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

CHRISTIAN MINISTERIAL ALLIANCE, *et al.*, **PLAINTIFFS,**

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

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

Defendant's Reply Brief in Support of Motion for Summary Judgment

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ARGUMENT

Plaintiffs have put forth no evidence demonstrating that race motivated the configuration of Arkansas's congressional districts, let alone that race was the predominant motive. The presumption of legislative good faith instructs courts to take care to avoid letting racial-gerrymandering cases proceed to trial based on equivocal evidence like that relied on by Plaintiffs. Plaintiffs cannot meet their evidentiary burden to proceed past summary judgment.

They fail to meet *Alexander*'s alternative-map requirements because neither of the two maps on which they rely matches or exceeds both the partisan advantage and core retention of the Enacted Plan. And they have no answer to the fact that their two alternative plans move drastically more black voters from their previous district than the Enacted Plan does. Recognizing this problem, Plaintiffs spend much of their briefing attempting to avoid the alternative-map requirement entirely. But *Alexander* makes clear that the alternative-map requirement applies here and forecloses Plaintiffs' challenge.

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The remaining evidence fails to show that the legislature was motivated by race as opposed to permissible considerations. Plaintiffs have no direct evidence that race played a role in the legislature's decision making, and the only available evidence cuts the other direction. The map itself evidences an intent to make minimal changes to the prior map while securing a modestly increased partisan performance in D2. Plaintiffs' attempt to disentangle that partisan motive from a racial one rests entirely on Dr. Baodong Liu's statistical work—the same statistical work that was rejected in *Alexander*—that cannot be relied upon here. And their remaining circumstantial evidence does nothing to point to the legislature's districting decisions' being driven by race as opposed to other plausible considerations.

Plaintiffs have failed to carry their burden to defeat the presumption of legislative good faith, and that presumption demands judgment be entered in the State's favor.

I. Plaintiffs cannot meet their demanding evidentiary burden to prove racial gerrymandering.

A. Plaintiffs are required to satisfy the predominance standard and overcome the presumption of legislative good faith to defeat summary judgment.

Plaintiffs bear the extraordinarily demanding burden 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 v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 7 (2024). This requires them to "untangle race from other permissible considerations." *Id.* They must "prove that the State 'subordinated' race-neutral districting criteria such as compactness, contiguity, and core preservation to 'racial considerations.'" *Id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). Their evidence must account for "the myriad considerations that a legislature must balance as part of its redistricting efforts," and cannot "ignore[]" . . . traditional districting criteria such as geographical constraints and the legislature's partisan interests." *Id.* at 24 (quotation omitted). This is "especially difficult" where, as here, "partisanship and race correlate," and Plaintiffs thus bear the burden of "ruling out the competing explanation that political considerations dominated the legislature's redistricting efforts." *Id.* at 9-10. It is therefore no surprise that, even prior to *Alexander*, the Supreme Court "never invalidated an electoral map in a case in which the plaintiff failed to adduce any direct evidence." *Id.* at 8.

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Alexander's clarification of how the presumption of good faith applies in racial gerrymandering cases makes that standard even more demanding. This Court must "draw the inference that cuts in the legislature's favor when confronted with evidence that could plausibly support multiple conclusions." *Id.* at 10; *see also Tenn. State Conf. of NAACP v. Lee*, No. 3:23-CV-00832, --- F. Supp.3d ---, 2024 WL 3896639, at *9 (M.D. Tenn. Aug. 21, 2024) ("The presumption compels courts to draw the inference that favors upholding a map if the evidence would permit a court to reach competing conclusions about the map's lawfulness." (quotations omitted)).

Circumstantial evidence is thus probative only to the extent it "rule[s] out" any other "plausible explanation" for an aspect of a map besides race. *Alexander*, 602 U.S. at 27; *see id.* at 24 (noting that "a court in a case such as this must rule out the possibility that politics drove the districting process"). Plaintiffs misconstrue the legal standard the Court must apply, both as to how the predominance standard works at summary judgment and how the presumption of good faith informs it.

Predominance. Plaintiffs attempt to sidestep their evidentiary burden of ruling out any plausible competing explanations for the legislature's districting decisions by misconstruing the predominance standard. They first argue that the "predominance inquiry does not permit a defendant to rely on post-hoc justifications." Resp. 33. But what Plaintiffs deride as "post-hoc justifications" are simply alternative explanations of the same circumstantial evidence. Indeed, accepting Plaintiffs' nonsensical characterization, their claim that racial considerations predominated is "post-hoc" because there is no contemporaneous direct evidence to support it.

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Plaintiffs rely on an out-of-context passage from the Court's decision in *Bethune-Hill* to support this argument. There, the Court responded to an argument made by Virginia that a line-drawing decision cannot be a racial gerrymander "if the legislature could have drawn the same lines in accordance with traditional criteria." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189 (2017). The Court rejected that argument, explaining that the predominance inquiry concerns the legislature's motive in drawing the district, not simply whether the district "look[s] consistent with traditional race-neutral principles." *Id*. at 190. Thus, even where a State chooses among "a plethora of maps" that comply with traditional principles, "if race for its own sake is the overriding reason for choosing one map over others, race still may predominate." *Id.* The Court rejected "*post hoc* justifications the legislature in theory could have used but in reality did

not," as part of its rejection of the argument that complying with traditional principles can immunize a racial motive. *Id.* at 189-90. *Bethune-Hill*'s discussion of post-hoc justifications thus has nothing to do with whether a legislature contemporaneously disclosed a given districting motivation, as Plaintiffs imply. *See also* Resp. 44 (citing *Bethune-Hill* for a similar argument). So where a plaintiff seeks to explain circumstantial evidence with a racial motive on the part of the legislature, the State may assert a plausible alternative explanation for that evidence irrespective of whether that explanation is supported by additional contemporaneous evidence.

