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

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

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER AND JUDGMENT

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Christian Ministerial Alliance, Marion Humphrey, Kymara Hill Seals, and Arkansas Community Institute, (collectively, "Plaintiffs"), respectfully move the Court to alter or amend its Order, ECF No. 193 ("Order"), and Judgment, ECF No. 194, entered July 25, 2023, pursuant to Federal Rule of Civil Procedure Rule 59(e), or in the alternative, Rule 60(b).

The Court's judgment for Defendants, holding that Arkansas's current method of electing appellate judges does not violate Section 2 of the Voting Rights Act of 1965, is premised on legal and factual errors that preclude judgment for Defendants at minimum with respect to the method of electing judges to the Arkansas Court of Appeals. When applied to the factual record developed at trial, controlling precedent makes clear that: racially polarized voting exists; under the totality of the circumstances, the political process is not equally open to Black Arkansans; and this Court has the authority to order appellate districts to be redrawn to remedy the Section 2 violation.

The Court's decision warrants reconsideration, whether under Rule 59(e) or Rule 60(b), because if it remains unaltered, Black Arkansans will continue to suffer the injustice of being denied their equal opportunity to participate in the political process and elect their candidates of choice. For these reasons, and as explained more fully below, Plaintiffs respectfully move the Court to amend its Order and enter judgment for Plaintiffs, or at minimum, enter partial judgment on Plaintiffs' claim against the method of electing judges to the Arkansas Court of Appeals.

STANDARD FOR RELIEF UNDER RULE 59(E) AND RULE 60(B)

A district court has "broad discretion" to grant a motion to alter or amend judgment. *Innovative Home Health Care v. P. T. O. T. Assocs. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998). Rule 59(e) permits a party to file a motion to alter or amend a judgment to "correct[] manifest errors of law or fact." *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (quoting *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988)).

Plaintiffs' motion does not raise new evidence or arguments, but rather seeks to correct clear legal and factual errors in the Court's Order.

In the alternative, Plaintiffs move for relief pursuant to Rule 60(b). Under Rule 60(b), the Court may relieve a party from an order for "any other reason that justifies relief" from the judgment. Fed. R. Civ. P. 60(b)(6). "Rule 60(b) is a motion grounded in equity and exists 'to prevent the [order or] judgment from becoming a vehicle of injustice.'" *Harley v. Zoesch*, 413 F.3d 866, 870 (8th Cir. 2005) (quoting *MIF Realty L.P. v. Rochester Assocs.*, 92 F.3d 752, 755 (8th Cir. 1996)). Given the critical issue at stake, namely the right to participate equally in the political process, the Court should exercise its discretion to reconsider the judgment entered.

The deadline for filing a motion for reconsideration is "no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). Judgment was entered in this case on July 25, 2023. This motion is timely filed on August 22, 2023, exactly 28 days from the date of judgment.

ARGUMENT

I. The Court's Analysis of Racially Polarized Voting Under *Gingles II* and *III* Was Legally and Factually Erroneous.

The first component of a Section 2 claim is whether Plaintiffs meet the three preconditions established in *Thornburg v. Gingles*, 478 U.S. 30 (1986): (1) the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district" (*Gingles I*); (2) the minority group is "politically cohesive" (*Gingles II*); and (3) the "white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate" (*Gingles III*). *Id.* 50–51, 56.

The foundational error of the Court's decision with respect to *Gingles II* and *III* is its conclusion that it was compelled, as a matter of law, to consider all elections for the relevant offices ("endogenous" elections), "whether minority candidates run or not." Order ¶ 211. That conclusion

cannot be squared with governing precedent, nor with the weight of authority in other circuits. This error of equally weighting elections with no minority candidates ("uniracial" elections) and contests between a Black and white candidate ("biracial" elections) further pervaded the Court's analysis of non-judicial (or "exogenous") elections and led to a flawed analysis of minority-voter cohesion. Finally, the Court erred by considering evidence not admitted into the trial record and relying upon that evidence to determine there is not racially polarized voting in Arkansas.

A. The Court Committed Legal Error by Considering All Biracial and Uniracial Judicial Elections Equally.

To begin with, it has never been the law that every single available election must be considered, or that races featuring only white candidates must be analyzed on equal footing with those that feature a choice between candidates of different races. On the contrary, binding precedent holds that this Court had a duty to follow the best evidence, because "[v]ote dilution claims are 'peculiarly dependent upon the facts of each case.'" *Cottier v. City of Martin*, 604 F.3d 553, 559 (8th Cir. 2010) ("*Cottier II*") (quoting *Gingles*, 478 U.S. at 79). Applying that principle, courts have repeatedly held that Section 2 plaintiffs are not "required to present evidence on white versus white elections if they do not believe that those elections are probative." *Jenkins v. Red Clay Consol. Sch. Dist.*, 4 F.3d 1103, 1128 (3d Cir. 1993).[1] *See also, e.g.*, *Campos v. City of Baytown*, 840 F.2d 1240, 1248–49 (5th Cir. 1988) (upholding district court decision where "the inquiry of racially polarized voting properly focused only on those contests . . . . that had a minority member as a candidate"); *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1301 (11th Cir. 2020) (quoting *Solomon v. Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1227 (11th Cir.

[1] *Jenkins* is a case the Eighth Circuit has cited often and approvingly. *See, e.g.*, *Clay v. Bd. of Ed. of City of St. Louis*, 90 F.3d 1357, 1361 (8th Cir. 1996); *Harvell v. Blytheville Sch. Dist.*, 71 F.3d 1382, 1386 (8th Cir. 1995).

2000) ("a court may assign more probative value to elections that include minority candidates, than elections with only white candidates")).

