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
Three-Judge Court: Hon. Holmes, Smith, and Wright

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

GOVERNOR MIKE BEEBE, ATTORNEY GENERAL DUSTIN MCDANIEL, AND THE ARKANSAS BOARD OF APPORTIONMENT'S RESPONSE TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Governor Mike Beebe, Attorney General Dustin McDaniel, and the Arkansas Board of Apportionment ("Separate Defendants") state as follows for their response to Plaintiffs' motion to enjoin certification of the Senate District 24 election during the pendency of this Court's deliberations:

I. THE COURT SHOULD NOT ALLOW PLAINTIFFS TO DO AN END-RUN AROUND THIS COURT'S PREVIOUS ORDER.

In the order denying Plaintiffs' previous request for an injunction to halt the election in new Senate District 24, this Court explained that "[n]o doubt, votes have already been cast, including both absentee votes and early votes cast in person." Order (Doc. 82), at 2. The Court elaborated: "These investments of time, money, and exercise of citizenship cannot be returned. In considering general equitable principles as they apply in reapportionment cases, the Court has

concluded that it is too late to enjoin these elections, which are already under way." *Id.* (citation and quotation omitted).

Plaintiffs now want this Court to enjoin certification of the election. Plaintiffs explain: "This simply means that the election, except for the sake of analysis of the results, is treated as if it did not occur." Pl. Mot. for Inj. (Doc. 86), ¶ 20. But the Court never said that exercise of citizenship exhibited by voters should be deemed an exercise in futility, with the only effect of those votes being to serve as Plaintiffs' post-trial evidence. To the contrary, the Court held that citizens' votes are significant—which is true only if the votes are actually counted, certified, and recognized to the fullest extent of the law absent a final decision that the election was unlawful.

II. PLAINTIFFS HAVE NOT SHOWN IRREPARABLE HARM.

Plaintiffs allege that if the Court does not enjoin the certification of the election results for State Senate District 24, "[s]omething [will be] lost that no court order can restore after it is gone." Pl. Mot. for Inj. (Doc. 86), ¶ 16. Plaintiffs misunderstand the law. This Court has well-established remedial authority under the Voting Rights Act to set aside election results (whether certified or not) and order a new or special election if the Court determines that there has been a violation of the Voting Rights Act. The scope of federal courts' power to remedy apportionment violations is defined by principles of equity. *See generally Reynolds v. Sims*, 377 U.S. 533, 585 (1964). It is within the scope of those equity powers to order a governmental body to hold special elections to redress violations of the Voting Rights Act. *See, e.g., Goosby v. Town Board of the Town of Hempstead*, 180 F.3d 476, 498 (2nd Cir. 1999) (affirming the district court's "order that provides for the district court to establish a schedule for a special election"); *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 278 (2nd Cir. 1994) (directing the district court to set deadlines for a city to adopt a new city council districting

plan, "conduct a primary election of town committee members in the new districts, and . . . conduct a general election to elect new City Council members following the nomination of candidates"); *Marks v. Stinson*, 19 F.3d 873, 889-90 (3rd Cir. 1994) (instructing the district court to assess a concluded state election for constitutional violations and stating that "it will have authority to order a special election"); *Armstrong v. Adams*, 869 F.2d 410, 414 (8th Cir. 1989) (upholding a settlement of VRA and constitutional claims, including an order that a new election take place despite commissioners' lack of authority under state law); *Chisom v. Roemer*, 853 F.2d 1186, 1192 (5th Cir. 1988) (vacating a preliminary injunction entered by the district court, which had enjoined a judicial election pending the outcome of a redistricting challenge under the Voting Rights Act, and noting that "at the appropriate time, should it become necessary, the federal courts may fashion whatever remedy the law, equity, and justice require"); *Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir. 1978) (upholding the district court's order of a new primary election following the state courts' due-process-violative decision to discard absentee ballots); *Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1967) (holding that a district court has the power to void and order new elections for violations of VRA and Constitution).

Thus, if this Court were to determine that a Voting Rights Act violation occurred, the Court could readily fashion a remedy to address such a violation, including requiring a new election. There is no legal or factual basis to believe that Senator Crumbly would be stripped of his seniority in the legislature or lose the "Senator" title on the ballot.

III. SENATOR CRUMBLY'S DEFEAT DOES NOT PROVE PLAINTIFFS' CASE.

The Court's acceptance of evidence in this case ended on May 10, 2012. To the extent that the election in new Senate District 24 is important evidence, Plaintiffs should not have sought a trial before the election. A trial *after* the election would have allowed for an analysis of

polarized voting and relative turnout with acceptable statistical techniques, the opportunity for Separate Defendants to review Dr. Handley's data for transposed votes and other mistakes, and the chance to cross examine her. Instead, Plaintiffs have presented only a highly selective snapshot of various polling sites without corresponding census data. A scientifically acceptable analysis of the election may very well have shown that Ingram was the black-preferred candidate or, at a minimum, enjoyed considerable cross-over voting by a non-cohesive black electorate. Indeed, Plaintiffs have contended that Senator Crumbly has never been a black-preferred candidate and that the African-American community regularly rallies around those candidates who oppose him.

