

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

THE CHRISTIAN MINISTERIAL ALLIANCE,
PATRICIA BREWER, CAROLYN BRIGGS,
LYNETTE BROWN, MABLE BYNUM, and
VELMA SMITH on behalf of themselves and all
other similarly situated persons,

Plaintiffs,

v.

JOHN THURSTON, in his official capacity as the
Secretary of State of Arkansas,

Defendant.

Civil Action

Case No. 4:23-cv-00471-DPM-DRS-JM
(three-judge court)

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT**

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INTRODUCTION

This Court should reject Defendant's request to decide this case in his favor without a trial by improperly elevating Plaintiffs' burden at the summary judgment stage. Following robust factual and expert discovery, including by four of Plaintiffs' experts to one of Defendant's, a myriad of key material facts remain disputed regarding whether Arkansas's Congressional District 2 ("CD2") was racially gerrymandered and enacted with a racially discriminatory purpose in violation of the U.S. Constitution. Indeed, the facts that this Court already found sufficient to state a claim at the pleading stage are now thoroughly supported by the evidence and bolstered by more facts that have emerged in discovery.

Rather than demonstrate an absence of key factual disputes, Defendant offers thinly supported post-hoc justifications for the Legislature's 2021 Redistricting Plan ("the Plan"), ignores or does not dispute evidence supporting Plaintiffs' claims, asks this Court to prematurely weigh evidence and assess experts' credibility, and rehashes legal arguments this Court already rejected at the motion to dismiss stage. This highlights the many live and fundamental material factual disputes that require resolution at trial.

For Plaintiffs' racial gerrymandering claim, Defendant does not dispute that a significant number of Black voters were disproportionately moved out of CD2, and an overwhelmingly white population was moved in (all more than necessary to rebalance the population after the 2020 Census). Rather, Defendant first claims that the redistricting principles the Arkansas Legislature purported to rely on explain the disproportionate sorting of Black voters. But two of the principles that the contemporaneous legislative record shows the Legislature claimed to be honoring—(1) minimizing splitting counties and cities and (2) keeping communities of interest together—were violated in Pulaski County, which contains the highest concentration of Black voters in the state and accounts for nearly 40% of the state's Black population. Instead, the

Legislature split Pulaski County for the first time, and across three Congressional districts, facilitated by the movement of thousands of Black voters out of CD2. That three-way county split also cracked cities, school districts, and judicial districts with high concentrations of Black people. None of this was necessary to equalize population, as legislators claimed.

To confirm the implausibility of Defendant's claims, Plaintiffs developed an alternative map showing that the Legislature could have adopted Plaintiffs' Alternative Plan 1, which performed better on equalizing population, on balance performed equally well or better on traditional redistricting principles, and did not crack Black communities by keeping Pulaski County whole. Defendant tries to cast doubt on Alternative Plan 1 by faulting its lower core retention score as compared to the Plan. But maintaining as much of the core of the prior district in the Plan was never mentioned as a guiding redistricting principle for the Legislature. Equally telling, Defendant has no evidence that the Legislature actually relied on core retention to draw the Plan. This post-hoc justification therefore cannot be a basis for summary judgment. And even putting aside the key material dispute regarding which redistricting principles were claimed objectives of the Legislature, the competing expert analyses assessing various maps' compliance with these principles require this Court to make credibility determinations and weigh competing evidence at trial.

In the alternative, Defendant admittedly speculates that the disproportionate sorting of Black voters out of CD2 can be explained by a hypothetical and undefined desire for political advantage. But there is no contemporaneous evidence that the Legislature relied on partisanship as a redistricting criterion, much less what specific partisan criteria they supposedly applied. Legislators disavowed any such justification during public debate, and the only legislator to testify in this litigation rejected the notion that the Legislature engaged in partisan

gerrymandering. To the contrary, he insisted that the map was justified on the basis of minimizing population and honoring redistricting principles alone, which, as explained above, demonstrably cannot explain the splitting of Black communities in Pulaski County.

But even accepting Defendant's speculation that the Legislature did pursue a partisan advantage in designing CD2, the U.S. Supreme Court has repeatedly affirmed it is impermissible for a legislature to rely on race as a proxy for seeking to achieve an incumbent or partisan advantage. And, here, Plaintiffs have presented evidence allowing a factfinder to determine that any such partisan ends were advanced only by relying on race as a forbidden proxy. Plaintiffs have presented expert evidence disentangling race from partisanship in two ways. First, Plaintiffs provide un rebutted expert evidence that Black voters were treated differently than white voters with the same party affiliation in how they were sorted in and out of CD2. Second, Plaintiffs provide two alternative maps (Plaintiffs' Alternative Plans 2 and 3) that equalize population, comply with traditional redistricting principles as well as or better than the Plan, and maintain the same partisanship advantage or better than the Plan, while not splitting Pulaski County. And the undisputed record is clear that legislative staff members responsible for developing maps had racial data displayed on screen as they drew maps, but no access to political performance data. All of this evidence would permit a factfinder to determine that, even if the Arkansas Legislature had been motivated by some partisan goal, it went about achieving that partisan end not by directly sorting voters on party lines, but by using race as a proxy for partisanship. Defendant's competing expert analysis requires this Court to also make credibility determinations and weigh competing evidence at trial.

Nor has Defendant met its burden at summary judgment to show the absence of disputed material facts about Plaintiffs' intentional racial vote diminishment claim. Although this claim is

analytically distinct from a racial gerrymandering claim, Defendant spends only a cursory page and a half of its Motion to argue that Plaintiffs cannot prevail. Plaintiffs have shown factual and expert evidence of the Plan's discriminatory impact on Black voters. Defendant's competing expert report, trying to downplay the harm, underscores the need to resolve credibility determinations and weigh the evidence at trial, not on the papers at summary judgment. Plaintiffs have also provided un rebutted expert analysis that the Legislature was aware of this impact and had alternatives that would have reduced or eliminated any discriminatory harm. Plaintiffs have also provided un rebutted expert analysis that the Legislature hid behind pretextual motives and a rushed and non-transparent process to avoid scrutiny of the racial harms inflicted by the Plan.

Redistricting cases involving claims of racial gerrymandering and intentional racial discrimination such as this one are fact-intensive, typically necessitating credibility determinations that only a trial can resolve. *See, e.g., Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) (noting that a legislature's "motivation is itself a factual question" and reversing summary judgment). This case is no exception. For all these reasons, Defendant's Motion should be denied so that the claims can proceed to trial as scheduled.

LEGAL STANDARD

For summary judgment, Defendant must show that no genuine dispute as to any material fact exists and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The Court must construe all facts and draw all rational inferences in the manner most favorable to Plaintiffs. *Scott v. Harris*, 550 U.S. 372, 378 (2007). Importantly, the "judge does not sit as a trier of fact when deciding a motion for summary judgment even if the case is scheduled to be heard without a jury." *Med. Inst. of Minn. v. Nat'l Ass'n of Trade & Tech. Sch.*, 817 F.2d 1310, 1315 (8th Cir. 1987).

Summary judgment is not trial. Defendant conflates the summary judgment and trial standard by improperly assigning a trial-like burden of persuasion to Plaintiffs at the Rule 56 stage. But Plaintiffs carry no such burden. At this stage, this Court does not weigh conflicting evidence or make credibility determinations. *See Agosto v. INS*, 436 U.S. 748, 756 (1978); *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 735 (8th Cir. 2014). The credibility of expert testimony, in particular, is a matter reserved for trial. *Ga. State Conf. of the NAACP v. Georgia*, No. 1:21-cv-05338-ELB-SCJ-SDG, 2023 WL 7093025, at *9 (N.D. Ga. Oct. 26, 2023) (resolving whether race or politics predominated “requires assessing the merits of [expert’s] conclusions, which we cannot appropriately do at summary judgment, where we must interpret the evidence in the Plaintiffs’ favor.”).

Nor should this Court attempt to discern the truth of any factual issue at this stage. *Great Plains Real Est. Dev., L.L.C. v. Union Cent. Life Ins. Co.*, 536 F.3d 939, 943–44 (8th Cir. 2008) (quoting *Morris v. City of Chillicothe*, 512 F.3d 1013, 1018 (8th Cir.2008)). Intentional discrimination claims in the voting context are rarely resolved at summary judgment because resolving those claims requires making findings of fact. The existence of racially discriminatory intent or motivation is a “pure question of fact” that only rarely can properly be resolved summarily. *See Rogers v. Lodge*, 458 U.S. 613, 622–23 (1982); *see Hunt v. Cromartie*, 526 U.S. 541, 552–53 (1999) (reversing and remanding grant of summary judgment in a redistricting case, holding that “it was error in this case for the District Court to resolve the disputed fact of motivation at the summary judgment stage.”). Whether “race predominated is a disputed factual issue precluding summary judgment in favor of Defendants” too. *Ga. State Conf. of the NAACP*, 2023 WL 7093025, at *9. Accordingly, cases challenging racially discriminatory redistricting maps are overwhelmingly decided at trial—not on a motion for summary judgment. *See, e.g.,*

Petteway v. Galveston Cnty., No. 3:22-cv-57, 2023 WL 6786025 (S.D. Tex. Oct. 13, 2023), *amended sub nom. Petteway v. Galveston Cnty., Tex.*, No. 3:22-cv-57, 2023 WL 6812289 (S.D. Tex. Oct. 15, 2023), *and aff'd sub nom. Petteway v. Galveston Cnty., Tex.*, No. 23-40582, 2023 WL 7442949 (5th Cir. Nov. 10, 2023); *Common Cause Fla. v. Byrd*, No. 4:22-cv-109-AW-MAF, 2024 WL 1308119 (N.D. Fla. Mar. 27, 2024); *Agee v. Benson*, No. 1:22-cv-272, 2024 WL 1298018 (W.D. Mich. Mar. 27, 2024); *S.C. State Conf. of NAACP v. Alexander*, 649 F. Supp. 3d 177 (D.S.C. 2023), *modified*, No. 3:21-cv-03302-MGL-TJH-RMG, 2024 WL 1327340 (D.S.C. Mar. 28, 2024), *and rev'd in part sub nom. Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1 (2024); *Harding v. Cnty. of Dallas, Tex.*, 948 F.3d 302, 314 (5th Cir. 2020); *Backus v. South Carolina*, 857 F. Supp. 2d 553 (D.S.C. 2012), *aff'd*, 568 U.S. 801 (2012).

STATEMENT OF FACTS

I. FACTS SUPPORTING CLAIM OF UNCONSTITUTIONAL RACIAL GERRYMANDERING.

A. The 2021 Congressional Redistricting Erased Black Population Gains in CD2 and Cracked the Black Community in Southeast Pulaski County Across Three Districts.

Over the last thirty years, Black Arkansans have seen their share of the statewide population steadily grow, while white Arkansans have experienced a steady decline in their share of the population. *See* Mot. Ex. 3, Cooper Rep. at 13, fig. 2. In the decade before the 2020 election, the statewide Black population grew by 5.82% while the white population declined by 5.06%. *See id.* ¶ 37. The contrast between Black population growth and white population decline is even greater in Pulaski County, which has 38.21% of the state's overall Black population—the highest concentration of Black Arkansans in the state. *Id.* ¶ 33. In Pulaski County, the Black population has grown by 10.03% while the white population has declined by 8.36%. *See id.* ¶ 44.

This growth has translated into stronger Black electoral influence especially within Pulaski County. Over the last decade, for example, Black voters' growing electoral influence in Pulaski County led to the elections of: Frank Scott Jr., Little Rock's first elected Black mayor since its founding 200 years ago; Eric Higgins, Pulaski County's first Black sheriff; and Terri Hollingsworth, Pulaski's first Black county clerk. *See* Ex. A, Smith Rep. at 23.

As is often the case, the 2020 Census identified population imbalances in Arkansas's four Congressional districts. All four districts experienced population changes requiring rebalancing to adhere to the one-person, one-vote requirement. Not all districts, however, required drastic changes. Indeed, CD2, which historically has included all of Pulaski County, required the *least* amount of rebalancing: with an overpopulation of only 16,510 persons, it deviated just 2.19% from the ideal population for each district post-2020 Census. Mot. Ex. 3, Cooper Rep. at 27, fig. 14. By comparison, the First Congressional District ("CD1") was underpopulated by 36,493 persons (a 4.85% population deviation), the Third Congressional District ("CD3") was overpopulated by 86,266 persons (an 11.46% population deviation), and the Fourth Congressional District ("CD4") was underpopulated by 66,283 persons (an 8.80% population deviation). *Id.*

Figure 14: 2011 Benchmark Plan – 2020 Census

District	Population	Deviation	% Deviation	% 18+ Black	% 18+ Latino	% 18+ NH White
1	716388	-36493	-4.85%	17.23%	3.18%	75.48%
2	769391	16510	2.19%	22.64%	5.77%	66.33%
3	839147	86266	11.46%	3.48%	13.03%	73.15%
4	686598	-66283	-8.80%	18.84%	5.18%	71.27%

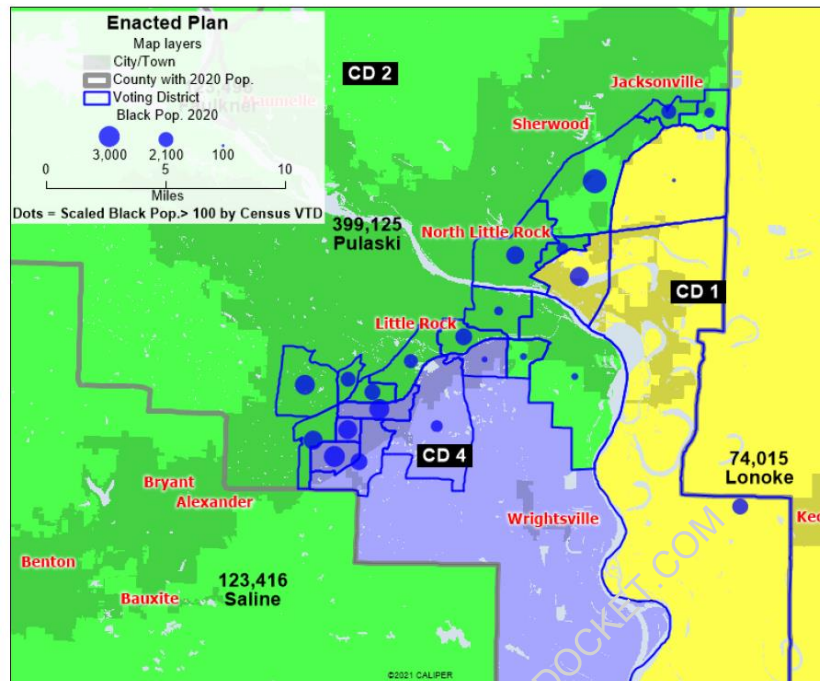
Despite the minimal changes needed to rebalance the population in CD2, the Plan moved 41,392 persons out of CD2, including 21,904 Black Arkansans from Pulaski County. *See Id.* ¶ 58, fig. 19.

Figure 19: CD 2 Population Shifted in Pulaski County into Enacted CDs 1 & 4

District	Pop.	Black	% Black	NH White	% NH White	Minority	% Minority
CD 2 to CD 1	8,612	5,226	60.68%	2,884	33.49%	5,728	66.51%
CD 2 to CD 4	32,780	16,678	50.88%	8,236	25.13%	24,544	74.87%
Total	41,392	21,904	52.92%	11,120	26.87%	30,272	73.13%

The Plan also trisected southeastern Pulaski County, splitting municipalities with significant Black populations, such as the cities of Little Rock and North Little Rock, and redistributing them across three of Arkansas's four Congressional districts. *See Mot. Ex. 3, Cooper Rep.* ¶¶ 33, 49; *see also id.* at 30, fig. 16 (representing the Black population density in Pulaski County). The Plan removed 14.55% of the Black population living in Little Rock from CD2 and 16.66% of the Black population living in North Little Rock from CD2. *Id.* ¶ 55.

Figure 16: 23 Adjacent VTDs Separated by Enacted Plan Boundaries



As a result, the Plan reduced the Black Voting Age Population (“BVAP”) in CD2 from 22.64% under the 2011 Plan¹ to 20.33% in the Plan at issue here. *Id.* ¶ 49. It did so despite the conceded growth in Black population both in the state at large and in Pulaski County. Ex. B, Bryan Dep. Tr. #1 at 36:18–20 (“In the Amended Complaint the plaintiffs state that there is a growing African American population in Arkansas, which is true.”).

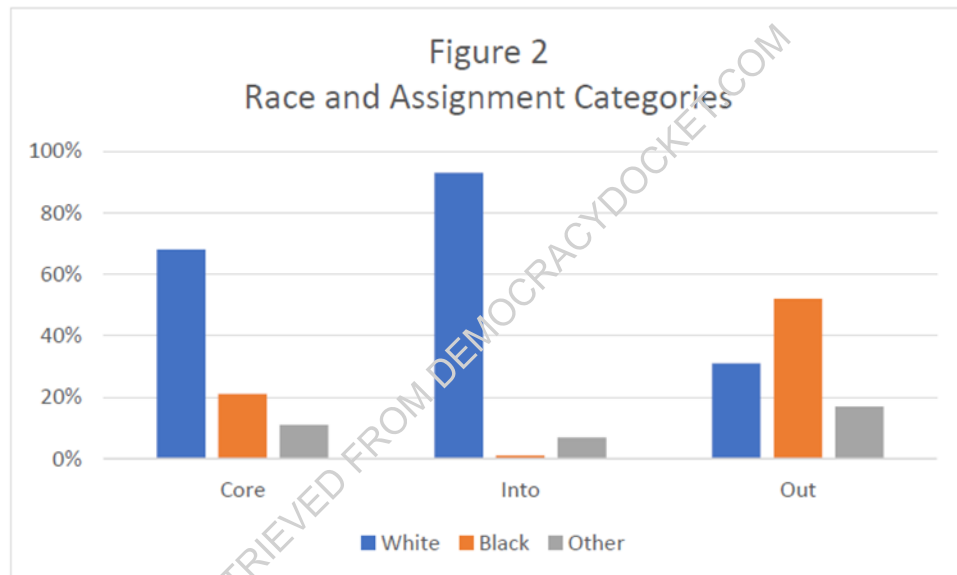
A significant number of Black Arkansans were moved out of CD2, and there were stark racial disparities in the movement of voters into and out of CD2. *See* Mot. Ex. 3, Cooper Rep. ¶¶ 50–58; Ex. C, Liu Rep. at 14–17. While 94.27% of the white population in Pulaski County was kept in CD2, only 85.56% of the Black population was retained in the district. *See* Mot. Ex. 3, Cooper Rep. ¶ 56. And white voters had a much greater likelihood of being moved into CD2—93% of the voters moved into CD2 were white, while only 1% were Black. *See* Ex. C, Liu Rep.

