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

FUTURE MAE JEFFERS, et al. PLAINTIFFS

v. Case No. 2:12-cv-00016-JLH

MIKE BEEBE, in his official capacity as Governor of Arkansas and Chairman of the Arkansas Board of Apportionment; MARK MARTIN, in his capacity as Secretary of State of Arkansas and as a member of the Arkansas Board of Apportionment; DUSTIN McDANIEL, in his capacity as Attorney General of Arkansas and a member of the Arkansas Board of Apportionment; and THE ARKANSAS BOARD OF APPORTIONMENT DEFENDANTS

BRIEF IN SUPPORT OF GOVERNOR MIKE BEEBE, ATTORNEY GENERAL DUSTIN MCDANIEL, AND THE ARKANSAS BOARD OF APPORTIONMENT'S MOTION TO DISMISS

Plaintiffs bring this action against the Arkansas Board of Apportionment and its members, challenging the Board's plan for a new Senate District 24 in the Delta area of eastern Arkansas. Plaintiffs claim that, in drafting the boundaries of Senate District 24, Defendants diluted the voting strength of African American residents in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the U.S. Constitution. Plaintiffs maintain that Defendants violated federal law even though the total African American population in new Senate District 24 is 57.05%, and the total black voting-age population ("BVAP") of the new district is 52.88%. *See* 2011 Senate Matrix, attached to Defs.' Motion to Dismiss as Exhibit 1.

Plaintiffs' complaint fails to state a plausible claim for relief, and this Court should dismiss it under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *First*, the complaint is riddled with mere formulaic recitations of the elements under *Thornburg v. Gingles*, 478 U.S. 30,

46 (1986), and lacks factual substance. When the conclusory allegations are properly ignored, the remaining factual allegations (if any) do not "nudge" the Section 2 and constitutional claims "across the line from conceivable to plausible." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). *Second*, and related to the first point, the complaint is based upon a series of legal premises that fail as a matter of law. For example, the Board of Apportionment had no obligation to create a Senate district with a 60% BVAP. A 60% rule lacks empirical and evidentiary support, has never been required by the U.S. Supreme Court, and is inconsistent with the Supreme Court's most recent Section 2 decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009). In addition, the Board of Apportionment did not have a legal duty to predict demographic trends over the next decade. Finally, plaintiffs have focused solely on Senate District 24 without proposing a feasible alternative plan for the entire Senate that would comply with all legal requirements. Indeed, plaintiffs' proposal would remove black voters from Senate District 25—an adjacent, unchallenged majority-minority district that already falls below the threshold of 60% BVAP that plaintiffs (incorrectly) contend is necessary to comply with Section 2 and is 2.2% below the ideal district size of 83,312. For all of these reasons, this Court should dismiss the complaint.

I. BACKGROUND

A. The Arkansas Board of Apportionment's Redistricting Plan

Article 8 of the Arkansas Constitution requires that the Board of Apportionment—comprised of the Governor, Secretary of State, and Attorney General—convene promptly after each federal census for the purpose of determining the state's legislative district boundaries. The

Board of Apportionment held its first meeting on March 16, 2011, a few weeks after the U.S. Census Bureau made census data available.[1]

The federal census data showed that Arkansas's 2010 population was 2,915,918, which represented a 9.1% increase over the 2000 population.[2] The black population comprised 15.4% of Arkansas's total population.[3] The census data also revealed significant demographic changes in the population distribution. To give just a few examples:

- The total population of Benton County (Northwest Arkansas) increased by 44.3%, and its black population increased by 347.4%.
- The total population of Washington County (Northwest Arkansas) increased by 28.8%, and its black population increased by 69.7%.
- The total population of Faulkner County (Central Arkansas) increased by 31.6%, and its black population increased by 58.5%.
- The total population of Pulaski County (Central Arkansas) increased by 5.9%, and its black population increased by 16.2%.
- The total population of Lonoke County (Central Arkansas) increased by 29.4%, and its black population increased by 19.7%.

[1] Meeting minutes, comments, maps, demographic profiles of districts, and other useful documents are available at http://www.arkansasredistricting.org/Pages/default.aspx. In addition, UALR's Global Information Systems Lab has visual representations of the Arkansas census data available at http://argis.ualr.edu/maps.htm.

[2] http://quickfacts.census.gov/qfd/states/05000.html

[3] *Id.*

- The total population of Lee County (Delta) *decreased* by 17.1%, and its black population *decreased* by 20%.
- The total population of Phillips County (Delta) *decreased* by 17.7%, and its black population *decreased* by 12.1%.

See Map of Percent Change in Total Population, attached as Exhibit 2; Map of Percent Change in Black Population, attached as Exhibit 3.

