UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

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

PLAINTIFFS' POST-TRIAL BRIEF

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PRELIMINARY STATEMENT

Although one in six Arkansans is Black, a Black candidate has never been elected to the Arkansas Supreme Court nor to any statewide office in recent history. And a Black candidate has never been elected to the Court of Appeals when facing a white opponent.

As the record amassed during five days of trial demonstrates, this stark track record of white electoral dominance and Black electoral exclusion reflects an ongoing violation of Section 2 of the Voting Rights Act ("VRA"). Plaintiffs satisfied the three preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and showed—through largely undisputed testimony—that under the totality of the circumstances, Black voters in Arkansas have less opportunity than other members of the electorate to participate in the political process and elect their candidates of choice.

Below, Plaintiffs highlight key evidence introduced at trial, explain why Defendants' counterarguments cannot be squared with the trial record, and (in Part II.B) answer the Court's question about the proper focus of the *Gingles* racially polarized voting analysis. As this brief explains, the trial record demonstrates that Black voters would have an opportunity to elect a candidate of their choice under a different system, as Plaintiffs' illustrative maps show is possible (*Gingles I*). The trial record demonstrates a longstanding pattern of racially polarized voting in the relevant electorates (*Gingles II* and *III*). And the trial record demonstrates that, under the totality of the circumstances, Black voters are being denied the right to participate equally (Senate Factors). Plaintiffs have therefore carried their burden to show by a preponderance of the evidence that Defendants unlawfully burdened their right to vote.

Arkansas's leadership could have redressed the problem over the past decades, but instead chose inaction and inertia. The state has repeatedly failed to provide opportunities for

Black Arkansans to participate equally in the political process and elect appellate judicial candidates of their choice. Given that the weight of the trial record weighs heavily in Plaintiffs' favor, the Court should act to correct this injustice and rule that Arkansas' appellate electoral methods violate Section 2.

ARGUMENT

I. Plaintiffs' Proof at Trial Satisfied *Gingles I*.

The first *Gingles* precondition (*Gingles I*) asks whether communities of Black voters in Arkansas are "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. Plaintiffs explained the standards governing both parts of the *Gingles I* inquiry—"numerosity" and "compactness"—in their brief in support of their motion for partial summary judgment. *See* Pls' Mot. Partial Summ. J. 3–5, 7–8, ECF No. 89. The illustrative districts for both the Supreme Court and Court of Appeals that are set forth in the supplemental report of Plaintiffs' expert, Mr. William Cooper, easily satisfy these standards. *See* Trial Tr. vol. 1, 95:13–143:25 (Cooper Direct); PTX 076 (Cooper Suppl. Decl.).

Indeed, with the record now closed, Plaintiffs' *Gingles I* evidence stands unrebutted. In discovery, Defendants hired an expert to opine on the *Gingles I* criteria. But Defendants did not enter his report into the trial record or call him to testify. That leaves Defendants with no evidence whatsoever to contradict Plaintiffs' satisfaction of *Gingles I*. Mr. Cooper's opinion and supporting fact witness testimony should therefore be credited, and that unrebutted evidence compels a conclusion that *Gingles I* is satisfied. [1]

[1] Defendants will likely continue to argue that Plaintiffs' illustrative districts constitute a racial gerrymander, but the Court should reject that claim. Plaintiffs have addressed past versions of this argument in prior briefing. *See* Pls' Resp. Opp'n to Defs' Mot. Summ. J. 21–31, ECF No. 103; Partial Pls' Mot. Summ. J. Reply 7–8, ECF No. 116. To the extent more remains to be said,

A. Plaintiffs' illustrative maps satisfy numerosity.

Numerosity under *Gingles I* is "an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?" *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009); *see* ECF No. 89 at 3–4. Defendants have never disputed that Plaintiffs' illustrative maps for both courts satisfy this standard, and Mr. Cooper's supplemental report and trial testimony once again established numerosity by a preponderance of the evidence. *See* PTX 076 at ¶¶ 6, 8; *see id*. at fig. 20, fig. 22; Trial Tr. vol. 1, 114:7–16, 134:17–139:25 (Cooper Direct). Defendants did not submit any evidence to the contrary, nor did they challenge this testimony on cross-examination.

B. Plaintiffs' illustrative maps are compact and comport with traditional criteria.

Mr. Cooper's supplemental report and trial testimony likewise establish by a preponderance that Plaintiffs' illustrative Court of Appeals and Supreme Court districts are "compact" under *Gingles I*. *See* 478 U.S. at 50. While there is no universal benchmark that determines whether an illustrative district is compact, "the inquiry should take into account traditional districting principles." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006) ("*LULAC*") (internal quotation marks omitted); *see* ECF No. 89 at 7–8. That is because *Gingles I* seeks only to confirm that greater representation is generally feasible; any specific alternative remedial plan will be determined later, in separate remedial proceedings. . *See* ECF No. 116 at 6(elaborating on this point).

