IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FOURTH 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. 60CV-22-1849

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

REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

State courts have an important role to play in interpreting state law. But they cannot right every grievance. The federal and Arkansas constitutions take many disputes—including most suits against the state government or about congressional redistricting—out of the courts' hands.

Here, those constitutions prevent this Court from hearing Plaintiffs' claims. Because Plaintiffs have sued state officials without plausibly alleging unconstitutional action, their suit is barred by sovereign immunity. And because the U.S. Constitution's Elections Clause vests congressional redistricting authority in the state legislature, not the judiciary, this Court lacks jurisdiction.

But even if the Court reaches the merits, Plaintiffs' suit fails. The Elections Clause bars state courts from supervising the redistricting process. Yet Plaintiffs' free-and-equal-elections and equal-protection theories would invite judicial micromanagement. Plus, those theories would

depart from history and longstanding precedent. Thus, this court should grant Defendants judgment on both claims.

ARGUMENT

I. Defendants have sovereign immunity

Arkansas's Constitution prevents plaintiffs from using litigation to control governmental action. *Bd. of Trustees of the University of Ark. v. Andrews*, 2018 Ark. 12, at 5, 535 S.W.3d 616, 619. Thus, "[t]he State of Arkansas shall never be made defendant in any of her courts," unless she has acted *ultra vires*. Ark. Const. art. V, sec. 20; *Martin v. Haas*, 2018 Ark. 283, at 7, 556 S.W.3d 509, 514. But the *ultra vires* exception to sovereign immunity applies narrowly. It is not sufficient for plaintiffs to claim the exception; they must "plead sufficient facts" to persuade the court that the government acted unlawfully if those facts were true. *Rutledge v. Remmel*, 2022 Ark. 86, at 6, 643 S.W.3d 5, 9.

Indeed, this year, the Arkansas Supreme Court dismissed a suit against the Attorney General that accused her of misusing state funds and exceeding her constitutional role. *See id.* at 3, 643 S.W.3d at 7. On its face, the suit alleged *ultra vires* action. But the Court probed further. *Id.* at 5, 643 S.W.3d at 8. Interpreting the statutes defining the Attorney General's role, it held that the actions the plaintiffs alleged the Attorney General to have taken were legally authorized. *Id.* at 6, 643 S.W.3d at 9. Consequently, the *ultra vires* exception could not save the suit from sovereign immunity. Put differently, "[b]are-bones allegations unsupported by law [could] not survive an immunity defense." *Id.* at 7, 643 S.W.3d at 9.

Remmel's reasoning controls here. Plaintiffs' claims have no basis in the constitutional provisions they purport to raise. The Free-and-Equal Elections Clause says nothing about redistricting. *See infra* Section III.A. And reading the Equal Protection Clause as coextensive

with its federal analogue—as the Supreme Court does— dooms that claim. *See infra* Section III.B. So this suit must be barred by sovereign immunity.

Pushing back, Plaintiffs treat *Thurston v. League of Women Voters of Arkansas* as a silver bullet. But that case must be read in accordance with the Court's later opinion in *Remmel*. Understood through that lens, *Thurston* can be read to conclude that the claims at issue there were plausible. *See* 2022 Ark. 32, 6, 639 S.W.3d 319, 322 (concluding that "the League has alleged that specific acts violate the [Constitution]"). But that case presented very different legal issues, even if it implicated the same constitutional provisions as this case ostensibly does. *See id.* at 2-3. 639 S.W.3d at 320 (absentee ballot and voter-support laws). So it cannot save this suit from sovereign immunity.