Thus, the Board of Apportionment was tasked with redrawing the district boundaries to account for significant population changes and demographic shifts. The difficulty of this task is underscored by a map depicting the extent to which the old Senate district boundaries deviated from the "ideal" district size of 83,311. *See* 2010 Senate Variance Map, attached to Defs.' Mot. to Dismiss as Exhibit 4. For example, if the boundaries of old Senate District 5 and old Senate District 16 were to remain the same after the 2010 census, they would each fall short of the ideal population size by over 14,000 people, thereby giving voters in those districts a disproportionate share voting power under the principle of one person, one vote.

After receiving numerous comments and holding public meetings, the Board of Apportionment voted 2 to 1 to approve a final plan for both legislative chambers. *See* 2011 Senate Plan, attached to Defs.' Mot. to Dismiss as Exhibit 5. Governor Beebe and Attorney General Dustin McDaniel voted in favor of the plan; Secretary of State Mark Martin voted against it.

Like the 2001 plan, the 2011 Senate Plan has four[4] majority-minority districts. The new majority-minority districts are as follows:

[4] *Compare Jeffers v. Clinton*, 756 F. Supp. 1195, 1200 (E.D. Ark. 1990) (upholding the Arkansas Board of Apportionment's proposed plan for two majority-minority Senate districts but modifying the borders).

- **Senate District 24**, which is the only district that plaintiffs challenge, has a total African American population of 57.05% and a BVAP of 52.88%. District 24 includes Crittenden County and the eastern parts of Cross, St. Francis, Lee, and Phillips Counties. This district includes West Memphis, Helena-West Helena, and part of Forrest City.[5] Senator Jack Crumbly,[6] an African American and plaintiff, is the incumbent senator of old District 16 and resides in new District 24.
- **Senate District 25** has a total African American population 58.37% and a BVAP of 55.85%. District 25 includes parts of Phillips, Desha, Lincoln, Arkansas, Monroe, and Jefferson Counties. The City of Pine Bluff is in District 25. Senator Stephanie Flowers,[7] an African American, is the incumbent senator of old District 5 and resides in new District 25.
- **Senate District 30** has a total African American population of 56.33% and a BVAP of 53.19%. District 30 is in Pulaski County and includes part of Little Rock. Linda Chesterfield,[8] an African American, is the incumbent senator of old District 34 and resides in new District 30.

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[5] *See* interactive map of Senate Districts, *available at* http://geocommons.com/users/AR-Apportionment/maps?page=1.

[6] *See* http://www.arkleg.state.ar.us/assembly/2011/2011R/Pages/MemberProfile.aspx?member=Crumbly

[7] *See* http://www.arkleg.state.ar.us/assembly/2011/2011R/Pages/MemberProfile.aspx?member=S.Flowers

[8] *See* http://www.arkleg.state.ar.us/assembly/2011/2011R/Pages/MemberProfile.aspx?member=L. Chesterfield

- **Senate District 31** has a total African population of 61.53% and a BVAP of 58.26%. District 31 is in Pulaski County and includes part of Little Rock. Joyce Elliot,[9] an African American, is the incumbent senator of old District 33 and resides in new District 31.

B. Plaintiffs' Lawsuit

Plaintiffs' lawsuit is the latest in a series of cases spanning over three decades regarding the Arkansas Board of Apportionment. In the first round of litigation, the plaintiffs prevailed in their efforts to establish court-ordered districts that had a Black Voting Age Population ("BVAP") of 60%. In the second round, however, the plaintiffs switched positions and argued that those very districts diluted their voting strength by packing African-Americans into too few districts. *See Jeffers v. Tucker*, 839 F. Supp. 612, 613 (E.D. Ark. 1993). The *Jeffers* plaintiffs urged this Court to draw districts in the Delta that would give them a bare majority and thereby disperse their voting influence more broadly. *Id.*

Nineteen years later, a new set of *Jeffers* plaintiffs has filed this lawsuit in which they argue that Section 2 compelled the Board of Apportionment to pack the new Senate District 24 with more African Americans in order to better ensure a "safe" seat for their preferred candidate. Plaintiffs waited until January 23, 2012, to file their lawsuit—approximately 6 months after the Board of Apportionment enacted the new redistricting plan , only four months before the primary elections on May 22, 2012, and only one month before the February 23, 2012, start of the candidate filing period.

