructed the Commission to create districts of "substantially equal populations." Ark. Laws Act 1323 § 1(b) (1995). Thus, the principle of one-person, one-vote, as applied to judicial elections, has been previously codified by Arkansas law. Accordingly, consideration and inclusion of the principle in illustrative plans does not invalidate them, nor provide a basis for the Court to find that Plaintiffs have not met their *Gingles I* burden at this phase.

Moreover, in their opposition to Plaintiffs' Motion for Summary Judgment, Defendants cite to former Assistant Attorney General Tim Humphries multiple times, calling him Arkansas's former "lead election lawyer." Defs.' Opp'n to Pls.' Mot. Summ. J. at 11. Defendants fail, however, to acknowledge their former "lead election lawyer['s]" unequivocal testimony that equal population was his "number two" priority in redistricting. SUMF ¶ 51. Defendants are simply wrong in asserting that Plaintiffs have "pursued a districting criterion that Arkansas has never

chosen for itself." Defendants' Motion for Summary Judgment (dated Sept. 16, 2021) ("Defs.' Mot. Summ. J.") at 33, ECF. No. 92.

Finally, to the extent Defendants wish to argue Plaintiffs' proposed districts should not account for the principle of one-person, one-vote, Defendants are free to propose an alternative redistricting plan that does not consider this traditional redistricting principle at the remedy stage of litigation. However, it is not a basis for denying Plaintiffs' motion.

III. The Governor's Office and Attorney General's Office Are Proper Defendants.

Finally, Defendants also rehash the argument that the Governor and Attorney General are not proper Defendants in this case. Defs.' Opp'n to Pls.' Mot. Summ. J. at 8-9. These arguments are entirely recycled from Defendants' brief in support of their own motion for summary judgment, *see* Defs.' Mot. Summ. J. at 16-20, and Plaintiffs have already comprehensively rebutted them in their brief in opposition to that motion, *see* Pls.' Opp'n to Defs.' Mot. Summ. J. at 4-11. Plaintiffs readopt those arguments here.

In addition, the Governor's and the Attorney General's Article III standing and *Ex Parte Young* arguments provide no basis for denying partial summary judgment to Plaintiffs because it will not resolve the question raised by this motion—whether Plaintiffs have satisfied *Gingles I*. Even if the Court were to dismiss the Governor's and Attorney General's offices, and it should not, the Secretary of State would remain a Defendant and the *Gingles I* question would still have to be addressed. By offering these unrelated arguments as reasons to deny partial summary judgment, Defendants seem to be asking the Court to require the parties to litigate *Gingles I* at trial, *even if* the Court is otherwise persuaded that the record is clearly in Plaintiffs' favor and that such a trial would serve no purpose. The Court should reject these arguments.

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