

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FOURTH DIVISION**

**DEBORAH SPRINGER SUTTLAR, JUDY GREEN, FRED LOVE,
in his individual and official capacity as State Representative,
KWAMI ABDUL-BEY, CLARICE ABDUL-BEY, and
PAULA WITHERS,**

PLAINTIFFS

vs.

CASE NO. 60CV-22-1849

**JOHN THURSTON, in his official capacity
as the Secretary of State of Arkansas and in his official capacity
as the Chairman of the Arkansas State Board of Election Commissioners;
and SHARON BROOKS, BILENDA
HARRIS-RITTER, WILLIAM LUTHER,
CHARLES ROBERTS, WENDY BRANDON, JAMIE CLEMMER and
JAMES HARMON SMITH III, in their official capacities
as members of the Arkansas State Board of
Election Commissioners,**

DEFENDANTS

Defendants' Brief in Support of Motion for Judgment on the Pleadings

INTRODUCTION

Plaintiffs are voters who lost a partisan redistricting battle over Arkansas's 2021 congressional maps. Upset, they sued the Secretary of State and Board of Election Commissioners to get a new map. But this Court lacks jurisdiction over their lawsuit. The federal constitution bars state courts from interfering with a state legislature's congressional redistricting decisions. And the Arkansas constitution provides no authority for courts to do so in the first place. Finally, the Arkansas constitution provides the Defendants with sovereign immunity from this suit, so this Court may not hear it.

This Court should grant Defendants judgment on the merits too. Relying exclusively on two roundly criticized, poorly reasoned, and deeply flawed out-of-state decisions—*League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), and *Harper v. Hall*, 868 S.E.2d 499

(N.C. 2022)—Plaintiffs ask this Court to radically reinterpret the Arkansas Constitution’s Free and Equal Elections Clause and invalidate Arkansas’s congressional map. But the Arkansas Supreme Court has not adopted such a broad reading, and the Elections Clause of the federal Constitution precludes it from doing so.

Recognizing that, Plaintiffs attempt to restyle their claim as a claim that Arkansas’s congressional map diluted the voting strength of Black Arkansans. They rest that argument on the assertion that in drawing the 2021 congressional map—and apparently every congressional map for more than half a century—Arkansas diluted black voting strength by failing to place Pulaski and Jefferson Counties into the same congressional district. And they say the decision to split some counties (and not others) as happens in every reapportionment somehow illustrates their point. That claim fares no better than their appeal to the courts of Pennsylvania and North Carolina. That’s because the Arkansas provisions at issue here have long been interpreted consistently with their federal counterparts and—as the United States Supreme Court has long held—the kind of vote-dilution claim at issue here isn’t available under the Constitution. In fact, that’s why Congress authorized the Attorney General to bring such cases under Section 2 of the Voting Rights Act.

And in any event, even if Plaintiffs could pursue such a claim or had pled that Arkansas intentionally discriminated against black voters, Plaintiffs’ proposed remedy—commanding Arkansas’s legislature to draw lines explicitly based on race—would violate both state and federal equal protection law. This Court should enter judgment against Plaintiffs.

BACKGROUND

A. This case involves challenges to modest revisions to Arkansas’s four congressional districts. The federal Constitution’s Elections Clause provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State

by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations” U.S. Const. art. I, sec 4, cl. 1. Consistent with that federal requirement, Arkansas law provides that the Arkansas General Assembly is responsible for reapportioning congressional districts after the Census. *See* Ark. Code Ann. 7-2-101 *et seq.*

Following the receipt of official census data last fall, the General Assembly reconvened in September to consider reapportionment legislation. (Compl. ¶ 45.) That reapportionment is required to comply with the federal constitutional requirement that the populations of a state’s congressional districts be as equal “as is practicable.” *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964). This is sometimes referred to as the “one person, one vote” rule.

“According to the 2020 Census, Arkansas has a total population of 3,011,524 persons” (Compl. ¶ 36.) Thus, “each congressional district in the 2021 Map must contain an ideal population of approximately 752,881 people.” (Compl. ¶ 31.) Due to population growth in Districts 2 and 3, along with population decline in Districts 1 and 4, the General Assembly was required to rebalance the population between Arkansas’s existing districts in order to comply with the one person, one vote rule (Compl. ¶¶ 33-35.) This meant redrawing boundaries to significantly reduce the population of District 3; substantially reduce the population of District 2; and increase the populations of Districts 1 and 4. (*Id.*) In addition to drawing districts that met the one person, one vote requirement, the General Assembly also aimed—consistent with judicial precedent—to draw districts that were compact, contiguous, minimized splits between political subdivisions (like counties), preserved communities of interest, avoided pairing incumbents, and otherwise complied with federal law. (*See* Compl. ¶ 63 (listing various traditional redistricting principles).)

In that process, the General Assembly considered a number of maps and eventually settled on House Bill 1982 and Senate Bill 743, which were numbered as Acts 1114 and 1116. (Compl. ¶ 52.) The Acts were adopted on October 6, 2021, the maps “became law on November 4, 2021,” (Compl. ¶ 78), and became “effective on January 14, 2022.” (Compl. ¶ 79.)

B. The new districts adopted by the General Assembly do not differ significantly from the maps adopted in 2011. (*Compare* Compl. ¶ 28 (2011 map) *with id.* ¶ 52 (2021 map).) In both maps, District 1 comprises the counties in the eastern and northern part of the state; District 2 is made up of central Arkansas counties; District 3 is toward the northwest; and District 4 comprises the remaining counties, mostly in the southern and western parts of the state. (*See id.*) This is how Arkansas’s congressional maps have looked for decades. (*See* Compl. ¶ 26 (2001 congressional maps).)