As Mr. Cooper testified, the illustrative maps in his supplemental report are compact by any reasonable measure and comport with traditional redistricting principles more broadly: They

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Plaintiffs will address Defendants' latest version of those arguments in their forthcoming reply brief.

are compact, contiguous, approximately equal in population, maintain traditional boundaries, follow communities of interest, and avoid dilution of minority voting interests. *See* Trial Tr. vol. 1, 118:12–120:19, 123:18–129:3, 138:14–21 (Cooper Direct). In other words, Plaintiffs' illustrative plans faithfully apply—and are fully consistent—with Arkansas's own criteria as Defendants themselves have characterized and applied them.[2] Indeed, Mr. Cooper testified, Plaintiffs' illustrative maps perform as well as—or, in many cases, much *better* than—districting plans of the State's own design when measured against these traditional redistricting criteria.[3]

There is no dispute at this point that Plaintiffs' illustrative districts are compact and contiguous, have roughly equal population, and further the state's interest in avoiding dilution of minority voting strength. Defendants' remaining arguments under *Gingles I* are limited to: (1) questioning whether the Black voters that are united in Plaintiffs' illustrative districts qualify as communities of interest; and (2) nitpicking the small handful of instances where Plaintiffs' illustrative districts split counties. We briefly address why each of those arguments is baseless.

[2] **Compactness:** *Compare* Trial Tr. vol. 1, 106:4-14 (Cooper Direct), *and* PTX 073 at ¶¶ 15, 42, 60 (Cooper Decl.), *with* PTX 077 at 3 (Board of Apportionment, "Redistricting Standards and Requirements"), *and* PTX 467 at 280:14-15 (Humphries Dep. Tr.). **Contiguity:** *Compare* Trial Tr. vol. 1, 106:4-14, *and* PTX 073 at ¶¶ 15, 42, 60, *with* PTX 077 at 3. **Population equality:** *Compare* Trial Tr. vol. 1, 120:17–19, *and* PTX 073 at ¶¶ 15, 42, 60, *with* PTX 077 at 2, *and* PTX 467 at 280:2-4. **Nondilution of Minority Voting Strength:** *Compare* Trial Tr. vol. 1, 128:18–129:3, *and* PTX 073 at ¶¶ 15, 42, 60, *with* PTX 077 at 2, *and* PTX 467 at 280:12-13. **Communities of Interest:** *Compare* Trial Tr. vol. 1, 107:2-3, 125:12-15, *and* PTX 073 at ¶¶ 15, 42, 60, *with* PTX 077 at 3, *and* PTX 467 at 280:10–11. **Maintaining Traditional Boundaries:** *Compare* Trial Tr. vol. 1, 106:10-24, *with* PTX 077 at 3, *and* PTX 467 at 280:5-9. Arkansas applies the same principles to both legislative and judicial redistricting. PTX 467 at 285:1-8.

[3] *See* Trial Tr. vol. 1, 120:20–121:17 (Cooper Direct) (populations of Court of Appeals districts have become malapportioned over time and thus have much greater population variance than Plaintiffs' illustrative plans); *id.* at 124:1-5 (recently enacted state legislative redistricting plans include hundreds of precinct splits; in contrast to Plaintiffs' illustrative maps which split no precincts); *id.* at 125:4-11 (county splits are "very common" in recently enacted state legislative redistricting plans).

Communities of interest. The trial record establishes that Plaintiffs' illustrative maps are fully consistent with the traditional redistricting principle of respecting communities of interest. Mr. Cooper testified about the common socioeconomic interests of the Black communities who would be united in Plaintiffs' illustrative districts. *See* Trial Tr. vol.1, 126:9–127:18. And numerous fact witnesses testified at trial to a range of ties that unite Black Arkansans in Little Rock, Pine Bluff, and the Delta.[4] That testimony includes:

- Senator Joyce Elliott explained that African American communities have "shared . . . cultural and historic experiences . . . that are so deeply embedded with who we are, we understand them without even sometimes saying a word." Trial Tr. vol. 4, 712:18-21. In particular, Black Arkansans throughout Little Rock and the Delta confront similar challenges in securing civil rights and economic opportunities. *See* Trial Tr. vol. 1, 82:20–83:3 (Humphrey Direct); Trial Tr. vol. 2, 270:2–271:7 (Seals Direct); *id.* at 312:10–314:24 (Sealy Direct); Trial Tr. vol. 4, 711:15–713:20 (Elliott Direct).
- Retired Judge Marion Humphrey described the migration during his lifetime of African Americans from rural communities to urban ones, leading to familial ties that bind Black communities in the Delta to those in Little Rock and Pine Bluff. Trial Tr. vol. 1, 81:14–83:7.

[4] Mr. Cooper's proposed illustrative map for the Supreme Court combines regions of the Delta, Jefferson County, and parts of Pulaski County within his illustrative majority-minority district. *See id*. at 125:12–126:8 (Cooper Direct); PTX 076 at fig. 19 (Cooper Suppl. Decl.). Mr. Cooper's proposed illustrative map for the Court of Appeals creates two districts that (i) encompass the Delta region as well as parts of Central Arkansas, including parts of Pine Bluff, and (ii) encompass parts of Pulaski County (including Little Rock), Jefferson County (including parts of Pine Bluff), as well as Dallas, Cleveland, Ouachita, and Calhoun Counties. *See* Trial Tr. vol. 1, 138:22–139:4 (Cooper Direct); PTX 076 at fig. 21 (Cooper Suppl. Decl.).