The presumption of good faith. Plaintiffs also misconstrue how the presumption of legislative good faith applies at summary judgment. The Supreme Court has held that the presumption of good faith not only "inform[s] the plaintiff's burden of proof at trial" but also must be considered "when assessing . . . the adequacy of a plaintiff's showing at [summary judgment] and determining whether to permit . . . trial to proceed." *Miller*, 515 U.S. at 916-17. Plaintiffs concede that the presumption of good faith applies at the summary-judgment stage. Resp. 57-58. But they mistake how the presumption interacts with the standard for summary judgment, arguing that if a plaintiff has "developed evidence of a discriminatory motive, the default presumption of good faith no longer applies." *Id*; *see id.* at 57 (arguing that "the presumption of good faith is" merely "a factor to consider" at summary judgment).

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To the contrary, the presumption of good faith constrains what evidence is permissible for a court to consider as evidence of discriminatory motive in the first place. Indeed, as another three-judge court recently held, the presumption "does not resemble" a burden-shifting framework like *McDonnell Douglas* but instead "comprises part of the constitutional test" in racial gerrymandering cases." *Tenn. State Conf.*, 2024 WL 38966639 at *9 (emphasis omitted). "To defeat summary judgment, [Plaintiffs] must produce sufficient evidence from which a reasonable

factfinder could infer discrimination." *Torgerson v. City of Rochester*, 643 F.3d 1031, 1050 (8th Cir. 2011). And *Alexander* instructs that a factfinder *cannot* infer discrimination "when confronted with evidence that could plausibly support multiple conclusions." *Alexander*, 602 U.S. at 10. So while the Court must, for example, assume for purposes of summary judgment that Plaintiffs' witnesses testify truthfully, it cannot give Plaintiffs the benefit of inferences which would be impermissible at trial. In attempting to defeat summary judgment using circumstantial evidence, Plaintiffs may rely only on evidence that is amenable to no plausible explanation besides a racial motive.

B. The Court is required to draw an adverse inference against Plaintiffs because they failed to produce an alternative map showing that the General Assembly could have achieved its political objectives in a manner comparably consistent with traditional districting criteria while producing a significantly greater racial balance.

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In arguing that Arkansas's congressional districts were enacted with a predominantly racial motive, Plaintiffs must "untangle race from other permissible considerations." *Alexander*, 602 U.S. at 7. That is "especially difficult" where "partisanship and race correlate" because "a map that has been gerrymandered to achieve a partisan end can look very similar to a racially gerrymandered map." *Id.* at 9. So a plaintiff must "provid[e] a substitute map that shows how the State 'could have achieved its legitimate political objectives' . . . 'while producing significantly greater racial balance.'" *Id*. at 34 (quoting *Easley v. Cromartie*, 532 U.S. 234, 258 (2001)). The alternative map must also be "'comparably consistent with traditional districting principles,'" *id.* at 10 (quoting *Cromartie*, 532 U.S. at 258), including, as relevant here, "core preservation," *id.* at 7; *see also id.* at 27 (holding that where an alternative map does not meet the same core retention as the enacted plan, a court "cannot rule out core retention as [a] plausible explanation for the difference").

"[W]hen all plaintiffs can muster is 'meager direct evidence of a racial gerrymander'"—or, as here, none—an alternative map is the only thing that "can perform the critical task of distinguishing between racial and political motivations." *Alexander*, 602 U.S. at 34 (quoting *Cooper v. Harris*, 581 U.S. 285, 322 (2017)). Where a plaintiff fails to provide an alternative map, it "should be interpreted by district courts as an implicit concession that the plaintiff cannot draw a map that undermines the legislature's defense that the districting lines were 'based on a permissible, rather than a prohibited, ground.'" *Id.* at 35 (quoting *Cooper*, 581 U.S. at 317). Thus, district courts must "draw an adverse inference from a plaintiff's failure to submit one." *Id.* That adverse inference spells doom for a plaintiff's case where they "lack[] direct evidence or some extraordinarily powerful circumstantial evidence such as the 'strangely irregular twenty-eight sided' district lines in *Gomillion v. Lightfoot*." *Alexander*, 602 U.S. at 35 (quoting 364 U.S. 339, 341 (1960)). Both are absent here, and Plaintiffs failed to produce an alternative map that meets or outperforms the Enacted Plan on (1) racial outcomes, (2) core retention, and (3) partisan outcomes. Their case consequently begins and ends at this hurdle.

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1. Plaintiffs were required to produce an alternative map to avoid an adverse inference.

Plaintiffs resist the application of *Alexander*'s alternative-map requirement by inventing an evidentiary requirement for the State with no basis in the case law. They argue that *Alexander*'s alternative-map requirement is limited to cases "where the Legislature claimed to have sought a particular partisan outcome" and the State brings forth contemporaneous and "specific evidence" of that motivation. Resp. 40. But contrary to that claim, *Alexander* makes clear that the alternative-map requirement is triggered in a circumstantial-only-evidence case "[w]hen partisanship and race correlate" and "the State" has "asserted a partisan-gerrymandering defense."

Alexander, 602 U.S. at 9-10. Plaintiffs do not dispute that race and party correlate here, and *Alexander* places no additional evidentiary burden on the State beyond that assertion. *See Cooper*, 581 U.S. at 308 (noting that evidence of a "challenged district's conformity to traditional districting principles, such as compactness and respect for county lines, . . . loses much of its value when the State *asserts* partisanship as a defense") (emphasis added). That makes sense because the State has no burden to show that partisan motivations predominated in any districting decision; rather, it is a plaintiff's burden to "rule out" partisanship as a "plausible explanation" for any feature of a map they challenge as a racial gerrymander. *Alexander*, 602 U.S. at 27.