As Plaintiffs note, there were some notable changes between the 2011 and 2021 maps. For instance, the 2021 map resolves what Plaintiffs allege was the earlier “2011 Map[’s] dilut[ion]” of “the voting strength of Black voters” that flowed from the 2011 map’s “splitting, for the first time since at least the 1940s” of “majority-Black Jefferson County across the 1st and 4th Congressional Districts.” (Compl. ¶ 29.) Indeed, as Plaintiffs concede, the 2021 map removes that split and places Jefferson County entirely within a single district, curing that alleged dilution. (Compl. ¶ 52.)

Outside of Jefferson County, the other notable difference between the current and prior maps is that the 2021 map substantially reduced the number of other county splits. Minimizing splits of political subdivision boundaries—such as counties—is an important redistricting criterion for a number of reasons, including lessening the burden on election officials creating ballots and keeping together communities of shared interests. The 2011 congressional map split

a total of five counties: Crawford, Newton, Searcy, and Sebastian, all of which are in the northwest portion of the state, in addition to, as noted, Jefferson County, one of the State's minority population centers. (Compl. ¶ 28.)

By contrast, the current map splits just two counties. (Compl. ¶ 52.) Sebastian County remains split between Districts 3 and 4, with slightly different boundaries, and Pulaski County is split between Districts 1, 2, and 4. (*Id.*) Pulaski and Sebastian are the State's largest and fourth-largest counties by population, respectively. (*See* Compl. ¶ 6.) Pulaski County, in addition to being the State's most populous county, is located in the center of Arkansas and shares a boundary with six other counties. (*E.g.*, Compl. ¶ 52.) Sebastian County is located along the western edge of the state, less than one hundred miles from Benton and Washington Counties, Arkansas's second and third most populous counties. (*Id.*) These factors make it difficult for a map drawer to avoid splitting Sebastian or Pulaski Counties without incurring a substantial number of splits elsewhere, as was the case with the 2011 congressional map.

Particularly relevant here, however, those adjustments barely changed the districts' racial demographics. Plaintiffs' Complaint concedes those changes are insignificant. (*See* Compl. ¶ 53 (noting that the black voting-age population in District 2 changed approximately two percent from the 2011 to 2021 maps); *id.* ¶ 74 (Governor Hutchinson acknowledging that "three of the four congressional districts do not differ that much from the current percentages").) And the current map—aside from splitting fewer counties—is also significantly more compact. (*Compare* Compl. ¶ 28 *with id.* ¶ 52.) In particular, it eliminated the elongated and oddly shaped upside-down "U" that previously constituted District 3. *See id.*

C. Despite much press attention and rigamarole from various interested parties (*e.g.*, Compl. ¶¶ 65-70), no plaintiff sued to block the use of the current maps for the 2022 election

cycle. In fact, Plaintiffs did not file this lawsuit until March 21, 2022, nearly five months after the congressional map became law, and long after any relief would have been possible for the next election. *See Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (staying injunction of Alabama’s congressional districts on the ground that the election was too close for court intervention on February 7, 2022).

Plaintiffs’ Complaint purports to state two claims under four provisions of the Arkansas Constitution. The factual basis for those claims is the same. Plaintiffs don’t contest that the General Assembly’s adoption of the 2021 congressional map resulted in near-perfect population equality as well as a reduction in the total number of county splits. Nor do they dispute that District 2 didn’t really change that much from the 2011 map drawn by a Democrat-dominated legislature and that District 2 had to be redrawn because the Census showed that it was overpopulated by more than 16,000. (Compl. ¶ 35 (noting that the population of District 2 “grew by 5.5%” while Districts 1 and 4 had a population decline).) Indeed, Plaintiffs don’t deny that the General Assembly’s splitting portions of Pulaski County into the underpopulated Districts 1 and 4 was critical to achieving population equality and that those changes resulted in no more than a negligible, couple-percentage-point difference in the racial demographics of District 2 as compared to the 2011 plan. (*See* Compl. ¶ 53.) Finally, Plaintiffs don’t dispute that the 2011 map didn’t contain a majority-minority district or that—even if Pulaski County had remained whole—it still wouldn’t be possible to draw a majority-minority congressional district.

In fact, it is unclear exactly what specifically Plaintiffs *do* challenge about the 2021 map other than its supposed “failure to capture and reflect Black voting strength . . . , particularly around Pulaski County.” (Compl. ¶ 84.) Though much of Plaintiffs’ Complaint centers on the split of Pulaski County in the 2021 map, they appear to argue that every congressional map the

General Assembly has adopted in recent history violated the state constitution. They claim that “[b]y separating counties with the largest Black populations among two or more congressional districts, the General Assembly has subdivided the state in such a way that the Black vote has been systematically diluted since at least 1961.” (Compl. ¶ 24; *see also id.* ¶ 99 (arguing that “the 2021 Map like its predecessor maps since the Jim Crow era in Arkansas, dilutes the vote of Black Arkansans”).)

At bottom then, Plaintiffs seem to attack not what the 2021 congressional map did, but the fact that ever since Arkansas has had four congressional districts, “Jefferson and Pulaski Counties . . . have never been in the same congressional district, and neither county has ever been drawn together in a district that includes the eastern and southeastern portions of the state.” (Compl. ¶ 3.) Thus, while Plaintiffs don’t really specify a remedy beyond their vague request that this Court order “the adoption of a valid congressional plan that does not unconstitutionally dilute the vote of Black voters in Arkansas” (Compl. ¶ 24), they apparently want this Court to order a map drawn explicitly based on race. (*See* Compl. ¶¶ 81-84 (discussing assigning counties to districts based on their racial demographics to create a so-called cross-over district.) Indeed, underscoring that they seek an order commanding Arkansas to draw a map based explicitly on race, they cite the various bills proposed in the General Assembly that combined Pulaski and Jefferson Counties into a single district—bills Plaintiffs do not (and could not) plead facts demonstrating they meet basic redistricting criteria, like population equivalence. (*See* Compl. ¶¶ 46-49.)