¹ This number is calculated using the 2020 census population demographics.

at 16, table 2, fig. 2. Conversely, Black voters had a greater likelihood of being moved out of CD2: 52% of the voters moved out of CD2 were Black, while only 31% were white. *Id.*

Table 2: Race and Assignment Categories

	White	Black	other
Core	384184 (68%)	118619 (21%)	60223 (11%)
Into	18709 (93%)	92 (1%)	1298 (7%)
Out	9573 (31%)	15790 (52%)	5231 (17%)



Even Defendant's expert, Thomas Bryan, found that Black voters were disproportionately moved out of CD2. Ex. B, Bryan Dep. Tr. #1 at 175:7–13, 177:4–13, 177:17–178:1, 180:7–13. Bryan reported that of the total 27,091 Black voters moved out of their 2011 districts to create the Plan, 21,904 were moved out of CD2. Mot. Ex. 1, Bryan Rep. at 101, Appendix D.1. In other words, over 80% of all Black voters who were assigned a new Congressional district were formerly residents of CD2.

B. The Map-Drawers Considered Racial Data and Lacked Political Data.

Every proposed map that was introduced in the Arkansas Legislature was drafted with the assistance of the Bureau of Legislative Research (“BLR”), non-partisan staffers for the Legislature. *See* Ex. D, Davenport Dep. Tr. at 43:17–20, 96:11–97:2. These legislative staffers acted as the hand of the Legislature, implementing changes to maps in AutoBound² (the official redistricting software) exclusively at the direction of legislators, who were often in the room while these changes were made. *See* Mot. Ex. 11, Burch Rep. at 46; Ex. E, Bowen Dep. Tr. at 103:14–21, 110:14–22; Ex. D, Davenport Dep. Tr. at 52:14–16, 206:4–20. As BLR staffers made changes, AutoBound updated the demographic changes—including racial demographics—on the staffers’ screens in real-time. *See* Ex. E, Bowen Dep. Tr. at 71:23–72:6, 73:3–12, 131:8–12, 132:13–17.

AutoBound provided map-drawers with a host of data views on their screens, including detailed reports of racial demographics. *See* Ex. D, Davenport Dep. Tr. at 64:12–20, 116:17–25. Data on racial composition was consistently available during the map-drawing process and was continuously displayed on the screen *by default* as maps were crafted. Ex. F, Hejazi Dep. Tr. at 62:18–63:23, 66:2–13. That racial data included granular details allowing map-drawers to easily view county and precinct data changes. *Id.* at 72:9–73:2, 77:1–5, 125:16–21, 164:4–21.

In contrast, map-drawers lacked access to political data. *See* Ex. D, Davenport Dep. Tr. at 77:5–11; Ex. E, Bowen Dep. Tr. at 64:15–23, 95:21–96:1, 236:13–16. BLR attorney Michelle Davenport testified that she did not have any political data available in AutoBound and did not

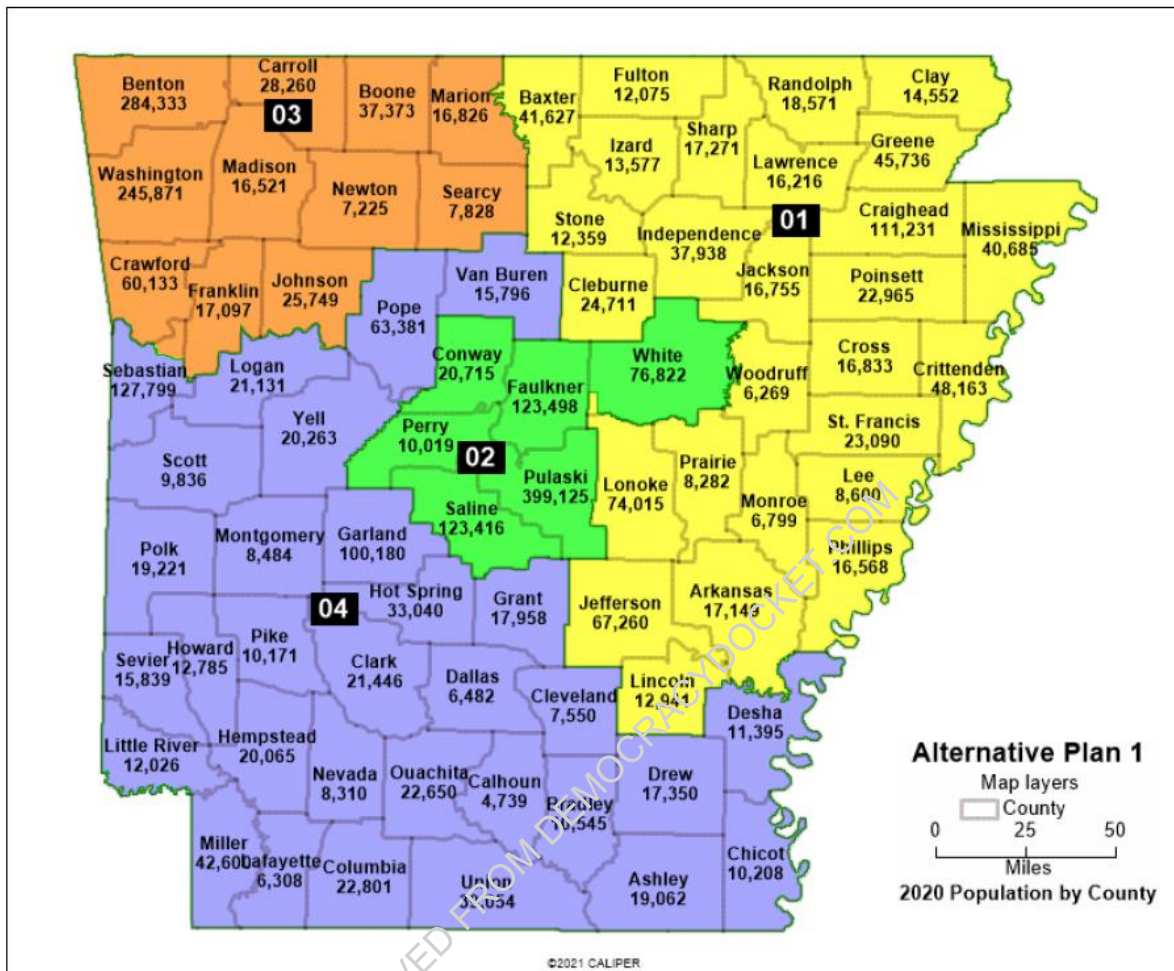
² During the 2021 Congressional Redistricting Process, AutoBound Edge (“AutoBound”) was the only software used by BLR to create proposed Congressional maps for the Legislature. Ex. D, Davenport Dep. Tr. at 44:10–12 (stating that AutoBound was the “software that [BLR] had available for map drawing.”), 74:7–74:10 (Q: “We’ve talked about AutoBound Edge. Is that the software that you solely used in order to develop congressional maps this cycle?” A: “That’s correct.”).

“use any political data in drawing congressional maps.” Ex. D, Davenport Dep. Tr. at 77:5–11. She also never generated reports with “political data or electoral performance data for any member of the [L]egislature.” *Id.* at 120:24–121:2.

C. The Need to Rebalance District Population and Traditional Redistricting Criteria Do Not Explain the Split of Pulaski County.

Arkansas law does not establish any redistricting criteria the Legislature must follow. *See* Ex. D, Davenport Dep. Tr. at 131:22–132:5. And nothing in the record suggests that the Legislature adopted any required redistricting criteria for the 2021 redistricting cycle. Rather, legislators were made aware of the U.S. Constitutional requirement of one person, one vote and general redistricting principles (discussed in more detail below) through a joint session presentation conducted by the BLR. *See* Mot. Ex. 11, Burch Rep. at 25–26. The legislative record reflects that the Legislature’s stated goals were chiefly focused on (1) rebalancing the population of each district to be within 1% of the ideal population size, (2) keeping counties and cities whole, and (3) respecting communities of interest. *See id.* at 25, 27.

But these goals do not explain the Plan the Legislature enacted. Had these traditional race-neutral criteria been the sole guideposts for the map-drawing process, the Plan would have looked very different. The Legislature could have enacted a plan that performed even better at equalizing the population—with only 0.02% population deviation as compared to the Plan’s 0.09% population deviation—and that, on balance, performed equally well or better than the Plan in adhering to traditional redistricting principles. *See* Mot. Ex. 3, Cooper Rep. ¶¶ 66–68, figs. 23–25 (showing Alternative Plan 1). A map adopted with neutral criteria could have made these improvements without the same stark racial disparities as the Plan.

Figure 23: Alternative Plan 1

Notably, as explained in more detail *infra*, the legislative record provides no indication that lines were drawn to achieve a partisan advantage, *see infra* ARGUMENT, Section I.B.2(a)(ii), and no indication even that political data was available to legislators (much less used in the mapping process), *see infra* ARGUMENT, Section I.B.2(a)(i). As noted above, in her analysis of the legislative record, Dr. Traci Burch observed that the Legislature's stated goals were chiefly focused on (1) rebalancing the population among the four districts, (2) avoiding splitting political subdivisions, and (3) keeping communities of interest together. *See* Mot. Ex. 11, Burch Rep. at 25, 27. These redistricting goals, which had broad, bipartisan support, were ultimately abandoned in favor of a map that split Pulaski County three ways. *See id.* at 25.

The legislative record shows that when legislators discussed adhering to the one person, one vote requirement, they spoke of keeping population deviations under 1%. *See id.* at 27–28 (“It was the very sincere desire of folks in both the House and Senate to have maps that kept deviations between the four districts at or below 1 percent, plus or minus.” (quoting Representative David Whitaker)). For example, Representative Nelda Speaks, the sponsor of the House version of the Plan and leading legislator on congressional redistricting, described the population deviation of her first bill, HB1959, as “quite a bit below the one percent.” *See id.* at 27.

The record also reveals another priority was keeping counties whole. *Id.* at 29. Indeed legislators expressed the view that small differences in population under the target one percent threshold were tolerable if that allowed the counties to remain whole. *Id.* at 31–32. Chairman Dwight Tosh, Chair of the House Committee considering proposed congressional maps, specifically articulated a desire for legislators to draft bills that kept counties whole knowing that it “may increase a difference in the [population] numbers.” *Id.* at 29–30.

Several Republican and Democratic members explicitly noted that their primary goal was to keep counties whole. *Id.* at 30. For example, Representative Speaks (R) stated: “My whole goal was not to separate and divide these counties. It is such a problem when you do this.” *Id.* at 30–31. Senator Matthew Pitsch (R) argued against splitting counties saying that it was “a very detrimental thing.” *Id.* at 31. In addition, Senator Mark Johnson (R), Senator Clarke Tucker (D) and Representative Fredrick J. Love (D) all discussed the importance of keeping counties whole and argued against splitting them. *See id.* at 31–32.

Finally, legislators were concerned with keeping communities of interest together. In particular, legislators repeatedly discussed Pulaski County and the greater Little Rock

metropolitan area as communities of interest. *See id.* at 34–35. Explaining why Pulaski County should remain whole as a community of interest, Senator Tucker explained:

[W]e do a lot of big projects here, and it takes cooperation between the county, the municipalities, the state government, and the federal government to do a lot of these projects, and it becomes more cumbersome and more complicated if you're dealing with multiple members of Congress through that process.

Id. at 35. Representative Jamie Scott also emphasized that splitting Pulaski County across three Congressional districts was “not good for economic development, and it is not good for representation.” *Id.*

Other potential redistricting criteria like ensuring districts are compact and that the new districts retain the core of prior districts (i.e., core retention) were infrequently discussed or altogether absent in the legislative record. *See* Mot. Ex. 14, Burch Dep. Tr. at 50:13–51:20. As Dr. Burch explained in her deposition testimony, “[N]ot only were [core retention and compactness] not discussed much . . . there wasn't much discussion of people comparing maps based on those principles.” *Id.* Core retention and compactness were never mentioned when legislators made statements about what they considered important criteria. *See id.*

The legislative record is likewise devoid of any suggestion that partisan gerrymandering was a redistricting objective. For example, Senator Jason Rapert (R)—Chair of the Senate Committee considering proposed congressional maps and an outspoken critic of partisan gerrymandering—expressly touted the Plan because it purportedly was “not all crossed up and gerrymandered like it was in 2011.” Ex. G, Rapert, Senate Chamber, Oct. 6, 2021 (Burch-CMA-0001057 at 1143). And Defendant has not—because he cannot—identify any contemporaneous

record evidence showing the Legislature prioritized partisan advantage.³ Mot. Ex. 10, Rapert Dep. Tr. at 8:3–17.

Dr. Burch’s analysis of the legislative record shows “that partisan and other alternative motivations do not sufficiently account for the enacted plan and its impact on minority voters.” Mot. Ex. 11, Burch Rep. at 51. The Legislature spent very little time discussing its motivations for passing the Plan, including those related to partisanship, during legislative debates. *See id.* In fact, supporters of the map, including some of its drafters, expressly denied the importance of partisanship to the process. *Id.* at 52–53. Senator Bart Hester (the sponsor of SB721, which also divided Pulaski County three ways), Senator Alan Clark, Senator Rapert, Representative Aaron Pilkington, Senator Johnson, Senator Tucker, Representative Monte Hodges, and Representative Andrew Collins all disavowed the relevance of partisanship in shaping the maps. *Id.* Senator Rapert also reaffirmed that partisanship was not a factor during his deposition. *Id.* at 53; Mot. Ex. 10, Rapert Dep. Tr. at 24:4–7. Moreover, legislators were presented with maps “that would have reliably elected a Republican” in CD2 “without cracking the Black vote.” *Id.* at 51.

Furthermore, several maps were introduced to the Legislature for consideration that met the broadly supported, bi-partisan goals of rebalancing district populations to within 1% of the ideal population size, keeping counties and cities whole, and keeping communities of interest together. For example, Representative Jim Dotson (R) introduced HB1963 which had a population deviation of $\pm 0.1\%$ for CD1 and CD2 and 0% for CD3 and CD4. His plan had only

³ Defendant cites a comment by Senator Rapert when he recalled that “[i]f partisanship was ever discussed, I would say it would just be a side note that somebody made about that.” Mot. at 30 (quoting Mot. Ex. 10, Rapert Dep. Tr. at 24:7–9). Defendant also cites another comment from Senator Rapert that unspecified “people” may have used Dave’s Redistricting which had political data. *See id.* at 24:11–14. Neither of these off-handed comments establishes that the Legislature had a partisan purpose in enacting the Plan.

two county splits, but did not split Pulaski County. *See id.* Representative Stephen Meeks (R) introduced HB1966 which had a population deviation of 0.15% in CD1, 0.09% in CD2, -0.08% in CD3, and -0.017% in CD4. Representative Meeks’ plan did not split any counties. *See id.* Senator Breanne Davis (R) introduced SB726 which had a population deviation of $\pm 0.1\%$ for CD1 and CD2 and 0% for CD3 and CD4. Senator Davis’s plan split three counties, but did not split Pulaski County. *See id.*

D. Partisanship Does Not Explain the Design of CD2.

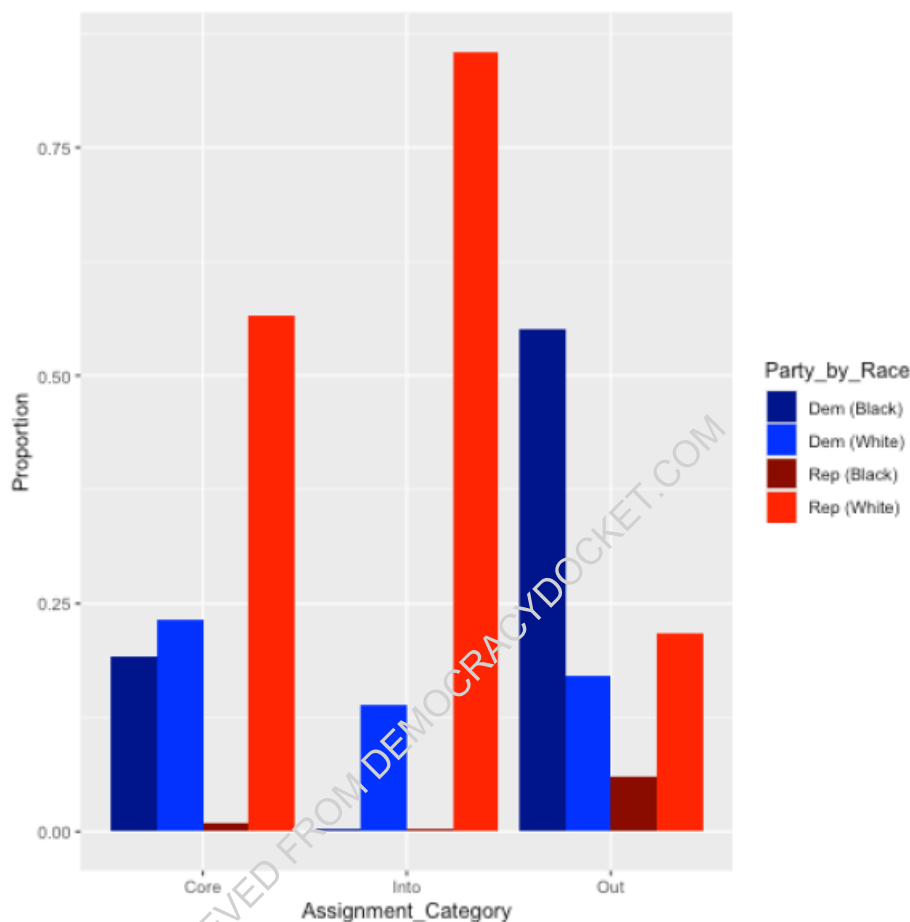
Plaintiffs have offered the unrebutted testimony of Dr. Baodong Liu, a political scientist, who, based on a rigorous statistical analysis, determined that race better explains the cracking of Pulaski County than hypothetical partisan concerns. Indeed, his unrebutted testimony establishes that partisan motivation is “not a statistically supportable alternative explanation” for the racial disparities exhibited by the map. Ex. C, Liu Rep. at 4.