Direct evidence of a partisan motive is not required to trigger the alternative-map requirement. To be sure, in *Alexander*, South Carolina presented direct evidence that its legislature was motivated by partisanship rather than race. *See, e.g.*, 602 U.S. at 14 (noting legislators' testimony). But *Alexander* nowhere suggests that this was required or that a plaintiff is relieved of the burden to affirmatively "'disentangle race from politics'" where neither side presents direct evidence on the race/party question. *Id.* at 9 (quoting *Cooper*, 581 U.S. at 308).[1] Indeed, the fact that the record is bereft of direct evidence of legislative motivations makes the alternative-map requirement even more important. The presumption of good faith ensures that courts take special care before "declaring that the legislature engaged in offensive and demeaning conduct that bears an uncomfortable resemblance to political apartheid." *Alexander*, 602 U.S. at 11 (internal quotations and citations omitted). Where (as here) race and party correlate, a partisan gerrymander "can look very similar" to a racial one. *Id.* at 9. Thus, an alternative map is usually

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[1] Plaintiffs cite a footnote in the district court decision in *Covington v. North* Carolina to support their direct-evidence argument. Resp. 53 (citing *Covington* v. North Carolina, 316 F.R.D. 117, 139, n.21 (M.D.N.C. 2016)). Even if it were persuasive, it is not good law because that case was decided prior to *Alexander* and did not apply the presumption of legislative good faith.

the only circumstantial evidence that can defeat the presumption of good faith and "ensure[] that 'race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.'" *Alexander*, 602 U.S. at 10 (quoting *Miller*, 515 U.S. at 913). Limiting the alternative-map requirement to cases involving direct evidence of a legislature's partisan objectives would remove this important guardrail.

Nor is the alternative-map requirement inapplicable where legislators contemporaneously denied using race *or* partisanship as districting criteria. Resp. 43-44. Indeed, in *Alexander* legislators contemporaneously denied that partisanship played a role in the districting process, and the Supreme Court nevertheless held that the district court clearly erred in finding that race, rather than party, drove the legislature's decisions. *Id.* at 79-80 (Kagan, J. dissenting) (reviewing contemporaneous denials of partisan motivation).

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Plaintiffs similarly urge the court to ignore core retention because there is no direct evidence as to what role core retention played in the districting process because it wasn't explicitly discussed during the debates. Resp. 40-41. But *Alexander* held that a "failure to consider core retention betrays a blinkered view of the redistricting process." 602 U.S. at 27. "Core retention recognizes th[e] reality" that legislators "usually begin with the existing map and make alterations to fit various districting goals." *Id.* And *Alexander* discounted simulated maps drawn by the plaintiffs' expert there because they did not "restrict[] the core retention in his simulations to at least 83%," which was the core retention score for the enacted map. *Id.* Importantly, *Alexander* contains no mention of whether core retention was a metric specifically used by the South Carolina legislature or whether the legislature required a specific percentage of core retention for any given district or the map as a whole. Rather, because core retention is simply a "reality" of

the districting process, a plaintiff must "rule [it] out" as a "plausible explanation for the difference between the Enacted Plan" and comparator maps. *Id.*

Even if there were some evidentiary requirement to raise either partisanship or core retention as plausible explanations with respect to the alternative map requirement, it is easily met here by the most probative circumstantial evidence available for the General Assembly's motivation: the Enacted Plan itself. The features of the map itself raise both partisanship (with respect to D2) and core retention (with respect to the Enacted Plan as a whole and D2 in particular) as plausible alternative explanations for Plaintiffs' claims of racial gerrymandering.

Partisanship. The Enacted Plan itself plausibly suggests a motive to increase Republican performance of D2 because the Enacted Plan does, in fact, increase Republican performance in D2. Using the 2020 presidential race as the benchmark (as Plaintiffs' expert does), the map resulted in a 2.2% improved Republican performance in D2. *See* Cooper Rep. 36, Fig. 22. The General Assembly accomplished this by moving Cleburne County—one of the most Republican-leaning counties in the State—into D2. *See* Bryan Rep. 103, Appx. E (ranking Cleburne County as the sixth-highest performing county for Republicans in the 2020 Presidential Election, with 83.9% voting for President Trump). And it moved out of D2 41,392 voters, *see* Bryan Reb. Rep. 42, Appx. B.1, from Pulaski County, the least-Republican county in the State, *see* Bryan. Rep. 104, Appx. E (ranking Pulaski County as the lowest performing county for Republicans in the 2020 presidential election, with just 38.5% voting for President Trump).

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It is at least plausible that this increase in partisan performance did not happen by mere chance. As Plaintiffs' expert's Alternative Plan 1 shows, when a map drawer prioritizes core retention and population equalization alone for D2 (by merely removing Van Buren County and making no other changes), partisan performance drops relative to the 2011 Map. *See* Bryan Reb.

Rep. 42 (calculating Alternative Plan 1's D2 core retention at 97.9%), *id.* (showing ~2.5% decrease in Republican vote relative to the Enacted Plan, and a 0.7% decrease relative to the 2011 Map). In order to increase the Republican performance in D2 without reconfiguring the entire district (as Cooper does in his Alternative Plan 3), a map drawer has two options. First, one or more Republican-leaning counties can be moved into D2. Second, a map drawer can move Democratic-leaning voters out of D2. The only place within D2 from which a substantial number of Democratic-leaning voters can be located and placed elsewhere is the southeast corner of Pulaski County. *See* Bryan Rep. 66-67 (displaying maps with relevant partisan data). The Enacted Plan does both, and this, at a minimum, gives rise to a plausible inference that partisan considerations motivated the drawing of D2.

Core retention. The Enacted Plan itself also gives rise to a plausible inference that core retention motivated that map as a whole and D2 in particular. Start with the obvious—the Enacted Plan has an incredibly high core retention of over 92%. That figure is all the more startling in context. In 2021 Republicans controlled Arkansas's redistricting process for the first time in over a century and left 92% of Arkansans in the district that the 2011 Democrat-controlled legislature placed them in. And 100% core retention was not possible because after the 2020 Census D2 and D3 together were overpopulated by approximately 100,000 people. Bryan Rep. 28-29. This means approximately 3% of Arkansans had to be moved out of their district no matter what, meaning the Enacted Plan retained 92% out of a possible 97% of the State's voters in their original districts. D2's core retention, the lowest of the four, still sits at 88.4%. *See* Bryan Reb. Rep. 42, Appx. B.1. Compare that to Alternative Plan 1, which Plaintiffs' expert describes as a "least change plan" with a "very high" core retention—of only 87.53%. Cooper Rep. ¶¶ 66, 68. And Alternative Plan 1, according to Plaintiffs' expert, "prioritizes core retention." *Id.* ¶ 66. If

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Plaintiffs' own expert map drawer prioritized core retention only to get a *lower* score than the Enacted Plan, it is at least plausible that the General Assembly was motivated by core retention when it achieved a higher score, both as to the map as a whole and D2 in particular.

