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

DEBORAH SPRINGER SUTTLAR, JUDY GREEN, FRED LOVE, in his individual and official capacity as State Representative, KWAMI ABDUL-BEY, CLARICE ABDUL-BEY, and PAULA WITHERS, PLAINTIFFS

vs. Case No. 4:22-cv-00368-KGB

JOHN THURSTON, in his official capacity as the Secretary of State of Arkansas and in his official capacity as the Chairman of the Arkansas State Board of Election Commissioners; and SHARON BROOKS, BILENDA HARRIS-RITTER, WILLIAM LUTHER, CHARLES ROBERTS, WENDY BRANDON, JAMIE CLEMMER and JAMES HARMON SMITH III, in their official capacities as members of the Arkansas State Board of Election Commissioners, DEFENDANTS

Defendants' Brief in Support of Motion to Dismiss

INTRODUCTION

Plaintiffs are voters who lost a partisan redistricting battle over Arkansas's 2021 congressional maps. Relying exclusively on two roundly criticized, poorly reasoned, and deeply flawed out-of-state decisions—*League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), and *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022)—they ask this Court to radically reinterpret the Arkansas Constitution's Free and Equal Elections Clause and invalidate Arkansas's congressional map. Rather than adopt a novel and unsupported reading of Arkansas law, this Court should simply apply well-established Arkansas law and dismiss Plaintiffs' meritless Free and Fair Elections claim. Indeed, absent clear guidance from a state's highest court, it is not generally the role of federal courts to adopt novel interpretations of state law.

Recognizing that, Plaintiffs attempt to restyle their claim as a claim that Arkansas's congressional map diluted the voting strength of Black Arkansans. They rest that argument on the assertion that in drawing the 2021 congressional map—and apparently every congressional map for more than half a century—Arkansas diluted black voting strength by failing to place Pulaski and Jefferson Counties into the same congressional district. And they say the decision to split some counties (and not others) as happens in every reapportionment somehow illustrates their point. That claim fares no better than their appeal to the courts of Pennsylvania and North Carolina. That's because the Arkansas provisions at issue here have long been interpreted consistently with their federal counterparts and—as the United States Supreme Court has long held—the kind of vote-dilution claim at issue here isn't available under the Constitution. In fact, that's why Congress authorized the Attorney General to bring such cases under Section 2 of the Voting Rights Act.

And in any event, even if Plaintiffs could pursue such a claim or had alleged that Arkansas intentionally discriminated against black voters, Plaintiffs' proposed remedy—commanding Arkansas's legislature to draw lines explicitly based on race—would violate both state and federal equal protection law. Plaintiffs' Complaint should be dismissed with prejudice.

BACKGROUND

A. This case involves challenges to modest revisions to Arkansas's four congressional districts. The federal Constitution's Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ." U.S. Const. art. I, sec 4, cl. 1. Consistent with that federal requirement, Arkansas law provides that the Arkansas General Assembly is responsible for reapportioning congressional districts after the Census. *See* Ark. Code Ann. 7-2-101 *et seq*.

Following the receipt of official census data last fall, the General Assembly reconvened in September to consider reapportionment legislation. (Compl. ¶ 45.) That reapportionment is required to comply with the federal constitutional requirement that the populations of a state's congressional districts be as equal "as is practicable." *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964). This is sometimes referred to as the "one person, one vote" rule.

"According to the 2020 Census, Arkansas has a total population of 3,011,524 persons . . . ." (Compl. ¶ 36.) Thus, "each congressional district in the 2021 Map must contain an ideal population of approximately 752,881 people." (Compl. ¶ 31.) Due to population growth in Districts 2 and 3, along with population decline in Districts 1 and 4, the General Assembly was required to rebalance the population between Arkansas's existing districts in order to comply with the one person, one vote rule. (Compl. ¶¶ 33-35.) This meant redrawing boundaries to significantly reduce the population of District 3; substantially reduce the population of District 2; and increase the populations of Districts 1 and 4. (*Id.*) In addition to drawing districts that met the one person, one vote requirement, the General Assembly also aimed—consistent with judicial precedent—to draw districts that were compact, contiguous, minimized splits between political subdivisions (like counties), preserved communities of interest, avoided pairing incumbents, and otherwise complied with federal law. (*See* Compl. ¶ 63 (listing various traditional redistricting principles).)