Dr. Liu conducted a statistical analysis that estimated the partisan breakdown along racial lines for the groups of voters retained (“Core”), moved into (“Into”), and moved out (“Out”) of CD2. Table 6 and Figure 4, shown below, illustrates this racial and partisan breakdown using the 2020 Presidential Election information. Ex. C, Liu Rep. at 21–22.

Table 6:
Race v Party among “Core” “Into” and “Out” groups in Congressional District 2 of the 2021 Enacted Plan, based on the 2020 Presidential Election

	White_Dem	Black_Dem	White_Rep	Black_Rep
Core	67,963 (23%)	56,345 (19%)	166,390 (57%)	2,965 (1%)
Into	1,625 (14%)	38 (.3%)	9,957 (86%)	26 (.2%)
Out	1,770 (17%)	5,685 (55%)	2,251 (22%)	631 (6%)

Figure 4: Visual Presentation of Party by Race in CD2, based on the 2020 Presidential Election



The Core designation in Figure 4 shows that white voters are disproportionately retained within CD2 as compared to their Black counterparts from the same party.⁴ *Id.* at 22. The Into designation in Figure 4 shows that white voters are also disproportionately moved into CD2 as compared to their Black counterparts of the same party. *Id.* at 22–23. And the Out designation

⁴ Figure 4 shows how race plays a role when the party is held constant. The two blue bars show the shares of Democratic voters, and the two red bars represent Republican voters. The darker color (dark blue and dark red) denotes Black voters while the lighter color shows white voters. Ex. C, Liu Rep. at 22.

in Figure 4 shows how Black Democrats were disproportionately moved out of CD2 at higher rates than white Democrats. *Id.* at 23. The Out designation also shows that white Republicans were moved out of CD2 at higher rates than white Democrats. *Id.* “[I]f affiliation with the Democratic party were the reason for why Black Democrats were moved out disproportionately, one should have seen the lighter blue bar [of Figure 4] at roughly the same height . . . But that was not true, as more white Republicans than white Democrats were moved out. The bar graph, therefore, shows that rather than favoring a political party, the configuration of CD2 in the 2021 Enacted Plan puts much more weight on race.” *Id.*

Dr. Liu then performed a statistical significance test and determined with “more than 99.9% confidence” that race was associated with a voter’s assignment in relation to CD2—that is, whether the voter remained in CD2, was moved into CD2, or was moved out of CD2 under the Plan—regardless of the voter’s political affiliation. *Id.* at 24, table 7, fig. 5. Therefore, Dr. Liu determined that Black Democrats were the *least* likely to be moved into CD2 and the *most* likely to be moved out of CD2. *Id.* at 25. In other words, Dr. Liu’s statistical analysis shows that race, rather than party, more likely explains the design of CD2 in the Plan.

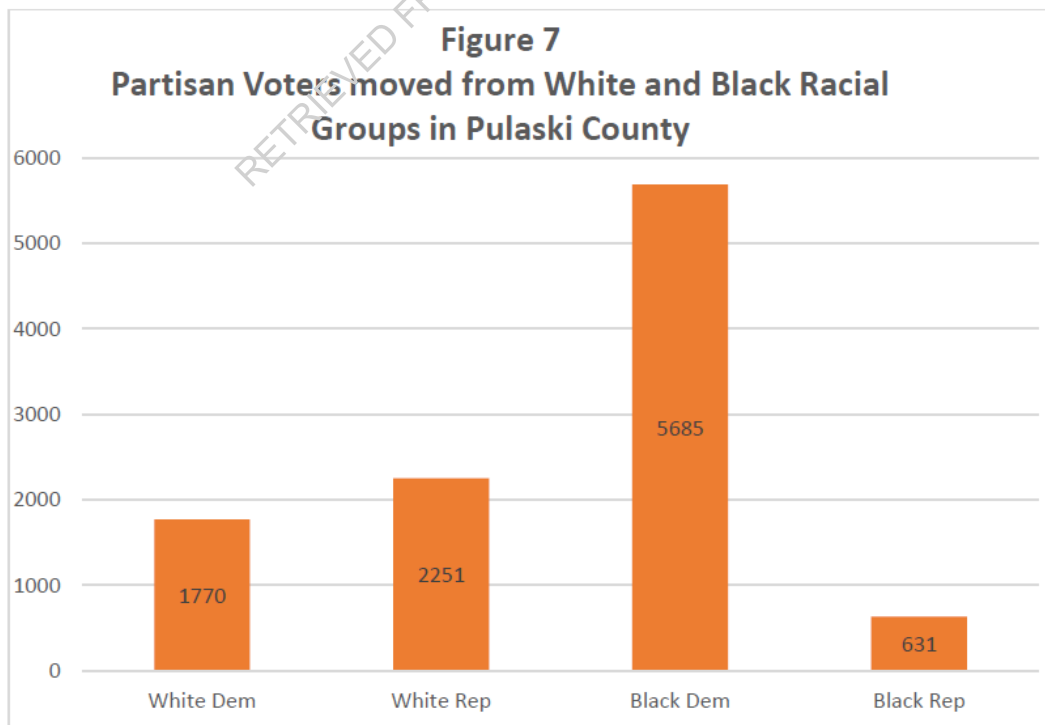
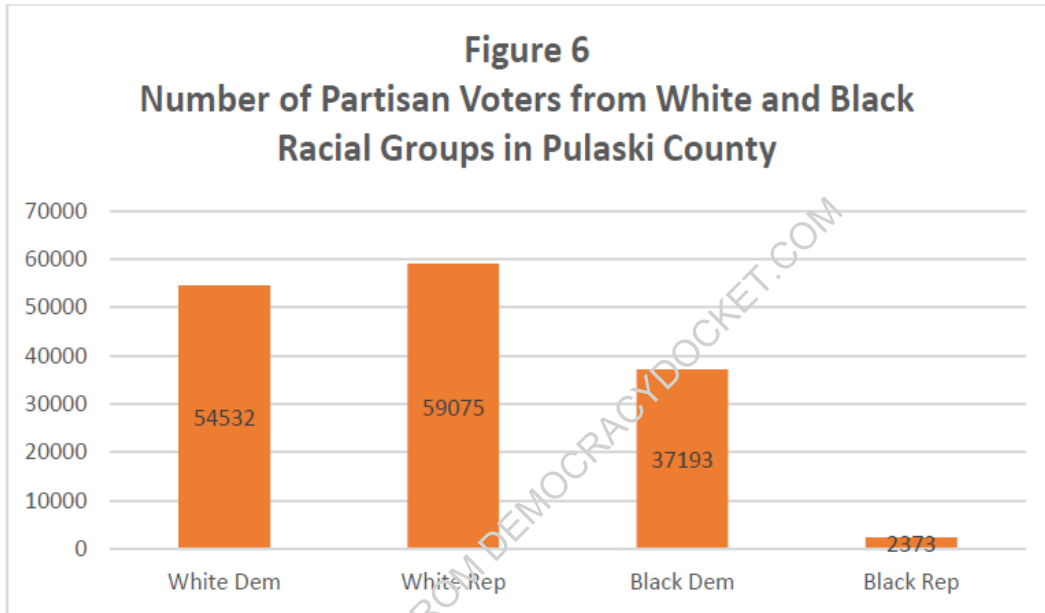
Table 7:
Pearson Residuals for Race v Party in CD2 of Enacted Plan, based on the 2020 Presidential Election

	White_Dem	Black_Dem	White_Rep	Black_Rep
Core	6.13	-5.81	.55	-6.97
Into	-19.70	-47.10	41.54	-9.32
Out	-11.72	81.02	-47.05	47.05

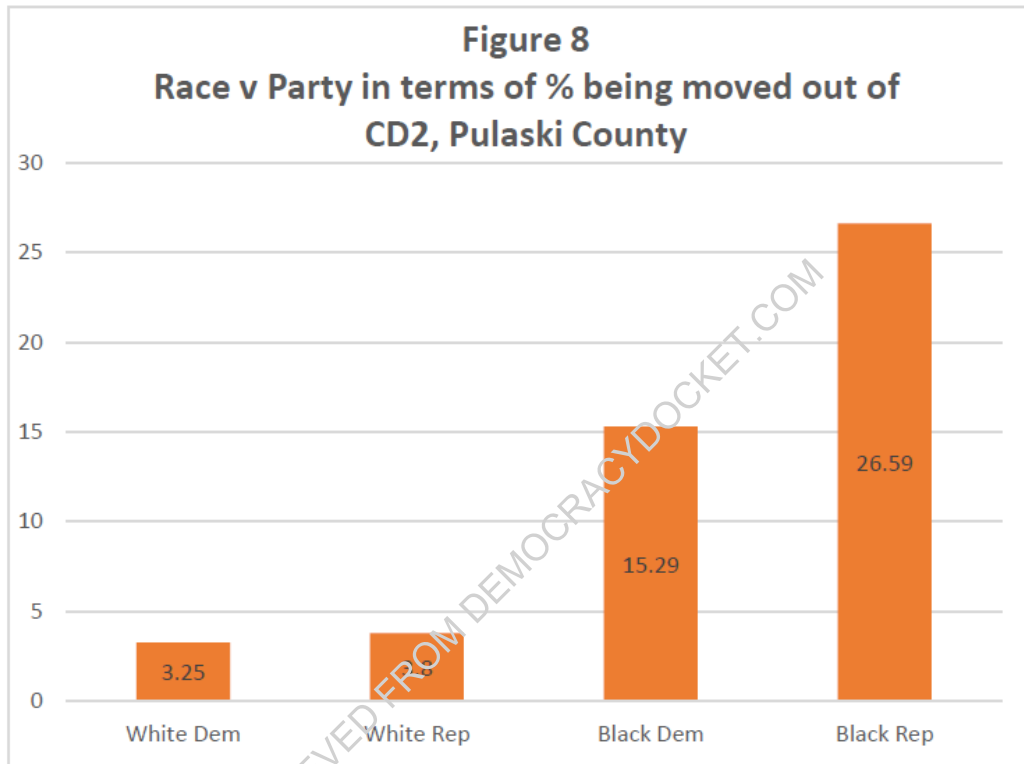
Pearson’s Chi-square test statistics=15667.14 (p<.001)

Analyzing the changes for Pulaski County, Dr. Liu likewise determined that race rather than political party better explained the way the Plan split Pulaski County. Dr. Liu found that Black Democratic voters were moved out of Pulaski County at higher rates than the white Democrats.

Id. at 27. Additionally, although “Black Democrats in Pulaski County were outnumbered by both white Democrats and white Republicans, [Black Democrats] were in fact the racial/partisan subgroup that was moved out of CD2 in the largest number by [the Plan].” *Id.* at 28. *Cf.* Figure 6 (overall number of partisan voters in Pulaski County), *with* Figure 7 (number of partisan voters moved out of Pulaski County).



Additionally, as compared to white voters of the same party, Black voters were much more likely to be moved out of CD2 in Pulaski County by [the Plan].” *Id.* at 29, fig. 8. Dr. Liu’s statistical, empirical analysis concluded “that race, rather than partisan preference, better explains the changes made of CD2 specifically within Pulaski County in [the Plan].” *Id.* at 31.

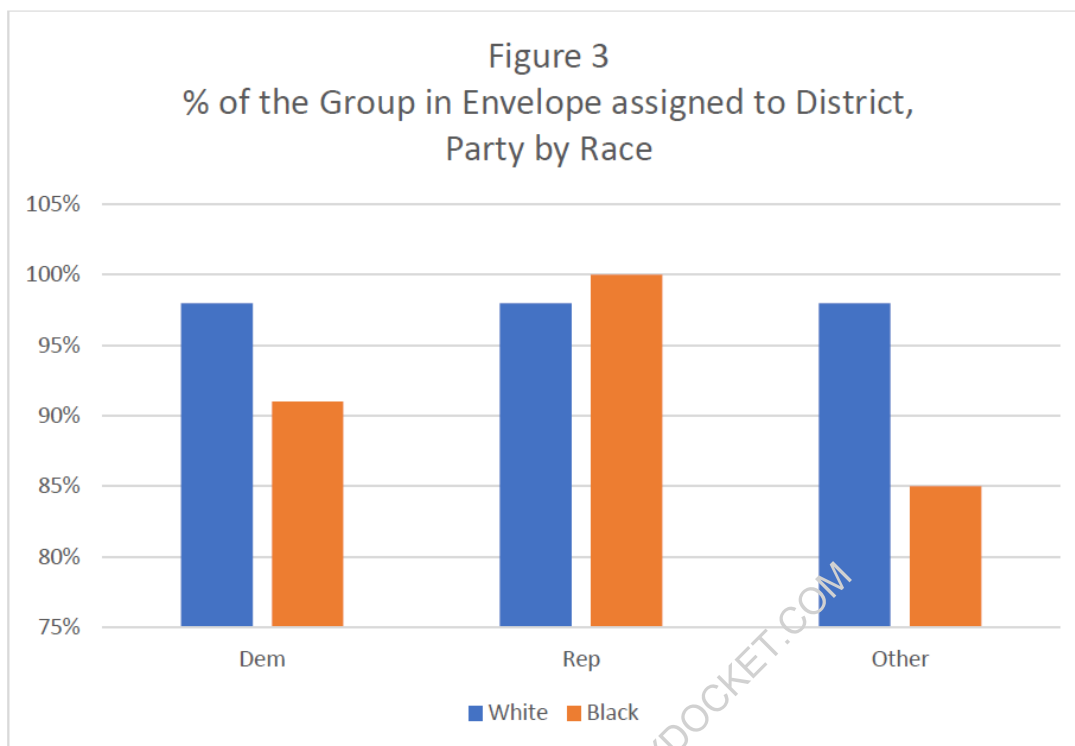


In addition to the Core/Into/Out analysis, Dr. Liu also conducted an “envelope” analysis. Dr. Liu’s “envelope” analysis is based on the statistical method originally proposed by Dr. Stephen Ansolabehere in *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016) and approved by the Supreme Court in *Cooper v. Harris*, 581 U.S. 285 (2017) to evaluate whether race was a consideration in assigning voters to a disputed district. Ex. C, Liu Rep. at 7. The “envelope” analysis begins with the premise that map-drawers will pull from a larger base area—the “envelope”—when assigning voters to a given district and assumes no relationship between the redistricting process and race (or partisan affiliation) before engaging in the empirical

analysis. *Id.* at 7, 11. From there, Dr. Liu used descriptive statistics to determine whether a particular group—be it racial or partisan—was treated differently from any others in its assignment to CD2. *Id.* at 11, 17. In examining Democrats, Republicans, and non-voters or third-party voters (“Others”), Dr. Liu found that: (1) Black Democratic voters were 7 percentage points less likely than white Democratic voters to be assigned to CD2 from the available envelope counties; (2) Black “Other” voters were 13 percentage points less likely than their white counterparts to be assigned to CD2; and (3) Black and white Republican voters had similar rates of assignment to CD2. *Id.* at 18–19, table 3, fig. 3.

**Table 3:
Enacted CD 2 and Assignments of Voters from Envelope—race v. party based on the 2020
Presidential Election**

Group	VAP in Envelope	VAP in District	(% of the Group in Envelope assigned to District)
White_Dem	66,820	65,263	(98%)
Black_Dem	59,397	54,133	(91%)
White_Rep	180,660	176,467	(98%)
Black_Rep	2,474	2,849	(100%)
White_other	164,986	161,157	(98%)
Black_other	72,630	61,729	(85%)



Plaintiffs' expert Bill Cooper's Alternative Plans 2 and 3 also demonstrate that partisanship is not a good explanation for the Plan. Cooper provided two additional alternative plans that both meet the one person, one vote requirement; that, on balance, perform equally well or better than the Plan on traditional redistricting principles; that perform comparably well in achieving a partisan advantage for Republicans; and that keep Pulaski County and its longstanding Black communities intact. *See* Ex. H, Final Cooper Dep. Tr. at 123:23–124:22, 222:22–223:5; Mot. Ex. 3, Cooper Rep. ¶¶ 70–72, fig. 26–28; Ex. I, Corrected Cooper Rebuttal Rep. ¶¶ 14–15, 17, figs. 1–3. As Defendant's expert, Bryan, stated, an improvement in political performance or partisan advantage is defined as "any amount of improvement in a race that was . . . a higher percent than what it would have been under the 2011 plan." Ex. B, Bryan Dep. Tr. #1 at 246:18–247:4. That could be as little as 0.01% increase. *See id.* at 247:6–9. Cooper's Alternative Plans 2 and 3 clearly meet this standard.

Alternative Plan 2 shows that the Legislature could have drawn a map with comparable partisan effect, but that better adhered to traditional redistricting principles than the Plan.

Alternative Plan 2 improves Republican performance by 0.9–1.3% across all five 2022 election contests that Defendant’s expert considered. *See* Mot. Ex. 9, Bryan Supp. Rep. ¶ 33, table VII.A.2.

Table VII.A.2 2022 Political Performance Difference from 2011 Enacted Plan in D2 by Plan

2022 Race	2021 Enacted	Cooper Alt1	Cooper Alt2	Cooper Alt2
Senate	2.0%	-0.6%	0.9%	4.3%
Congressional	2.0%	-0.5%	1.3%	4.9%
Governor	2.0%	-0.6%	1.1%	4.8%
Attorney General	2.0%	-0.6%	1.0%	4.0%
Secretary of State	2.0%	-0.6%	0.9%	4.1%

Moreover, Alternative Plan 2 creates less than a percentage point difference in partisan performance between it and the Plan. *See* Ex. H, Final Cooper Dep. Tr. at 124:8–14, 236:18–237:3; Mot. Ex. 3, Cooper Rep. at 42, fig. 28.

Figure 28: Redistricting Metrics – Enacted vs. Alternative Plan 2

Metric	2021 Enacted	Alternative Plan 2
Total Split Counties*	2	1
Total County Splits*	5	2
VTD Splits*	0	0
Split Municipalities*	6	2
Municipal Splits*	12	4
Core-based Statistical Area splits*	11	8
Unified School District splits*	84	59
One-person, one-vote (deviation)	0.09%	0.12%
DRA Compactness (higher=better)#	59	43
Core Retention	92.16%	80.31%
Incumbent Conflicts	0	0
CD 2 BVAP	20.33%	22.26%
CD 2 Trump	56.7%	55.7%
CD 2 Biden	43.3%	44.3%

Alternative Map 3 shows the Legislature could have enacted a plan that achieved even higher level of partisan effect than the Plan with comparable performance on traditional redistricting principles without cracking Pulaski County. *See* Ex. I, Corrected Cooper Rebuttal Rep. ¶¶ 7–9, 14, figs. 1–3.