The Fourth Circuit case relied upon by this Court is an outlier that cannot be squared with the weight of this precedent. Order ¶ 208. Most importantly, it cannot be reconciled with the decisions of the Supreme Court and the Eighth Circuit. In *Gingles* itself, the Supreme Court relied exclusively on contests featuring Black candidates to determine whether Black voters' strength was diluted. *Gingles*, 478 U.S. at 52–53, 80–82; *see also Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503–04 (5th Cir. 1987) ("*Gretna*") ("The various *Gingles* concurring and dissenting opinions do not consider evidence of elections in which only whites were candidates. Hence, neither do we."). The Eighth Circuit has likewise been clear that biracial elections featuring both Black and white candidates are generally the most probative and important data points in analyzing racially polarized voting. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1020-21 (8th Cir. 2006) ("Endogenous and *interracial elections* are the *best indicators* of whether the white majority usually defeats the minority candidate.") (emphases added) ("*Bone Shirt II*"); *Missouri State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1040 (E.D. Mo. 2016), *aff'd* 894 F.3d 924 (8th Cir. 2018) ("*Mo. Conf.*").

This is a point of broad consensus among courts: "As a general matter . . . elections involving white candidates only are much less probative of racially polarized voting than elections involving both black and white candidates." *Jenkins*, 4 F.3d at 1128; *see also, e.g.*, *Gretna*, 834 F.2d at 503–04. "Certainly, where only white candidates are competing for office in a particular jurisdiction, it is 'virtually unavoidable that certain white candidates would be supported by a large percentage of . . . black voters.'" *Nipper v. Smith*, 39 F.3d 1494, 1540 (11th Cir. 1994) (quoting *Gretna*, 834 F.2d at 502). However, Courts have recognized that "[s]uch elections . . . reveal little

about the issue to be determined: the capacity for white bloc voting usually to defeat black candidates of choice. Particularly where voting is extremely polarized by race in elections in which black candidates participate, white-on-white elections in which a small majority (or a plurality) of black voters prefer the winning candidate seem comparatively less important." *Id.* For these reasons, Courts have found "[i]t is logical…that the most probative evidence of whether minority voters have an equal opportunity to elect candidates of their choice is derived from elections involving black candidates." *Id.* As the Court recognized, this important point is so well established that it was *conceded* by Defendants in post-trial briefing. *See* Order ¶ 206; Defs.' Post-Trial Br. at 14 n.3, ECF No. 187.

Here, however, this Court did not apply this principle, treating uniracial elections as equally probative as biracial elections and therefore allowing the comparatively larger number of uniracial elections to drown out the clear evidence of racially polarized voting exhibited in the more probative biracial contests. Order ¶¶ 208-17. The Court appears to have done so because some of the uniracial elections occurred more recently than the biracial elections, because the uniracial elections are greater in number, or both. *See id.* ¶¶ 56-61. But those reasons are not supported by controlling or persuasive authority, which instead recognize that racially polarized voting analysis should focus on biracial elections, even when they are less recent or frequent, precisely because those facts indicate yet another way in which Black voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

As the Fifth Circuit has explained, "plaintiffs may not be denied relief simply because the absence of black candidates has created a sparsity of data on racially polarized voting in purely [endogenous] elections." *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201,

1209–10, n.9 (5th Cir. 1989). "To hold otherwise would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove." *Id.* Likewise, in *Nipper*, the Eleventh Circuit reversed a district court's decision to consider all elections, including uniracial elections, because the district court thought a smaller number of biracial races were too "stale" to be relied upon. 39 F.3d at 1539-40. Construing a record similar to that which the Court is considering here, the Eleventh Circuit echoed the Fifth Circuit in explaining that the biracial races should have been accorded greater weight. *Id.*

Moreover, this Court's conclusion that "[a] representative sample here requires considering more than four elections for appellate judgeships," Order ¶ 60, is likewise inconsistent with precedent. The Supreme Court in *Gingles* itself made clear that there is no minimum number of elections that must be analyzed, because "[t]he number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances." 478 U.S. at 57 n.25. And as *Westwego* suggested, a limited number of biracial elections is often a side effect of rampant racially polarized voting, which may discourage Black candidates from running in the first place. 872 F.2d at 1209–10 n.9. Consistent with this principle, the Eleventh Circuit reversed a district court that found no racially polarized voting, concluding instead that three endogenous biracial elections plus one exogenous biracial election exhibiting racially polarized voting were sufficient, at least where "non-expert testimony" corroborated the presence of racially polarized voting in the relevant jurisdiction. *City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1556–59 (11th Cir. 1987). Plaintiffs' evidence here includes more elections than what was sufficient to find racially polarized voting in *Stallings*: three endogenous elections and six exogenous elections exhibited racially polarized voting, and extensive non-expert testimony of racially polarized voting.

To reiterate, the Eighth Circuit has stressed that "[e]ndogenous *and* interracial elections are the best indicators of whether the white majority usually defeats the minority candidate." *Bone Shirt II*, 461 F.3d at 1020–21 (emphasis added) (internal citation omitted). Nothing in *Bone Shirt II*, nor in any of the numerous decisions reaching a similar conclusion across the country, permits an exception to this principle when racial discrimination in the political process means there are relatively fewer biracial elections to analyze.[2]

B. In Focusing on Uniracial Judicial Elections, the Order Also Fails to Consider Key Evidence Presented at Trial.

In considering all uniracial elections on equal footing with biracial elections, the Order is not only inconsistent with clear precedent, it also fails to consider key evidence presented at trial as to why biracial elections are the most probative.