In that process, the General Assembly considered a number of maps and eventually settled on House Bill 1982 and Senate Bill 743, which were numbered as Acts 1114 and 1116. (Compl. ¶ 52.) The Acts were adopted on October 6, 2021, the maps "became law on November 4, 2021," (Compl. ¶ 78), and became "effective on January 14, 2022." (Compl. ¶ 79.)

B. The new districts adopted by the General Assembly do not differ significantly from the maps adopted in 2011. (*Compare* Compl. ¶ 28 (2011 map) *with id.* ¶ 52 (2021 map).) In both maps, District 1 comprises the counties in the eastern and northern part of the state; District 2 is made up of central Arkansas counties; District 3 is toward the northwest; and District 4 comprises the remaining counties, mostly in the southern and western parts of the state. (*See id.*) This is how Arkansas's congressional maps have looked for decades. (*See* Compl. ¶ 26 (2001 congressional maps).)

As Plaintiffs note, there were some notable changes between the 2011 and 2021 maps. For instance, the 2021 map resolves what Plaintiffs allege was the earlier "2011 Map['s] dilut[ion]" of "the voting strength of Black voters" that flowed from the 2011 map's "splitting, for the first time since at least the 1940s" of "majority-Black Jefferson County across the 1st and 4th Congressional Districts." (Compl. ¶ 29.) Indeed, as Plaintiffs concede, the 2021 map removes that split and places Jefferson County entirely within a single district, curing that alleged dilution. (Compl. ¶ 52.)

Outside of Jefferson County, the other notable difference between the current and prior maps is that the 2021 map substantially reduced the number of other county splits. Minimizing splits of political subdivision boundaries—such as counties—is an important redistricting criterion for a number of reasons, including lessening the burden on election officials creating ballots and keeping together communities of shared interests. The 2011 congressional map split a total of five counties: Crawford, Newton, Searcy, and Sebastian, all of which are in the northwest portion of the state, in addition to, as noted, Jefferson County, one of the State's minority population centers. (Compl. ¶ 28.)

By contrast, the current map splits just two counties. (Compl. ¶ 52.) Sebastian County remains split between Districts 3 and 4, with slightly different boundaries, and Pulaski County is split between Districts 1, 2, and 4. (*Id.*) Pulaski and Sebastian are the State's largest and fourth-largest counties by population, respectively. (*See* Compl. ¶ 6.) Pulaski County, in addition to being the State's most populous county, is located in the center of Arkansas and shares a boundary with six other counties. (*E.g.*, Compl. ¶ 52.) Sebastian County is located along the western edge of the state, less than one hundred miles from Benton and Washington Counties, Arkansas's second and third most populous counties. (*Id.*) These factors make it difficult for a map drawer to avoid splitting Sebastian or Pulaski Counties without incurring a substantial number of splits elsewhere, as was the case with the 2011 congressional map.

Particularly relevant here, however, those adjustments barely changed the districts' racial demographics. Plaintiffs' Complaint concedes those changes are insignificant. (*See* Compl. ¶ 53 (noting that the black voting-age population in District 2 changed approximately two percent from the 2011 to 2021 maps); *id.* ¶ 74 (Governor Hutchinson acknowledging that "three of the four congressional districts do not differ that much from the current percentages").) And the current map—aside from splitting fewer counties—is also significantly more compact. (*Compare* Compl. ¶ 28 *with id.* ¶ 52.) In particular, it eliminated the elongated and oddly shaped upside-down "U" that previously constituted District 3. *See id.*

C. Despite much press attention and rigamarole from various interested parties (*e.g.*, Compl. ¶¶ 65-70), no plaintiff sued to block the use of the current maps for the 2022 election cycle. In fact, Plaintiffs did not file this lawsuit until March 21, 2022, nearly five months after the congressional map became law, and long after any relief would have been possible for the next election. *See Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (staying injunction of

Alabama's congressional districts on the ground that the election was too close for court intervention on February 7, 2022).

