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

THE CHRISTIAN MINISTERIAL ALLIANCE, PATRICIA BREWER, CAROLYN BRIGGS, LYNETTE BROWN, MABLE BYNUM, and VELMA SMITH on behalf of themselves and all other similarly situated persons, Plaintiffs, v. JOHN THURSTON, in his official capacity as the Secretary of State of Arkansas, Defendant.	Civil Action Case No. 4:23-cv-00471-DPM-DRS-JM (three-judge court)

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

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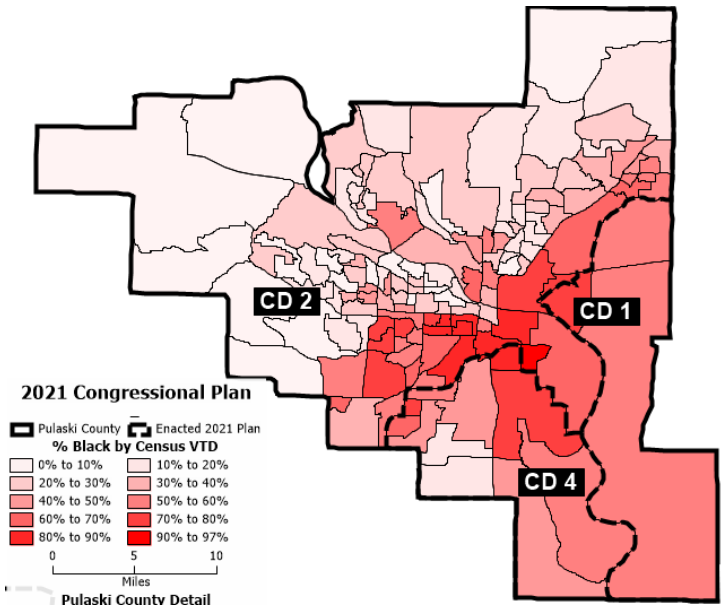
INTRODUCTION

Arkansas's 2021 Congressional Redistricting Plan ("the Plan") targets precincts serving high concentrations of Black voters in southeastern Pulaski County with laser precision, distributing them across three of Arkansas's four congressional districts. In so doing, the Plan trisects a portion of Pulaski County, and splits the cities of Little Rock and North Little Rock, excising neighborhoods disproportionately lived in by Black people—communities of interest that have long been contained within the Second Congressional District. Black Arkansans siphoned off from the Second Congressional District into the First and Fourth Congressional Districts now are joined with a supermajority of white voters in counties spanning into the northwest and northeast of Arkansas, with little in common in terms of shared socioeconomic and other interests. The Plan intentionally diminishes the opportunity for Black voters to exercise electoral power in the Second District. Whereas Black Arkansans had been an increasingly large and powerful voting constituency within the Second Congressional District, the Plan now ensures that they constitute no more than one-fifth of the voting-age population ("VAP") in any one district. Neither traditional redistricting principles nor a goal of achieving partisan advantage explains or excuses this race-based sorting, which on its face has the telltale signs of intent to single out Black voters, specifically, for disfavored treatment. This is a textbook case of unconstitutional "cracking" of a minority community to suppress its political voice.

Plaintiffs' First Amended Complaint ("Complaint") includes new and stronger factual allegations than those this Court considered previously in *Simpson v. Hutchinson*. These allegations are more than sufficient to support Plaintiffs' distinct claims for both racial gerrymandering in violation of the Fourteenth Amendment and intentional vote dilution in violation of the Fourteenth and Fifteenth Amendments, because these allegations support a plausible inference that race was a predominant factor in drawing the district lines (racial

gerrymandering) and that the legislature intentionally sought to reduce the voting potential of Black voters in Pulaski County by cracking them among three congressional districts (vote dilution). For example, the below illustration from the Complaint shows the concentration of Black voters in Pulaski County (in shades of red), documenting the surgical targeting with which the Plan spreads Black voters across three congressional districts while leaving untouched nearly every part of Pulaski County where white voters predominate.



Other specific allegations in the Complaint not before this Court in *Simpson* include:

- A desire for partisan advantage does not explain the different treatment of Black and white voters in the Plan. White Democrats and unaffiliated white voters were included in the redrawn Second Congressional District at a notably higher rate than their Black counterparts.

- The Plan's Senate sponsor conceded, "I don't disagree with a lot you said," when directly confronted with warnings about the stark racially discriminatory impacts of the Plan, and the resulting harmful impact the Plan would have on Black residents of Pulaski County.

- Plan proponents stifled consideration of the impact of the sorting on Black citizens by falsely saying that legislators should not consider race to avoid violating the U.S. Constitution and by dismissing concerns for the harm the Plan would pose as "performative theatrics" and "laughable."

- Black Arkansans made up 57% of the VAP moved to the First District and 50% of the VAP moved to the Fourth District, despite being only 22.6% of the VAP of the Second District before the Plan.

- The Complaint includes detailed maps that illustrate how the Plan surgically excised neighborhoods and voting precincts with significant Black populations while avoiding removal of those with larger white populations. These maps also illustrate how the Plan split a judicial subdistrict created by federal consent decree to provide Black electoral opportunity.

- The Plan divides not only Pulaski County and the cities of Little Rock and North Little Rock, but also part of the city of Jacksonville and multiple other political subdivisions including school districts and Circuit Court jurisdictions. The Complaint includes detailed maps illustrating how the Plan divides multiple cities within Pulaski County and all four school districts in the county across multiple congressional districts.

- The Plan splits historically Black neighborhoods and church congregations, in contravention of traditional redistricting principles that favor keeping such communities of interest together.

- Black voters in Pulaski County were not only separated from other Black voters in the Second District by the Plan, they were also submerged in districts with such large majorities of white voters so that Black voters now comprise no more than 20% of the electorate in each district.