As the legal basis for their request that this Court order the creation of districts based explicitly on race, Plaintiffs claim that the 2021 congressional map unconstitutionally dilutes “the votes of Black voters like Plaintiffs relative to other members of the electorate.” (Compl.

¶ 88; *see also id.* ¶ 99 (alleging that the 2021 map “dilutes the votes of Black Arkansans”).) Yet none of the constitutional provisions cited by Plaintiffs encompass this type of claim.

Arkansas’s “Free and Equal Elections” clause contained in Article 3, section 2, has been interpreted narrowly as a backstop in situations where the integrity of an election is in question or ballot secrecy has been compromised. The three provisions of Article 2 providing for equal protection of the law have never been interpreted by Arkansas courts differently than the Equal Protection Clause of the Fourteenth Amendment, which the United States Supreme Court has held does not encompass vote-dilution claims like the one Plaintiffs bring. And in any event, even if they could prevail on their state-law claims, Plaintiffs don’t even attempt to explain how their request for race-based districts could be squared with the Fourteenth Amendment.

D. Defendants previously moved to dismiss Plaintiffs’ complaint for failure to state a claim following removal to federal court. The federal district court stayed Plaintiffs’ obligation to respond to that motion until 14 days following remand. *See* May 12, 2022 Order (“Plaintiffs’ deadline to respond to defendants’ motion to dismiss shall be 14 days following the entry of this Court’s ruling on plaintiffs’ motion for remand.”). The district court remanded the case on July 13, and Plaintiffs simply blew past their July 27 deadline to respond. They never asked this Court to set a new deadline, and that deadline thus remained in place. Nor did Plaintiffs meet any other possible due date. As such, they defaulted on their ability to file a response. And their refusal to respond to Defendants’ motion only underscores what’s obvious from the face of Plaintiffs’ complaint: Plaintiffs’ unprecedented claims lack even a sliver of merit and should be disposed of on the pleadings.

The Court, however, has indicated it does not intend to consider Defendants’ motion to dismiss. *See* Order (Aug. 25, 2022). Defendants disagree with that decision because when a

defendant moves in federal court, that motion carries over, even if the case is remanded. *See Addition to Reporter's Notes, 2004 Amendment*, Ark. R. Civ. P. 55. While Arkansas courts once treated remanded cases “as if [they] had never been removed from state court,” *NCS Healthcare of Ark., Inc. v. W.P. Malone, Inc.*, 88 S.W.3d 852, 856 (Ark. 2002), in 2004 the civil rules were amended to “give effect to pleadings filed in federal court before remand.” *Laguna Village, Inc. v. Laborers' Int'l Union of N. Am.*, 672 882, 885 (Cal. 1983) (cited approvingly in the Arkansas *Reporter's Notes*); *see also Banks v. Allstate Indem. CO.*, 757 N.E.2d 776, 778 (Ohio Ct. App. 2001) (same). Now, federal court pleadings “become part of the state record on remand.” *Jontra Holdings Pty Ltd. V. Gas Sensing Tech. Corp.*, 479 P.3d 1222, 1234 & n.7 (Wy. 2021) (internal quotation marks omitted) (recognizing the effect of Arkansas's new rule). And certainly orders—like those setting deadlines—do. Thus, Plaintiffs were required to either respond to Defendants' motion to dismiss within the time period set by the district court's order or ask this Court to establish a new date. But hoping to avoid having to defend their meritless claims, Plaintiffs did neither.

E. In light of Plaintiffs' procedural games and in the interest of resolving this matter without needlessly wasting judicial or governmental resources, Defendants have filed an answer to Plaintiffs' Complaint and now ask the Court to enter judgment in their favor pursuant to Rule 12(c).

The rules provide that this Motion “shall be heard and determined before trial” because it raises both a lack of subject-matter jurisdiction and failure to state facts upon which relief can be granted. Ark. R. Civ. P. 12(d). Defendants challenge this Court's jurisdiction over this matter, including on the ground of sovereign immunity. It is especially important that this Motion be heard expeditiously so that Defendants may pursue appellate review any denial of sovereign

immunity. As the Court has scheduled trial for November 7—the day before the 2022 General Election—Defendants respectfully request that Plaintiffs be required to respond by September 8, 2022, and that the Court rule on this Motion with all deliberate speed.

LEGAL STANDARD

Arkansas Rule of Civil Procedure 12(c) requires this Court to enter judgment on Plaintiffs’ claims if, reading the complaint “in the light most favorable to” them, “the pleadings show on their face that there is no merit to the suit.” *Palade v. Bd. of Trustees of Univ. of Ark. Sys.*, 2022 Ark. 119, at *6, 645 S.W.3d 1, 5 (2022). The standard is the same as for a motion to dismiss pursuant to Rule 12(b). *See Dockery v. Morgan*, 2011 Ark. 94, at 6-7, 380 S.W.3d 377 (2011). Applying that standard, this Court must enter judgment on both Plaintiffs’ claims. Sovereign immunity precludes Plaintiffs from suing the Defendants because those state officials have not acted illegally. So this Court may not hear Plaintiffs’ claims. Similarly, Plaintiffs’ legal theories are entirely unsupportable, so their case fails on the merits.