[9] *See* http://www.arkleg.state.ar.us/assembly/2011/2011R/Pages/MemberProfile.aspx?member=Elliott

As explained below, plaintiffs' complaint is filled with formulaic recitations of the *Gingles* elements but short on factual substance. And the few allegations about the factual underpinnings of plaintiffs' claims are, for the most part, demonstrably false. For example, the publicly available data shows that old Senate District 16, which plaintiffs concede had a BVAP that was sufficiently high to permit African Americans within the district to elect the candidates of their choice (Compl., ¶ 33), had a BVAP of 55.48% under the Board of Apportionment's 2001 Senate Plan. *See* 2001 Senate Matrix, attached to Defs.' Motion to Dismiss as Exhibit 6;[10] 2001 Senate Plan, attached to Defs.' Mot. to Dismiss as Exhibit 7. The BVAP of old Senate District 16 did not "approach" 60% and was not 58% (*see* Compl., ¶¶ 33, 26, 47). To give another example, new Senate District 24 includes Helena-West Helena and part of Forrest City.[11] *See* note 5, *supra*; *see also* Plaintiffs' Brief Regarding Three-Judge Panel (Doc. 5), at 3-4 (stating that the plaintiffs from Helena-West Helena reside within the new Senate District 24 and attaching an exhibit showing that Helena-West-Helena lies within Senate District 24). Thus, paragraph 34 of the complaint, in which plaintiffs allege that Helena-West Helena and Forrest City were "cut out" of new Senate District 24, is wrong according to publicly available information and plaintiffs' own admissions.

[10] The 2001 Senate Matrix does not have a column for the BVAP percentage, but it has a column for the total BVAP and the total VAP of all races. The last column ("VABlack") divided by the next-to-last column ("VAPersons") allows for the calculation of the BVAP percentage. With regard to old District 16, the total BVAP of 28,868 can be divided by the total VAP of 52,031. The result is a BVAP percentage of 55.48%.

[11] *See* interactive map of Senate Districts, *available at* http://geocommons.com/users/AR-Apportionment/maps?page=1.

II. ARGUMENT

A. The Pleading Standard Under Rules 8 and 12(b)(6)

1. *Twombly* and *Iqbal*

Under the U.S. Supreme Court's most recent decisions on Rules 8 and 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). This pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 555).

The Supreme Court's plausibility test involves two steps. First, this Court must determine which allegations in the complaint are conclusory and, therefore, should be ignored. The complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 55. In other words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949. Allegations that "are no more than conclusions" are "not entitled to the assumption of truth." *Id*. at 1950.

Second, the non-conclusory allegations must be evaluated to determine whether they contain sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id*. (quoting *Twombly*, 550 U.S. at 557). The allegations must be sufficient to "nudge" the claims "across the line from conceivable to plausible." *Id.* at 1951 (quoting *Twombly*, 550 U.S. at 570).

2. The Court's Consideration Of Materials Outside The Pleadings

The U.S. Court of Appeals for the Eighth Circuit has held that, when addressing a motion to dismiss, "[t]he court may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record." *Illig v. Union Electric Company*, 652 F.3d 971, 976 (8th Cir. 2011); *see also Stahl v. United States Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003) ("The district court may take judicial notice of public records and may thus consider them on a motion to dismiss."); *United States v. Southern California Edison Co.*, 300 F.Supp.2d 964, 970 (E.D. Cal. 2004) ("The court need not accept as true allegations that contradict facts which may be judicially noticed. For example, matters of public record may be considered, including pleadings, orders, and other papers filed with the court or records of administrative bodies . . . ."). The Eighth Circuit has also has also held that courts may consider whether a claim is barred by an affirmative defense that is apparent from either the face of the complaint or public records. *See Noble Systems Corp. v. Alorica Central, LLC*, 543 F.3d 978, 983 (8th Cir. 2008) (citing *Owen v. Kronheim*, 304 F.2d 957, 958 (D.C. Cir. 1962)).

B. The Complaint Does Not State A Plausible Claim Under Section 2 Of The Voting Rights Act (Count 1).

1. The *Gingles* Framework

Under Section 2 of the Voting Rights Act, States may not use voting practices and procedures that "result[] in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . ." 42 U.S.C. § 1973(a). Following the 1982 amendments to the statute, a violation of Section 2 is established if, "based on the totality of circumstances, it is shown that the political processes leading to the nomination or election in the State . . . are not equally open to participation by members of a class of citizens protected by subsection (a) . . . in

that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The statute closes with this proviso: "[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.*

The Supreme Court first construed the amended version of Section 2 in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Under the *Gingles* framework, a Section 2 Plaintiff must first establish three "necessary preconditions" for a claim of vote dilution: (1) the minority group must be "sufficiently and geographically compact to constitute a majority in a single-member district," (2) the minority group must be "politically cohesive," and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id*. at 50-51. Under the third factor, plaintiffs must show that white bloc voting is so intense that it "normally will defeat the combined strength of minority support plus white 'crossover' votes." *Id.* at 57.

Once the plaintiff has established the threshold preconditions, the plaintiff must prove vote dilution under the totality of the circumstances. *Bartlett*, at 556 U.S. at 11-12 ("[O]nly when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances."). The Senate Committee report that accompanied the 1982 amendments to the Voting Rights Act contains a list of factors—often called the "Senate Report" factors—for courts to consider. The Senate Report factors are:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. The extent to which voting in the elections of the state or political subdivision is racially polarized;[12]

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single-shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;

7. The extent to which members of the minority group have been elected to public office in the jurisdiction;

8. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

9. Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S.R. No. 97-417, at 28-29 (1982); *Gingles*, 478 U.S. at 44-45.

