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.

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Introduction 1

Argument 2

I. The Governor and Attorney General are entitled to summary judgment because they are not proper defendants. 2

II. Plaintiffs have failed as a matter of law to satisfy any of the *Gingles* preconditions. 7

A. Plaintiffs have not satisfied the first *Gingles* precondition. 7

1. Plaintiffs' proposed districts are racial gerrymanders. 7

2. Plaintiffs' proposed districts fail to satisfy the requirement of group compactness. 12

B. Plaintiffs have not satisfied the second and third *Gingles* preconditions, because black voters do not vote cohesively in Arkansas appellate judicial elections, and because their preferred candidates usually win. 17

1. The Court must consider and equally weigh all the judicial elections in evidence—and at least give significant weight to elections between white candidates. 18

i. The Eighth Circuit has rejected Plaintiffs' theory. 19

ii. Plaintiffs' rationale for ignoring elections between white candidates is unpersuasive and rooted in racial stereotypes. 24

2. Considering all judicial elections, black voters do not vote cohesively. 27

3. Black voters' preferred candidates are not usually defeated by white bloc voting. 28

i. If the Court considers all elections, Plaintiffs cannot demonstrate racially polarized voting. 28

ii. Even if the Court only or primarily considered elections involving black candidates, Plaintiffs would still fail to prove racially polarized voting. 31

III. If the Court reaches the totality of the circumstances, Defendants are still entitled to summary judgment. 35

A. Voting is not racially polarized in Arkansas's appellate judicial elections. (Senate Factor 2) 36

B. Black candidates in Arkansas appellate judicial elections succeed more often than they are defeated. (Senate Factor 7)..... 37

C. Arkansas has a compelling interest in maintaining its current system of electing its Supreme Court. (Senate Factor 9) 38

D. The remaining Senate factors do not defeat Defendants' motion for summary judgment..... 42

Conclusion 45

TABLE OF AUTHORITIES

Cases

Ala. State Conf. of NAACP v. Alabama, — F. Supp. 3d —,
No. 2:16-CV-731-WKW, 2020 WL 583803 (M.D. Ala. Feb. 5, 2020) 2, 40, 41, 42

Barrett v. Thurston,
593 S.W.3d 1 (Ark. 2020)..... 5

Bartlett v. Strickland,
556 U.S. 1 (2009)..... 9, 28

Bogan v. Scott-Harris,
523 U.S. 44 (1998)..... 4

Bone Shirt v. Hazeltine,
461 F.3d 1011 (8th Cir. 2006) 8, 10, 11, 18, 24

Chisom v. Roemer,
501 U.S. 380 (1991)..... 39

Church v. Missouri,
913 F.3d 736 (8th Cir. 2019) 3, 5, 6

Citizens for Equal Protection v. Bruning,
455 F.3d 859 (8th Cir. 2006) 6

Clay v. Bd. of Ed. of City of St. Louis,
90 F.3d 1357 (8th Cir. 1996) 20, 21

Cooper v. Harris,
137 S. Ct. 1455 (2017)..... 11

Cottier v. City of Martin,
445 F.3d 1113 (8th Cir. 2006) 7, 8, 10, 11, 24

Cottier v. City of Martin,
604 F.3d 553 (8th Cir. 2010) (en banc) 8, 22, 23, 24

Dig. Recognition Network, Inc. v. Hutchinson,
803 F.3d 952 (8th Cir. 2015) 4, 6

Drennen v. Bennett,
322 S.W.2d 585 (Ark. 1959)..... 5

Ex parte Young,
209 U.S. 123 (1908)..... 2

Fabela v. City of Farmers Branch,
No. 3:10-CV-1425, 2012 WL 3135545 (N.D. Tex. Aug. 2, 2012) 31

Growe v. Emison,
507 U.S. 25 (1993)..... 28

Harvell v. Blytheville Sch. Dist. No. 5,
71 F.3d 1382 (8th Cir. 1995) (en banc) 8, 19, 20, 21, 26

King v. Ill. Bd. of Elections,
522 U.S. 1087 (1998) 12

Lopez v. Abbott,
339 F. Supp. 3d 589 (S.D. Tex. 2018) 40

LULAC v. Perry,
548 U.S. 399 (2006) 12, 13, 17

Mallory v. Ohio,
173 F.3d 377 (6th Cir. 1999) 40

Mandel v. Bradley,
432 U.S. 173 (1977) 12

Miller v. Johnson,
515 U.S. 900 (1995) 8

Milwaukee Branch of the NAACP v. Thompson,
116 F.3d 1194 (7th Cir. 1997) 40

Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.,
894 F.3d 924 (8th Cir. 2018) 32, 35

NAACP, Inc. v. City of Niagara Falls,
65 F.3d 1002 (2d Cir. 1995) 26

NAACP, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.,
462 F. Supp. 3d 368 (S.D.N.Y. 2020) 30

Ohio A. Philip Randolph Inst. v. Householder,
373 F. Supp. 3d 978 (S.D. Ohio 2019) 30

Pope v. Cnty. of Albany,
94 F. Supp. 3d 302 (N.D.N.Y. 2015) 30

Stabler v. County of Thurston,
129 F.3d 1015 (8th Cir. 1997) 8, 11

Thornburg v. Gingles,
478 U.S. 30 (1986) 28, 35, 36, 37, 42

United States v. City of Euclid,
580 F. Supp. 2d 584 (N.D. Ohio 2008) 30

United States v. Junction City Sch. Dist.,
— F.4th —, 2021 WL 3745740 (8th Cir. Aug. 25, 2021) 44

Westwego Citizens for Better Gov't v. City of Westwego,
872 F.2d 1201 (5th Cir. 1989) 38

Statutes

52 U.S.C. 10301 25

Act 889, 1999 Ark. Acts 3315 (Mar. 29, 1999) 4, 33

Ark. Code Ann. 16-118-105 5

Other Authorities

Christopher S. Elmendorf et al.,
Racially Polarized Voting, 83 U. Chi. L. Rev. 587 (2016)..... 19

University of Arkansas System Division of Agriculture,
Rural Profile of Arkansas (2021)..... 15

INTRODUCTION

From the outset, the actual results of Arkansas's judicial elections have presented difficulties for Plaintiffs' theory that the State's appellate-court elections violate the Voting Rights Act. In their complaint, they alleged only three instances of black voters' preferred candidate losing an appellate-court election—all three involving Judge Wendell Griffen; all three occurring more than a decade ago. Reviewing these and the complaint's allegations regarding nonjudicial elections, this Court expressly ruled that, if Plaintiffs could prove nothing more than the contents of the complaint, their claims would fail. (*See* Order, Doc. 36 ("MTD Order") at 14-15 & n.6.) Operating on an erroneous legal view, Plaintiffs have refused to develop evidence to prove anything beyond the complaint's allegations. They believe the only relevant evidence is what happens in elections between black and white *candidates*. Because of this error, Plaintiffs' expert analyzed only four judicial elections: Judge Griffen's three defeats, and another ten-year-old election in which black and white voters were united in their opposition to a black judicial candidate. Plaintiffs' total failure to develop evidence in response to this Court's prior admonition means that Defendants are entitled to summary judgment.

Plaintiffs hope to avoid this conclusion by manufacturing fact issues. But there are none. No one disputes the results of Judge Griffen's three losses. And because Plaintiffs' expert refused to analyze the vast majority of recent judicial elections, no one disputes the conclusion of Defendants' expert that black voters' preferred candidates were successful in two-thirds of the other 27 appellate-court elections since they became nonpartisan 20 years ago. The parties disagree only about the law: whether this Court should disregard those 27 other elections and find a Voting Rights Act violation based on Judge Griffen's three losses. Eighth Circuit precedent confirms this Court's conclusion at the motion-to-dismiss stage that it should not.

The rest of the parties' disputes are legal as well. There is no dispute about the factual details of the districts that Plaintiffs have proposed, only whether they are legally sufficient. For instance, Plaintiffs' demographer admits that he created these districts based primarily on the race of the voters they contain. The only question is whether that means these districts violate Eighth Circuit precedent condemning racial gerrymandering in Section 2 cases. Plaintiffs have no argument other than to say that the Eighth Circuit is wrong. Similarly, Plaintiffs do not dispute that their proposed districts connect geographically and socially disparate populations of black voters in urban central Arkansas and in the rural Delta. Again, the only question is legal: Does this violate the Supreme Court's requirement that Plaintiffs respect distinct communities of interest? The answer is that Plaintiffs' districts violate this requirement—the same answer an Alabama federal court reached when it considered districts proposed by the same demographer on which Plaintiffs rely here. *See Ala. State Conf. of NAACP v. Alabama*, — F. Supp. 3d —, No. 2:16-CV-731-WKW, 2020 WL 583803, at *24-25 (M.D. Ala. Feb. 5, 2020).

The undisputed facts material to each issue entitle Defendants to judgment as a matter of law, even without reaching the totality-of-the-circumstances inquiry. To be clear, under that inquiry the undisputed facts show Defendants are entitled to judgment as a matter of law based on the most important factors—including Arkansas's strong interest in maintaining its 147-year-old system for electing the state supreme court. For these reasons, there are no disputed fact issues to resolve at trial, and this Court should grant summary judgment for Defendants.

ARGUMENT

I. The Governor and Attorney General are entitled to summary judgment because they are not proper defendants.

Plaintiffs have sued three defendants under *Ex parte Young*, 209 U.S. 123 (1908): the Governor of Arkansas, the Arkansas Attorney General, and the Arkansas Secretary of State. As

Plaintiffs concede, for an official to be "a proper defendant," that official must have "'some connection to the enforcement of the act'" Plaintiffs challenge. (Pls. Resp. in Opp'n to Defs. MSJ, Doc. 103 ("Pls. MSJ Resp.") at 4 (quoting *McDaniel v. Precythe*, 897 F.3d 946, 952 (8th Cir. 2018)).) The Secretary has many connections to enforcing Arkansas's election laws. (*See* Second Am. Compl., Doc. 37 ¶ 13 (enumerating some of the Secretary's connections with election laws).) But the Governor and the Attorney General have no comparable connection to enforcing Arkansas's election laws. (*See id.* ¶¶ 12, 14 (discussing responsibilities of these officials unrelated to elections).) Plaintiffs do not really dispute any of this. With one footnoted, inapposite exception that only regards the Attorney General (Pls. MSJ Resp. 10 n.3), Plaintiffs cite no "methods of enforcement" that either the Governor or Attorney General has to enforce the laws they challenge, *Church v. Missouri*, 913 F.3d 736, 749 (8th Cir. 2019) (holding a defendant must have such methods to be sued under *Ex parte Young*). So they are not proper defendants.

Plaintiffs argue otherwise, because predecessors to these offices had some advisory connection to *writing* the laws Plaintiffs challenge, and the Governor or Attorney General may have some connection to writing those laws' replacements (*i.e.*, new districts for the Supreme Court or Court of Appeals). But law writing is not law enforcement; it is legislation. And legislation is not a basis for suit under *Ex parte Young*. State officials cannot be sued under *Ex parte Young* "for their legislative acts." *Church*, 913 F.3d at 751 (quoting *Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980)) (holding that Missouri's governor could not be sued under *Ex parte Young* for the legislative act of withholding appropriated funds). Yet with one exception, what Plaintiffs say makes the Governor and Attorney General proper *Ex parte Young* defendants is their hypothetical legislative acts. That only confirms their immunity.

