

Exhibit N

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

CHRISTIAN MINISTERIAL
ALLIANCE, PATRICIA BREWER,
CAROLYN BRIGGS, LYNETTE
BROWN, MABLE BYNUM and VELMA
SMITH, on behalf of
themselves and all other
similarly situated persons,
Plaintiffs,

No. 4:23CV00471-DPM-DRS-JM

Monday, December 4, 2023
Little Rock, Arkansas
9:04 a.m.

v.

JOHN THURSTON, in his
official capacity as the
Secretary of State of
Arkansas,
Defendant.

**TRANSCRIPT OF HEARING ON MOTION TO DISMISS
THREE-JUDGE PANEL PRESIDING**
HONORABLE CHIEF JUDGE D.P. MARSHALL JR.
HONORABLE CIRCUIT JUDGE DAVID R. STRAS
HONORABLE JUDGE JAMES M. MOODY JR.

APPEARANCES:

On Behalf of the Plaintiffs:

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10 On Behalf of the Defendant:

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24 *Proceedings reported by machine stenography. Transcript*
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1 P R O C E E D I N G S

2 CHIEF JUDGE MARSHALL: This is the Christian
3 Ministerial Alliance and others against John Thurston, as the
4 Secretary of the State of Arkansas. Our case number is
5 4:23CV471. We're here today for oral argument on the motions to
6 dismiss. It's good to see all counsel. And I welcome you here
7 on behalf of my colleagues: Judge Stras from the Court of
8 Appeals and Brother Moody from our court here.

9 Ms. Byrd, would you please make the introductions for the
10 counsel for the plaintiffs.

11 MS. BYRD: Good morning, Your Honor. Can you hear me?

12 CHIEF JUDGE MARSHALL: Not well, but we'll work on
13 that.

14 MS. BYRD: Okay. For the NAACP Legal Defense Fund,
15 and who will be arguing for the plaintiffs, is Michael Skocpol.
16 Next to him is Leah Aden, NAACP Legal Defense Fund; Mr. Daniel
17 Bookin, O'Melveny & Myers; Ashley Pavel, O'Melveny & Myers; John
18 Cusick, NAACP Legal Defense Fund; Rick Rozos, NAACP Legal
19 Defense Fund. And I'm Arkie Byrd, local counsel.

20 CHIEF JUDGE MARSHALL: Very good. Welcome to each and
21 every one of you.

22 Mr. Skocpol, we look forward to hearing from you in due
23 course.

24 MR. SKOCPOL: Thank you, Your Honor.

25 CHIEF JUDGE MARSHALL: Mr. Bronni, Solicitor General

1 Bronni, how are you this morning?

2 MR. BRONNI: Good morning, Your Honor. My apologies.
3 My voice is college football-induced laryngitis.

4 CHIEF JUDGE MARSHALL: You stick to that story, okay?
5 Would you introduce your colleague, please.

6 MR. BRONNI: Sure. Along with me, Deputy Solicitor
7 General Dylan Jacobs, who will be arguing on the secretary's
8 behalf.

9 CHIEF JUDGE MARSHALL: Very good. Thank you.

10 All right. Counsel, as we said in our order, we look
11 forward to your thoughts, approximately 30 minutes of argument
12 per side.

13 You represent the movant, Mr. Jacobs, so we'll take you
14 first. I understood that you wanted to reserve some time for
15 rebuttal.

16 MR. JACOBS: That's correct, Your Honor. About eight
17 minutes or so. I don't know if the Court is keeping a close
18 formal time, but that's approximately how much I would like if
19 the Court --

20 CHIEF JUDGE MARSHALL: I will try, but there's no
21 warranty on anything I do involving numbers. But make a run at
22 us, please.

23 MR. JACOBS: Good morning, Your Honors. May it please
24 the Court. This is the most recent lawsuit challenging
25 Arkansas's most recent congressional reapportionment.

1 Redistricting is a politically fraught activity, to put it
2 mildly. Rarely is anyone, or perhaps -- excuse me. Rarely is
3 everyone, or perhaps anyone, satisfied with the outcome. The
4 plaintiffs here are Arkansas voters who are ultimately
5 dissatisfied with the political outcome of the state's 2021
6 congressional redistricting process.

7 The heart of their claim, as it was in *Simpson*, is a
8 Republican Arkansas Legislature redrew congressional district
9 lines to make it easier for a Republican to get elected to
10 Arkansas's Second Congressional District.

11 Knowing that political gerrymandering claim is not
12 available in federal court, they have recast those allegations
13 as a racial gerrymander. The Court previously dismissed the
14 same claims based on the same factual allegations as the
15 plaintiffs make here. And this case is functionally no
16 different than *Simpson*, and the results should be no different.

17 CHIEF JUDGE MARSHALL: Are there not new factual
18 allegations, Mr. Jacobs?

19 MR. JACOBS: So we don't think so, Your Honor. The
20 quote/unquote new allegations that are contained in the
21 complaint are merely subsets of the same sorts of factual
22 allegations that were made in *Simpson*, or merely different
23 conclusory allegations that are made, or different, I would say,
24 editorializations of the same factual allegations that were made
25 in *Simpson*.

1 CHIEF JUDGE MARSHALL: What about -- Ms. Black, if you
2 could work on our microphones. We're getting some feedback.

3 What about, for example, what I would call -- and,
4 admittedly, a label -- the overkill allegation? That is, you
5 had a 16,000-person problem to fix, but you ultimately moved
6 around 41,000 folks. And I may not have the numbers right, but
7 I think you know the point I'm talking about.

8 MR. JACOBS: Certainly, Your Honor. Those same
9 factual allegations were made in *Simpson*. The *Simpson* complaint
10 contained multiple references to Cleburne County coming in the
11 Second Congressional District, resulting in what both sets of
12 plaintiffs have described as a greater-than-necessary number of
13 voters coming out of Pulaski County into the Fourth and First
14 Congressional District.

15 And this Court concluded in *Simpson* that there is nothing
16 on the face of the map that gives rise to a plausible inference
17 that the motive behind doing that was based on race rather than
18 other permissible motives, such as partisan considerations or
19 just generalized need to equalize population.

20 CIRCUIT JUDGE STRAS: Let me follow up with Judge
21 Marshall's point, which is, when you have an overkill problem,
22 one of the things I think the complaint points out is that the
23 state drew the lines such that it disrupted school district
24 lines, county board lines, all kinds of other lines as well. So
25 it would be one thing if the overkill was to preserve some of

1 those things, but I think they allege that you ended up with an
2 illogical drawing of lines in other respects. What do you make
3 of that allegation?

4 MR. JACOBS: So I think anytime a county line is split
5 on a congressional map, you are going to end up splitting what
6 I'll call subsidiary political subdivision lines, meaning school
7 district lines, city board lines, things like that, because
8 those lines are smaller than the county lines and often are
9 coterminous with the county lines.

10 So it was the case in *Simpson* that the same lines were
11 split here. And I don't think that the decision to split
12 Pulaski County in ways that resulted in other subsidiary lines
13 being split raises a plausible inference that race was the
14 motivating factor for doing that rather than other permissible
15 motivations. At the end of the day, that is what the Court is
16 here to decide, whether there's a plausible inference or that
17 merely race was a possible motivation. And, as in *Simpson*, the
18 plaintiffs haven't pleaded any factual allegations that point to
19 race being the motive rather than other permissible motives.

20 CIRCUIT JUDGE STRAS: I was just going to say, you are
21 talking about what has been affirmatively pleaded. What about
22 what hasn't been affirmatively pleaded? In the first
23 litigation, there were allegations that led to a very plausible
24 alternative inference that they were political, that there were
25 purely partisan reasons for drawing the district lines the way

1 they did. Here we're in kind of a strange situation because we
2 know -- this panel knows that from the first litigation, but we
3 don't have those allegations here. And those aren't pleaded
4 here, so we don't really have a plausible alternative
5 explanation. What do we do about that?

6 MR. JACOBS: So I think the Supreme Court made clear
7 in *Twombly* and *Iqbal* what the Court is supposed to do in
8 considering other plausible alternative explanations. And
9 there's no requirement in either of those cases that the obvious
10 alternative explanation be starkly pled in detail in the
11 complaint's factual allegations in the sense that the plaintiffs
12 had to plead, as in *Simpson*, affirmatively that the legislature
13 was motivated by partisan thoughts as well as others.

