

**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

**SEPARATE DEFENDANTS' PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW**

Governor Mike Beebe, Attorney General Dustin McDaniel, and the Arkansas Board of Apportionment ("Separate Defendants") submit the following Proposed Findings of Fact and Conclusions of Law:

I. PROPOSED FINDINGS OF FACT

1. 1990 Senate District 30 had a Black voting-age population ("BVAP") of 62%, according to the 1980 Census. *See Jeffers v. Clinton*, 756 F. Supp. at 1202-03 (Mar. 5, 1990).
2. At the Democratic primary held May 29, 1990, Roy C. "Bill" Lewellen defeated Paul B. Benham, 7,248 votes to 6,409 votes, which was 53.1% to 46.9%.
3. At the general election held November 6, 1990, Roy C. "Bill" Lewellen, a Democrat, defeated Charles L. Robinson, a Republican, 10,009 votes to 4,899 votes, which was 67.1% to 32.9%.

4. In 1991, the Board of Apportionment redrew the boundaries of 1990 Senate District 30 so that it included portions of Crittenden, Lee, Phillips, and St. Francis Counties, but excluded Cross County. The 1991 district was numbered Senate District 22.

5. When drawn in 1991, Senate District 22 had a BVAP of 61.9%, according to the 1990 Census. *See Jeffers v. Tucker*, 847 F. Supp. 655, 661 (E.D. Ark. 1994).

6. In the May 1992 Democratic primary for Senate District 22, Senator Bill Lewellen defeated L.T. Sims II, 10,573 votes to 2,841 votes. He was unopposed in the November general election.

7. Senator Lewellen was unopposed for re-election in 1996.

8. In the 2000 election, Senator Lewellen was not a candidate.

9. Since 2000, there have been five elections in 2001 Senate District 16 and its predecessor, 1991 Senate District 22. Alvin Simes was a candidate in four of those contests.

10. In the 2000 election, Alvin Simes was elected to represent Senate District 22.

11. Alvin Simes defeated Steve Higginbothom in the 2000 primary election for Senate District 22 by a margin of 52.8% to 47.2%, which was 5,909 votes to 5,276 votes.

12. At the November 2000 general election, Alvin Simes defeated Carolyn “Brown” Elliott, 11,502 votes to 6,238 votes, which was 65% to 35%.

13. In 2001, the Board of Apportionment drew Senate District 16 with portions of the same counties — Crittenden, Lee, Phillips, and St. Francis — that contributed to 1991 Senate District 22.

14. 2001 Senate District 16 had a BVAP of 55.48%, according to the 2000 Census.

15. Simes lost to Higginbothom in the May 2002 Democratic Primary Election for Senate District 16, 4,299 votes to 6,079 votes, which was 36.5% to 51.6%. Candidate Gordon McCoy received 12% of the votes.

16. In the November 2002 general election, Steve Higginbothom defeated write-in candidate Rose McGee 14,034 votes to 1,555 votes, which was 90% to 10%.

17. Plaintiffs' expert witness, Dr. Handley, believes that in the 2006 and 2010 elections, only African-American candidates competed for office in Senate District 16.

18. According to Dr. Handley, the 2006 Democratic primary election for Senate District 16 featured only Black candidates. The winner did not face a Republican opponent. The BVAP of this district was higher than 55%.

19. The 2006 Democratic primary runoff election for Senate District 16 featured only Black candidates according to Dr. Handley. The winner did not face a Republican opponent. The BVAP of this district was higher than 55%.

20. The 2010 Democratic primary election for Senate District 16 featured only Black candidates according to Dr. Handley. The winner did not face a Republican opponent. The BVAP in this district was higher than 55%.

21. In the 2006 election for Senate District 16, Senator Steve Higginbothom was not a candidate.

22. The May 2006 Democratic primary election for Senate District 16 featured only African-American candidates according to Dr. Handley. The three candidates received votes as follows:

Candidate	Votes	Percentage
Representative Arnell Willis	3,923	34.6%
Jack B. Crumbly	3,882	34.2%
Alvin Simes	3,544	31.2%

23. In the June 2006 runoff election, Jack B. Crumbly defeated Representative Arnell Willis by 68 votes (4,768 votes to 4,700 votes), which was 50.4% to 49.6%.

24. Mr. Crumbly was unopposed in the general election.

25. The BVAP of this district was higher than 55%.

26. Senator Crumbly was unopposed in the 2010 general election.

27. The BVAP for Senate District 16 increased from 55%, according to the 2000 Census, to 61%, according to the 2010 Census.

28. The portions of Crittenden, Lee, and St. Francis Counties that were not included in 2001 Senate District 16, were included in Senate District 17, along with all of Cross, Monroe, and Woodruff Counties and the portions of Phillips County that were not included in Senate District 16 or 5.

29. 2001 Senate District 17 had a BVAP of 27%, according to the 2000 Census.

30. In the 2004 Democratic Primary election for Senate District 17, the Black-preferred candidate according to Handley (Jones) received the most votes in the parts of the district in the combined region of Crittenden, St. Francis, Phillips, and Lee Counties. The BVAP of this region, considering only the polling areas shown in Dr. Handley's data, was approximately 28.9%.

31. Jones lost the district-wide election to Luker by 5,192 votes to 8,288 votes, which was 38.5% to 61.5%.

32. 2001 House District 13 is all of Phillips County.

33. According to the 2000 Census, 2001 House District 13 had a BVAP of 52.88%.

34. In the 2002 Democratic primary for House District 13, Willis lost to King by less than 100 votes (2,576 votes to 2,667 votes), which was 49.1% to 50.9%.

35. Representative King was unopposed in the November 2002 general election.

36. In the 2004 Democratic primary for House District 13, Willis defeated Hall by 3,419 votes to 2,631 votes, which was 56.5% to 43.5%.

37. Willis was unopposed in the November 2004 general election.

38. The results of the May 2006 primary in Phillips County were reported at the county level only, so it is not possible to determine whether African Americans and Whites voted cohesively or whether they tended to vote for different candidates.

39. In the June 2006 runoff, Clark Hall defeated Bill Brandon, 2,002 votes to 1,990 votes, which was 50.15% to 49.85%.

40. According to the 2010 Census, the BVAP for House District 13 was 58.7%.

41. In the May 2010 Democratic primary for House District 13, Weaver lost to Hall by 1,355 votes to 3,326 votes, which was 29% to 71.1%.

42. Hall was unopposed in the November 2010 general election for House District 13.

43. 2001 House District 51 consists of Monroe County and portions of Lee, Phillips, and Woodruff Counties.

44. According to the 2010 Census, the BVAP for House District 51 was 34.8%.

45. In the May 2010 Democratic primary for House District 51, Gilcrest lost to Wright by 2,515 votes to 2,898 votes, which was 46.5% to 53.5%.

46. House District 52 consists of the portions of Lee and St. Francis Counties that are not included in House District 51.

47. According to the 2000 Census, the BVAP for House District 52 was 58%.

48. The 2004 Democratic primary election for House District 52 featured only Black candidates according to Dr. Handley. The winner did not face a Republican opponent. The BVAP of this district was higher than 55%.

49. The 2010 Democratic primary election for House District 52 featured only Black candidates according to Dr. Handley. The winner did not face a Republican opponent. The BVAP of this district was higher than 55%.

50. In the May 2004 Democratic primary for House District 52, Nancy Duffy Blount defeated Reginald Murdock, 2,578 votes to 2,395 votes, which was 51.8% to 48.2%.

51. Dr. Handley believes that both candidates were African American. She did not analyze this contest because of time constraints and her belief that there was no White candidate.

52. Nancy Duffy Blount was unopposed in the November 2004 general election.

53. In 2006, Nancy Duffy Blount was unopposed in both the May primary and the November general election.

54. In 2008, Nancy Duffy Blount was unopposed in both the May primary and the November general election.

55. According to the 2010 Census, the BVAP of House District 52 was 59.9%.

56. In 2010, Nancy Duffy Blount was not a candidate for House District 52. In the May primary, Reginald Murdock defeated Elizabeth Johnson by 2,819 votes to 1,743 votes, or 61.8% to 38.2%.

57. Dr. Handley believes that both candidates were African American. She did not analyze this contest because of time constraints and her belief that there was no White candidate.

58. Reginald Murdock was unopposed in the November 2010 general election.

59. House District 53 from 2001 is in Crittenden County and consists of portions of West Memphis and its adjacent cities and towns.

60. According to the 2000 Census, the BVAP of House District 53 was 21%.

61. According to the 2010 Census, the BVAP of House District 53 was 33.9%.

62. In the May 2006 Democratic primary for House District 53, Basil L. Joiner lost to Representative Denny Sumpter by 439 votes to 682 votes, which was 39.2% to 60.8%.

63. 2001 House District 54 consists of the portions of Crittenden County that are not included in House District 53.

64. According to the 2000 Census, the BVAP of House District 54 was 66%.

65. The 2004 Democratic primary election for House District 54 featured only Black candidates according to Dr. Handley. The winner prevailed in the general election against a Republican opponent.

66. In the May 2004 Democratic primary for House District 54, Dr. Handley believes there were three African American candidates. The candidates received votes, as follows:

Candidate	Votes	Percentage
Phillip Carter	743	37.1%
Otis L. Davis	703	35.1%
Vickie Miles-Robertson	555	27.7%

67. Dr. Handley believes that all the candidates were African American. She did not analyze this contest because of time constraints and her belief that there was no White candidate.

68. In the June 2004 runoff for House District 54, Davis defeated Carter, 798 votes to 721 votes, or 52.5% to 47.5%.

69. In the November 2004 general election for House District 54, Democrat Otis L. Davis defeated Republican Ray Nassar by 5,112 votes to 2,425 votes, which was 67.8% to 32.2%.

70. According to the 2010 Census, the BVAP of House District 54 was 65.1%.

71. The 2010 Democratic primary election for House District 54 featured only Black candidates according to Dr. Handley. The winner did not face a Republican opponent.