First, the Court's Order fails to account for Dr. Liu's testimony explaining why a focus on biracial elections is the most rigorous and trusted methodology for identifying racially polarized voting. Dr. Liu credibly and persuasively explained why his expert methodology, focusing only on biracial elections, is the most reliable way to accurately determine Black voters' preferences and the most statistically sound way to assess racially polarized voting given the data available in this case. Dr. Liu explained that, as a matter of social science, the Court's approach of "using uniracial elections would dilute the results and make misleading conclusions." Trial Tr. vol. 3, 502:23-25 (Liu Cross); *see also id.* at 450:17-24 (Liu Direct). And he explained why that is: using

[2] *See, e.g.*, *Cisneros v. Pasadena Ind. Sch. Dist.*, No. 4:12-CV-2579, 2014 WL 1668500, at *9 (S.D. Tex. Apr. 25, 2014) (citing *Bone Shirt I* and *II* for proposition that interracial endogenous elections are the "most probative"); *Large v. Fremont Cnty.*, 709 F. Supp. 2d 1176, 1205 (D. Wyo. 2010) (same); *United States v. City of Euclid*, 580 F. Supp. 2d 584, 597 n.16 (N.D. Ohio 2008) (same); *see also Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 304 (D. Mass. 2004) (holding that minority group's ability to elect preferred candidates "is best and most easily measured in elections that offer black voters the chance to support a viable black candidate against a viable white candidate").

uniracial elections as data points would be like trying to determine travelers' preferred way to get from Point A to Point B while giving them an incomplete set of options—offering them only a train or a bus, for example, when their true preference might be to travel by car. *See id.*at 450:13–452:2 (Liu Direct).

Courts have corroborated this logic, finding that "elections involving white candidates are only probative '[w]here black voters have a genuine candidate of choice.'" *S. Christian Leadership Conf. of Ala. v. Sessions*, 56 F.3d 1281, 1304 (11th Cir. 1995) (citing *Nipper*, 39 F.3d at 1540–41). At trial here, witnesses testified to the fact that they did not feel that they had a genuine choice in contests where only white appellate judicial candidates appeared on the ballot. *See, e.g.*, Trial Tr. vol. 2, 269:1-7 (Seals Direct); *Id*. at 349:21-350:7 (Allen Direct). The Court ignored this testimony to give equal weight to endogenous uniracial elections in its findings on racially polarized voting. This defies precedent holding that "a court cannot assume, 'based only on a cursory examination[,]' that because the majority of black voters supported a white candidate, that candidate was a 'genuine candidate of choice,' *S. Christian Leadership Conf. of Ala.*, 56 F.3d at 1304 (citing *Nipper*, 39 F.3d at 1540.) Rather, "a court must find some support, such as 'anecdotal testimonial evidence, polling data, a review of the appeals made during the campaign, [or] turnout information, indicating [that] black voters were energized to support a particular white candidate.'" *Id*. The record here includes no such evidence—indeed, the weight of evidence contradicts the Court's assumptions.

Multiple experts also explained why it would be folly to disregard evidence of racially polarized voting based on the relatively small number of biracial races available. Dr. Liu testified that "the lack of candidates in biracial elections *itself* demonstrates how formidable the system can be to minority candidates." Trial Tr. vol. 3, 555:22-24 (Liu Cross) (emphasis added). As Dr. Liu

explained, racially polarized voting ("RPV") "obviously played a role to discourage candidates from running in the first place as it's so expensive and usually lead[s] to the defeat of black preferred candidates." *Id.* at 454:5-8. In addition, Plaintiffs' expert Dr. McCrary explained that "[t]he impact [of RPV] is not only to prevent the election of minority candidates, but to affect the way that minority candidates view their chances of winning election . . . . And that would play into the calculations as to whether to run for office or not." Trial Tr. vol. 2, 592:2-4, 592:14-16 (McCrary Direct).

Expert testimony was corroborated by testimony from fact witnesses who gave personal accounts of how racially polarized voting deters Black candidacies at the outset. *See* Trial Tr. vol. 2, 254:14-16 (Seals Direct) ("the difference in the vote is like white people are not going to vote for us, they're just not going to do it."); Trial Tr. vol. 3, 422:5-6 (Brown Direct) ("I couldn't win that district, it was too white. I knew that."); Trial Tr. vol. 4, 672:4-13 (Hunt Direct) ("[I]t would have been nonsensical. It would have been totally impractical. It would have been a waste of money."). The Order does not address this important body of testimony.

In any event, even if the Court was inclined to consider *some* uniracial elections, the majority of the uniracial, endogenous elections that Defendants' expert and the Court have relied upon yielded confidence intervals that were far too wide to determine to a reasonable degree of confidence who the Black-preferred candidate was. Trial Tr. vol. 5, 854:14-18, 858:20–859:4 (Alford Cross). This fact was established and unrebutted at trial, but the Court's Order nevertheless relies on those datapoints interchangeably. This approach cannot be squared with the facts in the record, methodological norms, or precedent.

The Court also erred by failing to substantively assess evidence to determine if and when white candidates in uniracial elections were the "genuine candidate of choice" among Black voters.

S. Christian Leadership Conf. of Ala., 56 F.3d at 1304 (citing *Nipper*, 39 F.3d at 1540). It is a "clear abuse of discretion" where the district court "fails to consider an important factor, gives significant weight to an irrelevant or improper factor, or commits a clear error of judgment in weighing those factors." *U.S. ex rel. Raynor v. Nat'l Rural Utils. Coop. Fin., Corp.*, 690 F.3d 951, 957 (8th Cir. 2012) (quoting *Matthew v. Unum Life Ins. Co. of Am.*, 639 F.3d 857, 863 (8th Cir. 2011)). Proper consideration of the record evidence reveals that white candidates in endogenous uniracial elections did not represent a "genuine candidate of choice" for Black voters. Reevaluating the weight of these elections accordingly would tip the scales in favor of a finding for Plaintiffs on *Gingles II* and *III*.

C. The Court Commits the Same Errors in its Analysis of Non-Judicial Elections by Equally Considering Uniracial Races and Drawing Conclusions That Are Unsupported by the Trial Record.

In addition to the errors above with respect to the analysis of judicial appellate elections, the Court erred in its analysis of non-judicial elections by: (1) giving equal weight to exogenous biracial and uniracial elections; (2) considering elections that are outside the trial record; and (3) imposing an unprecedented legal requirement to disprove partisan polarization.