14 Instead, what the court says in *Iqbal*, what reviewing
15 courts are supposed to do in evaluating complaints under the
16 plausibility standard is to use, quote, their judicial
17 experience and common sense.

18 And I would submit that it is well within the Court's
19 judicial experience and common sense to know that congressional
20 elections in Arkansas are conducted on a partisan basis, that
21 the state legislature in Arkansas is elected on a partisan basis
22 and that it was partisan-elected officials who were conducting
23 the redistricting.

24 CHIEF JUDGE MARSHALL: Mr. Jacobs, stay with us on
25 this race/politics issue for a minute, okay, if I can interrupt.

1 *Iqbal* says, in giving us its general guidance about pleading,
2 that we are supposed to make -- that this is a, quote,
3 context-specific task that requires a reviewing court to draw on
4 its judicial experience and common sense. You emphasized the
5 last part of that. I would like you to go back to the first
6 part. That is the context-specific task. This isn't a
7 slip-and-fall case. It's a Voting Rights Act case. And we've
8 got this arguable or alleged intertwining of race and politics,
9 that we're supposed to be erasing partisanship, that we are
10 supposed to be very careful with.

11 Comment, please, on that. Are we doing -- are we being as
12 sensitive to that context as the law suggests that we should be
13 in this context, or are we looking at this more like a
14 run-of-the-mill case?

15 MR. JACOBS: I think the Court's two decisions in
16 *Simpson* exhibit the exact sort of approach that courts are
17 supposed to take in this with respect to the sensitivity of
18 challenges to reapportionment maps. So the court says in
19 *Miller* -- the Supreme Court says in *Miller* that challenges to
20 apportionment maps under the 14th and 15th Amendments are some
21 of the most intrusive and sensitive types of cases that the
22 federal courts can hear in terms of state court, state/federal
23 relations, in terms of the requirement of assuming the good
24 faith of state legislators in exercising their delegated
25 responsibilities under the Constitution.

1 And the way that that is supposed to play out in *Miller* is
2 that plaintiffs in these types of cases have an extraordinarily
3 demanding burden to come on the front end and show that race was
4 the predominant motive in making these decisions rather than the
5 myriad legitimate considerations that state legislators may take
6 into account.

7 And I think the Court's decision in *Simpson* exemplifies
8 that, in addition to *Twombly* and *Iqbal*'s direction that mere
9 possible inferences that could be raised from factual
10 allegations are not enough to proceed past the motion to dismiss
11 stage and proceed to what here would be very intrusive and
12 expensive discovery into the motives of the state legislature in
13 reapportionment.

14 CIRCUIT JUDGE STRAS: To follow up on a point you made
15 about the predominant factor, I think in *Simpson*, I think maybe
16 they are making this argument in the petition for certiorari as
17 well. But the argument here certainly is that we should borrow
18 the standard from the *Arlington Heights* decision. And that it
19 should be a motivating factor versus a predominant factor seems
20 to be a key part of their argument here, and I want to give you
21 a chance to respond to that.

22 MR. JACOBS: Sure. So we think the proper standard is
23 *Miller*'s predominance test that the Court applied in *Simpson*.
24 In each and every redistricting challenge under the Constitution
25 that has been brought against a single-member district

1 reapportionment plan, like we have here, since *Miller*, the
2 Supreme Court has applied predominance in every single case. It
3 has been unflagging in that. It has never suggested that
4 anything other than the predominant standard applies.

5 The plaintiffs in *Simpson* called their claims both racial
6 gerrymandering and vote dilution. If one looks at the *Simpson*
7 complaint, both of those lines of cases are cited. And, yet,
8 the Court in *Simpson*, describing those claims as, quote, vote
9 dilution claims, correctly applied the predominant standard for
10 *Miller*, and it should do so here.

11 The cases that the plaintiffs rely on here were decided
12 long before *Miller*. And they were challenges to the overall
13 voting scheme that was being used, such as the use of at-large
14 elections or multimember districting plans with the goal of
15 receiving a remedy of a single-member district map.

16 And *Miller's* instruction to be especially sensitive in
17 challenges to reapportionment maps, to lean on the presumption
18 of good faith of state legislators, is at its highest when you
19 are considering a single-member district plan over something
20 like the use of an at-large voting scheme, because it is one
21 thing to say the selection or retention of a multimember or
22 at-large voting scheme was motivated by race. It's another to
23 say the minute line drawing decisions that a legislature made
24 within a map were racially motivated. The Supreme Court has
25 never applied anything less than predominance to that analysis.

1 Now, ultimately I don't think that it matters here. I
2 don't think the Court necessarily needs to decide that, because
3 under the plausibility analysis, I don't think the factual
4 allegations here raise a plausible inference of either a
5 predominant racial motive or that racial -- that race was even a
6 motivating factor in the lines that the legislature drew rather
7 than the legislature merely being aware of race, as the Supreme
8 Court has noted is always the case in reapportionment.

9 CHIEF JUDGE MARSHALL: Isn't each aspect of the
10 *Arlington Heights*, each factor of that test, satisfied here?
11 The impact, you have an obvious impact. Right? Let me find --
12 you know, I'm sure, the criteria offhand better than I do. But
13 you have an obvious impact. Lead me through the factors.
14 Aren't each satisfied here?

15 MR. JACOBS: So the factors from *Arlington Heights* are
16 geared toward what sorts of evidence that courts are to consider
17 in determining whether a legislature was motivated by race in
18 whatever decision-making. We have various factual allegations
19 that you can, I guess, plug in under the heading of various --
20 of the *Arlington Heights* factors. But the issue is still
21 whether the specific factual allegations that the plaintiffs
22 have made plausibly lead to an inference of a racial motive
23 rather than some other motive. So, for instance, I'll just pick
24 the third on the list, which are departures from normal
25 procedural sequences.

1 CHIEF JUDGE MARSHALL: And there were those here,
2 weren't there?

3 MR. JACOBS: So I hesitate to say yes. In the sense
4 that it was a very rushed process, that is true. However, I
5 think it's hard to say that it's a departure from the normal
6 process given that the complaint doesn't allege what a sort of
7 normal process would have looked like, in the sense that the
8 legislature in 2021 was redistricting in a special session in
9 the fall after receiving Census data months late from the Census
10 Bureau rather than it would have done in past years after
11 receiving that data on time. So I think it's hard to say absent
12 more factual allegations what the normal procedures ought to
13 have looked like from which the plaintiffs claimed that the
14 legislature departed here.

15 CHIEF JUDGE MARSHALL: I don't know that this is
16 determinative, Mr. Jacobs. And maybe this is not a hill you
17 want to die on. But I don't understand the argument there when
18 the House Committee said, This is the way we're going to do
19 this, and bills were introduced. They had a process for ranking
20 those bills. Another bill, 1971, was everybody's favorite. And
21 then -- what is it -- two days before, this plan comes in in the
22 middle of the night? Are you really going to say that that's
23 not an irregular process?

24 MR. JACOBS: I think Your Honor is correct. It's not
25 a hill that I want to die on. I don't want to concede that it

1 is. I think my point in referencing that particular one at the
2 start was to say that even if the Court thinks that that is the
3 kind of departure from normal process that falls under our
4 *Arlington Heights* various evidentiary examples, the plaintiffs
5 are still required to plead that that leads to a plausible
6 inference of racial motive rather than something else.

7 So here, sure, if the Court assumes the way the bill at
8 issue here was adopted was a departure from some either normal
9 procedure or a departure from the stated procedure that the
10 committee members said they were going to use, there's no reason
11 that that suggests a racial motive rather than other permissible
12 motives, you know, politics or something else.

13 Another thing I want to say about the *Arlington Heights*
14 standard is the way that the framework is supposed to work is on
15 the front end plaintiff has to show that race was a motivating
16 factor or a substantial motivating factor depending on the
17 particular language that is supposed to be used. And it shifts
18 the burden to the defendant to show that, you know, they would
19 have taken the same action but for race.