Neither can their Hail-Mary waiver argument. True, the Supreme Court will not entertain sovereign immunity arguments on appeal not raised in the circuit court. *Perry v. Payne*, 2022 Ark. 112, at 3. But that is a matter of failing to preserve the issue for appellate review, not waiver. Indeed, post-*Andrews*, the Supreme Court has never held that the State has waived sovereign immunity in any case. "The General Assembly does not have the power to override a constitutional provision" by waiving sovereign immunity, nor does the executive branch. *Andrews*, 2018 Ark. at 11. The Supreme Court recognized this in *Arkansas Dep't of Veterans Affs. v. Mallett*, 2018 Ark. 217 (2018). There, the Department did not raise sovereign immunity until three years into the case when it filed a Rule 12(c) motion seeking dismissal on that basis. *Id*. at 2. And that was after its answer had "actually conceded that the [Arkansas Minimum Wage Act] waived sovereign immunity." *Id.* at 5 (Baker, J., dissenting). Yet the Supreme Court did not hold that the State had waived sovereign immunity. Defendants here have similarly filed

a motion pursuant to Rule 12(c) seeking dismissal of Plaintiffs' claims on the basis of sovereign immunity. That is sufficient to raise the issue under the Supreme Court's precedents.

Even if sovereign immunity could be waived by failure to assert it, Defendants have raised sovereign immunity in their answers and motions. And they did so on time. *See* Br. in Opp. to Mot. for Partial Summary Judgment, at 7-8. This Court must therefore consider that defense.

II. The Elections Clause bars both jurisdiction and Plaintiffs' merits theory

The U.S. Constitution assigns authority to "prescribe[]" "[t]he Times, Places, and Manner of holding [congressional] Elections" to "the Legislature" of each state. U.S. Const. art. I, sec. 4. This text is clear: only the "legislative process" in each state may regulate congressional redistricting. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 799 (2015).

In Arkansas, legislative power is vested in the General Assembly and kept "separate" and "distinct" from the judicial power. Ark. Const. art. IV, secs. 1-2, art. V, sec. 1. Indeed, the Supreme Court has explained that "the courts have no power to enforce the mandates of the Constitution which are directed at the legislative function." *Wells v. Purcell*, 267 Ark. 456, 463, 592 S.W.2d 100, 104 (1979) (internal quotation marks omitted). Thus, this court may not "tinker[]" with the regulatory power over federal elections vested in the legislature, at least not without the legislature's clear authorization. *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 Elections Clause has two implications for this case. *First*, in the absence of some express jurisdictional grant, this Court may not entertain Plaintiffs' claims. Doing so would

insert the judiciary into a purely legislative function. *Cf. Wells*, 267 Ark. at 462, 592 S.W.2d at 104.

Plaintiffs' rejoinder is nonresponsive. Plaintiffs point out that circuit courts have "original jurisdiction of all justiciable matters not otherwise assigned." Br. in Opp. at 7 (quoting Ark. Const. amend. 80, sec. 6(A)). But federal congressional districting is not an ordinary "justiciable matter[]"; it is exclusively vested by the federal Constitution in the General Assembly. If the state courts were to have any role, it would have to be pursuant to an express grant of authority by the legislature. The Supreme Court's decision in *Catlett v. Beeson*, 240 Ark. 646, 401 S.W.2d 202 (1966), is not to the contrary. The Court didn't discuss jurisdiction at all in that case, and the challenges regarding the congressional districts were about changes that had been made following a federal-court ruling striking down the previous map and a vacancy that arose, necessitating a special election. Nothing in *Catlett* indicates that state courts possess the sort of freewheeling jurisdiction over congressional redistricting that Plaintiffs assert, and the absence of any other state-court challenge to Arkansas's congressional districts since *Catlett* belies any such notion.

Second, even if this Court has jurisdiction, it is constitutionally barred from construing the Free-and-Equal Elections and Equal Protection Clauses as broadly as Plaintiffs ask. Plaintiffs would read those broad guarantees to impose specific restrictions on legislators—by forbidding them from dividing Pulaski County among three congressional districts, for instance. *See* Compl. ¶ 56. What's more, Plaintiffs seek strict scrutiny of the legislature's maps, which by their own confession would require the legislature to show a compelling interest in each of its myriad line-drawing decisions. *Id.* ¶ 91. Applying that standard would require judicial micromanagement of redistricting, violating both the Elections Clause's vesting of redistricting authority in the state

legislature and the Arkansas Constitution's prohibition against judicial "control[]" of "[t]he legislature." *Wells*, 267 Ark. at 462, 592 S.W.2d at 104. Indeed, rather than uphold state sovereignty as Plaintiffs claim, their claims would treat both the Elections Clause and this state's separation-of-powers doctrine as a nullity. 132819617975