First, for the same reasons explained above, biracial exogenous elections are more probative of racially polarized voting than uniracial exogenous elections. *See supra* Section I(A); Trial Tr. vol. 3, 467:7-11 (Liu Direct); PTX 074 at 5 n.3; *Black Political Task Force*, 300 F. Supp. 2d at 307 (instructing that "the next most fertile field" after biracial endogenous elections "is composed of multi-race exogenous elections"). Plaintiffs' expert, Dr. Liu, found racially polarized voting in six out of seven biracial exogenous races, and Defendants' expert found comparable results. *See* Pls.' Post-Trial Findings of Fact & Conclusions of Law ¶¶ 75-89, ECF No. 189 ("Pls.

FOF & COL"). This evidence is more probative, and thus should have been given greater weight, than Dr. Alford's analysis of uniracial elections.

When analyzing endogenous elections, the Court appeared to emphasize the probative value of recent elections over biracial elections. *See* Order ¶¶ 56-61. Notwithstanding Plaintiffs' arguments that this was an inappropriate way to weigh the evidence, if the Court applies that same logic to exogenous elections, then the evidence further supports Plaintiffs, not Defendants. Dr. Alford found that in every single uniracial exogenous election in the past ten years, the Black-preferred candidate was defeated. DX 1 at 20-21 (Expert Report of John R. Alford, Ph.D.); Trial Tr. vol. 5, 866:19–868:3 (Alford Cross).

Second, the Court cites outcomes from several exogenous elections that were not in the trial record to find that there is "recent Black candidate success in central Arkansas elections." Order ¶¶ 64, 251 (citing Little Rock Mayor in 2018 and 2022, Pulaski County Sheriff in 2018 and 2022, and Pulaski County Circuit Clerk in 2018 and 2022). Defendants did not introduce this evidence during trial, and the failure to present evidence during trial is already sufficient ground to disregard it. *See, e.g.*, *Hopman v. Union Pac. R.R.,* No. 4:18-cv-00074-KGB, 2022 WL 963662, at *12 (E.D. Ark. Mar. 30, 2022). Furthermore, the Court's consideration and reliance upon this evidence is prejudicial to Plaintiffs and irrelevant to the *Gingles II* and *III* inquiry.

This untimely evidence is prejudicial to Plaintiffs, who were denied the opportunity to present evidence to rebut the relevance of these elections and especially to permit their expert to analyze the elections. The Court's citing of 2022 elections that post-dated trial and post-trial briefing further adds to this prejudice. Moreover, without expert analysis, the Court's Order rests on an assumption that the Black candidate was the Black voters' candidate of choice. *See Harvell*, 71 F.3d at 1386 ("[A] candidate is [not] the minority-preferred candidate simply because that

candidate is a member of the minority."). The Court erred by drawing conclusions without important information for the racially-polarized voting inquiry including, *inter alia*, who was Black voters' candidate of choice, did Black voters vote cohesively to elect the candidate, and did white voters also vote for Black voters' candidate of choice.

Even if these new facts could properly be considered, they are still irrelevant to the *Gingles II* and *III* analysis. Defendants concede that local elections are irrelevant to the analysis of statewide Supreme Court elections in Arkansas. *See* Defs.' Post-Trial Br. at 19-20. It is also the wrong inquiry for the Court of Appeals. Plaintiffs challenge the failure to draw two majority-Black districts in an area broader than the Pulaski County elections the Court considered. Courts, including the Supreme Court, have consistently found that elections involving an electorate narrower than that of the position in question are misleading for purposes of an analysis of racially polarized voting. *See, e.g., Abbott v. Perez*, 138 S. Ct. 2305, 2331–32 (2018) (it is the "wrong approach" for a district court to consider "only one, small part of [an illustrative] district"). For these reasons the Order should not have considered this small, cherry-picked set of local races.

Third, the evidence in the record does not support the Court's partisanship findings and, in any event, that is not a relevant inquiry under controlling precedent. The "Eighth Circuit has made clear that the 'reason' for voter 'cohesion is *irrelevant* in the threshold determination of whether the *Gingles* preconditions are met.'" Pls.' Resp. Opp'n. Defs.' Mot. Summ. J. at 39, ECF No. 103 (citing *Cottier v. City of Martin*, 445 F.3d 1113, 1119 (8th Cir. 2006) (emphasis added) ("*Cottier I*"). "To imply that party affiliation should negate political cohesion would have the effect of denying minority voters an equal opportunity to elect representatives of their choice regardless of the reason." *Id.* (internal citations omitted); *see also Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1008 (D.S.D. 2004) ("[P]artisanship has no bearing on the *Gingles* factors.") (collecting cases)

("*Bone Shirt I*"); *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 841 (M.D. La. 2022), *cert. granted before judgment*, 142 S. Ct. 2892 (2022), and *cert. dismissed as improvidently granted*, 143 S. Ct. 2654 (2023) ("The Court rejects Defendants' attempt to append an additional requirement to *Gingles II*, namely, that Black voters' cohesion must be shown to be caused by or attributable to race instead of something else, like partisanship. The Court finds no basis for this requirement in the law."). Simply put, "inquiry into the *cause* of white bloc voting is not relevant to a consideration of the *Gingles* preconditions." *Goosby v. Town Bd. of Town of Hempstead,* 180 F.3d 476, 493 (2d Cir. 1999) (emphasis in original).

Partisanship is not only legally irrelevant under Section 2, but there is no evidence here that party was the cause of voter choices independent of race. Even Defendants' expert Dr. Alford conceded he had done no such analysis. Trial Tr. vol. 5, 865:20–866:4 (Alford Cross). Nor is a finding of racially polarized voting undermined by the Order's observation that, in one election, "[w]hen Black voters were offered a choice between a Black Republican and a white Democrat, in the 2006 State Treasurer race, they overwhelmingly chose the white Democrat, by a margin of 88% to 12% . . ." Order ¶ 160.