72. In the May 2010 Democratic primary for House District 54, Dr. Handley believes all four candidates were African American. The candidates received votes, as follows:

Candidate	Votes	Percentage
Fred Smith	1,034	39.3%
James Pulliaum	695	26.4%
Gary Tobar	494	18.8%
D'James Rogers II	410	15.6%

73. Dr. Handley did not analyze this contest because of time constraints and her belief that there was no White candidate.

74. In the June 2010 runoff for House District 54, Fred Smith defeated James Pulliaum, 1,960 votes to 1,705 votes, which was 53.5% to 46.5%.

75. Dr. Handley believes that both candidates were African American. She did not analyze this contest because of time constraints and her belief that there was no White candidate.

76. In the five-county region of Cross, Crittenden, St. Francis, Phillips, and Lee counties, the Black-preferred candidate according to Dr. Handley (Sheffield) received the most votes in the 2002 Democratic primary election for Lt. Governor. The BVAP of this region was approximately 42.3%.

77. In the four-county region of Crittenden, St. Francis, Phillips, and Lee counties, the Black-preferred candidate according to Dr. Handley (Sheffield) received the most votes in the 2002 Democratic primary election for Lt. Governor. The BVAP of this region was approximately 45.9%.

78. Sheffield defeated Kurt Dilday in the statewide election, 205,502 votes to 61,379 votes, which was 77% to 23%.

79. In the five-county region of Cross, Crittenden, St. Francis, Phillips, and Lee counties, the Black-preferred candidate according to Dr. Handley (Sheffield) received the most votes in the 2002 general election for Lt. Governor. The BVAP of this region was approximately 42.3%.

80. In the four-county region of Crittenden, St. Francis, Phillips, and Lee counties, the Black-preferred candidate according to Dr. Handley (Sheffield) received the most votes in the 2002 general election for Lt. Governor. The BVAP of this region was approximately 45.9%.

81. Sheffield lost to Rockefeller in the statewide election, 318,592 votes to 477,062 votes, which was 40% to 60%.

82. In the 2004 judicial election for Chief Justice, the candidates were Wendell L. Griffen and Jim Hannah.

83. In the four-county region of Crittenden, St. Francis, Phillips, and Lee counties, the Black-preferred candidate according to Handley (Griffen) received the most votes in the 2004 election for Chief Justice. The BVAP of this region was approximately 45.9%.

84. Griffen lost to Hannah in the statewide election, 114,835 votes to 191,695 votes, which was 37.5% to 62.5%.

85. In the 2006 judicial election for Associate Justice of the Supreme Court, the candidates were Wendell L. Griffen and Paul E. Danielson.

86. In the five-county region of Cross, Crittenden, St. Francis, Phillips, and Lee counties, the Black-preferred candidate according to Dr. Handley (Griffen) received the most votes in the 2006 election for Associate Justice. The BVAP of this region was approximately 46%.

87. In the four-county region of Crittenden, St. Francis, Phillips, and Lee counties, the Black-preferred candidate according to Dr. Handley (Griffen) received the most votes in the 2006 election for Associate Justice. The BVAP of this region was approximately 50.1%.

88. Griffen lost to Danielson in the statewide election, 132,789 votes to 177,406 votes, which was 42.8% to 57.2%.

89. In the four-county region of Crittenden, St. Francis, Phillips, and Lee counties, the Black-preferred candidate according to Dr. Handley (Obama) received the most votes in the 2008 Democratic primary election for president. The BVAP of this region was approximately 50.1%.

90. Obama lost to Clinton in the statewide election, 82,476 votes to 220,136 votes, which was 26.3% to 70.1%.

91. In the four-county region of Crittenden, St. Francis, Phillips, and Lee counties, the Black-preferred candidate according to Dr. Handley (Obama) received the most votes in the 2008 general election for President. The BVAP of this region was approximately 50.1%.

92. In the five-county region of Cross, Crittenden, St. Francis, Phillips, and Lee counties, the Black-preferred candidate according to Handley (Obama) received the most votes in the 2008 general election for President. The BVAP of this region was approximately 46%.

93. The Delta that Dr. Handley analyzed includes Monroe County.

94. Monroe County is not adjacent to the Mississippi River.

95. Monroe County does not comprise any part of New Senate District 24.

96. The 2010 BVAP of Monroe County is 37.4%.

97. The Delta that Dr. Handley analyzed includes Woodruff County.

98. Woodruff County is not adjacent to the Mississippi River.

99. Woodruff County does not comprise any part of New Senate District 24.

100. The 2010 BVAP of Woodruff County is 26%.

101. Dr. Handley's bloc-voting analysis included only election contests that featured one or more African American candidates. In other words, Dr. Handley did not consider contests in which the only candidates were White.

102. With the exception of three election contests in old Senate District 16 that featured only Black candidates, Dr. Handley analyzed polarization only in contests featuring a Black candidate and a White candidate.

103. Dr. Handley did not report on the polarization (or lack thereof) in five of the contests set forth in Table 1 of her report, which featured only Black candidates. Those five contests are as follows: (1) State Representative Dist. 52 – May 2004 Primary (Murdock v. Blount); (2) State Representative Dist. 54 – May 2004 Primary (Carter v. Davis. v. Robertson); (3) State Representative Dist. 52 – May 2010 Primary (Murdoch v. Johnson); (4) State Representative Dist. 54 – May 2010 Primary (Smith v. Tobar v. Rogers v. Pulliaum); and (5) State Representative Dist. 54 – June 2010 Primary (Smith v. Pulliaum).

104. Dr. Handley cannot determine whether contests featuring only Black candidates are more polarized than interracial contests because she did not analyze enough contests featuring only Black candidates.

105. Dr. Handley did not analyze polarization in any municipal elections.

106. Dr. Handley did not analyze polarization in any county elections.

107. Dr. Handley relied on Plaintiffs' lawyers to get the election returns for county contests and was "unable" to get the returns.

108. Dr. Handley relied on Peter Wattson (counsel of record for Plaintiffs) to supply her with information containing election results alongside demographic racial data from the U.S. Census Bureau.

109. The U.S. Census Bureau's geographic unit for reporting demographic data does not coincide with how election results in Arkansas have usually been tabulated from 2000-2010. The U.S. Census Bureau reports racial demographic information by Voter Tabulation District ("VTD"), whereas election results in Arkansas have typically been reported by "polling place."

110. A polling place is a location, such as a church or fire station, where citizens cast their votes.

111. In some cases, there is no polling place within a precinct; voters who live there must travel to a different precinct to cast their votes.

112. Official proclamations from county boards of election commissioners show which precincts are assigned to a polling place for a given election.

113. Plaintiffs have not produced any official proclamations from a county board of election commissioners in this case.

114. In the course of preparing her expert report, Dr. Handley did not review any documents showing which precincts are assigned to a polling place for a given election.

115. In the course of preparing her expert report, Dr. Handley did not review any official proclamations from a county board of election commissioners.

116. Dr. Handley did not check the accuracy of Peter Wattson's work with regard to determining which precincts are assigned to a polling place for a given election.

117. If Dr. Handley's election results have been mistakenly paired with demographic information from a precinct that was not officially assigned to the polling place, the mistake will produce errors.

118. Dr. Handley applied three statistical techniques to the eighteen election contests that met her race-based criteria: homogenous precinct analysis, bivariate regression, and ecological inference.

119. Dr. Handley describes the three techniques as "complementary."

120. Dr. Handley does not make assumptions about a particular contest if one technique shows one thing and another technique shows something dramatically different.

121. Ecological inference estimates are not necessarily exact, and Dr. Handley did not calculate a margin of error for any of her estimates.

122. In her analysis, Dr. Handley did not consider reconstituted election results with regard to national and statewide elections that took place within the precise geography of new Senate District 24.

123. The percentage minority population needed to create an “effective minority district” (that is, a district that provides minority voters with the ability to elect candidates of their choice to office) varies depending on the locality—there is no single target (for example, 65 percent) that can be applied universally.

124. Dr. Handley says that her clients asked her to “ascertain the level of Black population required in this region of the state to provide African Americans with the ability to elect candidates of their choice to legislative office, particularly in the general area of 2011 Senate District 24.” However, Dr. Handley did not “fully” answer this question.

125. Dr. Handley did a “tentative try” at applying her model for Senate District 16, but she did not generate any calculations that she will “comment on.”

126. 98.4% of the people who live within the boundaries of new Senate District 24 reside within the four-county region of Crittenden, St. Francis, Lee, and Phillips counties.

127. Part IV of Dr. Handley’s expert report is titled “Providing Minority Voters with the Ability to Elect Their Preferred Candidates.” The only information that Dr. Handley provides in this section is Table 4, which shows the BVAP percentage needed to equalize turnout on election day.

128. In Dr. Handley’s earlier writings, she wrote that “[o]ne cannot adhere slavishly to the most easily quantifiable part of minority vote calculations, namely, to the equalization percentage.” Brace, Groffman, Handley & Niemi, *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 Law & Policy 1 (Jan. 1988), Ex. 37, at 57. In Chicago, for

example, Dr. Handley and her co-authors noted that “for blacks, incumbency, polarization, and other factors may now be as significant as differences in [turnout factors such as] registration rates, voting, and even VAP [Voting-age Population].” *Id.*

129. More recently, Dr. Handley and her co-authors advanced a formal model for determining “the percentage minority necessary to provide minority voters with an equal opportunity to elect their candidates of choice.” Groffman, Handley & Lublin, *Drawing Effective Minority Districts: A Conceptual Framework And Some Empirical Evidence*, 79 U.N.C. L. Rev. 1383 (2001), Ex. 38. The purpose of the model is to “estimate[] future minority voting strength.” *Id.* at 1387. On page 1404 of the article, Dr. Handley discusses the first component of the model—namely, the equalization of Black and White turnout. On page 1407 of the article, Dr. Handley discusses additional critical variables: cohesion and cross-over voting. Dr. Handley wrote: “Equalizing turnout is not the best indicator of whether minority voters will have an equal opportunity to elect minority candidates. We also need to incorporate the level of minority cohesion and the degree of White crossover voting that can be expected when a minority-preferred candidate competes for office.” *Id.* at 1407 (emphasis added). “If, for example, White voters regularly cross over to vote for Black candidates, the percentage Black necessary to create an effective Black district decreases.” *Id.*

130. Dr. Handley noted that, after majority-minority districts were redrawn in the wake of the Supreme Court’s anti-gerrymandering decisions, the Black population in eight districts fell to a level below 50 percent, and the African American candidates won in every contest in which they sought re-election.