20 One of the reasons I think that's incompatible with
21 reapportionment challenges here is the Supreme Court's
22 insistence on the extraordinarily demanding burden that
23 plaintiffs face in these sorts of challenges and the presumption
24 of legislative good faith, because this burden shifting on the
25 back end of *Arlington Heights*, where a defendant comes in and

1 says, Well, I would have taken the same action without respect
2 to race, that's really another way of saying that race didn't
3 predominate the decision that I made because I would have taken
4 that, you know, action for another reason.

5 And *Miller* makes very clear that in reapportionment
6 challenges predominance is supposed to be shown on the front end
7 by a plaintiff, not on the back end by a defendant. It's taken
8 that approach in every case that it's had since *Miller*.

9 CHIEF JUDGE MARSHALL: So a couple of quick points,
10 and then I promise to be quiet. I feel like I'm taking up too
11 much air. Are you arguing that *Arlington Heights* does not
12 apply?

13 MR. JACOBS: No, Your Honor. In the sense that --

14 CHIEF JUDGE MARSHALL: Okay.

15 MR. JACOBS: -- the five factors are the sorts of
16 evidence that courts always consider.

17 CHIEF JUDGE MARSHALL: Okay. Thank you for the
18 clarification. I hear what you are saying about predominance
19 and at the front end. But isn't the way to reconcile that
20 dilemma to faithfully apply the plausibility standard in this
21 specific context? And that is I'm wondering -- let me ask it
22 this way. What other similar case has been decided on a motion
23 to dismiss rather than at summary judgment or after trial, when
24 you have a fuller record and can adequately make the sensitive
25 decision that the law requires for us here?

1 MR. JACOBS: So I'm not aware of any other than this
2 Court's decision in *Simpson*. I think the reason for that is the
3 unusual nature of this case rather than the Court's decision in
4 *Simpson* being an aberration.

5 CHIEF JUDGE MARSHALL: Please say some more about
6 that.

7 MR. JACOBS: This case does not look like your typical
8 racial gerrymandering case. In the cases that you see that are
9 alleging a racial gerrymander, you see usually things like overt
10 racial targets that a legislature is using usually in a claimed
11 effort to comply with the Voting Rights Act, or you see very
12 bizarre district configurations like land bridges connecting
13 very far-flung populations to each other in a way such that if a
14 court has the demographics in front of it, it looks fairly
15 obvious that there was a racial motive behind that.

16 In contrast, what you have here is a very modest revision
17 to an existing map that led to more compact districts and an
18 approximately 2 percent change in the relevant racial
19 demographics of District 2. You go from 22.6 percent Black
20 voting-age population to 20.4 percent approximately on either
21 end. And that's in a district where it's not close to being a
22 majority-minority district. It's not close to having a
23 different electoral outcome that would be swayed by this kind of
24 change. And you just really don't see those sorts of minute
25 challenges being brought as a racial gerrymander in federal

1 court. So I think that's the reason why you don't see many
2 cases being dismissed at the motion to dismiss stage as this
3 Court did in *Simpson*.

4 I think back to the standard on the predominance point --
5 CIRCUIT JUDGE STRAS: Can I ask you a quick question
6 about that?

7 MR. JACOBS: Yes, Your Honor.

8 CIRCUIT JUDGE STRAS: In response to Judge Marshall's
9 question, I hear you saying that the -- and I think this is
10 probably right -- the *Arlington Heights* factors bear on sort of
11 the causation or the motivating factor versus the predominant
12 factor. But I hear you saying that in the vote dilution or
13 racial gerrymandering context that you still have to go by that
14 heightened standard. So you may consider the *Arlington Heights*
15 factors, but you have to consider it in the light of the
16 predominant factor and test. Am I right? Is that the argument
17 you are making?

18 MR. JACOBS: I believe that's true, Your Honor.
19 That's the case in all intentional discrimination cases is that
20 the government on the back end always has the ability to show
21 through evidence that race was not actually the reason that we
22 did this, and we would have done it absent racial
23 considerations.

24 So even in the sort of vote dilution line of cases that
25 preexisted *Miller*, it was not as though a plaintiff showed that

1 race could have been a motivating factor among many and that was
2 the end of the analysis. You always had a defendant, you know,
3 able to show that, well, if it was one of many, it wasn't the
4 actual reason that we did this. I think that is the part of the
5 *Arlington Heights* framework, this burden shifting that I think
6 the Supreme Court has rejected for use in these types of cases
7 in *Miller*.

8 CIRCUIT JUDGE STRAS: Just to follow up, the reason
9 why I asked that question is I think your arguments actually go
10 together on this point, which is, you are saying this is an
11 unusual case because there are such smaller percentage changes
12 in the racial composition of the various districts. And one
13 might say that could be a motivating factor, but is it the
14 predominant factor when you are making such small minute
15 changes? So I think there's some work being done there, and I
16 want to pin that down on whether it's predominant or motivating.

17 MR. JACOBS: Again, we do think it's predominant.
18 Ultimately, I'm not sure that it matters, as I said before. And
19 that's also coupled with the fact that the Court has to view
20 redistricting challenges at the district level.

21 So this is a case challenging the Second District as a
22 whole. And the focus of the analysis is not necessarily honed
23 in on the splits in the southeastern portion of Pulaski County
24 but zoomed out to the level of the district as a whole and was
25 race the predominant motivating factor for the way the entire

1 district was drawn, a district of 752,000 people and of which
2 the split-out portion affected about 41,000, resulting in a
3 2 percent change in the demographics.

4 And under the predominance standard especially, we don't
5 think that there's anything in this complaint that, at least
6 with a causal inference, that race was the motivating factor
7 rather than something else, the same as in *Simpson*.

8 CHIEF JUDGE MARSHALL: Judge Moody, did you want to
9 question? We're coming near to the end of the state's time.

10 JUDGE MOODY: Not yet.

11 MR. JACOBS: I believe I've used about what I planned
12 to.

13 CHIEF JUDGE MARSHALL: You have. Let me ask a final
14 question and, if you would then, wrap up. What about the Hunt
15 Decree allegations? And I don't recall those from the first
16 complaint and amended complaint in *Simpson*, but the allegation
17 that, yes, the basic facts on the ground are the same, but
18 remember, Court, what this has done to the Hunt Decree district.

19 MR. JACOBS: So, again, I don't think the fact that
20 the Hunt Decree subdistrict was split, along with school
21 district lines, city ward lines, again, I don't think that that
22 leads to a plausible inference that the reason for that was
23 race.

24 Again, the Hunt Decree is a consent agreement that was
25 entered into many years ago. I think that the population

1 demographics of the portion of southeast Arkansas -- I won't say
2 it's a foregone conclusion, but it was going to lead into some
3 split of a Hunt Decree subdistrict. But the population
4 demographics are what the population demographics are in the
5 locations where Districts 1 and Districts 4 happen to border the
6 Second District.

7 I think the plaintiffs brought a kind of heat map that
8 displays that quite nicely, that the legislature, to do this
9 balancing between Districts 1 and 4 with District 2, had exactly
10 one place they could have done that, because in the southeastern
11 portion of Pulaski County are where all of those districts
12 intersect, and it happens to be where a much heavier Black
13 population resides in Arkansas. The fact that is so does not
14 lead to a plausible inference that it was because of the racial
15 demographics that the legislature selected that location to do
16 the splitting.

17 CHIEF JUDGE MARSHALL: Thank you, Mr. Jacobs.

18 MR. JACOBS: Thank you, Your Honor.

19 CHIEF JUDGE MARSHALL: Mr. Skocpol.

20 MR. SKOCPOL: We do have a graphic that we will put
21 up, and we have copies of that if it would be helpful to see.
22 But we'll have it up on the easel here.

23 CHIEF JUDGE MARSHALL: Very good. Why don't we take
24 those now so we don't have to interrupt the argument. Has your
25 Brother Jacobs seen all of this?

1 MR. SKOCPOL: Yes. And it's also just an enlarged
2 image that appears at paragraph 143 of the complaint.

3 CHIEF JUDGE MARSHALL: Okay. Mr. Skocpol.

4 MR. SKOCPOL: Thank you, Chief Judge Marshall. Good
5 morning, Your Honors. Michael Skocpol with the Legal Defense
6 Fund on behalf of plaintiffs, the Christian Ministerial Alliance
7 and five individual Black voters, many of whom are here today,
8 with other members of the community.