- Neal Sealy, the Executive Director of the Arkansas Community Institute (ACI), explained that it is common for ACI's mostly Black members to commute between Jefferson County and Little Rock. Trial Tr. vol. 2, 315:9-18.
- Rev. Maxine Allen, Plaintiff representative for the Christian Ministerial Alliance (CMA), explained that small "family churches" bring together "mixed" urban-suburban-rural congregations. *Id*. at vol. 2, 341:13–342:14 (Allen Direct). She explained that members commute "as far as maybe 50 miles" to worship together. *Id.* at 341:2-4

In other words, leaders who are deeply familiar with these communities corroborated Mr. Cooper's expert opinion. Taken together, this record makes clear that Plaintiffs' illustrative districts encompass a community of Black Arkansans who are united by a common history, common challenges, and deep civic, religious, and ancestral ties. There is no doubt that these illustrative maps account for communities of interest more than enough to satisfy *Gingles I*. *See, e.g.*, ECF No. 116 at 6–7 (collecting cases explaining that illustrative maps need not "'accommodate every conceivable community of interest,'" constitute a "'perfectly harmonized districting plan,'" or identify an "'ultimate solution'").

Defendants presented no contrary evidence at trial. But they have argued that Plaintiffs' illustrative maps are noncompact under *Gingles I* because they combine urban and rural communities. Plaintiffs have explained why this argument is wrong in prior briefing. *See* Pls' Resp. Opp'n to Defs' Mot. Summ. J. 14–15, ECF No. 103; ECF No. 116 at 5–7. And the trial record further forecloses this argument, by establishing that combined urban-rural districts are common in Arkansas. *See* Trial Tr. vol. 1, 127:19–128:12 (Cooper Direct); Trial Tr. vol. 4, 710:24–711:17 (Elliott Direct). Both "enormous geographical distance" *and* "disparate needs and interests" would need to separate Black voters in these districts to raise compactness concerns.

See LULAC, 548 U.S. at 435; ECF No. 116 at 5–6. But the record here establishes that neither is the case.

Splitting counties. Plaintiffs' illustrative maps also adhere to Arkansas's traditional principle of keeping counties and other political subdivisions intact "[w]hen possible." PTX 077 at 3. For both the Supreme Court and Court of Appeals, Plaintiffs' illustrative maps maintained most county boundaries and split just a small handful of counties. *See* Trial Tr. vol. 1, 123:22-25, 140:1-12 (Cooper Direct). In the few instances where Plaintiffs' illustrative maps do split counties, Mr. Cooper made sure not to split precincts, which simplifies administration for election officials. *See id.* at 140:18-24. Moreover, those county splits mirror the Legislature's own recently enacted legislative maps. *See* PTX 469, 470; Trial Tr. vol. 1, 124:9-18, 140:9-12 (Cooper Direct).

Nevertheless, Defendants continued at trial to focus on this non-issue of split counties. Their arguments imply that splitting even a few counties is somehow anomalous or inconsistent with traditional redistricting principles. But the unrebutted trial record shows that it is not.

To the contrary, county splits are "very common," both in districting generally and in Arkansas specifically. Trial Tr. vol. 1, 125:4-11 (Cooper Direct). That is because traditional redistricting criteria are a "balancing act." *Id.* at 143:20-25. Nondilution of minority voting strength and population equality generally are the foremost considerations when redistricting. PTX 467 (Humphries Dep. Tr.) at 281:6–282:17; Trial Tr. vol. 1, 160:24–161:1 (Cooper Cross). But other criteria generally are not—and realistically cannot be—ironclad requirements.[5]

[5] *See, e.g.*, PTX 077 at 3 (explaining that it is "preferable" and "better" to maintain political subdivisions; that districts should maintain communities of interest "[w]here possible"; and that while compactness is "ideal" nevertheless "most districts have some irregularity in shape"); Trial Tr. vol. 1, 143:20-25 (Cooper Direct) ("It's a balancing act. That's for sure.").

Moreover, any preference for keeping counties intact is especially likely to be tempered in pursuit of other redistricting principles. *See* Trial Tr. vol. 1, 159:2-8 (Cooper Cross) ("Trying to preserve political subdivisions intact . . . is not always followed due to the importance of one person one vote and other parts of traditional redistricting principles."). Defendants' former redistricting specialist Tim Humphries testified emphatically that keeping counties intact "was not a priority at all." PTX 467 (Humphries Dep. Tr.) at 289:9-10. He also testified that county splitting "wouldn't be a problem" "as long as you split them on precinct lines," as Mr. Cooper did in this case. *Id.* at 194:21–195:2. That means that when inevitable trade-offs arise, it is generally appropriate and unremarkable to split counties in pursuit of other goals. And that is what Mr. Cooper did here, splitting counties sparingly to better equalize population, preserve minority voting power, or both. *See, e.g.*, Trial Tr. vol. 1, 124:6-18, 140:1-17 (Cooper Direct); *id.* at 159:2-21 (Cross).