131. In her article, Dr. Handley considered 20 congressional races in the South. In every case, the “% black needed to equalize turnout” exceeded 50%, and it was as high as 58%

in the contest for Georgia's second congressional district. *Drawing Effective Minority Districts*, Ex. 38, at 1406. But when crossover and cohesion numbers were introduced into the model, the "effectiveness" number was substantially smaller than the "turnout equalization" number in every instance. For example, in Georgia's second congressional district, Dr. Handley calculated that the "% black needed to win, incorporating cohesion and crossover," was only 37.1%. *Id.* at 1408. In most cases, the effectiveness number was "in the range of 33%-39%. *Id.* "This is because, even though blacks are typically turning out to vote at lower rates than Whites, blacks are voting very cohesively—over 95% of the black voters consistently voted for the black Democrat in the general election—and approximately one-third of the White voters supported the black Democrat in the general election." *Id.*

132. If Blacks engage in bloc voting or cohesion more intensely than Whites in a given election, that fact tends to lower the percentage of Black population needed to have effective districts.

133. Dr. Handley's model is represented in the equation in footnotes 68 and 72 of her *North Carolina Law Review* article.

134. Dr. Handley recently applied this equation when she served as a consultant for the Alaska Redistricting Board. Ex. 39.

135. In Part 3 of the Alaska Report, Dr. Handley calculated the minority VAP percentage needed to have the ability to elect a minority-preferred candidate. Dr. Handley considered numerous elections and applied the model as set forth in her *North Carolina Law Review* article.

136. Dr. Handley calculated a "target percentage of 41.8" and concluded that, on average, any district with an Alaska Native VAP greater than 41.8% should be able to elect an

Alaska Native-preferred candidate to office.” *Id.* “This percentage is lower than 50% Alaska Native,” Dr. Handley explained,” because of the turnout rates and cross-over votes that minority-preferred candidates “can usually expect.” *Id.*

137. In this case, Dr. Handley has only “gone through the first stage” of her model. Dr. Handley considered turnout equalization, but she did not incorporate cohesion or cross-over voting.

138. Professor Zax calculated that Dr. Handley’s model would show that a BVAP of 49.9% in the new Senate District 24 is the threshold above which the Black-preferred candidate would expect to receive more than 50% of the vote.

139. According to Dr. Handley, the presence of a minority incumbent should be taken into account.

140. African Americans have recently been elected to county-wide offices in St. Francis and Lee counties.

141. The 2010 U.S. Census data showed that Arkansas’s 2010 population was 2,915,918.

142. Arkansas’s 2010 population of 2,915,918 represented a 9.1% increase over the state’s 2000 population.

143. The 2010 U.S. Census data showed that the Black population was 15.4% of Arkansas’s total population.

144. The total population of Benton County increased by 44.3%.

145. The total population of Washington County increased by 28.8%.

146. The total population of Faulkner County increased by 31.6%.

147. The Black population of Faulkner County increased by 58.5%.

148. The total population of Pulaski County increased by 5.9%.
149. The Black population of Pulaski County increased by 16.2%.
150. The total population of Lonoke County increased by 29.4%.
151. The Black population of Lonoke County increased by 19.7%.
152. The total population of Lee County decreased by 17.1%.
153. The Black population of Lee County decreased by 20%.
154. The total population of Phillips County decreased by 17.7%.
155. The Black population of Phillips County decreased by 12.1%.
156. Crittenden County has a Black population of 51.2% according to the 2010 census data.
157. The 2010 BVAP of St. Francis County was 48.2%.
158. The 2010 BVAP of Lee County was 52.9%.
159. The 2010 Senate Variance Map (Ex. 35) accurately shows Arkansas's population under the 2010 census data in relation to the borders of the previous Senate districts.
160. The 2010 Senate Variance Map (Ex. 35) correctly shows the extent of the deviation if the Senate district boundaries were left unchanged.
161. 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.
162. The 2010 Census reported that Senate District 16 had a population of 68,732, which was 14,580, or 17.5%, less than the ideal population of 83,312.

163. To meet equal population requirements, so that the population of Senate District 16 was no more than five percent below the ideal, its boundaries needed to be redrawn to add at least 10,415 people, to bring its population up to at least 79,147.

164. St. Francis, Lee, Crittenden, and Phillips counties each have a 2010 Census total population whose majority is African-American, though the voting-age population of St. Francis County is 48.2% African American and the voting-age population of Crittenden County is 47% African American.

165. The 2010 Census reported that the population of District 16 included the following, classified by race:

Table 1 – District 16 Population by Race

Total Population

White	Black	White %	Black %
21,622	45,252	31%	66%

Voting-age Population

White	Black	White %	Black %
18,183	30,602	36%	61%

166. The 2010 Census reported that the White and Black racial classifications of District 16, allocated by county, were approximately as follows:

Table 2 – District 16 Population by Race by County

Total Population

	White	Black	White %	Black %
Crittenden	3,410	16,101	17%	81%
Lee	2,934	4,970	36%	61%
Phillips	4,568	10,375	30%	68%
St. Francis	10,710	13,806	42%	54%
Total	21,622	45,252	31%	66%

Voting-age Population

	White	Black	White %	Black %
Crittenden	2,888	10,309	22%	77%
Lee	2,573	3,737	40%	58%
Phillips	3,775	6,814	35%	63%
St. Francis	8,947	9,742	46%	50%
Total	18,183	30,602	36%	61%

167. Phillips, Lee, and St. Francis counties have the first, second, and fifth highest percentage of African-American population of any counties in the state.

168. The members of the Arkansas Board of Apportionment in 2011 were Governor Mike Beebe, Attorney General Dustin McDaniel, and Secretary of State Mark Martin. They all participated in drawing new legislative districts following the 2010 Census.

169. Governor Beebe wanted to make sure that the respective districts contained the appropriate number of people within the parameters of what the law provided.

170. General McDaniel made it a clear priority to his staff that throughout the redistricting process they must be ever vigilant and vocal if they ever had a concern that the Board was not in compliance with the law.

171. Governor Beebe and Attorney General Dustin McDaniel wanted to keep communities of interest together where possible.

172. Governor Beebe and Attorney General Dustin McDaniel wanted to take into consideration the wants and desires of the people in the state that expressed those desires, including, but not limited to Senate incumbents.

173. Plaintiff Jack Crumbly is a State Senator whose residence is in Senate District 24 under the plan adopted by the Board of Apportionment in 2011.

174. Senator Crumbly believes that a higher BVAP will likely enhance his chances for re-election to the Senate.

175. Before the Board of Apportionment adopted Senate District 24 in 2011, Senator Crumbly proposed that the district have boundaries that are different from those that the Board actually adopted.

176. Defendant Secretary Martin submitted his own plan of redistricting, which included a Black voting-age population of 56.1% for the area that most closely reflects the boundaries of old Senate District 16 and new Senate District 24. However, Secretary Martin's proposed Senate District 2 had a BVAP of 53.21%, and he proposed five House districts with a BVAP of less than 53%.

177. On July 29, 2011, Defendant Board of Apportionment met and by a 2-1 vote adopted the current maps for Arkansas's 35 Senate districts and 100 House of Representatives districts.

178. Governor Mike Beebe and Attorney General Dustin McDaniel voted in favor of the plans; Secretary of State Mark Martin voted against them.

179. New Senate District 24 has a Black population of 57.05%.

180. New Senate District 24 has a Black voting-age population ("BVAP") of 52.88%.

181. New Senate District 24 has a minority voting-age population of 55.72%.

182. East Arkansas Regional Unit is a prison that exists within new Senate District 24.

183. The 2010 Census Block Information for East Arkansas Regional Unit (Ex. 36) shows a Black adult prisoner population of 849.

184. The 2010 Census Block Information for East Arkansas Regional Unit (Ex. 36) shows a non-Black adult prisoner population of 833.

185. Rounding to the nearest tenth of a percent, the census data shows that the BVAP of the prison was 50.5% on census day.

186. Excluding the prison from the tabulation of new Senate District 24's BVAP would increase the district's BVAP to above 52.88%.

187. The Board of Apportionment's 2001 Senate plan had four majority-minority districts.

188. The Board of Apportionment's 2011 Senate plan has four majority-minority districts.

189. New Senate District 24 includes all of Crittenden County.

190. New Senate District 24 includes part of Cross County.

191. New Senate District 24 includes part of St. Francis County.
192. New Senate District 24 includes part of Lee County.
193. New Senate District 24 includes part of Phillips County.
194. Plaintiff Jack Crumbly is a member of the Arkansas State Senate.
195. Senator Crumbly is an African American.
196. Senator Crumbly was elected to the State Senate from old Senate District 16.
197. Senator Crumbly resides in new Senate District 24.
198. New Senate District 25 has a total African American population 58.37%.
199. New Senate District 25 has a BVAP of 55.85%.
200. New Senate District 25 includes part of Phillips County.
201. New Senate District 25 includes part of Desha County.
202. New Senate District 25 includes part of Lincoln County.
203. New Senate District 25 includes part of Arkansas County.
204. New Senate District 25 includes parts of Jefferson County and Monroe County.
205. Stephanie Flowers is a member of the Arkansas State Senate.
206. Senator Flowers is an African American.
207. Senator Flowers was elected to the State Senate from old Senate District 5.
208. Senator Flowers resides in new Senate District 25.
209. New Senate District 30 has a total African American population of 56.33%.
210. New Senate District 30 has a BVAP of 53.19%.
211. New Senate District 30 is in Pulaski County.
212. New Senate District 30 includes part of Little Rock.
213. Linda Chesterfield is a member of the Arkansas State Senate.