In sum, this is a circumstantial-evidence case where race and partisanship correlate, and the State has raised the plausible alternative explanation of partisan motivation for the racial gerrymandering Plaintiffs allege. *Alexander* therefore required them to submit an alternative map to disentangle race from politics, while accounting for other permissible considerations that could have plausibly influenced the legislature's districting decisions.

2. None of Plaintiffs' proffered alternative maps lets them avoid an adverse inference.

Alexander required Plaintiffs to "provid[e] a substitute map that shows how the State 'could have achieved its legitimate political objectives' . . . 'while producing significantly greater racial balance.'" *Alexander*, 602 U.S. at 34 (quoting *Cromartie*, 532 U.S. at 258). The alternative map must also be "'comparably consistent with traditional districting principles,'" *id.* at 10 (quoting *Cromartie*, 532 U.S. at 258), including, as relevant here, "core preservation," *id.* at 7.

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Following the Supreme Court's approach in *Alexander*, the comparable metrics for partisanship and core retention the Plaintiffs must meet here are the metrics of the legislature's districting decisions: the of Enacted Plan. In *Alexander*, the South Carolina legislature's enacted map had a "projected Republican vote share" of 54.39%. 602 U.S. at 15. So the Court observed that "any map with the partisan breakdown that the legislature sought" would have "something in the range of 54% Republican to 46% Democratic." *Id.* at 21. The plaintiffs failed to offer a map that matched that performance. As to core retention, the enacted map had a score of 83%. *Id.* at 27. So the plaintiffs were required to "restrict the core retention in" alternative maps "to at least

83%." *Id.* Their "failure to do so" meant that the Court could "not rule out core retention as another plausible explanation for the difference between" South Carolina's map and the simulated maps offered by the plaintiffs.

Alternative Plan 1. Plaintiffs' alternative maps fail to control for both partisanship and core retention. As to Alternative Plan 1, Plaintiffs concede that it "is not meant to satisfy *Alexander*'s alternative map requirement." Resp. 40; *see also* Cooper Rep. 36, Fig. 22.

Alternative Plan 2. Alternative Plan 2 fails to match the Enacted Plan in either partisanship or core retention and thus fails to save Plaintiffs from an adverse inference against them.

Using the 2020 presidential election, as Plaintiffs' expert does, the Enacted Plan improved Republican performance in D2 by approximately 2.2% compared to the 2011 Map. *See* Cooper Rep. 36, Fig. 22. Alternative Plan 2 nets only a 1% Republican advantage over the 2011 Map. Cooper Rep. 43, Fig. 28. Plaintiffs insist without any support that this is a "comparable partisan effect." Resp. 24. And even if it isn't, they claim that "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." Resp. 55. Their argument that a factual dispute exists is mistaken because the only evidence as to what partisan tilt was acceptable to the General Assembly is the partisan advantage actually secured by the Enacted Plan. Plaintiffs' failure to "control for party preference," *Alexander*, 602 U.S. at 26, by meeting the actual partisan advantage the legislature obtained fails to "rule out the possibility that politics drove the districting process" to a greater degree than in Plaintiffs' Alternative Plan 2, *id.* at 23. Alternative Plan 2, which would erase the majority of the partisan gains made by the Enacted Plan, fails to rule out partisan considerations as a plausible alternative for the configuration of D2.

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Alternative Plan 2 similarly fails to match the core retention of the Enacted Plan (92.2% vs. 80.4%). *See* Bryan Reb. Rep. 28, Table VI.1. Plaintiffs mistakenly argue that a lack of direct evidence about the legislature's priorities and goals concerning core retention means that assessing the difference between the two maps requires "weighing Bryan's conclusions about core retention against Cooper's." Resp. 56.[2] To the contrary, the experts' respective opinions about the maps' core retention scores are irrelevant. The question for the Court is whether Alternative Plan 2 rules out all plausible non-racial motivations for the configuration of D2. And Alternative Plan 2 moves over *twice* as many people from their prior district as the Enacted Plan. *Compare* Bryan Reb. Rep. 41, Appx. B.1 (Enacted Plan moves a total of 243,113) *with id.* 43 Appx. B.3 (Alternative Plan 2 moves 591,312). *Alexander* held that "restricting" core retention in an alternative map "to at least" the enacted plan's score is required to rule it out as a "plausible explanation" for the difference in the maps. *Alexander*, 602 U.S. at 27. So moving twice as many people as the Enacted Plan simply can't cut it.

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Finally, Plaintiffs argue that Alternative Plan 2 meets the requirement to show a "significantly greater racial balance," *id.* at 34 (quotation omitted) simply by "not cracking Pulaski County and improving CD2's BVAP,"[3] Resp. 56. But while Alternative Plan 2's BVAP in D2 is greater than in the Enacted Plan and only slightly lower than the 2011 Plan, *see* Bryan Reb. Rep. 19, Table IV.A.4, this is only accomplished through moving three times the APB population from their previous districts compared to the Enacted Plan. *See id.* at 28 (90,554 vs. 27,091). This includes nearly half the APB population of D4. In the context of this case, where Plaintiffs' challenge is directed at the movement of 21,904 voters from the southeast corner of D2, *see*

[2] They also mistakenly cite Cooper's Alternative Plan 1's core retention (87.53%) as being Alternative Plan 2's core retention. *See* Resp. 56.

[3] BVAP is black voting-age population. APB is any-part black.

Bryan Reb. Rep. 41 Appx. B.1, it blinks reality to suggest that an alternative plan may show a "significantly greater racial balance" in one district by moving an even greater number of the minority population from another district. Plaintiffs offer no defense of this puzzling map drawing choice.

Alternative Plan 2 fails to satisfy any of *Alexander*'s requirements for an alternative map and thus cannot save them from an adverse inference.