- The Plan violated the traditional redistricting principles outlined by Arkansas's own Board of Apportionment, such as respect for political subdivisions and communities of interest.

- Only 16,510 people needed to be moved out of the Second District to achieve population parity. Yet the Plan removed over 41,000 people, primarily from areas where Black people were concentrated, and brought in 25,000 people from the virtually all-white population of Cleburne County—which had been in the First District, where population needed to be *added* to achieve parity.

There is no merit to Defendant's argument that partisan gerrymandering of the Second Congressional District is an "obvious alternative explanation" that forecloses an inference of race-based decision-making. In contrast to the complaints in *Simpson*, here the Complaint contains no suggestion of partisan gerrymandering. To the contrary, the Complaint alleges facts that plausibly demonstrate that partisan goals do not explain the Plan's stark differential treatment of Black and white communities and specifically alleges that Black Democrats and white Democrats in the Second Congressional District were treated differently in redistricting.

Defendant's alternative explanation that "one-person, one-vote" compliance explains the cracking of the Black community in Pulaski County fares no better. "[T]he requirement that districts have approximately equal populations is a background rule against which redistricting takes place. It is not a factor to be treated like other nonracial factors when a court determines whether race predominated over other, 'traditional' factors in the drawing of district boundaries." *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. 254, 273 (2015) (citation omitted). Moreover, the Complaint alleges that other maps achieved parity without sorting voters based on race as the Plan does.

Nor does the presumption that the legislature acted in good faith warrant dismissal of Plaintiffs' Complaint. Courts regularly allow allegations of racial gerrymandering and vote dilution to proceed past the pleading stage despite the presumption of legislative good faith. None of the decisions cited by Defendant in support of this argument was decided on a motion to dismiss. The allegations in the Complaint provide more than the requisite proof that separating voters by race was the predominant purpose and intentional discrimination was a motivating factor in the Plan. "When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

The oppositions to the motions to dismiss in *Simpson* did not bring to the Court's attention the above arguments or authorities regarding obvious alternative explanations or legislative good faith. Nor did the *Simpson* complaint include the critical factual allegations set forth above.

Plaintiffs' allegations support a finding that the Plan violates their rights under the Fourteenth and Fifteenth Amendments. Defendant's motion to dismiss should be denied.

LEGAL STANDARDS

I. STANDARD OF REVIEW

To survive a motion to dismiss, a complaint need only "state a claim to relief that is plausible on its face." *McDonough v. Anoka County*, 799 F.3d 931, 945 (8th Cir. 2015) (citation omitted). The court must accept all factual allegations in the complaint and draw reasonable inferences in favor of the nonmoving party. *Id.* Rule 12(b)(6) "'does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of' the violation." *Id.* (citation omitted).

II. RACIAL GERRYMANDERING AND VOTE DILUTION ARE ANALYTICALLY DISTINCT CLAIMS WITH DIFFERENT EVIDENTIARY FRAMEWORKS

Defendant's motion conflates the standards for racial gerrymandering and vote dilution. Mot. at 8-10. The Supreme Court has held racial-gerrymandering claims are "analytically distinct" from vote-dilution claims and require a "different analysis." *Shaw* v. *Reno*, 509 U.S. 630, 650, 652 (1993); *see Miller v. Johnson*, 515 U.S. 900, 911 (1995). Because racial gerrymandering and intentional vote dilution claims are distinct, they require separate analysis at the pleading stage. *See, e.g.*, *League of United Latin Am. Citizens v. Abbott*, 604 F. Supp. 3d 463, 507-10 (W.D. Tex. 2022) ("*LULAC II*").

To plead a racial gerrymandering claim, Plaintiffs need only plausibly allege that the legislature classified voters into districts by race, not an intent to minimize Black voting power. Racial gerrymandering is an effort to "separate voters into different districts on the basis of race," *Shaw*, 509 U.S. at 649, "*regardless of the motivations*" for the use of race. *Id.* at 645 (emphasis added). Courts examine whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without" a challenged district. *Cooper v. Harris*, 581 U.S. 285, 291 (2017) (citation omitted). If that is shown, courts must assess whether

the state has proffered a compelling interest, and whether the state action is narrowly tailored to that end, to justify the predominant use of race. *Id.* at 291-92. Because Defendant has identified no compelling interest that would justify race-based sorting, the only question for this claim is whether Plaintiffs have plausibly alleged that race predominated in the Plan's design.

In contrast, intentional vote-dilution claims raise the issue of whether the state intentionally sought "to minimize or cancel out the voting potential of racial or ethnic minorities." *Miller*, 515 U.S. at 911 (citation omitted). A plaintiff must show only that this discriminatory intent was a "motivating factor" in the challenged decision, *Arlington Heights*, 429 U.S. at 265-266—not that it was the "predominant" factor. *Accord Rogers v. Lodge*, 458 U.S. 613, 617-19 (1982). This racial motive "may often be inferred from the totality of the relevant facts, including the fact . . . that the law bears more heavily on one race than another." *Id.* at 618.

III. BOTH RACIAL GERRYMANDERING AND INTENTIONAL VOTE DILUTION CLAIMS ARE RARELY RESOLVABLE ON A MOTION TO DISMISS

Determining whether racial gerrymandering or intentional vote dilution occurred requires factual findings, *i.e.*, whether race predominated (for the racial gerrymandering claim), and whether race was a motivating factor and whether there was dilutive effect (for the intentional discrimination claim). *See Cooper*, 581 U.S. at 293 (racial predominance); *Rogers*, 458 U.S. at 623 (racially discriminatory intent). Such findings of fact are ordinarily adjudicated after discovery and trial, not on a motion to dismiss. *See, e.g.*, *Bethune-Hill v. Va. State Bd. of Elecs.*, 580 U.S. 178, 196 (2017) (remanding to adjudicate racial gerrymandering claim on the merits); *Hunt v. Cromartie*, 526 U.S. 541, 552-54 (1999) (*Cromartie I*) (remanding for trial on the merits of racial gerrymandering claim); *Shaw*, 509 U.S. at 649 (reversing dismissal of complaint alleging racial gerrymandering); *South Carolina State Conference of NAACP v. Alexander*, No. 3:21-cv-03302, 2022 WL 2334410, at *3 (D.S.C. Jun. 28, 2022) (denying motion to dismiss racial gerrymandering

claim and intentional vote dilution claims).