214. Senator Chesterfield is an African American.
215. Senator Chesterfield was elected to the State Senate from old Senate District 34.
216. Senator Chesterfield resides in new Senate District 30.
217. New Senate District 31 has a total African population of 61.53%.
218. New Senate District 31 has a BVAP of 58.26%.
219. New Senate District 31 is in Pulaski County.
220. New Senate District 31 includes part of Little Rock.
221. Joyce Elliot is a member of the Arkansas State Senate.
222. Senator Elliot is an African American.
223. Senator Elliot was elected to the State Senate from old Senate District 33.
224. Senator Elliot resides in new Senate District 31.

225. Whereas African Americans made up about 66% of the total population of 2001 District 16, and about 61% of its voting-age population, the areas of Crittenden County in 2011 District 24 that were not in 2001 District 16 are about two-thirds White. The following table shows the approximate numbers:

Table 3 – Crittenden County Whites Added**Total Population**

	Population	White	Black	White %	Black %
District 16					
Crittenden	19,864	3,410	16,101	17%	81%
Added	31,038	20,036	9,950	65%	32%
District 24					
Crittenden	50,902	23,446	26,051	46%	51%

Voting-Age Population

	18+Pop	White	Black	White %	Black %
District 16					
Crittenden	13,421	2,888	10,309	22%	77%
Added	22,672	15,371	6,654	68%	29%
District 24					
Crittenden	36,093	18,259	16,963	51%	47%

226. A voting-age population of approximately 11,952 in St. Francis County that had been included in 2001 District 16 is not included in 2011 District 24.

227. Senator Crumbly resides in St. Francis County.

228. The 2010 Census figures for 2001 District 16, 2011 District 24, and Jeffers_01 District 24 are shown in the following table:

Table 6 – Population by Race: 2001 Dist. 16, 2011 Dist. 24, Jeffers_01 Dist. 24**Total Population**

	White	Black	White %	Black %
2001 District 16	21,622	45,252	31%	66%
2011 District 24	35,227	49,716	40%	57%
Jeffers_01 District 24	27,397	52,657	33%	64%

Voting-Age Population

	White	Black	White %	Black %
2001 District 16	18,183	30,602	36%	61%
2011 District 24	28,132	33,137	45%	53%
Jeffers_01 District 24	22,823	35,749	38%	59%

229. State Representatives Jerry R. Brown, Clark Hall, and Keith Ingram are all White Democratic incumbent State Representatives residing in 2001 Senate District 17 during their 2011-12 term.

230. Representatives Brown and Hall are serving their third term in the House, and thus are term-limited from running for the House again in 2012.

231. Senator Jim Luker is serving his third term in the Senate, and thus is term-limited from running for the Senate again in 2012.

232. Representative Keith Ingram is currently serving his second term in the Arkansas House of Representatives, and thus is not term-limited from running for the House again in 2012.

233. The 2011 Senate plan for Districts 23 and 24, as drawn by Defendant Board of Apportionment, places Representative Jerry R. Brown in the successor to 2001 District 17, which is 2011 Senate District 23.

234. Representatives Hall and Ingram reside in Senate District 24, along with Senator Crumbly.

235. On September 14, 2011, Representative Jerry R. Brown announced his intention to run for the Arkansas Senate from District 23.

236. On October 17, 2011, Representative Clark Hall announced his intention to run for Congress from the First Congressional District.

237. On January 16, 2012, Representative Keith Ingram announced his intention to run for the Arkansas Senate from District 24.

238. Crittenden County has 58% of the voting-age population of Senate District 24 (36,093 out of 62,666).

239. In Dr. Lisa Handley's racial bloc-voting analysis, Dr. Handley defined the geographic region of Arkansas that would be the focus of her analysis as "the Delta."

240. Dr. Handley defined "the Delta" as the following Arkansas counties: Crittenden, Cross, Lee, St. Francis, Phillips, Monroe, and Woodruff.

241. Dr. Handley's definition of "the Delta" came from Plaintiffs' lawyers.

242. Willis won a plurality of the votes in the 2006 contest for Senate District 16 (34.6% of the total vote). Dr. Handley's ecological inference estimate shows that white voters preferred Willis over Crumbly (43.7% to 40.0%), but her homogeneous precinct analysis shows that white voters preferred Crumbly (44.6% to 33.7%) and her bivariate regression estimate likewise shows a white preference for Crumbly over Willis (40.2% to 38.1%).

243. In the 2006 primary runoff election for Senate District 16, Senator Crumbly won by approximately 68 votes. Dr. Handley's ecological inference estimate shows that blacks

preferred Willis over Crumbly (53.9% to 45.3%). But her homogenous precinct analysis shows the opposite result: black voters preferred Crumbly over Willis (57.1% to 42.9%).

244. In the 2010 primary election for State Senate District 16, Dr. Handley's ecological inference estimates show that blacks preferred Simes over the winner, Crumbly (51.1% to 48.6%). Dr. Handley's data for this contest incorrectly switched the votes for the candidates in every polling area in Lee County.

245. Table 1 of Dr. Handley's report is a list of 24 contests in the Delta since 2000 that have included at least one African American candidate.

246. Dr. Handley could not analyze polarization in one of the interracial contests (Mitchell v. Brandon v. Hall – State Rep. Dist. 13 May Primary 2006) because Phillips County did not report election returns by precinct or polling area for this election.

247. In the contests in Dr. Handley's Table 1 within geographical regions in which the BVAP was less than 32%, the black-preferred candidate received the most votes in two election scenarios.

248. In the contests in Dr. Handley's Table 1 within geographical regions in which the BVAP was between 42% and 45%, the black-preferred candidate received the most votes in two out of three election scenarios.

249. In the contests in Dr. Handley's Table 1 within geographical regions in which the BVAP was between 46% and 53%, the black-preferred candidate received the most votes in 9 out of 11 election scenarios.

250. Willis, the black-preferred candidate, defeated Hall in the 2004 Democratic primary election for House District 13. The BVAP for this district was approximately 52.88%.

251. In the contests in Dr. Handley's Table 1 within geographical areas in which the BVAP was 55% or higher, white candidates ran for office in 4 out of 12 elections.

252. The black-preferred candidate according to Dr. Handley, Davis, defeated Nassar in the 2004 general election for House District 54.

253. The black-preferred candidate according to Dr. Handley, Simes, defeated Higginbothom in the 2000 Democratic primary election for Senate District 22.

254. The 2010 Democratic primary runoff election for House District 54 featured only black candidates. The winner did not face a Republican opponent. The BVAP of this district was higher than 55%.

255. Since 2000, there have been five elections in old Senate District 16 and its predecessor, Senate District 22. Alvin Simes was a candidate in four of those contests.

256. Separate Defendants wanted to maintain minority districts as much as possible.

257. While taking the totality of the circumstances into account, the Separate Defendants sought to ensure that minority voters have the opportunity to elect the candidate of their choice in new Senate District 24.

258. Separate Defendants did not approve of Senator Crumbly's proposed boundaries for the proposed Senate district (24) because, if adopted, they believed that those boundaries would have impacted another African-American incumbent senator's district.

259. The Separate Defendants did not approve of Senator Crumbly's proposed boundaries for the proposed Senate district (24) because, if adopted, they believed that those boundaries would have resulted in the proposed district to the North (23) being "too elongated."

260. The Separate Defendants did not approve of Senator Crumbly's proposed boundaries for the proposed district (24), because, if adopted, they believed that those boundaries would have resulted in another district having insufficient community of interest.

261. The Separate Defendants worked to find African-American-dominant precincts in order to add them to Senator Crumbly's district. Also, Exhibit 64 shows that, in most of the precincts west of new Senate District 24, voters favored McCain over Obama in the 2008 presidential election.

262. Even though the Separate Defendants wanted to minimize population variances among the new districts, new Senate District 24 was given the highest total population of any senate district in the state to increase the African-American population.

263. The Separate Defendants did not adopt Senate District 24 to avoid an election contest between white incumbent legislators.

264. Representatives Jerry Brown and Clark Hall are serving their third term in the Arkansas House of Representatives, and thus are term-limited from running for the House again in 2012.

265. Representative Keith Ingram is currently serving his second term in the Arkansas House of Representatives, and is thus not term-limited from running for the House again in 2012.

266. Governor Beebe and General McDaniel were both surprised when Keith Ingram announced he was running for the Senate.

267. Neither Governor Beebe nor General McDaniel had discussions with Representative Brown, Representative Hall, or Representative Ingram about district borders.

268. The Board of Apportionment hired Joe Woodson as its Redistricting Coordinator. Woodson was not a decision-maker or legal counsel, and did not prepare any proposed maps for the Board.

269. Woodson did not communicate about substantive issues related to redistricting with any of the Board members outside of the Board's three public meetings. Woodson communicated with the Board members and the public simultaneously by posting information onto the Board's public website.

270. Woodson scheduled and attended a series of public hearings around the State, at which he informed members of the public about the redistricting process and responded to questions and concerns from the public.

271. At some of the public hearings, Woodson referred to the number 55% when generally discussing the BVAP for majority-minority districts. Woodson's reference to a BVAP of 55% was not intended to convey that a BVAP of 55% was a legal requirement or a bright-line rule. Woodson always used qualifiers such as "about" and "around" when he referenced a BVAP of 55% for majority-minority districts. Woodson did not tell the Governor, the Attorney General, or the Secretary of State, or any of their staff-members, that a BVAP of 55% was a legal requirement or a bright-line rule for majority-minority districts. Woodson never told any person that a BVAP of 55% was a legal requirement or a bright-line rule for majority-minority districts.

272. Woodson did not study any of the proposed maps submitted by the Board members prior to the final vote on July 29, 2011. Woodson did not study the proposal for Senate District 24 submitted by any of the Board members prior to the final vote on July 29, 2011.

Woodson took no action regarding the Board's approved Senate map after it was adopted on July 29, 2011.

273. Leo Chitman, an African-American who resides in Crittenden County, is registered to vote and votes regularly. He has served as an election judge at a polling site in the 1970s. He was elected Mayor of the City of West Memphis in 1982. He was elected Chair of the Crittenden County Election Commission in 2007.