Plaintiffs' Complaint purports to state two claims under four provisions of the Arkansas Constitution. The factual basis for those claims is the same. Plaintiffs don't contest that the General Assembly's adoption of the 2021 congressional map resulted in near-perfect population equality as well as a reduction in the total number of county splits. Nor do they dispute that District 2 didn't really change that much from the 2011 map drawn by a Democrat-dominated legislature and that District 2 had to be redrawn because the Census showed that it was overpopulated by more than 16,000. (Compl. ¶ 35 (noting that the population of District 2 "grew by 5.5%" while Districts 1 and 4 had a population decline).) Indeed, Plaintiffs don't deny that the General Assembly's splitting portions of Pulaski County into the underpopulated Districts 1 and 4 was critical to achieving population equality and that those changes resulted in no more than a negligible, couple-percentage-point difference in the racial demographics of District 2 as compared to the 2011 plan. (*See* Compl. ¶ 53.) Finally, Plaintiffs don't dispute that the 2011 map didn't contain a majority-minority district or that—even if Pulaski County had remained whole—it still wouldn't be possible to draw a majority-minority congressional district.

In fact, it is unclear exactly what specifically Plaintiffs *do* challenge about the 2021 map other than its supposed "failure to capture and reflect Black voting strength . . ., particularly around Pulaski County." (Compl. ¶ 84.) Though much of Plaintiffs' Complaint centers on the split of Pulaski County in the 2021 map, they appear to argue that every congressional map the General Assembly has adopted in recent history violated the state constitution. They claim that "[b]y separating counties with the largest Black populations among two or more congressional districts, the General Assembly has subdivided the state in such a way that the Black vote has

been systematically diluted since at least 1961." (Compl. ¶ 24; *see also id.* ¶ 99 (arguing that "the 2021 Map like its predecessor maps since the Jim Crow era in Arkansas, dilutes the vote of Black Arkansans").)

At bottom then, Plaintiffs seem to attack not what the 2021 congressional map did, but the fact that ever since Arkansas has had four congressional districts, "Jefferson and Pulaski Counties . . . have never been in the same congressional district, and neither county has ever been drawn together in a district that includes the eastern and southeastern portions of the state." (Compl. ¶ 3.) Thus, while Plaintiffs don't really specify a remedy beyond their vague request that this Court order "the adoption of a valid congressional plan that does not unconstitutionally dilute the vote of Black voters in Arkansas" (Compl. ¶ 24), they apparently want this Court to order a map drawn explicitly based on race. (*See* Compl. ¶¶ 81-84 (discussing assigning counties to districts based on their racial demographics to create a so-called cross-over district.) Indeed, underscoring that they seek an order commanding Arkansas to draw a map based explicitly on race, they cite the various bills proposed in the General Assembly that combined Pulaski and Jefferson Counties into a single district—bills Plaintiffs do not (and could not) allege meet basic redistricting criteria, like population equivalence. (*See* Compl. ¶¶ 46-49.)

As the legal basis for their request that this Court order the creation of districts based explicitly on race, Plaintiffs claim that the 2021 congressional map unconstitutionally dilutes "the votes of Black voters like Plaintiffs relative to other members of the electorate." (Compl. ¶ 88; *see also id.* ¶ 99 (alleging that the 2021 map "dilutes the votes of Black Arkansans").) Yet none of the constitutional provisions cited by Plaintiffs encompass this type of claim. Arkansas's "Free and Equal Elections" clause contained in Article 3, section 2, has been interpreted narrowly as a backstop in situations where the integrity of an election is in question