Biracial elections are key to the degree they are probative of whether Black voters have a fair opportunity to elect genuine candidates of choice, as discussed above. But that does not mean that Black voters will always prefer Black candidates, or that there is no racially polarized voting when Black voters coalesce around a white candidate whose platform they determine better represents their interests than a Black candidate. White voter support in biracial elections is also relevant to the racially polarized voting analysis. It is notable that white voters displayed reduced support for Black Republican candidates as opposed to white Republican candidates. *See* Trial Tr. vol. 3, 532:18-24, 536:17-538:12 (Liu Cross) (discussing lower white voter support for Black

Republican candidates, and its relevance for racially polarized voting analysis); *see also infra* Section II(B) (discussing 2022 election loss by Black Republican candidate). There was also trial testimony that white voters provided greater support for a white candidate than a Black candidate on the same Democratic ticket. Trial Tr. vol. 2, 252:22-254:20 (Seals Direct).

Finally, witness testimony corroborates that race rather than party is the driving factor here. *See* Trial Tr. vol. 1, 78:2–79:2 (Humphrey Direct); Trial Tr. vol. 2, 292:6-13 (Seals Redirect) (when asked if race or party play a bigger role in Arkansas politics, she stated "Race is huge."). For these reasons, the weight of the evidence in the record did not support a finding that partisan polarization solely explained the election results or that there was insufficient evidence of racially polarized voting in exogenous elections in Arkansas.

D. The Court Erred by Finding That Black Arkansas Voters Are Not Politically Cohesive.

The Court's failure to find biracial elections, whether endogenous or exogenous, to be the most probative also led to a flawed analysis of political cohesion. Dr. Liu found across nine of the eleven biracial elections held in Arkansas over a twenty-year period, there was a clear candidate of choice for Black voters, with levels of support ranging from 61.79 to 84.7 percent for endogenous elections and 65.24 to 94.72 percent for exogenous elections. *See* Pls.' FOF & COL ¶¶ 64-84. Dr. Alford's findings are consistent with Dr. Liu's that there was high voter cohesion in biracial elections. *Id.* ¶¶ 86-87. This is the most relevant data and is enough to show that, by a preponderance of the evidence, Black voters are cohesive under *Gingles II*.

While there is no fixed threshold of minority support necessary to satisfy this precondition, it is well established that—at a minimum—support exceeding 60 percent is sufficient. *See Bone Shirt I*, 336 F. Supp. 2d at 999 ("[T]he court holds that cohesion exists at levels above 60 percent and may exist, albeit more weakly, at lower levels"); *see also African Am. Voting Rts. Legal Def.*

Fund v. Villa, 54 F.3d 1345, 1353 n.11 (8th Cir. 1995) (the "60% figure is merely a guideline, not an absolute threshold") (internal citation omitted).

The Court's analysis also incorrectly muddles the *Gingles II* inquiry with the performance inquiry that is appropriate for the remedial stage. The Court takes the percentage of Black voting-age population in Plaintiffs' illustrative maps and multiplies that by the average level of Black voter support across all judicial races in the past ten years. *See* Order ¶¶ 129-134. The Court finds that a Black-preferred candidate would need between 39.4 and 41.4 percent of white voter support to win. *See id.* ¶¶ 129-134 & nn.4-5. The Court uses this arithmetic to support its holding that "Plaintiffs have failed to prove that Black voters' preferences in Arkansas's appellate-judge elections are cohesive enough to satisfy the second *Gingles* precondition." *Id.* ¶ 227; *see generally id.* ¶¶ 222-27.

This analysis is inconsistent with precedent for several reasons. Again, the most probative evidence is the level of cohesion in biracial races, not all appellate judicial races over the past ten years. *See Bone Shirt II*, 461 F.3d at 1020-21. In those races, Black voter cohesion is much higher, which means Black voters would need far less support from white voters to elect candidates of choice.

Additionally, the Court misapprehends *Bartlett v. Strickland*, 556 U.S. 1 (2009). Order ¶¶ 225-26. That case concerned whether *Gingles I* "can be satisfied when the minority group makes up less than 50 percent of the voting-age population in the potential election district." *Bartlett*, 556 U.S. at 12. In that context, the Court suggested it was skeptical that Plaintiffs could satisfy *Gingles III* if no illustrative map could be drawn where Black voters constituted a majority because—regardless of actual voting—by definition, Black voters would require white cross-over support to elect a candidate of choice in such a district. The Court expressly concluded it did not have to

reach the issue, however, because no party had raised it, and it proceeded to resolve whether *Gingles I* required an illustrative map of at least 50 percent. *Id.* at 16.

Here, however, the Court found that Plaintiffs' illustrative maps surpass the 50 percent threshold and satisfy *Gingles I*. Order ¶ 199. This finding, plus the evidence of Black-voter cohesion in biracial elections, are sufficient to meet the *Gingles I* and *II* preconditions, respectively. The Court's use of arithmetic to estimate white voter support in the illustrative districts—*i.e.*, the possible performance of minority-preferred candidates in hypothetical remedial maps—is not part of determining the existence of a Section 2 violation, and nothing in *Bartlett* suggests otherwise. *Bartlett* certainly does not overrule the clear Eighth Circuit precedent establishing that the levels of Black voter cohesion in biracial elections here satisfy *Gingles II.*

E. The Court Erred by Considering Evidence Outside the Record to Find "Special Circumstances" Explain the Outcome of Biracial Judicial Elections.

Under the third *Gingles* factor, Plaintiffs must show that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. *Allen v. Milligan*, 143 S. Ct. 1487, 1503 (2023) (citing *Gingles*, 478 U.S. at 51). This precondition also requires the district court to analyze the "special circumstances" that attend elections to make sure there are no non-racial factors at play that would appear to either defeat or demonstrate a Section 2 violation. *Mo. Conf.*, 894 F.3d at 936.