274. Roy C. Lewellen, an African-American who resides in Crittenden County, is registered to vote and votes regularly. He is currently the elected City Attorney of the City of Marianna. He has previously served as an elected member of the City Council of Marianna. In 1991, he was elected to the State Senate in District 22. He defeated an incumbent Senator who was white. He served in the State Senate for 10 years, serving all of his allowable terms.

275. Vicky Robertson, an African-American who resides in Crittenden County, is registered to vote and votes regularly. She has been elected to positions on the Crittenden County Quorum Court, the West Memphis City Council, and the West Memphis School Board. She ran unsuccessfully for a position in the State House of Representatives in a three-candidate race where all three candidates were African-American.

276. Reginald Murdoch, an African-American who resides in Lee County, is the elected State Representative for Senate District 52 (District 48 following redistricting). Representative Murdoch lost his first race for the State House to an African-American female, then he won his second race against another African-American female. Representative Murdoch had a few conversations with Attorney General McDaniel about redistricting, and Attorney General McDaniel told Murdoch that Keith Ingram had no intention of running for State Senate "as far as he knew."

277. Peggy Robinson Wright, an African-American who resides in St. Francis County, is registered to vote and votes regularly. She served as the elected City Clerk for the City of Forrest City prior to 1989, and in 1989 she lost an election for St. Francis County Clerk.

278. Eddie O'Neal, an African-American who resides in Phillips County, is registered to vote and votes regularly. From 2000-2002, he served as an elected member of the City Council of Helena-West Helena. There are two African-Americans currently elected to countywide office in Phillips County, the Clerk and the Coroner. The Mayor of Helena-West Helena is African-American.

279. Linda White, an African-American who resides in Phillips County, has been the elected County Clerk for the last 17 years. She was originally elected in a contest against Joseph St. Columbia, a white male. She received the endorsement of the outgoing County Clerk, a white female.

280. Mary Jeffers, an African-American who resides in St. Francis County, is an elected member of the City Council of Forrest City. Four of the eight elected members of the City Council of Forrest City are African-American.

281. Rev. C. W. Campbell, an African-American who resides in Crittenden County, is registered to vote and votes regularly.

282. Joseph Perry, an African-American who resides in Lee County, has served as a Republican representative on the Lee County Election Commission.

283. Henry Peacock, an African-American who resides in St. Francis County, has been elected to both the School Board and the City Council of Forrest City.

284. Richard Wilson is one of three Assistant Directors for the Arkansas Bureau of Legislative Research (BLR). During redistricting, he had confidential conversations with

members of the Arkansas House and Senate regarding redistricting. Wilson and the other BLR Assistant Directors drafted redistricting maps for legislators at the request of the legislators, including Senator Jack Crumbly. When Wilson or the other BLR Assistant Directors prepared a map for a legislator, the Assistant Director did not consider any factors aside from target population size and the specific requests of the legislator. Stipulated Exhibit 4 is a map that Wilson prepared for Senator Crumbly at Senator Crumbly's request. Wilson considered only target population and the maximization of BVAP in his preparation of Exhibit 4.

285. Secretary of State Martin did not express his concerns about the BVAP of new Senate District 24, or BVAP in any proposed majority-minority House or Senate District, to the Governor or the Attorney General.

286. Secretary of State Martin is the chief elections officer in the State of Arkansas. His office encourages citizens to vote, tells citizens how to register to vote, educates citizens about how to cast their votes and where to vote, and provides voter outreach services to citizens upon request without regard to the race of the requesting citizen. His office also trains election officials, poll workers, and election volunteers.

287. Two of the Secretary of State's draft Senate maps included a Senate District with Crittenden County whole. *See* Ex. 15 & 16.

288. Secretary of State Martin did not perform any statistical analysis of racially polarized voting in Arkansas, nor did his staff. Secretary Martin did not consider hiring anyone to perform such an analysis, and did not recommend that the Board of Apportionment hire someone to do such an analysis.

289. Governor Mike Beebe was a member of the Board of Apportionment, and served as the Chair of the Board under the Arkansas Constitution.

290. The members of the Board refrained from engaging in any personal communications among the members, because such communications would violate the Arkansas Freedom of Information Act if they occurred outside the context of a public meeting.

291. The Board gave equal consideration to Republican incumbent legislators and Democratic incumbent legislators.

292. The BVAP of Senator Crumbly's District was about 61% prior to redistricting (District 16), and about 53% after redistricting (District 24). Senator Crumbly's District was drawn with a large population at Senator Crumbly's request, in order to increase the BVAP of the District.

293. No Senate District was drawn in a vacuum. The Board did not have the luxury of drawing a single District. The Board had to draw 35 districts.

294. When drawing Senate District 24, Governor Beebe's intent was to maximize the BVAP of the District as much as possible while also taking into consideration all of the other factors the Board was required to take into account, including populations, communities of interest, geography, history, and the effect on other districts.

295. If the Board had adopted Senator Crumbly's proposed map for his Senate district, it would have adversely impacted another majority-minority district by reducing the BVAP of the other district.

296. The City of Forrest City was split in the Board's adopted Senate map in order to increase the number of African-American voters in District 24.

297. Governor Beebe did not promise to draw Senator Crumbly's Senate District first. Governor Beebe did not promise to draw any particular Senate District first.

298. Prior to the Board's final vote on July 29, 2011, Governor Beebe had no knowledge that Keith Ingram would run for State Senate.

299. Prior to the Board's final vote on July 29, 2011, General McDaniel had no knowledge that Keith Ingram would run for State Senate.

300. Governor Beebe considered Senator Crumbly to be an ally and wanted him to be reelected at the time of the Board's final vote on July 29, 2011.

301. State Representative Keith Ingram's intention prior to the fall of 2011 was to run for Speaker of the House of Representatives. In the fall of 2011, he began to look at the Senate race and began talking to the people of Senate District 24. Ingram changed his mind and made the decision to run for State Senate in November or December of 2011.

302. The process of creating the final maps approved by the Board of Apportionment included literally thousands of compromises over several months.

303. After Senator Crumbly began expressing his concerns about Senate District 24, General McDaniel instructed his staff to address Senator Crumbly's concerns while continuing to address other concerns such as compactness, communities of interest, the impact on other districts (including other majority-minority districts), and geographic design.

304. General McDaniel's goal for Senate District 24 was to maximize BVAP in conjunction with all of the other important factors, and not at the expense of all other factors.

305. General McDaniel interpreted Senator Crumbly's request as a request to make race the predominate factor in Senate District 24, but General McDaniel's legal understanding is that race should not be the predominate factor in redistricting.

306. Senator Crumbly made it clear to General McDaniel that he wanted a BVAP of at least 60% in his Senate District. However, it was not possible to achieve a BVAP of 60% while still considering the other factors that should be considered.

307. General McDaniel's staff provided counsel to the staff of the other Board members regarding what constitutes an effective majority-minority district. General McDaniel's staff concluded that the final BVAP of adopted Senate District 24 was sufficient to render Senate District 24 effective and legally defensible.

308. General McDaniel decided not to attend any of the public redistricting hearings because he could not attend all of them and he did not want to create the impression that any area of the State was more important than any other area of the State.

309. The Secretary of State never expressed a concern about the BVAP of Senate District 24 to the Attorney General.

310. The Attorney General's Office received a laptop from either the Board of Apportionment or the Secretary of State's Office, for use in redistricting. The laptop was new and unformatted when received by the Attorney General's Office. IT staff of the Attorney General's Office installed a variety of licensed software on the laptop. When staff of the Attorney General's Office attempted to use the laptop for redistricting, it was discovered that the laptop was slow and ineffective. The laptop was not used over the course of the redistricting process. At the end of redistricting, the laptop was returned to the Board or the Secretary of State's Office. Prior to the return of the laptop, IT staff of the Attorney General's Office conducted a disc wipe on the laptop, to remove the licensed software from the laptop and allow for resale of the laptop, consistent with office policy adopted from the Arkansas Department of Information Systems.

311. At the beginning of the redistricting process, General McDaniel told every state legislator to provide him with a map reflecting their ideal legislative district. General McDaniel made two promises to the legislators regarding the ideal maps they submitted: (1) the maps would be considered, and (2) no legislator would receive their ideal district. No legislative district was redrawn exactly as any individual legislator requested.

312. All of the members of the legislature used the Bureau of Legislative Research to draw individual maps of their districts that would please them and emailed the maps to the Redistricting Coordinator.

313. There are a number of opportunities given to Arkansas citizens to register to vote, and it is not difficult to register to vote in the State of Arkansas.

314. Over the past 20 years, there have been no instances of official discrimination or discriminatory practices that have affected the ability of African-Americans to vote in the area that is now Senate District 24.

315. There are no legislators from the Delta who are unresponsive to the needs of African-Americans.

316. The BVAP for new Senate District 24 was increased after Senator Crumbly expressed his concerns to General McDaniel.

317. Dr. Lisa Handley contracted with the East Arkansas Redistricting Coalition (EARC) to serve as an expert consultant and witness in this case. Pursuant to the contract between Dr. Handley and the EARC, the EARC agreed to provide Dr. Handley with a list of key electoral contests that were pre-determined to illustrate the difficulty for an African-American candidate to win election in Senate District 24 with a BVAP of 53%.

318. Dr. Handley was unable to determine a BVAP for new Senate District 24 that she believes would produce an effective majority-minority district.

319. Dr. Handley only analyzed biracial election contests for the most part, though she acknowledges that other contests featuring only black candidates would add value to her analysis.

320. Dr. Handley is not certain that her analysis includes all of the biracial election contests during the period of time she analyzed, because she relied upon the Plaintiffs' attorneys to provide her with the biracial contests to be analyzed.

321. In the election contests she analyzed, Dr. Handley did not include early and absentee voting in her analysis.

322. According to Dr. Handley, voting is racially polarized if a majority of voters of one racial group would select a different candidate than a majority of voters of a different racial group. According to Dr. Handley, if 50% plus one of African-American voters vote for the African-American candidate, and 50% plus one of white voters vote for the white candidate, then the election is racially polarized.