Alternative Plan 3. While Alternative Plan 3 exceeds the partisan performance of the Enacted Plan, it fails to match the Enacted Plan's core retention and thus cannot satisfy *Alexander*'s requirement.

Alternative Plan 3 falls woefully short of the Enacted Plan's Core Retention (92.2% vs. 70.6%). Bryan Supp. Rep. 13, Table VI.1.[4] As explained above, *Alexander* requires an alternative map to at least match the enacted plan's core retention, and Alternative Plan 3's failure to do so means that it cannot rule out core retention as a plausible explanation of the difference in the map's configuration. *See* 602 U.S. at 27. Indeed, Alternative Plan 3 takes this failure even further and moves over three-and-a-half times as many people from their prior district as the Enacted Plan. *Compare* Bryan Reb. Rep. 41, Appx. B.1 (Enacted Plan moves a total of 243,113) *with* Bryan Supp. Rep. 20, Appx. B.1 (Alternative Plan 3 moves a total of 884,467).

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Alternative Plan 3 also exacerbates the racial-balance problem discussed above regarding Alternative Plan 2. Rather than showing any "greater" racial balance, Alternative Plan 3's D2 BVAP is basically identical to that of the Enacted Plan (20.35% and 20.33%, respectively—a difference of less than 400 people). *See* Cooper Reb. Rep. 9, Fig. 3. And it worsens the problem

[4] In their brief, Plaintiffs mistakenly cite Cooper's original rebuttal report's figure of 73.53%, Resp. 56, instead of his corrected calculation of 70.66%, *see* Corrected Cooper Reb. Rep. at 9, Fig. 3.

of moving significantly more of the APB population than the Enacted Plan. It moves 31,424 from D2, Bryan Supp. Rep. 20, Appx. B.1, while the Enacted Plan moves only 21,904, Bryan Reb. Rep. 41, Appx. B.1. Map-wide, Alternative Plan 3 moves 124,106 APB, Bryan Supp. Rep. 20, Appx. B.1, four-and-a-half times the 27,903 moved by the Enacted Plan, Bryan Supp. Rep. 20, Appx. B.1. Again, whatever a "significantly greater racial balance" means in the context of this case, Plaintiffs have failed to show it with Alternative Plan 3.

Alternative Plan 3 fails to match the core retention of the Enacted Plan and thus fails to satisfy *Alexander*'s requirements. It further fails to show any greater racial balance, on any possible metric. It cannot save Plaintiffs from an adverse inference.

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C. All the available direct evidence points away from a racial motive.

Plaintiffs do not claim to have direct evidence of a racial motive, and they cannot dispute that the available direct evidence undercuts their racial-gerrymandering claim. This includes testimony and other remarks by Senator Jason Rapert, who served as Chair of the Senate State Agencies Committee during the redistricting process and denied that race played any role in the General Assembly's decision making. *See* MSJ Br. 28-30. And every other Republican legislature who mentioned race denied that it was a proper consideration. *See id.* 30-31.

Senator Rapert's testimony also sheds light on the three-way split of Pulaski County. He explained that because of Pulaski County's unique status as a populous nexus between three congressional districts, it is "the most logical and easiest place to get that population separated where it's manageable." (Rapert Dep. 20:20-24). Plaintiffs misunderstand the point of this testimony. Rather than simply showing a bare desire to rebalance the population, which Plaintiffs correctly note is a background rule rather than a districting principle, Resp. 41-43, Senator Rapert's testimony gives rise to the plausible explanation that the southeast corner of Pulaski County was split three ways simply because it was an easy way to balance the populations of three districts at

once, rather than due to any racial considerations. This by itself serves as a plausible non-racial explanation for D2's configuration. And Plaintiffs present no evidence that the populations of any other three districts could be balanced with a split of a single county, as was done here.

D. The features of the Enacted Plan itself do not evidence a racial motive.

The Supreme Court has "recognized that, as a practical matter, challenges will often need to show that the State's chosen map conflicts with traditional redistricting criteria." *Alexander*, 602 U.S. at 8 (cleaned up). A legislature must balance "myriad considerations" in "its redistricting efforts." *Id.* at 24. And "[t]raditional redistricting principles . . . are numerous and malleable," and some "are surprisingly ethereal and admit of degrees." *Bethune-Hill*, 580 U.S. at 190 (cleaned up). Relative to the 2011 Plan, the Enacted Plan improved in all the traditional criteria. *See* MSJ Br. 32-34.

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The only traditional criteria on which Plaintiffs attack the map is the political subdivision splits caused by the three-way split of Pulaski County. Plaintiffs acknowledge that the splits of smaller geographies, such as cities and school districts, are a consequence of splitting Pulaski County. Resp. 37-38. They shift their focus from those numerous smaller geographies to simply arguing that the three-way split of Pulaski County was unnecessary to create a map comporting with traditional districting principles. But Plaintiffs' burden is not to show that districting changes were unnecessary, but that they were motivated by race. Indeed, outside of the one-person-one-vote requirement and geographic contiguity of districts, arguably no features of a map are "necessary." And it is not the State's burden to show that the three-way split of Pulaski County was the only way to accomplish any particular objective the legislature may have had.

As the State explained, the three-way split itself does not facially support a racial motivation because of its unique location. *See* MSJ Rep. at 33-38. The southeast corner of Pulaski

County sits at a populous juncture of three congressional districts in an area that is heavily Democratic-leaning. Nothing on the face of the map rules out non-racial considerations as plausible explanations for the split. Nor do Plaintiffs claim that this is an "exceptional case[]" where "a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to "segregate voters" on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 646-47 (1993) (quoting *Gomillion*, 363 U.S. at 341). The geographic features of D2 thus do not allow Plaintiffs to disentangle race from the plausible partisan motivations behind the configuration of the district.

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E. The circumstantial evidence does not support a racial motive.

This remains a circumstantial-only case. Given the presumption of legislative good faith, Plaintiffs bear the extraordinary burden of showing that the only plausible explanation for the configuration of D2 is race. They come nowhere close to making that showing.