This Court found that special circumstances explain Judge Wendell Griffen's loss in three elections, undermining the significance of the racially polarized nature of these elections. Order ¶ 236. The Order asserted that Judge Griffen's "history of investigations" and "views about controversial topics" are special circumstances that explain his defeats, citing exhibits that were part of Defendants' pre-trial filings but were not introduced or admitted at trial. Order ¶ 237. The trial record does not support these findings.

Neither party called Judge Griffen as a witness. Plaintiffs' expert, Dr. Liu, noted that Black voters cohesively supported Judge Griffen in his losing campaigns, and several fact witnesses supported this testimony. *See, e.g.*, Trial Tr. vol. 1, 49:15-22 (Humphrey Direct); Trial Tr. vol. 2, 265:17–267:10 (Seals Direct); Trial Tr. vol. 2, 350:24-351:19 (Allen Direct). Kymara Seals, for example, made no mention of Judge Griffen's disciplinary history or his social stances on issues; in fact, she testified that he was her candidate of choice because of his values, qualifications, and character, as well as his passion for people and for justice. Trial Tr. vol. 2, 266:9–267:10 (Seals Direct).

The Defendants called no fact witnesses; neither was documentary evidence introduced about Judge Griffen's disciplinary history nor his comments away from the bench. *See* Defs.' Ex. List, ECF No. 177. There was no evidence regarding the influence of Judge Griffen's alleged political stances on Arkansas voters. Thus, there is no evidence admitted into the record to support the conclusion that "Judge Griffen was not the typical judicial candidate," Order ¶150, or that special circumstances were justifications for Judge Griffen losing three elections. *Id.* ¶¶235, 237.

Even if the Court were to take judicial notice of certain facts in the newspaper articles quoting Judge Griffen, the evidence of special circumstances is hearsay. Federal Rule of Evidence 201(b) provides that "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." While the newspaper articles that were not properly tendered could be admissible, *see* Federal Rule of Evidence 902(6), "[c]aution must also be taken to avoid admitting evidence, through the use of judicial notice, in contravention of the relevancy, foundation, and hearsay rules." *Am. Prairie Const. Co. v. Hoich*, 560 F3d. 780, 797 (8th Cir. 2009) (citations omitted).

Moreover, each judicially noticed document that includes hearsay evidence is "generally only admissible at trial through an enumerated hearsay exception." *Id.* Because these articles were not tendered at trial, Plaintiffs did not have an opportunity to object or to limit the use of the contents of the articles. For these reasons, the Court should decline to take judicial notice of these articles.

Finally, even if the Court admitted or now decides to take judicial notice of the newspaper articles, the conclusions reached in the Order are not supported by the totality of the evidence. As noted above, there was no testimony at trial that disciplinary matters or Judge Griffen's in- or out-of-court statements decreased Black voter support. *See, e.g.,* Trial Tr. vol. 2, 351:20-352:10 (Allen Direct) (the existence of a disciplinary complaint "doesn't imply merit to the complaint" and did not change Reverend Allen's support for Judge Griffen). In fact, as discussed above, testimony in the record undermines the Court's conclusions and indicates Judge Griffen was a genuine candidate of choice for Black voters. If anything, the record shows Judge Griffen did not receive white cross-over voters—but there is no evidence to conclude that this is because of special circumstances as opposed to racial polarization. Therefore, the findings of special circumstances are not supported by the record.

* * *

For these reasons, Plaintiffs established by a preponderance of the evidence in the record, and under the proper legal standard, that there is racially polarized voting under *Gingles II* and *III*.

II. The Court Erred in Holding Plaintiffs Failed to Establish Their Claim Under the Totality of the Circumstances.

The Court erred in finding that Plaintiffs failed to "prove that the totality of the circumstances indicates minority voters ha[ve] less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice." Order ¶ 240 (citing *Bone Shirt II*, 461 F.3d at 1021). The Court largely limited its conclusions regarding

the totality of circumstances to the two factors that "predominate the analysis," namely, "the extent to which voting in the jurisdiction is racially polarized (Factor Two) and the extent to which members of the minority group have been elected to office in the jurisdiction (Factor 7)." *Id.* ¶ 242. If properly considered, however, the evidence weighs in Plaintiffs' favor on both these factors and the totality of circumstances is further bolstered by findings on the other Senate Factors, which the Court failed to weigh despite extensive and undisputed evidence.

A. Senate Factor 2

As detailed above, the Court erred when weighing the evidence of racially polarized voting. *See supra* Section I(A). A proper finding of racially polarized voting under *Gingles II* and *III* logically extends to a determination that Senate Factor 2 is met here. Moreover, the Court failed to weigh record testimony that both corroborates the statistical evidence of racially polarized voting and demonstrates how these patterns fuel the systems that dilute Black voters' opportunities to engage in the political process. For example, Judge Hill stated, "[in] my experience white voters don't vote for Black judges." Pls.' FOF & COL ¶ 121 (citing Trial Tr. vol. 2, 394:13-24 (Hill Direct)). Judge Brown then described declining to run for a vacant Court of Appeals seat, stating "I couldn't win that district, it was too white. I knew that." *Id*. (citing Trial Tr. vol. 3, 422:4-6 (Brown Direct)). Judge Hunt echoed similar assessments towards the prospects of success in a majority-white electorate, explaining it would be "nonsensical," "totally impractical," "a waste of money," and "taxing in every sense of the word," due to conspicuous patterns of racially polarized voting. Trial Tr. vol. 4, 672:4-13 (Hunt Direct).

Kymara Seals testified to her emotional revelation about persistent patterns of racially polarized voting, recalling the difference in the vote share earned by a Black Republican compared to his white Republican counterparts in the same election cycle and deducing the deficit could only

logically be attributed to his race, not party. Pls.' FOF & COL ¶ 122 (citing Trial Tr. vol. 2, 254:5-23 (Seals Direct)). It sent the message, she said, that "white people are not going to vote for us, they're just not going to do it." *Id*. at 254:14-16.