Figure 3: Redistricting Metrics – Benchmark & Enacted v. Alternative 3

	2011 Benchmark	2021 Enacted	Alternative 3
Total Split Counties*	5	2	1
Total County Splits*	10	5	2
VTD Splits*	1	0	0
Split Municipalities*	5	6	8
Municipal Splits*	10	12	16
Core-based Statistical Area splits*	13	11	5
Unified School District splits*	100	84	87
One-person, one-vote (deviation)	20.26%	0.09%	0.27%
DRA Compactness higher=better) #	41	59	62
Core Retention	NA	92.16%	73.53%
Incumbent Conflicts	0	0	0
CD 2 BVAP	22.64%	20.33%	20.1%

Alternative Plan 3 increases Republican performance nearly four-fold as compared to the 2011 Plan increasing performance by 4.0–4.9% across all five 2022 election contests examined by Defendant’s expert. *See* Mot. Ex. 9, Bryan Supp. Rep. ¶ 33, table VII.A.2. Moreover, Alternative Map 3 clearly outperforms the Plan by increasing Republican performance by nearly two percentage points. *See* Ex. H, Final Cooper Dep. Tr. at 124:15–22, 216:11–20, 245:11–17, 246:12–23; Ex. I, Corrected Cooper Rebuttal Rep. at 10, fig. 5.

Figure 5: Partisan Metrics: Enacted v. Alternative Plans 2 and 3

Metric	2021 Enacted	Alternative 2	Alternative 3
2020 Election (Head-to-Head)			
CD 2 R – Trump	56.7%	55.7%	58.3%
CD 2 D – Biden	43.3%	44.3%	41.7%
Republican Margin	13.4%	11.4%	16.6%
2022 Election (Head-to-Head)			
CD 2 R – Boozman	60.00%	60.0%	60.82%
CD 2 D – James	40.00%	40.0%	39.18%
Republican Margin	20.00%	20.0%	21.64%

II. FACTS SUPPORTING INTENTIONAL VOTE DILUTION CLAIM.

A. The Plan Has a Discriminatory Impact on Black Voters in CD2.

As described above, the undisputed record shows that the Plan divided Black voters in southeast Pulaski County among three Congressional districts (CDs 1, 2, and 4). Mot. Ex. 1, Bryan Rep. at 101, Appendix D.1. A significant number—nearly 22,000 Black voters from Pulaski County—were removed from CD2 where they had previously been assigned in the 2011 Plan. Mot. Ex. 3, Cooper Rep. ¶ 57, fig. 19; Mot. Ex. 1, Bryan Rep. at 101, Appendix D.1. Prior to the Plan’s three-way split of Pulaski County, the County had been assigned in its entirety to a single congressional district since at least the 1980 redistricting plan. *See* Ex. J, Cooper Rep. Exhibits C-1 to C-4.

As discussed above, the undisputed record also shows that the Plan treats Black voters differently than white voters in sorting them among districts, even when those voters are affiliated with the same political party. Ex C, Liu Rep. at 21–25; *see* Ex. B, Bryan Dep. Tr. #1 at 189:3–190:3 (conceding that he did not conduct analyses to assess allegations that white Democratic voters were included in the redrawn CD2 at a notably higher rate than Black Democratic voters within the same counties at issue and that white unaffiliated voters were

included in CD2 at a notably higher rate than Black unaffiliated voters within the same county). And it is undisputed that in disproportionately removing Black voters from CD2, the Legislature disregarded traditional redistricting principles as to CD2 by splitting counties, municipalities, school districts, and judicial district boundaries, breaking up longstanding Black communities of interest in CD2, and reducing the BVAP in CD2 from 22.6% in the 2011 enacted plan, when using 2020 Census data, to 20.3% in the Plan. *See* Mot. Ex. 3, Cooper Rep. ¶¶ 14 (explaining traditional redistricting principles), 62 (stating that the Plan’s improvement on certain redistricting metrics “came with an unnecessary removal of concentrations of significantly or predominately Black precincts and an unnecessary division of a longstanding Black community of interest in central and southeast Pulaski County”); Mot. Ex. 1, Bryan Rep. at 42 (acknowledging that “splits of political geographies should be minimized”).

The more than 2% decrease in BVAP under the Plan as compared to the 2011 Plan negates the 10% BVAP growth in Pulaski County between 2010 and 2020. *See* Mot. Ex. 1, Bryan Rep. at 90, Appendix A.2. The reduction of BVAP follows a decades-long pattern of reducing the Black population in the Congressional district in which their representation among persons of voting age was greatest, *see* Mot. Ex. 3, Cooper Rep. ¶¶ 17–19, fig. 1, and occurred at a time when the statewide Black population was growing and the white population was decreasing, *see id.* ¶¶ 33–39, figs. 10, 13.

Figure 1: BVAP by District 1981 Plan to 2021 Plan³

Enacted Plans	% BVAP				BVAP % from Benchmark Plans
	CD 1	CD 2	CD 3	CD 4	
2021 Enacted (2020 Census)	16.89%	20.33%	3.56%	19.76%	-2.31%
2011 Benchmark (2020 Census)	17.23%	22.64%	3.48%	18.84%	-0.65%
2001 Benchmark (2010 Census)	15.06%	19.47%	2.46%	23.29%	-1.18%
1991 Benchmark (2000 Census)	15.32%	17.56%	1.73%	24.47%	-0.19%
1981 Benchmark (1990 Census)	15.13%	15.12%	1.87%	24.66%	NA

Figure 10: Arkansas – 2010 and 2020 Population by Race and Ethnicity⁹

	2010 Number	Percent	2010 Number	Percent	2020 Number	Percent	2010-2020 Change	2010-2020 % Change
Total Population	2,915,918	100.00%	2,915,918	100.00%	3,011,524	100.00%	95,606	3.28%
NH white	2,173,469	74.54%	2,173,469	74.54%	2,063,550	68.52%	-109,919	-5.06%
Minority Subtotal	742,449	25.46%	742,449	25.46%	947,974	31.48%	205,525	27.68%
Latino	186,050	6.38%	186,050	6.38%	256,847	8.53%	70,797	38.05%
Any Part Black	468,710	16.07%	468,710	16.07%	495,968	16.47%	27,258	5.82%

Figure 13: Pulaski County – 1990 -2020 Population by Race and Ethnicity

	1990 Number	1990 Percent	2010 Number	Percent	2020 Number	Percent	2010-2020 Change	2010-2020 % Change
Total Population	349,660	100.00%	382,748	100.00%	399,125	100.00%	16,377	4.28%
NH white	250,549	71.66%	211,697	55.31%	193,993	48.60%	-17,704	-8.36%
Minority Subtotal	99,111	28.34%	171,051	44.69%	205,132	51.40%	34,081	19.92%
Latino	3,199	0.91%	22,168	5.79%	33,153	8.31%	10,985	49.55%
AP Black (SR in 1990)	91,976	26.30%	137,860	36.02%	151,682	38.00%	13,822	10.03%

The Plan disrupts this growing core of Black voter political influence, singling out Pulaski County for a three-way split even though it was historically wholly within CD2. *See* Mot. Ex. 1, Bryan Rep. at 101, Appendix D.1; Ex. J, Cooper Rep. Exhibits C-1 to C-4.

B. The Legislature Disregarded Concerns About the Plan's Adverse Racial Impact.

The Legislature was aware of but refused to address the adverse racial impacts of the Plan. At the onset of the 2021 Congressional redistricting cycle, legislators knew they were

permitted to consider race to avoid crafting a map with discriminatory effects. *See* Mot. Ex. 11, Burch Rep. at 38–39 (“In both presentations before the House and Joint State Agencies and Governmental Affairs Committees, Ms. Davenport went on to emphasize that one way that it is permissible to consider race is ‘for drawing or adjusting a district based on racial considerations in order to avoid a violation of the Voting Rights Act.’”). Legislators were also aware of the racial demographics of Pulaski County and CD2. *See id.* at 38, 41–45. And yet, supporters of HB1982 and SB743, the bills ultimately enacted as the Plan, claimed not to be aware of the racial impact of the Plan when pressed to explain why they were proposing a plan that would trisect a Black community of interest. *See id.* at 45–47.

Rather, the authors of the bills *acknowledged and agreed with* the warnings. When Senator Tucker told Senator Jane English, the author of SB743 the Senate version of the Plan, that splitting Pulaski County three ways would hurt members of that community more than other constituents, Senator English replied “I don’t disagree with a lot you said.” *Id.* at 50. A number of other legislators provided additional warnings regarding the disproportionate adverse impact of the Plan on racial minorities in Pulaski County. *See id.* at 41–44. Proponents of the bills did not dispute these statements. *See id.* at 43.

Moreover, on the evening before the bills were passed, Governor Hutchinson warned legislators of the potential dilutive effects of the proposed map, saying “I would urge (lawmakers) that you do not want to dilute minority representation or influence in congressional races.” *Id.* at 44. The next day, after the bills were passed, Hutchinson expressed that he was “concerned about the impact of the redistricting plan on minority populations” and “the removal of minority areas in Pulaski County into two different congressional districts,” and refused to

sign the redistricting legislation. *Id.* (quoting 3:20. Frizzell, Casey. 2021. “Arkansas Congressional Redistricting Bills to Go Into Law without Governor’s Signature.”).

C. The Legislative Process Was Rushed and Opaque.

Dr. Burch’s unrebutted testimony, which examined the full legislative record, explains that the Legislature pushed forward the Plan in a rushed, opaque process that disregarded their own agreed-on process. *See* Mot. Ex. 11, Burch Rep. at 6–14. In August 2021, the Joint House and Senate Committee on State Agencies and Governmental Affairs agreed on a process where bills were to be submitted and then heard on predefined dates in September. *See id.* at 7. All bills would then be ranked at the end of the process. *Id.* On September 29, 2021, the House Committee ranked all of the proposed bills,⁵ and HB1971, sponsored by Representative Speaks, received the most votes. *Id.* The House Committee amended HB1971 on September 30. However, no additional substantive action was taken until October 4. *Id.* at 8. On October 4, without explanation, the Legislature departed from the agreed-on process to introduce HB1982 and SB743. *Id.* at 8–9. The bills were voted on the next morning and were ultimately enacted on October 7. *Id.* Both Republican and Democratic legislators objected to the process’s speed and to its lack of transparency. *Id.* at 10. Senator Keith Ingram (D) raised concerns that the bills’ supporters were “trying to rush something through.” *Id.* at 11. Representatives Rick Beck (R), John Payton (R), and Fred Allen (D) also commented that the process was rushed.

Representative Payton said:

I’m sure most of you probably didn’t even see the map until 15 minutes ago, but this bill was rushed. It was being modified right up to the last minute yesterday. It was rushed through committee yesterday, and this amendment is evidence of that. It needs [to be] corrected because it was rushed.

Id. Representative Allen stated:

⁵ The Senate never ranked the bills. Mot. Ex. 11, Burch Rep. at 18.

And there's no sense enough rushing to get this bill passed when all we have to do is spend a little bit more time, energy, and effort to correct it and to come up with something that's workable for everyone.

Id.

Several Republican legislators also commented on the lack of transparency in the process of drafting HB1982 and SB743. Senator Bob Ballinger stated:

And otherwise, I will feel like it's just a matter of the committee process getting rolled over, and pushed over and frankly things not being deliberated in the open, the way it's supposed to be.

Id. at 12. Similarly, in explaining his "no" vote for HB1982 despite liking the overall Plan, Representative Beck said:

I do appreciate the process, at least the way we started it. . . . I can't vote for this because the process in which we got here I think was less than transparent

Id. Senator Pitsch also criticized the process:

I keep missing the after-hours meeting, because I get phone calls from people late at night, we carved up your county again, it's not there.

Id. Despite this chorus of criticism, proponents of the bills forged ahead, extracting the bills out of committee over bipartisan objections, introducing and passing the bills during a period of less than 14 hours, with much of the work occurring overnight. *See id.* at 10, 19–23. As purported justification for the rushed process and the limitations on amendments, President Pro Tempore Jimmy Hickey explained that spending more time on discussion and debate would result in hearing additional complaints about the impact on Pulaski County. *Id.* at 23.

ARGUMENT

Following discovery, myriad material factual disputes require trial to be held on Plaintiffs' racial gerrymandering claim under the Fourteenth Amendment and intentional vote diminishment claim under the Fourteenth and Fifteenth Amendments. Instead of demonstrating a legitimate and defined partisan objective or otherwise meaningfully engaging with the evidence

in the record, Defendant offers thinly supported post-hoc justifications, ignores evidence that supports Plaintiffs' claims, and asks the Court to prematurely weigh evidence and assess expert credibility. The material factual disputes that Defendant's Motion disregards must be resolved at trial.

I. DEFENDANT IS NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' RACIAL GERRYMANDERING CLAIM.

A. Legal Standard.

Racial gerrymandering occurs when "race was the predominant factor motivating the Legislature's decision to place a significant number of voters within or without a particular district." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 187 (2017) (internal citations and quotations omitted). Racial gerrymandering claims apply to the boundaries of individual districts and require district-by-district analysis, though statewide evidence may be considered. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 262–63 (2015) ("ALBC"). Race predominates when "the legislature subordinate[s] traditional race neutral districting principles . . . to racial considerations." *Id.* Those principles may include compactness; contiguity; respecting communities of interest defined by actual shared interests; minimizing county, municipal, and voting tabulation district ("VTD") or precinct splits; incumbency; and constituent consistency. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995).

Courts have found, for example, that "the division of counties, municipalities, and precincts may be evidence of racial predominance." *Covington v. North Carolina*, 316 F.R.D. 117, 137 (M.D.N.C. 2016), *aff'd*, 581 U.S. 1015 (2017). "Race may predominate even when a reapportionment plan respects traditional principles," however, and plaintiffs need not show that there was "a conflict or inconsistency between the enacted plan and traditional redistricting criteria." *Bethune-Hill*, 580 U.S. at 189–90; *see also Clark v. Putnam Cnty.*, 293 F.3d 1261, 1270

(11th Cir. 2002) (“The fact that other considerations may have played a role in . . . redistricting does not mean that race did not predominate.”). Evidence of disparities in the racial makeup of voters shifted in and out of districts may also help show racial predominance. *See, e.g., Cooper v. Harris*, 581 U.S. 285, 310 (2017).

Compliance with the one person one vote requirement cannot justify sorting voters based on race. In a court’s holistic analysis, “the requirement that districts have approximately equal populations is a background rule against which redistricting takes place.” *ALBC*, 575 U.S. at 273. It “is not a factor to be treated like other nonracial factors when a court determines whether race predominated over other, ‘traditional’ factors in the drawing of district boundaries.” *Id.*

Using race as the predominant means of sorting voters is unconstitutional even if done for a partisan objective. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 8 n.1 (2024). Indeed, “[a] plaintiff can also establish racial predominance by showing that the [L]egislature used ‘race as a proxy’ for ‘political interests.’” *Id.* (quoting *Miller*, 515 U.S. at 914); *see also Cooper*, 581 U.S. at 308 n.7 (“[T]he sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics.”). If a defendant raises a partisanship defense, the court needs “[t]o untangle race from other permissible considerations,” which in turn “require[s] the plaintiff to show that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.” *Alexander*, 602 U.S. at 7 (internal citation and quotations omitted). A plaintiff in a circumstantial-evidence-only case may need to produce an alternative map to rebut a properly supported partisanship defense. *Alexander*, 602 U.S. at 34.

The predominance inquiry does not permit a defendant to rely on post-hoc justifications. Traditional redistricting factors are subordinated to race if they are considered “only after the

race-based decision ha[s] been made.” *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (*Shaw II*).

Accordingly, “[t]he racial predominance inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality did not.” *Bethune-Hill*, 580 U.S. at 799. Once a plaintiff establishes that race predominated, the burden shifts to the defendant to “demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest.” *Id.* at 801 (quoting *Miller*, 515 U.S. at 920). Because Defendant has not put forward any evidence of a compelling government interest to support race-based line drawing, the question here is whether the record evidence supporting the racial gerrymandering claim, construed in the light most favorable to Plaintiffs, shows race predominated over other criteria.

B. Race Predominated in the Drawing of CD2.

Plaintiffs have assembled more than sufficient evidence that race was the predominant factor in the design of the Plan. That is true for the following reasons, each of which Plaintiffs elaborate upon below:

First, Plaintiffs have evidence that the Legislature’s changes to CD2 caused stark racial disparities while repeatedly violating traditional redistricting principles, and that the only contemporaneous race-neutral justification offered for the Plan—rebalancing population and minimizing county splits—cannot explain the decisions that were made. This evidence is discussed further in Section I.B.1.

Second, whether a partisanship goal motivated the design of CD2 remains at most a disputed question of fact. That is so primarily because the record lacks evidence of that the Legislature actually had a partisan motivation. But even if Defendant could rely on a speculative partisanship defense that lacks support in the record, Plaintiffs have still satisfied their burden to show that race predominated over any potential consideration of partisanship. Namely, (1)

Plaintiffs have provided un rebutted expert evidence that race, rather than a political affiliation, more likely explains the design of CD2; and (2) Plaintiffs have provided alternative maps that maintain nearly the same or greater partisanship advantage in CD2, while adhering to traditional redistricting principles comparable to or better than the Plan without splitting Pulaski County. For these reasons, even if the Legislature had some partisan motivation, the record would still reflect that it impermissibly used race as a proxy in pursuit of those partisan goals. These alternative grounds on which Plaintiffs overcome Defendant's unsubstantiated partisanship defense are discussed further in Section I.B.2.

1. *Race Predominated over Traditional Redistricting Principles in the Drawing of CD2.*

a. The Plan Moved a Significant & Disproportionate Number of Black Voters Out of CD2.

First, there is ample evidence—almost all uncontested—of the stark racial disparities in the sorting of voters under the Plan. Cooper and Dr. Liu's analyses show that the Plan moved a significant number of Black voters out of CD2 and that stark racial disparities marked the movement of voters into and out of CD2 when rebalancing populations after the 2020 Census. Mot. Ex. 3, Cooper Rep. ¶¶ 50–59; Ex. C, Liu Rep. at 14–17.