Plaintiffs begin by noting the Governor and Attorney General's predecessors' involvement on the former Court of Appeals Apportionment Commission, a defunct, temporary body that made Court of Appeals redistricting recommendations to the General Assembly 18 years ago, in 2003, and dissolved thereafter. (Pls. MSJ Resp. 5; Pls. Resp. to Defs. SUMF, Doc. 104 ("Pls. Resp. SUMF") ¶ 204.) That involvement does not make them proper *Ex parte Young* defendants. First, the Commission no longer exists, and nothing in Arkansas law requires that the General Assembly re-create the Commission—nor even if it did re-create the Commission, to designate the same officials as members. *See* Act 889, sec. 6, 1999 Ark. Acts 3315, 3318-19 (Mar. 29, 1999) (creating the Commission to assist the General Assembly solely with 2003 Court of Appeals redistricting).

Second, and more fundamentally, *Ex parte Young* does not allow Plaintiffs to sue the Governor or the Attorney General to enjoin them from giving redistricting advice to the General Assembly or a hypothetical commission. (*See* Pls. MSJ Resp. 6 (basing claim on how "the Attorney General's Office educate[s] the Commission").) As the Eighth Circuit has held, "advis[ing] the state legislature or other state officials about [the] constitutionality of a law . . . does not suffice to establish 'some connection with the enforcement'" of that law. *Dig. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 962 (8th Cir. 2015). Like proposing a budget, proposing a district map or advising the General Assembly on one is a legislative act, not a law-enforcement act. *See Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (holding that a mayor was immune from suit when he "perform[ed] legislative functions," including the proposal of a budget).

Along these same lines, the Governor is not a proper *Ex parte Young* defendant simply because he had conversations with members of the General Assembly about changing the method of selecting Supreme Court justices. (*See* Pls. MSJ Resp. 7 (citing Pls. Resp. SUMF

¶¶ 222-23).) Such conversations show a connection to *legislating* a new method of electing the Supreme Court, not *enforcing* the current method. And what Plaintiffs must show is that the Governor has some "methods of enforc[ing]" the laws they challenge, not some role in writing them. *Church*, 913 F.3d at 749. The Governor is no more subject to the suit for the discussions he might have with legislators about legislating judicial-selection methods than state legislators are for that legislation itself.

Plaintiffs last mention that the Attorney General has the power to sue to remove a state officer if that officer "usurps an office . . . to which he or she is not entitled by law." Ark. Code Ann. 16-118-105(b)(1). (*See* Pls. MSJ Resp. 10 n.3.) But as Plaintiffs acknowledge, this is only a power to "enforce qualifications for state office"—not to claim that a certified winner of a judicial election actually lost to his opponent. (*Id.* (quotation marks omitted) (citing *Drennen v. Bennett*, 322 S.W.2d 585 (Ark. 1959)).) The Secretary certifies the winner of each election, *see* Ark. Code Ann. 7-5-704, and the certified winner would not have usurped an office to which he or she is not entitled by law. By contrast, the Secretary does not certify candidates' qualifications. He merely verifies that candidates have self-certified their qualifications. *Cf. Barrett v. Thurston*, 593 S.W.3d 1, 8 (Ark. 2020) (noting that State Board of Election Commissioners "may not exercise discretion . . . concerning the eligibility of a candidate"). So if it is discovered post-election that the winner falsely self-certified a necessary qualification, he or she has usurped an office. Only a situation like this would trigger the Attorney General's power to enforce the qualifications for an office. *See, e.g.*, *Drennen*, 322 S.W.2d at 587-88 (discussing Attorney General's power to enforce residency requirements for state board). But Plaintiffs do not challenge any such qualifications, so the Attorney General is not a proper defendant.

Ultimately, Plaintiffs argue the Governor and Attorney General do not need enforcement authority to be proper *Ex parte Young* defendants, because this is not a pre-enforcement challenge. (Pls. MSJ Resp. 9-10.) But Plaintiffs cite no case holding that when a law is already being enforced, like the laws Plaintiffs challenge here, an *Ex parte Young* plaintiff no longer needs to sue defendants who actually enforce that law. Rather, all that changes is that plaintiffs no longer need to establish a "credible threat" of enforcement, because enforcement is already happening. (*Id.* at 9 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159-61 (2014)).) They still must sue defendants with enforcement authority.

The only case Plaintiffs cite for their novel theory of *Ex parte Young* suits actually shows they are wrong. In *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), the Eighth Circuit held Nebraska's Governor and Attorney General were proper defendants in a challenge to the Nebraska Constitution's prohibition of same-sex marriage. But in subsequent cases, the Eighth Circuit has explained at length that "*Bruning* did not eliminate the longstanding requirement that a state official must have some connection with the enforcement of the law at issue before she is subject to suit." *Dig. Recognition Network*, 803 F.3d at 961 (quotation marks omitted). *Bruning* had turned on particular state-law powers the Governor and Attorney General had to "enforce the Nebraska Constitution." *Id.*; *see Church*, 913 F.3d at 749 ("The *Bruning* and *Hutchinson* decisions mean that a governor's general-enforcement authority is 'some connection' if that authority gives the governor *methods* of enforcement.").

In sum, to sue the Governor and Attorney General under *Ex parte Young*, Plaintiffs must show the Governor and Attorney General have some method of enforcing the laws they challenge. Plaintiffs do not claim the Governor has any method of enforcing those laws. And the only enforcement method of the Attorney General they cite is a method of enforcing other laws,

not the laws challenged in this case. Accordingly, the Governor and Attorney General are not proper *Ex parte Young* defendants and are entitled to summary judgment.

II. Plaintiffs have failed as a matter of law to satisfy any of the *Gingles* preconditions.

A. Plaintiffs have not satisfied the first *Gingles* precondition.

The first *Gingles* precondition requires Plaintiffs to show a possible remedy exists, which they attempt to do through several racial gerrymanders. But the Eighth Circuit has made clear that racially gerrymandered districts do not satisfy this precondition. This is reason enough to grant Defendants' motion for summary judgment, although Plaintiffs' claims fail at the first precondition for another reason: Their own demographer admitted that he could not draw the necessary districts without combining distinct communities of interest, most importantly, the community in and around Little Rock and the community hundreds of miles away in the Delta. And he could not justify combining these communities on any ground other than the race of the voters who live there. Because this violates the Supreme Court's rule against combining distinct communities of interest solely based on race, it is another reason to grant Defendants' motion.

1. Plaintiffs' proposed districts are racial gerrymanders.

Plaintiffs' proposed majority-minority districts split counties on the basis of race—admittedly so. Under the Eighth Circuit's precedent, that means Plaintiffs' proposed remedies cannot satisfy the first *Gingles* precondition. Far from denying the proposed districts are racially gerrymandered, Plaintiffs argue that they are allowed to rely on such districts. Yet they never respond to (or even cite) the many Eighth Circuit cases holding just the opposite. Regardless, Plaintiffs' insistence that racial gerrymandering is required to remedy Section 2 violations is wrong.

i. The first *Gingles* precondition, in essence, requires Plaintiffs to "demonstrate a proper and workable remedy exists." *Cottier v. City of Martin*, 445 F.3d 1113, 1117 (8th Cir. 2006) ("*Cottier I*"), *overruled on other grounds, Cottier v. City of Martin*, 604 F.3d 553 (8th Cir. 2010)

(en banc) ("*Cottier III*"); *see also Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1025 (8th Cir. 2006) (Gruender, J., concurring in the judgment) ("If no 'proper and workable remedy exists,' then a plaintiff's claims fail as a matter of law." (quoting *Cottier I*, 445 F.3d at 1117)). And a proper remedy, the en banc Eighth Circuit has held, is one that is not racially gerrymandered. *See Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1391 (8th Cir. 1995) (en banc) (holding that a Section 2 remedy must "steer clear of the type of racial gerrymandering proscribed in *Miller* [*v. Johnson*,]" 515 U.S. 900 (1995)); *cf. Miller*, 515 U.S. at 916 (holding that a district is an impermissible racial gerrymander if "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district").

The Eighth Circuit has subsequently made clear *Harvell*'s rule applies not just at the remedial stage, but at the liability stage as well. In other words, Plaintiffs must comply with it to satisfy *Gingles*'s first precondition. First, in *Stabler v. County of Thurston*, 129 F.3d 1015 (8th Cir. 1997), the Eighth Circuit rejected the argument that "a districting plan adopted or imposed as a remedy for a § 2 violation necessarily uses race as part of its basis." *Id.* at 1024. *Stabler* held that proposed districts did not satisfy *Gingles*'s first precondition because "race was the predominant factor" motivating their composition. *Id.* at 1025. Then, in *Cottier I*, the Eighth Circuit held that "proposed districts" satisfied *Gingles*'s first precondition, in part "because the districts are not primarily based on race." *Cottier I*, 445 F.3d at 1118. Citing *Stabler*, the court stated that the districts would not have been permissible "if race [were] the predominant factor motivating the placement of a significant number of voters within or without a particular district." *Id.* at 1117. Finally, in *Bone Shirt*, which Plaintiffs rely on throughout their summary-judgment briefing, the Eighth Circuit addressed the racial-gerrymandering question under *Gingles* and held again that the plaintiffs' "proposed remedial plan" would have failed under *Gingles*

"if race [wa]s the predominant factor in placing voters within or outside of a particular district." 461 F.3d at 1019. Because their proposed districts followed "traditional boundaries"—county lines, Indian reservation boundaries, and rivers—the Eighth Circuit held race was not the predominant factor in shaping their boundaries, and that they satisfied *Gingles*. *Id.*

In sum, though a proposed district under *Gingles*'s first precondition must contain a majority of minority voters, *see generally Bartlett v. Strickland*, 556 U.S. 1 (2009), to reach that goal Plaintiffs cannot sublimate traditional redistricting concerns to race, or place large numbers of voters in one district rather than another because of race.

ii. Notwithstanding the rule that racially gerrymandered districts fail to satisfy this precondition, William Cooper, the demographer whom Plaintiffs retained to draw their proposed districts, candidly admitted to placing significant numbers of voters within and without those districts on account of race. (*See* Br. in Supp. of Defs. MSJ, Doc. 92 ("Defs. MSJ Br.") at 30-32.) Cooper admitted that he split Pulaski County between predominantly black neighborhoods and predominantly white neighborhoods "in order to have a majority Black Supreme Court district." (*Id.* at 30.) He admitted that he split Jefferson County in his Court of Appeals plans' District 7, and Pulaski County in his Court of Appeals plans' District 8, between black and white neighborhoods in order to attain majority-black populations. (*Id.* at 31.) He also agreed that in the District 7 of one illustrative plan for the Court of Appeals, he intentionally split Mississippi County between "majority black" precincts and "areas that are overwhelmingly white," in order to make District 7 a majority-black district. (*Id.*) By any definition, these race-motivated county splits of some of Arkansas's largest counties placed significant numbers of voters within and without Plaintiffs' proposed districts on account of race. Accordingly, these districts do not satisfy *Gingles*'s first precondition.