or ballot secrecy has been compromised. The three provisions of Article 2 providing for equal protection of the law have never been interpreted by the Arkansas courts differently than the Equal Protection Clause of the Fourteenth Amendment, which the United States Supreme Court has held does not encompass vote-dilution claims like the one Plaintiffs bring. And in any event, even if they could prevail on their state-law claims, Plaintiffs don't even attempt to explain how their request for race-based districts could be squared with the Fourteenth Amendment. Thus, Defendants now ask the Court to dismiss Plaintiffs' Complaint.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) requires dismissal of claims that "fail[] to state a claim upon which relief can be granted" by motion. Under that rule, a complaint's factual allegations are accepted as true and viewed in the light most favorable to the plaintiff. *Hanten v. Sch. Dist. of Riverview Gardens*, 183 F.3d 799, 805 (8th Cir. 1999) (citing *Gordon v. Hansen*, 168 F.3d 1109, 1113 (8th Cir. 1999)). "At a minimum, however, a complaint must contain facts sufficient to state a claim as a matter of law and must not be merely conclusory in its allegations." *Id.* (quoting *Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 651 (8th Cir. 1998)). Moreover, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). And, as here, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

Rule 12(b)(6) dismissals are an "important mechanism for weeding out meritless claims." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

In other words, if "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," then the complaint fails to "show[] that the pleader is entitled to relief" under Federal Rule of Civil Procedure 8(a)(2) and must be dismissed. *Id.* at 679.

Likewise, a court should dismiss when, based on the plaintiff's own allegations, he has no cognizable claims. "[D]ismissal under Rule 12(b)(6) serves to eliminate actions which are fatally flawed in their legal premises and designed to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity." *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001).

Applying that standard, this Court should dismiss Plaintiffs' Complaint with prejudice

ARGUMENT

I. The Free and Equal Elections Clause does not regulate the General Assembly's duty to apportion congressional districts.

Plaintiffs claim that Arkansas's 2021 congressional map violates the Free and Equal Elections Clause of the Arkansas Constitution. (Compl. ¶¶ 85-94.) Yet Plaintiffs' Complaint fails to cite a *single decision* by an Arkansas court interpreting that provision, let alone recognizing such a claim. Instead, Plaintiffs rely entirely on two roundly criticized, shoddily reasoned out-of-state decisions conjuring such claims. (Compl. ¶ 87 (citing *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), and *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022).) The Arkansas Supreme Court has never recognized such claims, and that court's decisions make clear that Article 3, section 2 has nothing to do with congressional apportionment. Accordingly, this Court should decline Plaintiffs' invitation to invent such a claim and should instead dismiss the complaint with prejudice.

A. Arkansas's Constitution, like that of many other states, has a provision guaranteeing "free and equal" elections.[1] It provides: "Elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted whereby such right shall be impaired or forfeited, except for the commission of a felony, upon lawful conviction thereof." Ark. Const. art. 3, sec. 2.

The Arkansas Supreme Court has construed that clause narrowly and solely as a protection against "fraud and [voter] intimidation." *Patton v. Coates*, 41 Ark. 111, 126 (1883). In fact, less than ten years after the Arkansas Constitution's adoption in 1874, the Arkansas Supreme Court held that clause is designed to protect against "fraudulent combinations for illegal voting" that would otherwise "override honest votes," and attempts to "deter[] [voters] from the exercise of free will" through "fear." *Id.* at 124. Consistent with that narrow purpose, the Arkansas Supreme Court has held that provision protects the secrecy of the ballot. *Jones v. Glidewell*, 13 S.W. 723, 725-26 (Ark. 1890). And along the same lines, modern cases interpreting the Free and Equal Elections Clause have held that it allows for the nullification of an election in cases where a "wrong . . . render[s] the result of the election uncertain." *Whitley v. Cranford*, 119 S.W.3d 28, 34 (Ark. 2003). Hence, whatever the exact contours of that clause, it plainly has nothing to do with reapportionment, and this Court shouldn't invent new causes of action on the Arkansas Supreme Court's behalf. *See, e.g.*, *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348, 364 (6th Cir. 2018) (explaining that federal courts should be "extremely