9 Between 2010 and 2020, the Black population of Pulaski
10 County boomed while the white population declined. At the same
11 time, the district, the Second Congressional District, showed
12 signs of becoming -- of being on the cusp of becoming
13 politically competitive. Black voters specifically were the
14 driving force behind that shift. And it was Black voters
15 specifically who were targeted in the redistricting that
16 followed.

17 Now, how do you know that? How do you draw that inference?
18 You know that, first, because the legislature singled out
19 Pulaski County's Black community by making it the focal point of
20 an unprecedented three-way county split that splices right
21 through the heart of the Black community. You know that because
22 the legislature removed predominantly Black voters from the
23 Second Congressional District at two to three times the level
24 necessary merely to balance population between the districts,
25 what Chief Judge Marshall referred to as the overkill problem,

1 while replacing them with an influx of overwhelmingly white
2 voters elsewhere in the district.

3 You also know that, and the Court's questions I think have
4 highlighted that these are new allegations since the *Simpson*
5 complaint because the legislature repeatedly violated
6 traditional redistricting principles, its own stated principles
7 that it adopted to govern redistricting, to carve up
8 municipalities, school districts, specific Black neighborhoods,
9 like Rose City in North Little Rock, even an historically
10 significant majority Black judicial district that is a stand-in
11 for the specific parts of Pulaski County where Black voters have
12 long constituted an effective political majority going back
13 decades. And all of those splits were done in ways that
14 disproportionately affected Black voters that had disparate
15 demographics on either side of the line.

16 And, finally, you know that because the legislature treated
17 Black voters and white voters with the same party affiliation
18 differently, making race a stronger predictor than party of who
19 was moved out of CD2.

20 So I want to particularly focus on those two new buckets of
21 allegations because I think those are the clearest genuinely new
22 allegations from the *Simpson* complaint, although we do have a
23 number of other new allegations or facts that we think
24 materially strengthen what you previously saw in the *Simpson*
25 complaints.

1 CIRCUIT JUDGE STRAS: Before you get there, I just
2 want to ask about what's not in this complaint. I'm really
3 struggling with that. So in the other complaint, we had
4 statements from legislators indicating that it really was
5 partisan, at least in their opinion, each individual
6 legislator -- not every legislator, but some legislators, that
7 in their opinion it was partisan. Those allegations aren't in
8 this complaint, but you have the same panel. And it's really
9 hard to sort of un-ring what we already saw.

10 I guess my first question is, are we required to ignore
11 those allegations from the first complaint? And then the second
12 question is are any of those allegations incorrect? Would you
13 be saying that those things didn't happen or there's some reason
14 to think they didn't happen?

15 MR. SKOCPOL: You are limited to the factual
16 allegations in the complaint before you. And those allegations
17 need to be credited, and you need to draw reasonable inferences
18 on our favor because we're here on a motion to dismiss. And it
19 is correct that there is a difference, and we have a different
20 theory of the evidence and the claims that prove our two
21 distinct claims.

22 I do want to discuss the governing standard here. We have
23 two distinct claims. We have I think somewhat different
24 theories of how the evidence bears on those claims. So we,
25 whereas the *Simpson* amended complaint in particular focused very

1 strongly on just sort of quoting lengthy statements from the
2 legislative history, we don't think the particular legislative
3 history that *Simpson* highlighted is especially probative one way
4 or the other. So I don't know that it matters whether you can
5 consider those facts or not. It is true that, you know, various
6 statements were made in the record by both proponents and
7 opponents of the map that was ultimately enacted.

8 But I think our theory is that both like just a
9 straightforward denial by the legislators that they considered
10 race or statements by opponents of the map one way or the other
11 about the character of the map just simply aren't that
12 probative, because anytime you have -- and the Supreme Court has
13 said this. It's extremely rare to have smoking gun direct
14 evidence admissions in the public record of a racial motive. So
15 I just don't think you can put too much weight on the statements
16 one way or the other.

17 CIRCUIT JUDGE STRAS: And that's the struggle I'm
18 having. So to the extent that -- and I agree you have a
19 different focus in this complaint. But to the extent that you
20 rely on statements going the other way, like the governor and
21 what the governor did, I mean, don't we equally have to say,
22 well, we're not really going to consider those all that much
23 either because we have all these other statements we're not
24 considering that suggests a different motive? Or how would you
25 have us approach that?

1 MR. SKOCPOL: Thank you, Your Honor. I think this is
2 a subtle but important distinction. So, as I understood the
3 theory that the *Simpson* plaintiffs brought before you, it was
4 that these various statements and criticisms were in the record
5 about what the motive of the plan was or wasn't and that you
6 could consider that as evidence of what the motive was. As I
7 said, we don't think anything that was said in the record is
8 particularly probative on that question. Where we introduced
9 criticisms from legislative opponents, the primary thing we're
10 using that to support is that this is a case where it is very
11 clear that the legislature knew the demographics of the area
12 that they were targeting, which are stark. And it is really
13 hard to draw a map that could more precisely target the Black
14 community than this one.

15 To the extent that part of the theory of the defense would
16 be, Well, that's just a coincidence, or they didn't know that
17 that was happening, the fact that they were so strongly met with
18 these criticisms, despite what, you know, you've just heard was
19 a rushed and in some ways irregular process to get these maps,
20 that it was obvious to everyone involved, that it was known,
21 that they were specifically told about both the demographics of
22 the area that was being affected and the harm that that would
23 cause to Black voters and other voters of color.

24 So, for example, I think you mentioned the governor's
25 statements. The *Simpson* complaint, I think, really highlighted

1 statements that the governor made after the enactment of the
2 plan. And this Court correctly said that that has less bearing
3 on what the legislature knew before the plan. We include those
4 statements because the fact that a governor of the own party, of
5 the legislative proponent's own party, refused to sign these
6 maps, while citing concerns about racial discrimination, goes to
7 the fact that this was really obvious and well known exactly
8 what they were doing. So it's hard to say that they didn't
9 realize they were targeting Black voters in this way.

10 But we also highlight that the governor did make a version
11 of those statements before the plan passed, so you can consider
12 that even more directly. This is all at paragraphs 117 to 120
13 of our complaint. The first statement was made on October 6th.
14 The plan passed the legislature, I believe, on October 7th.

15 CHIEF JUDGE MARSHALL: Mr. Skocpol, can I pull you to
16 the two-claim issue that you mentioned before and distinguishing
17 between, and then I hope, as a part of that, the relationship
18 between *Arlington Heights* and the predominance thread that our
19 panel has identified, how all of that fits together?

20 MR. SKOCPOL: Yes, absolutely. And I would like to
21 make sure I take some time to talk about both the race versus
22 party allegations and the violations of traditional
23 redistricting principles that I think speak directly to the
24 alternative explanations that this Court has identified before.

25 But, absolutely, let's start with the governing legal

1 standard. And I appreciate the chance to clarify this because
2 there's been some confusion, understandably, because the *Simpson*
3 plaintiffs never asked you to distinguish the two distinct
4 claims that are here. And the defendants have continued to
5 conflate them, as you heard this morning.

6 So what we have here are two analytically distinct claims,
7 one for racial gerrymandering and one for intentional vote
8 dilution. You know these are analytically distinct claims
9 because the Supreme Court has repeatedly said that, including
10 both in and after the *Miller* decision, contrary to what my
11 friend representing the state said today. So *Miller* uses the
12 language of analytically distinct. And it talks about this at
13 -- page 911 of that decision I think spells that out. But even
14 more recently than that, as recently as the 2018 decision in
15 *Abbott v. Perez*, Justice Scalia's opinion for the court there at
16 page 2314 talks about these as distinct claims.

17 So what are the two distinct claims, the two analytically
18 distinct claims? For racial gerrymandering, our burden is to
19 show that race was the predominant factor motivating the
20 legislators' decision to place a significant number of voters
21 within or without the Second Congressional District.

22 And I highlight that language because, despite what you
23 heard from the other side about the sort of absolute size of the
24 change in the Black voting-age population, which I'll come back
25 to later, they don't dispute -- I don't understand them to

1 dispute that we satisfied the significant number part of that.
2 We're talking about tens of thousands of voters, two to three
3 times as many as were needed, simply to balance population moved
4 into and out of the district we allege on the basis of race.