ARGUMENT

I. This Court lacks jurisdiction to entertain Plaintiffs’ claims.

A. This federal constitution gives the General Assembly, not state courts, exclusive authority to draw congressional districts.

The United States Constitution assigns authority to “prescribe[]” “[t]he Times, Places and Manner of holding [congressional] elections” to “the Legislature” of each state. U.S. Const. art. I, sec. 4 (Elections Clause). A legislature is “[t]he power that makes laws.” 2 Thomas Sheridan, *A Complete Dictionary of the English Language* (4th ed. 1797); 2 Samuel Johnson, *A Dictionary of the English Language* (1st ed. 1755). The United States Supreme Court has explained that the word as used in the Elections Clause refers to the “legislative process” as defined by each state’s constitution. *Ariz. State Legis. v. Ariz. Ind. Redistricting Comm’n*, 576 U.S. 787, 799 (2015).

Arkansas's constitution provides that the "powers of the government . . . shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy"—the legislative, executive, and judicial. Ark. Const. art. 4 sec. 1. It further specifies that no "one of these departments[] shall exercise any power belonging to either of the others." Ark. Const. art. 4, sec. 2. "The legislative power of the people of this State," save for the initiative and referendum process, "shall be vested in a General Assembly." Ark. Const. art. 5, sec. 1. It is in the General Assembly that the federal Elections Clause vests the authority to manage federal elections. That legislative power includes drawing the boundaries of congressional districts.

Courts, by contrast, exercise the judicial power. Ark. Const. amend. 80. The Arkansas Supreme Court has long confirmed that "[c]ourts cannot make laws. They can only construe them." *Williams v. Buchanan*, 86 Ark. 259, 110 S.W. 1024, 1029 (1908). Thus, this Court has no power to take upon itself the task of drawing congressional districts. To do so would be to usurp the power of the General Assembly. Yet that is exactly what Plaintiffs ask this Court to do. The relief they seek is for this Court to "[o]rder[] the adoption of a valid congressional plan that does not unconstitutionally dilute the vote of Black voters in Arkansas." (Compl. 24.) As explained below, Arkansas's constitution does not recognize the sort of "vote dilution" claims Plaintiffs urge. Thus, the question of whether any congressional plan is "valid" under Plaintiffs' theory necessarily subjugates the legislative branch to the decisional whims of the courts.

The Elections Clause does not allow state courts to, as Plaintiffs urge, reinvent century-old constitutional text to impose fresh conditions on redistricting decisions that rest solely with the legislature. Because a ruling in Plaintiffs' favor would violate the Constitution, the supreme law of the land, Defendants are entitled to judgment.

B. This Court lacks jurisdiction under state law to hear challenges to the General Assembly’s congressional districting decisions.

As explained above, the federal constitution delegates sole congressional districting authority to the General Assembly, and state courts are not permitted to engage in the sort of legislative redistricting activity that Plaintiffs propose. But even if that were not the case, Arkansas courts lack jurisdiction to entertain challenges to the General Assembly’s congressional map.

Plaintiffs fail to point to any authority on the part of this Court to exercise subject-matter jurisdiction over challenges to the congressional map. That is because there is none. Recognizing that the Elections Clause vests the state legislature with sole authority over congressional apportionment, the state constitution imposes no limitations on those legislative decisions. Indeed, the state constitution is completely silent as to congressional redistricting.

The apportionment of the General Assembly provides a useful contrast. Article 8, Section 1, originally provided that the Legislature would apportion itself.” *Harvey v. Clinton*, 308 Ark. 546, 549, 826 S.W.2d 236, 237 (1992). However, beginning with Amendment 23, “the people took the power of apportionment from the legislative branch and placed it in the executive branch, subject to judicial review.” *Id.* The current Article 8, section 5 vests the Arkansas Supreme Court with original jurisdiction to consider challenges to the legislative redistricting adopted by the Board of Apportionment. The Supreme Court has the power “to compel . . . the board to perform its duties . . . and [] to revise any arbitrary action of or abuse of discretion by the board.” Ark. Const. art. 8, sec. 5. The Supreme Court’s revision jurisdiction is further limited to suits filed “within 30 days after the filing” of the Board’s plan. *Id.*; *see also Rockefeller v. Smith*, 246 Ark. 819, 823, 440 S.W.2d 580, 582 (1969) (holding that revision is subject to 30-day limitation).

Article 8, section 5 thus provides the Arkansas judiciary with a defined role in the process of state legislative apportionment. The Arkansas Supreme Court has jurisdiction to review decisions by the Board of Apportionment, along with a standard to apply. The Court even has the power to “revise” an action of the Board if it is “arbitrary” or an “abuse of discretion.” Ark. Const. art. 8, sec. 5.

By contrast, no provision of the state constitution contemplates such a role for the state courts with respect to congressional redistricting. The state constitution is silent on the matter. It places no constraints on the General Assembly’s congressional apportionment authority, and it provides no power for courts to review those legislative determinations. Nor tellingly does it provide any guidepost by which a state court could conduct such a review.

Plaintiffs are not entitled to the relief they seek as a matter of law. The Court should therefore enter judgment in favor of Defendants.