[1] Twelve other states have such a provision: Arizona, Ariz. Const. art. II, sec. 21; Delaware, Del. Const. art. I, sec. 3; Illinois, Ill. Const. art. III, sec. 3; Indiana, Ind. Const. art. 2, sec. 1; Kentucky, Ky. Const. sec. 6; Oklahoma, Okla. Const. art. III, sec. 5; Oregon, Or. Const. art. II, sec. 1; Pennsylvania, Pa. Const. art. 1, sec. 5; South Dakota, S.D. Const. art. VI, sec. 19; Tennessee, Tenn. Const. art. I, sec. 5; Washington, Wash. Const. art. I, sec. 19; and Wyoming, Wy. Const. art. I, sec. 27.

cautious about adopting substantive innovation in state law"); *Taylor v. Phelan*, 9 F.3d 882, 887 (10th Cir.1993) (quotation omitted) ("As a federal court, we are generally reticent to expand state law without clear guidance from its highest court."). Plaintiffs' claim thus fails as a matter of law and should be dismissed.

B. Faced with that precedent, Plaintiffs resort to arguing that the Pennsylvania Supreme Court has given its "free and equal" elections provision "the broadest interpretation, one which governs all aspects of the electoral process, and which provides the people . . . an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to vote to do so." *League of Women Voters*, 178 A.3d at 814. Yet as that court acknowledged, its approach was hardly well-founded, and no other state high court has concluded language like that in Arkansas's constitution provides a way to challenge reapportionment or pursue a vote-dilution claim. *Id.* at 813 n.71. Indeed, it is telling that the Plaintiffs' only other supposed support for their argument that this Court should adopt an entirely new reading of Arkansas's Constitution consists of a passing citation to an equally unreasoned North Carolina decision involving a different kind of provision. (Compl. ¶ 87.) *See Harper v. Hall*, 868 S.E.2d 499, 564 (N.C. 2022) (Newby, C.J., dissenting) (explaining the *Harper* decision "will solidify th[e] belief" that "judges decide cases based on partisan considerations").

Dispositively, the Arkansas Supreme Court has not embraced that approach. Instead, consistent with the narrow reading explained above, the Arkansas Supreme Court has consistently held in cases involving the Free and Equal Elections clause that Arkansas's "constitution has not, as we have seen, prescribed any conditions or rules governing the exercise of the right [of suffrage]; nor has it inhibited the legislature from prescribing such rules,

regulations, and conditions as it might deem proper and for the public interests." *Davidson v. Rhea*, 256 S.W.2d 744, 746 (Ark. 1953) (quotation omitted).

Nor for that matter would such a contrary approach be consistent with the federal Constitution's command that "[t]he Times, Places and Manner" of congressional elections "shall be prescribed in each State by the Legislature thereof" unless "Congress" should "make or alter such Regulations." U.S. Const. art. I, sec. 4, cl. 1. "The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress." *Rucho v. Common Cause*, 139 S. Ct. 15 2484, 2496 (2019); *see also Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay) ("The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules."). Consequently, even if Plaintiffs' reading of Arkansas's Free and Fair Elections Clause were plausible under state law (and it isn't), Plaintiffs' claim would still fail as a matter of law because the federal Constitution assigns the power to draw congressional districts to the General Assembly. Dismissal is required.

C. Alternatively, Plaintiffs appear to assert that any law involving the right to vote is subject to strict scrutiny under state law and that this somehow invalidates Arkansas's congressional districts. (*See* Compl. ¶ 98.) But underscoring that this argument has no more support than Plaintiffs' reliance on Pennsylvania law, Plaintiffs don't even cite any election cases to support that claim. (*See* Compl. ¶¶ 90-91.) They rely instead on a case where the Arkansas Supreme Court held that the state's sodomy law violated a "fundamental right to privacy" and

couldn't survive strict scrutiny. (*See* Compl. ¶ 91 (citing *Jegley v. Picado*, 80 S.W.3d 332, 350 (Ark. 2002)). It's entirely unclear why Plaintiffs think that case is relevant here.