1. *Alexander* rejected the exact methodology Dr. Liu offers in this case and entirely forecloses reliance on it at any stage of litigation.

The Court allowed the case to proceed to discovery based on Plaintiffs' allegation that "black and white voters 'with the same party preferences were sorted differently among the relevant districts.'" *Christian Ministerial All. v. Thurston*, 714 F. Supp. 3d 1093, 1097 (E.D. Ark. 2024) (citing Am. Compl. ¶ 22). Specifically, Plaintiffs alleged that "[t]he new map removed black Democrats from the second district 'at a notably higher rate' than white Democrats" and "did the same for black and white unaffiliated voters." *Id.* (citing Am. Compl. ¶ 189). The Court predicted that "[a]ctually proving it may turn out to be a challenge[,]" and that "[i]t may turn out that geography rather than race played the predominant role in the General Assembly's decision," *id.* at 1098.

The only proof offered by Plaintiffs for their allegation that black and white voters with the same party preference were treated differently is Dr. Liu's statistical work measuring correlations between a voter's race, partisan preference, and assignment in or out of D2. The Supreme Court rejected Dr. Liu's work in *Alexander* for the same reason this Court must reject it here. It is "plainly flawed" because it fails to account for geography, including "contiguity and compactness." *Alexander*, 602 U.S. at 31; Resp. 51 ("Defendant is correct that Dr. Liu's statistical analysis cannot control for contiguity or compactness as variables[.]"). Most pertinently, it fails to account for where in the county or congressional district a voter lives. *Id.* at 29. Sitting in clear-error review, the Court held that these methodological flaws "preclude reliance on Dr. Liu's methodology." *Id.* at 32. Dr. Liu admits that he used the same methodology here as in *Alexander*, and his opinions must suffer the same fate.

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Plaintiffs' excuses for nonetheless offering Dr. Liu's rejected methodology are unavailing. They first note that Dr. Liu updated his method to consider "multiple different measures of partisan preference." Resp. 51. That is a red herring because the State doesn't challenge the election data he relied on here.

Second, Plaintiffs say that "Dr. Liu expands his methodology to include formal tests of statistical significance," which raise the confidence level of his calculated associations. Resp. 51. This, too, is irrelevant. The Supreme Court did not reject Dr. Liu's methodology due to a weakness in statistical correlations. Rather, his method is "plainly flawed" because it fails to account for the confounding factor of geography—a fact both he and Plaintiffs admit. (*See* Liu Dep. 99:1-20 ("Q. A voter's geographic proximity to the border of Congressional District 2 is not a variable that you considered, correct? A. Correct.")).

Third, Plaintiffs note that "Dr. Liu expands his analysis to include a county-level assessment of Pulaski County." Resp. 51. This, too, does nothing to fix the flaws in his method. The Supreme Court rejected a district-level analysis because his method does not account for *where* in the district a voter lives. Adding a county-level analysis simply means that Dr. Liu now also fails to account for where in the county a voter lives. This is especially fatal where, as here, race and political party are not evenly distributed across a district or county. *See* MSJ. Rep. 35-39 (collecting maps of the race/party distributions across D2 and Pulaski County). Dr. Liu's methodology cannot account for the fact that, all else being equal, a voter living next to the border of a district is more readily moved than a voter living in the middle of a district many miles from the district border. None of Dr. Liu's updates to his methodology change that basic fact or suddenly account for contiguity and compactness. This Court is therefore bound by *Alexander* to reject his work here.

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Plaintiffs' remaining defense of Dr. Liu's methodology is simply that it is the best they have available, and it is not possible to modify his methodology to incorporate the variables the Supreme Court identified as confounding his analysis. Resp. 51-53. But whether this methodology is the best available does not matter in the face of the Supreme Court's binding direction that it cannot be used because it is "highly unrealistic" and thus fails to "provid[e] any significant support for [Plaintiffs'] position." *Alexander*, 602 U.S. at 32. Nor can the stage of litigation excuse Plaintiffs' attempt to shirk the Supreme Court's decision. Plaintiffs cannot create a triable issue of material fact using expert methodology, reliance upon which the Supreme Court has held to be clearly erroneous.

Alexander requires this Court to give Dr. Liu's opinions no weight in assessing whether Plaintiffs have sufficiently disentangled race from partisanship.

2. Dr. Burch's "content analysis" of the circumstantial evidence departs from *Alexander* and must be disregarded.

Dr. Burch offers her own gloss on the evidentiary record, performing what she describes as a "content analysis" concerning the *Arlington Heights* factors. Dr. Burch's ultimate opinion is that "partisan and other alternative motivations do not sufficiently account for the enacted plan and its impact on minority voters." Burch Rep. 51. As previously explained, while Dr. Burch's organization of the circumstantial evidence in this case is may be informative, her ultimate opinions about that evidence cannot support Plaintiffs' effort to defeat summary judgment. MSJ Br. 42-44. That is because Dr. Burch fails to apply the evidentiary framework called for by *Alexander*, specifically its directive that, in light of the presumption of good faith, only evidence that cannot plausibly be explained by some non-racial consideration may further a plaintiff's claim of racial gerrymandering. *See Alexander*, 602 U.S. at 10. Dr. Burch not only failed to apply that framework, but she testified that she didn't "exactly know what [the presumption of legislative good faith] means or if there's a test or whatever . . . ." (Burch Dep. 28:16-29:13.)

Plaintiffs argue that Dr. Burch is not required to "apply a legal standard when formulating [her] opinion," Resp. 65, but that misses the point. In this context, the presumption of good faith operates as factual framework for Plaintiffs' burden of proof. It requires assessing whether a given piece of evidence may plausibly be explained by something other than race, and if so, precluding reliance on it. Dr. Burch did not assess whether a non-racial explanation may plausibly explain any of the evidence she reviewed. Indeed, her report is replete with examples where she drew inferences in favor of a racial motivation in spite of clearly plausible alternatives. *See* MSJ Br. 44 (noting examples). Because Dr. Burch's report fails to identify which, if any evidence, she believes may only plausibly be explained by race, it fails to "provide[] any significant

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support for [Plaintiffs'] position" in overcoming the presumption of good faith. *Alexander*, 602 U.S. at 33.