323. Dr. Handley did not analyze any municipal or county election contests within the Delta.

324. In her analysis, Dr. Handley did not consider correlation coefficients, confidence intervals, or margins of error.

325. In her analysis of statewide contests, Dr. Handley made no effort to determine the election results within the Delta region she defined, but focused only upon the statewide outcomes of the contests.

326. Dr. Handley admits that analyzing statewide election contests in what is now Senate District 24 would be useful, but she made no effort to do so because she was unable to perform reconstituted elections analysis for Senate District 24.

327. In most of the biracial legislative contests analyzed by Dr. Handley, the black-preferred candidate received a higher percentage of the actual vote than the BVAP of the District.

328. Dr. Handley admits that there is no single BVAP percentage that would result in an effective district for all voting districts.

329. In the 11 election scenarios analyzed by Dr. Handley where the BVAP of the relevant district ranged from 46% to 53%, the black-preferred candidate received the most votes in 9 of the 11 scenarios.

330. A black-preferred candidate will have at least an even chance of being elected in Senate District 24.

331. Crittenden, St. Francis, Phillips, Cross, and Lee Counties have experienced an increase in cross-over voting by white voters, and continued cohesion by African-American voters.

332. Crittenden, St. Francis, Phillips, Cross, and Lee Counties have experienced substantial success by African-American candidates running for political office.

333. The closest approximation of Senate District 24 is the four-county region of Crittenden, St. Francis, Phillips, and Lee Counties. The four-county region is a closer approximation of Senate District 24 than old Senate District 16 because the four-county region includes a greater percentage of the voters in Senate District 24 than does old Senate District 16, and the four-county region includes fewer voters who are not contained in Senate District 24

than does old Senate District 16. Old Senate District 16 has twice the misallocation of the four-county region when compared to Senate District 24. The four-county region contains 77% of the same population as Senate District 24; old Senate District 16 contains 51% of the same population as Senate District 24.

334. The four-county region of Crittenden, St. Francis, and Lee Counties has a BVAP of 50.1% under the 2010 Census. The four-county region had a BVAP of 45.9% under the 2000 Census.

335. In the last six statewide elections in which there was an African-American candidate, in the four-county region of Crittenden, Lee, St. Francis, and Phillips Counties, the African-American candidate received a majority of the votes in each election.

336. In the 2002 primary election for Lieutenant Governor, the black-preferred candidate as identified by Dr. Handley received 76.7% of the vote in the four-county region. The BVAP of the four-county region at this time was 45.9%.

337. In the 2002 general election for Lieutenant Governor, the black-preferred candidate as identified by Dr. Handley received 55.7% of the vote in the four-county region. The BVAP of the four-county region at this time was 45.9%.

338. In the 2004 election for Chief Justice of the Arkansas Supreme Court, the black-preferred candidate as identified by Dr. Handley received 50.3% of the vote in the four-county region. The BVAP of the four-county region at this time was 45.9%.

339. In the 2006 election for Associate Justice of the Arkansas Supreme Court, the black-preferred candidate as identified by Dr. Handley received 54.6% of the vote in the four-county region. The BVAP of the four-county region at this time was 50.1%.

340. In the 2008 primary election for President, the black-preferred candidate as identified by Dr. Handley received 51% of the vote in the four-county region. The BVAP of the four-county region at this time was 50.1%.

341. In the 2008 general election for President, the black-preferred candidate as identified by Dr. Handley received 59.6% of the vote in the four-county region. The BVAP of the four-county region at this time was 50.1%.

342. According to Dr. Handley's published model (Stipulated Exhibits 38 and 39), the best way to determine the BVAP necessary to achieve an effective majority-minority district is to analyze voting age populations, turnout rates, and cohesion rates. Dr. Handley did not perform the calculations recommended in her published model in her analysis of 18 electoral contests in this case.

343. Assuming that Dr. Handley's data is reliable, Dr. Handley's published model for determining the future effectiveness of a district predicts that a 49.9% BVAP would be sufficient to produce an effective Senate District 24.

344. Nearly one-third of the votes cast in the 18 electoral contests analyzed by Dr. Handley were early and absentee votes, but Dr. Handley did not analyze the early and absentee votes. Specifically, Dr. Handley failed to account for 83,650 votes among the 18 contests she analyzed, a total of 31.1% of all of the votes cast in those elections.

345. The absence of early and absentee votes from Dr. Handley's analysis of 18 electoral contests makes Dr. Handley's analysis unreliable, because the early and absentee votes could cancel or reverse Dr. Handley's findings. For example, in one of the 18 electoral contests (*Hall v. Willis*, 2004), candidate Hall won the election day votes narrowly, but candidate Willis won nearly three-quarters of the early and absentee votes. Thus, candidate Willis, the black-

preferred candidate according to Dr. Handley, won 56.5% of the total vote and won the election. However, in Dr. Handley's analysis, which excluded early and absentee voting, Dr. Handley used data showing that candidate Hall won the election with 51% of the total vote.

II. PROPOSED CONCLUSIONS OF LAW

1. 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).

2. 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.*

3. 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.

4. Under the *Gingles* preconditions, courts do “not assume the existence of racial bloc voting; plaintiffs must prove it.” *Gingles*, 478 U.S. at 46; *see also Growe v. Emison*, 507 U.S. 25, 41 (1993) (holding that courts “may not presume bloc[] voting”).

5. If the plaintiff meets the burden of establishing the threshold preconditions, the plaintiff must then also prove vote dilution under the totality of the circumstances. *Bartlett v. Strickland*, 556 U.S. 1, 11-12 (2009) (“[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. S.R. No. 97-417, at 28-29 (1982); *Gingles*, 478 U.S. at 44-45 (referring to Senate Report factors such as the history of official discrimination, the extent to which minority group members have been elected to public office, and the unresponsiveness of elected officials).

6. In *Gingles*, the Supreme Court presumed that a Section 2 plaintiff’s “submergence” theory of vote dilution requires a redistricting body’s complete failure to create a majority-minority district. *See, e.g., Gingles*, 478 U.S. at 51 (“[T]he minority must be able to demonstrate that *the white majority* votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority’s preferred candidate”) (emphasis added) (citations omitted); *id.* at 68 (“The essence of a submergence claim is that minority group members prefer certain candidates whom they could elect were it not for the interaction of the challenged electoral law or structure *with a white majority* that votes as a significant bloc for different candidates.”) (emphasis added).

7. Thus, the Supreme Court’s analytical framework for determining Section 2 liability presumed a threshold showing that the redistricting body has drawn a white-majority district when, in fact, a compact black-majority district could have been created.

8. More recently, in *Bartlett v. Strickland*, 556 U.S. 1 (2009), the Supreme Court addressed 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.

9. The *Bartlett* Court adopted a “majority-minority rule” for analyzing Section 2 liability under the first *Gingles* precondition. 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.*

10. The *Bartlett* Court held that Section 2 should not be interpreted in a way that “would place courts in the untenable position of predicting many particular variables and tying them to race-based assumptions.” *Id.* at 17. The Court cautioned against an interpretation of Section 2 that would force the judiciary to “make predictions or adopt premises that even experienced polling analyzes and political experts could not assess with certainty, particularly over the long term.” *Id.* Such inquiries would include: “What percentage of white voters supported minority-preferred candidates in the past? How reliable would the crossover votes be in future elections? What types of candidates have white and minority voters supported together in the past and will those trends continue? Were past crossover votes based on incumbency, and did that depend on race? What are the historical turnout rates among white and minority voters

and will they stay the same?” *Id.* at 17. Those types 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.*

11. 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.” *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994). 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; *Page v. Bartles*, 144 F. Supp. 2d 346 (D.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).

12. In summary, *Bartlett* stands for the propositions 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 be based on clear and predictable rules rather than speculative, race-based assumptions. The import of these principles is that there is no liability under Section 2 if the minority-race voters constitute a majority in the district at issue.

13. The majority-minority rule is ultimately grounded in the text of Section 2, which is concerned about situations in which minority groups 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 (emphasis added). When a district’s black voting-age population exceeds 50% (or, as here, 52.88%), it is implausible that members of the minority group have less of an opportunity to participate in the political process than the white voters in the district. See *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) (stating that, if a cohesive minority group is large enough to constitute a “majority” in a single-member district, the minority group “has a good chance of electing its candidate of choice, if the group is placed in a district where it constitutes a majority”). To demand more misses the point of Section 2. See *Bartlett*, 556 U.S. at 20 (“Section 2 does not guarantee minority voters an electoral advantage.”); see also *De Grandy*, 512 U.S. at 1016 (“Failure to maximize cannot be the measure of § 2.”).

14. The cases cited above, in addition to the Supreme Court’s series of decisions striking down race-based redistricting decisions under the Fourteenth Amendment, make clear that the legal landscape has changed significantly since *Smith* and *Jeffers* were decided over 20 years ago. *First*, the Supreme Court has clearly held that states have no Section 2 duty to maximize minority voting strength. *De Grandy*, 512 U.S. at 1016. *Second*, the Supreme Court has clearly held that states have no Section 2 duty to guarantee an electoral advantage for minority voters and that lower courts should not make race-based assumptions about minority turnout, white support for minority-preferred candidates, and similar factors. *Bartlett*, 556 U.S. at 17-20. *Third*, the Supreme Court noted that, under some circumstances, redistricting bodies may lawfully create districts that reduce the significance of race by “encouraging minority and majority voters to work together toward a common goal.” *Id.* at 23. *Fourth*, the 65% “rule of

thumb,” which was utilized by the *Jeffers* and *Smith* courts, has been questioned for its lack of support in Supreme Court precedent, record evidence, and social science literature. *See, e.g., Cottier v. City of Martin*, 604 F.3d 553, 565-72 (8th Cir. 210) (en banc) (Smith, J., dissenting). Indeed, Plaintiffs’ expert witness in this case testified, consistent with her writings, that we should not use a preconceived “rule of thumb.” The other parties agree. *See* Joint Stipulation (Doc. 80), ¶ 124. *Fifth*, the Supreme Court has repeatedly held, in the post-*Jeffers* era, that a redistricting body’s use of race as the predominate factor in its decisionmaking is always suspect and often unlawful under the Equal Protection Clause. *See, e.g., Miller v. Johnson*, 515 U.S. 900 (1995).