In response, Plaintiffs do not dispute that race was the predominant factor that motivated the placement of significant numbers of voters within and without their proposed districts. Instead, they begin their response with a distraction, arguing that at the liability stage of a Section 2 case, they must propose only a "potentially viable" remedy. They note the first *Gingles* precondition does not require them to establish that their proposed plans are truly viable—that is, that they would provide a realistic opportunity to minority voters to elect a candidate of choice. (Pls. MSJ Resp. 22.) This is beside the point.

While Plaintiffs are correct that they do not need to propose a final remedy at this juncture, they do need to prove it is at least possible to design a remedy that does not have racially gerrymandered districts. *Cottier I*, for example, said that "[t]he ultimate viability and effectiveness of a remedy is considered at the remedial stage" of a Section 2 case, and that the point "of the first *Gingles* precondition is to prove that a solution is possible," though "not necessarily to present the final solution to the problem." 445 F.3d at 1117. But *Cottier I* also said that, as part of "prov[ing] that a solution is possible," Plaintiffs must also "demonstrate a proper and workable remedy exists" that does not racially gerrymander—*at the liability stage*.[1] *Id.* Not only have Plaintiffs failed to do that, their demographer has admitted the only way to "have a majority Black Supreme Court district" is to split Pulaski County on racial lines (Defs. MSJ Br. 30), and that "Jefferson County will have to be split" on racial lines "in order to create two majority Black [Court of Appeals] districts" (*id.* at 31). That is, Plaintiffs' expert admits the only possible remedy is one that impermissibly places large numbers of voters within and without remedial districts on the basis of race.

[1] *Bone Shirt* drew the same distinction. It rejected the defendants' argument that the plaintiffs had to prove their proposed districts would provide "sufficient" electoral opportunity at the liability stage, but also required the plaintiffs to show race was not the predominant factor in motivating their proposed districts' shape at liability. 461 F.3d at 1019.

Plaintiffs' only other response to Defendants' argument is simply to say the Eighth Circuit must be wrong. It cannot be, they say, that Section 2 does not allow racial gerrymandering; if it were, "each time plaintiffs attempted to satisfy *Gingles I*, it would be deemed an impermissible racial gerrymander, and thus there could be *no* Section 2 litigation." (Pls. MSJ Resp. 22-23.) That is not correct. For one thing, *Stabler* rejected this same argument, reaffirmed *Harvell*, and held that proposed Section 2 remedies must not gerrymander. *See Stabler*, 129 F.3d at 1024-25 (rejecting plaintiffs' argument that Section 2 claims cannot "be defeated on the basis of gerrymander[ing]" because any Section 2 remedy "necessarily uses race as part of its basis"). For another thing, *Bone Shirt* and *Cottier I*—along with common sense—show it is possible to create a majority-minority district without racially gerrymandering. *See Bone Shirt*, 461 F.3d at 1019 (approving of proposed districts that each combined several whole counties with a reservation and used rivers as their boundaries); *Cottier I*, 445 F.3d at 1118 (approving of proposed city wards that "follow[ed] census blocks" and "recognized traditional neighborhoods" within the subject city). That said, in this case, Plaintiffs' own demographer has admitted that he cannot draw the necessary majority-minority districts without racial gerrymandering. But that is not always, or even usually, true in other Section 2 cases.

Finally, Plaintiffs say that even if "race was the predominant factor in [their] proposed plans," they would satisfy strict scrutiny because they are narrowly tailored to a compelling interest: complying with Section 2. (Pls. MSJ Resp. 23.) But the Supreme Court has never held that complying with Section 2 is a compelling interest that justifies racial gerrymandering. As it said just four years ago, it has only "assumed" it, after two decades of opportunities to settle the question. *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (citing *Shaw v. Hunt*, 517 U.S. 899, 915 (1996)). The much older summary affirmance Plaintiffs cite in this regard, *King v. Ill. Bd. of*

Elections, 522 U.S. 1087 (1998), is not precedential. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (summary affirmances "should not be understood as breaking new ground"—which holding that Section 2 compliance justifies racial gerrymandering would have).

In any case, whether Plaintiffs' proposed districts would satisfy strict scrutiny is ultimately irrelevant. For the question before this Court is not whether Plaintiffs' districts would survive constitutional challenge if adopted by Arkansas. It is whether they satisfy *Gingles*'s first precondition, which requires interpretation of Section 2—not the Constitution. The Eighth Circuit has held time and again that even if the Constitution might permit racial gerrymanders drawn to comply with Section 2, Section 2 as interpreted by *Gingles* does not require racial gerrymanders. Plaintiffs' proposed districts, which their expert witness confessed are racially gerrymandered, fail as a matter of law to satisfy *Gingles*'s first precondition.

2. Plaintiffs' proposed districts fail to satisfy the requirement of group compactness.

Plaintiffs' proposed districts fail as a matter of law for a second reason: They are not compact in the sense Section 2 requires. Both Plaintiffs' proposed Supreme Court districts and their Court of Appeals districts depend on connecting black voters in urban population centers in Little Rock and Pine Bluff to rural black voters in the Delta, hundreds of miles away. Yet the Supreme Court has held that to satisfy *Gingles*'s first precondition, proposed districts' minority populations—not just their overall shapes—must be geographically compact. Proposed Section 2 remedies may not "combine[] two farflung segments of a racial group with disparate interests." *LULAC v. Perry*, 548 U.S. 399, 433 (2006). Plaintiffs' proposed districts do just that—a fact again conceded by Mr. Cooper—so they fail as a matter of law.

As Plaintiffs correctly emphasize, in *LULAC*, it was the "geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests

of these populations—not either factor alone—that render[ed] District 25 noncompact for § 2 purposes." (Pls. MSJ Resp. 15 (quoting *LULAC*, 548 U.S. at 435).) But this does not help them, because the same could be said of the distinct Arkansas communities Plaintiffs seek to combine. Plaintiffs have proposed two remedial Supreme Court districts that connect Little Rock and Pine Bluff to the Delta. (Revised Cooper Decl., Doc. 91-3 at 30, 32 (Figure 15 & Figure 17).) They only differ in that one contains Mississippi County, a Delta county at the northeastern point of the State, and the other does not. Taking the one that does, Pine Bluff and Blytheville (the population hub of Mississippi County) are about 200 miles apart; Little Rock and Blytheville about 180 miles apart. Plaintiffs' other proposed remedial Supreme Court district stops short of Mississippi County, only going as far north as Crittenden County. But even in this district, about 140 miles separate Pine Bluff and West Memphis, Crittenden County's population center.[2]

Plaintiffs' proposed Court of Appeals districts are no more compact. The only real difference between Mr. Cooper's Supreme Court and Court of Appeals plans is that instead of connecting both Little Rock and Pine Bluff to the Delta, he connected only Pine Bluff to the Delta, leaving Little Rock to anchor a separate majority-minority district. Thus, in both his Court of Appeals plans, proposed District 7 winds from Pine Bluff up the State's eastern border to Mississippi County, encompassing Blytheville, about 200 miles away. (*See* Revised Cooper Decl. at 20, 25, 27 (Figure 8, Figure 12, & Figure 14).) Plaintiffs do fleetingly note that in one of their proposed versions of Court of Appeals District 8, two cherry-picked counties are only 68 miles apart. (Pls. MSJ Resp. 16.) But showing one compact Court of Appeals district will not carry

[2] Distances according to shortest route on Google Maps, *see* https://bit.ly/3DSNZDZ (Pine Bluff to Blytheville); https://bit.ly/3vqTred (Little Rock to Blytheville); https://bit.ly/3aQbH7g (Pine Bluff to West Memphis).

Plaintiffs' burden, because Arkansas already has one majority-minority Court of Appeals district, meaning Plaintiffs must show two such districts are possible to satisfy the first precondition.

Regarding the interests of black voters in these geographically distant communities, Plaintiffs do not demonstrate these voters have similar interests. (*See* Pls. MSJ Resp. 15 (promising to "demonstrate" that "the Black communities in Plaintiffs' proposed districts . . . have similar needs and interests").) Given their own demographer's testimony, they could not demonstrate any similarities. Mr. Cooper was asked point-blank what voters in Little Rock have in common with voters in several Delta counties. His answer—which he expanded, unprompted, to include Jefferson County (*i.e.*, Pine Bluff)—was that they live in the same State and are familiar with each other. Here is the exchange in full:

> Q: What do the voters in Little Rock that you've included in [proposed Supreme Court] 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.

(Cooper Depo., Doc. 88-5 at 90:17-91:4.)

It is no wonder Mr. Cooper could not offer many similarities between Little Rock or Pine Bluff and the Delta other than their sharing the same State. Little Rock is Arkansas's urban capital city. As Mr. Cooper conceded, in something of an understatement, he "d[id]n't think there would be much in the way of agriculture within the city of Little Rock." (*Id.* at 88:7-8.) The Delta, by contrast, is one of "[t]he three Rural regions of Arkansas." University of Arkansas

System Division of Agriculture, *Rural Profile of Arkansas* 7 (2021).[3] (*See* Cooper Depo. at 71:8-16, 87:24-88:3.) When asked about "the role of agriculture" in the Delta counties, Mr. Cooper responded: "I don't know what else people would necessarily do in some of these Mississippi River counties other than light industry or agriculture." (*Id.* at 89:18-21.)

Of course, Mr. Cooper's views about the exclusive role of light industry and agriculture in the Delta's economy are an overstatement, born of his confessed ignorance of the State. (*See id.* at 19:24-21:23 (acknowledging that he was last in Arkansas on a back-roads detour for several hours in the late 1990s, and has never spent more than a night in the State).) But his assumptions have a basis in truth. In the University of Arkansas's most recent *Rural Profile of Arkansas*, released this year, it found negligible agriculture in the State's cities; yet, in the rural regions, 10% of employment is in farming and forestry. *Rural Profile of Arkansas*, *supra*, at 18. In the State's several urban counties, about 7% of the workforce is employed in manufacturing; in the rural regions, the figure is around 15%. *Id.* And these differences in types of employment have ramifications for income, education, and people's way of life. In Pulaski County, average earnings per job in 2018 were $56,804, and in Jefferson County, average earnings were $47,427. *Id.* at 22. But in many of the Delta counties, average earnings were lower, with one county, Lee, averaging only $29,054 in earnings per job. *Id.*

Against all this, Plaintiffs offer a paragraph of assertions about the "interests that these communities share." (Pls. MSJ Resp. 16.) No evidence supports those assertions. Plaintiffs say Mr. Cooper "considered the socioeconomic communities shared by the Black communities" he tethered together. (*Id.* (citing Pls. Resp. SUMF ¶ 109).) But all the cited material shows is that

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

Mr. Cooper compared *statewide* demographic averages for white Arkansans to *statewide* demographic averages for black Arkansans. (Pls. Resp. SUMF ¶ 109 (citing Revised Cooper Decl. ¶ 71); *see* Cooper Depo. at 33:25-35:12).) Such comparisons offer literally no evidence about similarities between black voters in Little Rock or Pine Bluff, and black voters in the Delta.