3. The Bureau of Legislative Research's lack of partisan data does not suggest that legislators themselves relied on racial considerations.

Plaintiffs make much of BLR staff attorneys' lacking partisan data within their mapping software, while at the same time having access to racial statistics. Resp. 44-46. They argue that this data was visible on the computer screens while BLR staff attorneys were working on maps, and one or more legislators could have looked at the data while they were present in the room. Thus, they say either BLR staff or legislators must have used racial data to draft the map, given the lack of partisan data in BLR's districting software. And if the legislature did engage in partisan gerrymandering, "it could have pursued that goal only by using race as a proxy." Resp. 56-57. There are numerous problems with this theory.

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First, Plaintiffs assume without argument or evidence that legislators needed political data to accomplish the straightforward partisan changes that were made to D2. As explained above, the General Assembly brought one of the State's most Republican-leaning counties into D2 and removed precincts from the least Republican-leaning county. It is certainly plausible that elected officials in Arkansas would be able to formulate that plan, even if they lacked access to any political data, simply based on their background knowledge and experience regarding Arkansas politics. In fact, Plaintiffs' map drawing expert—who doesn't live in Arkansas—testified that he did not use partisan data when drawing Alternative Plan 2, and that he was simply able to operate based on assumptions about the "similarities between the Ozarks and the Appalachians." (Cooper Dep. 239:16-240:6.)

Second, any notion that BLR staff attorneys' access to racial data is relevant misunderstands their role in the process. As Michelle Davenport explained when questioned about her

role: "I was the scrivener who was operating the machine, moving the lines as directed." (Davenport Dep. 265:2-3.) And when asked who one would need to speak to "to know why these particular precincts were moved out of Congressional District 2 into other congressional districts," she responded: "The sponsor of those bills." (*Id.* 265:8-12.) Lori Bowen answered that one would "need to speak to the legislators that instructed us to draw it that way" when asked "who could tell [counsel] what the explanations for" the precincts moved out of D2 were. (Bowen Dep. 285:14-19; *see also id.* 302:18-21 (testifying that she did not "exercise any discretion in drawing the maps outside of what [she] was instructed to do by a legislator.")) BLR's staff attorneys merely memorialized the specific instructions given to them by legislators, rather than having their own creative input in the process.

Third, both BLR attorneys testified that they never used the racial data in their work. Ms. Bowen testified as follows:

> Q. Do you think having race data available -- available to you was helpful in drawing proposed congressional maps?
>
> [Objection omitted]
>
> A. Not for what I was doing.
>
> Q. Why not?
>
> A. Because I was just given instructions for how to draw the maps, and I needed the county – the actual geographies, that's what I needed to do -- to fulfill my role.

(Bowen Dep. 93:19-94:4.) Ms. Davenport similarly testified:

> Q. Was having race data at the precinct, or any other level, available to you helpful when you were drawing congressional maps?

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> A. That wasn't something that I would be looking at. I'm strictly following the request of the member.

(Davenport Dep. 84:14-18.) There is no evidence in the record that BLR staff attorneys made use of the software's racial data for any purpose while drawing maps for legislators. And given their testimony that they did not exercise any discretion in their map drawing, this means that no legislators told them to use any racial data when drawing maps.

Fourth, Plaintiffs note that "legislators were in the room with [Ms. Bowen] when she was working on the" Enacted Plan, implying that they may have discussed race with or around her. Resp. 46. But Ms. Bowen testified:

> Q. In the context of this entire congressional redistricting process, were you ever in a room, while you were developing any proposed map, where there was any discussion by a legislator about the racial composition of any geography in Arkansas?
>
> [Objection omitted]
>
> A. No, I don't believe it was ever discussed.

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(Bowen Dep. 288:5-19.) The record thus refutes the notion that legislators ever discussed race while Ms. Bowen was working on the Enacted Plan.

Fifth, Plaintiffs assume that BLR's lack of political data means that legislators lacked political data. In fact, the record at least plausibly suggests that legislators accessed political data on websites such as Dave's Redistricting. *See* MSJ Br. 30 (reviewing Senator Rapert's testimony).

In sum, the testimony of the BLR staff attorneys shows neither that they nor any legislators considered racial data when drawing maps, not that racial data must have been used as a proxy for political data.

4. The remaining considerations under the *Arlington Heights* factors do not support a racial motive.

Whether considered under the umbrella of Plaintiffs' racial-gerrymandering claim or their vote-dilution claim, *see* Sec. II, none of the evidence Plaintiffs point to establishes a racial purpose, as opposed to other permissible considerations.

Discriminatory impact. Plaintiffs first rely on the impact of the Enacted Plan's changes to D2, arguing that the removal of approximately 21,904 black "voters"[5] from the district evidences discriminatory intent. Resp. 62 (citing Bryan Rep. at 101, Appx. D.1). They omit, however, that this represents only 52.9% of the voters moved from D2. *Id*. Plaintiffs do not explain how it is plausible to argue that the General Assembly intentionally targeted black voters when the map swept up nearly as many white and Hispanic voters in this districting decision. Nor do they make any further effort to disentangle race and politics not already discussed above. They assert that it is "no coincidence" that the removal of voters from D2 "followed within months of this 2020 election." Resp. 63. That is true, but not for a racial reason. After all, the legislature was required to redraw its districts after the 2020 Census.

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Next Plaintiffs point to the legislature's awareness of the allegedly discriminatory impact of the map during the process. This Court has already addressed this claim, holding that "[t]his argument does not work." *Simpson v. Thurston*, No. 4:22-cv-213, 2023 WL 3993040, at *2 (E.D. Ark. May 25, 2023) (*Simpson II*). That remains the case. Because of the good-faith presumption,

[5] The figure Plaintiffs cite represents the total APB population removed from D2, not the voting-age population. The number of voters would obviously be lower than this.