Other evidence further corroborates that splitting counties is standard. Three examples:

First, the Legislature's own recent districting plans have failed to maintain many political subdivisions, more so than Mr. Cooper's illustrative plans. Recently adopted Congressional districts "split Pulaski county into three pieces." Trial Tr. vol. 1, 128:4-12 (Cooper Direct). And recently adopted state legislative maps split many counties, including splitting Mississippi County in essentially the same way that Mr. Cooper did. *Id.* at 124:9-18, 125:6-11; *see* PTX 470. Those same maps also split hundreds of precincts. Trial Tr. vol. 1, 124:1-5.

Second, the Court of Appeals Apportionment Commission considered plans that split as many or more counties than Plaintiffs' illustrative maps. For example, Mr. Humphries, on behalf of the Arkansas Attorney General's Office, drafted a map for the Commission's consideration that split Pulaski, Lonoke, Jefferson, and Lincoln counties. *See* PTX 057 at SOS1030; PTX 467

(Humphries Dep. Tr.) at 155:9-25. Mr. Humphries testified that this map was approved by the Attorney General and "follow[ed] traditional redistricting principles." PTX 467 at 156:1-10. This was just one of a number of maps proposed to the Commission by the Attorney General's office over the years in which one or more counties were split. *See, e.g.*, PTX406 at SOS1595 (noting that "plans A-F" all "split Pulaski County between districts.").

Third, Defendants' own pronouncements evince an understanding that county-splitting is commonplace. The Secretary of State's "Redistricting 101" guide shows that that "changes within" a county are commonplace during redistricting. *See* PTX 005 at SOS0335–37, SOS0362–66, SOS0393–94.

This evidentiary showing that splitting counties is consistent with Arkansas's own traditional approach to redistricting is sufficient to rebut Defendants' unfounded arguments. But that showing is not necessary for Plaintiffs to prevail. Despite "tak[ing] into account traditional districting principles," *LULAC*, 548 U.S. at 433, the *Gingles I* inquiry does not require rigid adherence to the State's own stated priorities. To the contrary, when a state's redistricting priorities conflict with the Voting Rights Act, complying with the law takes precedence. *See Bartlett*, 556 U.S. at 7 (noting that a state's election law requirements may be superseded by federal law); *see also Perez v. Abbott*, 250 F. Supp. 3d 123, 142 (W.D. Tex. 2017) (holding that states cannot "claim that a single traditional districting principle . . . allows them to avoid drawing districts required by § 2 under the totality of circumstances.").

II. Plaintiffs' Proof at Trial Satisfied *Gingles II* and *III*.

A. The trial record confirms racially polarized voting under *Gingles II* and *III*.

The evidence presented at trial overwhelmingly demonstrated that *Gingles II* and *III* have been satisfied. Plaintiffs' expert, Dr. Baodong Liu, has repeatedly been recognized as an expert in racially polarized voting in federal voting rights cases using the same methodology that he

used in this case. Dr. Liu testified that he analyzed 11 biracial elections in Arkansas and found that "9 out of 11 show . . . very large, very significant racially polarized voting." Trial Tr. vol. 3, 463:22-23 (Liu Direct).

Based on the elections he analyzed, Dr. Liu concluded that "in the state of Arkansas there has been [a] strong empirical pattern of racially polarized voting in that black voters are cohesive in voting for their candidate of choice usually." *Id.* at 475:19-22. "At the same time, white voters as a majority have voted against the same candidate preferred by black voters." *Id.* at 475:22-24. Defendants' expert, Dr. Alford, agreed with Dr. Liu that biracial elections are the most probative. Trial Tr. vol. 5, 825:3-6. That testimony squares with Circuit precedent, *see Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1020–21 (8th Cir. 2006), and with the practice of the plaintiffs' expert in *Gingles*. *Gingles*, 478 U.S. at 52–53 (expert "collected and evaluated data from 53 General Assembly primary and general elections *involving black candidacies*") (emphasis added).

Although Defendants have argued that Dr. Liu should have also looked at uniracial elections, uniracial elections have much less probative value than biracial elections in assessing racially polarized voting. *See, e.g.*, ECF No. 103 at 26–27 (collecting cases). That is because the right to equal participation under the Voting Rights Act is not satisfied where "[c]andidates favored by blacks can win, but only if the candidates are white." *Smith v. Clinton*, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988) (Arnold, J.). Moreover, a focus on uniracial elections ignores 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 testified, "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. The phenomenon Dr. Liu described is one that courts have recognized must be accounted for in any analysis of RPV. *See Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d at 1208, 1209–10, n.9 (5th Cir. 1989) ("[P]laintiffs 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," because "[t]o 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.").

The phenomenon Dr. Liu described is also one that many other witnesses testified from personal experience is the reality of Arkansas politics:

- Veteran campaign strategist Kymara Seals testified that "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. 2, 254:14-16 (Seals Direct). Ms. Seals further explained that, for the "at large positions, we don't stand a chance." *Id.* at 268:7.
- Judge Waymond Brown described declining to run for vacant Court of Appeals seat in a predominantly white district, saying "I couldn't win that district, it was too white. I knew that." Trial Tr. vol. 3, 422:5-6 (Brown Direct). He also described putting up a billboard with his face on it, and being told that was a tactical blunder due to the "very racialized" environment: "I got calls immediately, take that down. Black people said they're going to know you're black; white people said they're going to know you're black." *Id.* at 422:14-21.
- Likewise, former judicial candidate Eugene Hunt explained that he would not have seriously considered running in a district where Black voters lacked sufficient population to elect a candidate of their choice: "[I]t would have been nonsensical. It would have

been totally impractical. It would have been a waste of money." Trial Tr. vol. 4, 672:4-13 (Hunt Direct).