Mr. Cooper's testimony does not fill this evidentiary gap. He did not, as Plaintiffs claim, "testif[y] that he reviewed the demographics in multiple counties in Arkansas." (Pls. MSJ Resp. 15 (citing Pls. Resp. SUMF ¶ 109 (quoting Cooper Depo. at 37:7-38:13)).) To the contrary, he unequivocally testified he had never reviewed black Arkansans' demographics on the county level, because he believed there was "no reason to." (Cooper Depo. at 38:10.) He went on to say, in a snippet of the exchange Plaintiffs quote, "[W]hile I didn't produce it, I do have [demographic] information about all counties." (*Id.* at 37:20-21.) But when asked whether he analyzed that information or just had it, he flatly answered, in testimony Plaintiffs do not quote: "I didn't analyze it. I have it." (*Id.* at 37:25.) Finally, when asked if he could "tell us as [he sat] here today how the demographics of the African-American community in Little Rock compare with those of the African-American community in the Delta region," he answered: "I just haven't gotten down to that granular level, but if I were ever called upon to do so, I could respond, but there's no reason to respond because I've given you the state-level data and I've given you an example county [Pulaski County] and that should be sufficient." (*Id.* at 38:1-13.)

In sum, Mr. Cooper has offered no opinion that there are demographic similarities between black voters in central Arkansas and the Delta. And he unambiguously admitted that he has never reviewed the county-level demographic data needed for such an opinion. His only opinion is that voters in these communities have similar interests, because they reside in the same State and are familiar with each other's "traditions." In other words, Mr. Cooper admits that the

black communities of central Arkansas and the Delta are socially as well as geographically disparate communities whose "only common index is race." *LULAC*, 548 U.S. at 435. Therefore, Plaintiffs' proposed maps do not satisfy the reasonable-compactness inquiry, and Defendants are entitled to judgment as a matter of law on the first *Gingles* precondition.

B. Plaintiffs have not satisfied the second and third *Gingles* preconditions, because black voters do not vote cohesively in Arkansas appellate judicial elections, and because their preferred candidates usually win.

Plaintiffs argue the Court cannot grant summary judgment on the second and third *Gingles* preconditions because the experts who opined on those preconditions disagree. But the experts' factual opinions are essentially identical. The only disagreement here is legal: In a Section 2 case, which elections are legally relevant? If the Court agrees with Defendants that, as a matter of law, elections between white candidates are just as relevant as elections between white and black candidates—or even just that they are entitled to significant weight—it must enter judgment in favor of Defendants.

Both sides' experts agree that of the thirty nonpartisan elections for the Supreme Court and Court of Appeals, just four have been contested by black and white candidates: elections in 2004, 2006, 2008, and 2010, three of which involved Judge Wendell Griffen. They agree that in those elections, (1) black voters supported Judge Griffen; (2) white voters supported his opponents; (3) Judge Griffen lost; and, (4) in the election contested by a black candidate who was not Judge Griffen, neither black nor white voters supported her. There is also no dispute about the results of elections between candidates of the same race. Because Plaintiffs insist these elections are legally irrelevant, their expert did not offer any opinions about them. So Defendants' expert is the only one with an opinion on these elections. He analyzed 26 nonpartisan judicial elections between candidates of the same race, or 30 nonpartisan judicial elections total—over seven times more than Plaintiffs' expert. His best and undisputed estimate is that in 18 of those 30 elections,

black voters' top choices were successful. Thus, even counting Judge Griffen's elections, black voters' top choices succeeded in 60% of nonpartisan elections for the Supreme Court and Court of Appeals. As to cohesion, he found black voters supported their preferred candidates by margins below the 60% guideline for determining cohesion. (*See* Defs. MSJ Br. 40-48.)

This undisputed evidence leads to only one conclusion: Black voters do not vote as a cohesive bloc in judicial elections, and their preferred candidates are not usually defeated. For Plaintiffs to prove otherwise, the Court would have to hold that three elections between 2004 and 2008, each involving Judge Griffen, as a matter of law are more significant than the 26 elections between candidates of the same race between 2004 and 2020. Not only that, the Court would be required to disregard the undisputed evidence that Judge Griffen lost because of his unique traits, not because of racially polarized voting.

1. The Court must consider and equally weigh all the judicial elections in evidence—and at least give significant weight to elections between white candidates.

As Defendants explained in their summary-judgment brief, a trilogy of Eighth Circuit cases holds that minority-preferred candidates in elections between white candidates are minority-preferred candidates no less than elections between a minority candidate and a white candidate. (Defs. MSJ Br. 38-40.) More than that, those cases ultimately conclude that elections between white candidates are entitled to equal weight as elections between a minority candidate and a white candidate.

Plaintiffs do not distinguish those cases. Instead, they claim that the Eighth Circuit "recognized" that elections between black and white candidates are more important than those between white candidates in *Bone Shirt v. Hazeltine*, 461 F.3d 1111 (8th Cir. 2006). (Pls. MSJ Resp. 26.) As explained below, this overstates what *Bone Shirt* actually held. So Plaintiffs place

far more emphasis on what other "courts around the country" have held. (*Id.* (citing a Third Circuit decision and district-court decisions from Massachusetts, Mississippi, Ohio, Texas, and Wyoming); *id.* at 27 (citing 1991 Fifth Circuit decision); *id.* at 33 (citing two 1980s Fifth Circuit decisions and a district-court decision from New York).) At the same time, they urge the Court to disregard out-of-circuit authority that cuts against them, dismissing a Fourth Circuit decision as "not the law in this Circuit." (*Id.* at 34 n.12.)

Contrary to Plaintiffs' characterization, there is no nationwide consensus that they are correct. In fact, a helpful law review article on the subject—which Plaintiffs incorrectly cite for the proposition that there is a consensus on which elections matter (*id.* at 34)—notes that "the diversity of legal doctrine across the circuits with respect to white-versus-white elections" is "striking." Christopher S. Elmendorf et al., *Racially Polarized Voting*, 83 U. Chi. L. Rev. 587, 622 (2016). That article goes on to explain that at least the Second, Fourth, and Ninth Circuits agree with the Eighth Circuit. These four circuits "credit white-versus-white elections" and deem minority-preferred candidates in those elections minority candidates of choice. *Id.* Far from "overwhelmingly" supporting Plaintiffs' arguments (Pls. MSJ Resp. 26), out-of-circuit precedent instead supports Defendants'.

In any event, the Eighth Circuit has held that this Court must not disregard the more than two dozen judicial elections since 2004 between candidates of the same race. Even if this Court were free to ignore that holding, Plaintiffs have not offered persuasive arguments for disregarding these elections. With these elections properly considered, the undisputed facts entitle Defendants to judgment as a matter of law under the second and third *Gingles* preconditions.

i. The Eighth Circuit has rejected Plaintiffs' theory.

The bad news for Plaintiffs' theory begins with *Harvell v. Blytheville School District No. 5*, 71 F.3d 1382 (8th Cir. 1995) (en banc), where the en banc Eighth Circuit "specifically rejected

the presumption . . . that only African-American candidates can be preferred by African-American voters." *Clay v. Bd. of Ed. of City of St. Louis*, 90 F.3d 1357, 1361 (8th Cir. 1996) (citing *Harvell*, 71 F.3d at 1386). "Such stereotyping," it held, "runs afoul of the principles embodied in the Equal Protection Clause." *Harvell*, 71 F.3d at 1386. Moreover, responding to arguments that candidates who had received a majority of black voters' support were not black voters' preferred candidates, it said it "cannot accept" the proposition that "the black voters of Blytheville have gone five consecutive years . . . without stating a preference." *Id.* at 1387. Minority-preferred candidates, it said, are "generally" the candidates who "receive [minority] votes, not some idealized figure whose absence from the ballot keeps a disappointed electorate at home." *Id.*

Disregarding the passages above, Plaintiffs note that *Harvell* did not directly address which elections courts should analyze, and that in *Harvell* the evidence showed candidate race did matter to black voters. (Pls. MSJ Resp. 32.) But that misses the point: *Harvell* held courts must actually look at that evidence, not assume it away or assume what it would show. Indeed, Plaintiffs' arguments for disregarding elections between white candidates cannot be squared with key parts of *Harvell*. For one thing, Plaintiffs' theory would require this Court to conclude that black voters have not had a single candidate of choice in a Supreme Court or Court of Appeals election since Judge Griffen's defeat in 2008—a span of 22 contests and 13 years. Since then, as they would have it, every candidate to receive a majority of black votes was likely "something less than a true preference," or even no "preference at all." (Pls. MSJ Resp. 27.) They cannot square this argument with *Harvell*'s holding that courts should presume minority voters "stat[e] a preference" in all elections, or its refusal to accept the claim that black voters in that case went just five years without stating a preference. 71 F.3d at 1387.

Plaintiffs' arguments are also in tension with *Harvell*'s caution against assuming that black voters prefer only black candidates. *See id.* at 1386. Although Plaintiffs disclaim making any such assumption (*see* Pls. MSJ Resp. 32), it is precisely what drives their theory. According to them, in elections with minority candidates, "the race of the candidate provides minority voters with a clear signal as to who will best represent their interests"—the minority candidate. (*Id.* at 26-27.) But in "an election between white candidates," they claim, black voters are left "without a clear signal" and likely "without a preference at all." (*Id.* at 27.) This is precisely the presumption that *Harvell* prohibited. And Plaintiffs adhere to it so strongly that in any election between white candidates, they would irrebuttably presume black voters have no preferred candidate at all. (*See* Liu Depo., Ex. U at 53:25-55:19[4] (refusing to answer whether President Biden was black voters' preferred candidate in Arkansas in 2020, despite receiving an estimated 94% of their votes, because "he's a white candidate" and "his opponent . . . [wa]s also white").)

After *Harvell*, the Eighth Circuit made clear in *Clay* that the "definition of minority preferred candidate" is simply "the candidate[] receiving the highest number of African-American votes." *Clay*, 90 F.3d at 1361-62. "Absent a showing that minority preferred candidates are, for some reason, excluded from the ballot," the Eighth Circuit directed courts to presume that all elections feature *some* minority-preferred candidate. *Id.* at 1362. As with *Harvell*, in response Plaintiffs point to irrelevant features of *Clay*. Whereas the plaintiffs' expert in *Clay* was so certain black voters preferred black candidates he did not analyze election results at all, their expert, Plaintiffs point out, at least analyzed the four judicial elections featuring black candidates. (Pls. MSJ Resp. 31-32.) But *Clay* did not merely condemn extreme disregard of statistical evidence.

[4] Additional excerpts of Dr. Liu's deposition are attached to this brief as Exhibit U.

It announced a rule: A minority candidate of choice is whichever candidate receives the most minority votes, and that absent proof to the contrary, every election has one.