A wide variety of allegations can be used to support both racial gerrymandering and vote dilution claims at the pleading stage because "[o]utright admissions of impermissible racial motivation are infrequent." *Cromartie I*, 526 U.S. at 553. Plaintiffs need not "produce a 'smoking gun,' especially not in their initial complaint, to make a plausible allegation of racial intent." *League of United Latin Am. Citizens v. Abbott*, No. 1:21-cv-00991, 2022 WL 174525, at *3 (W.D. Tex. Jan. 18, 2022) ("*LULAC I*"). As with the distinct racial gerrymandering claim, discriminatory purpose may be proved by direct or circumstantial evidence. *Cooper*, 581 U.S. at 308-09; *Rogers*, 458 U.S. at 618. Defendant largely and improperly relies primarily on cases decided after receiving evidence. *See, e.g.*, *Wright v. North Carolina*, 787 F.3d 256, 266 (4th Cir. 2015).

ARGUMENT

On a Motion to Dismiss, a complaint "should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Wilson v. Ark. Dep't of Human Servs.,* 850 F.3d 368, 371 (8th Cir. 2017) (citation omitted). Taken as a whole, the facts alleged in the Complaint give rise to more than plausible claims of racial gerrymandering and intentional vote dilution.

I. PLAINTIFFS HAVE STATED A CLAIM OF RACIAL GERRYMANDERING

At the pleading stage, Plaintiffs state a claim of racial gerrymandering by plausibly alleging that the state subordinated other factors to racial considerations, such that race predominated in the design of a challenged district. To make that showing, Plaintiffs may rely on "'direct evidence' of legislative intent, 'circumstantial evidence of a district's shape and demographics,' or a mix of both." *Cooper*, 581 U.S. at 291 (citation omitted). Facts probative of racial gerrymandering include: (1) racial disparities in the movement of persons into and out of the district, and other

demographic impacts; (2) indications that the legislature anticipated these racially disparate impacts, such as the legislature's access to racial demographic data during the redistricting; and (3) unexplained deviations from traditional redistricting criteria, which tend to establish that traditional redistricting criteria were subordinated in the line-drawing process. *See, e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 906 (1996) (district's "highly irregular and geographically non-compact" shape); *Cooper*, 581 U.S. at 310-11 (legislature's awareness and consideration of racial impact); *Ala. Legis. Black Caucus*, 575 U.S. at 274 (transgression of redistricting guidelines and subordination of traditional districting principles).

A. The Complaint Plausibly Alleges That Racial Gerrymandering Is Evident on the Face of the Plan Itself, Due to the Stark Racial Disparities It Creates Within Pulaski County

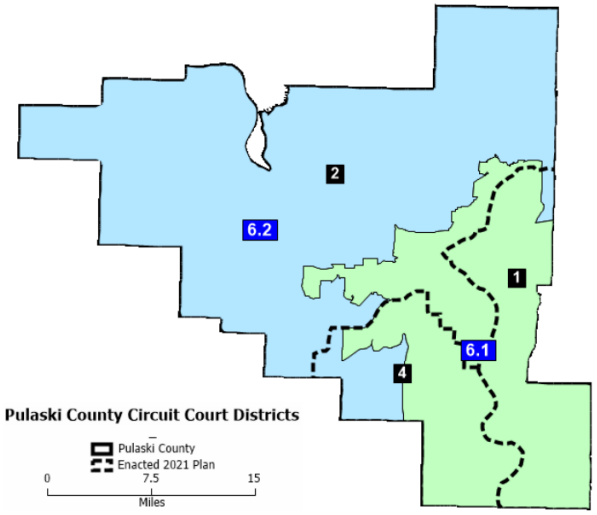
The demographics of precincts that were included in and excluded from the Second District support Plaintiffs' claim of racial gerrymandering. *See Cromartie I*, 526 U.S. at 548; *Cooper*, 581 U.S. at 310; *Ala. Legis. Black Caucus*, 575 U.S. at 274.

It was well known to legislators that the Black population of Pulaski County—and of the Second District before the Plan—was concentrated in the County's southeast. (¶¶ 17, 110, 120, 130, 143). And it is precisely that population that the Plan targeted for removal from the Second Congressional District and dispersal into the First and Fourth. Black Arkansans made up 57% of the VAP moved to the First District and 50% of the VAP moved to the Fourth District, despite being only 22.6% of the VAP of the Second District before the Plan. (¶¶ 64, 136).

The allegations of the Complaint document, in much more exacting detail than the complaints in *Simpson*, how this targeting of areas with high concentrations of Black people was carried out with laser precision. (¶¶131-46). The graphic reproduced in the introduction tells part of this story. In addition, the Plan excises fourteen voting precincts in southeastern Pulaski County that had historically been in the Second District, nearly all of which contained predominantly Black

voters. (¶¶ 8-9, 140-45). "Overall, Black people made up more than half the VAP in the areas of southeastern Pulaski County that were excised from the Second Congressional District. By contrast, white voters made up less than a third of the VAP of these targeted precincts." (¶ 10).