- As Plaintiffs' expert Dr. Peyton McCrary concluded from his survey of Arkansas's long history of racially polarized voting, "[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).

None of the testimony from Defendants' expert negates Dr. Liu's conclusions or the ample fact witness testimony that corroborates them. As to the endogenous elections Dr. Liu analyzed, Dr. Alford essentially agreed "that the black-preferred candidate was defeated in three of the four" such elections. Trial Tr. vol. 5, 839:7-12 (Alford Cross). Dr. Alford also agreed with Dr. Liu that in six of the seven biracial exogenous elections over the last 20 years, the Black-preferred candidate lost. *Id.* at 842:21–843:3.

Because both sides' experts agreed that biracial elections are more probative, Dr. Alford's analysis of uniracial elections cannot outweigh this showing from the biracial elections. Dr. Alford's analysis of uniracial elections is also unpersuasive for the following reasons. *First*, the vast majority of uniracial endogenous elections that Dr. Alford analyzed yielded confidence intervals that were far too wide to determine to a reasonable degree of confidence who the Black-preferred candidate was. *Id.* at 854:14-18, 858:20–859:4. *Second*, as to the uniracial exogenous elections Dr. Alford analyzed, he *admitted* that over the past 10 years, the Black-preferred candidate lost every single general statewide election in Arkansas. *Id.* at 867:21–868:3. *Third*, Dr. Liu explained why uniracial elections are much more likely to produce misleading data than biracial elections—meaning that a blunderbuss analysis like Dr. Alford's, wherein a large

number of unreliable uniracial elections drown out the much more probative biracial elections, is particularly likely to obscure voters' true preferences. *See* Trial Tr. vol. 4, 450:13–452:2 (Liu Direct). This all adds up to compelling evidence of consistent racially polarized voting in Arkansas that confirms *Gingles II* and *III* are satisfied.

B. Both Drs. Liu and Alford Correctly Focused on Endogenous Elections and Exogenous Statewide Elections

On Day 3 of the Trial, the Court asked the parties a question concerning "the scope that [the Court is] supposed to analyze" the *Gingles* factors geographically. Trial Tr. vol. 3, 608:18–609:13. Plaintiffs understand the Court's inquiry to be focused on whether local elections are relevant to the *Gingles II* and *III* analysis either for the Court of Appeals elections or the Supreme Court elections. Both parties here focused on endogenous elections and, failing that, state-wide elections because case law instructs that these are the most probative data points for the *Gingles II* and *III* inquiry. Aside from endogenous elections, the proper geographic scope is statewide for several reasons:

First, with respect to the Supreme Court, Plaintiffs are challenging a *statewide* method of election. The question under Section 2 is whether 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). The relevant question therefore is whether there is racially polarized voting at the statewide level that results in Black voters having less opportunity to elect candidates of choice. If there is such polarized voting at the state level such that the "white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate," *Gingles*, 478 U.S. at 51, then Black voters are denied an equal opportunity to participate. That is true regardless of whether or not there is polarization in, say, an exogenous local election in Pulaski County or the city of Little Rock.

Similarly, in the context of the Court of Appeals, the relevant frame of reference would at minimum be the entire geographic area in which vote dilution is alleged to have occurred rather than a handful of such exogenous local elections within that area. In *Gingles* itself, the Court looked at polarization in the multi-member districts at issue—not in exogenous local elections. *See Gingles*, 478 U.S. at 52–54. If endogenous data points are not available, the next best place to turn is races that subsume *all* of the geography at issue—which will generally be statewide races. For this reason, *both* parties' experts focused on endogenous elections and then, when they looked beyond those, statewide exogenous elections.

Second, courts have found that statewide elections provide probative evidence as to RPV even where they reflect a broader electorate than that of the position in question. *See, e.g.*, *LULAC*, 548 U.S. at 427; *Baltimore Cnty. Branch of the NAACP v. Baltimore Cnty.*, No. 21-cv-3232, 2022 WL 657562, at *9 (D. Md. Feb. 22, 2022). By contrast, courts 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. For example, the Supreme Court has called it the "wrong approach" for a district court to consider "only one, small part of" an illustrative district. *Abbott v. Perez*, 138 S. Ct. 2305, 2331–32 (2018); *see also, e.g.*, *Thomas v. Bryant*, 366 F. Supp. 3d 786, 805 (S.D. Miss. 2019) (rejecting RPV evidence of local elections within the geographic area of the relevant political office); *Rangel v. Morales*, 8 F.3d 242, 245–46 (5th Cir. 1993) (exogenous election evidence should "encompass *more* geographic area than just [the election district at issue]" (emphasis added)). That is because the goal of RPV analysis is not to determine whether minority candidates can sometimes prevail within certain small political subdivisions where minority voters are the majority or a significant plurality. Rather, the goal is to determine whether minority voters' preferred candidate is usually defeated by the

cohesive vote of the majority when competing in a broader electorate. The former says nothing about the latter.