Finally, in *Cottier III*, the en banc Eighth Circuit made it clear that Section 2 plaintiffs must prove a pattern of electoral defeat in all elections, not just elections involving minority candidates. In that case, Native Americans challenged their city's districting scheme for its city council. The parties presented data on 35 elections. 604 F.3d at 560. Only seven, a number the Eighth Circuit thought "very small," were elections between a minority candidate and a non-minority candidate. *Id.* Here were the results:

Election Results from *Cottier III*

Type of election	**Native-American-preferred candidate success rate**
Between candidates of different races	1 out of 7 (14% success rate)
Between white candidates	16 out of 28 (57% success rate)
Total	**17 out of 35 (49% success rate)**

Id. If Plaintiffs' theory were correct, the Eighth Circuit would have discarded (or at least discounted) the 28 elections between only white candidates and concluded that white voters usually voted as a bloc to defeat Native Americans' preferred candidate. But that is not what the Eighth Circuit did. Instead, it simply added the two types of elections up and viewed the evidence "as a whole." *Id.* It observed that the evidence "show[ed] almost equal numbers of victories for Indian-preferred candidates and non-Indian-preferred candidates"—the 49% success rate over all elections shown above. *Id.* And it then concluded that those results did not support "a finding that a white majority in [the city] votes sufficiently as a bloc usually to defeat the Indian-preferred candidate." *Id.*

Plaintiffs cannot reconcile their exclusionary approach to elections between white candidates with *Cottier III*. Therefore, even though it is the Eighth Circuit's most recent en banc decision about Section 2, Plaintiffs relegate *Cottier III* to a single footnote. (Pls. MSJ Resp. 32 n.11.) The only distinction they offer there is that *Cottier* was decided after a trial, not at summary judgment. But that is irrelevant. Whether the evidence above was offered at trial or summary judgment does not change what the Eighth Circuit thought of it: that evidence of success in elections between white candidates was not only legally relevant; it was dispositive.

Beside that, Plaintiffs' only response to *Cottier III* is to read into its silence, arguing that elections between candidates of different races must be more probative after *Cottier III*, because it did not "quibble with *Bone Shirt*'s conclusion that biracial elections are more probative than uniracial elections." (*Id.*) But whether or not *Cottier III* expressly addressed Plaintiffs' understanding of *Bone Shirt*'s "conclusion," after the en banc decision in *Cottier III* that understanding cannot be Eighth Circuit law. If it were, *Cottier III* could not have been decided as it was. In that case, despite the fact that the minority-preferred candidate lost six out of seven contests between candidates of different races, the Eighth Circuit held the plaintiffs had failed to prove that white voters usually voted as a bloc to defeat minority-preferred candidates. That holding leaves no room for Plaintiffs' understanding of *Bone Shirt*.

Regardless, Plaintiffs base that understanding on a stray sentence of dictum in *Bone Shirt*, so there was no need for *Cottier III* to "quibble with" it. In *Bone Shirt*, Native Americans challenged South Dakota's state-legislative districts. They offered evidence from ten state-legislative elections, only one of which was contested by a Native American candidate. Before describing that evidence, the panel stated that "[e]ndogenous [*i.e.*, elections for the office in question] and

interracial elections are the best indicators of whether the white majority usually defeats the minority candidate." *Bone Shirt*, 461 F.3d at 1020-21 (footnote omitted). It offered no reasoning in support of that statement. And it cited only to the subsequently overruled panel opinion in *Cottier I* and another circuit's opinion.[5] *See id.* at 1021. Then the court considered all ten elections, including the nine contested only by white candidates, and concluded that "[i]n *each* election, the white majority voted as a bloc to defeat the Indian-preferred candidate." *Id.* (emphasis added).

Given this unblemished record of defeats in state-legislative elections, the Eighth Circuit had no trouble concluding that voting in South Dakota's state-legislative elections was racially polarized. It made no difference whether elections between candidates of different races were given greater or equal weight; in each election for the office in question, the Native-American-preferred candidate lost. So the passing suggestion that elections between candidates of different races were the "best indicators" of polarized voting was unnecessary to the decision. By contrast, in *Cottier III* the en banc Eighth Circuit faced a fact pattern where it mattered how much weight was given to elections between candidates of different races. And it gave such elections the same weight it gave elections between candidates of the same race. Here, this Court must follow the en banc court's example.

ii. Plaintiffs' rationale for ignoring elections between white candidates is unpersuasive and rooted in racial stereotypes.

Aside from the Eighth Circuit's precedent rejecting Plaintiffs' theory, this Court has already rejected it. (*See* MTD Order at 14-15.) And nothing in Plaintiffs' current briefing should persuade the Court to embrace that theory now. To the contrary, the more Plaintiffs expound on their legal theory, the more blatantly rooted in racial stereotypes it becomes. Beside selectively

[5] Importantly, *Cottier I* said only that endogenous elections are more probative, not that elections between minority and non-minority candidates are more probative. *See Cottier I*, 445 F.3d at 1121.

string-citing decisions that share their view, Plaintiffs offer one paragraph of argument for "the primacy of interracial elections." (Pls. MSJ Resp. 26.) There, they assert that candidates' race "provides minority voters with a clear signal as to who will best represent their interests." (*Id.* at 26-27.) They then reason that "without [that] clear signal," minority voters are lost in "an election between white candidates," perhaps left "without a preference at all," choosing between candidates that "represent something less than a true preference." (*Id.* at 27.) Best, then, Plaintiffs argue, to ignore elections between white candidates altogether.

There are four fatal problems with this argument. The first is that it ignores the statute. Indeed, Plaintiffs' entire brief does not cite it once. Section 2 says that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population," and that the extent to which members of a protected class are elected is just "one circumstance that may be considered." 52 U.S.C. 10301(b). On Plaintiffs' view, Section 2 *does* establish a right to proportional representation by minority officials, and minority candidates' success is the only fact that counts. If Plaintiffs were right, it would not matter if every judge on the Court of Appeals and every justice on the Supreme Court had been supported by black voters. Even then, they would still be entitled to a remedy because Judge Griffen lost his elections over a decade ago. All that matters, on their theory, is minority candidates' success or failure; everything else is irrelevant.

The second problem with Plaintiffs' theory is that it assumes its conclusion. The whole point of a racially polarized voting analysis is to see whether or not minority voters have cohesive preferences and whether or not those preferences differ from, and are defeated by, white voters' preferences. But Plaintiffs' theory assumes that analysis away. Even if minority voters' preferred candidates regularly win, as long as they are white Plaintiffs' theory would presume

that they are not minority voters' true preference. A theory that gives Plaintiffs an irrebuttable presumption on a critical element of their case is suspect at best.

The third problem with Plaintiffs' theory is that it rests on racial stereotypes. The assumption on which it is based is that minority voters believe minority candidates—even in judicial elections—"will best represent their interests." (Pls. MSJ Resp. 26-27.) That is, minority voters believe that minority judges will decide cases in ways that benefit them. And without the "clear signal" of candidate race (*id.* at 27), differences between white candidates in judicial philosophy, background, experience, and past judicial decisions are irrelevant to minority voters. As the Second Circuit said in rejecting the argument that "[w]hite-white elections . . . . are an improper evidentiary source," courts should "decline to adopt an approach precluding the possibility that a white candidate can be the actual and legitimate choice of minority voters." *NAACP, Inc. v. City of Niagara Falls*, 65 F.3d 1002, 1015-16 (2d Cir. 1995). "Such an approach"— advocated by Plaintiffs here—"would project a bleak, if not hopeless, view of our society" that is "inconsistent with our people's aspirations for a multiracial and integrated constitutional democracy." *Id.* at 1016. Or, as the Eighth Circuit put it, crediting "[s]uch stereotyping" would "run[] afoul of the principles embodied in the Equal Protection Clause." *Harvell*, 71 F.3d at 1386.

Finally, the fourth problem is that, even if Plaintiffs' stereotypes were correct, they would still be beside the point. Section 2 does not grant minority voters a right to elect "a true preference" in some idealized sense. (Pls. MSJ Resp. 27). It grants them a right to vote in a fair share of elections for successful candidates, not perfect ones. *See Harvell*, 71 F.3d at 1387 (holding candidates of choice are ones who "receive [minority] votes, not some idealized figure whose absence from the ballot keeps a disappointed electorate at home"). Asking whether minority voters had been able to elect "a true preference" would not be an administrable standard, and it is

plainly not the question Section 2 and *Gingles* ask. As explained in Defendants' summary-judgment brief, *Gingles*'s racially polarized voting inquiry simply asks whether bloc voting by white voters defeats minority-preferred candidates or not. (Defs. MSJ Br. 52-53.) If Section 2 were about equalizing the opportunity to elect "true preferences," courts would also have to ask whether the candidates voted for by white voters were their own "true preferences," not just whether those candidates won. Preferring to ignore this problem, Plaintiffs offer no response.

Ultimately, Plaintiffs' theory rests on the presupposition that Section 2 grants minority voters a right to elect their "true" preferences. In a system where voters can only choose the best of two available options, that is a right that no voter, black or white, enjoys. So the premise of Plaintiffs' theory is false, and their theory fails as a result.

2. Considering all judicial elections, black voters do not vote cohesively.

The second *Gingles* precondition requires minority voters to vote cohesively for the offices in question. Plaintiffs do not dispute that black voters do not vote cohesively in elections for the Arkansas Supreme Court and Court of Appeals—assuming the Court considers all of those elections. (Pls. MSJ Resp. 28-29.) Nor could they. Defendants' expert's undisputed analysis of the 30 nonpartisan elections for those courts shows that black voters only support their top choices for those courts by an average of 56.2%, and 55.6% and 56.7% for the Supreme Court and Court of Appeals respectively. (*See* Defs. MSJ Br. 41.) And Plaintiffs agree that 60% is a reasonable guidepost for cohesion, if not an absolute threshold. (Pls. MSJ Resp. 28-29.)

After all, in a system of two-person races, the cohesion requirement would do no work if it were satisfied by average support for preferred candidates around 50%. Nor, if the bar for cohesion were set so low, could it serve its purpose of "establish[ing] that the minority has the potential to elect a representative of its own choice in some single-member district." *Growe v.*

Emison, 507 U.S. 25, 40 (1993). If under 60% of minority voters supported their preferred candidates in a narrowly majority-minority district, while—as *Gingles*'s third precondition requires—white voters voted as a cohesive bloc against the minority's preferred candidates, the minority's preferred candidates would lose and drawing remedial districts would be futile.[6]

Plaintiffs' only argument on cohesion is that, if the Court disregards the last 22 elections for the Supreme Court and Court of Appeals—or 26 of the last 30 elections—and considers only four elections held 11 to 17 years ago, then it will find cohesion. (Pls. MSJ Resp. 28.) Even in those four elections, black voters voted non-cohesively in at least two; in Judge Griffen's first loss, only 58% of black voters supported Judge Griffen, and in the 2010 non-partisan primary contested by Evelyn Moorehead, 36% of black voters supported their top choice, Judge Fox. (Defs. MSJ Br. 9, **Table 1**.) These elections are no basis for discounting the last 22 elections.

3. Black voters' preferred candidates are not usually defeated by white bloc voting.

i. If the Court considers all elections, Plaintiffs cannot demonstrate racially polarized voting.