The targeted division of longstanding Black communities in Pulaski County is particularly evident in how the Plan trisects the "Hunt subdistrict" used in Pulaski County's Circuit Court elections. Circuit Court Subdistrict 6.1 was created to provide political representation for Black voters and therefore is designed to serve the areas of the county where they have historically been most concentrated. As depicted in the below illustration, the Plan splits Subdistrict 6.1 in three through its heart. By contrast, few precincts falling outside Subdistrict were removed from the Second Congressional District. This telltale evidence of racial targeting was not mentioned in the *Simpson* complaints.



This removal of significant Black communities from CD2 into CD1 and CD4 stands in stark contrast to the large number of white voters who were moved into the Second Congressional District. While moving mostly Black voters out of the Second District, the Plan moves over 25,000 voters from Cleburne County, which is 93% white, into the Second District. (¶¶ 2, 204). This occurred even though the population of the First District needed to be *decreased* to achieve one-

person, one-vote parity with other districts in the 2021 Redistricting, not increased. (¶ 204). The map itself bears the hallmarks of race-focused decision-making. *Cooper*, 581 U.S. at 310 ("[B]y further slimming the district and adding a couple of knobs to its snakelike body . . . the General Assembly incorporated tens of thousands of new voters and pushed out tens of thousands of old ones").

B. The Complaint Alleges that the Legislature Was Aware of These Demographics, and Their Harmful Effects on Black Voters, at the Time the 2021 Redistricting Plan was Being Considered

The "availability and use" of racial data during redistricting further supports the inference that traditional districting criteria was subordinated to race. *See Bush v. Vera*, 517 U.S. 952, 961-63 (1996).

The Arkansas Legislature received demographic data showing the effect of the Plan on Black citizens in the Second District. The General Assembly had demographic data showing the racial demographics of the parts of Pulaski County excised from the Second District. (¶ 105). Even without such data, it was common knowledge that the Black population of Pulaski County is concentrated in the County's southeast. (¶ 130).

In addition, proponents of the Plan were warned repeatedly that the plan targeted Black voters for movement and otherwise would harm Black voters' electoral opportunities. (¶¶ 106-07, 109-115). Indeed, multiple members of both houses of the General Assembly implored the Legislature to consider the harmful impact the Plan would have on representation for neighborhoods populated by Black and other minority residents in the Little Rock area in Pulaski (¶¶ 107-15). Senator Jane English, a sponsor of the Senate bill, responded to Senator Tucker's description of the harms that the proposed plan would cause to Black residents of the Second District by admitting, "I don't disagree with a lot you said." (¶¶ 107-08).

Plaintiffs also allege that legislators falsely claimed that the Plan's racial impacts should

not even be discussed because of the Fourteenth Amendment, in order to shield themselves from having to justify or explain their unconstitutional decisions.[1] (¶¶ 3, 120-23). Legislators' false and pretextual responses to legitimate concerns support an inference that race predominated in their decision-making. *See Cooper*, 581 U.S. at 314-15 (affirming a finding of racial gerrymandering based on part on rejecting a map drawer's "self-contradictory" race-neutral justifications); *see also Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").

Moreover, the failure of legislators supporting the Plan to offer any non-pretextual response to the many concerns raised about the deleterious effect of the Plan on Black citizens supports an inference at the dismissal that racial considerations predominated. As the court noted in *Jacksonville Branch of NAACP v. City of Jacksonville*:

> The Court finds it significant that despite this public outcry, . . . the City Council made [no] attempt to address or alleviate their concerns. . . . [If there was no discriminatory intent], then it is puzzling why the City Council would fail to respond to these public concerns at all.

635 F. Supp. 3d 1229, 1291 (M.D. Fla. 2022), *appeal dismissed*, No. 22-13544-HH, 2023 WL 2966338 (11th Cir. Jan. 12, 2023).

It is not incumbent on Plaintiffs to allege facts about the intent of the General Assembly as a whole. Racial-gerrymandering cases turn on a careful examination of the reasons why a district's lines were drawn in a particular way, and that inquiry naturally focuses on the mapmakers and key legislators who drew or directed the challenged lines. *See Cooper*, 581 U.S. at 299-301, 310-16 (focusing on evidence of intent of the plan's legislative "architects" and

[1] *Allen v. Milligan*, 143 S. Ct. 1487, 1510 (2023) (it is permissible to consider "race in the context of districting" as long as race is not "the predominant factor in drawing district lines").

"mapmakers"); *Ala. Legis. Black Caucus*, 575 U.S. at 273-274 (examining evidence of intent of "[t]he legislators in charge of creating" the plan).[2]

C. The Complaint Alleges that the Legislature Subordinated Traditional Redistricting Principles to Racial Considerations

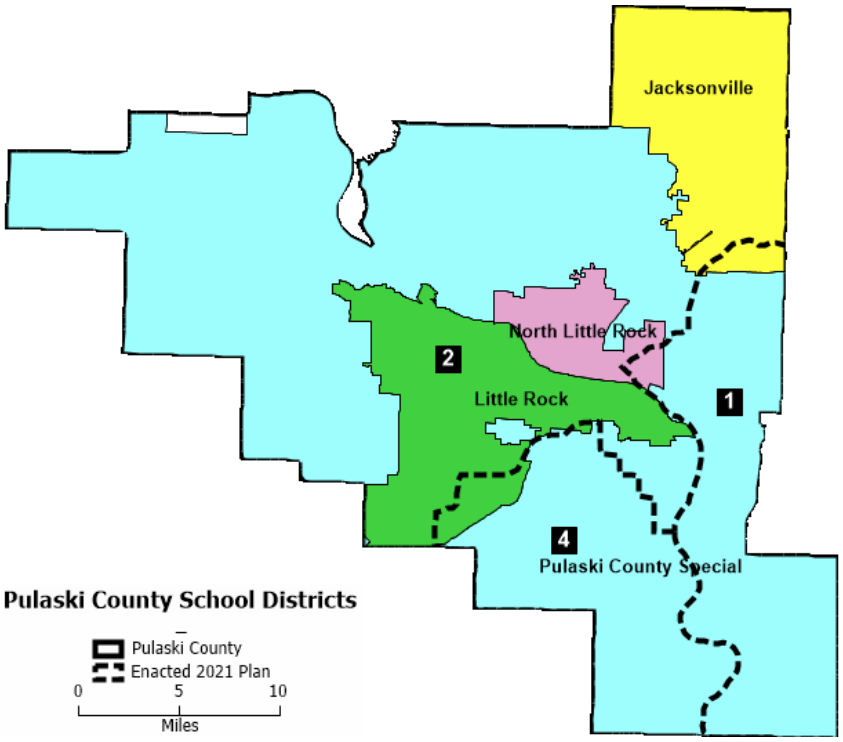
A legislature's failure to follow traditional redistricting principles, as occurred here, is evidence of racial motivation. *Cromartie I*, 526 U.S. at 547-49; *Shaw*, 517 U.S. at 906-07. "[A] conflict or inconsistency" with traditional redistricting principles can be "persuasive circumstantial evidence tending to show racial predomination." *Bethune-Hill*, 580 U.S. at 190.