Third, the Court should not consider evidence that was not timely disclosed, especially when that evidence may present an incomplete picture and is purportedly relevant to an issue that both parties have enlisted experts to analyze. While there is a thoroughly developed record concerning endogenous and exogenous statewide elections, the record here is devoid of similar evidence and analysis concerning county-level or local elections. To the extent that Defendants wish to cherry-pick certain elections and submit them now, Plaintiffs therefore respectfully submit that it is far too late in the day to permit such untimely evidence. *See* Fed. R. Civ. P. 37(c)(1). Permitting such evidence into the record at this late stage would be particularly inappropriate because the evidence in question cannot meaningfully be evaluated or weighed against the existing record without the aid of expert testimony. *See Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1008-09 (8th Cir. 2008) (affirming exclusion of untimely evidence where expert reports relied on the existing disclosures, rendering the opposing party unable to "refute the evidence at trial").

For all these reasons, the existing record of racially polarized voting in endogenous and exogenous statewide elections is the appropriate basis on which to assess racially polarized voting, and to find that Plaintiffs have satisfied the second and third *Gingles* preconditions.[6]

[6] Finally, to the extent the Court may wonder how localized RPV might inform a remedy for the Section 2 violations that have been proven in this case, the Court was correct on Day 2 of trial that considering any such facts at this stage would be premature. *See* Trial Tr. vol. 2, 302:9-10. The question at this liability stage of the case is whether a Section 2 violation has been established, not the precise mechanics of how to fashion relief. *See, e.g.*, *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006).

III. Plaintiffs' Proof at Trial Established a Violation of the Voting Rights Act Section 2 Based on the Totality of the Circumstances.

The purpose of the *Gingles* prerequisites is to identify colorable Section 2 claims, but the ultimate question in this case is whether the totality of the circumstances reveals that Black Arkansans have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" to the Supreme Court and Court of Appeals. *See Gingles*, 478 U.S. at 43; *see also Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) ("[T]he *Gingles* requirements are preconditions, consistent with the text and purpose of § 2, to help courts determine which claims could meet the totality-of-the-circumstances standard for a § 2 violation.").

On that ultimate question, the trial record leaves no room for doubt. The traditional "Senate Factors" all support a finding of liability here, for all the reasons summarized by Plaintiffs' expert, Dr. Peyton McCrary, in his unrebutted expert report and trial testimony. *See* PTX 078 (Declaration of Dr. Peyton McCrary); Trial Tr. vol. 3, 581:5–608:14 (McCrary Direct). The following discussion highlights just a fraction of the extensive evidence that Plaintiffs have adduced with respect to the Senate Factors—virtually all of which stands unrebutted and unchallenged. This record more than suffices to confirm that liability is warranted under the totality of the circumstances.

Senate Factor 1 (History of Voting Rights Discrimination). Even before trial began, prior caselaw recognized Arkansas's extensive history of racial discrimination against Black voters. *See* ECF No. 103 at 43–44; Trial Tr. vol. 3, 583:16–585:14 (McCrary Direct). Defendants have not made any effort to dispute that this factor weighs heavily in favor of Plaintiffs, and the trial record in this case overwhelmingly confirms the point, including the following evidence:

- Senator Elliott testified that "Arkansas is in the bottom of the states that make it harder, make it really, really difficult to vote." Trial Tr. vol. 4, 741:24–743:12 (Elliott Direct). She listed laws recently passed that reduce the amount of time voters can return their ballots, add signature matching requirements, and prohibit gestures like providing voters with bottled water within 100 feet of a polling site. *Id*. Senator Elliott also explained how these modern obstacles compound historic legacies of exclusion that are particular to the Black community. She recalled that she "did not come from a family legacy of people voting because of the fear of doing something that they thought might get them in trouble." *Id.* at 706:6-17. She then explained that "if you are not coming from that legacy of, no matter what, you vote," then increased burdens on voting become "one more reason you just don't even try." *Id.* at 743:10-12.
- Kymara Seals recalled how New Town Missionary Baptist, "one of the oldest [B]lack voting sites" in her community, was closed shortly before the 2020 election. Trial Tr. vol. 2, 246:12-20 (Seals Direct). It took an "uproar" from the community and a lawsuit to get it restored. *Id.*
- Rev. Maxine Allen described being asked for her photo identification at her polling site (when there was no ID requirement under law) by a poll worker who knew her personally. *Id.* at 355:10–356:10 (Allen Direct). The poll worker did not ask the same of white voters. *Id.*

The Court should credit all of this testimony, which—again—Defendants have not attempted to discredit or rebut. The Court should similarly credit unrebutted testimony specific to the political processes at issue in this case, namely the many decades of discrimination within the

legal profession and judicial systems of Arkansas that have created barriers to Black representation in judicial elections:

- Judge Victor Hill described discrimination from professors who denied him and other Black students from tutoring sessions available to white students. *Id*. 383:2-19 (Hill Direct).
- Eugene Hunt recalled a traumatic experience when he was attacked and threatened with arrest by a white judge. Trial Tr. vol. 4, 657:13–659:20 (Hunt Direct).
- Judge Waymond Brown described being called the n-word by voters on the campaign trail, and "a three-fifths person" and other insults by his white colleagues on the Court of Appeals. Trial Tr. vol. 3, 417:3-20; 434:16-436:15 (Brown Direct).
- Dr. Peyton McCrary discussed at length the history of discrimination in admission and support for Black students at the University of Arkansas School of Law at Fayetteville, impeding the pipeline of Black jurists in the State. *Id.* at 585:22–590:2 (McCrary Direct).