The third *Gingles* precondition requires Plaintiffs to "demonstrate that the white majority votes sufficiently as a bloc to enable it . . . *usually* to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986) (emphasis added). If the Court considers all elections, as the Eighth Circuit's precedent requires—not just Judge Griffen's, as Plaintiffs would

[6] For similar reasons, the Supreme Court's decision in *Bartlett* abrogates older precedent holding cohesion of 60% was sufficient to satisfy *Gingles*'s second precondition. (*See* Defs. MSJ Br. 43-44.) Plaintiffs wave away this argument as "an elaborate arithmetical exercise." (Pls. MSJ Resp. 29). But the point is simple. *Bartlett* held that Section 2 did not require States to draw 49% minority districts, because in those districts minority voters would need at least 1% "assistance" from white voters to elect their preferred candidates, and Section 2 affords no right to elect preferred candidates with "assistance from others." 556 U.S. at 14. Yet in a 51% minority district, if only 60% of minority voters support a preferred candidate, they will need "assistance" from white voters just as surely—indeed, far more assistance than a cohesive 49% minority population would.

prefer—there is no material dispute about whether that is the case. Rather, the unrebutted evidence is that black voters' preferred candidates have won the majority of nonpartisan elections for the courts at issue here, and in recent years have won the overwhelming majority of elections. (*See* Defs. MSJ Br. 47 (summarizing figures).) Plaintiffs' main response to this evidence is to insist that the Court cannot consider it but must consider only Judge Griffen's several losses over a decade ago, along with elections for partisan nonjudicial offices between black Democrats and white Republicans. (Pls. MSJ Resp. 30.) Indeed, according to them the Court can learn more about black voters' ability to elect their preferred appellate judges from Barack Obama's 2008 presidential race against John McCain than it can from the last 22 contests for appellate judgeships.

Plaintiffs do, however, offer one slight substantive response to the overwhelming evidence of black voters' preferred candidates' electoral success in judicial elections. They note that for many of the elections Dr. Alford analyzed, he acknowledged that due to limitations in the voting data he "could not determine with 95% confidence who the Black-preferred candidate was." (*Id.* at 36; Alford Report, Doc. 91-6 ¶¶ 13-17 (discussing limitations in the data); *id.* ¶ 21 (explaining that his confidence intervals are wider than Dr. Liu's because, unlike Dr. Liu, he accounted for uncertainty as to black and white voters' rates of turnout).) Rather, he could only say who the black voters' preferred candidate most likely was. But that is no reason to "afford these elections little—if any—weight," as Plaintiffs suggest *sans* authority. (Pls. MSJ Resp. 36.)

Ninety-five percent confidence may be "the standard that's most commonly utilized in political science for testing null hypotheses" (*id.* at 36 n.13), but it is not the standard of proof in this case. Rather, Plaintiffs bear the burden to prove racially polarized voting by a preponder-

ance of the evidence. *Defendants* do not have to prove to a 95% certainty—a standard approaching proof beyond a reasonable doubt—that polarized voting does *not* exist. If Defendants offer unrebutted evidence that shows black voters likely voted for winners over and over again, Plaintiffs cannot meet their burden at trial.

For this reason, the vast majority of opinions on Section 2 only report political scientists' bottom-line estimates (sometimes called "point estimates") of black and white voters' support—not their margins of error. Indeed, courts that have entertained attacks on experts' confidence levels have overwhelmingly rejected them. *See United States v. City of Euclid*, 580 F. Supp. 2d 584, 602 (N.D. Ohio 2008) ("[A]n approach might yield an inexact result for purposes of a hypothetical mathematical challenge, but could still be correlative, probative, and sufficiently accurate to bear on the ultimate issue of racial bloc voting. The standard of proof here is preponderance, not mathematical certainty."); *see also NAACP, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 390 (S.D.N.Y. 2020) (rejecting challenge to plaintiff's expert testimony on the basis of wide confidence intervals because "point estimates are the most likely outcomes" and "'similar results repeating year after year' would constitute a 'pattern'"); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1044 n.483 (S.D. Ohio 2019) (three-judge court) (overruling challenge to polarized-voting analysis that "did not provide confidence intervals" and finding courts "routinely" accept expert reports lacking them), *vacated & remanded on other grounds sub nom. Chabot v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 102 (2019); *Pope v. Cnty. of Albany*, 94 F. Supp. 3d 302, 337 (N.D.N.Y. 2015) (finding report from Dr. Liu that did "not indicate margins of errors or confidence intervals" reliable); *Fabela v. City of Farmers Branch*, No. 3:10-CV-1425, 2012 WL 3135545, at *11 & n.33 (N.D. Tex. Aug. 2,

2012) (crediting plaintiff's expert testimony where "the confidence intervals" were "broad," explaining that they were necessarily broad because of shortcomings in the precinct-level data, and noting that "it is undisputed that a point estimate is the 'best estimate' for the data"). Plaintiffs cite no case to the contrary.

There is no reason for a different conclusion here. Dr. Alford's estimates are accurate enough to show whom black voters likely preferred, and more than accurate enough to defeat Plaintiffs' case—as it is they, not Defendants, who carry the burden to prove racially polarized voting. Moreover, any uncertainty in Dr. Alford's estimates does not create a triable issue of fact. Because Dr. Liu refused to analyze the vast majority of Arkansas's judicial elections, Dr. Alford's estimates are the only evidence either party has about whom black and white voters preferred in the 26 elections between candidates of the same race that he analyzed. Discovery is over, and Dr. Alford's estimates are undisputed. Nothing at trial could change that fact.

ii. Even if the Court only or primarily considered elections involving black candidates, Plaintiffs would still fail to prove racially polarized voting.

Plaintiffs' only real hope of proving racially polarized voting is to persuade the Court to disregard the last 22 elections over the past 13 years for the Supreme Court and Court of Appeals and only consider Judge Griffen's three defeats. Even if the Court focused on those three elections, they would still not prove Arkansas's judicial elections are racially polarized. That is because special circumstances, rather than some antipathy to black candidates, explain Judge Griffen's repeated defeats. And Plaintiffs' evidence of election results from partisan races merely proves that in partisan contests, black and white voters prefer different parties. That unsurprising fact has no relevance to predicting the likelihood of polarized voting in judicial elections in Arkansas, because those elections are nonpartisan.

Judge Griffen's elections.—"The third *Gingles* precondition . . . requires that the district court analyze the 'special circumstances' that attend elections to make sure that there are no non-racial factors at play that would appear to *either defeat* or demonstrate a section 2 violation." *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 936 (8th Cir. 2018) (emphasis added) (quoting *Gingles*, 478 U.S. at 51). As Defendants' summary-judgment briefing explained, undisputed evidence shows that Judge Griffen was a uniquely controversial candidate, with a long history of judicial discipline proceedings, politically charged denunciations of national politicians and evangelical leaders, and controversial stances on issues ranging from abortion to defunding the University of Arkansas because of alleged racism. (Defs. MSJ Br. 54-57.) Judge Griffen himself told newspapers that he likely lost his seat on the Court of Appeals because of his extrajudicial commentary, and his opponent agreed. (*Id.* at 56.)

Plaintiffs have no substantive response, other than to suggest that perhaps Judge Griffen lost due to his race, not his many controversies, because "people who don't agree with" him concede that "he is a hard worker," and because one of the Plaintiffs testified that black voters "like him." (Pls. MSJ Resp. 38-39.) Instead, they argue the Court cannot decide Judge Griffen was opposed by white voters until it hears witnesses read his judicial-discipline history into the record and recite the relevant passages from the *Democrat-Gazette* at trial. (*Id.*) (How the Court will be any better informed by this procedure is left unexplained.) Contrary to Plaintiffs' insistence, nothing bars the Court from deciding at summary judgment that a reasonable fact-finder could only form one view of the evidence—particularly when that fact-finder is the Court itself.

Any reasonable fact-finder would have to conclude the special circumstances surrounding his ill-fated campaigns were the likely cause, for three reasons. First, Defendants have offered

undisputed evidence that Judge Griffen was an intensely controversial figure during his campaigns, and that he recognized himself as one. (*See* Defs. MSJ Br. 54-56.) Second, Plaintiffs have only offered, in response, testimony that he was generally perceived as a hard worker and that black voters like him. Accepting both claims as true, neither detracts from his being an intensely controversial figure. Thus, contrary to Plaintiffs' suggestions, there is no "conflicting evidence" on this issue. (Pls. MSJ Resp. 39.) Third and last, apart from Judge Griffen, the evidence suggests white voters have no qualms with black judicial candidates. White voters helped elect Judge Waymond Brown in 2008, in what was then a majority-white district. (Defs. MSJ Br. 64.) Not only that, his opponent was also black, which means white voters did not even recruit a white candidate to run against Judge Brown. Similarly, the three black appointees to the Court of Appeals, Judges Griffen, Neal, and Roaf, ran unopposed for reelection in majority-white districts, though Judge Griffen eventually drew an opponent. (*Id.*)

Plaintiffs incorrectly claim that as a matter of law no candidates were able to run against those judges because they had not been assigned districts. (Pls. MSJ Resp. 57-58.) In 1999, the General Assembly assigned those appointees to interim districts and made them eligible to run for reelection in "the November 2000 general election," Act 889, sec. 3, 1999 Ark. Acts 3315, 3316 (Mar. 29, 1999), and in 2000 they ran for reelection unopposed, a year-and-a-half after the legislature opened the door for challengers to run against them, *see* Ark. Sec'y of State, *Summary for Primary 2000* (reporting results for uncontested elections of Judges Griffen, Neal, and Roaf like all other judicial candidates).[7] If white voters were generally opposed to black judges, they

[7] Produced in native Excel format, and available online at https://www.sos.arkansas.gov/uploads/elections/2k_primarysum2.xls.

would have supported opponents to these black judges—including Judge Griffen himself, *before* he became a controversial figure.

Nonjudicial elections.—Plaintiffs also contend that a series of black Democrats' defeats by white Republicans shows that black voters support and white voters oppose black candidates and, respectively, would support or would oppose future black judicial candidates. (Pls. MSJ Resp. 28-30.) But when confronted with undisputed evidence that black and white voters vote in exactly the same way in contests between white Democrats and white Republicans, and that black voters do not support black *Republicans* when given opportunities to vote for one (Defs. MSJ Br. 57-60), Plaintiffs say the Court cannot consider the reason that white voters have voted against black Democrats, or the reason black voters have voted for them (*see* Pls. MSJ Resp. 39). The cause, they say, of polarized voting is irrelevant.

Plaintiffs' position on nonjudicial elections and their relevance is logically inconsistent. It both seeks to leverage the defeats of black candidates for nonjudicial offices to predict black candidates' chances in future judicial elections, and maintains that whether those nonjudicial candidates' losses were caused by candidate race, or instead party affiliations that are absent from judicial ballots, is irrelevant. Plaintiffs cannot have it both ways.

Because this is not a case about partisan offices, voting patterns in elections for partisan offices are only helpful insofar as they help the Court predict voting behavior in the very different nonpartisan elections for the judicial offices at issue. Plaintiffs argue those voting patterns help the Court, because they show that white voters tend to vote against black candidates. That argument, however, puts the question of cause at issue; for it to work, the candidates' race must explain the voting pattern. If in fact that voting pattern is explained by the black candidates' Democratic party affiliation, then it has no predictive value for the nonpartisan offices at issue

here. And indeed, that is exactly what the evidence shows. While black and white voters have starkly divergent voting patterns in partisan elections, they largely support the same candidates in the much different nonpartisan offices relevant to Plaintiffs' claims.