When applying the *Gingles* framework, courts must be mindful that redistricting "is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Growe v. Emison*, 507 U.S. 25, 34 (1993). "[T]he underlying districting decision is one that ordinarily falls within a legislature's sphere of competence. Hence, the legislature must have discretion to exercise the political judgment necessary to balance competing interests, and courts must exercise *extraordinary caution* in adjudicating claims that a

[12] This factor is already encompassed by the second and third threshold preconditions under *Gingles*.

State has drawn district lines on the basis of race." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (emphasis in original) (internal citations and quotations omitted).

2. **The Complaint Is Based Upon Legal Conclusions Rather Than Factual Allegations That Satisfy The *Gingles* Framework Under Current Facts.**

a. Racial Cohesion And Block Voting

Although plaintiffs' complaint states that the *Gingles* preconditions are satisfied, it does not allege the factual underpinnings that plausibly give rise to this conclusion. Plaintiffs do not cite any statistical or anecdotal evidence from a recent election (or series of elections) that shows cohesive voting among African Americans. Nor do plaintiffs cite any statistical or anecdotal evidence from a recent election (or series of elections) that shows the lack of cross-over voting by whites. Under the *Gingles* preconditions, courts do "not assume the existence of racial bloc voting; plaintiffs must prove it." *Gingles*, 478 US. at 46; *see also Growe*, 507 U.S. at 41 (holding that courts "may not presume block voting"). In short, plaintiffs must do more than give formulaic recitations of the *Gingles* elements and assert that the preconditions are satisfied. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 129 S Ct. at 1950.

b. Totality Of The Circumstances

Looking to the Senate Report factors for guidance on the "totality of the circumstances," plaintiffs' complaint says nothing about specific acts of official discrimination that have impacted citizens' ability to vote in a particular election. Nor does the complaint allege that Senate District 24 is inappropriately large in size or that Senate elections entail discriminatory voting procedures. The complaint also says nothing about racial appeals during political campaigns, and it does not contend that representatives have been unresponsive.

Lastly, the complaint does not allege that plaintiffs (or other black voters) have been unable to elect the candidates of their choice. It is important to note that the phrase "a candidate of their choice" does not mean a candidate of a particular race. *Armour v. Ohio*, 775 F.Supp. 1044, 1060 (N.D. Ohio 1991) (stating that claim that a group has the right to elect a candidate of that group's same race "misapprehend[s] the requirements of the Voting Rights Act"); *see also Harvell v. Blythville School Dist. No. 5*, 71 F.3d 1382, 1386 (8th Cir. 1995) (en banc) ("Such stereotyping runs afoul of the principles embodied in the Equal Protection clause."). But even if the success of black candidates were the measure of Section 2 (and it is not), the complaint mentions only a series of victories by black candidates, including in old District 16 with a BVAP below 56%. *See* Compl., ¶¶ 33, 42; 2001 Senate Matrix, attached to Defs.' Mot. to Dismiss as Exhibit 6.

In the final analysis, "[o]ne may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast." *DeGrandy*, 512 U.S. at 1016-17. Plaintiffs here have not alleged famine; rather, they complain only that, after numerous successes, the Board of Apportionment failed to draw a district that would, in their view, guarantee the election of a particular candidate or candidates for the next decade. That is not what Section 2 requires. *Bartlett*, 556 U.S. at 20 ("Section 2 does not guarantee minority voters an electoral advantage.").

3. Plaintiffs' Complaint Is Based Upon Erroneous Legal Assumptions.

a. The Fact That Senate District 24's BVAP Does Not "Approach" 60% Does Not Give Rise To A Claim Under Section 2.

The cornerstone of plaintiffs' complaint is the notion that, even though new Senate District 24 has an African American majority of 57.05% and a BVAP of 52.88%, the extent of the black majority is not large enough to comply with Section 2. Compl., ¶ 31. According to

plaintiffs, "history has shown that a BVAP of significantly less than 60% is not sufficient to permit African American voters to elect a candidate of their choice" because of "block voting by [w]hites." *Id.* The complaint makes no factual allegations in support of this 60% presumption; it mentions neither statistics, nor social science literature, nor anecdotal evidence from recent elections. Instead, plaintiffs merely quote from this Court's 24-year-old decision in *Smith* for the proposition that "minorities must have something more than a mere majority" and "a 60% nonwhite [BVAP] majority is appropriate." Compl., ¶ 32; *see Smith v. Clinton*, 687 F. Supp. 1361, 1362-63 (E.D. Ark. 1988) (citing *Ketchum v. Byrne*, 740 F. 2d 1398 (7th Cir. 1984)).