Dr. Liu's analysis found that white voters were much more likely to be moved into CD2 from other districts while Black voters were more likely than their white counterparts to be moved out of CD2. *See* Ex. C, Liu Rep. at 16–17, table 2, fig. 2. That is, 93% of those moved into CD2 were white voters while only 1% of Black voters were moved into CD2. *See id.* Conversely, 52% of Black voters made up those moved out of CD2 while only 31% of white voters were moved out of the district. *See id.* at table 2.

Cooper's analysis likewise shows that the majority of voters in Pulaski County moved out of CD2 were Black. Mot. Ex. 3, Cooper Rep. ¶ 58. Twelve of the fourteen VTDs in Pulaski

County that were removed from CD2 had significant Black populations, ranging from 46.82% to 84.39%. *Id.* ¶ 56. Moreover, in Pulaski County, the Plan retained 94.27% of the white population in CD2, while keeping only 85.56% of the Black population in CD2. *Id.* Even Defendant’s expert, Bryan, found that Black voters were disproportionately moved out of CD2. *See, e.g.,* Ex. B, Bryan Depo Tr. #1 at 171:1–9, 173:9–16 (Q: “Does your own evidence demonstrate both in the table and in the paragraph 28 . . . that in District 2 Black voters were disproportionately moved out of the district irrespective of why? That fact is documented in your testimony.” A: “Yes. They were moved disproportionately.”); *see also* Ex. B, Bryan Depo Tr. #1 at 175:7–13, 177:4–13, 177:17–178:01, 180:7–13; Mot. Ex. 1, Bryan Rep. ¶ 28.

The evidence here is similar to evidence that was credited *after trial* by a three-judge Court to support a finding of racial predominance in a Virginia Congressional plan. In *Page v. Virginia State Board of Elections*, the Legislature “moved over 180,000 people in and out of the districts” despite needing “to achieve an overall population increase of only 63,976 people” to bring those districts into balance. No. 3:13-cv-678, 2015 WL 3604029, at *12 (E.D. Va. June 5, 2015). And among the populations moved out of the underpopulated district, most “were predominantly white, while the populations moved into the District were predominantly African American.” *Id.* So, too, here: the Legislature moved significantly more Arkansans than necessary to rebalance the population of CD2. Mot. Ex. 3, Cooper Rep. ¶¶ 46–48. And in Pulaski County, among the 41,392 persons moved out of CD2, over half were Black, while only 11,120 were white. *Id.* ¶ 58, fig. 19. As in *Page*, the Arkansas Legislature both moved more individuals than was necessary to rebalance CD2 and disproportionately moved one racial demographic. *See id.* ¶¶ 46–48, fig. 14, fig. 19; Mot. Ex. 1 Bryan Rep. ¶¶ 72, 122.

- b. The Plan Subordinated Traditional Redistricting Principles like Respect for Political Subdivisions and Singled Out Black Communities for Disfavored Treatment by Splitting Central/Southeast Pulaski County in Three.

The parties' experts agree that "[i]t is a traditional redistricting principle that splits of political geographies should be minimized." Mot. Ex. 1, Bryan Rep. ¶ 96; *see* Mot. Ex. 3, Cooper Rep. ¶ 14e–f. And the legislative record confirms that the Legislature prioritized avoiding such splits. *See* Mot. Ex. 11, Burch Rep. at 29–34. Nevertheless, the Plan disregards this principle for Black communities of interest by unnecessarily dividing central and southeast Pulaski County into three Congressional districts, and repeatedly splitting political subdivisions within those counties in the process.

Political geographies like counties and cities represent communities of interest. Ex. H, Final Cooper Dep. Tr. at 267:25–269:14. Pulaski County—which has the highest concentration of Black voters in the state—accounts for 38.21% of the state's overall Black population and is a significant community of interest. *See* Mot. Ex. 3, Cooper Rep. ¶ 33. In splitting Pulaski County three ways, the Plan fractures this community of interest. *Id.* ¶ 14e–f. By splitting the central and southeast section of Pulaski County, moreover, the Plan also split municipalities with significant Black populations like Little Rock and North Little Rock. *Id.* ¶¶ 52, 55, fig. 16.

Cooper's report shows that "all or part of 12 neighborhoods (total pop. 15,910; 58.1% Black) in southeast Little Rock were moved out of CD2," including a neighborhood that is now split between CD2 and CD4. *Id.* ¶ 51. The Plan removes 14.55% of the Black population living in Little Rock from CD2 and 16.66% of the Black population living in North Little Rock from CD2. *See id.* ¶ 55. Twenty-three VTDs in "the municipalities of Little Rock, North Little Rock, Jackson, and Sherwood are adjacent to one another but divided by the boundaries of the Plan."

Id. ¶ 52. All twenty-three of these adjacent VTDs were together in CD2 under the 2011 Plan. *See id.*

Defendant argues that splitting municipalities is an inevitable consequence of splitting counties. Mot. at 33. But that is no justification where the splitting of *Pulaski County* is unnecessary, and where Pulaski County was targeted for an unprecedented *three-way* split that radically departed from historical practice and the treatment of other counties in the Plan. That splitting Pulaski County across three districts also entailed splitting multiple municipalities illustrates the Plan’s lack of respect for political subdivisions. The purported justifications for the changes to CD2—such as rebalancing the population, complying with race-neutral traditional redistricting principles, and minimizing county splits—cannot explain the disproportionate movement of Black voters and splitting of Pulaski County.

Through Cooper, Plaintiffs offer expert opinion that “CD2 required only a minor modification” such as removing a single rural county from CD2 “to satisfy equalizing population, while adhering to traditional redistricting principles.” Mot. Ex. 3, Cooper Rep. ¶¶ 46–48. Alternative Plan 1 is a “least change plan” that prioritizes core retention by making as few changes as possible while respecting traditional redistricting principles—most importantly, avoiding a three-way split of Pulaski County. *Id.* ¶ 66. Cooper’s Alternative Plan 1 shows that, if the Legislature had in fact prioritized traditional redistricting principles, it could have enacted a plan that, on balance, performed equally well or better than the Plan on traditional redistricting principles and equalized the populations among the districts while implementing only minimal changes and keeping Pulaski County intact. *Id.* ¶¶ 67–68, figs. 23–25.

Plaintiffs’ Alternative Plan 1 specifically represents a plan with only a 0.02% population deviation as compared to the Plan’s 0.09% population deviation. *See id.* ¶ 67, fig. 25. In

addition to a smaller population deviation than the Plan, Alternative Plan 1 scores the same on the composite compactness score while also reducing divisions across communities of interest and political subdivisions, including county splits, split municipalities, municipal splits, core-based statistical area splits, and unified school district splits. *See id.* ¶ 68, fig. 25.⁶ While core retention is slightly lower than the Plan, the 87.53% core retention is still very high, as shown in Figure 25 below. *See id.* Had one person, one vote and traditional redistricting principles guided the Legislature, as one example, the Plan could have looked more like Alternative Plan 1.

Figure 25: Redistricting Metrics – Enacted vs. Alternative Plan 1

Metric	2021 Enacted	Alternative Plan 1
Total Split Counties*	2	2
Total County Splits*	5	4
VTD Splits*	0	0
Split Municipalities*	6	3
Municipal Splits*	12	7
Core-based Statistical Area splits*	11	9
Unified School District splits*	84	71
One-person, one-vote (deviation)	0.09%	0.02%
DRA Compactness (higher=better)#	59	59
Core Retention	92.16%	87.53%
Incumbent Conflicts	0	0
CD 2 BVAP	20.33%	23.15%

Defendant argues that Alternative Plan 1 “does not satisfy *Alexander’s* alternative-map requirement because it does not match the core retention or partisan outcomes of the Enacted

⁶ Figure 25: (*) Indicates the unpopulated splits. The composite compactness measure identified as (#) is published by Dave’s Redistricting Application (“DRA”). The DRA composite compactness score, where higher is better, is based on the Reock and Polsby Popper measures using the methodology as described at <https://medium.com/dra-2020/ratings-deep-dive-c03290659b7>. Ex. 3, Cooper Rep. at 35 n.12.

Plan.” Mot. at 13. But that is a red herring: Alternative Plan 1 is not meant to satisfy *Alexander’s* alternative map requirement for cases where the Legislature claimed to have sought a particular partisan outcome with specific evidence. Because whether a partisanship motivation is being advanced altogether as a justification is a disputed fact, Cooper’s Alternative Map 1 was developed for another purpose—to show that the Arkansas Legislature could have enacted a plan that, on balance performs equally well or better than the Plan on traditional redistricting principles and equalizing populations among districts, *without* cracking Pulaski County as the Plan’s legislative proponents have claimed was necessary. As discussed below, *Alexander’s* alternative map requirement for cases where the Legislature claimed to have a partisan motivation—to the degree relevant here—is satisfied by Alternative Plans 2 and 3.

Furthermore, there are at least two material factual disputes regarding core retention. First, there is a factual dispute about whether the Legislature required core retention, and if so, what role it played in the map-drawing process. Defendant provides no direct evidence on either point. Mot. at 9; Ex. B, Bryan Dep. Tr. #1 at 154:16–155:13 (Bryan conceding he doesn’t know if the Legislature required high core retention for proposed maps and admitting that he did not hear any criteria discussed in his review of pieces of the legislative record). Based on the public record, there is no contemporaneous evidence that the Legislature prioritized core retention, or established a standard for judging core retention in evaluating proposed maps. *See supra* STATEMENT OF FACTS, Section I.C. Rather, Defendant’s only expert, Bryan, simply presumed that core retention must have been a legislative priority given that he found that the Plan had a 92% core retention rate; Bryan had no other basis than his analysis of the results of the Legislature’s mapping process for his conclusion that core retention was prioritized; he did not review all legislative hearings, and of the hearings he reviewed, he only reviewed snippets.

Ex. B, Bryan Depo Tr. #1 at 102:20–104:1, 109:9–110:7. Nor did Bryan speak to any legislators, *see id.* at 33:18–34:01, 40:1–10, and thus has no firsthand knowledge as to what subjectively motivated the drawing of the 2021 Congressional map. *See id.* at 142:10–15 (“I do not know who drew the map and I do not know what other data besides data required by law were used to draw the map.”), 154:16–155:13.

Second, there is a dispute regarding the sufficiency of Alternative Plan 1’s core-retention score. Cooper’s report concluded it is “very high” at 87.53%—while disputing that core retention is a traditional redistricting principle—and Alternative Plan 1 is accompanied by “overall superior” scores on traditional redistricting metrics. Mot. Ex. 3, Cooper Rep. ¶¶ 15, 68. For his part, Bryan admits there is no bright line rule for when core retention becomes too high or too low. *See* Ex. B, Bryan Dep. Tr. #1 at 182:5–8, 185:20–186:5, 186:11–15, 223:9–12. He has “no idea” if the Legislature even assessed core retention “at all.” *Id.* at 186:11–15. And, in any event, Bryan concedes that the Plan did not prioritize core retention for minorities in CD2. *See* Mot. Ex. 1, Bryan Rep. ¶ 124. Specifically, CD2 was only able to average a high core retention of 94.6% by offsetting the “lower rates of core retention of [Black] and Hispanic[.]” populations with high rates of core retention of the white population. *Id.* ¶ 124, table VII.1. While the white population of CD2 had a 97.7% core retention, Black populations had only 88.4% core retention. *See id.* at table VII.1.

c. The Goal of Rebalancing Population Does Not Justify a Racial Gerrymander.

Defendant also rehashes an argument that the changes to CD2 were justified by the goal of rebalancing population. As at the Motion to Dismiss stage, Defendant once again argues that the legislative record “show[s] that the General Assembly was chiefly motivated simply to balance the population” Mot. at 10.

This Court correctly rejected that argument before, and should do so again. Dismissal Order, ECF 42 at 7–8 (quoting *Ala Legis. Black Caucus*, 575 U.S. at 273) (noting that “the requirement that districts have approximately equal populations is a background rule against which redistricting takes place[,] . . . not a factor to be treated like other nonracial factors.”).

In addition to this argument being a non-starter as matter of law, the record developed in discovery has now cast doubt on this claimed justification as a factual matter. If the Legislature’s goal was to comply with the one person, one vote requirement, it had many proposed maps before it that would have complied with traditional redistricting principles without reassigning Black voters on the basis of race. *See* Mot. Ex. 11, Burch Rep. at 78, Appendix C. The law does not require the legislature to choose a map with the lowest possible deviation. *See* Ex. D, Davenport Dep. Tr. at 131:22–132:2 (“Arkansas does not have any redistricting criteria that is established by statute or by constitution”); Mot. Ex. 3, Cooper Rep. ¶ 14a (noting that “the Legislature did not stipulate to a required minimal deviation for the 2021 redistricting process.”); Mot. Ex. 1, Bryan Rep. ¶¶ 28, 119. To the contrary, the governing law gave the Legislature considerable leeway to deviate from perfect equality within permissible bounds, in order to comply with traditional redistricting principles such as keeping political subdivisions whole. *See* Mot. Ex. 3, Cooper Rep. ¶ 14a (citing *Tennant v. Jefferson Cnty.*, 567 U.S. 758 (2012)); *see also Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (“Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives. As long as the criteria are nondiscriminatory . . . these are all legitimate objectives that on a proper showing could justify minor population deviations.”).

Moreover, achieving the lowest possible deviation was not a goal expressed by legislators. Instead, legislators prioritized keeping deviations under 1%. *See* Mot. Ex. 11, Burch Rep. at 27–29 (“Typically, when legislators discussed population deviation during the discussion or presentation of particular bills, most mentioned the one percent threshold . . . described in the BLR redistricting.”). Further, the BLR informed the Legislature that deviations could be acceptable if justified by legitimate reasons. *See id.* at 38 (explaining that the BLR advised the Legislature that looking at deviation alone was “not going to win the day” because “the court is going to look beyond just that percentage that pops up on the map when we print it out.”).

2. *Race, Not Partisan Advantage, Explains the Legislature’s Design of CD2.*

The summary judgment record is also sufficient to reject Defendant’s contention that pursuit of partisan advantage explains the design of CD2. That is true primarily because the record does not support Defendant’s contention that partisanship actually motivated the Legislature here, as explained further in Section I.B.2(a). And, in any event, even if there were sufficient evidence to assert partisan advantage as a contemporaneous motivation of the Legislature, Plaintiffs have still overcome that defense for the reasons discussed in Section I.B.2(b).

a. The Contemporaneous Evidence Does Not Support That The Legislature Acted to Secure a Partisanship Advantage.

First, Defendant argues that “the evidence shows that the General Assembly was motivated to . . . secure a greater partisan advantage in [CD2] over the previous Democrat-drawn map.” Mot. at 9. However, as discussed below, *see infra* ARGUMENT, Section I.B.2(a)(ii), Defendant has disclaimed any knowledge of the map-drawing process or criteria the Legislature relied on for designing the Plan. And the contemporaneous evidence belies Defendant’s assertion that partisanship considerations drove the mapping of district lines. *See supra*

STATEMENT OF FACTS, Section I.B. Indeed, Defendant’s “evidence” consists of a few speculative and equivocal offhand comments from legislators. Even Defendant’s sole expert admitted he could only offer “conjecture”—without any supporting evidence—that “the only reason [he] could think of” for the three-way split of Pulaski County was that “*maybe* the Republican leadership of each one of those districts 1 and 4 said I don’t want to take all of those Democratic voters.” Ex. B, Bryan Dep. Tr. #1 at 230:13–19 (emphasis added). And that conjecture is not only unsupported but thoroughly refuted by Dr. Liu’s meticulous statistical analysis establishing that partisan motive is not a viable alternative explanation for the racial disparities in the design of CD2.

In requesting summary judgment on such a porous record, Defendant ignores the fact that a legislature’s “motivation is itself a factual question.” *E.g., Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) (reversing summary judgment). Courts look to the “actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications that the legislature in theory could have used but in reality did not.” *Bethune-Hill*, 580 U.S. at 189–90. Here, the evidence of the Legislature’s actual, contemporaneous motives does not reflect that the Plan was motivated by partisanship. Indeed, considerable evidence refutes that theory, and very little (if any) supports it.

(i) The Legislature and Map-Drawers Had Access to Racial Data and Not Political Data.

The record does not support a partisanship defense because there is no evidence that map-drawers considered or used political performance data; the record shows that racial data was readily available, but political data was not. The process for drawing the Plan was also not racially neutral, contrary to what was claimed publicly during the legislative process.

Contemporaneous evidence shows that racial data was readily available to map-drawers, BLR legislative staffers, and legislators. Only racial demographic data from the census (not political election results or voter registration information by party) was uploaded and available on the AutoBound software. *See* Ex. D, Davenport Dep. Tr. at 84:24–85:5. Using AutoBound, map-drawers could view detailed racial data for each district, *see* Ex. K, Bridges Dep. Tr. at 160:24–163:17, and had the ability to set a threshold for desired demographics, *see* Ex. F, Hejazi Dep. Tr. at 133:20–134:10. In fact, AutoBound’s default setting displayed this racial data onscreen, *see* Ex. F, Hejazi Dep. Tr. at 62:21–63:23, 66:2–13, and updated in real-time as map-drawers moved lines around, *see* Ex. E, Bowen Dep. Tr. at 70:23–72:6. Some legislators even directed BLR map-drawers about how to draw Congressional districts while in the same room with the racial data visible onscreen. *See id.* at 210:13–211:7.

Legislators also made requests to BLR for reports on racial demographic data, including in relation to the House version of the Plan. *See* Ex. D, Davenport Dep. Tr. at 117:17–24, 230:22–231:13. These reports could provide a detailed breakdown of the minority population of each district as well as at the county level. *See* Ex. D, Davenport Dep. Tr. at 64:12–24, 66:16–19, 232:12–233:5.

Defendant argues that “[b]ecause of the good-faith presumption, even if legislators were “aware of race when they drew the district lines,” courts “cannot simply leap to the conclusion that they were lying about their motives.” Mot. at 45 (citing *Simpson v. Thurston*, No. 4:22-cv-213, 2023 WL 3993040, at *2 (E.D. Ark. May 25, 2023) (*Simpson II*)). But, as an initial matter, legislators denied that they considered race or used racial data during consideration of Congressional map proposals, *see* Mot. Ex. 11, Burch Rep. at 51–52, when in fact the record evidence is that they did, *see* Ex. K, Bridges Dep. Tr. at 160:24–163:17 (map-drawers could

view detailed racial data when crafting maps), Ex. F, Hejazi Dep. Tr. at 62:21–63:23, 66:2–13 (displaying racial demographic data was the default setting for AutoBound), Ex. E, Bowen Dep. Tr. at 210:12–211:7 (legislators directed changes while in the same room with BLR map-drawers), Ex. D, Davenport Dep. Tr. at 117:17–24, 230:22–231:13 (legislators were provided detailed racial demographic reports for the House version of the Plan).