Contrary to Plaintiffs' claim, the Arkansas Supreme Court hasn't held that elections laws (like the apportionment statute at issue here) are subject to strict scrutiny. Indeed, just weeks ago—in an action brought by the same law firms as this case—the Arkansas Supreme Court unanimously granted the State's emergency application for a stay in a case where a state circuit court wrongly enjoined four state voting laws on the grounds that those provisions were subject to and failed strict scrutiny. *See* Per Curiam Order, *Thurston v. League of Women Voters of Ark.*, Case No. CV-22-190 (Apr. 1, 2022). This Court should therefore decline Plaintiffs' invitation to rewrite state law and subject reapportionment decision to strict scrutiny under the Free and Fair Elections Clause. It should dismiss Plaintiffs' Article 3, section 2 claim.

II. Plaintiffs fail to state a claim under any section of Article 2 of the Arkansas Constitution.

Plaintiffs claim that Arkansas's 2021 congressional maps violates three provisions of Article 2 of the Arkansas Constitution that "guarantee[] to the people [] equal protection of its laws." (Compl. ¶ 96.) Like their federal-constitution counterparts, those provisions prohibit intentional discrimination on the basis of race; they do not support the sort of vote-dilution claim that Plaintiffs allege here. Moreover, to the extent Plaintiffs may claim to challenge the 2021 map on intentional-discrimination grounds, their Complaint fails to plausibly allege such a claim. And in any event, Plaintiffs' demand that Arkansas draw congressional districts based explicitly on race would violate state and federal equal protection law. This Court should dismiss Plaintiffs' claim.

A. Plaintiffs' vote-dilution claim fails as a matter of law.

None of the provisions of Article 2 of the Arkansas constitution support Plaintiffs' vote-dilution claim. Instead, reading those provisions like their federal counterpart—as the Arkansas Supreme Court has long done—Plaintiffs' claim fails as a matter of law.

The first provision that Plaintiffs cite is Article 2, section 2. It is titled "Individual liberty" and provides:

> All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

The second provision that Plaintiffs cite is Article 2, section 3, titled "Legal equality"; it provides that "The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition." The third provision is Article 2, section 18. It is titled "privileges and immunities--Nondiscrimination," and it provides that "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."[2]

1. The Arkansas Supreme Court has generally interpreted these provisions simultaneously when considering equal-protection challenges. *See, e.g.*, *Muntaqim v. Payne*, 628 S.W.3d 629, 636 (Ark. 2021) ("Equal protection is established by the Arkansas Constitution in article 2, sections 2, 3, and 18."); *Waller v. Banks*, 2013 Ark. 399, at *8 ("Equal protection

[2] Plaintiffs refer to this section as the "Equal Rights Amendment." (Compl. ¶ 96.) That nomenclature appears to rest solely on its appearance in the majority opinion in *Jegley v. Picado*, 80 S.W.3d at 350. But Article 2, section 18 is not an "amendment"; it is part of the original Constitution of 1874. And aside from a 2006 decision refusing to extend *Jegley*'s interpretation of section 18, *Talbert v. State*, 239 S.W.3d 504, 512 (Ark. 2006), the Arkansas Supreme Court has not used that nomenclature since.

under the law is guaranteed by article 2, sections 2, 3, and 18 of the Arkansas Constitution."). Indeed, the court has long noted that "many laws are challenged jointly under [Article 2, section 18] and the federal equal protection clause," and it has interpreted these "various sections in separate parts of" the Arkansas Constitution" as "fall[ing] under the general umbrella of . . . 'equality' and 'equal protection' guarantees" and "aim[ing] to prohibit arbitrary classifications and favoritism by the legislative branch." *Streight v. Ragland*, 655 S.W.2d 459, 463 n.10 (Ark. 1983). Plaintiffs, like the Arkansas Supreme Court, do not attribute any separate meaning to the three sections inasmuch as they establish equal-protection principles. (Compl. ¶¶ 95-102.)