Smith and similar cases, however, involved *remedies* for proven violations of Section 2; they had nothing to do with establishing *liability*. *See, e.g.*, *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1023 (8th Cir. 2006) (holding that the district court's remedial plan, which gave Native-American voters a 65% percent majority in one district and a 74% majority in another district, was appropriate under the reasoning of *Ketchum*). Plaintiffs' position also fails for two additional reasons: first, there is no empirical or evidentiary basis for a 60% rule; second, such a rule is not supported by Supreme Court precedent and is inconsistent with the Court's most recent pronouncements on Section 2 in *Bartlett.*

i). The 60% Rule Lacks Empirical Or Evidentiary Support.

The *Smith* court, following the Seventh Circuit's decision in *Ketchum* and other lower-court decisions of that era, reasoned that a "guideline" of 65% of the total black population was appropriate for remedying a Section 2 violation under the following calculation: start with a bare majority of 50%; then add 5% to offset the fact that the minority population tends to be younger than the white population, which means that a greater percentage of minority residents are below the legal voting age; then add 5% for historically lower voter registration rates among blacks;

then add 5% for historically lower voter turnout among blacks. The second step—an increase of 5% to account for a younger population—does not need to be performed if voting age population, rather than total population, is the starting point. *Smith*, 687 F. Supp. at 1363. The *Smith* court's mathematical formula was not based upon any citations to historical texts[13] or social science literature, much less evidence in the record regarding the particular district at issue. Rather, the court's reasoning was based entirely upon the *ipse dixit* that the "the extent to which minorities must outnumber whites in the relevant jurisdiction is a matter of 'general acceptance.'" *Id*. at 1362-63.

Two years later, the court revised its formula for remedying a Section 2 violation—again without the benefit of record evidence, historical texts, or social science literature—to account for the power of incumbency on voting behavior: "We think a 58% BVAP district with no white incumbent is the equivalent [of 60%] in practical political terms." *Jeffers v. Clinton*, 756 F.Supp. 1195, 1200 (1990) (adopting the Board's remedial plan for a Senate district that did not have an incumbent of either race). Under this line of thinking, one must wonder what additional changes would need to be made to the formula if, as here, the district at issue has a two-term African American incumbent. Indeed, numerous upward and downward departures from a 50% baseline could be added to the algorithm, with none based on peer-reviewed literature or, more importantly, evidence of voting behavior from the particular district at issue.

[13] The *Smith* court did not consider, for example, that "[b]y 1976, ninety-four percent of Arkansas's voting-age African Americans were registered, the highest proportion of any state in the South." *See* Encyclopedia of Arkansas, available at http://encyclopediaofarkansas.net /encyclopedia/entry-detail.aspx?entryID=4564. The Encyclopedia of Arkansas is an online publication with oversight and editorial boards comprised of distinguished academics and politicians.

Plaintiffs' proposed 60% rule clearly lacks empirical support under more recent voting trends that show reduced polarization. In a law review article that Justice Souter cited in his *Bartlett* dissent, Professor Richard Pildes reviewed two studies about voting behavior in the 1990s that were performed by several distinguished political scientists.[14] *See* Richard H. Pildes, *Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517, at 1529-32 (2002). Both studies concluded that, although African Americans tended to vote in a highly polarized manner, approximately one-third of white voters regularly voted for black candidates in primary and general elections for Congress in the South. *Id.* at 1530-31. "These figures might suggest a reliable bloc of white voters in the South are voting consistently on the basis of party affiliation, rather than the race of a candidate." *Id.* Thus, "for congressional races in the South during the 1990s, 33% to 39% of a district's registered voters generally had to be black for a black candidate to be elected, substantially below the majority-black voter registration level that had been thought necessary on the eve of the 1990s redistricting." *Id*. at 1531. Data regarding state elections in New Jersey pointed to a similar pattern. *Id.* at 1533. The creation of super-majority or "safe" black districts based on unproven and invalid assumptions about voting behavior meant that black candidates in some districts won by overwhelming margins during the 1990s. *Id.* at 1536. "This suggests those congressional candidates could have prevailed in districts less packed with supportive voters," leaving more black voters available to influence outcomes in other districts. *Id*. Thus, although the arbitrary 60% rule cited by some lower courts may have been well intentioned, it has likely failed to serve its intended purposes.

[14] Bernard Groffman co-authored one of the studies. As Professor Pildes explains, "Groffman was the central expert witness before the district court in the *Gingles* litigation, and the Supreme Court explicitly endorsed Groffman's conception of vote dilution and his technical means of determining polarized voting in [*Gingles*]." Pildes, *supra,* at n.32.

ii). The 60% Rule Is Not Supported By Supreme Court Precedent.