C. Plaintiffs’ suit is barred by sovereign immunity

This Court also lacks jurisdiction because Plaintiffs’ claims are barred by the doctrine of sovereign immunity. Article 5, section 20 of the Arkansas Constitution says that “[t]he State of Arkansas shall never be made a defendant in any of her courts.” The doctrine of sovereign immunity prevents lawsuits against the state that either subject the state to financial liability or seek to control state action. *Board of Trustees of University of Arkansas v. Andrews*, 2018 Ark. 12, 535 S.W.3d 626 (2018). The Arkansas Supreme Court has repeatedly held that sovereign immunity bars suit against not only the State itself, but also suits against state agencies and officials sued in their official capacity. *Ark. Dep’t of Community Corr. v. City of Pine Bluff*, 2013 Ark. 36, *3, 425 S.W.3d 731, 733. This lawsuit is barred because it seeks to control the actions of the State by preventing Defendants from enforcing the 2021 congressional map, and to force the State legislature to draft and adopt a new one. Plus, it improperly seeks to recover

attorney's fees from the State. See *Arkansas Department of Human Services v. Fort Smith School District*, 2015 Ark. 81, *9 455 S.W.3d 294, 300 (holding that a "request for reimbursement of costs and attorney's fees is barred by the doctrine of sovereign immunity").

And no exception to this bar applies. Previously, there were three recognized exceptions to sovereign immunity: "(1) when the State is the moving party seeking specific relief; (2) when an act of the legislature has created a specific waiver of sovereign immunity; and (3) when the state agency is acting illegally or if a state agency officer refuses to do a purely ministerial action required by statute." *Andrews*, 2013 Ark. at *5-6, 425 S.W.3d at 620. But in *Andrews*, the Arkansas Supreme Court held that the second exception is inconsistent with the text of the sovereign immunity provision in the Arkansas Constitution. *Id.*

The third exception, the "illegal-acts" exception, does not allow this suit. That exception to sovereign immunity applies only when the plaintiff seeks prospective injunctive relief to enjoin ongoing illegal, unconstitutional, ultra vires, or bad-faith conduct. *Bd. of Trs. of Univ. of Ark. v. Burcham*, 2014 Ark. 61, * 3-4; *Ark. Lottery Comm'n v. Alpha Marketing*, 2013 Ark. 232, * 12, 428 S.W.3d 415, 422. To survive dismissal at this stage, a "complaint must assert facts that, if proven, would demonstrate a legal violation." *Rutledge v. Remmel*, 2022 Ark. 86, 5, 643 S.W.3d 5, 8 (2022). This inquiry collapses to a determination as to the merits of Plaintiffs' legal theories. See *Williams v. McCoy*, 2018 Ark. 17, 5, 535 S.W.3d 266, 269 (2018) (reversing, in part, circuit court's denial of sovereign immunity for failure to assert a viable legal theory).

As explained below, even assuming the facts pled by Plaintiffs are true, their claims fail on the merits. Because no exception to sovereign immunity applies, this Court lacks jurisdiction to further entertain Plaintiffs' claims. The Court must enter judgment against them.

II. The Free and Equal Elections Clause does not regulate the General Assembly's duty to apportion congressional districts.

Plaintiffs claim that Arkansas's 2021 congressional map violates the Free and Equal Elections Clause of the Arkansas Constitution. (Compl. ¶¶ 85-94.) Yet Plaintiffs' Complaint fails to cite a *single decision* by an Arkansas court interpreting that provision, let alone recognizing such a claim. Instead, Plaintiffs rely entirely on two roundly criticized, shoddily reasoned out-of-state decisions conjuring such claims. (Compl. ¶ 87 (citing *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), and *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022).) The Arkansas Supreme Court has never recognized such claims, and that court's decisions make clear that Article 3, section 2 has nothing to do with congressional apportionment. Accordingly, this Court should decline Plaintiffs' invitation to invent such a claim and should grant Defendants judgment against them.

Arkansas's Constitution, like that of many other states, has a provision guaranteeing "free and equal" elections.¹ It provides: "Elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted whereby such right shall be impaired or forfeited, except for the commission of a felony, upon lawful conviction thereof." Ark. Const. art. 3, sec. 2.

The Arkansas Supreme Court has construed that clause narrowly and solely as a protection against "fraud and [voter] intimidation." *Patton v. Coates*, 41 Ark. 111, 126 (1883). In fact, less than ten years after the Arkansas Constitution's adoption in 1874, the Arkansas

¹ Twelve other states have such a provision: Arizona, Ariz. Const. art. II, sec. 21; Delaware, Del. Const. art. I, sec. 3; Illinois, Ill. Const. art. III, sec. 3; Indiana, Ind. Const. art. 2, sec. 1; Kentucky, Ky. Const. sec. 6; Oklahoma, Okla. Const. art. III, sec. 5; Oregon, Or. Const. art. II, sec. 1; Pennsylvania, Pa. Const. art. 1, sec. 5; South Dakota, S.D. Const. art. VI, sec. 19; Tennessee, Tenn. Const. art. I, sec. 5; Washington, Wash. Const. art. I, sec. 19; and Wyoming, Wy. Const. art. I, sec. 27.

Supreme Court held that clause is designed to protect against “fraudulent combinations for illegal voting” that would otherwise “override honest votes,” and attempts to “deter[] [voters] from the exercise of free will” through “fear.” *Id.* at 124. Consistent with that narrow purpose, the Arkansas Supreme Court has held that provision protects the secrecy of the ballot. *Jones v. Glidewell*, 13 S.W. 723, 725-26 (Ark. 1890). And along the same lines, modern cases interpreting the Free and Equal Elections Clause have held that it allows for the nullification of an election in cases where a “wrong . . . render[s] the result of the election uncertain.” *Whitley v. Cranford*, 119 S.W.3d 28, 34 (Ark. 2003). Hence, whatever the exact contours of that clause, it plainly has nothing to do with reapportionment, and this Court shouldn’t invent new causes of action on the Arkansas Supreme Court’s behalf. *See, e.g., Lindenberg v. Jackson Nat’l Life Ins. Co.*, 912 F.3d 348, 364 (6th Cir. 2018) (explaining that federal courts should be “extremely cautious about adopting substantive innovation in state law”); *Taylor v. Phelan*, 9 F.3d 882, 887 (10th Cir.1993) (quotation omitted) (“As a federal court, we are generally reticent to expand state law without clear guidance from its highest court.”). Plaintiffs’ claim thus fails as a matter of law, and this Court should grant judgment against them.