Moreover, legislators had more than mere awareness of the racial impact of the Plan. *See id.* As detailed above, legislators were in the room alongside map-drawers, providing verbal instructions about their proposed maps, while racial data was displayed. Senator Rapert acknowledged that racial data showed up on screens during the map-drawing process, although he claims that he did not specifically ask for racial statistics. *See* Mot. Ex. 11, Burch Rep. at 45 (referencing Senator Rapert’s Oct. 6, 2021 floor statements). BLR staffer Lori Bowen also confirmed that racial composition was visible on the AutoBound screen when she was developing HB1982 and SB743, the two maps that became the Plan, and that legislators were in the room with her when she was working on the Plan. *See* Ex. E, Bowen Dep. Tr. at 269:3–11, 286:13–287:5.

In contrast, the record is clear that political performance data was *not* available on AutoBound while map-drawers worked with legislators. Ex. E, Bowen Dep. Tr. at 94:5–21. Citygate, the official software vendor for Arkansas’s redistricting process, never loaded voting or political data onto AutoBound. *See* Ex. F, Hejazi Dep. Tr. at 69:24–70:4. Moreover, Defendant’s Office, the Secretary of State’s Office, does not even collect complete partisan affiliation data such that it could have been loaded into AutoBound. *See* Ex. K, Bridges Dep. Tr. at 61:9–17; 66:4–11. While party affiliation is an option voters can check on their voter

registration form, roughly 80% of all Arkansas voters leave this field blank. *See id.* at 67:25–69:10.

(ii) Contemporaneous Evidence Contradicts a Partisan Motive for the Approved Map.

The summary judgment record is also devoid of contemporaneous evidence from legislators themselves that the Plan’s legislative proponents were actually motivated by partisanship, much less embraced it as a criterion for drawing or choosing among maps. To the contrary, as detailed *supra*, legislators’ contemporaneous justifications of the Plan centered on compliance with traditional redistricting principles. The few isolated statements that Defendant cites as evidence of partisan motivation cannot be credited at summary judgment—both because there is a great deal of evidence that suggests the opposite and because even on its own terms Defendant’s evidence is equivocal at best.

As discussed above, the only criteria the Legislature discussed were certain traditional redistricting principles, and the only justification they publicly embraced was the desire to rebalance population and minimize splitting of counties. *See supra* STATEMENT OF FACTS, Section I.C. So the public record of the legislative proceedings does not support Defendant’s contention that the Plan was motivated by partisan advantage. *See* Mot. Ex. 11, Burch Rep. at 25. And the only legislative proponent of the Plan (former Senator Rapert) whose testimony is in the record was emphatic in *denying* any partisan motivation. *See* Mot. Ex. 10, Rapert Dep. Tr. at 24:4–7.

Notably, in written discovery, Defendant expressly disavowed having any knowledge, facts, or evidence that would support the contention that the Legislature had a partisanship motive. Ex. L, Def’s Ltr. & Supp. Resp. to Pls’ Interrog. No. 2, 4–15 (Aug. 14, 2024). And Defendant testified that there was no evidence of partisan motive in the public record. Ex. K,

Bridges Dep. Tr. at 189:23–190:12 (“[O]ur office does not have information on whether or not [the Legislature] had any racial or political motivations in how they drew those maps.”).

Defendant’s sole expert, Bryan, concededly does not provide any evidence to support a partisan motivation, either. As explained above, Bryan admitted he had no basis to opine on the Legislature’s motive, could only offer “conjecture” that partisan advantage motivated the map, and did not even review the legislative record in full. *See supra* ARGUMENT, Section I.B.2(a).

In moving for summary judgment, Defendant now cites a handful of passing references to the possibility of partisan motivations made by Senator Rapert in his deposition, and by others during the legislative debates. For example, Defendant cites Senator Rapert’s recollection that “[i]f partisanship was ever discussed, I would say it would just be a side note that somebody made about that.” Mot. at 30 (quoting Mot. Ex. 10, Rapert Dep. Tr. at 24:7–9). Defendant also cites another comment from Senator Rapert about the possibility that unspecified “people” used Dave’s Redistricting (which had political data) during the process. *See id.* at 24:11–14. These off-handed, speculative comments cannot establish, or even be construed to suggest, that the Legislature had a partisan purpose in enacting the Plan. What Defendant needs to avoid a trial—and cannot supply—is evidence conclusively establishing that the Legislature prioritized partisan advantage in the redistricting process. Defendant has nothing even suggesting such a motivation, much less conclusively establishing it. Moreover, any inference about partisan motivation that might be drawn from Senator Rapert’s musings is disputed by other evidence in the record as described above. *See supra* STATEMENT OF FACTS, Section I.D.

This case is therefore distinguishable from *Alexander*, which, notably, was decided after trial. In *Alexander*, the Supreme Court credited that the defendants’ presented evidence of partisanship, including contemporaneous evidence from leading legislative proponents of the

map and other evidence from the key architects of the map-drawing process that, in fact, the map was drawn to achieve specific partisan aims. *Alexander*, 602 U.S. at 14 (“At the same time, the Republican-controlled legislature also made it clear that it would aim to create a stronger Republican tilt in District 1. There, Senate Majority Leader Massey, for instance, testified at trial that partisanship was ‘one of the most important factors’ in the process and that the Republican Party was “not going to pass a plan that sacrificed [District 1]. . . . Contemporaneous evidence confirms that leaders in the legislature sought to ‘create a stronger Republican tilt’ in District 1 while ‘honoring’ other race-neutral, traditional districting criteria.”). There is nothing like that here, and the only testimony from a legislative proponent of the Plan expressly *denies* any partisan motivation. *See supra* STATEMENT OF FACTS, Section I.C.

In sum, admissions from Defendant’s sole expert—coupled with the dearth of any direct evidence of motivation in the record⁷—demonstrate there is at most a material fact dispute to the extent Defendant plans to rely on partisan motive as a defense. And construed in the light most favorable to Plaintiffs, the record affirmatively refutes any such motivation.

3. *Even Assuming a Partisanship Defense Is Properly Raised on this Record, Plaintiffs Have Presented Sufficient Evidence to Overcome It.*

a. Unrebutted Statistical Analysis Demonstrates Race, Rather than Party, Explains CD2’s Design.

Plaintiffs have developed substantial evidence that race, rather than party, explains the Legislature’s redistribution of voters. Indeed, this Court already held that allegations that Black and white voters with the same party preferences were sorted differently, if proved, support an

⁷ Nonparty legislators invoked the legislative privilege to preclude Plaintiffs from obtaining discovery into legislative motive. Defendant did not contest the privilege, nor propound any discovery of its own regarding motive.

inference that the state drew its lines with an impermissible racial motive. *See* Dismissal Order, ECF 42 at 6.

As explained above, *see supra* STATEMENT OF FACTS, Section I.D; *see also* ARGUMENT, Sections I.B.1–I.B.2, Plaintiffs have now supported these allegations with substantial evidence. Testimony from Dr. Liu clearly supports the allegation that Black and white voters with the *same* party affiliation were sorted differently in CD2. Dr. Liu’s analysis determined that (1) white voters were disproportionately retained within CD2 as compared to Black voters of the same party; (2) white voters were also disproportionately moved into CD2 as compared to Black voter of the same party; (3) Black Democrats were disproportionately moved out of CD2 at higher rates than white Democrats; and (4) white Republicans were moved out of CD2 at higher rates than white Democrats. Ex. C, Liu Rep. at 22–23.

Defendant does not rebut any of Dr. Liu’s analysis, nor does Defendant dispute the admissibility of Dr. Liu’s testimony with a *Daubert* motion. *See generally* Mot. Instead, Defendant asks the court to simply ignore Dr. Liu’s report, citing *Alexander* as justification. Mot. at 10–11, 40–42. But, Defendant’s assertion of *Alexander* as a defense is inappropriate for summary judgment because it essentially asks the Court to prematurely weigh the credibility of Dr. Liu’s expert testimony. After all, *Alexander* itself was decided after trial.

In any event, Defendant’s argument rests on the inaccurate premise that the methods and opinions Dr. Liu offered in this case are identical to those he offered in *Alexander*. *See* Mot. at 41 (claiming that Dr. Liu used the “exact methodology in *Alexander*”). They are not. The base methodology that Dr. Liu uses, the Ansolabehere methods, was approved by the Supreme Court in *Cooper* and reaffirmed in *Alexander*. *See Alexander*, 602 U.S. at 31 n.9. And, contrary to Defendant’s assertion, Dr. Liu testified that he refined his methodology in ways that directly

respond to *Alexander*'s guidance. *See* Ex. C, Liu Rep. at 12. Although it would be improper for this Court to weigh the impact of those changes on the persuasiveness of Dr. Liu's undisputed testimony at this stage, we briefly summarize them here to set the record straight.

First, heeding specific guidance from *Alexander*, Dr. Liu has expanded and refined his analyses to consider multiple different measures of partisan preference, including the 2020 presidential election data that *Alexander* said would have been more probative. *Id.* at 12–13; *cf.* *Alexander*, 602 U.S. at 32.

Second, Dr. Liu expands his methodology to include formal tests of statistical significance. *See* Ex. C, Liu Rep. at 13–14. Using this additional step in his method, Dr. Liu determined “there is more than 99.9% confidence that there is an association between race and [district] assignment type even when accounting for the factor of political party.” *Id.* at 23–26.

Third, Dr. Liu expands his analysis to include a county-level assessment of Pulaski County. *See id.* at 4. By checking whether the patterns he observes are present within the specific county where splitting occurred, Dr. Liu's analysis in this case accounts for the geographical distribution of Black and non-Black voters at a more granular level than any of his analyses in *Alexander*. *See* Mot. Ex. 13, Liu Dep. Tr. at 81:20–83:6.

While Defendant is correct that Dr. Liu's statistical analysis cannot control for contiguity or compactness as variables, that does not mean his analysis is uninformed by geography. *See id.* Rather, Dr. Liu has included those geographic factors, and accounted for the particular geography of CD2, in ways that are consistent with the generally accepted methods in political science.

As a political scientist, Dr. Liu must utilize the best tools and methods, generally accepted in his field. Completely controlling for geography through contiguity and compactness

within the statistical regression analysis is not something that Dr. Liu's methods can account for with the same quantitative rigor voter behavioral characteristics. That is because the Ansolabehere methods that Dr. Liu applies adhere to *Alexander's* guidance by "operat[ing] at the voter level" to discern patterns of movement based on the racial and partisan characteristics of individual voters. *See* 602 U.S. at 31 n.9. But compactness and contiguity are geographical characteristics of districts, not variables that can be ascribed to individual voters. *See* Mot. Ex. 13, Liu Dep. Tr. at 99:5–16. So it is not possible for Dr. Liu to incorporate those as variables that can be rigorously controlled for in the same way that race and partisanship can. *See id.* at 73:22–74:8, 99:5–20.

But Dr. Liu's inability to incorporate *other* variables does not render his empirical statistical analysis irrelevant as to the relationship of the race and party variables that he *does* consider. As already noted, the Ansolabehere methods that he employs remain the best and most rigorous available to disentangle the effects of race and party. *See Alexander*, 602 U.S. at 31 n.9. And Dr. Liu's testimony that "consideration of voters' partisan preferences is not a statistically supportable alternative explanation for the apparent consideration of race" is undisputed as the *only* expert analysis in this case to perform any such disentangling. Ex. C, Liu Rep. at 31; Ex. M, Liu Rebuttal Rep. at 2–7. Plaintiffs intend to rely on other evidence, such as Cooper's testimony, to address the potential effects of other possible considerations like compactness and contiguity. Dr. Liu's report can and should be weighed as one part of a broader evidentiary record, not in isolation.

In sum, consistent with testimony about the data available during the map-drawing process, contemporaneous legislative record, and legislator deposition testimony, Dr. Liu's expert testimony reveals that race, not partisanship better explains the design of CD2.

b. *If Required, Alternative Plans Would Further Confirm that Race, Not Political Affiliation Explain the Design of CD2.*

To further aid a court’s ability to disentangle race from a partisan objective in a circumstantial-evidence-only case where the defendant asserts with evidentiary support⁸ a partisanship defense, a plaintiff may need to produce an alternative map. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 34 (2024). A plaintiff can satisfy this requirement by producing an alternative map that achieves a legislative body’s specifically defined and legitimate political objectives in a manner that is comparably consistent with traditional districting criteria, while creating greater racial balance without impermissible sorting based on race. *Id.* (quoting *Easley v. Cromartie*, 532 U.S. 234, 258 (2001)).

But when the record provides no basis for concluding that a legislature pursued specific political objectives in drawing lines (or fails to indicate what those political objectives might have been), a plaintiff is not required to present alternative maps that satisfy such speculative political criteria to prevail. *See Covington*, 316 F.R.D. at 139 n.21 (“That easily distinguishes this case from the *Cromartie* cases, where there was substantial direct evidence supporting the State’s ‘legitimate political explanation for its districting decision.’ . . . Given these considerable distinctions between the cases, we see no basis for requiring Plaintiffs to present us with alternative plans showing that the ‘legislature could have achieved its legitimate political objectives in alternative ways.’ Defendants have not identified with any specificity which ‘legitimate political objectives’ any alternative plans ought to have ‘achieved.’”) (cleaned up).

Here, as explained above, *see supra* ARGUMENT, Section I.B.2(a), the weight of the evidence does not support that a partisan goal, and not race, was the predominating factor in

⁸ To be appropriately raised, defenses must be well-grounded in fact and law. *See* FRCP 11(b)(2), (3) (noting defenses in a written motion must be warranted by existing law and factual contentions must have evidentiary support)

designing the Plan. But even if Defendant could point to something more than “conjecture” on this point, Ex. B, Bryan Dep. Tr. #1 at 229:12–231:2, Plaintiffs would be entitled to a trial to determine whether a partisan objective truly predominated.

That is so because (1) to the extent *Alexander*’s alternative map requirement is implicated here, Plaintiffs have satisfied that requirement; and (2) even if Defendant could establish that the Legislature had a partisan goal in mind, the record would still show that any such partisan goal was impermissibly pursued by using race as a proxy.

- (i) Although the Alternative Map Requirement Does Not Apply Given the Facts Here, Cooper’s Alternative Plans 2 and 3 Still Satisfy Any Such Requirement by Showing that the Cracking of Pulaski County Is Not Explained by a Desire for Partisan Gain.

Even if *Alexander*’s alternative-map requirement applies in this case, Plaintiffs have provided two maps that satisfy any such requirement. Defendant’s only objections to these maps represent factual disputes about how to weigh competing expert testimony, and these disputes are inappropriate for resolution on summary judgment.

Cooper’s Alternative Plans 2 and 3 both contain district populations that comply with the one person, one vote requirements. On balance, they perform equally well or better than the enacted Plan across traditional redistricting principles. Both Alternative Plans 2 and 3 also achieve a comparable level or higher level of Republican partisan advantage to that achieved by the enacted Plan. They do all of these things while not cracking Black communities and keeping Pulaski County whole. *See* Ex. H, Final Cooper Dep. Tr. at 123:23–124:22, 222:22–223:11; Mot. Ex. 3, Cooper Rep. ¶¶ 70–72, fig. 26-28; Ex. I, Corrected Cooper Rebuttal Rep. ¶¶ 14–15, 17, figs. 1–3. Each of Cooper’s alternative plans is therefore sufficient under *Alexander*. *See* 602 U.S. at 10.

Alternative Plan 2 shows that the Legislature could have enacted a plan with comparable partisan effect and better performance on traditional redistricting principles. Alternative Plan 2 improves Republican performance by 0.9–1.3% across all five 2022 election contests that Defendant’s expert examined, *see* Mot. Ex. 9, Bryan Supp. Rep. ¶ 33, table VII.A.2, and therefore furthers the kind of Republican partisan advantage in CD2 that Defendant speculates was the Legislature’s aim.

Defendant argues that Alternative Plan 2 fails because it does not exceed the precise measure of partisan advantage that Defendant ascribes to the Plan in his post-hoc analysis—that is, based on the 2020 presidential election returns, the Plan’s political performance is 56.7% (Trump) v. 43.3% (Biden) versus 55.7% (Trump) v. 44.3% (Trump) for Alternative Plan 2. *See* Mot. at 20. But assuming a partisan advantage was an objective, there is no evidence in the record revealing any metrics for assessing a partisanship advantage (*e.g.*, using what election contest(s) and/or achieving what level or percentage of partisan advantage). At best for Defendant, the competing partisanship advantage discussion represents nothing more than a factual dispute about the relevant metrics to measure partisan gain, and what level of performance on those metrics is necessary to achieve “comparable” partisan gain. These disputes are inappropriate for resolution on summary judgment.

Alternative Plan 3 shows that the Legislature could have enacted a plan that achieved even higher performance on certain partisan metrics (*i.e.*, five 2022 electoral contests) than the Plan with comparable performance on traditional redistricting principles without cracking Pulaski County. *See* Ex. I, Corrected, Cooper Rebuttal Rep. ¶¶ 7–9; 14, figs. 1–3. Defendant concedes that Alternative Plan 3 improves Republican political performance more than the Plan. Ex. B, Bryan Dep. Tr. #1 at 313:7–16.

Like Alternative Plan 1 discussed above, *see supra* ARGUMENT, Section I.B.1(b), Defendant argues both Alternative Plan 2 and 3 fail as alternative maps because they trail the Plan on a single metric, core retention. Mot. at 24–25. But as described above, *see supra* ARGUMENT, Section I.B.2(a), Defendant identifies no contemporaneous evidence that the Legislature prioritized core retention, or had a particular goal for it. Without such evidence, determining the weight to accord this single measure requires weighing Bryan’s conclusions about core retention against Cooper’s. Cooper concluded that Alternative Plan 2’s “Core retention is slightly lower than the . . . Plan but still very high at 87.53%,” Mot. Ex. 3, Cooper Rep. ¶ 68, and that Alternative Plan 3 has a “reasonably high level of core retention” of 73.53%, Ex. I, Corrected Cooper Rebuttal Rep. ¶ 9. Bryan says that he disagrees, and Defendant asks the Court to credit Bryan’s opinion and “assess[] the merits of [Cooper]’s conclusions[.]” But this is not something the Court can “appropriately do at summary judgment, where [it] must interpret the evidence in Plaintiffs’ favor.” *Ga. State Conf. of the NAACP*, 2023 WL 7093025, at *10.