The Supreme Court has never held that a 60% or 65% guideline is appropriate in either the liability or remedial phases of Section 2 litigation. In *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977), the Court considered a case involving the Attorney General's preclearance review of a redistricting plan under Section 5 of the Voting Rights Act. The Court did not adopt a 60% or 65% rule for general use, and it gave considerable deference to the State of New York and the U.S. Attorney General. "In the process of drawing black majority districts in order to comply with [Section] 5," the Court stated, "the State must decide how substantial those majorities must be in order to satisfy the Voting Rights Act." *Id.* at 162. The Court elaborated with the unexceptional proposition that, "[a]t a minimum, and by definition, a 'black majority' must be more than 50% black." *Id.* The Court ultimately held that the Attorney General's conclusion that a 65% majority would be required to comply with Section 5 under the circumstances of the case was "reasonable." *Id.* The Court never held that such a percentage was required by Section 5 or should be utilized in other cases under the Voting Rights Act. Notably, the U.S. Department of Justice filed a brief a few years later in which it stated that it "attach[ed] no particular significance to a 65% figure." Kimball Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 Law & Pol'y 43, 45 (1988) (citing Brief in Opp. to Writ of Cert., *City Council of Chicago v. Ketchum*, 471 U.S. 1135 (1985)). In a similar vein, the Chief of the Voting Section of the Justice Department's Civil Rights Division, Gerald Hebert, publicly stated that "there is no 65 percent threshold population figure applied as a rule of thumb by the Department in redistricting matters reviewed under Section 5." *Id.* Mr. Hebert explained, "[t]he Department has frequently concluded, based on the facts presented in a particular submission, that districts containing a minority population

significantly less than 65% (and even 50%) of the total may be entitled to Section 5 preclearance." *Id.*

Whatever uncertainty about a 60% standard may have existed prior to 2009, the Supreme Court's decision in *Bartlett v. Strickland* has put it to rest. *See Cottier v. City of Martin*, 604 F.3d 553, 565-72 (8th Cir. 2010) (Smith, J., dissenting) (concluding that *Bartlett* modified what constitutes an "effective majority" under Section 2 to mean a "50-percent numerical threshold" and that a 60-percent or 65-percent rule is inconsistent with *Bartlett*).[15] *Bartlett* involved the extent to which Section 2 requires "crossover" districts in which minority voters, who make up less than a majority of a district's population, could theoretically combine with white voters to elect the minority's preferred representatives. Although the issue in *Bartlett* was different than the issue in this case, the Court's language and reasoning is highly instructive.

The *Bartlett* Court adopted a "majority-minority rule" for Section 2 liability. The majority-minority rule "relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting age population in the relevant geographic area." *Bartlett*, 556 U.S. at 18. The majority-minority rule "has its foundation in the principles of democratic governance." *Id.* The Court elaborated: "The special significance, in a democratic process, of a majority means it is a special wrong when a minority group has 50 percent or more of the voting

[15] In *Cottier*, a majority of the Eighth Circuit, sitting *en banc*, held that the plaintiff failed to meet the third *Gingles* precondition (significant block voting by white voters) and, therefore, reversed the district court's judgment of liability under Section 2. Given the absence of liability, the majority never reached the issue of whether, at the remedial phase, a 60% or 65% guideline was appropriate. In dissent, Judge Smith, joined by Judges Murphy, Bye, and Melloy, concluded that the *en banc* court should not have disturbed the district court's judgment of liability for procedural reasons. The dissenting judges believed, however, that the district court's decision regarding an appropriate remedy should have been remanded for reconsideration in light of *Bartlett* because the Supreme Court's decision was inconsistent with the district court's use of a 65% or 60% rule for determining what constitutes an effective majority. Thus, four Eighth Circuit judges believe that *Bartlett* is inconsistent with a 60% rule, and the other judges have not opined on the issue.

population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district." *Id*. At the same time, "Section 2 does not guarantee minority voters an electoral advantage." *Id*. at 20; *see also De Grandy v. Johnson*, 512 U.S. 997, 1016 (1994) ("Failure to maximize cannot be the measure of § 2."); *compare* Compl., ¶ 45 (quoting a citizen complaint that the new districts were not drafted "with the intent to maximize majority/minority district[s]").

The Supreme Court's majority-minority rule also has the virtue of allowing for "workable standards and sound judicial and legislative administration." *Id.* at 17. Every decision by a redistricting body should not result in litigation and its inevitable upheaval of the electoral process, but that is the unfortunate result of amorphous and "suspect" liability standards that defy predictability and invite courts to "make inquiries based on racial classifications and race-based predictions." *Id*. at 18. District courts should not be placed in the "untenable position of predicting many political variables and tying them to race-based assumptions," which would be involved in answering questions such as "What are the historical turnout rates among white and minority voters and will they stay the same?" *Id*. at 17. Those type of questions, the Court concluded, "are speculative, and the answers (if they could be supposed) would prove elusive." *Id.* At bottom, "[a] requirement to draw election districts on answers to these and like inquiries ought not to be inferred from the text or purpose of § 2." *Id*.