15. Plaintiffs admit that new Senate District 24 has a total black population of 57.05%, a black voting-age population of 52.88%, and a minority voting-age population of 55.72%. Under these undisputed facts, Plaintiffs’ Section 2 claims fails as a matter of law for the reasons explained above. Plaintiffs have not cited a single case in which a court has held that, where, as here, a redistricting body has created a majority-minority district, that body’s failure to create a district with an even larger super-majority of minority residents constitutes a Section 2 violation. In fact, neither Plaintiffs nor Secretary Martin has cited a single case—at any level—in which a plaintiff has even asserted such a theory (much less prevailed). We decline to be the first court in the United States to adopt such a novel theory, particularly post-*Bartlett*.

16. In addition, Plaintiffs have not satisfied their burden of proving that white bloc voting has “usually” defeated black-preferred candidates and will “normally” do so in the future. In other words, Plaintiffs have not met their burden of proving the third element of the *Gingles* preconditions.

17. At the outset, we are troubled by the fact that Dr. Handley focused her analysis on a seven-county region that includes Woodruff and Monroe counties. Those counties contribute no territory to new Senate District 24. Dr. Handley included those counties for one reason: Plaintiffs' counsel requested that they be included.

18. We are also troubled by the fact that Plaintiffs agreed, in their contract with Dr. Handley's consulting firm, to provide Dr. Handley with a set of contests that were apparently chosen to reach a desired conclusion. *See* Ex. 69, § 3(b).

19. We are also concerned by the fact that the contests considered by Dr. Handley intentionally excluded those instances in which only white candidates sought office. This racial criterion does not comport with *Gingles*. *See Gingles*, 478 U.S. at 68 ("Clearly, only the race of the voter, not the race of the candidate, is relevant to vote dilution analysis."); *see also id.* at 67 ("[B]oth the language of § 2 and a functional understanding of the phenomenon of vote dilution mandate the conclusion that the race of the candidate *per se* is irrelevant to racial bloc voting analysis."); *id.* at 68 ("[T]he fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry.").

20. We are also troubled by the unverifiable method in which Dr. Handley considered U.S. Census data alongside election results. The data was apparently compiled by a non-expert (Plaintiffs' counsel), and Dr. Handley did not check any of it for accuracy. There were no witnesses at trial who could verify the accuracy and reliability of the data. What is more, Plaintiffs never produced any proclamations from a county board of election commissioners or documents showing how polling sites were correlated to Voter Tabulation Districts (*i.e.*, precincts). Thus, there is no basis in the record to assume that Dr. Handley's data were constructed appropriately; she could not testify that it was.

21. Finally, we are concerned by the fact that Dr. Handley's data omitted approximately one-third of the votes cast in the 18 contests that she analyzed. Although it may be impossible to tie early and absentee votes to specific precincts, we have concerns that ignoring these votes could render the resulting analysis unreliable. Plaintiffs offered no evidence at trial that ignoring thousands of votes was inconsequential. Indeed, there are some instances—such as the 2004 primary election on House District 13—in which the votes cast on election day clearly trended differently than the early votes.

22. Even if we were to ignore our serious concerns with Dr. Handley's data and methodology (and we cannot), we still come to the conclusion that white bloc voting is unlikely to defeat the minority-preferred candidate most of the time in new Senate District 24. We note the importance of geography in the bloc voting analysis. In *Smith v. Clinton*, 687 F. Supp. 1310 (E.D. Ark. 1988), for example, the defendants argued the significant passage of time since the Board's redistricting plan served barred the plaintiffs' claims under the doctrine of laches. This Court rejected that argument, noting that "the plaintiffs are required to prove that, as a result of the challenged structure, a white majority block is usually able to defeat the preferred candidates of the minority" and that "evidence of this circumstance would be unavailable unless the structure had been in place for some time." *Id.* at 1313. In this case, we do not have the luxury of evaluating electoral outcomes in the challenged district over a period of "some time"; indeed, there had been no elections in the new district at the time of the trial. Thus, even if this case is ripe at this time, *Smith* stands for the proposition that we must, at a minimum, focus on the new geography of the challenged district. In short, the district lines have changed, and our focus must be on the new district.

23. When district lines have changed, Dr. Handley testified that the “most direct” way to test the effectiveness of the new district is with recompiled election results. “Recompiled election results” refers to a method of considering outcomes in elections that have covered the entirety of the challenged district (usually statewide contests) to determine whether the challenged district would have elected the minority-preferred candidate. In this case, none of the parties were able to recompile election results within the precise boundaries of the challenged district for various technical reasons, including the fact that (1) early and absentee votes usually have not been assigned to a particular precinct and (2) polling place areas were split in the creation of the new district. However, this does not mean that a close approximation of the new district cannot be devised for the purpose of considering recompiled election results. The four-county region of Phillips, St. Francis, Crittenden, and Phillips Counties includes 98.4% of the people who live in new Senate District 24. Moreover, this four-county region had a BVAP that ranged from 45.9% in 2000 to 50.1% in 2010. Thus, if black-preferred candidates succeeded within the four-county region most of the time, it is reasonable to conclude that new Senate District 24 (which has a higher BVAP) will result in the election of minority-preferred candidates at least half of the time.

24. As explained in the findings of fact, the black-preferred candidate succeeded 100% of the time within the four-county region. Thus, in the geography that most closely approximates the geography of new Senate District 24, the black-preferred candidate always won. Bloc voting by whites did not “usually” defeat the minority-preferred candidates in the recompiled election results within this highly relevant region.

25. In addition to recompiled election results, Dr. Handley has historically used another method for testing the future effectiveness of a district: considering relative turnout,

cohesion, and cross-over voting over a number of contests and generating an average number that predicts the minimum BVAP needed to confer equal opportunity. Dr. Handley's model is presented in Handley et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 North Carolina Law Review 1383 (2001), Ex. 38. Dr. Handley applied her model as recently as last year in her consulting work for Alaska. Ex. 29. Dr. Handley testified in the *Euclid* case¹ that she has never tested the effectiveness of a new district other than *via* (1) recompiled election results or (2) the model advanced in her *North Carolina*

¹ See Handley Dep., *United States v. Euclid City School Dist. Board of Education*, No. 1:08-cv-2832, 2009 WL 2512031 (N.D. Ohio May 5, 2009). At the trial of this case, Dr. Handley affirmed the following colloquy from *Euclid*:

Q: You are saying having a district with, a single district with a 61 percent black voting age population wasn't enough for you to consider that district having an opportunity to elect a minority preferred candidate?

A: I would say that I had a very good idea that it would. I certainly tested it with recompiled election results.

Q: In every redistricting you have done in voting rights cases, have you always tested as you did in your report for the United States versus Euclid Board of Education?

A: In a voting rights context, assuming the data was available, I would test. In terms of drawing legislative districts, no, it's not necessarily part of my work. In terms of a Voting Rights Act claim, yes, I would test it, if it were possible to test it, yes.

Q: If it were not possible to test it, would your opinion be that you couldn't create a single member district with an opportunity to elect a minority preferred candidate?

A: No, it wouldn't because there is another methodology that I have also employed when I don't have recompiled election results to determine the likelihood of a district electing a candidate of choice. Recompiled election results are the most direct way to do this. There are other means of doing this.

Q: Have you employed those other means ever?

A: Yes.

Q: What are they, the other means?

A: Well, you would do an analysis of voting patterns, look at the relative turn out rates of blacks or whatever minority group you are interested in, and whites. You look at the degree of cross over you might expect from whites. Look at the degree of cohesion you might expect from minorities. You use that information together to produce a percentage figure, jurisdiction specific percentage figure, that indicates the percentage minority that is likely to be able to elect a candidate of choice.

Q: In our case -- are there other methods, or is that the other method?

A: Those are the two methods that I would use. That I have used. I'm not aware of any other method.

Law Review article. At trial, Dr. Handley also admitted that those are the only two methodologies that she discussed at a conference for the National Association of State Legislatures under the heading “Determining the Effectiveness of Proposed Minority Districts.”

26. Dr. Handley did not use her *North Carolina Law Review* model in this case. Dr. Zax applied Dr. Handley’s model to her data, and it showed that a BVAP of 49.9% can be predicted to give equal opportunity to black and white voters within new Senate District 24. In contrast, Dr. Handley testified about only one variable (turnout), even though her writings are emphatic that cohesion and cross-over voting must also be considered in addition to relative turnout.

27. At no time during trial did Plaintiffs refute the notion that, if Dr. Handley’s *North Carolina Law Review* model were applied to the data that she analyzed in this case, the resulting calculation would be a BVAP of 49.9%.

28. Dr. Handley’s reasons for jettisoning her *North Carolina Law Review* model in this case are not credible. Her contract required her to calculate the BVAP needed to have an effective district, and she failed to do so. She testified that she “played around” with applying her model and “did not fully” answer the question posed in her contract. She also testified that she did not want to “comment” on what her calculation revealed. The equation set forth in footnotes 68 and 72 of her *North Carolina Law Review* article solves for the minimum BVAP needed to give the black-preferred candidate a 50% vote share; therefore, as Dr. Zax testified, it does not matter whether a black-preferred candidate has won or lost a contest. In other words, if a black-preferred candidate has lost in a contest, the equation will result in a higher BVAP such that the black-preferred candidate has a vote share equal to the white-preferred candidate. Indeed, in Dr. Handley’s *North Carolina Law Review* article, Dr. Handley applied her model to

legislative contests in South Carolina in which black legislators both won and lost. Ex. 38, at 1411-23. Likewise, in her consulting work, Dr. Handley applied her model to contests in Alaska in which minority-preferred candidates both won and lost. *See, e.g.*, Ex. 39 at 4; *id.* at 18 (using the turnout, cross-over, and cohesion numbers from the 2010 House District 6 general election in Alaska, where the white-preferred candidate (Dick) defeated the minority-preferred candidate (Salmon)). After reading these exhibits, we have found no instance in which Dr. Handley advised that her model does not work if a minority-preferred candidate has lost in the district at issue. To the contrary, the express purpose of the model is to “estimate[] future minority voting strength” based on the electoral evidence in the jurisdiction at issue. *See* Ex. 38, at 1387. The absence of such a caveat in her writings—combined with the inherent nature of the equation, the fact that Dr. Handley applied her model to contests in which minority-preferred candidates lost in South Carolina and Alaska, Dr. Handley’s testimony in *Euclid*, and Dr. Handley’s NCLS presentation—leads us to believe that the model could readily work here. To be sure, it may be that the model results in a calculation that does not help the Plaintiffs win. But that is no reason why the model cannot be used in this case.