Senate Factor 2 (Racially Polarized Voting). This factor overlaps with the *Gingles II* and *III* inquiry discussed above, with which the Court is already very familiar. The Court heard the reality of the situation over and over again from Plaintiffs' witnesses: racially polarized voting is so pervasive in the politics of judicial elections that Black candidates do not even *run* for the appellate courts when doing so would require appealing to a mostly white electorate. Indeed, the record testimony already summarized above on this point confirms that racially polarized voting is not just empirically observable in Arkansas; it is a reality that Black voters and candidates must contend with day in and day out on the ground. *See supra,* Part II.A. Just as Plaintiffs have satisfied the *Gingles* preconditions, they have shown that stark and pervasive racially polarized voting supports finding a violation under the totality of the circumstances.

Senate Factor 3 (Practices and Procedures that Enhance Opportunities for Discrimination Against Black Voters, also known as "Enhancing Factors"). The systems by which Arkansas elects appellate judges are rife with the kinds of structural barriers and minority-suppressive practices that this factor looks for, including:

- Unusually large election districts, *see, e.g.*, Trial Tr. vol. 3, 595:5–596:2 (McCrary Direct);
- Numbered place elections, *see, e.g.*, *id.* at 592:17–593:23;
- Majority-vote requirements, *see, e.g.*, *id.* at 593:24–595:4;
- Restrictions on appointed candidates seeking reelection, *see, e.g.*, *id.* at 596:3–597:6.

This factor, like others, has not been contested by Defendants.

Senate Factor 4 (Informal Slating). The salient question under Senate Factor 4 is, what is "the ability of minorities to participate in [a] slating organization and to receive its endorsement"? *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1569 (11th Cir. 1984). A range of gatekeeping mechanisms can qualify as unofficial or informal slating, including endorsements by influential individuals or organizations. *See, e.g., Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213, 221–22 (2d Cir. 2021) (considering informal slating by "[i]nfluential members of the white, private-school community" during school board elections).

Here, fact witnesses provided multiple examples of ways in which predominantly white private sector entities, organizations, and individuals steer resources away from Black candidates and influence who has the resources to mount a campaign. For example:

- Retired Judge Marion Humphrey—who has extensive experience as both a candidate and campaign manager spanning many decades—testified that he does not see "corporate

people contributing very much to African-American candidates." Trial Tr. vol. 1, 62:14-15 (Humphrey Direct).

- Neil Sealy discussed the influence of contributions from "developers," "contractors," "realtors," and "wealthy people" in local political races, stating it was "rare" for their contributions to be directed to Black candidates. Trial Tr. vol. 2, 327:25–328:15 (Sealy Direct).
- Explaining the influence of endorsements from groups like the Chamber of Commerce, Kymara Seals testified that Black candidates "don't often get those endorsements." *Id.* at 256:25-257:1 (Seals Direct).

Whether or not the Court finds that endorsements and contributions from these influential organizations equates to informal slating, these examples are still relevant to the Court's evaluation of the totality of the circumstances. This is because the Senate Report's "list of typical factors is neither comprehensive nor exclusive," and "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality'" and "on a 'functional' view of the political process." *Gingles*, 478 U.S. at 44–45 (citing U.S. Code Cong. & Admin. News 1982, pp. 207–08). The present reality in Arkansas is that these endorsing organizations influence candidacies, but Black candidates have rarely received their financial support.

Senate Factor 5 (Discrimination in Education, Employment, Health). Here, again, the evidence adduced at trial is overwhelming in favor of Plaintiffs, unchallenged, and unrebutted. It is also consistent with past judicial decisions finding widespread discrimination supportive of this factor. *See* ECF No. 103 at 51 (collecting cases). Here, again, are just a few highlights of the record evidence on this factor:

- Judge Victor Hill and Senator Joyce Elliott both described their direct experiences of discrimination by educators, who denied them the same mentoring, resources, and academic accolades as their white peers. Trial Tr. vol. 2, 383:2-19 (Hill Direct); Trial Tr. vol. 4, 693:20–699:23 (Elliott Direct).
- Reverend Allen discussed how schools "today in 2022 that were completed in 2021," look drastically different in quality across the predominantly Black versus predominantly white areas of Pulaski County. Trial Tr. vol. 2, 360:7-23 (Allen Direct).
- Ms. Seals and Mr. Sealy both described racial disparities along economic metrics, including housing access and quality. Ms. Seals discussed the State's failure to enforce an implied warranty of habitability and the disparate impact on Black renters. *Id.* at 272:19–273:21 (Seals Direct). Mr. Sealy discussed the Arkansas Community Institute's extensive work and concerns around racial disparities in household debt. *Id.* at 313: 14–19 (Sealy Direct). Mr. Cooper cited Census data to support, quantitatively, the observations of fact witnesses about social and economic disparities across the State. *See, e.g.*, Trial Tr. vol. 1, 126:12-21 (Cooper Direct).
- Senator Elliott testified that Arkansans continue to "live racially and economically segregated." Trial Tr. vol. 4, 734:17. She, Mr. Sealy, and Reverend Allen all discussed how I-630 in Little Rock demarcates a stark boundary line between resourced white neighborhoods and Black neighborhoods that lack basic services like grocery stores. Trial Tr. vol. 2, 318:3-7 (Sealy Direct); *id.* at 343:17–344:25 (Allen Direct); Trial Tr. vol. 4, 737:12–740:21 (Elliott Direct).
- Ms. Seals and Reverend Allen both described instances of racial profiling by police—Ms. Seals' son was pulled over without cause, as was Reverend Allen when she was wearing