To get around this barrier, Plaintiffs twist U.S. Supreme Court precedent. That Court, they say, has held for "over a century" that state courts have "a significant role to play in congressional redistricting." Br. in Opp. at 8-9. To the contrary, the Supreme Court is considering the scope of state court redistricting authority for the first time this Term. *See generally Moore v. Harper*, No. 21-1271 (U.S. 2022). Plus, four current Justices have already written that the Elections Clause constrains state courts. *See, e.g.*, *Moore v. Harper*, 142 S. Ct. 1089, 1091 (2022) (Alito, J., joined by Thomas & Gorsuch, J.J., dissenting from the denial of application for stay) ("[I]f the language of the Elections Clause is taken seriously, there must be *some* limit on the authority of state courts. . . ."); *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., joined by Kavanaugh, 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.").

And Plaintiffs' supposedly contradictory cases are not on-point:

- *Arizona State Legislature* and *Davis v. Hildebrant* both held simply that state constitutions could define that state's legislative process to include initiatives and referenda. *See* 576 U.S. 787, 817-18 (2015); 241 U.S. 565, 568 (1916). They do not authorize judicial intervention into the legislative redistricting process.

- *Wesberry v. Sanders* forbids state legislatures from redistricting in violation of the federal Constitution. 376 U.S. 1, 6 (1964). Of course: the Elections Clause and other federal constitutional provisions are co-applicable to redistricting. But the same logic cannot apply to state constitutional provisions or judicial decisions which are trumped by the Elections Clause. *See* U.S. Const. art. VI (declaring that the Constitution is "supreme" and binding on "the judges in every state," notwithstanding state constitutional provisions "to the contrary").
- After eschewing federal court review of political gerrymandering claims, *Rucho v. Common Cause* explained that states could still ban political gerrymandering through constitutional amendment. 139 S. Ct. 2484, 2507 (2019). But the amendments cited approvingly are quite detailed, leaving little room for courts to craft their own redistricting policies. *See id.* (discussing Colo. Const. art. V, secs. 44, 46; Mo. Const. art. III, sec. 3; and Fla. Const. art. III, sec. 20). Plaintiffs, by contrast, ask this Court to fashion its own redistricting standards not contained in the text of the state constitution.
- Finally, *Growe v. Emerson* is an abstention case. That case instructs federal courts to hold off on exercising concurrent jurisdiction because redistricting cases "bear[] on important matters of state policy." 507 U.S. 25, 32-33 (1993). It does not give state courts a blank check for prescribing redistricting standards.

In sum, the text of the Elections Clause plainly assigns redistricting authority to the legislature, not this Court. Because the General Assembly exclusively possesses redistricting authority and has not clearly granted circuit courts jurisdiction over related cases, this Court

cannot hear this case. But if it does, it certainly cannot micromanage the redistricting process as Plaintiffs ask.

III. Plaintiffs' claims are meritless

Even without the Elections Clause, Plaintiffs' theories fail on the merits. As they admit, Arkansas courts have never read either the Free-and-Equal Elections or Equal Protection Clauses as broadly as Plaintiffs propose. To the contrary, history and precedent counsel against adopting their reading.

A. The Free & Equal Elections Clause targets fraud and coercion, not redistricting

Plaintiffs do not dispute that their interpretation of the Free-and-Equal Elections Clause rests entirely on out-of-state precedent. Br. in Opp. at 13-14. Those precedents are problematic on their own terms. *See Moore v. Harper*, 142 S. Ct. 1089, 1090 (Alito, J., dissenting from denial of application for stay) (expressing skepticism about the North Carolina Supreme Court's opinion in *Harper v. Hall* because that state's free-elections clause "says [nothing] about partisan gerrymandering"). But whatever their merits for other states, they do not fit with Arkansas's longstanding interpretation of that Clause.

Contrary to Plaintiffs' vague declaration, that Clause does not speak to every voting-related issue. Br. in Opp. at 12. Instead, it provides two specific protections: (1) it prevents fraud and coercion, and (2) it ensures that the state does not strip voters of the franchise.