5 So the question there is really, just looking at all the
6 direct and circumstantial evidence bearing on it, can you say
7 that race predominated in the legislature's decision-making
8 about where to place these lines through the heart of the Black
9 community in Pulaski County.

10 For the intentional vote dilution claim, we simply need to
11 show that the challenge to legislative action had the effect of
12 diluting or impairing the Black voting power and that intent to
13 harm Black voters in that way was at least a motivating factor
14 for the decision.

15 So it's not that, you know, motivating factor -- to Judge
16 Stras's question, it's not that motivating factor is, you know,
17 we're trying to get the motivating factor standard and not the
18 predominant standard. We think we can meet both of those
19 standards. We think both -- we have stated a claim for both of
20 these on largely the same evidence. But they are two
21 analytically distinct claims and two analytically distinct
22 intents.

23 CIRCUIT JUDGE STRAS: Let me challenge you a little
24 bit on that. This gets to the overlap between the two claims,
25 the analytical overlap, which you may be right. I'll even grant

1 you that they are two separate claims. The problem I'm having
2 with that is -- and a lot of cases do this. Racial gerrymanders
3 are described as packing and cracking, some combination or one
4 or the other. And packing or cracking are a form of vote
5 dilution. So what I'm having trouble with is how -- and I don't
6 think the court necessarily has done this. But how can the
7 court set up two different sort of causal-type standards for
8 what in effect are caused by the exact same thing, cracking or
9 packing?

10 MR. SKOCPOL: Well, I do think the conduct that is
11 covered by the two claims can overlap. And this case is an
12 example of that. The reason -- the main reason I think the
13 Supreme Court has said why they are analytically distinct claims
14 is because they are directed at different constitutional harms.

15 So for the racial gerrymandering claim, the harm is, as
16 this Court has said, like a form of racial stereotyping. The
17 harm is to voters in being classified on both the basis of race
18 and where you draw the lines. So the focus is particularly on
19 what was driving the decision about sometimes very particular
20 decisions about where the lines were drawn, whether that's for
21 packing or cracking.

22 For the intentional vote dilution claim, the harm is the
23 suppression of Black voters' ability to meaningfully exercise
24 their vote and the suppression of Black voting power. So there,
25 for example, we do need to show some effect on Black voting

1 power. And I think that's why they are analytically distinct
2 claims that do I think regularly overlap. In our brief we cite,
3 for example, a case from just last year where a district court
4 sort of treated these two claims separately, I believe, in
5 denying the motion to dismiss.

6 If there are no further questions on the standard, I would
7 like to talk about the new allegations that we include that are
8 directly responsive to the obvious, quote, obvious alternative
9 explanations that this Court previously identified.

10 CHIEF JUDGE MARSHALL: And in that context, would you
11 deal with the pleading standard as well? As you talk about the
12 facts, talk some law to me too on that.

13 MR. SKOCPOL: Absolutely, Your Honor. So I think --
14 you know, I think that's a good table setting. We recognize
15 we're not writing on a completely clean slate here and that you
16 have had issued two decisions before in the *Simpson* case. I
17 believe what this Court said in those cases was that those
18 claims are just a few facts short of getting over the line to
19 being a plausible inference of racial discrimination.

20 So everything I'm about to talk about as to the pleading
21 standard here I think is that little bit extra that you need
22 beyond the stark disparities in this map, which are themselves
23 strongly probative that something irregular and racially
24 motivated was going on here, the additional constellation of
25 facts you need to get over that line from merely a possible

1 explanation to plausible.

2 And that's why I think it's important that we include new
3 allegations that speak directly to these alternative
4 explanations that, as I understood this Court to be saying, give
5 them pause about what was most likely or whether this was more
6 than simply possible.

7 So with respect to the possible potential partisanship
8 explanation, I want to say that this was not a stated criteria
9 that the legislature had or an explanation that they ever
10 embraced publicly. So that's why, you know, there's only so
11 much we can say about that in our complaint at this stage.

12 But we recognize that it is a commonly raised explanation
13 that reasonably gave this Court pause in *Simpson* for reasons
14 particular to those complaints. The *Simpson* complaints embraced
15 partisanship as a co-equal explanation for what happened here in
16 support of the doomed partisan gerrymandering theme that they
17 were pursuing at the same time. And that partly reflects the
18 fact I think that they had members of the minority party in the
19 legislature as plaintiffs and were seeking specific relief based
20 on that. To be very clear, these are not -- we do not represent
21 anyone who has any sort of partisan affiliation like that, and
22 we're not seeking any sort of partisan relief here.

23 But what the Supreme Court has said about this -- and
24 *Cooper v. Harris* is the case that speaks most directly to this
25 in its analysis, in particular, at footnotes 1 and 7. Where

1 race and party overlap, being partisanship a possible
2 explanation, the court's task is to disentangle race from
3 politics. Our task is to give you facts that allow you to draw
4 a reasonable inference that disentangles race from politics.
5 That would, particularly for the racial gerrymandering claim,
6 support an inference that race predominated in the line drawing.

7 Unlike in the *Simpson* complaints that you previously saw,
8 we have done that. So at paragraphs 188 to 191 of our
9 complaint, we spell out that Black Democratic and unaffiliated
10 voters were excluded from the Second Congressional District at a
11 notably higher rate than white Democratic and unaffiliated
12 voters. So two voters, one Black, one white, same party
13 affiliation or lack thereof, the legislature was more likely to
14 move the Black voter out of the district than the white voter.
15 That supports a plausible inference that race demonstrably more
16 so than party drove who remained and who was cut out.

17 It's also important to note that we are not saying that you
18 have to completely ignore the role that, you know, the fact that
19 politics exist or partisan politics exist. And what the Supreme
20 Court said about this in *Cooper* is -- and this is a quote. "If
21 legislators use race as their predominant redistricting
22 criterion with the end goal of advancing their partisan
23 interests, their action still triggers strict scrutiny."

24 So, again, we don't have any of these facts here because
25 this isn't a defense that the state has properly raised yet or

1 an explanation that was offered in the public record. But if at
2 some point, you know, given that it's a possibility, where there
3 is some overlap between race and party here later on, it may be
4 that they could have some partisan end goal. Hypothetically,
5 that wouldn't foreclose a racial gerrymandering claim because if
6 the way they went about pursuing those interests was by focusing
7 on race in the redistricting process.

8 CHIEF JUDGE MARSHALL: Is the partisan gerrymandering
9 point in the nature of an affirmative defense?

10 MR. SKOCPOL: I don't know that the cases are clear on
11 that specific question. I do think that's a reasonable way to
12 think about it. You know, it is not our burden to anticipate
13 every single possible defense or explanation that the
14 legislature could raise at this stage and plead around that.

15 I think we've -- we have included allegations that address
16 this possibility as specifically as we can at this stage without
17 knowing exactly whether the state will raise that defense or
18 what it will look like. I think this goes to the point that
19 whether they are formally classified as affirmative defenses or
20 not, these are quintessentially factual issues that are almost
21 never resolved on a motion to dismiss. You know, in all of the
22 cases that govern this, it's usually at the very least at
23 summary judgment if not on a factual record, as it was in
24 *Cooper*.

25 CHIEF JUDGE MARSHALL: Should we wait on the Supreme

1 Court's decision in the South Carolina case to help us on
2 disentangling race and politics or not?

3 MR. SKOCPOL: I don't think so, Your Honor, for
4 precisely the reason I just said, which is that is a typical
5 version of these claims that proceeded all the way to a bench
6 trial and very detailed, you know, competing expert testimony,
7 fact-finding, evidentiary presentations on this question. And I
8 think, you know, the issues that are before the Supreme Court in
9 that case are really about parsing through that record under a
10 clear error standard. So I think whatever they say on this
11 question will really go to how you resolve this at summary
12 judgment or a trial when you actually have facts to contend
13 with.

14 You know, a good illustration of what that can look like
15 is, for example, the *Cromartie I* decision, which was all about
16 whether it was appropriate to grant summary judgment based on
17 competing presentations of evidence about this question of
18 disentangling race and politics. *Cooper* also goes into that in
19 detail.