Traditional redistricting criteria include maintaining political subdivisions and communities of interest. *Ala. Legis. Black Caucus*, 575 U.S. at 272. The Arkansas Board of Apportionment similarly counsels to maintain cores of existing districts where practicable and to preserve whole subdivisions, including by minimizing splits of counties and cities and maintaining communities of interest. (¶¶ 150-52). The Complaint alleges that the Plan deviates from these principles in Pulaski County, unlike elsewhere in the state, and that it does so without explanation or justification. (¶¶ 162-87).

Plaintiffs' Complaint alleges that the Plan violates the traditional redistricting principle of respect for political subdivisions, and does so at multiple levels of government. The Plan splits

[2] The Court's decision in *Brnovich*—which did not involve a racial-gerrymandering claim—does not suggest otherwise. There, the Court rejected the Ninth Circuit's application of the "cat's paw" theory to attribute one legislator's alleged discriminatory purpose in supporting a law related to mail-in voting to the rest of the legislature, even when the district court had found that the legislature as a whole engaged in a "sincere" and "serious legislative debate on the wisdom" of the relevant law and was not motivated by discriminatory intent. *Brnovich v. Democratic Nat'l Committee*, 141 S. Ct. 2321, 2349-50 (2021). Nothing in *Brnovich* suggests that where, as alleged here (¶¶ 84, 108), a legislature is shown to have delegated the task of drawing district lines to legislators and staff who predominantly relied on race, the plaintiff must present evidence illuminating the motivation of every legislator who voted for the gerrymandered map. In addition, *Brnovich*—a case decided after a trial on the merits—certainly does not support dismissing a complaint at the pleading stage.

Pulaski County three ways (¶¶ 21, 25, 162). This was "the first time in recent history the Legislature split one county into not two but *three* different congressional districts" (¶ 165). The Plan divides three different municipalities: Little Rock, North Little Rock, and Jacksonville (¶¶ 21, 171-72). The Plan also divides all four major public-school districts (see below illustration).[3] (¶¶ 21, 174-79).



The Complaint also alleges the map divides important and longstanding communities of interest, namely Black communities in Pulaski County. The Plan splits Pulaski through the heart of Black communities in south and southeastern Pulaski County such that "neighbors, churchgoers, classmates, and co-workers living in close proximity will have different representation in three different Congressional districts" (¶¶ 21, 166-67, 184-87). Such gross violations of traditional

[3] That the Plan split three fewer counties than the prior redistricting, Mot. at 3, cannot excuse the Plan's targeting of Black voters. The fact that some traditional redistricting principles are followed does not prevent the conclusion "that race predominated over them." *Vera*, 517 U.S. at 966; *see also Hunt*, 517 U.S. at 907.

redistricting principles are strong evidence of racial gerrymandering, particularly where predominantly Black communities have been singled out for this differential treatment. Comparable violations of traditional redistricting principles did not occur in areas of Pulaski County where white voters predominate. (¶¶ 143, 167).

Finally, the state's traditional redistricting principles favor retaining the core of existing districts. The core of the Second Congressional District for decades has been an intact Pulaski County; the Plan, however, splits it among three congressional districts.

II. PLAINTIFFS HAVE ADEQUATELY PLEADED INTENTIONAL VOTE DILUTION IN VIOLATION OF THE FOURTEENTH AMENDMENT

The Complaint satisfies the *Arlington Heights* framework, which the Supreme Court has recognized should be used in evaluating vote dilution claims. *Cromartie I*, 526 U.S. at 546 n.2; *see, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2324-26 (2018). In applying the *Arlington Heights* framework, courts consider a non-exhaustive list of factors including: (a) discriminatory impact, (b) the historical background of the challenged decision, (c) the sequence of events leading up to the decision, (d) procedural or substantive deviations from the normal decision-making process, and (e) contemporaneous statements by the decisionmakers. 429 U.S. at 266-68.

A. The Complaint Alleges Racially Discriminatory Impact

Racial impact is an "'important starting point' for assessing discriminatory intent under *Arlington Heights*." *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 488-89 (1997) (citation omitted). This is particularly true when evaluating a claim of discriminatory intent at the pleading stage, and when Plaintiffs plausibly allege that decisionmakers were aware of a racially discriminatory impact. *See, e.g.*, *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 565 (3rd Cir. 2002) (reversing dismissal where "the district court drew this distinction between the NCAA's 'awareness' [of a discriminatory impact] and its 'purpose'"); *Jumbo v. Alabama State Univ.*, 229

F. Supp. 3d 1266, 1272 (M.D. Ala. 2017) (holding that "disparate impact is enough to show discriminatory intent at the 12(b)(6) stage").