Faced with that precedent, Plaintiffs resort to arguing that the Pennsylvania Supreme Court has given its “free and equal” elections provision “the broadest interpretation, one which governs all aspects of the electoral process, and which provides the people . . . an equally effective power to select the representative of his or her choice, and bars the dilution of the people’s power to vote to do so.” *League of Women Voters*, 178 A.3d at 814. Yet as that court acknowledged, its approach was hardly well-founded, and no other state high court has concluded language like that in Arkansas’s constitution provides a way to challenge reapportionment or pursue a vote-dilution claim. *Id.* at 813 n.71. Indeed, it is telling that the

Plaintiffs’ only other supposed support for their argument that this Court should adopt an entirely new reading of Arkansas’s Constitution consists of a passing citation to an equally unreasoned North Carolina decision involving a different kind of provision. (Compl. ¶ 87.) *See Harper v. Hall*, 868 S.E.2d 499, 564 (N.C. 2022) (Newby, C.J., dissenting) (explaining the *Harper* decision “will solidify th[e] belief” that “judges decide cases based on partisan considerations”).

Dispositively, the Arkansas Supreme Court has not embraced that approach. Instead, consistent with the narrow reading explained above, the Arkansas Supreme Court has consistently held in cases involving the Free and Equal Elections clause that Arkansas’s “constitution has not, as we have seen, prescribed any conditions or rules governing the exercise of the right [of suffrage]; nor has it inhibited the legislature from prescribing such rules, regulations, and conditions as it might deem proper and for the public interests.” *Davidson v. Rhea*, 256 S.W.2d 744, 746 (Ark. 1953) (quotation omitted).

Nor for that matter would such a contrary approach be consistent with the federal Constitution’s command that “[t]he Times, Places and Manner” of congressional elections “shall be prescribed in each State by the Legislature thereof” unless “Congress” should “make or alter such Regulations.” U.S. Const. art. I, sec. 4, cl. 1. “The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress.” *Rucho v. Common Cause*, 139 S. Ct. 15 2484, 2496 (2019); *see also Democratic Nat’l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay) (“The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules.”). Consequently, even if Plaintiffs’ reading

of Arkansas's Free and Fair Elections Clause were plausible under state law (and it isn't), Plaintiffs' claim would still fail as a matter of law because the federal Constitution assigns the power to draw congressional districts to the General Assembly. This Court must enter judgment against them.

Alternatively, Plaintiffs appear to assert that any law involving the right to vote is subject to strict scrutiny under state law and that this somehow invalidates Arkansas's congressional districts. (*See* Compl. ¶ 98.) But underscoring that this argument has no more support than Plaintiffs' reliance on Pennsylvania law, Plaintiffs don't even cite any election cases to support that claim. (*See* Compl. ¶¶ 90-91.) They rely instead on a case where the Arkansas Supreme Court held that the state's sodomy law violated a "fundamental right to privacy" and couldn't survive strict scrutiny. (*See* Compl. ¶ 91 (citing *Jegley v. Picado*, 80 S.W.3d 332, 350 (Ark. 2002))). It's entirely unclear why Plaintiffs think that case is relevant here.

Contrary to Plaintiffs' claim, the Arkansas Supreme Court hasn't held that elections laws (like the apportionment statute at issue here) are subject to strict scrutiny. Indeed, just recently—in an action brought by the same law firms as this case—the Arkansas Supreme Court unanimously granted the State's emergency application for a stay in a case where a state circuit court wrongly enjoined four state voting laws on the grounds that those provisions were subject to and failed strict scrutiny. *See* Per Curiam Order, *Thurston v. League of Women Voters of Ark.*, Case No. CV-22-190 (Apr. 1, 2022). This Court should therefore decline Plaintiffs' invitation to rewrite state law and subject reapportionment decision to strict scrutiny under the Free and Fair Elections Clause. It should grant judgment against Plaintiffs' Article 3, section 2 claim.

III. Plaintiffs fail to state a claim under any section of Article 2 of the Arkansas Constitution.

Plaintiffs claim that Arkansas’s 2021 congressional maps violates three provisions of Article 2 of the Arkansas Constitution that “guarantee[] to the people [] equal protection of its laws.” (Compl. ¶ 96.) Like their federal-constitution counterparts, those provisions prohibit intentional discrimination on the basis of race; they do not support the sort of vote-dilution claim that Plaintiffs plead here. Moreover, to the extent Plaintiffs may claim to challenge the 2021 map on intentional-discrimination grounds, their Complaint fails to plead facts that would establish such a claim. And in any event, Plaintiffs’ demand that Arkansas draw congressional districts based explicitly on race would violate state and federal equal protection law. This Court should grant judgment against Plaintiffs’ claim.

A. Plaintiffs’ vote-dilution claim fails as a matter of law.

None of the provisions of Article 2 of the Arkansas constitution support Plaintiffs’ vote-dilution claim. Instead, reading those provisions like their federal counterpart—as the Arkansas Supreme Court has long done—Plaintiffs’ claim fails as a matter of law.