20 And I think, if you look at those, you will see that this
21 really isn't suited for resolution on a motion to dismiss, where
22 we have alleged that it is demonstrably the case in the
23 demographics of the areas that were moved that race played a
24 more significant role or was a more significant determinant than
25 party. That's not an allegation we make lightly. We will have

1 evidence to support that at an appropriate stage. But at this
2 stage, it needs to be credited. And I think that is just a
3 fundamental difference from the *Simpson* case.

4 Judge Stras, I think you said, you know, we know those
5 facts about the partisan, what happened here from the previous
6 case. I just want to be very clear. It's not that there's some
7 facts that they alleged that we're leaving out. We have a
8 fundamentally different theory of what happened here. Their
9 theory was, quote, that it was obvious. This is in their
10 amended complaint, that, quote, the reason for the singling out
11 of those precincts was, quote, their voting history. And they
12 alleged that on par with race.

13 We have specifically alleged the opposite of that, that
14 race better than party explains what happens here. So it's more
15 that either we've alleged a different set of facts, or we've
16 alleged this new and additional significant fact that allows you
17 to draw the inference, disentangle the two and draw the
18 inference that race predominated.

19 CHIEF JUDGE MARSHALL: Doesn't that make the point
20 about the complexity of this, that the same facts could be spun
21 or interpreted in one way, race more important than politics,
22 and, at the same time, the other way, politics more important
23 than race?

24 MR. SKOCPOL: Yes, Your Honor. That's how this
25 usually plays out in these cases. So we, you know, we do our

1 diligence of making these allegations and pointing to evidence
2 that the disparities, the stark racial disparities that we're
3 talking about here, are, in fact, driven by race and not just a
4 coincidence based on partisan motive. And then they put on
5 their own evidence analyzing the factual record to say why,
6 well, that's not the best characterization. So, again, this
7 goes to this being a quintessentially factual issue.

8 CIRCUIT JUDGE STRAS: Let me just follow up on that.
9 I mean, one of the ones that I think you rely on -- although,
10 you know, correct me if I'm wrong, because this was definitely
11 true in *Simpson*, where some folks had said, who were involved in
12 the process, said, We can't consider race. We're not going to
13 consider race. I think that's also in this complaint.

14 In terms of the alternative explanation, I think Justice
15 Alito brought this up in one of his separate opinions, which is,
16 you kind of have to consider race for Section 2. You kind of
17 are not supposed to consider race for the 14th Amendment and the
18 15th Amendment. So I wonder if that actually hurts your case,
19 where they say, No, no, we're not considering race. Well, you
20 know, you take that at face value of presumption of regularity,
21 and perhaps the motivation isn't race.

22 MR. SKOCPOL: Well, Your Honor, I think this is an
23 example of the kind of allegation that was focused, the focus
24 and very prominent in *Simpson* and that we just don't think at
25 this stage is very probative one way or the other. So I

1 appreciate the chance to disentangle the theories, moving from
2 disentangling race and party to disentangling our theory from
3 theirs.

4 Theirs was, I think they used the phrase like the
5 legislature doeth protest too much, so they were asking you to
6 take note of the fact that these denials occurred and because it
7 happened multiple times and for the exact opposite. And I don't
8 know that that's a reasonable inference, you know, particularly
9 given the sensitivities here for this Court to draw.

10 We're alleging something different, which is we don't think
11 that the flat denial of considering race is very probative one
12 way or the other. You are always going to have that in a racial
13 discrimination case concerning sort of facially neutral state
14 action. But what we do allege is that, when confronted with
15 valid obvious criticisms of this plan from all corners, the
16 proponents of the plan responded with a false -- objectively
17 false and evasive responses in order to avoid having to explain
18 what they were doing here.

19 And the false statement they made, going to what Judge
20 Stras just said about the Voting Rights Act, is that they
21 couldn't possibly engage in any consideration or even discussion
22 of race, that that was prohibited, and therefore they couldn't
23 possibly respond to these criticisms. I think for the exact
24 reason Judge Stras said and the fact that the -- you know,
25 avoiding non-dilution of minority voting strength is a

1 traditional redistricting principle in Arkansas. That was
2 objectively false.

3 We're not asking you to draw any inferences there even
4 really. They said it, and it wasn't true. And the reason was
5 because they were trying to avoid scrutiny on this plan. And
6 that's consistent with all the other hallmarks in the
7 legislative process of decision-makers who have something to
8 hide. So there was the rushed process, which, you know,
9 opposing counsel conceded. They don't need to concede anything.
10 We're here on a motion to dismiss. You take our allegations as
11 true. But it was a rushed process. There were other
12 irregularities and a truncated debate and the departure from
13 their agreed-upon process for ranking maps.

14 Again, you know, we think that's in the sort of -- that's
15 evidence that helps corroborate and further confirm the
16 inference of partisan motivation. But we're not relying
17 primarily on evidence from the legislative record here. So I do
18 want to get back to the traditional redistricting principles
19 point because that was the other alternative explanation before
20 this Court before, and I think we've included new and materially
21 significant allegations that address that as well.

22 JUDGE MOODY: Can you give me five seconds before you
23 do that?

24 MR. SKOCPOL: Yes.

25 JUDGE MOODY: So do you have the benefit of your

1 response handy, because I'm going to direct you to -- it's
2 Document 26 unless you have it memorized.

3 MR. SKOCPOL: Yes, Your Honor.

4 JUDGE MOODY: It's actually page 9 of 31 on the
5 document, but it's enumerated page 3 in your brief. I'll give
6 you both references.

7 MR. SKOCPOL: Yes. I have it.

8 JUDGE MOODY: This is in your bullet points. It says
9 this is why our case is different from *Simpson*. So if we go to
10 the top of page 9 on page 3 -- it's redundant, but you know
11 where I am.

12 MR. SKOCPOL: Yeah.

13 JUDGE MOODY: It says -- you do the math, and you say:
14 Despite the fact 57 percent was moved into the First District --
15 we're really only 1 and 5 prior to that. So this goes to how --
16 I guess that's the math behind at the very last sentence, it
17 says: "Black Democrats and white Democrats in the Second
18 Congressional District were treated differently."

19 MR. SKOCPOL: I'm sorry. I was with you on the first
20 one.

21 JUDGE MOODY: Top bullet point on page 9 and then the
22 last phrase on page 9. So we're going from top to bottom on
23 that same page.

24 MR. SKOCPOL: Yeah, I see.

25 JUDGE MOODY: And I've been waiting for it. And I

1 think you told me that the facts were in and around paragraph
2 188 of your amended complaint. So what I'm trying to do is -- I
3 see the math at the top. But it seems like there's a conclusion
4 that these were all Democrats. And I thought through it may be
5 the fact that the state itself is claiming that this was
6 partisan gerrymandering so everybody we moved is a Democrat.
7 But I was looking to see what facts that you pled supported the
8 conclusion that these white Democrats were treated differently
9 than Black Democrats. And you referenced 188. I was just
10 asking is it in and around there that I would find more pleading
11 on that issue as opposed to the conclusion?

12 MR. SKOCPOL: Yes, Your Honor. And I appreciate the
13 chance to clarify because the statistics in the bullet at the
14 top of the page here are not the allegations that I'm referring
15 to there. So those are the stark racial disparities in who was
16 moved into and out of the district. And that is a hallmark of a
17 racial gerrymandering claim. I think this Court previously
18 recognized that that was --

19 JUDGE MOODY: Well, the two go hand in hand. It
20 doesn't matter what the numbers are if there wasn't a racial
21 disparity.

22 MR. SKOCPOL: Yes. So if you then look at paragraph
23 -- and I think what you are looking for is specifically at
24 paragraph 189 of our complaint.

25 JUDGE MOODY: And I'm there. And I'm just asking you,

1 is that where I should find all of the pleadings that support
2 the bottom of page 3 or 9, depending on how you do it?

3 MR. SKOCPOL: Yes.

4 JUDGE MOODY: Okay. I'll get out of your way.

5 MR. SKOCPOL: It doesn't have the same statistics,
6 because, again, we're not at the stage of putting in -- you
7 know, this is the kind of thing that people put on extensive
8 expert reports about. And we don't have that at this stage.
9 We're just giving you the top-line conclusion from, you know, if
10 you dig into -- if you dig under the hood of those stark racial
11 disparities, we're giving you the top-line conclusion about what
12 you would see in terms of race being a better predictor than
13 party.