Moreover, the Arkansas Supreme Court has interpreted the state Constitution's equal-protection provisions as coextensive with their federal counterparts. *See Maiden v. State*, 438 S.W. 3d 263, 275 (Ark. 2014) (noting that only "[o]n occasion" has the Arkansas Supreme Court "provide[d] more protection under the Arkansas Constitution than that provided by the federal courts under the United States Constitution"); *Talbert*, 239 S.W.3d at 512 ("The analysis under [Article 2, section 18] is the same as that under the Equal Protection Clause of the United States Constitution."); *Staggs v. Staggs*, 641 S.W.2d 29, 31 (Ark. 1982) (holding that the statute at issue "is not violative of Article II, §§ 3 and 18 of the Constitution of Arkansas, nor is it contrary to similar provisions of the Constitution of the United States"). Thus, as relevant here, this Court should interpret those provisions in the same manner as it would interpret their federal counterparts.

2. Applying that standard, Plaintiffs' claim fails as a matter of law. Plaintiffs argue that Arkansas's 2021 map is unconstitutional because, they say, it has the effect of diluting black voting power. (*See* (Compl. ¶¶ 88, ¶ 99.) They do not allege that the General Assembly adopted that map to harm black Arkansans or to dilute the voting strength of black Arkansans. In fact,

the closest Plaintiffs come to such an allegation is their assertion that the General Assembly "intentionally and systematically targeted and further cracked the Black population in the state by surgically removing majority Black precincts . . . within Pulaski County from" District 2 (Compl. ¶ 56) and that "racial data was considered—at times, exclusively—throughout the map-drawing process" (Compl. ¶ 60). Yet they tellingly do not allege that the "thirteen Pulaski County precincts"[3] they reference were moved to other districts for the purpose of diluting black voting strength instead of for partisan or other reasons. To the contrary, at another point in their complaint, Plaintiffs specifically allege that the General Assembly "'split up Pulaski County'" to "appease 'rural voters who felt like they were disenfranchised" by the 2011 map. (Compl. ¶ 69 (quoting statement by Sen. Garner).) Hence, Plaintiffs don't plead intentional discrimination.

That failure is fatal to their claim because—just as under federal law—Arkansas's equal-protection provisions prohibit only "intentional discrimination." *McClelland v. Paris Pub. Sch.*, 742 S.W.2d 907, 910 (Ark. 1988). Under that standard, to prevail on their equal protection claim, Plaintiffs must demonstrate that Arkansas's 2021 map was "adopted with a discriminatory *purpose* and ha[s] the effect of diluting minority voting strength." *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (emphasis added). As the United States Supreme Court has long held, a law doesn't violate equal protection merely "because it may affect a greater proportion of one race than another." *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). That's why, for example, Congress had to amend Section 2 of the Voting Rights Act to allow the Attorney General to pursue claims based

[3] The General Assembly moved fourteen precincts from Pulaski County, not thirteen as Plaintiffs allege. *See* 2021 Ark. Act 1116, Sec. 1 (amending Ark. Code Ann. 7-2-102(a)(2) to add precincts 47, 54, and 55 to District 1), *id.* (amending Ark. Code Ann. 7-2-105(a)(2) to add precincts 103, 104, 105, 124, 125, 126, 127, 131, 132, 133, and 135 to District 4).

solely on "showing discriminatory effect alone." *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).[4] Nor for that matter does equal protection "require proportional representation as an imperative of political organization." *Mobile v. Bolden*, 446 U.S. 55, 75-76 (1980).

Consequently, Plaintiffs' allegation that Arkansas's 2021 map merely because, they say, it had the effect of diluting black Arkansans' voting strength isn't sufficient. This Court should dismiss Plaintiffs' claim.

B. Plaintiffs have failed to state a claim of intentional discrimination.

1. To the extent that Plaintiffs may argue that they *do* allege intentional discrimination, their Complaint fails to plausibly allege such a claim.

Where plaintiffs allege racial gerrymandering, "the burden of proof on the plaintiffs . . . is a demanding one." *Easley v. Cromartie*, 532 U.S. 234, 241 (2001). To prevail, a plaintiff must prove that race was not simply "*a* motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the legislature's districting decision." *Id.* (citation and internal quotation marks omitted). Because of (1) the "evidentiary difficulty" of distinguishing "between being aware of racial considerations and being motivated by them," (2) "the sensitive nature of redistricting," and (3) "the presumption of good faith that must be accorded legislative enactments," courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Id.* at 916.