The *Bartlett* Court also emphasized the importance of legislative choice and discretion in redistricting. "Assuming a majority-minority district with a substantial minority population," the Court held, "a legislative determination, based on proper factors, to create two crossover districts may serve to diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal." *Id.* at 23. As the Supreme

Court has explained elsewhere, "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *De Grandy*, 512 U.S. at 1020. Thus, "[t]he option to draw [cross-over and influence] districts gives legislatures a choice that can lead to less racial isolation, not more." *Bartlett*, 556 U.S. at 23; *see also Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) ("[C]reating majority-black districts necessarily leaves fewer black voters and therefore diminishes black-voter influence in predominately white districts."); *Page v. Bartles*, 144 F. Supp. 2d 346 (N.N.J. 2001) (holding that a state's decision to reduce the African-American voting age population in a district from 53% to 27% would not prevent minorities from electing their preferred candidate and, instead, would help ensure minority influence in an additional district).

In summary, *Bartlett* is inconsistent with a 60% rule—whether used as a *per se* requirement or as a rule of thumb (with upward and downward adjustments) that informs the liability determination under Section 2. *Bartlett* demonstrates that Section 2 does not guarantee minority voters an electoral advantage; that deference is owed to legislative decisions that may lead to more coalition building and less racial isolation; and that judicial decisionmaking under the Voting Rights Act should not be based on speculative, race-based assumptions. A 60% rule violates those principles, but the Court's simple majority-minority rule does not. *See Bartlett*, 556 U.S. at 16-19*; Voinovich*, 507 U.S. at 153 ("A politically cohesive minority group that is large enough to constitute the majority of a single-member district *has a good chance of electing its candidate of choice*, if the group is placed in a district where it constitutes a majority.") (emphasis added). The import of *Bartlett*, then, is that there is no liability under Section 2 if the minority-race voters constitute a majority of the voting age population.

b. Section 2 Does Not Require Redistricting Bodies To Make Predictions About Demographic Trends Over Future Weeks, Months, And Years.

Plaintiffs correctly allege that the population in certain "Delta counties" is declining. Compl., ¶¶ 38. But the significance plaintiffs attach to this fact is misplaced. For one thing, plaintiffs do not allege that the black population is declining faster than the white population in any particular city or county, so they can draw no conclusions about the effectiveness of Senate District 24. More importantly, the Board of Apportionment does not have a crystal ball, and it is not comprised of demographers and statisticians. Federal census data is presumptively accurate, and it must be used unless there is clearly more reliable data. *McNeil v. Springfield Park District*, 851 F.2d 937, 944-46 (7th Cir. 1988). "Estimates based on past trends are generally not sufficient to override 'hard' decennial census data." *Id.* at 946; *see also Perez v. Pasadena Independent School Dist*., 958 F. Supp. 1196, 1210-13 (S.D. Tex. 1997). Carried to its logical conclusion, plaintiffs would apparently have the Board of Apportionment predict the Delta's population trend over the next decade and create super-majority districts that are guaranteed to be "safe" for particular candidates for years to come. Even if that approach were logistically feasible, it is not required by Section 2.

c. Senate District 24 Is Not An Island, And Plaintiffs Have Not Proposed A Feasible Alternative.

"[P]laintiffs in vote dilution cases must demonstrate that the challenged system suppressed minority voting strength in comparison to some alternative, feasible benchmark system." *Nipper v. Smith*, 39 F.3d 1494, 1531 (11th Cir. 1994) (en banc) (citing *Holder v. Hall*, 512 U.S. 874, 880-81 (1994)). "A district court cannot implement an incomplete plan, containing only a single district, with the rest of the map left blank." *Negron v. City of Miami Beach*, 113 F.3d 1563, 1571 (11th Cir. 1997) (holding that the district court properly rejected a

Section 2 plaintiff's limited redistricting plan, which involved only a single district and failed to explain what the remaining districts "might look like, where they would be located, or what their racial and ethnic makeup might be"); *Black Political Task Force v. Galvin*, 300 F.Supp. 2d 291, 299 (D. Mass. 2004) ("In a vote dilution case," the plaintiff must "demonstrate that an effective and feasible remedy exists by proffering an alternative plan as a benchmark.").