History and precedent confirm as much. *Contra id.* at 13 (claiming that Defendants cannot "cite any Arkansas precedent that supports their position"). Arkansas's current Free-and-Equal Elections Clause is not unique. Other early constitutions incorporated similar clauses, as did Arkansas's 1836 Constitution. *See, e.g.*, Ark. Const. of 1836, art. II, sec. 5; N.H. Const. of 1784, pt. 1, art. 11; N.C. Const. of 1776, pt. 1, sec. VI. At that point, no one thought the Clauses

spoke to redistricting. Understandably so: many states held at-large elections until Congress mandated single-member districting in the 1840s. *See* Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* 43 (2013).

Instead, the Clauses safeguarded the franchise in two ways. First, they aimed "[t]o keep every election free of all the influences and surroundings which might bear improperly upon it, or might impel the electors to cast their suffrages otherwise than as their judgments would dictate." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 771 (6th ed. 1890). In other words, the Clauses targeted fraud and coercion. Indeed, Arkansas's Clause adds that "[n]o power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage." Ark. Const. art. III, sec. 2. And in the years immediately following its adoption, the Supreme Court explained that it meant voters could cast their ballots without fear of intimidation. *Patton v. Coates*, 41 Ark. 111, 131-32, 1883 WL 1212, at 11. Other state courts interpreted analogous provisions similarly. *See, e.g.*, *Patterson v. Barlow*, 60 Pa. 54, 76 (1869); *Commonwealth v. McClelland*, 83 Ky. 686, 693 (1886); *People v. Hoffman*, 116 Ill. 587, 616-17 (1886).

Second, Free-and-Equal Elections Clauses prohibit the government from stripping the right to vote from disfavored citizens. *See* Cooley, *A Treatise on Constitutional Limitations*, at 775. Thus, our Clause ensures that no voter can "forfeit[]" his right unless he commits a felony. Ark. Const. art. III, sec. 2.

Plaintiffs cannot argue that this case falls into either bucket—nor do they try. And that deficiency should be enough for this court to toss their Free-and-Equal Elections Clause claim.

B. Arkansas's Equal Protection Clauses are coextensive with their federal analogue

Plaintiffs' equal protections claim fares no better. Plaintiffs admit that they want this Court to adopt a reading of Arkansas's Equal Protection Clauses that is broader than the federal Clause. But the Arkansas Supreme Court has declined to diverge from the federal approach in any of its equal protection cases. *See Maiden v. State*, 2014 Ark. 294, at 17, 438 S.W.3d 263, 275 (explaining that the Arkansas Supreme Court will only diverge from federal constitutional interpretations if it "has traditionally viewed an issue differently than the federal courts" and suggesting that equal protection is not one of those issues). Indeed, Plaintiffs muster only inapposite precedent to justify divergence. *See* Br. in Opp. at 18 (citing *State v. Sullivan* & *State v. Brown*, two cases about search-and-seizure law, and *Jegley v. Picado*, which interprets the right to privacy). Those cases did not involve Arkansas's Equal Protection Clauses, nor were they related to redistricting.

And applying the federal standard, Plaintiffs' claim fails because they do not plead intent. True, Plaintiffs *say* that the General Assembly must have acted with mal intent. *See id.* at 20 (quoting Compl. ¶¶ 56, 60). But saying something does not make it so. *Williams v. McCoy*, 2018 Ark. 17, at 4, 535 S.W.3d 266, 269 ("The mere statement that it is so, without factual support, simply fails to comport with our fact-pleading requirements." (internal quotation marks omitted)).

Besides, Plaintiffs' intent argument is deeply contradictory. Bizarrely, they argue that the General Assembly intentionally discriminated when splitting Pulaski County because it relied on race "at times, exclusively." Compl. ¶ 60. Yet their complaint points to two other reasons why the legislature split the County: keeping a congressional district "majority-Republican" or

"appeas[ing] rural voters." *Id.* ¶¶ 68-69. Both cannot be true. Thus, their argument is implausible on its face.

CONCLUSION

Because Plaintiffs' claims are barred both jurisdictionally and on the merits, this court should grant Defendants judgment on the pleadings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dylan L. Jacobs, hereby certify that on October 3, 2022, I electronically filed the foregoing with the Clerk of the Court using the Court's eflex system, which shall advise all parties of record.