The first provision that Plaintiffs cite is Article 2, section 2. It is titled “Individual liberty” and provides:

All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

The second provision that Plaintiffs cite is Article 2, section 3, titled “Legal equality”; it provides that “The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition.” The third provision is

Article 2, section 18. It is titled “privileges and immunities--Nondiscrimination,” and it provides that “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.”²

1. The Arkansas Supreme Court has generally interpreted these provisions simultaneously when considering equal-protection challenges. *See, e.g., Muntaqim v. Payne*, 628 S.W.3d 629, 636 (Ark. 2021) (“Equal protection is established by the Arkansas Constitution in article 2, sections 2, 3, and 18.”); *Waller v. Banks*, 2013 Ark. 399, at *8 (“Equal protection under the law is guaranteed by article 2, sections 2, 3, and 18 of the Arkansas Constitution.”). Indeed, the court has long noted that “many laws are challenged jointly under [Article 2, section 18] and the federal equal protection clause,” and it has interpreted these “various sections in separate parts of” the Arkansas Constitution” as “fall[ing] under the general umbrella of . . . ‘equality’ and ‘equal protection’ guarantees” and “aim[ing] to prohibit arbitrary classifications and favoritism by the legislative branch.” *Streight v. Ragland*, 655 S.W.2d 459, 463 n.10 (Ark. 1983). Plaintiffs, like the Arkansas Supreme Court, do not attribute any separate meaning to the three sections inasmuch as they establish equal-protection principles. (Compl. ¶¶ 95-102.)

Moreover, the Arkansas Supreme Court has interpreted the state Constitution’s equal-protection provisions as coextensive with their federal counterparts. *See Maiden v. State*, 438 S.W. 3d 263, 275 (Ark. 2014) (noting that only “[o]n occasion” has the Arkansas Supreme Court “provide[d] more protection under the Arkansas Constitution than that provided by the federal

² Plaintiffs refer to this section as the “Equal Rights Amendment.” (Compl. ¶ 96.) That nomenclature appears to rest solely on its appearance in the majority opinion in *Jegley v. Picado*, 80 S.W.3d at 350. But Article 2, section 18 is not an “amendment”; it is part of the original Constitution of 1874. And aside from a 2006 decision refusing to extend *Jegley*’s interpretation of section 18, *Talbert v. State*, 239 S.W.3d 504, 512 (Ark. 2006), the Arkansas Supreme Court has not used that nomenclature since.

courts under the United States Constitution”); *Talbert*, 239 S.W.3d at 512 (“The analysis under [Article 2, section 18] is the same as that under the Equal Protection Clause of the United States Constitution.”); *Staggs v. Staggs*, 641 S.W.2d 29, 31 (Ark. 1982) (holding that the statute at issue “is not violative of Article II, §§ 3 and 18 of the Constitution of Arkansas, nor is it contrary to similar provisions of the Constitution of the United States”). Thus, as relevant here, this Court must interpret those provisions in the same manner as it would interpret their federal counterparts.

2. Applying that standard, Plaintiffs’ claim fails as a matter of law. Plaintiffs argue that Arkansas’s 2021 map is unconstitutional because, they say, it has the effect of diluting black voting power. (See Compl. ¶¶ 88, 99.) They do not plead that the General Assembly adopted that map to harm black Arkansans or to dilute the voting strength of black Arkansans. In fact, the closest Plaintiffs come to such an allegation is their assertion that the General Assembly “intentionally and systematically targeted and further cracked the Black population in the state by surgically removing majority Black precincts . . . within Pulaski County from” District 2 (Compl. ¶ 56) and that “racial data was considered—at times, exclusively—throughout the map-drawing process” (Compl. ¶ 60). But “[t]he mere statement that it is so, without factual support, simply fails to comport with [Arkansas’s] fact-pleading requirements.” *Williams*, 2018 Ark., at *5, 535 S.W.3d at 269. Further, Plaintiffs tellingly do not allege that the “thirteen Pulaski County precincts”³ they reference were moved to other districts for the purpose of diluting black voting strength instead of for partisan or other reasons. To the contrary, at another point in their

³ The General Assembly moved fourteen precincts from Pulaski County, not thirteen as Plaintiffs allege. See 2021 Ark. Act 1116, Sec. 1 (amending Ark. Code Ann. 7-2-102(a)(2) to add precincts 47, 54, and 55 to District 1), *id.* (amending Ark. Code Ann. 7-2-105(a)(2) to add precincts 103, 104, 105, 124, 125, 126, 127, 131, 132, 133, and 135 to District 4).

complaint, Plaintiffs specifically plead that the General Assembly “split up Pulaski County” to “appease ‘rural voters who felt like they were disenfranchised’ by the 2011 map. (Compl. ¶ 69 (quoting statement by Sen. Garner).) Hence, Plaintiffs don’t plead intentional discrimination.

That failure is fatal to their claim because—just as under federal law—Arkansas’s equal-protection provisions prohibit only “intentional discrimination.” *McClelland v. Paris Pub. Sch.*, 742 S.W.2d 907, 910 (Ark. 1988). Under that standard, to prevail on their equal protection claim, Plaintiffs must demonstrate that Arkansas’s 2021 map was “adopted with a discriminatory purpose and ha[s] the effect of diluting minority voting strength.” *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (emphasis added). As the United States Supreme Court has long held, a law doesn’t violate equal protection merely “because it may affect a greater proportion of one race than another.” *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). That’s why, for example, Congress had to amend Section 2 of the Voting Rights Act to allow the Attorney General to pursue claims based solely on “showing discriminatory effect alone.” *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).⁴ Nor for that matter does equal protection “require proportional representation as an imperative of political organization.” *Mobile v. Bolden*, 446 U.S. 55, 75-76 (1980).