The Court had to ignore all this evidence to determine that the record is "without evidence that white voters are unreceptive to Black candidates." Order ¶ 244.

B. Senate Factor 7

The Court's analysis of Senate Factor 7 evades the most probative evidence and improperly interprets data points beyond the trial record. The Court frames the failure of two Black candidates in elections for the Supreme Court's statewide, at-large districts as the "exception" rather than the trend for Black candidates' viability in Arkansas. Order ¶ 250. In fact, no Black candidate for Supreme Court in Arkansas *or any* statewide elected office has succeeded in modern history. Pls.' FOF & COL ¶ 160 (citing PTX 466 at 86:5-7; PTX 467 at 164:16-24; PTX 468 at 49:16-20; and Trial Tr. vol. 1, 57:1-9 (Humphrey Direct)). And no Black candidate has *ever* defeated a white opponent for *any* appellate judicial office. Pls.' FOF & COL ¶ 163 (citing PTX 467 at 163:22–164:21, 164:25–165:8; Trial Tr. vol. 3, 423:9–426:10 (Brown Direct) and Joint Stipulation ⁋ 49). Nothing in the Court's discussion of races outside the trial record changes these facts. *See* Order ¶ 251.

In Arkansas, Black candidates have succeeded when opportunities to participate in the political process have been made equally available to Black voters, particularly in majority or near-majority Black districts—including through districts created by court intervention. But in statewide races, Black candidates continually fail. These facts support rather than undermine a finding for Plaintiffs on Senate Factor 7.

The Court cites examples from 2022 of Black candidate success in Little Rock and Pulaski County as "illustrative of recent Black candidate success in central Arkansas elections." *Id*. While these races were not properly before the Court for the reasons stated above, they actually support Plaintiffs' claims because they show that Black voters can only succeed in communities where voters of color are a majority or close to it. According to American Community Survey estimates, Little Rock is majority non-white and Pulaski County's white, non-Hispanic or Latino population has declined in recent years, now barely constituting a majority. *See, e.g.*, PTX 75 at App. H (Cooper Revised Rep.). The fact that the only cited examples of Black candidate success against white opponents were where Black communities are provided a larger voter share supports Plaintiffs' arguments about the lack of opportunity for minority candidate success in majority-white and statewide elections.

These cherry-picked examples are also far less probative than evidence from other exogenous elections *in* the record, including Senator Joyce Elliott's defeat in elections for Arkansas's 2nd Congressional District, which better mirrors the mix of urban pockets and rural suburbs necessarily reflected in appellate court districting. Trial Tr. vol. 4, 714:20-725:1 (Elliott Direct). Senator Elliott testified extensively to the challenges she faced as a Black candidate, *id*, and Defendants offered little counterpoint to undermine these accounts. Trial Tr. vol. 4, 746:4-751:4 (Elliott Cross).

Rather than showing Black candidates may be elected "with ease," the examples from Pulaski County and Little Rock demonstrate that designing districts that can perform for Black voters, and may even elect Black candidates, is possible but not promised in Arkansas. Relatedly, the Court notes that 15 percent of leaders elected to the Arkansas House of Representatives are Black, "a number roughly equal to the Black population in Arkansas." Order ¶ 167. Yet this fact,

Plaintiffs note, is "partly attributable to the fact that Black members of both houses have been elected from single-member majority-Black districts that have been determined by federal courts to satisfy Section 2 of the Voting Rights Act." Pls.' FOF & COL ¶ 166 (citing PTX 078 ¶¶ 53–56 and *Jeffers v. Clinton*, 756 F. Supp. 1195 (E.D. Ark. 1990)).

In discussing the 2022 election cycle that occurred post-trial, the Order omits any mention of the defeat of multiple Black candidates for statewide office. Chris Jones, a Black Democrat, was defeated by a white opponent for Governor, and his brother, Leon Jones, Jr., a Black Republican, was defeated in his bid for Attorney General. Indeed, no Black candidate won any statewide or federal position in 2022. The statewide trend of Black candidate defeat is not just historic, but ongoing.

The Order also does not consider extensive evidence about the barriers Black candidates face not only to win elections in Arkansas, but to enter them in the first place. Dr. McCrary noted the deterrent effects of racially polarized voting for the pipeline of Black political candidates. Pls.' FOF & COL ¶ 123 (citing Trial Tr. vol. 3, 591:25–596:16 (McCrary Direct)). "The impact is not only to prevent the election of minority candidates, but to affect the way that minority candidates view their chances of winning election." *Id*. Attorney Hunt and Senator Elliott reiterated this effect based on their own experiences, echoing that they both ruled out running for statewide offices because of the barriers they observed for Black candidates ever winning at large. Pls.' FOF & COL ¶ 161 (citing Trial Tr. vol. 4, 675:14- 676:4 (Hunt Direct); *id*. at 716:13-23 (Elliott Direct)).

For these reasons, the Order should reflect the clear facts on the record: Senate Factor 7 is met.

C. Other Senate Factors

The Court should not limit its corrections on reconsideration to finding in favor of Plaintiffs on Senate Factors 2 and 7 but should also properly engage with the broader Senate Factors record. The Order omits significant, relevant, and largely uncontested evidence of the totality of the circumstances that should lead to a finding in Plaintiffs' favor.

***Senate Factor 1*:** Regarding Senate Factor 1, the Court should follow precedent set by multiple prior courts and take judicial notice of the history of voting discrimination in Arkansas. *See* Pls.' FOF & COL ¶ 103 and PTX 078 ¶ 19 (citing *Smith v. Clinton*, 687 F. Supp. 1310, 1317 (E.D. Ark. 1988); *Perkins v. City of W. Helena*, 675 F.2d 201, 211 (8th Cir. 1982), *aff'd* 459 U.S. 801 (1982); *Jeffers v. Clinton*, 730 F. Supp. 196, 204 (8th Cir. 1989); *Jeffers v. Tucker*, 847 F. Supp. 655, 659 (E.D. Ark. 1994)). This finding can be further supplemented by extensive expert and fact testimony in the record. Pls.' FOF & COL ¶¶ 104-119.