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." *Id.* (cleaned up). To be sure, opponents of the map expressed their concerns over what they believed would be a racial impact; "[b]ut mere awareness" of such an impact "is not enough." *Simpson v. Hutchinson*, 636 F. Supp. 3d 951, 956 (E.D. Ark. 2022) (*Simpson I*). Instead, Plaintiffs must bring forth facts "showing that the General Assembly selected or reaffirmed a particular course of action at least in part because of its impact on" black Arkansans. *Id.* (cleaned up). Plaintiffs erroneously assert that these statements ought to be viewed differently here than in *Simpson*, attempting to bolster their case by simply pointing to additional statements of the same kind. Resp. 68-71. But these additional statements do nothing to bridge the gap between the legislature being aware and warned of the map's alleged racial impact and its "select[ing] or reaffirm[ing]" its choice "because of" that impact, rather than in spite of it. *Simpson I*, 636 F. Supp.3d at 956 (cleaned up).

Other contemporaneous statements by legislators. Plaintiffs rely on Dr. Burch's collection of evidence regarding the purported goals of various legislators, arguing that professed goals were abandoned in favor of a race-based result. Resp. 65-66. These statements suffer from the same fatal flaw of applying equally to partisan considerations as race, which (as explained above) Plaintiffs have failed to disentangle. Additionally, Plaintiffs' argument on this point requires ignoring the best available evidence of what the legislature was motivated by—the map itself. It is perfectly plausible that, irrespective of whatever positions taken in the debates leading up to the ultimate vote, that legislators who voted for the map did so because it best served the goals they had settled on by the end of the process. Believing otherwise requires the Court to assume that these legislators were simply lying about their true motivations all along, which the presumption of good faith prohibits.

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Plaintiffs further point to the lack of a professed partisan motivation in statements by legislators. Resp. 67. But it should not be surprising that a legislator would choose to not openly discuss partisan districting goals "because voters don't like excessive partisan manipulation of district lines." *Alexander*, 602 U.S. at 79 n.3 (Kagan, J., dissenting).

Sequence of events and procedural departures. Plaintiffs acknowledge that this Court has already rejected the rushed redistricting process as a basis for inferring a racial motive. *See* Resp. 72 (citing *Simpson II*, 2023 WL 3993040, at *2). Plaintiffs claim that an additional gloss makes a difference, arguing that one reason for the rush toward the end of the process was the desire of Senators Garner and Ballinger for the debate on the congressional map to end. Resp. 72-73 (citing Burch Rep. 23-24). But the problem from *Simpson* remains. Even if legislators did proceed to a vote at a fast pace because they wanted to end the debate on the map, "nothing suggests that it did so to accomplish a discriminatory goal," *id.* (quotation omitted), as opposed to permissible reasons such as partisanship or even simple exhaustion from a contentious round of districting. Plaintiffs similarly fail to negate other plausible explanations for the deviations from the original ranking procedure or why, if the purpose was to "stifle dissent," Resp. 74, it was for a racial purpose. In any event, Plaintiffs fail to explain the relevance of the procedural debate and departures in light of the fact that the Enacted Plan eventually passed handily. The presumption of good faith precludes drawing a racial inference here, just as it did in *Simpson*.

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History. For the reasons explained in the opening brief, Plaintiffs' arguments about the State's history of race discrimination aren't relevant to their assertion that the 2021 Arkansas General Assembly engaged in racially discriminatory districting. Resp. 46; *see also Simpson II*, 2023 WL 3993040, at *2 ("[A] history of discrimination fails to establish discriminatory intent,

at least when it is not reasonably contemporaneous with the adoption of the new map.") (cleaned up).

* * *

Plaintiffs lack any circumstantial evidence that can overcome the presumption of legislative good faith. Despite Plaintiffs' many complaints about the Enacted Plan, the legislature, and the redistricting process, they have failed to show that any of the features they complain of must be explained by race rather than permissible considerations.

II. Plaintiffs' vote-dilution claim likewise fails.

The Supreme Court recently explained that a "vote-dilution claim is 'analytically distinct' from a racial-gerrymandering claim and follows a 'different analysis.'" *Alexander*, 602 U.S. at 38 (quoting *Shaw*, 609 U.S. at 645). "A plaintiff pressing a vote-dilution claim cannot prevail simply by showing that race played a predominant role in the districting process." *Id.* "Rather, such a plaintiff must show that the State "enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities.'" *Id.* (quoting *Miller*, 515 U.S. at 911). "In other words, the plaintiff must show that the State's districting plan "has the purpose and effect" of diluting the minority vote. *Id.* (quoting *Shaw*, 609 U.S. at 645).

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As explained in the opening brief, this Court should follow its approach in *Simpson*. Resp. 47. Because Plaintiffs lack any evidence of discriminatory motive sufficient to overcome the presumption of good faith, there is no need to separately analyze the discriminatory impact of the map. But even if there were, Plaintiffs fail the requirement to show a discriminatory impact.

Perhaps recognizing that, Plaintiffs erroneously assert they may show "any racially discriminatory impact." Resp. 60. For this they cite two inapposite cases under Section 5 and Section 2 of the Voting Rights Act. *Id.* (citing *City of Pleasant Grove v. United States*, 479 U.S. 462, 471–72 n.11 (1987), and *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 438-40

(2006)). They provide no authority for their claim that a constitutional vote-dilution claim can be sustained where a districting decision has no impact on a minority population's electoral power. Though there is no clear standard in the Supreme Court's case law, courts have held that there must be some actual effect. *See* MSJ Br. 43 (collecting cases); *see also Tenn. State Conf.*, 2024 WL 3896639, at *14-15 (reviewing the case law and arriving at no settled conclusion).

Plaintiffs don't dispute the State's expert's analysis showing that the voters moved out of D2 would have no impact on its congressional race, MSJ Br. 48, instead alleging without authority that actual election results are an "overly simplistic and narrow view of discriminatory impact." Resp. 64. But the most probative impact in a challenge to electoral districts is an electoral impact. Plaintiffs further claim that this analysis "fails to acknowledge" various evidence of intent, but that simply conflates the separate intent and effect requirement in a vote-dilution case. Plaintiffs' vote-dilution claim therefore fails.

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CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of Defendants.

Respectfully submitted,

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