III. If the Court reaches the totality of the circumstances, Defendants are still entitled to summary judgment.

Plaintiffs devote over a third of their summary-judgment briefing to arguing that the Senate factors support them, briefing numerous factors on which Defendants did not move for summary judgment. (Pls. MSJ Resp. 40-63.) This is odd, because the Court can only reach the Senate factors if Defendants' principal argument for summary judgment—that Plaintiffs have failed as a matter of law to establish each of the *Gingles* preconditions—fails. Plaintiffs cannot compensate for their failure to satisfy the *Gingles* preconditions by focusing on the Senate factors.

Along similar lines, they cannot compensate for their failure, as a matter of law, to demonstrate the Senate factors on which Defendants moved for summary judgment by pointing to other Senate factors on which Defendants did not move. Two of the factors on which Defendants moved for summary judgment—polarized voting, and the extent minority candidates have been elected in the jurisdiction—are "essential to" a Section 2 claim. *Gingles*, 478 U.S. at 48-49 n.15. The Eighth Circuit has called these "[t]he two primary factors considered in [the] totality analysis," *Harvell*, 71 F.3d at 1390, and said they "predominate the totality-of-the-circumstances analysis," *Mo. State Conf. of the NAACP*, 894 F.3d at 938 (quoting *Bone Shirt*, 461 F.3d at 1022). And a third factor on which Defendants moved, the strength of the State's interest in statewide elections for its supreme court, has often defeated challenges to at-large judicial electoral systems on its own. Plaintiffs cannot create a fact issue on these Senate factors by pointing to the less important ones, on which Defendants did not move.

A. Voting is not racially polarized in Arkansas's appellate judicial elections. (Senate Factor 2)

One of the two "essential" Senate factors to proving a Section 2 case, *Gingles*, 478 U.S. at 48-49 n.15, is racially polarized voting—or in the language of the Senate report from which the Senate factors get their name, "the extent to which voting in the elections of the state or political subdivision *is* racially polarized," *id.* at 37 (emphasis added). Plaintiffs assert, in a paragraph, that they prevail on Senate Factor 2 because there is "extensive evidence that appellate judicial elections in Arkansas have been defined by RPV [racially polarized voting]." (Pls. MSJ Resp. 48.) But the "extensive evidence" to which they refer consists of three elections involving Judge Griffen 13 to 17 years ago. How that is evidence, let alone *extensive* evidence, that voting for Arkansas's appellate courts is currently racially polarized is left unexplained. Since those three elections, it is undisputed, black voters' top choices have been successful in an estimated 14 out of 22 Supreme Court and Court of Appeals contests, or 64% of the time. (Defs. MSJ Br. 11, 14.) And since 2014, the figure has improved to 10 of 13 contests, a 77% success rate. (*Id.* at 11, 14-15.)

Based on that undisputed evidence, no one could say that voting for Arkansas's appellate courts is racially polarized today. And as the Supreme Court and Plaintiffs' own expert both recognize, "a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election," *Gingles*, 478 U.S. at 57—or as this Court put it, "even three elections by a single candidate." (MTD Order at 14 n.6; *see* Liu Report, Doc. 91-9 at 10 n.9 ("As a statistical rule, more recent elections help us . . . predict what will happen in the near future.").) Plaintiffs cannot prove Senate Factor 2, one of the two essential factors to a Section 2 claim.

B. Black candidates in Arkansas appellate judicial elections succeed more often than they are defeated. (Senate Factor 7)

The second of the two essential Senate factors requires Plaintiffs to prove "difficulty in electing" minority candidates. *Gingles*, 478 U.S. at 48-49 n.15. Plaintiffs have had no such difficulty. Of the five black candidates for the Court of Appeals the parties have identified—Judge Waymond Brown, Judge Olly Neal, Judge Andree Roaf, Judge Griffen, and Judge Eugene Hunt—four were elected to the Court of Appeals. Judge Hunt did not lose to a white candidate, but to Judge Brown; Judges Neal and Roaf did not even draw opponents in majority-white districts; and Judge Griffen too was reelected unopposed and only lost his second bid for reelection after years of conflict with the judicial discipline commission. This track record hardly amounts to difficulty in electing minority candidates. With the exception of Judge Griffen's Supreme Court campaigns and of Evelyn Moorehead's campaign for the Supreme Court in 2010 (in which she lacked the support of even black voters), black candidates have been elected with ease.

The composition of the districts from which these judges ran successful campaigns particularly belies Plaintiffs' claim that white voters are hostile to black judicial candidates. First, consider Judge Brown. He was first elected in District 7 when it was a majority-white district. (Defs. MSJ Br. 64.) Yet not only did he win that district, he did not even draw a white opponent. Instead, his opponent was Judge Hunt, "another Black candidate." (Pls. MSJ Resp. 57.) Plaintiffs attempt to minimize the significance of this contest because Judge Brown's opponent was black. (*Id.*) But that cuts against Plaintiffs' case. If white voters were opposed to black judicial candidates, a majority-white district would not have been content to choose between two black judicial candidates. Even today, if white voters were so opposed to black judicial candidates, it is unclear why they have not made efforts to unseat Judge Brown in a district that is only 51% black. (*See* Revised Cooper Decl. at 17 (Figure 7).) Instead, he has been reelected unopposed.

Then there are Judges Neal, Roaf, and Griffen. In early 1999, after being appointed to unnumbered seats by the Governor, they were assigned to districts from which challengers could oppose them at the November 2000 general election. No one challenged them and they were all reelected unopposed. The districts to which Neal, Roaf, and Griffen were assigned, respectively, were Districts 1, 5, and 6. In 2000, Plaintiffs' demographer found those districts had non-Hispanic white voting-age population of 84%, 70%, and 73%, respectively. (*Id.* at 12 (Figure 3).) That is to say, they were overwhelmingly white. Yet no white candidate ran against these judges. Only after Judge Griffen became a controversial figure and twice-defeated candidate for the Supreme Court was he defeated in his second bid for re-election.

Undeterred by this record of success for black candidates, Plaintiffs change the topic to the relatively small number of black candidates. (Pls. MSJ Resp. 56-57.) They point out that in cases where no or few minority candidates run, courts have held that does not "preclude Section 2 relief." (*Id.* at 56.) But the cases Plaintiffs cite are cases where no black candidates won because "there ha[d] been no black candidates." *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1209 (5th Cir. 1989). In that circumstance, courts still counted the failure to elect black candidates in plaintiffs' favor. Here, the majority of the black candidates who have run for the Court of Appeals have won, and in majority-white districts, no less. While the relatively small number of those candidates may not *preclude* Section 2 relief, it does not *support* it, when those candidates who have run have generally prevailed—and when the sole minority-preferred black candidate who has not was a singularly unorthodox candidate.

C. Arkansas has a compelling interest in maintaining its current system of electing its Supreme Court. (Senate Factor 9)

Since 1874, Arkansas has elected its state supreme court statewide, like the vast majority of States that elect their state supreme courts. Not one court, no matter how strong the evidence

of racially polarized voting, has ever ordered that a state supreme court—or any other court—that was elected at-large be split into districts. (Defs. MSJ Br. 67.) Instead, they have all held that States' interest in linking a court's jurisdiction to its electoral base outweighs even an otherwise strong case of vote dilution. Plaintiffs do not deny that if this Court ordered the Arkansas Supreme Court districted, it would be the first to order districting of *any* court elected at-large, let alone any state supreme court. (Pls. MSJ Br. 58-61.) This is a particularly weak case to take the unprecedented step of invalidating Arkansas's 147-year-old system of electing its State's highest court.

Though Plaintiffs do not dispute the remedy they request is unprecedented, they do make a handful of points that merit response. First, Plaintiffs claim that the Supreme Court "upheld judicial subdistricts" for Louisiana's supreme court in *Chisom v. Roemer*, 501 U.S. 380 (1991). (Pls. MSJ Resp. 58.) This is both false and misleading. Taking the misleading part first, Louisiana already elected its state supreme court via districts before *Chisom*; five of the districts were single-member and one, in the New Orleans area, elected two justices at-large. *Chisom*, 501 U.S. at 384. The question in *Chisom* was not whether to district the Louisiana Supreme Court, but where to split the one multi-member district in New Orleans into two single-member districts, like those everywhere else in that State. *See id.* at 385. So *Chisom* was not about whether federal courts could order state courts that were elected at-large to be districted, or even about whether they could fundamentally change judicial electoral systems. Worse for Plaintiffs' claim, the Court did not "uphold" districting in *Chisom*. Instead, it expressly did "not address . . . the remedy that might be appropriate to redress a violation if proved." *Id.* at 390. All the Court held is that the suit in *Chisom* should not have been dismissed on the ground that judicial offices were outside the ambit of Section 2 altogether. *See id.* at 404.

Plaintiffs also claim that all the cases Defendants rely on for their linkage interest concern trial courts. (Pls. MSJ Resp. 61.) This too is false. *Lopez v. Abbott*, 339 F. Supp. 3d 589 (S.D. Tex. 2018), and *Ala. State Conf. of NAACP v. Alabama*, — F. Supp. 3d —, No. 2:16-CV-731-WKW, 2020 WL 583803 (M.D. Ala. Feb. 5, 2020), both rejected challenges to States' at-large systems for electing their state supreme courts on the basis of linkage. Similarly, *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194 (7th Cir. 1997), rejected a challenge to Wisconsin's at-large method of electing its intermediate appellate court on the basis of linkage.

Beside misstating what the cases are about, Plaintiffs suggest the interest in linkage is weaker at the appellate than at the trial level, because parties before the Arkansas Supreme Court would at least be guaranteed a say in the election of one justice. (Pls. MSJ Resp. 60.) But as the district court in *Alabama State Conference* reasoned in rejecting this argument, "what power appellate judges lose in their inability to issue solo judgments, they gain in the *weight and finality* of their judgments." *Ala. State Conf.*, 2020 WL 583803, at *69. While a trial court's decisions are reviewable on appeal, the Arkansas Supreme Court is the last arbiter of state law. Like Alabama, Arkansas "has a weighty interest in preserving all of its citizens' right to have a say in who the state's most powerful judges are." *Id.*

Next, Plaintiffs suggest Arkansas cannot assert an interest in linkage because it uses districts for inferior courts. (Pls. MSJ Resp. 60.) Plaintiffs cite no case holding that a State that does not require linkage for all courts cannot assert an interest in linkage. That is unsurprising, as courts to whom that argument has been made have rejected it. *See, e.g.*, *Mallory v. Ohio*, 173 F.3d 377, 385 (6th Cir. 1999) (holding Ohio had "a legitimate interest in linkage" where "the principle of linkage [wa]s . . . consistently applied in those jurisdictions" where it was applied); *Milwaukee Branch of the NAACP*, 116 F.3d at 1200-01 (holding that even though "Wisconsin

already ha[d] weakened the link between jurisdiction and electoral base" for some courts, Section 2 still did "not compel [it] to disregard a belief that larger jurisdictions promote impartial administration of justice").