Plaintiffs' Complaint clearly describes how the harms of the Plan's cracking of Pulaski County fall disproportionately on Black voters, as set forth above. Part I.A, *supra*. Moreover, the Complaint alleges that these racially discriminatory impacts had the effect of diluting Black electoral potential: "the 2021 Redistricting Plan ensures that Black people constitute no more than approximately one-fifth of the voting-age population ('VAP') in any one district, particularly the Second Congressional District where Black voters have demonstrated growing electoral influence." (¶ 6). The Complaint also alleges that the legislators were well-aware of the discriminatory impact of the Plan. (¶¶ 19, 107-17, 124, 223). These facts contribute strongly to an inference of discriminatory intent. *See Petteway v. Galveston Cty.*, No. 3:22-CV-57, 2023 WL 2782705, at *14 (S.D. Tex. Mar. 30, 2023) ("The foreseeable effect of an action to dilute minority voting strength is 'objective evidence that, combined with other evidence, provide[s] ample support for finding discriminatory intent.'") (citation omitted).

Defendant does not dispute that Plaintiffs have shown the map's racial impact, but argues that racial impact has no bearing on Defendant's intent. Mot. at 9-10. Contrary to Defendant's assertion, "the impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions." *Reno*, 520 U.S. at 487 (emphasis added).

B. The Complaint Alleges Historical Background that Supports an Inference of Discriminatory Intent

The Complaint makes detailed allegations explaining the irrefutable history of racial discrimination in Arkansas, both historically and in recent times. (¶¶ 205-14). As federal courts have repeatedly concluded, Arkansas has a "long history of official racial discrimination in voting,

discriminatory voting rules, and exclusion of Black people from accessing political power" (¶ 205). *See Whitfield v. Democratic Party of State of Ark.*, 890 F.2d 1423, 1424 (8th Cir. 1989); *Jeffers v. Clinton*, 730 F. Supp. 196, 210 (E.D. Ark. 1989). In addition to a long and disturbing history of discrimination against Black people, Arkansas remains, to this day, the only former Confederate state that has never elected a Black person to Congress. (¶¶ 12, 69). And no Black person from Arkansas has ever been elected to the U.S. Senate or to the statewide offices of Governor, Lt. Governor, Chief Justice or Associate Justice of the Supreme Court, Secretary of State, Treasurer, Auditor, or Land Commissioner.[4] (¶ 69).

C. The Complaint Alleges a Sequence of Events Leading up to the 2021 Redistricting that Supports an Inference of Discriminatory Purpose

The Complaint alleges specific facts about the sequence of events that preceded the Plan that support an inference of discriminatory purpose.

In particular, the Complaint alleges that "[t]he Plan was enacted in response to growing Black political power in Pulaski County anchored in the Second Congressional District." (¶ 26). In the years leading up to the 2021 Redistricting, the Black VAP in the Second District and Pulaski County had grown while its white VAP had shrunk. (¶¶ 12, 64-65). Between 2010 and 2020 the total VAP in the Second District increased by 7.2%. The Black VAP of the Second District increased by 21.4% while white VAP decreased 3.1%. (¶ 64). During the same period the total VAP of Pulaski County increased by 6.5%. Black VAP of Pulaski County increased by

[4] *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987), is readily distinguishable. In *McClesky,* the Court described petitioner's historical evidence as "focus[ing] on Georgia laws in force during and just after the Civil War," whereas here Plaintiffs identify a long history of exclusion from statewide and federal office, accompanied by a long history official discrimination in voting and racialized campaign dynamics that extends to the present day. (¶¶ 205–14). Nor is the "original sin" language in *Abbott*, 138 S. Ct. at 2324-25, applicable to this case. In *Abbott*, the district court had relieved plaintiffs of their burden of proof because of the action of a prior legislature. *Id.* That is not what Plaintiffs are alleging here.

16.2% while the white VAP decreased by 6.3%. (¶ 65). The complaints in *Simpson* did not allege any of these important facts.

Moreover, the growing population of Black voters in Pulaski County was contributing to increasingly successful results for Black voters' preferred candidates (which included Black candidates). At the local level, Black candidates won elections countywide and citywide in Little Rock in the years immediately preceding the 2021 Redistricting. (¶ 67). In the last contest held with a unified Pulaski County in the former Second Congressional District in 2020, Black State Senator Joyce Elliott came close to prevailing in the Second Congressional District against the white incumbent, while benefiting from overwhelming support from Black voters in Pulaski County. (¶¶ 70-73). It was no coincidence that the cracking of Pulaski County followed within months. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 438-39 (2006) (finding relevant that "the State divided the cohesive Latino community" just as "Latino voters were poised to elect their candidate of choice"); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 697 (S.D. Tex. 2017) (finding relevant that voting changes were made just when "Latinos in Pasadena were becoming more politically active" and were likely to "elect a majority of Council positions in the 2015 election").

D. The Complaint Alleges Deviations from the Normal Legislative Decision-Making Process that Support an Inference of Discriminatory Intent

Plaintiffs' Complaint alleges in detail how the legislature deviated from its normal procedures. (¶¶ 199-203). At the outset of the hearings on redistricting, the chair of the committee established a structured ranking procedure for advancing the committee's preferred map to the full house. (¶ 78). That procedure was completely subverted when HB 1982 first appeared as a late-night substitution that supplanted the bill the House Committee ranked as its top choice. (¶¶ 16, 78-85). Multiple committee members, including members of the majority party, complained of the

procedural irregularity that created a rushed deliberation process lacking in transparency. (¶¶ 85, 97-103). Rep. Payton objected that the difference "totally changes how [he] would rank the bills" and complained that members of the House Committee did not know "we were not ranking bills, but ranking sponsors." (¶ 99). Sen. Pitsch also made clear he was angry about the short notice to review the bill. (¶ 102). Sen. Garner voiced his frustration at the lack of information available regarding the map upon which the Committee was being asked to vote. (¶ 103).