The electoral results suggest that Senator Crumbly did not enjoy strong support in the African-American community in this week's election. For example:

- Plaintiffs contend that the polling site in Hughes is predominately African-American and sits within St. Francis County—Senator Crumbly's alleged "base of support." But Ingram received 46.23% of the vote at this polling site. In contrast, President Obama received 81.38% of the vote compared to 18.62% for his opponent. The voters at this polling site cohesively rallied around President Obama, but not Senator Crumbly.
- Plaintiffs contend that the polling site in Richland, Lee County, is predominately African-American. However, Ingram received 52.86% of the vote at this polling site. It should be recognized that Plaintiffs report the results as 21 votes for Crumbly and 20 for Ingram; however, the Secretary of State's website shows 37 votes for Ingram and 33 for Crumbly.
- Plaintiffs contend that the polling site in Sunset, Crittenden County, is predominately African-American. Although the Plaintiffs report the results as 11 votes for Crumbly and 5 for Ingram, the Secretary of State website shows 13 votes for Crumbly and 7 for

Ingram. At the same polling site, President Obama received 18 votes compared to only one for his challenger. The statistics from the U.S. Census indicate that, out of a total voting age population of 151, there are only 10 white residents of voting age. Thus, the dense African American community at this polling site supported President Obama by a wide margin, but their support for Senator Crumbly was splintered.

- The BVAP of the part of Phillips County in District 24 is 63.4%. President Obama received 1,653 (63%) votes compared to 971 for John Wolfe. Ingram received 1,451 (54.39%) votes compared to 1,217 for Crumbly. This demonstrates that, even with a higher BVAP, the voters simply chose not to support Senator Crumbly.

Two witnesses for Plaintiffs—Joseph Perry and former Senator Roy C. Lewellen—testified that the non-racial attributes of a particular candidate can often matter more to voters than the candidate's race. That appears to be the case in this most recent election. Unlike most of the biracial legislative contests in the Delta over the past 10 years (and unlike *all* of the biracial statewide contests in the past decade), Senator Crumbly's vote share did not exceed the black voting-age population of the district. In fact, Senator Crumbly received only 39.43% of the votes in a district with a 52.88% BVAP. As the Supreme Court has explained, "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994). It appears that, in this singular contest, minority voters found common political ground in a candidate other than Senator Crumbly. Even a 60% BVAP would likely not have resulted in a victory for Senator Crumbly. Only one thing could have achieved that result: A map that intentionally excluded all of Senator Crumbly's potential rivals from the new district. The Voting Rights Act does not require such a result.

Finally, even if Plaintiffs could establish that Senator Crumbly was the black-preferred candidate at this late date, they have again attempted to emphasize the importance of a single election. The Supreme Court has cautioned that a pattern of legally significant polarized voting extending over a period of time is more probative than the results of any single election. *Thornburg v. Gingles*, 478 U.S. 30, 57 & n.25 (1986). "Above all, an inquiring court should resist the temptation to confine itself to raw numbers in a particular election, instead endeavoring to make a practical, commonsense appraisal of all the evidence." *Black Political Task Force v. Galvin*, 300 F.Supp.2d 291, 304 (D. Mass. 2004).

The evidence at trial showed that (1) black, black-preferred candidates in statewide biracial elections *always* received more votes in the relevant region than their white, white-preferred opponents; (2) Dr. Handley's model of turnout, cohesion, and cross-over voting—when considered over all of the 18 contests that she deems relevant—predicts that a 49.9% BVAP will be sufficient to confer equal opportunity; and (3) black, black-preferred candidates in biracial legislative elections in the Delta usually received vote shares in excess of the BVAP of the particular district. There are, of course, occasional aberrations—which only go to show that the qualities of the candidates, beyond mere race, matter very much.

IV. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion to enjoin certification of the votes in the contest for Senate District 24.

DUSTIN MCDANIEL
Attorney General of Arkansas

By: /s/ *David A. Curran*
David A. Curran, Ark. Bar No. 2003031
Assistant Attorney General
C. Joseph Cordi Jr., Ark. Bar No. 91225
Assistant Attorney General
Warren T. Readnour, Ark. Bar No. 93224
Senior Assistant Attorney General
Office of the Arkansas Attorney General
323 Center St., Suite 500
Little Rock, AR 72201
Phone: (501) 682-1681
Fax: (501) 682-2591
Email: david.curran@arkansasag.gov

Attorneys for Separate Defendants Governor Mike Beebe, Attorney General Dustin McDaniel, and the Arkansas Board of Apportionment

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 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:

James F. Valley
james@jamesfvalley.com

Peter S. Wattson
peterwattson@gmail.com

W. Asa Hutchinson,
asa@ahlawgroup.com

W. Asa Hutchinson, III
ahutchinson@ahlawgroup.com

/s/ David A. Curran