14 JUDGE MOODY: Thank you.

15 MR. SKOCPOL: So with respect to the other alternative
16 explanation, which I understand to be essentially that this is
17 all just a big coincidence and this map is the product of a
18 routine application of traditional redistricting principles to
19 balance population between the districts as required by one
20 person, one vote, what I'll say about that is I understand why,
21 given how the *Simpson* complaint pled these things, that that
22 potential explanation gave you some pause.

23 They really didn't give you anything non-conclusory about
24 how the plan did or did not comport with traditional
25 redistricting principles beyond the simple fact of splitting

1 Pulaski County itself. I think it's reasonable to think that
2 that alone is maybe not enough of a departure from traditional
3 redistricting principles.

4 But we, by contrast, as it sounds like the Court has
5 already picked up on, allege multiple violations of traditional
6 redistricting principles at all levels -- well, not at all
7 levels, but at many different levels, including splitting
8 municipalities throughout the districts, including both the
9 cities of North Little Rock and Little Rock, every major school
10 district in the district, communities of interest. Generally
11 the Black community in southeast Pulaski County is itself a
12 longstanding community of interest the traditional redistricting
13 principles would -- under traditional redistricting principles
14 would warrant consideration and preservation if possible, but
15 specific communities of interest within that.

16 And the example we have is the Rose City neighborhood in
17 North Little Rock, where you have neighbors in a predominantly
18 Black area who have two different congressional representatives.
19 And that's the kind of thing a legislature usually tries to
20 avoid.

21 The other thing that wasn't mentioned yet that is new and
22 additional beyond the *Simpson* complaint, and I think important
23 here, is we allege the facts that allow you to conclude that
24 splitting Pulaski County in three ways was itself an
25 extraordinary departure from traditional routine redistricting

1 practice. So we allege at paragraphs 165 to 167 of the
2 complaint that this had never been done before, at least in
3 recent history, as far back as we know, to split a congressional
4 county into more than two different congressional districts.
5 And that was only done in the Black community in Pulaski County
6 and nowhere else in the state.

7 Now, that's important, because one of the things you are
8 looking for here is striking departures from ordinary practice
9 that suggest that something other than the routine application
10 of traditional redistricting principles is going on here. I
11 don't think the *Simpson* complaints necessarily gave you that.
12 But the new additional allegations we've given you give you very
13 strong evidence that something out of the ordinary is happening
14 here, and a routine application of traditional redistricting
15 principles cannot explain what happened here. And that's
16 legally significant particularly to the racial gerrymandering
17 claim, where the classic hallmark of a racial gerrymander is
18 that, in order to show that race predominated, the question is
19 whether traditional redistricting principles were subordinated
20 to racial considerations. And I think these additional
21 allegations, much like the partisanship allegations, give you
22 what you need to draw that inference at this stage.

23 CIRCUIT JUDGE STRAS: On that point, you heard
24 opposing counsel make the point that we're talking about such
25 small changes in the demographics because there's only -- I

1 mean, obviously, every vote is important. 41,000 votes ends
2 up -- it's split -- ends up changing the racial composition of
3 these districts by a relatively small margin. I want to give
4 you a chance to address that, because at least from an intuitive
5 point of view, that makes sense.

6 MR. SKOCPOL: Yes. I appreciate that, Your Honor. To
7 put that number in context -- so what they are saying, and we
8 don't deny that they can reasonably -- you can reasonably pull
9 this out of the allegations in the complaint. The fact they
10 want to rely on is the voting-age person -- the voting age --
11 Black voting-age population of the district that sort of
12 previous existed at the end of the decade as of 2020 was reduced
13 by a bit over two percentage points when the lines were redrawn.
14 To put that number in context, that is an entire decade's worth
15 or close to an entire decade's worth of Black population growth
16 in Pulaski County during a decade when, as we allege, the Black
17 population, the Black voting-age population, as a percentage of
18 what was there before, had grown by 20 percent, and the white
19 population was simultaneously declining. So what that fact
20 tells you is that in effect what the legislature did here was
21 roll back the clock by a decade on Black political gains in the
22 Second Congressional District.

23 You know, this is a sensitive context-dependent inquiry. I
24 understand the point that, you know, in other racial
25 gerrymandering cases, you may see larger swings, although I

1 think you do sometimes see -- for example, in *Cooper*, it was
2 just a few percentage points in one of the districts that was
3 held after trial to be a racial gerrymander.

4 The context here is important. As we allege, you know,
5 what was happening in this district -- Arkansas is not a state
6 that currently has a sort of tightly locked swing district.
7 What we allege was happening was that the district over the
8 course of that decade went from being a foregone conclusion to
9 being just on the cusp of being competitive. And it took that
10 ten years of booming population growth for Black voters and
11 other voters of color to make that shift. You know, in this
12 context, a little over two percentage points -- you know, a
13 little over two percentage points of the entire voting-age
14 population of the district that is overwhelmingly and
15 disproportionately Black voters is enough to basically turn back
16 the clock by ten years.

17 CHIEF JUDGE MARSHALL: A couple of points, Mr.
18 Skocpol. What paragraph was it on the complaint that you
19 directed my Brother Moody to on the more Black Democrats than
20 white Democrats and white independents were transferred out?

21 MR. SKOCPOL: Those allegations generally are at 188,
22 188 to 191. I think the specific factual predicate for it would
23 be at, I believe, paragraph 189. If you find I'm one paragraph
24 off on that, please don't hold me to it.

25 CHIEF JUDGE MARSHALL: For some reason I heard that as

1 149 or 148, so I was wandering around. No. It's in 189. You
2 are exactly right. Thank you for that clarification.

3 Second, unless there's other questions, it's probably time
4 for a concluding thought or two so we can hear some more from
5 your Brother Jacobs.

6 MR. SKOCPOL: Absolutely, Your Honor. I think the
7 fundamental point here is that, although there were good reasons
8 particular to the *Simpson* amended complaint why this Court might
9 have thought that it didn't survive a motion to dismiss, this
10 case, like most cases plausibly alleging these claims should
11 proceed.

12 The Court -- I do want to briefly address the Court's
13 question about developments in the law, and I want to be clear.
14 We're not alleging that the basic legal standard has changed in
15 the six months or so since you last saw the *Simpson* complaints.
16 The main thing that has happened is that other racial
17 gerrymandering claims that have been brought around the country
18 following the 2021 redistricting cycle have been moving forward
19 into fact-finding.

20 There was a trial held in Michigan last week. These are
21 claims that are usually resolved on the facts and on a full
22 evidentiary record, where the state can support with facts, not
23 just assertions of its attorneys, the kinds of facts that they
24 are at this point left asking you to rely on, like the fact that
25 there was no other possible way to split Pulaski County other

1 than to bring both of these congressional districts in.

2 That relies on a whole chain of inferences about decisions
3 they made elsewhere and accepting those as a given. That's a
4 classic example of, you know, they are asking you to credit
5 facts that aren't in the record and construe those facts in the
6 light most favorable to the defendants, whereas a
7 straightforward application of the precedent that govern our two
8 claims does raise a plausible inference at the very least that
9 race was what was driving these changes to the Second
10 Congressional District. So we would ask that you deny the
11 motion. Thank you very much.

12 CHIEF JUDGE MARSHALL: Thank you.

13 Mr. Jacobs, equity loves equality here, and I'm not going
14 to cut you off at eight minutes.

15 MR. JACOBS: I appreciate that, Your Honor. I will
16 endeavor to be speedy, nonetheless. If I can start, so Judge
17 Stras, you had a question about what materials or statements
18 that the Court can consider at this stage on a motion to
19 dismiss. I think at the very least the Court can consider the
20 statements made at committee hearings and chamber hearings that
21 are referenced in the complaint.