In addition, the Plan was rushed through in 72 hours with scant opportunity for meaningful debate, assessment of the bill's impact, or public comment. (¶¶ 18, 96). Public comment on the Plan consisted of just a few minutes at the end of a House committee meeting in which a Black Pulaski County resident expressed concern. (¶ 86). The bill passed minutes later. (*Id.*). SB 743 was similarly rushed—passed by the full Senate just a day after it was introduced. (¶¶ 89-92). Just two days later, both bills were sent to the Governor (¶ 93) who refused to sign them, citing likely discriminatory effects on Black voters (¶ 23). These irregularities deprived legislators and the public from being able to comment on and oppose the discriminatory Plan effectively.

E. The Complaint Alleges Facts Concerning the Legislative Debate Regarding the Plan that Support an Inference of Discriminatory Intent

"[C]ontemporary statements of members of the decisionmaking body" are probative of intent. *Perkins v. City of West Helena, Ark.*, 675 F.2d 201, 213 (8th Cir. 1982). Here, as noted above, the Complaint alleges legislators falsely asserted that racial impact of redistricting should not even be discussed. (*See* ¶¶ 3, 19, 122-23). The Complaint alleges that this was a pretext to avoid addressing the issue of how the Plan targeted Black residents and voters for removal from of the Second District and having to justify its deleterious effects on them. (¶¶ 120-23).

As set forth above, Legislators were well aware of the harm that the Plan would cause to Black residents and voters in the Second District, both because of their awareness of the

demographics and the numerous warnings they received. The legislators refused even to discuss these harms (¶¶ 3, 18-20), with the exception of a moment of candor from Senator Jane English, the sponsor of the Senate bill. Senator English's only response to Senator Tucker's long list of the harms her bill would cause specifically to Black voters and other voters of color was, "I don't disagree with a lot you said." (¶¶ 20, 108). Otherwise, proponents of the Plan dismissed the legitimate concerns raised about the Plan's racially discriminatory impact as "performative theatrics" and "laughable." (¶ 122).

Not only did the General Assembly pass the Plan after receiving demographic data from the Bureau of Legislative research which confirmed the warnings regarding the impact of the Plan on Black voters, the legislature did so in only 72 hours. (¶¶ 18, 105). The complaints in *Simpson* did not allege any of the above responses by proponents of the Plan to warnings of the harm the Plan would visit on Black voters or the fact that demographic data provided by the legislature's own research agency confirmed the accuracy of the warnings.

Defendant's argument that the Court should not draw a negative inference from the Legislature's refusal to address valid concerns about the Plan's racial impact is wrong on two levels. Mot. at 10. First, the legislators' failure to respond to the repeated warnings about the harm the proposed plan would cause to Black residents of the Second District is itself evidence of discriminatory intent. *Petteway*, 2023 WL 2782705, at *14 (that legislators forged ahead despite public outcry about the "disparate and discriminatorily dilutive effect" of their maps supports a finding of discriminatory intent); *see also City of Jacksonville*, 635 F. Supp. 3d at 1291 (noting that if there was no intent to draw districts based on race, "it is puzzling why the City Council would fail to respond to these public concerns at all"). But legislators did not stop at a mere failure

to respond. They *falsely* stated that race should not be discussed at all.[5] This false statement of the law provided the cover for enacting a discriminatory redistricting plan without having to discuss or justify its harmful effect on Black residents of the Second District. (¶¶ 19, 120-23). Plaintiffs can establish intentional discrimination by showing "that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves*, 530 U.S. at 147 (citation omitted); *see also Veasey v. Abbott*, 830 F.3d 216, 235-36 (5th Cir. 2016). And "the trier of fact can reasonably infer from the falsity of the explanation that the [defendant] is dissembling to cover up a discriminatory purpose." *Reeves*, 530 U.S. at 147. The allegations in the Complaint are more than sufficient to support a plausible inference of racial vote dilution.

Neither the complaint nor the oppositions to the motions to dismiss in *Simpson* addressed the distinct *Arlington Heights* framework.

III. THE PLAN VIOLATES THE FIFTEENTH AMENDMENT PROHIBITION OF VOTE DILUTION FOR THE SAME REASONS IT VIOLATES THE FOURTEENTH AMENDMENT PROHIBITION

The same facts, arguments, and authorities set forth above establishing vote dilution under the Fourteenth Amendment establish vote dilution under the Fifteenth Amendment. The Supreme Court has not decided whether intentional vote dilution violates both the Fourteenth and Fifteenth Amendments. *See Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000). The Eighth Circuit, however, has recognized Fifteenth Amendment vote dilution claims. Mot. at 11; *Perkins*, 675 F.2d at 205; *see also Simpson v. Thurston*, No. 4:22-CV-213, 2023 WL 3993040, at *1 n.1 (E.D. Ark. May 25, 2023).

[5] *See* n. 1, *supra.*

IV. DEFENDANT'S REMAINING ARGUMENTS ARE WITHOUT MERIT

A. There Are Not Other "Obvious Alternative Explanations" that Warrant Dismissal of Plaintiffs' Complaint

There is no merit to Defendant's argument that two "obvious alternative explanations" render the Complaint implausible. Mot. at 10. Alternative explanations that are merely consistent with the facts do not foreclose an inference of discriminatory motive. *See, e.g.*, *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009) ("Defendant is not entitled to dismissal if the facts are merely consistent with lawful conduct.").