Consequently, Plaintiffs’ allegation that Arkansas’s 2021 map merely because, they say, it had the effect of diluting black Arkansans’ voting strength isn’t sufficient. This Court should grant judgment against Plaintiffs’ claim.

B. Plaintiffs have failed to state a claim of intentional discrimination.

1. To the extent that Plaintiffs may argue that they *do* allege intentional discrimination, their Complaint fails to plead facts that would demonstrate such a claim.

⁴ Plaintiffs’ vote-dilution theory mirrors that of a Section 2 claim, inasmuch as they allege racially polarized voting per the second and third *Gingles* preconditions. *See* 478 U.S. at 50-51. Such allegations have nothing to do with an intentional discrimination claim.

Where plaintiffs allege racial gerrymandering, “the burden of proof on the plaintiffs . . . is a demanding one.” *Easley v. Cromartie*, 532 U.S. 234, 241 (2001). To prevail, a plaintiff must prove that race was not simply “a motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the legislature’s districting decision.” *Id.* (citation and internal quotation marks omitted). Because of (1) the “evidentiary difficulty” of distinguishing “between being aware of racial considerations and being motivated by them,” (2) “the sensitive nature of redistricting,” and (3) “the presumption of good faith that must be accorded legislative enactments,” courts must “exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.” *Id.* at 916.

Plaintiffs do not plead that the General Assembly’s predominant motive in adopting the 2021 congressional maps was to effectuate a racial gerrymander. *See supra* at pp. 16-17 (discussing closest allegations in Plaintiffs’ complaint). Nor do Plaintiffs allege that the General Assembly “‘subordinated’ other factors—compactness, county splits, partisan advantage, etc.—to ‘racial considerations.’” *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). While they point to other maps that they allege the General Assembly could have adopted, they don’t actually plead those maps are consistent with traditional redistricting criteria or more importantly the Constitution’s “one person, one vote” requirement. (Compl. ¶¶ 46-49.) Thus, Plaintiffs cannot plausibly claim to have plead facts demonstrating intentional discrimination. “The mere statement that it is so, without factual support, simply fails to comport with our fact-pleading requirements.” *Williams*, 2018 Ark., at *5, 535 S.W.3d at 269.

2. Plaintiffs’ claim also fails because their requested remedy—drawing a so-called cross-over district based on race—would itself violate equal protection. Plaintiffs apparently want this

Court to command the General Assembly to create a map combining Pulaski and Jefferson Counties “together in a district that includes the eastern and southeastern portions of the state, where the state’s most predominantly Black counties are located.” (Compl. ¶ 3; *see also id.* ¶ 47 (suggesting that Sen. Elliot’s map “addressed historic Black vote dilution in Arkansas by joining Pulaski and Jefferson Counties in one congressional district and combining them with other heavily Black counties”).)

“Under the Equal Protection Clause, districting maps” like that, which “sort voters on the basis of race[,] ‘are by their very nature odious.’” *Wis. Legislature v. Wis. Elec. Comm’n*, 142 S. Ct. 1245, 1248 (2022) (quoting *Shaw*, 509 U.S. at 643). They “cannot be upheld unless they are narrowly tailored to achieving a compelling state interest.” *Miller*, 515 U.S. at 904. And while the Supreme Court has assumed (without ever holding) that “complying with the VRA is a compelling state interest,” *Wis. Legislature*, 142 S. Ct. at 1248, a state relying on such a justification must have “a strong basis in evidence for concluding that the [VRA] required its action.” *Cooper*, 137 S. Ct. at 1464. But Plaintiffs don’t claim the VRA mandates such reliance here. And even if Plaintiffs were correct that the Arkansas Constitution embodies some sort of VRA-like race-dilution claim—and as explained above, it does not—it does not follow that compliance with such a provision would be a compelling state interest justifying departure from traditional equal-protection principles. Indeed, given that the Supreme Court has never held that even VRA compliance is a compelling state interest, it is doubtful that compliance with a race-driven state-law requirement would be.

Nor in any event could Plaintiffs square such an argument with the allegations in their Complaint. For one, they seek a remedy that they indisputably couldn’t get under the VRA. Plaintiffs do not seek to compel Arkansas to create a majority-minority district so as to comply

with the VRA. Instead, Plaintiffs seek a so-called crossover district; that is, a district where “White ‘crossover’ voting” allows the election of “Black-preferred candidates.” (Compl. ¶ 81.) But the VRA “does not mandate creating or preserving crossover districts.” *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009) (plurality opinion).⁵ By definition, then, a map drawn to create them isn’t one drawn to comply with the VRA, and a district explicitly based on race, like Plaintiffs seek here, would violate equal protection. It also goes without saying that even if Plaintiffs succeeded in showing that the Arkansas Constitution requires more than what the VRA would, thus going beyond even what the United States Supreme Court has only assumed would be narrowly tailored, such a requirement would likewise violate equal protection.

As a result, even if Plaintiffs had adequately pled intentional discrimination, judgment would be warranted.

⁵ As a three-judge court in this district has recognized, Justice Kennedy’s opinion for the three-justice plurality is controlling under *Marks v. United States*, 430 U.S. 188, 193 (1977). See *Jeffers v. Beebe*, 895 F. Supp. 2d 920, 931 n.11 (E.D. Ark. 2012) (three-judge panel).

CONCLUSION

For the foregoing reasons, the Court should grant judgment against Plaintiffs' on both their claims.

Respectfully submitted,

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