Plaintiffs do not allege that the General Assembly's predominant motive in adopting the 2021 congressional maps was to effectuate a racial gerrymander. *See supra* at pp. 15-16 (discussing closest allegations in Plaintiffs' complaint). Nor do Plaintiffs allege that the General

[4] Plaintiffs' vote-dilution theory mirrors that of a Section 2 claim, inasmuch as they allege racially polarized voting per the second and third *Gingles* preconditions. *See* 478 U.S. at 50-51. Such allegations have nothing to do with an intentional discrimination claim.

Assembly "'subordinated' other factors—compactness, county splits, partisan advantage, etc.—to 'racial considerations.'" *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). While they point to other maps that they allege the General Assembly could have adopted, they don't actually allege those maps are consistent with traditional redistricting criteria or more importantly the Constitution's "one person, one vote" requirement. (Compl. ¶¶ 46-49.) Thus, Plaintiffs cannot plausibly claim to have plead intentional discrimination.

2. Plaintiffs' claim also fails because their requested remedy—drawing a so-called cross-over district based on race—would itself violate equal protection. Plaintiffs apparently want this Court to command the General Assembly to create a map combining Pulaski and Jefferson Counties "together in a district that includes the eastern and southeastern portions of the state, where the state's most predominantly Black counties are located." (Compl. ¶ 3; *see also id.* ¶ 47 (suggesting that Sen. Elliot's map "addressed historic Black vote dilution in Arkansas by joining Pulaski and Jefferson Counties in one congressional district and combining them with other heavily Black counties").)

"Under the Equal Protection Clause, districting maps" like that, which "sort voters on the basis of race[,] 'are by their very nature odious.'" *Wis. Legislature v. Wis. Elec. Comm'n*, 142 S. Ct. 1245, 1248 (2022) (quoting *Shaw*, 509 U.S. at 643). They "cannot be upheld unless they are narrowly tailored to achieving a compelling state interest." *Miller*, 515 U.S. at 904. And while the Supreme Court has assumed (without ever holding) that "complying with the VRA is a compelling state interest," *Wis. Legislature*, 142 S. Ct. at 1248, a state relying on such a justification must have "a strong basis in evidence for concluding that the [VRA] required its action." *Cooper*, 137 S. Ct. at 1464. But Plaintiffs don't claim the VRA mandates such reliance

here. And even if Plaintiffs were correct that the Arkansas Constitution embodies some sort of VRA-like race-dilution claim—and as explained above, it does not—it does not follow that compliance with such a provision would be a compelling state interest justifying departure from traditional equal-protection principles. Indeed, given that the Supreme Court has never held that even VRA compliance is a compelling state interest, it is doubtful that compliance with a race-driven state-law requirement would be.

Nor in any event could Plaintiffs square such an argument with the allegations in their Complaint. For one, they seek a remedy that they indisputably couldn't get under the VRA. Plaintiffs do not seek to compel Arkansas to create a majority-minority district so as to comply with the VRA. Instead, Plaintiffs seek a so-called crossover district; that is, a district where "White 'crossover' voting" allows the election of "Black-preferred candidates." (Compl. ¶ 81.) But the VRA "does not mandate creating or preserving crossover districts." *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009) (plurality opinion).[5] By definition, then, a map drawn to create them isn't one drawn to comply with the VRA, and a district explicitly based on race, like Plaintiffs seek here, would violate equal protection. It also goes without saying that even if Plaintiffs succeeded in showing that the Arkansas Constitution requires more than what the VRA would, thus going beyond even what the Supreme Court has only assumed would be narrowly tailored, such a requirement would likewise violate equal protection.

As a result, even if Plaintiffs had alleged intentional discrimination, dismissal would be warranted.

[5] As a three-judge court in this district has recognized, Justice Kennedy's opinion for the three-justice plurality is controlling under *Marks v. United States*, 430 U.S. 188, 193 (1977). *See Jeffers v. Beebe*, 895 F. Supp. 2d 920, 931 n.11 (E.D. Ark. 2012) (three-judge panel).

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint with prejudice.

Respectfully submitted,

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