22 So those are the October 5th, 2021, Senate Committee on
23 State Agencies morning session, which is referenced in footnote
24 1 -- excuse me -- footnote 14. It's hyperlinked. They cite a
25 snippet of that. I think that the federal rules allow the Court

1 to consider all of a document even when part is cited. I think
2 if they cited one video file, the Court is able to review the
3 whole video of that if it wishes. The same thing with the
4 Senate State Agencies Committee p.m. session from October 5th
5 that's referenced in footnote 1. There's the chamber session of
6 the House of Representatives on October 6th, which is referenced
7 at footnote 13. The October 6th Senate morning session,
8 footnote 16 as well; and the October 6th Senate session in the
9 afternoon, which is referenced in footnote 17. All of those at
10 the very least can come in for the Court's consideration at the
11 motion to dismiss stage because they are incorporated into the
12 plaintiffs' complaint.

13 CHIEF JUDGE MARSHALL: A question on that note. We
14 have a reference in paragraph 79 to House Bill 1971, which was
15 the leading horse, the front runner in the ranking process that
16 that committee had adopted before the new bill comes in. Can we
17 consider House Bill 1971?

18 MR. JACOBS: I don't have a problem with the Court
19 considering that House bill or any House bills. I'm fine with
20 the Court considering whatever it likes on that, but it's not
21 our argument to restrict the evidence, Your Honor.

22 CHIEF JUDGE MARSHALL: With a pass if you need one --
23 I understand this is an odd question -- but how different is
24 that bill to what we have to what was done in the final adopted
25 plan on the Pulaski County issues? Right?

1 MR. JACOBS: Your Honor, you referenced House Bill
2 1471?

3 CHIEF JUDGE MARSHALL: 1971.

4 MR. JACOBS: 1971. So without having the attached map
5 in front of me, that would be difficult for me to go in.

6 CHIEF JUDGE MARSHALL: I understand. It's okay.

7 MR. JACOBS: I can look up the bill, but the bill
8 doesn't have the map attached to it in a readily available
9 format. It would take me a few minutes to find it, Your Honor.

10 I believe the Court asked about waiting on the *Alexander*
11 decision that's in front of the Supreme Court. We don't think
12 that that's necessary, although I would say that the vote
13 dilution argument that the plaintiffs make that a different
14 standard ought to apply to essentially gerrymandering claims
15 that are labeled vote dilution, which is at issue here, that is
16 before the court, the Supreme Court, in *Alexander*. To the
17 extent that the Court is hesitant to decide that or thinks that
18 it's outcome determinative, then perhaps waiting on *Alexander* to
19 come out would provide some direction on that. I'll say the
20 district court, the three-judge panel in South Carolina in
21 *Alexander*, considered the same vote dilution argument. And it
22 said that predominance under *Miller* was the appropriate standard
23 to apply to a challenge to a legislative reapportionment whether
24 it's called racial gerrymandering or vote dilution.

25 So we had a few questions about the plaintiffs' allegation

1 that Black Democratic voters in Pulaski County are treated
2 differently than white Democratic voters under the congressional
3 district. I'll note that there were a lot of numbers and
4 percentages in plaintiffs' complaint. There's a lot of hard
5 data.

6 When you go to this factual allegation, that isn't there.
7 What the allegation says in paragraph 189 is simply that white
8 Democratic voters were included in the redrawn Second
9 Congressional District at a, quote, notably higher rate than
10 Black Democratic voters. We don't know what that alleged
11 percentage is. Plaintiffs say they don't have to make that sort
12 of allegation here. Even if that's true, I think simply by
13 looking at the congressional map and where the border of
14 District 1 is to the east and District 4 is to the south and
15 where a split between District 2 and District 1 and District 4
16 is available, it is unsurprising that a split in that area could
17 have a disproportionate effect on Black voters in Pulaski
18 County. That's where the numbers are.

19 So if it is, in fact, true that there is a higher effect
20 for Black voters than white voters, the Court can see why that
21 is the case, because that's the demographic reality of where the
22 districts, where the preexisting district borders are. And
23 nothing about that impact leads to a plausible inference that
24 that was the motive behind the legislature's decision to draw
25 the split where they did. And, indeed, the Court can look and

1 see that there's at least a couple of precincts included that
2 were drawn out of District 4, very, very low Black population.
3 And there were more towards the center of Pulaski County
4 precincts that have very high Black populations that were left
5 in.

6 So, you know, the unstated disparate impact, to the extent
7 it exists, again, is also explained by the demographic reality
8 of Pulaski County. And it's not a plausible -- it does not give
9 rise to a plausible inference of discriminatory intent.

10 Just a couple of words on the argument that the legislators
11 who said -- the Republican legislators who said that they didn't
12 want to consider race, or maybe they thought it was
13 impermissible to consider race, I understand plaintiffs to claim
14 that they were making false statements when they said that as a
15 knowingly false statement, I guess, that they didn't think that
16 they could consider race. And the argument they make in their
17 brief on this is by citing to cases that say that it's proper
18 sometimes to consider race when redistricting for compliance
19 with the Voting Rights Act. Those are the only reasons that the
20 Supreme Court at least has ever said that race is a permissible
21 reason to consider in the redistricting context. The cases
22 discussing that are in Section 5 and Section 2, that you might
23 need to hit or think you might need to hit a racial target, to
24 get preclearance from the Department of Justice if you are under
25 Section 5 preclearance, or if you think that you are going to

1 get sued under Section 2 if you don't draw a majority-minority
2 district.

3 In those cases the Supreme Court has at least assumed that
4 it is permissible for legislatures to consider race. And that I
5 understand is plaintiffs' argument for saying, Well, these
6 legislators were making false statements. They knew it was
7 false because the Supreme Court has said you can consider race.

8 The problem with that is that Arkansas is not under
9 Section 5 preclearance. And nobody is arguing that you could
10 draw a majority-minority district out of District 2 or anywhere
11 else in Arkansas such that Section 2 would obligate the
12 legislature to consider race.

13 So when you consider that Arkansas did not have a Voting
14 Rights Act duty or even ability to rely on race in
15 redistricting, then I don't think it's a permissible inference
16 to simply say that the legislators were lying when they made
17 these statements. That goes against the presumptive of
18 legislative good faith. The Court made the point in its
19 decision in *Simpson* that you can't simply assume that
20 legislators were lying about their motives, which is essentially
21 what those allegations in the complaint ask the Court to do.

22 CHIEF JUDGE MARSHALL: I want to be sure I understand
23 your argument, Mr. Jacobs. Given the state of the legal world,
24 do you think that the legislators could not consider race in
25 drawing lines?

1 MR. JACOBS: That is not the argument that I'm making.
2 The argument that I'm making is that the state of the legal
3 world does not make it so that the Court can infer that
4 legislators were lying when they said that they believed that.

5 CHIEF JUDGE MARSHALL: I'm not sure you can have it
6 both ways. That is, if they could consider race as a matter of
7 law but they said, We can't consider race, then, granted, there
8 are lots of inferences that could be drawn from that. But why
9 isn't one reasonable inference, as your Brother Skocpol says,
10 that there's an intent to dissemble about what's going on?

11 MR. JACOBS: So I think the only permissible uses of
12 race, the only compelling interests of race, the only
13 compelling -- the only uses of race that amount to a compelling
14 interest in the reapportionment context that the Supreme Court
15 has identified is Voting Rights Act compliance. The Supreme
16 Court has never blessed any other reason for the use of race in
17 redistricting. So to the extent that Arkansas did not have a
18 need, an obligation under the Voting Rights Act to use race in
19 its congressional district, then it did not have a compelling
20 reason under the 14th Amendment to use race. So I think that
21 probably, no, the legislature wasn't permitted to consider race
22 in redrawing the congressional districts.

23 CHIEF JUDGE MARSHALL: Thanks for clarifying. I
24 interrupted you. Please go back to your grocery list.

25 MR. JACOBS: Unless the Court has any further

1 questions, I believe that's everything that I have.

2 CHIEF JUDGE MARSHALL: Thank you, Mr. Jacobs.

3 Thank you, Mr. Skocpol and all the lawyers that worked on
4 the papers.

5 The motion to dismiss the first amended complaint is
6 submitted. An opinion will issue in due course. We're in
7 recess.

8 (Proceedings adjourned at 10:28 a.m.)

9 REPORTER'S CERTIFICATE

10 I certify that the foregoing is a correct transcript from
11 the record of proceedings in the above-entitled matter.

12 /s/Elaine Hinson, RMR, CRR, CCR Date: December 20, 2023.
13 United States Court Reporter

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