Plaintiffs make two last-ditch arguments. First, they claim that the Court can only weigh the strength of Arkansas's interest against the "strength of the Section 2 violation," if Plaintiffs have shown one, after "the fact-intensive inquiry of a full trial." (Pls. MSJ Resp. 61.) That is wrong. The strength of the State's interest in linkage is a question of law, not fact. *See Ala. State Conf.*, 2020 WL 583803, at *70 (collecting cases). As to "the strength of the Section 2 violation," if Plaintiffs have established one its strength is known already; it consists of Judge Griffen's failure to win a seat on the Supreme Court and the loss of his seat on the Court of Appeals over a decade ago. Plaintiffs have nothing more to offer. So whatever weighing is necessary does not require a trial.

Second, Plaintiffs say the Court could maintain statewide elections by requiring Arkansas to adopt cumulative voting, a system whereby all the justices would run against each other at once and voters could cast votes for multiple candidates or place all their votes on one. (Pls. MSJ Resp. 61-62.) This approach is just as unprecedented.

Plaintiffs do not acknowledge the State's interest in not adopting this radical system. Nor do they dispute that no court has ever ordered a State to adopt cumulative voting in judicial elections. They only say that, for some reason, while the Court can consider the State's interest in linkage at the liability stage, it may not consider the State's interest in not adopting cumulative voting until it reaches the remedial stage of the case (if it does). (Pls. MSJ Resp. 62.) That is wrong. Senate Factor 9 asks is "whether the policy underlying the state or political subdivision's

use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Gingles*, 478 U.S. at 37. As Defendants have explained, to no response from Plaintiffs, Arkansas has a decidedly non-tenuous interest in electing its justices from numbered positions, rather than in an all-against-all free-for-all. (Defs. MSJ Br. 70-71.) Though the details are a question for the remedial stage, the Court may address now—as Plaintiffs concede with respect to their districting proposal—whether Arkansas's interest in maintaining its current system outweighs whatever marginal violation Plaintiffs may have shown.

D. The remaining Senate factors do not defeat Defendants' motion for summary judgment.

As a matter of law, the remaining Senate factors have no bearing on whether Defendants are entitled to summary judgment. If the Court finds Defendants are entitled to judgment on even one of the *Gingles* preconditions, it cannot even reach the Senate factors and Defendants must prevail. If the Court finds Defendants are entitled to judgment on either one of the two essential Senate factors, Defendants must prevail, irrespective of the other Senate factors. And if the Court finds the State's interest in linkage outweighs any violation Plaintiffs have shown, Defendants must prevail with respect to the Supreme Court. Why, then, Plaintiffs even brief the other Senate factors at this stage is unclear. That said, these factors do not materially support the Plaintiffs' case.

Plaintiffs brief Senate Factor 1, regarding the history of voting-rights discrimination, extensively. (Pls. MSJ Resp. 43-48.) Yet most of their briefing concerns just that—history. Plaintiffs do not explain how this history has any bearing on whether black Arkansans have less opportunity today than white Arkansans to elect judges of their choice. *See Ala. State Conf.*, 2020 WL 583803, at *41 ("[T]he more recent evidence of African-American voter registration and

turnout points toward a finding that Alabama's appellate judicial elections today are equally open to participation by African Americans.").

Plaintiffs do insist that Arkansas's choice not to intentionally draw a majority-black district for the Court of Appeals is a form of official discrimination. (Pls. MSJ Resp. 45-48.) But this is baffling. In the first place, it is circular. It suggests that Plaintiffs are entitled to majority-black Court of Appeals districts, because Arkansas has not drawn them. Second, it overlooks that Arkansas in fact has a majority-black Court of Appeals district, District 7, which when drawn was over 44% black by design. (Revised Cooper Decl. ¶ 36 (noting that District 7 was "created [as] "a Black 'opportunity' district").) That district has elected a black judge since its formation. Third, it bizarrely casts as sinister legal advice from the Attorney General's Office that drawing majority-black districts would fall to a "constitutional challenge." (Pls. MSJ Resp. 46 n.17.) The State's choice to avoid what the Attorney General's Office warned would be an unconstitutional "racial gerrymander[]" (*id.*) is not an act of discrimination, but the opposite.

Plaintiffs next argue under Senate Factor 3 that Arkansas has used various voting practices or procedures that "enhance the opportunity for discrimination against the minority group," such as at-large voting for the Supreme Court and mutltimember districts for the Court of Appeals. (Pls. MSJ Resp. 48 (quotation marks omitted).) Plaintiffs point to courts that have recognized the "theoretical basis" for why those systems can dilute minority voting strength. (*Id.* (quotation marks omitted).) But Plaintiffs cannot stake their case on theory. They must prove that those systems actually "operate to impair blacks' ability to elect representatives of their choice." (*Id.* at 49 (quotation marks omitted).) Here, theory is just that—theory. Rather than seeing their votes diluted white voters votes, black voters consistently vote for winners on both courts. It is Plaintiffs who, by packing black voters into one Supreme Court district out of seven

and two districts for the Court of Appeals out of twelve, would create a state-court system where black voters had no say in the election of the vast majority of the State's appellate judges.

On Senate Factor 5, Plaintiffs recite a litany of current demographic statistics but fail to connect any of these to historical discrimination. (*See* Pls. MSJ Resp. 51-54.) For example, they cite no analysis of these statistics by their experts or anyone else, instead pointing to district court decisions discussing dated statistics—the most recent of which is over 30 years old and one of which will soon be 40. (*Id.* at 51.) And they cite to Arkansas district courts' school desegregation cases as evidence of discrimination. (*Id.* at 52.) But they do not note the Eighth Circuit's most recent decision, which questioned the continuing need for federal-court oversight of Arkansas schools. *See United States v. Junction City Sch. Dist.*, — F.4th —, 2021 WL 3745740, at *7 (8th Cir. Aug. 25, 2021) ("We also note that we have concerns about these desegregation orders continuing in place."). In that case, it was "unclear" whether "there is any reason for the continued federal oversight." *Id.* In other words, the Eighth Circuit was not convinced there are lingering effects of discrimination in education in Arkansas.

Last, Plaintiffs are still unable to point to any evidence of racial appeals (Senate Factor 6) in Arkansas elections, judicial or otherwise. Their only example of a racial appeal is a flyer printed by Representative French Hill's campaign about Joyce Elliott. That flyer, they claim, was a racial appeal because it asserted she believed Black Lives Matter should be making policy. (Pls. MSJ Resp. 55.) That is not a racial appeal. Black Lives Matter is a group with a number of controversial policy positions, including, most famously, supporting defunding the police; a candidate can criticize his opponent's support of that group without appealing to racial sentiment.

* * *

The upshot is that Defendants have proved there are no disputes of material fact about the two most important Senate factors. They have also proved that, as a matter of law, Arkansas's linkage interest defeats Plaintiffs' claim as to the Arkansas Supreme Court. This entitles Defendants to summary judgment, even if the Court were to reach the totality of the circumstances. And Plaintiffs cannot defeat summary judgment by pointing to evidence on other Senate factors, which courts have consistently treated as less important.

CONCLUSION

For these reasons, Defendants respectfully request that the Court grant their motion and render summary judgment in their favor.

Dated: October 21, 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.

ORAL DEPOSITION

OF

BAODONG LIU, Ph.D.

(Taken August 6, 2021, at 10:01 a.m.)

EXHIBIT
U

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INDEX

STYLE AND NUMBER	1
APPEARANCES	2
CAPTION	4
WITNESS: BAODONG LIU, Ph.D.	
Examination by Ms. Merritt	5
Examination by Mr. La Chappelle	152
Deposition Concluded	154
COURT REPORTER'S CERTIFICATE	88

EXHIBITS

EXHIBIT 1 - Expert Report of Liu	14
EXHIBIT 2 - Expert Report of Morrison	91
EXHIBIT 3 - Expert Report of Alford	140

CAPTION

ANSWERS AND ORAL DEPOSITION OF BAODONG LIU, Ph.D., a witness produced at the request of the Defendants, taken in the above-styled and numbered cause on the 6th day of August, 2021, before Kristina R. Gray, Arkansas Supreme Court Certified Court Reporter #725, at 10:01 a.m., via Zoom videoconference, pursuant to the agreement hereinafter set forth.

* * * * * * * * * *

STIPULATIONS

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

mean by my analysis lack of indication of level support. If it's about psychological enthusiasm, of course, it's not about that, but there is an exact point estimate for each racial group. It's just very clear in my report.

BY MS. MERRITT:

Q Right. And that's what I was trying to make sure I understood. You're not looking at what's driving voting behavior. You're looking at who won and who lost each election based on the election results and the census data that shows you the race of the voters, right?

A Again, it's a mischaracterization of what I do. As I said earlier, we are political scientists. We are certainly interested in all factors, being partisan, racial, gender, whatever, but one can only form a conclusion based on the data. So the data gives me a high level of confidence to talk conclusion about racially-polarized voting pattern in biracial election. That's what I said. But whether it's driven by bipartisan or race or other reasons beyond race and party, I have no data to form a direct opinion of this, so to say I'm not even interested is a mischaracterization.

Q Okay. Would you not concede, Dr. Liu, that Joe

Biden, who, according to our expert, received 94 percent of Black votes in the general election and 58 percent in a four-way primary, was likely the Black candidate of choice in Arkansas?

MR. LA CHAPPELLE: Objection to form.

A Okay. So if you can clarify your question, I probably can understand more precisely what you want me to answer. So are you asking in primary election in 2020, Joe Biden run against other candidates and he won majority support from Black voters?

BY MS. MERRITT:

Q Correct. And would that not indicate that Joe Biden was the candidate of choice of minority voters in Arkansas?

A I give my operational procedure about analyzing biracial election, so if it's a biracial election, I analyze it. And if the biracial election showed that Black voters choose a white candidate, that's the Black voters' choice. So if you are asking me about Joe Biden, you should ask whoever you mentioned here because this is not what I did. I don't know how I address your question.

Q Okay. So you don't have an opinion on whether or not Joe Biden, who received 94 percent of the Black vote in the 2020 general election, was the candidate of

choice of Black voters in Arkansas?

A Again, this is a very long question, but if I understand you correctly, if a race involved only white candidate, in this case, 2020 general election, the presidential election has Joe Biden at the top of the ticket for the Democratic Party as the nominee. Obviously, he's a white candidate. And his opponent, a Republican candidate, is also white. Therefore, the election itself tells us between Joe Biden and Donald Trump what's the choice for Black voters and the choice for white voters. That I can certainly tell you, but that does not establish anything about what the Section 2 cases are all about, which is racially-polarized voting, to analyze whether electoral system is fair to minority voters to fully engage in political process. That election in 2020 general election does not tell us about whether the electoral system in judicial election in Arkansas is fair or not. You cannot use that election to answer that question.

Q Are you aware of a body of research that supports your theory that Black voters in Arkansas support Black candidates in nonpartisan judicial elections?

MR. LA CHAPPELLE: Objection to form.

A Could you repeat that question, please?

BY MS. MERRITT:

CERTIFICATE

STATE OF ARKANSAS)

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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 16th day of August, 2021.

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