As to Alternative Plan 3, Defendant also argues that, while its CD2 BVAP is higher than that of the Plan, it is not yet high *enough* to show “significantly greater racial balance.” *Alexander*, 602 U.S. at 34; *see* Mot. at 24. But it is undisputed that Alternative Plan 3 achieves a greater racial balance than the Plan by not cracking Pulaski County and improving CD2’s BVAP. A determination as to whether that is enough to satisfy the requirements set forth in *Alexander* requires weighing competing expert opinions, an undertaking that is plainly inappropriate at the summary judgment stage.

(ii) To the Extent Partisanship Was a Factor, the Evidence Shows that the Legislature Impermissibly Used Race as a Proxy for Political Affiliation.

Finally, even if the Court were to credit Defendant’s scant evidence of partisanship, it is impermissible to rely on race as a proxy for seeking to achieve some ultimate partisan advantage.

Alexander, 602 U.S. at 8 n1 (“A plaintiff can also establish racial predominance by showing that the legislature used ‘race as a proxy’ for ‘political interest[s].’”). “[T]he sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics.” *Cooper*, 137 S. Ct. at 1473 n.7; *see also id.* at 1464 n.1. “[T]o the extent race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation.” *Bush*, 517 U.S. at 968; *see also Veasey v. Abbott*, 830 F.3d 216, 241 n.30 (5th Cir. 2016) (en banc) (“acting to preserve legislative power in a partisan manner can also be impermissibly discriminatory”). Here, the evidence supports an inference that to the degree the Legislature had a partisan goal, it could have pursued that goal only by using race as a proxy, as it did not have access to the partisan data necessary to pursue partisan gerrymandering directly. *See supra* STATEMENT OF FACTS, Section I.B; *see also* ARGUMENT, Section I.B.2(a)(i). This circumstance is very different from *Alexander*, where the map-drawer testified that “he used political data” from the 2020 presidential election to draw the maps. *Alexander*, 602 U.S. at 14, 19.

C. The Presumption of Legislative Good Faith Does Not Entitle Defendant to Summary Judgment.

While Defendant is correct that the presumption of good faith applies at every stage of litigation, *see* Mot. at 8–9, Defendant does not cite any case law supporting his suggestion that the presumption of good faith outweighs this Court’s obligation at summary judgment to draw all inferences in the light most favorable to Plaintiffs. *See Hunt*, 526 U.S. at 552–553 (in a racial gerrymandering case “the nonmoving party’s evidence is to be believed, and all justifiable inferences are to be drawn in that party’s favor,” while the presumption of good faith is a factor to consider) (internal quotation and brackets omitted). Indeed, where, as here, Plaintiffs have developed evidence of a discriminatory motive, the default presumption of good faith no longer

applies. *See Miller*, 515 U.S. at 915–16 (1995) (“[U]ntil a claimant makes a showing sufficient to support that allegation [of race-based decision-making] the good faith of a state legislature must be presumed.”); *Miss. State Conf. of NAACP v. State Bd. of Election Comm’rs*, No. 3:22-cv-734-DPJ-HSO-LHS, 2024 WL 3275965, *5 (S.D. Miss. July 2, 2024) (presumption of good faith “can be overcome if the plaintiff makes a sufficient showing that the legislature subordinated traditional race-neutral districting principles to race”) (referencing *Miller*, 515 U.S. at 916).

As explained above, Plaintiffs have adduced more than enough evidence to create a triable issue of material fact as to legislative motive, notwithstanding the starting presumption of legislative good faith. At summary judgment, this evidence must be credited, and all justifiable inferences must be drawn in Plaintiffs’ favor.

II. DEFENDANT IS NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS’ VOTE DILUTION CLAIM.

Defendant does little to address Plaintiffs’ vote dilution claim. In a cursory page and a half, Defendant asserts that Plaintiffs cannot prevail because they “cannot show either a racial motivation or dilutive effect.” Mot. at 47. Intentional discrimination claims involve a “sensitive inquiry into . . . circumstantial and direct evidence of intent,” *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977), yet Defendant fails to meaningfully engage with *any* of the evidence in the record that bears on this fact-specific inquiry. Summary judgment is thus inappropriate on this claim too.

As the Supreme Court recently reaffirmed, racial gerrymandering and intentional vote dilution claims are analytically distinct. *Alexander*, 602 U.S. at 38. Racial gerrymandering claims focus on whether race predominated in the way a district was constructed “regardless of the motivations” for considering race. *Shaw v. Reno*, 509 U.S. 630, 645 (1993). By contrast,

classic intentional racial vote dilution claims ask whether the Legislature intentionally sought “to minimize or cancel out the voting potential of racial or ethnic minorities.” *Miller*, 515 U.S. at 911 (citation omitted); *Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *see also White v. Regester*, 412 U.S. 755, 765 (1973). In particular, this Court must ask whether the Legislature acted with discriminatory purpose by intentionally seeking to diminish or cancel out the voting potential of Black voters, as compared to the racial gerrymandering claim, where the Court must ask whether the Legislature predominantly used race to assign voters into and out of CD2 without a compelling reason. *See generally Miller*, 515 U.S. at 911 (comparing intentional vote dilution claims and racial gerrymandering claims).

It falls to Plaintiffs to show discriminatory purpose and effect. *Alexander*, 602 U.S. at 39. In assessing an intentional vote dilution claim, the Court must apply the *Arlington Heights* framework. A voting scheme that unconstitutionally diminishes “the voting strength of racial minorities [is] subject to the standard of proof generally applicable to Equal Protection Clause cases.” *Rogers*, 458 U.S. at 617 (citing *Arlington Heights*, and *Washington v. Davis*, 426 U.S. 229 (1976)). Discriminatory purpose may be shown with direct or circumstantial evidence. *Rogers*, 458 U.S. at 618.

An “important starting point” under *Arlington Heights* is whether the “impact of the official action . . . bears more heavily on one race than another.” 429 U.S. at 266 (internal quotation marks and citations omitted). Courts then turn to other “evidentiary source[s]” indicative of discriminatory intent, such as: (i) “[t]he historical background of the [challenged] decision;” (ii) “[t]he specific sequence of events leading up to the challenged decision;” (iii) “[d]epartures from normal procedural sequence;” and (iv) “[t]he legislative or administrative history” of the decision. *Id.* at 267.

Courts must consider “all of the circumstances that bear upon the issue of discriminatory intent,” *Foster v. Chatman*, 578 U.S. 488, 501 (2016) (citing *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)), “including the normal inferences to be drawn from the foreseeability of defendant’s actions,” *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009) (citing *McMillan v. Escambia Cnty.*, 748 F.2d 1037, 1047 (5th Cir. 1984)). Courts do not need to find that every *Arlington Heights* factor supports a racially discriminatory motivation and can also look to relevant factors beyond those enumerated in *Arlington Heights*. 429 U.S. at 266–68; *see also Petteway v. Galveston Cnty.*, 667 F. Supp. 3d 447, 470 (S.D. Tex. 2023) (describing the *Arlington Heights* factors as “nonexhaustive”); *Fla. State Conf. of the NAACP v. Lee*, 576 F. Supp. 3d 974, 983 (N.D. Fla. 2021) (“*Arlington Heights* . . . is a totality of circumstances test [and the] Court must weigh Plaintiffs’ evidence as a whole.”). Defendant argues that certain factors in and of themselves do not establish intentional racial discrimination. Mot. at 44–46. However, evaluating each factor in isolation “invites [the] Court to err . . . by ‘miss[ing] the forest in carefully surveying the many trees.’” *Fla. State Conf. of the NAACP*, 576 F. Supp. 3d at 983 (quoting *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016)).

Under an intentional discrimination theory, any racially discriminatory impact will suffice to establish liability. *See, e.g., City of Pleasant Grove v. United States*, 479 U.S. 462, 471–72 n.11 (1987); *cf. League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 438–40 (2006) (“*LULAC*”) (“Even if [the challenged plan’s] disproportionality were deemed insubstantial, that consideration would not overcome the other evidence of vote dilution” within the meaning of Section 2 of the Voting Rights Act, including evidence that bore “the mark of intentional discrimination”). Any contention that there is an unspecified threshold number of affected voters or a degree of impact to make out this claim “is unquestionably wrong.” *Chisom v. Roemer*, 501

U.S. 380, 409 (1991) (Scalia, J. dissenting). Thus, regardless of a minority group's size, if the government acts with an invidious purpose and harms the affected group, its action violates the equal protection clause.

Moreover, the Supreme Court and other courts have found that an intent to disadvantage minority citizens to gain a perceived political or partisan benefit qualifies as discriminatory intent. *See LULAC*, 548 U.S. at 440 (stating that taking away a political opportunity just as minority voters were about to exercise it “bears the mark of intentional discrimination”); *Garza v. Cnty. of L.A.*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) (“[E]lected officials engaged in the single-minded pursuit of incumbency can run roughshod over the rights of protected minorities.”).

Plaintiffs have put forth evidence to show, consistent with the *Arlington Heights* framework, that Defendant intentionally discriminated against Black voters in southeast Pulaski County by enacting the Plan. Defendant has not engaged with this evidence. Instead, Defendant argues that the Court “should resolve Plaintiffs’ vote-dilution claim the same way it did in *Simpson*,” a case decided at the motion to dismiss stage before any discovery took place. Mot. at 47. But Plaintiffs have already survived dismissal on their vote-dilution claim here. Defendant further suggests that the presumption of legislative good faith necessitates judgment without any inquiry into the evidentiary factors bearing on legislative intent. *Id.* However, the presumption of legislative good faith can be overcome where Plaintiffs have developed evidence of a discriminatory motive. *See Arlington Heights*, 429 U.S. at 265–66 (explaining that judicial deference is not justified when there is proof of a discriminatory purpose); *see also supra* ARGUMENT, Section I.C.

In short, genuine disputes of material facts over discriminatory intent must be resolved at

trial. *Hunt*, 526 U.S. at 553. Indeed, summary judgment is generally inappropriate in intentional discrimination cases like this one because the “legislature’s motivation is itself a factual question.” *Id.* Plaintiffs have set forth evidence indicating that the Plan had a discriminatory impact on Black voters and was enacted with a discriminatory motive. Thus, summary judgment is inappropriate on this claim.

A. Discriminatory Impact.

A significant number—at least 21,904 Black voters—were unjustifiably removed from Pulaski County where they had been assigned in CD2 under the 2011 Plan and moved into CDs 1 and 4. Mot. Ex. 1, Bryan Rep. at 101, Appendix D.1. Defendant’s expert concedes that Black voters were disproportionately removed from CD2. *See, e.g., id.* ¶ 28.

The undisputed record also shows that the Plan treats Black voters differently than white voters, even when those voters have the same political affiliation. *See* Ex. C, Liu Rep. at 21–25; *see also* Ex. B, Bryan Dep. Tr. #1 at 189:3–10, 189:18–190:3.

As explained above, *see supra* ARGUMENT, Section I.B.1(b), in targeting Black voters for removal from CD2, the Legislature disregarded traditional redistricting principles it applied elsewhere in the State, treating Pulaski County differently by breaking that county among three districts, and, within that county, splitting up municipalities, school districts, and judicial districts. Thus, the Plan split community centers with large Black populations that could serve as hubs for mobilizing and growing political power, thereby “minimiz[ing]” the potential voting power of Black voters. *See, Miller*, 515 U.S. at 911 (quoting *Mobile v. Bolden*, 446 U.S. 55, 66 (1980)). The Plan reduced Black voting power despite growth in the minority population and a decrease in the white population in Pulaski County over the prior decade, effectively erasing Black population gains in CD2 during this period. Mot. Ex. 11, Burch Rep. at 47–48; Mot. Ex. 3, Cooper Rep. ¶ 16–20, fig. 1.

The impact of the Legislature’s discriminatory line-drawing was a significant setback to Black voters’ potential to exercise their political influence in Arkansas’ Congressional elections, particularly in CD2. The more than 2% decrease in BVAP in CD2 under the Plan obscures the effect of a 10% BVAP growth in Pulaski County, which had historically been entirely within CD2. *See* Mot. Ex. 1, Bryan Rep. at 90, Appendix A.2.

And the impact of the Legislature’s “cracking” of the Black community in southeast Pulaski County follows a decades-long pattern of reducing the Black population in CD2, *see* Mot. Ex. 3, Cooper Rep. ¶¶ 17–19, and occurred at a time when the statewide Black population (not just the Black Pulaski population) was growing and the white population was decreasing, *see id.* ¶¶ 33–39. The Plan directly disrupts this growing core of political influence, focusing on Pulaski County for a three-way split even though it was historically wholly within CD2. Mot. Ex. 1, Bryan Rep. at 101, Appendix D.1.

Pulaski County was the anchor of Black political power, with the largest Black population in Arkansas following the 2020 Census. *See id.* at 89, Appendix A.1. Prior to the 2021 redistricting cycle, the growing population of Black voters in Pulaski County was contributing to increasingly successful results for Black candidates. In the years immediately preceding the 2021 redistricting cycle, Black candidates won—for the first time in history—countywide and citywide in Pulaski County and Little Rock. *See* Ex. A, Smith Rep. at 22–23. In the 2020 Congressional election—the last contest held with a unified Pulaski County in CD2—Black State Senator Joyce Elliott mounted a competitive challenge in CD2 against the white incumbent, French Hill, though Senator Elliot ultimately lost. *See id.* at 23.

It was no coincidence that the cracking of Pulaski County in 2021 followed within months of this 2020 election. *Cf. LULAC*, 548 U.S. at 438–39 (finding relevant that “the State

divided the cohesive Latino community” just as “Latino voters were poised to elect their candidate of choice”); *id.* at 440–41 (explaining that the State’s decision “to break apart a Latino opportunity district to protect the incumbent congressman from the growing dissatisfaction of the cohesive and politically active Latino community in the district” evinced “the mark of intentional discrimination.”); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 697 (S.D. Tex. 2017) (finding relevant that voting changes were made just when “Latinos in Pasadena were becoming more politically active.”).

The impact of splitting Pulaski County was foreseeable to the Legislature given the testimony during the legislative process by legislators and members of the public. *See* Mot. Ex. 11, Burch Rep. at 38, 42–45. Supporters of the map did not refute that the Plan would disproportionately harm the political influence of minorities in Pulaski County. *Id.* at 43; *see also Petteway v. Galveston Cnty.*, 667 F. Supp. 3d 447, 472 (S.D. Tex. Mar. 30, 2023) (“The foreseeable effect of an action to dilute minority voting strength is ‘objective evidence that, combined with other evidence, provide[s] ample support for finding discriminatory intent.’”) (citation omitted). And as the remaining *Arlington Heights* factors show, achieving this impact was the Legislature’s intent.

Defendant contends that Bryan’s analysis of a single hypothetical electoral outcome is sufficient to show that the Plan had no discriminatory effect on Black voters in Pulaski County. Mot. at 47–48. This overly simplistic and narrow view of discriminatory impact fails to acknowledge the tranche of evidence in the record showing that the Plan intentionally diminished Black voters’ electoral opportunity and voting potential by cracking the exact communities where Black power and influence were well-known and documented to be growing.

B. Contemporaneous Statements by Decisionmakers.

Under *Arlington Heights*, “legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports.” 429 U.S. at 268. Dr. Burch’s comprehensive review of the legislative record and contemporaneous statements of decisionmakers shows the Plan abandons key traditional redistricting principles, belies any premise that partisanship drove the Plan, and demonstrates that the Legislature reified its course of action after learning of the Plan’s harmful racial impact.

Defendant agrees that Dr. Burch’s review of the legislative record may be “useful,” Mot. at 44, but nevertheless urges the Court to disregard her testimony because Dr. Burch did not presume legislative good faith while conducting her analysis. This is wrong. Defendant does not and cannot cite any case law supporting its claim that an expert is required to apply a legal standard when formulating their opinion—indeed, doing so would intrude on the Court’s role as the ultimate arbiter of the legal standard at issue. Plaintiffs are entitled to rebut the legal presumption of good faith through facts. Dr. Burch’s opinions are a part of that factual rebuttal. As an expert, Dr. Burch is entitled to reach an objective, independent opinion for the factfinder to consider against the presumption of good faith. *Arkwright Mut. Ins. Co. v. Gwinner Oil, Inc.*, 125 F.3d 1176, 1183 (8th Cir. 1997) (“Questions of an expert’s credibility and the weight accorded to his testimony are ultimately for the trier of fact to determine.”). And that consideration is properly reserved for trial.

1. *The Enacted Map abandoned traditional redistricting principles important to the Legislature.*

The legislative record shows that in addition to equalizing population, certain traditional redistricting principles were important to the Legislature, while others were not. *See* Mot. Ex 11,

Burch Rep. at 25–37. Instead of engaging with the Plan’s performance on the stated priorities of the Legislature, Defendant focuses on the principles that the Plan arguably happens to perform well on. Mot. at 33 (“[T]he Enacted Map reduces political subdivision splits, improves compactness, avoids pairing incumbents, achieves satisfactory population equality, and preserves overwhelmingly the core of prior districts”). But Defendant ignores the fact that compactness, pairing incumbents, and core retention were not criteria that the Legislature required or prioritized. Mot. Ex. 14, Burch Dep. Tr. at 50:13–51:19 (“...not only were [core retention and compactness] not discussed much . . . there wasn’t much discussion of people comparing maps based on those principles . . . when people made statements about what it is that they considered important, these were also not what they discussed.”).

Instead, legislators’ contemporaneous statements show their priorities “were keeping population deviations under one percent, keeping counties and cities whole, and respecting communities of interest.” Mot. Ex. 11, Burch Rep. at 27. Support for these redistricting principles was bipartisan. *Id.* at 29. And yet two of the three goals—keeping counties and cities whole, and respecting communities of interest—were abandoned under the Plan when the Legislature trisected southeast Pulaski County and its incorporated municipalities and other political entities. The Legislature abandoned these two goals despite the fact that doing so was not necessary to its other stated goal of keeping population deviations under one percent, *see supra* STATEMENT OF FACTS, Section I.C, Defendant argues that the abandonment of these goals was a result of “simple legislative compromises.” Mot. at 45. Plaintiffs provide evidence of a different explanation: legislators abandoned these goals to pass a map that targets Black not white communities for cracking to prevent Black voters from gaining meaningful political power in Arkansas. Regardless of whether the Court ultimately finds Defendant or Plaintiffs’

explanation more compelling, summary judgment “is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact.” *Hunt*, 526 U.S. at 553.