***Senate Factor 3*:** The record is unquestionable on Senate Factor 3, which addresses factors in Arkansas's election systems that "may enhance the opportunity for discrimination against the minority group." Senate Report at 206–07. Arkansas's appellate election systems, especially for the Supreme Court, are wrought with these features, including a majority-vote requirement, numbered posts, staggered terms, and at-large voting districts. Pls.' FOF & COL ¶¶ 124-133.

***Senate Factor 4*:** While Arkansas's judicial races are not defined by formal slating processes, the record includes multiple examples of informal slating processes and racial disparities in access to resources that speak to Senate Factor 4. Kymara Seals, Judge Humphrey, and Neil Sealy all testified about the inequities Black candidates face in accessing the support of business entities and wealthy donor networks, for example. Pls.' FOF & COL ¶¶ 134-140.

***Senate Factor 5*:** There is extensive statistical and testimonial evidence of discrimination in education, employment, and health assessed under Senate Factor 5. Demographic measures demonstrating racial inequality across each of these metrics are uncontested in the record and further contextualized by historic analysis offered by expert Dr. McCrary and the observations of nearly every fact witness at trial. Pls.' FOF & COL ¶¶ 141-152. Senate Factor 5 is undeniably met.

***Senate Factor 6*:** The Court is overly narrow in its factual finding that "[t]here have been no racial appeals in Arkansas judicial elections whatsoever." Order ¶ 168. The only material in the record regarding Judge Wendell Griffen was a cartoon depicting him as a clown, which Dr. McCrary characterized as a racialized "historical trope." PTX 158; *see also* Pls.' FOF & COL ¶ 154 (citing PTX 078 ¶ 45). The racial campaign appeals analysis should also not be limited to investigating only the offices at issue in this litigation. *See, e.g.*, *Bone Shirt I*, 336 F. Supp. 2d at 1041 (weighing favorably evidence of racial appeals related to broader election coverage and statewide gubernatorial campaigns in a case regarding racial vote dilution of state legislative seats). Here, multiple witnesses discussed other racial campaign appeals that have framed political conversation in Arkansas and their experiences as Black candidates and voters. *See* Pls.' FOF & COL ¶¶ 141-158. Reverend Allen explained that these racial appeals sent a broad signal that Black voters like her could be "taken for granted" and treated as "less educated and knowledgeable about voting." Pls.' FOF & COL ¶ 155 (citing Trial Tr. vol. 2, 374:2–375:24 (Allen Direct)).

* * *

Omitting any analysis of the additional Senate Factors results in incomplete factual findings and reversible legal error. The determination on the totality of circumstances requires an analysis of the *totality* of evidence presented—not simply one or two factors, or even the Senate Factors alone. *See, e.g.*, *Ga. State Conf. of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d

1336, 1342 (11th Cir. 2015) (Affirming that the court is not limited to considering "solely these factors" because the list of Senate Factors is "neither comprehensive nor exclusive." (quoting *Gingles*, 478 U.S. at 45)). A plaintiff need not prove "any particular number of factors . . . or that a majority of them point one way or the other," *id.* at 45 (citation omitted), and "[n]o one of the factors is dispositive." *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1120 (5th Cir. 1991) (also noting that plaintiffs "need not prove a majority" of the Senate Factors and "other factors may be relevant.") (internal citations omitted).

Indeed, "the final determination of whether the voting strength of minority voters is canceled out demands the court's overall judgment, based on the totality of the circumstances and guided by those relevant factors in the particular case." *Whitfield v. Democratic Party of Ark.*, 890 F.2d 1423, 1432 (8th Cir. 1989) (cleaned up). Here, the Court offered only limited rationale, rather than an overall analysis of the sweeping record of Senate Factor evidence and additional facts demonstrating how discrimination has played a significant role in diluting Black Arkansans' opportunities to participate in the political process and elect candidates of their choice.

D. The State's Linkage Interest Does Not Preclude a Remedy

Finally, the Court erred in its analysis of the unofficial "ninth factor," related to the tenuousness of Defendants' policy justification for the electoral systems in place—here, the state's "linkage" interest in at-large elections. *See* Order ¶ 253-275. Specifically, the Court improperly suggests that it is limited in remedying a Section 2 violation for "judicial elections in particular." *Id*. ¶ 260-63. The Supreme Court has affirmed explicitly that "state judicial elections are included within the ambit of § 2 as amended." *Chisom v. Roemer*, 501 U.S. 380, 404 (1991). This dictate is only given meaning where limits can be enforced, and linkage cannot be a shield to Section 2 violations where at-large judicial systems exist—and certainly where they do not, as with the

Arkansas Court of Appeals. Although Plaintiffs contest the policy interest in at-large Supreme Court elections, there is no reason why the linkage interest would preclude redrawing the Court of Appeals districts, which are already districted. There is no basis for concluding that the Court is without power to remedy a Section 2 violation for the Court of Appeals.

* * *

Due to these errors, it was manifestly incorrect as a matter of both fact and law for the Order to state that "[e]ven if the Court had found for the Plaintiff's on all three *Gingles* factors, Defendants would still be entitled to judgment on both of the two essential Senate factors." Order ¶ 276. This conclusion cannot be reconciled with the record, as corrected above.

CONCLUSION

Because the Court's Judgment is based on mistakes of law and fact, relief under Federal Rule of Civil Procedure Rule 59(e), or in the alternative, Rule 60(b), is appropriate. Plaintiffs respectfully ask the Court to:

1. Amend its Order to reflect all the issues addressed herein;
2. Enter Judgment for Plaintiffs or, at minimum, Partial Judgment for Plaintiffs with respect to the Arkansas Court of Appeals; and
3. Set a schedule for a remedial hearing with respect to the Arkansas Court of Appeals.

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