In this case, plaintiffs have singularly focused on Senate District 24 and ignored any ripple effects that their proposal would cause. Plaintiffs have proposed an alternative to their liking only for that one district (*see* Compl., Exhibit 1) that, among other things, cuts out part of Crittenden County to the north and includes the entirety of St. Francis County to the west. Plaintiffs' alternative would also include a large chunk of Phillips County that currently resides in Senate District 25—a majority-minority district currently represented by Senator Stephanie Flowers. Notably, Senate District 25 is already 2.12% below the ideal population size and has a BVAP of 55.85%. Taking additional black voters from that district to move them to District 24 would impinge upon the "one person, one vote" requirement and reduce the minority voting age population of District 25. *See* 2011 Senate Matrix, attached to Defs.' Mot. to Dismiss as Exhibit 1. The notion that Senate District 24 must be increased to a 59.49% BVAP whereas Senate District 25 should be further reduced in both total population and BVAP is unfounded under Section 2. *See Johnson v. De Grandy*, 512 U.S. 997, 1019 (1994) (stating that the notion of trading the rights of some minority voters under Section 2 against the rights of other members of the same minority class is "of highly suspect validity").

C. The Complaint Does Not State A Plausible Claim That Defendants Violated The U.S. Constitution Or Section 1983 (Count 2).

1. The Fourteenth Amendment

Plaintiffs contend that Defendants violated the Equal Protection Clause of the Fourteenth Amendment, which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Am. XIV, § 1. A claim under the Fourteenth Amendment is more onerous than a statutory claim under the Voting Rights Act. A redistricting plan violates the Fourteenth Amendment if it was "conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination" and has the intended effect. *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971); *see also City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980); *Roberts v. Wamser*, 883 F.3d 617, 623 (8th Cir. 1989) (noting that a voting rights plaintiff proceeding under 42 U.S.C. § 1983 for constitutional violations must prove purposeful discrimination). The plaintiff's burden is 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." *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

Plaintiffs have not alleged any facts giving rise to an inference that a defendant intentionally designed Senate District 24 as a device to further racial discrimination. Indeed, plaintiffs admit that Senate District 24 has a BVAP majority. The undersigned counsel is not aware of any cases that have invalidated a majority-minority district under the theory that a failure to create an even larger super-majority for the minority voters is tantamount to purposeful discrimination.

The closest plaintiffs get to making an allegation of purposeful discrimination is paragraph 40 of the complaint, where plaintiffs allege that the Board of Apportionment wanted to avoid white incumbent legislators from being placed in the same district. But that paragraph

does not make any factual allegations that would allow the Court to reach the stated conclusion. Plaintiffs' citation to the *Jeffers* case, which involved the 1981 Board of Apportionment, does not prove anything about the hearts and minds of the individuals who constituted the Board three decades later. In any event, public records show that Keith Ingram of West Memphis[16] and Clark Hall of Marvell[17] both reside in the new Senate District 24, along with incumbent Senator Crumbly.[18] Thus, Senate District 24 did not have a purpose *or* effect of eliminating potential competition among these white representatives who allegedly might run for the state Senate.

2. The Fifteenth Amendment

The Fifteenth Amendment states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const., Amend. XV, § 1. The Supreme Court has "never held any legislative apportionment inconsistent with the Fifteenth Amendment." *Voinovich*, 507 U.S. at 146*; see also Reno v. Bossier Parish School Board*, 528 U.S. 320, 334 n.3 (2000) ("[W]e have never held that vote dilution violates the Fifteenth Amendment."); *Bolden*, 446 U.S. at 84, n.3 (Stevens, J., concurring) (characterizing the plurality opinion as concluding that the Fifteenth Amendment applies only to practices that directly affect access to the ballot).

Even if the Fifteenth Amendment were applicable to plaintiffs' claim (and it is not), plaintiffs would have to demonstrate that there was a discriminatory purpose behind the 2011 Senate Plan. *See Bolden*, 446 U.S. at 63 ("While other of the Court's Fifteenth Amendment decisions have dealt with different issues, none has questioned the necessity of showing

[16] *See* http://www.arkansashouse.org/member/233/keith-m-ingram

[17] *See* http://www.arkansashouse.org/member/193/clark-hall

[18] *See* http://geocommons.com/maps/91598

purposeful discrimination in order to show a Fifteenth Amendment violation."). As explained above, plaintiffs have not come close to alleging facts giving rise to an inference of purposeful race discrimination.

III. CONCLUSION

The Supreme Court has held that dilution of minority voting strength may occur in two ways: "by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." *Gingles*, 478 U.S. at 46. This case does not involve either category of dilution under *Gingles*. Senate District 24 will not disperse African Americans into districts where they constitute an ineffective minority (or *any* minority for that matter). Nor will it pack African Americans into a district where they have an excessive majority. Although plaintiffs may have preferred a district with a super-majority BVAP that would, in their view, be a safe seat for their preferred candidate or candidates—even at the expense of other majority-minority districts—"Section 2 does not guarantee minority voters an electoral advantage." *Bartlett*, 556 U.S. at 20. Plaintiffs' complaint is devoid of factual allegations that set forth a plausible claim for relief, and this Court should dismiss it under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the following:

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