29. In summary, Dr. Handley’s *Euclid* testimony and her NCLS presentation make clear that she has two usual methods for determining the effectiveness of a new district: (1) recompiled election results and (2) the BVAP percentage needed to get a 50% minority vote share when considering the turnout, cohesion, and cross-over voting percentages from the relevant contests. She has never used another method. Plaintiffs did not submit *any* evidence on what these two systematic, robust methodologies show with regard to the new district. Separate Defendants, in contrast, submitted evidence regarding *both* methodologies. Both

methodologies show that 52.88% will be more than sufficient to provide equal opportunity to the racial groups within new Senate District 24.

30. Even if we were to focus only on state legislative contests and thereby ignore Dr. Handley's usual methodologies for testing the effectiveness of a new district, Plaintiffs have failed to prove that white bloc voting has "usually" defeated minority-preferred candidates and can be expected to do so in new Senate District 24.

31. Dr. Handley deemed biracial contests to be the most probative. Dr. Handley analyzed nine biracial legislative contests. In *most* of those contests, the black-preferred candidate received vote shares that exceeded the BVAP of the district in which the contest was held. Specifically, in the 2004 general election for House District 54, the black-preferred candidate (Davis) received a vote share of 68.8%, even though the BVAP of the district was only 65.8%. In the 2004 primary election for House District 13, the black-preferred candidate (Hall) received a vote share of 56.5%, even though the BVAP of the district was only 52.89%. In the 2004 primary election for Senate District 17, the black-preferred candidate (Jones) received a vote share of 38.5%, even though the BVAP of the district was only 26.9%. In the 2006 primary election for House District 53, the black-preferred candidate (Joiner) received 39.2% of the vote, even though the BVAP of the district was only 33.9%. Finally, in the 2010 primary election for House District 51, the black-preferred candidate (Gilcrest) received 46.5% of the vote, even though the district was only 34.8%. These legislative election results further reinforce the conclusion that was generated by the recompiled statewide election results and also the model set forth in Dr. Handley's *North Carolina Law Review* article: A district with a 52.88% BVAP is more than sufficient to provide equal opportunity to African American voters in the new district.

32. Dr. Handley testified that old District 16 was ineffective for the black electorate because Plaintiff Senator Crumbly was victorious in those contests as a “white-preferred” rather than a “black-preferred” candidate. We reject this argument for several reasons. First, Dr. Handley excluded contests between two or more white candidates from her analysis and focused mostly on biracial elections, in defiance of *Gingles*, under the implicit assumption that black candidates can best represent black voters. Second, Senator Crumbly, who is a plaintiff, testified that a district with a higher BVAP would improve his electoral chances. Third, Dr. Handley’s statistical techniques are at best ambiguous on this point. Her ecological inference estimate technique shows that Willis (not Crumbly) was the white-preferred candidate in the 2006 primary election for Senate District 16. Dr. Handley’s data had other errors, too. Moreover, in the 2006 primary runoff election, Dr. Handley’s homogeneous precinct analysis shows that black voters preferred the winner (Crumbly). Dr. Handley testified that homogenous precinct analysis is a “very good check” and that she throws out a contest as unreliable if the statistical techniques are inconsistent. In the 2010 primary election for State Senate District 16, Dr. Handley’s favorite technique (ecological inference) shows that 48.6% of the black electorate voted for Crumbly, and she did not report a margin of error despite the availability of a margin of error for this technique. Dr. Handley also testified that the results of ecological inference analysis can change every time the simulation is run. In addition, Dr. Handley’s data for the 2010 contest between Crumbly and Simes incorrectly switched the votes for the candidates in every polling area in Lee County. Finally, in all of the contests analyzed by Dr. Handley, the early and absentee votes were ignored, and those accounted for approximately one-third of the votes cast. Based on all of these facts, we cannot conclude that Crumbly is clearly a “white-preferred” candidate rather than a “black-preferred candidate.”

33. We also note that Senator Crumbly has not faced a white opponent in any of the three contests analyzed by Dr. Handley. Dr. Handley testified that the BVAP of old Senate District 16 in these contests was approximately 61%. It is possible that a BVAP can get so high that white candidates are dissuaded from running. (In the 12 contests noted by Dr. Handley in which the BVAP exceeded 55%, white candidates vied for office in only 4 of those contests.) Under Dr. Handley's reasoning, a BVAP will never be "effective" unless the most polarizing African American candidate regularly gets elected in contests that feature only black candidates. If African American voters have no clear preference—such in the 2010 primary election for Senate District 16—a BVAP of 80% or 90% (or perhaps more) would potentially be required under Dr. Handley's logic. This logic is inconsistent with the Supreme Court's Section 2 jurisprudence. In short, we cannot say that a district that has only featured black candidates in recent years has deprived the black electorate of equal opportunity during that period.

34. In summary, the statewide contests—when recompiled within the four-county region—show that a BVAP of 52.88% will be more than sufficient to provide equal opportunity. In addition, an analysis of turnout, cohesion, and cross-over voting—when performed over all 18 elections deemed relevant by Dr. Handley—shows that a BVAP of 52.88% will be more than sufficient to provide equal opportunity. Finally, an analysis of the biracial legislative contests shows that black-preferred candidates have almost always received vote shares that exceed the BVAP of the district and, therefore, a BVAP of 52.88% will be more than sufficient to provide equal opportunity. The contests featuring Senator Crumbly are not very probative. The entire constellation of electoral evidence weighs strongly in favor of Separate Defendants.

35. In the final analysis, Plaintiffs' case is based primarily on the fact that, in the 2002 primary election for Senate District 16, Steve Higginbotham (white) got 51.6% of the vote and

narrowly defeated Simes (black) and McCoy (black). This single, ten-year-old contest is far from dispositive. We have serious concerns about placing so much weight on a single election. *See Gingles*, 478 U.S. at 57 (noting the importance of considering multiple elections and that “the evil to be avoided is the subordination of minority groups in American politics, not the defeat of individuals in particular electoral contests”) (citation and quotation omitted). A data set consisting of one election is simply insufficient—particularly when Dr. Handley’s ecological inference estimates show that, when compared to the 2000 contest between Higginbotham and Simes, the black electorate increased its support for Higginbotham and decreased its support for Simes in the 2002 rematch. Two witness for Plaintiffs—former Senator Roy C. Lewellen and Joseph Perry—testified that the non-racial attributes of a particular candidate can often matter more to voters than the candidate’s race. In addition, we note that the legal requirement under Section 2 is “equal opportunity” among racial groups, not a guarantee. The evidence at trial showed that a white candidate narrowly won this single Senate contest in 2002 and that no white candidate vied for the Senate seat over the remainder of the decade. Such facts do not show the absence of equal opportunity. On balance, we are unconvinced that a district with a 52.88% BVAP will be insufficient to provide equal opportunity to black voters within new Senate District 24.

36. The totality of the circumstances weighs in favor of Separate Defendants. First, there is no evidence of official discrimination in recent years that has affected the ability of minorities to participate in the political process.

37. Second, there is no evidence of unusually large districts or other voting procedures that may enhance the opportunity for discrimination. The population decreased in the Delta and increased in other parts of the state, including Northwest Arkansas and Central

Arkansas. This shift required districts in the Delta that are geographically larger than in years past.

38. There is no evidence that Arkansas uses a candidate slating process. Instead, there are party primary elections.

39. There is scant evidence that campaigns have been characterized by overt or subtle racial appeals. At most, there is evidence that one candidate recently sent direct-mail leaflets to potential African American voters that painted African Americans in a positive light.

40. There is substantial evidence that African Americans have been elected to office in Arkansas and the Delta. The designated deposition testimony of Senator Crumbly identifies dozens of such office holders. Plaintiffs' witnesses identified even more. Although Dr. Handley did not analyze county contests, we note the testimony at trial that African American candidates have occupied county-wide offices in the Delta in recent years. For example, Emily Holly, an African American, defeated a white opponent in an election for St. Francis County Clerk. The 2010 BVAP of St. Francis County was 48.2%.

41. Plaintiffs also contend that Separate 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 only 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).

42. The plaintiff's burden is to show that "race was the predominant factor motivating the . . . decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). In addition, "[the term] 'discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker[s] . . . selected or reaffirmed a particular course of conduct at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeny*, 442 U.S. 256, 279 (1979).

43. There is no evidence of purposeful discrimination in this case.

44. Both Governor Beebe and Attorney General McDaniel testified that, at the request of Senator Crumbly, they went back and added additional African Americans to the district in an effort to increase the BVAP.

45. There is no record evidence that Governor Beebe or Attorney General McDaniel had conversations with Keith Ingram, Clark Hall, or Jerry Brown about district borders. The trial record reveals, however, that many such conversations occurred with Senator Crumbly. In addition, Governor Beebe and Attorney General McDaniel testified that they felt certain Keith Ingram would run for state representative rather than challenge Senator Crumbly.

46. Governor Beebe and Attorney General McDaniel gave credible testimony about their concern for numerous factors, including their desire to maintain two majority-black districts in the Delta; compliance with the principle of one person, one vote; compactness; protecting Senate incumbents from having to run against another Senate incumbent; and joining like communities of interest where possible. The law does not require a guaranteed outcome for

minority candidates. A failure to maximize the BVAP is not tantamount to purposeful discrimination.

47. 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).

48. 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 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.

49. We are mindful that redistricting “is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.” *Grove 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 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). Plaintiffs have failed to prove a violation of either the Constitution or Section 2 of the Voting Rights Act.

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 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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