2. *Partisanship was not a redistricting principle that drove the map.*

As explained earlier, *see supra* ARGUMENT, Section II.B, contemporaneous statements also show that, in contrast to the trial record in *Alexander*, partisanship was not a driving redistricting principle behind the map. Mot. Ex 11, Burch Rep. at 51–54. To the extent politics were discussed, it was “to a very limited extent and generally only in response to discussions as a defense against . . . racial intent.” Mot. Ex 14, Burch Dep. Tr. at 70:19–22. This is unsurprising, given the general consensus among legislators that it was “not hard to draw fo[u]r Republican districts in Arkansas.” *Id.* at 71:2–3. In fact, Dr. Burch notes that contemporaneous statements indicate that supporters of the map “said they weren’t supporting the map for partisan reasons” and “push[ed] back against that idea on the record[.]” *Id.* at 71:14–72:19; *see also* Mot. Ex. 11, Burch Rep. at 52–54 (collecting contemporaneous statements).

Defendant takes issue with this characterization of key legislators’ statements. Mot. at 44 (describing evidence of legislative “ill will” as “equivocal at most.”). But here again, Defendant’s disputed characterization of these statements is not dispositive. Fed. R. Civ. P. 56(a) (for grant of summary judgment, movant must “show[] that there is no genuine dispute as to any material fact.”).

3. *The Legislature was aware of but refused to address the adverse racial impacts of the Plan.*

Legislators’ discussions of race during the redistricting cycle provide additional evidence of discriminatory intent. That evidence supports the conclusion that the Legislature was not race-blind while line-drawing, nor merely aware of race; it was also motivated by it. After learning of the harms of the proposed map, the Legislature rejected non-discriminatory

alternatives and instead “selected or reaffirmed” a map with known discriminatory effects “at least in part because of its impact on [B]lack Arkansans.” Mot. at 46 (quoting *Simpson v. Hutchinson*, 636 F. Supp. 3d 951, 956 (E.D. Ark. 2022) (*Simpson I*)). Rather than choosing to reduce or eliminate these discriminatory effects, legislators instead stated that they would not consider race in the drawing of the maps because to do so would be improper or unconstitutional. Mot. Ex. 11, Burch Rep. at 38, 41–42.

But those claims ring hollow based on the record here, which shows a disputed key fact. From the outset of the 2021 Congressional redistricting, legislators knew that they were permitted to consider race to avoid passing a map with discriminatory effects. *See id.* at 38. In August 2021, BLR provided a training on Congressional redistricting. *Id.* During this training, legislators, including Chairman Tosh and Representative Speaks, were told that they could consider race to ensure that the enacted map did not have a discriminatory effect on racial minorities. *See id.* at 38–41. They were also told that they were prohibited from “any practice or procedure that has a discriminatory effect on racial or language minorities.” *Id.* at 39.

The Legislature was also aware of the racial makeup of Pulaski County and CD2. And yet, supporters of HB 1982 and SB743, which became the enacted Plan, denied this knowledge when pressed to explain why they were proposing a map that would trisect a Black community of interest. *Id.* at 45–47. When considered against the evidence on the record, these legislators’ claims of race-blindness strain credulity and support an inference of an ulterior, racial motive. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (“Proof that the defendant’s explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.”); *see also Jacksonville Branch of NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229, 1291 (M.D. Fla.

2022) (disingenuous promise by legislators to address public concerns about racial impact supported inference of discriminatory intent). As previously discussed, *see supra* ARGUMENT, Section I.B.2(a)(i); *see also* STATEMENT OF FACTS, Section I.B, legislators were typically in the room when map-drawers drew maps containing detailed, precinct-level racial data on AutoBound. *See also* Mot. Ex. 11, Burch Rep. at 45–46. And SB743’s sponsor Senator English professed to not know the racial makeup of affected areas of Pulaski County, including Rose City, a majority-minority neighborhood in North Little Rock, despite the fact that she has personally represented parts of North Little Rock and northern Pulaski County since 2013. *Id.* at 47.

Defendant claims this evidence is not enough to show intent. Mot. at 45–46. In support of this position, Defendant cites *Simpson I* and *II* in support of two interrelated claims: first, that “mere awareness” of race does not show racial intent; and second, that warnings of racial harm also do not show racial intent. *Id.* (citing *Simpson I*, 636 F. Supp. 3d at 956 and *Simpson II*, 2023 WL 3993040 at *1–2). Plaintiffs’ record is distinguishable on both points.

First, Plaintiffs have produced evidence of more than just “mere awareness.” In *Simpson*, the problem with plaintiffs’ explanation for why legislators chose the enacted map was that equally plausible alternative explanations, such as partisanship, were supported by the record. Here, after significant discovery, equally plausible alternative explanations are not supported by the record. Unlike in *Simpson*, the record shows that the Legislature disclaimed a partisan motivation. Mot. Ex. 11, Burch Rep. at 52–54. Also unlike in *Simpson*, the record shows that the Legislature had alternative ways of achieving their stated objectives of keeping population deviations under one percent; keeping counties and cities whole; and preserving communities of interest. *Id.* at 27–36, 54 (noting several proposed maps, including HB1966, would have

achieved these objectives without splitting Pulaski County three ways). And, unlike in *Simpson*, the record shows that the Legislature had alternative ways of rebalancing the populations among the four Congressional districts and achieve any purported partisan objective as well as respecting other redistricting criteria. *See supra* ARGUMENT, Section I.B.3(b). On this point, Defendant confuses the evidentiary burdens that apply at summary judgment: Plaintiffs do not need to “rule out any permissible inference that can be drawn,” Mot. 46–47; rather, as the non-movant, all reasonable inferences are drawn in Plaintiffs’ favor. *Hunt*, 526 U.S. at 552–53.

Second, the warnings of discriminatory impact in this case are unlike those the court found insufficient in *Simpson II*. In *Simpson II*, the court found warnings to legislators less compelling because the Court was presented with only a few stray, conclusory comments by opponents of the bill. 2023 WL 3993040, at *1. Here, the warnings were numerous, substantive in nature, and came from a wide variety of sources, including supporters of the bill. Thus, despite the rushed timeframe, proponents of HB1982 and SB743 were repeatedly provided with credible warnings that the map would have a discriminatory impact on Black Arkansans. *See* Mot. at 45; Mot. Ex. 11, Burch Rep. at 42–45. These warnings were not conclusory: legislators were given both qualitative and quantitative data about the harmful impact of the maps on Black political influence in Pulaski County and CD2. *Id.* at 42–45; *contra Simpson II*, 2023 WL 3993040, at *1. Finally, the warnings came from diverse quarters. Defendant mischaracterizes these warnings as coming only from opponents of the map. Mot. at 45. Not so. Mot. Ex. 11, Burch Rep. at 44, 50 (discussing warnings by Republican legislators). For instance, the authors of the bills *acknowledged and agreed with* the warnings. When Senator Tucker told Senator English, the author of SB743, that splitting Pulaski County three ways would hurt members of

that community more than other constituents, Senator English replied “I don’t disagree with a lot you said.” *Id.* at 50.

Senator Rapert also asked BLR to provide the racial demographic changes from the 2011 maps as compared to the Plan, Mot. Ex. 10, Rapert Dep. Tr. at 16:6–9, and read those statistics aloud to the full Senate, *see* Mot. Ex. 11, Burch Rep., Rapert Senate Chamber, Oct. 6, 2021 (Burch-CMA-0001057 at 1143). If legislators were not already aware, Senator Rapert’s actions alerted every legislator in attendance of the over 2% reduction in BVAP in the Plan as compared to the 2011 Plan.

Additionally, on the evening before the bills were passed, Governor Hutchinson warned legislators of the potential dilutive effects of the proposed map, saying “I would urge (lawmakers) that you do not want to dilute minority representation or influence in congressional races.” *Id.* The next day, after the bills were passed, Governor Hutchinson expressed that he was “concerned about the impact of the redistricting plan on minority populations” and “the removal of minority areas in Pulaski County into two different congressional districts.” *Id.* (quoting 3:20. Frizzell, Casey. 2021. “Arkansas Congressional Redistricting Bills to Go Into Law without Governor’s Signature.”).

C. Sequence of Events.

“The specific sequence of events leading up to [a] challenged decision also may shed some light on the decisionmaker’s purposes.” *Arlington Heights*, 429 U.S. at 267. As Dr. Burch’s unrebutted testimony explains, the sequence of events shows that the Legislature initially agreed upon a process for ranking and voting on bills but abandoned that process and instead pushed forward the Plan in a rushed, opaque process that was criticized by members of both parties. Mot. Ex. 11, Burch Rep. at 6–14.

After the two bills, HB1982 and SB743, that would become the enacted Plan were introduced, the process was “neither transparent nor careful” and left many legislators confused while bill supporters attempted to limit debate and public comment. *Id.* at 8. As shown in Dr. Burch’s timeline in Figure 1 of her report, major events took place in rapid succession, often in a matter of minutes, leaving no time for debate or objections. *Id.* at 8–9, fig. 1. Republican and Democratic legislators objected to speed and the lack of transparency that characterized this eleventh-hour maneuver. *Id.* at 10. HB1982 and SB743 were introduced on October 4, 2021 at approximately 8:40 PM for consideration by the Joint Committee handling the redistricting process at 10:30 AM the next morning. *Id.* This less than fourteen-hour, overnight turnaround led Senator Rapert to text other legislators to make sure they were ready to discuss the bills in the morning. *Id.* When the bills were discussed the next morning, there was significant bipartisan confusion and frustration among legislators about the content of the maps as well as the rushed process. *See id.* at 10–14. Despite this confusion, the bills were voted on that same day and were ultimately enacted on October 7, 2021. *Id.* at 8–9.

Defendant does not contest that the process was rushed or irregular. Mot. at 45. Indeed, at the hearing for the motion to dismiss, Defendant’s counsel conceded that the process was “very rushed.” Ex. N, MTD Hearing at 13:3–4. Instead, Defendant argues that “‘the brevity of the legislative process’ cannot, on its own, ‘give rise to an inference of bad faith.’” Mot at 45. (quoting *Simpson II*, 2023 WL 3993040, at *2, *vacated and remanded*, 144 S. Ct. 2602 (2024)). Plaintiffs’ agree. But, unlike in *Simpson II*, Plaintiffs have evinced something more—an explanation by legislators for why the process was rushed. In particular, proponents of the bill made clear that the last-minute nature of the introduction of HB1982 and SB743 was intended to stifle debate and public input. Mot. Ex. 11, Burch Rep. at 23–24. Senator Trent Garner and

Senator Ballinger agreed that if the Legislature slowed down and took time to correct issues with SB743, it would reinvigorate debate from opponents of the bill. *Id.* at 23–24. So proponents of the bills forged ahead, introducing and passing the bills in a less-than 14-hour period, much of which was overnight. *Id.* at 10. This evidence—which is the only evidence presented on the issue—calls into serious question the presumed good faith of the legislators.

D. Procedural or Substantive Deviations from Normal Process.

The leadup to the enactment of the Plan was not only rushed and opaque, but was also a significant “[d]eparture[] from the normal procedural sequence” agreed upon by the Legislature that supports the conclusion that “improper purposes are playing a role.” *Arlington Heights*, 429 U.S. at 267. Defendant’s motion for summary judgment does not claim, let alone show, that there were not procedural and substantive deviations from the normal process. *See* Mot. at 44–46. Defendant also provides no alternate explanation for the departures.⁹ Instead, as Dr. Burch’s unrebutted report describes, the deviation from the ranking process, the introduction of HB1982 and SB743 late at night, and the subsequent attempts to extract the bills from committee were all seen as significant procedural departures and produced internal outcry among legislators. *See* Mot. Ex. 11, Burch Rep. at 17–19.

Legislators from both parties objected to the initial departure from the ranking process as a significant deviation from the ordinary legislative process. *Id.*¹⁰ Legislators protested that they should not consider new bills without comparing them to the previously heard and ranked bills. *Id.* at 18–19. When Representative Wardlaw moved to substitute HB1982 for HB1971, the highest ranked map from the ranking process, the move caused “an uproar.” *Id.* at 19. Concerns

⁹ As Dr. Burch notes, external factors, such as the delay in census data, do not explain the departure. *See* Mot. Ex. 11, Burch Rep. at 6-7.

¹⁰ The deviation from the ranking process began with the introduction of HB1976 on September 30, 2021 by Representative Speaks. HB1976 was materially similar to HB1982. *Id.* at 18.

about the procedural departures were voiced even by supporters of the map. *Id.* For instance, Representative Beck stated “I have some concerns as to this process. It’s almost like we went through a process where we gave everything a weighted average and then now, we’re going to throw that out the door . . . I just have my concerns about the validity of this.” *Id.* (quoting 3:44:50 10/5/21 Meeting of the House State Agencies and Governmental Affairs Committee).

The record shows that the significant irregularities continued after the initial departure from the ranking process. During the 10:30 AM meeting of the Senate on October 5, legislators suggested that certain errors should be corrected in the map. *Id.* at 20. But Senator Rapert and Senator Hickey pressured legislators to pass SB743 as-is, before the Senate went into session at 11:00 AM. In fact, Senator Hickey “threatened to extract the bill from the Senate State Agencies and Governmental Affairs Committee if the members did not follow through and vote the bill out of committee.” *Id.* at 21. Representatives also felt pressure to pass HB1982 quickly, and eventually capitulated to that pressure, passing HB1982 out of committee in the afternoon of October 5th. *Id.* But on the Senate side, Senators voted overwhelmingly against passing SB743 out of committee. *Id.* at 22. As threatened, Senator Hickey immediately moved to extract the bill. *Id.* Both Democratic and Republican senators spoke out against this move. *Id.* at 20–23. The record suggests that the push to extract SB743, like the other attempts to rush through the proposed Congressional bills, was expressly intended to stifle dissent. *Id.* at 24–25.

E. Historical Background.

The value of historical background information for purposes of assessing the Legislature’s intent has long been recognized. *See Perkins v. City of W. Helena*, 675 F. 2d 201, 211 (8th Cir. 1982) (“Nonetheless, evidence of historical discrimination is relevant to the question of invidious intent”); *see also Arlington Heights*, 429 U.S. at 267; *Regester*, 412 U.S. at 766–67.

Arkansas has a long, judicially recognized, history of racial discrimination which includes concerted efforts to limit the power of Black voters.¹¹ *See* Ex. A, Smith Rep. at 3–4. Since Reconstruction, “[t]hrough a process of almost constant and creative reinvention, state officials from both major political parties have implemented new schemes to prevent Black voters from access to the ballot or to greatly reduce their effect on elections.” *Id.* at 4. That pattern continues today. *Id.* at 21–23 (describing “election integrity” laws and their disproportionate harm to minority voters).

Arkansas has engaged in a pattern of cracking its Black population into different Congressional districts that has persisted through redistricting cycles for at least the past 35 years. Mot. Ex. 3, Cooper Rep. at 11–20, Section III.A. As noted above, *see supra* STATEMENT OF FACTS, Section II.A, the Congressional district with the highest BVAP in Arkansas’s Congressional plans has consistently decreased each of the past four decades despite the statewide BVAP increasing over that same time period. *Id.* ¶¶ 16–21, fig. 1. As a result, despite Black citizens making up more than approximately 15% of the state’s population today, Arkansas has never elected a Black representative to Congress. Ex. A, Smith Rep. at 22.

¹¹ *Whitfield v. Democratic Party of State of Ark.*, 890 F.2d 1423, 1424 (8th Cir. 1989) (citing *Perkins v. City of W. Helena*, 675 F.2d 201, 211 (8th Cir. 1982), *aff’d* 459 U.S. 801 (1982)) (“The state has a history of official discrimination in its electoral process. Arkansas has used racially discriminatory voting practices such as statutory restrictions on the rights of blacks to vote, discriminatory literacy tests, poll taxes, a ‘whites only’ Democratic primary, segregated polling places, and at large elections.”); *Jeffers v. Clinton*, 730 F. Supp. 196, 210 (E.D. Ark. 1989) (Arkansas holds a “legacy of a history of discrimination, much of it governmental, beginning with the constitutionally sanctioned institution of human slavery.”); *Consent Decree, Hunt v. Arkansas*, No. PB-C-89-406, 1991 WL 12009081 (E.D. Ark. Nov. 7, 1991) (State of Arkansas admitted that judicial election procedures violated Section 2 of the Voting Rights Act by denying Black voters an equal opportunity to elect candidates of their choice); *Jeffers v. Tucker*, 847 F. Supp. 655, 659 (E.D. Ark. 1994).

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court deny Defendant's Motion for Summary Judgment.

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Respectfully Submitted,

/s/ Leah C. Aden

Leah C. Aden*

John S. Cusick*

NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.

40 Rector St, 5th Fl.

New York, NY 10006

Tel.: (212) 965-7715

laden@naacpldf.org

jcusick@naacpldf.org

Michael Skocpol*

Joseph Wong*

NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.

700 14th St, Ste. 600

Washington, D.C. 20005

Tel.: (202) 682-1300

mskocpol@naacpldf.org

jwong@naacpldf.org

/s/ Daniel Bookin

Chris A. Hollinger*

Daniel Bookin*

O'MELVENY & MYERS LLP

Two Embarcadero Center, 28th Floor

San Francisco, CA 94111

Tel.: (415) 984-8786

chollinger@omm.com

dbookin@omm.com

Ashley Pavel*

O'MELVENY & MYERS LLP

610 Newport Center Dr., 17th Fl.

Newport Beach, California 92660

Tel.: (949) 823-7138

apavel@omm.com

/s/ Arkie Byrd

Arkie Byrd, Arkansas Bar No. 80020

MAYS, BYRD & ASSOCIATES, P.A.

212 Center Street, Suite 700

Little Rock, AR 72201

Tel.: (501) 372-6303

Fax: (501) 399-9280

abyrd@maysbyrdlaw.com

* *Admitted Pro Hac Vice*

*Counsel for Plaintiffs The Christian Ministerial
Alliance, Patricia Brewer, Carolyn Briggs,
Lynette Brown, Mable Bynum, and Velma Smith*