a hoodie in a rental car. Trial. Tr. vol. 2, 273:22–274:22 (Seals Direct); *id.* at 359:1-21 (Allen Direct).

Senate Factor 6 (Racial Appeals). The trial record reflects extensive use of racial appeals in Arkansas politics, both overt and coded. Again, just a few striking examples:

- Kymara Seals testified that during one of his races for the Supreme Court, a widely circulated editorial cartoon mocked Judge Griffen by depicting him in the makeup and attire of Jim Crow-era racist "minstrel shows." *Id*. at 258:15–259:10 (Seals Direct); *see* PTX 158. Ms. Seals grew emotional on the stand as she recalled this "pure racist" cartoon and feeling "disgusted" when she first saw it. *Id*. at 258:9–260:16 ("I kind of struggle with it. I don't want to see it. . . . It's racist.").
- The Court heard the audio of a radio ad supporting Representative French Hill in his 2018 Congressional race. *See* PTX 343. That ad featured a caricature of two Black women stating that his political opponents wanted to go back to "lynching black folks again" and would revert to "race verdicts" whenever a "white girl screams rape," among other racialized tropes and colloquialisms. *Id.* Reverend Allen explained that she understood this ad to target her and other Black women, and that it made her feel "very angry" and "underestimated as a voter." Trial Tr. vol. 2, 374:2–375:24 (Allen Direct). As she explained, with palpable emotion: "It makes me feel like black voters are . . . taken for granted, that black voters are perceived as less educated and knowledgeable about voting . . . ." *Id*.
- The Court heard about other racialized appeals made in opposition to Senator Elliott's candidacy, in particular during that same recent run for Congress. As Senator Elliott herself recalled, "[t]here were some overt racist appeals in that race for sure." Trial Tr.

vol. 4, 719:16-17 (Elliott Direct). As one example, she recalled a flyer where an innocuous image of her was "darkened," with text linking her to "Black Lives Matter" and characterizing her as supporting "riots" as a "reasonable response to police violence," even though she had not ever said the things that were attributed to her. *Id*. at 719:14–725:1; *see* PTX 319. Ms. Seals similarly discussed how the ad used distorted images to implicitly depict Senator Elliott as "a threat to the white man." Trial Tr. vol. 2, 260:21–262:14; *see* PTX 321.

To be sure, some of the testimony about racial appeals that the Court heard concerned judicial elections and some did not. But the Court should consider the broad effects these many appeals have beyond the individual elections they occur in because they send a message to Black voters about their political status in the State, which has ramifications for *all* elections—including judicial races. This inclusive review of campaign appeals is accepted practice and appropriate here. *See, e.g.*, *Jeffers v. Clinton*, 730 F. Supp. 196, 212–13 (E.D. Ark. 1989), *aff'd*, 498 U.S. 1019 (1991) (crediting evidence of campaign appeals in mayoral and county judge races in a Section 2 challenge related to apportionment of the General Assembly).

Senate Factor 7 (Record of Successful Elections of Black Candidates). This factor is as clear-cut as could be. No Black person has ever been elected to the Arkansas Supreme Court. Trial Tr. vol. 3, 602:4-16 (McCrary Direct). No Black candidate for the Court of Appeals has ever won a contested election against a white candidate. *See, e.g., id.* at 602:17–604:5. And, at least since Reconstruction, no Black person has ever won any other statewide election in the state of Arkansas. *See, e.g.*, PTX 466 (Casteel Dep. Tr.) at 86:5-7.

Defendants have no response. On the last day of trial, Defendants told this Court that more than a hundred years without the electorates for these offices even once choosing a Black

candidate over a white candidate is not enough. *See* Trial Tr. vol. 5, 764:9-15 (Mr. Jacobs). Defendants would have the Court disregard the clear-cut evidence going to this factor, and overlook all the other overwhelming evidence of vote dilution in this case, and instead just wait to see how "future [Black] candidates" might fare under the systems currently in place. *Id.* at 764:14.

But the record tells the story already. Voting in Arkansas is so starkly polarized, and the barriers for Black candidates already so high, that those future candidates might not even bother to run absent relief in this litigation. The status quo violates the Voting Rights Act and cannot be allowed to continue.

CONCLUSION

For the foregoing reasons and based on the facts adduced at trial, the Court should declare the current systems of electing judges for the Arkansas Supreme Court and Court of Appeals to be in violation of Section 2 of the Voting Rights Act and proceed to determining a remedy that will afford Black voters in Arkansas a meaningful opportunity to elect their preferred candidates.

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