1. Political gerrymandering is not an obvious alternative explanation for the Plan's surgical targeting of Black voters

Defendant's argument that political gerrymandering is an obvious alternative explanation for the Plan is wrong for three independent reasons. First, unlike the complaints in *Simpson,* there is nothing in the Complaint suggesting that partisan gerrymandering occurred. *See Simpson v. Hutchinson*, 636 F. Supp. 3d 951, 957 (E.D. Ark. 2022). To the contrary, the Complaint specifically alleges that partisan goals cannot explain the extreme and surgical targeting of Black communities apparent in the Plan's dissection of Pulaski County. White Democratic and unaffiliated voters were included in the redrawn Second Congressional District at a notably higher rate than Black Democratic and unaffiliated voters, respectively, within the same counties at issue. (¶ 189). Corroborating these allegations, the Complaint also alleges that other plans could have fulfilled partisan goals without singling out and harming Black voters this way. (¶¶ 22, 25, 116, 188-91).

Second, partisan gerrymandering is not an "obvious alternative explanation" that would overcome the inference of intentional racial discrimination raised by Plaintiffs' allegations. The facts of this case are very different from the "obvious alternative explanation" accepted in *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009). In *Iqbal,* the plaintiff contended that Muslims were

unconstitutionally singled out for investigation after the September 11 attacks. The Supreme Court found convincing the obvious alternative explanation that law enforcement was focusing on Muslim suspects because the attack was carried out by al Qaeda, an Islamic fundamentalist group headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. Therefore, it "[came] as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims." *Id.* Partisan gerrymandering provides no such obvious alternative explanation for singling out Black residents of the Second District for dispersal among three congressional districts and thereby seriously harming both their voting power and effective representation in Congress.

Third, partisan motives can coexist with unconstitutional racial discrimination. With respect to racial gerrymandering, absent a compelling interest, states may not "place[] a significant number of voters within or without a district predominately because of their race" for *any* reason. *Cooper*, 581 U.S. at 308 n.7 (quotation marks omitted). That is true "regardless of their ultimate objective in taking that step," and even if "legislators use[d] race . . . with the end goal of advancing their partisan interests." *Id.* In other words, the Constitution prohibits the "use of race as a proxy" for political interests. *Miller,* 515 U.S. at 914.

Because racial and partisan motives are often difficult to disentangle, and can lead to the same observable effects, a court must conduct "'a sensitive inquiry' into all 'circumstantial and direct evidence of intent.'" *Cooper*, 581 U.S. at 307 (quoting *Cromartie I*, 526 U.S. at 546); *see also Easley v. Cromartie*, 532 U.S. 234, 243-44 (2001) ("*Cromartie II*") (carefully evaluating evidence presented at trial to determine whether race rather than partisanship predominated). Such an inquiry cannot be accomplished on a motion to dismiss.

2. Achieving population parity is not an acceptable alternative explanation for the Plan

Defendant's argument that Pulaski County was split to achieve "numerical equality between the districts" likewise does not warrant dismissal of the Complaint. Mot. at 10. "[T]he requirement that districts have approximately equal populations is a background rule against which redistricting takes place. It is not a factor to be treated like other nonracial factors when a court determines whether race predominated over other, 'traditional' factors in the drawing of district boundaries." *Ala. Legis. Black Caucus,* 575 U.S. at 273 (citation omitted). The issue is not whether a legislature believes that the need to equalize population among districts, but rather "whether the legislature 'placed' race 'above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*.'" *Id.* (citation omitted) (emphasis in original).

Moreover, the Complaint alleges that achieving one-person, one-vote parity does not explain the Plan, which moves far more voters than necessary. (¶ 134). Although the General Assembly needed to move only roughly 16,510 people out of the Second District to balance its population, it moved 41,392 mostly Black people. (*Id.*). And legislators introduced multiple other redistricting plans that achieved voter population parity without severely disadvantaging Black voters in the Second District. (¶¶ 116, 160-61).

B. The Presumption of Legislative Good Faith Does Not Warrant Dismissal of the Complaint

The presumption of legislative good faith does not overcome the allegations of discriminatory purpose in the Complaint. Mot. at 7, 9. In *Arlington Heights*, the Court stated, "When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." 429 U.S. at 265-66. As set forth at length above, Plaintiffs have pleaded more than enough facts to create a strong inference that race was the predominant reason for and that vote dilution was a purpose of the Plan.

The decisions upon which defendant relies were decided on evidentiary records, not on motions to dismiss.[6] These cases support Plaintiffs' position that the taking of evidence is necessary to resolve Plaintiffs' claims.

In *Miller,* the Court emphasized that the "evidentiary difficulty" and "sensitive nature of redistricting," along with the presumption of good faith, "requires courts to exercise extraordinary caution" in evaluating claims involving congressional redistricting. 515 U.S. at 916. Such decisions on well-pleaded complaints as this should not be made on motions to dismiss. *LULAC II*, 604 F. Supp. 3d at 493 (rejecting legislative good faith defense as basis for motion to dismiss); *see also Mi Familia Vota v. Hobbs*, 608 F. Supp. 3d 827, 863-64 (D. Ariz. 2022) (same); *United States v. Georgia*, 574 F. Supp. 3d 1245, 1251 n.4 (N.D. Ga. 2021) ("[E]ven if the presumption applies, it is not a shield that requires automatic dismissal of discrimination claims at the pleading stage.").

The oppositions to the motions to dismiss in *Simpson* did not bring to the Court's attention any of the above arguments or authorities regarding obvious alternative explanations or legislative good faith.

CONCLUSION

For the foregoing reasons, the Court should deny Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint.

[6] *See Cromartie II*, 532 U.S. at 248 (analyzing "maps in evidence"); *Abbott,* 138 S. Ct. at 2348, 2349 n.13, 2356 (referring to testimony and the factual record); *Miller*, 515 U.S. at 918 (stating that testimony was taken); *Butts v. City of New York*, 779 F.2d 141, 147-48 (2d Cir. 1985) (reviewing bench trial).

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