No. 23-_____

In the Supreme Court of the United States

JACKIE WILLIAMS SIMPSON, ET AL.,

Appellants,

v.

JOHN THURSTON,
IN HIS OFFICIAL CAPACITY AS THE ARKANSAS SECRETARY OF STATE,

Appellee.

On Appeal from the United States District Court for the Eastern District of Arkansas

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

In 2021, the Arkansas General Assembly took the exceptional measure of splitting a community of 140,000 Blacks from a close-knit community in the southern border of the Second Congressional District in Pulaski County, Arkansas, into, not two, but three congressional districts, while simultaneously transferring the virtually all-White Cleburne County into the northern part of the Second Congressional District.

This was the only significant change in Arkansas's 2021 Redistricting Law, which was conceived in secrecy, adopted without explanation, and uniformly deplored by Arkansas Governor Asa Hutchinson and Little Rock City Mayor Frank Scott, Jr.

The bills were not prepared by legislative staff, and no explanation or justification for the configuration of the gerrymandered boundary was provided by the bills' sponsors. It served no obvious governmental purpose, and violated traditional redistricting guidelines. The sponsors of the bills refused to discuss anything about race during the Legislature's discussion of the bills, although other members pointed out the impact of the bills on the minority communities.

The Three-Judge District Court granted the State's Motions to Dismiss on the basis that the allegations of the Complaint, and an Amended Complaint, "fail to create a plausible inference that the legislature *as a whole* was imbued with racial motives." (App.3a, Memorandum and Order filed May 25, 2023, italics in original). The questions presented are:

1. Whether the District Court erred in finding that the Plaintiffs failed to allege facts that state a claim under the Equal Protection Clause of the Fourteenth

Amendment, the Fifteenth Amendment or Section 2 of the Voting Rights Act (52 U.S.C. §10301(a) and (b))?

2. Whether, under Section 2 of the Voting Rights Act, the District Court erred in requiring that the Plaintiffs allege facts that created a plausible inference that *intent*, rather than the *effect*, of the redistricting legislation, was necessary to be pled in order to state a claim?

3. Whether Plaintiffs, in a case solely challenging the "cracking" of Black voters from a larger Black community in their historic Congressional District into two other Congressional Districts, thereby diluting the voting strength of that Black community, must allege and prove the three prongs of this Court's decision in *Thornburg v. Gingles*, 478 U.S. 3, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986)

PARTIES TO THE PROCEEDINGS

The following were parties in the court below:

Appellants and Plaintiffs below:

- **Jackie Williams Simpson**, a Black citizen of Pulaski County, Arkansas, who was also a resident of and voter in the Second Congressional District of Arkansas, but is now a resident in the First Congressional District under the 2021 Redistricting Law.
- **Arkansas State Representative Denise Ennett**, a Black citizen of Pulaski County, Arkansas, and a State Representative whose district includes the southern portion of Pulaski County that, after the adoption of the Arkansas Redistricting Law of 2021, is now split among the First, Second and Fourth congressional districts.
- **Wanda King**, a Black citizen of Pulaski County, Arkansas, who, until adoption of the Arkansas Redistricting law of 2021, was also a resident of and voter in the Second Congressional District of Arkansas, but is now a resident in the First Congressional District under the 2021 Redistricting Law.
- **Charles E. Bolden**, a Black citizen of Pulaski County, Arkansas, who is a resident of the Second Congressional District, and an officer of Black-oriented civic organizations whose members have been split from the Second Congressional District to the First and Fourth Congressional Districts.

- **State Senator Linda Chesterfield**, a Black citizen of Pulaski County, Arkansas, and a State Senator who formerly lived in the Second Congressional District, but, as a result of the 2021 Redistricting Law, now lives in the Fourth Congressional District, and whose senatorial district now lies in the First, Second, and Fourth Congressional Districts.
- **Dr. Anika Whitfield**, a Black physician, citizen of Pulaski County, Arkansas, and a resident of the Second Congressional District. She is a member of Black-oriented organizations whose members have been moved from the Second Congressional District to the First and Fourth Districts by the 2021 Redistricting plan.

Appellee and Defendant below:

- **John Thurston**, who was at the time of filing suit and continues to be the duly elected and serving Secretary of State of Arkansas. Secretary Thurston is Arkansas's chief election official and is responsible for administering and overseeing the state's elections and implementing election laws and regulations, including Arkansas's congressional plan.

Other Defendants who the District Court dismissed in its Memorandum Opinion and Order of October 24, 2022, were:

- **Asa Hutchinson**, who, at the time of filing of the suit, was the duly elected and serving Governor of the State of Arkansas. He was named in his official capacity as Arkansas's chief executive official responsible for administering and enforcing the state's laws and Constitution, including those related to elections, and including the rights of citizens of the State to vote and to equal protection of the laws. He was dismissed as a Defendant on the basis that, as Governor, his role in elections was "too tenuous to allow a prospective injunction action to be brought against him." (Memorandum Opinion and Order of October 24, 2022, p. 15).
- **The State of Arkansas** was also dismissed as a Defendant in the same Opinion and Order, on the basis that it has sovereign immunity which Congress has not waived in the Voting Rights Act.

LIST OF PROCEEDINGS

U.S. District Court, Eastern District of Arkansas
(three-judge district court)

No. 4:22-cv-213

Jackie Williams Simpson, Et Al., Plaintiffs,
v. John Thurston, Et Al., Defendants.

Three-Judge panel:

Judge David R. Stras of the U.S. Court of Appeals Eighth Circuit, Chief District Judge D.P. Marshall, Jr., and District Judge James M. Moody, Jr.

Memorandum Opinion and Judgment: May 25, 2023

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

STATUTORY PROVISIONS

OTHER DOCUMENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

JUDICIAL RULES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

The Appellants, who are disenfranchised citizens of Pulaski County, Arkansas, respectfully request that the Court note probable jurisdiction or summarily reverse the judgment of the three-judge panel of the United States District Court for the Eastern District of Arkansas.

OPINIONS BELOW

The Three-Judge District Court's initial Memorandum Opinion and Order entered October 24, 2022, granting in part and denying in part the Defendants' Motion to Dismiss, but allowing the filing of an amended complaint is available at 2022 WL 14068633, and is reproduced at App.9a. The final Memorandum Opinion and Order of the District Court panel was entered on May 25, 2023; is available at 2023 WL 3993040, and is reproduced at App.1a.

JURISDICTION OF THIS COURT

The District Court entered its final Memorandum Opinion and Order on May 25, 2023. (App.1a). A Notice of Appeal was filed by Plaintiffs/Appellants on June 12, 2023. App.28a. This Court has jurisdiction under 28 U.S.C. § 1253.

This Jurisdictional Statement is filed within sixty (60) days of the filing of the Notice of Appeal as required by Supreme Court Rule 18, subpart 3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> **Section 1**. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . ; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The Fifteenth Amendment to the United States Constitution, which provides in relevant part:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

3. The Voting Rights Act (52 U.S.C. § 10301(a) and (b))

Due to the length of those provisions, the pertinent text is contained at App.27a to this Jurisdictional Statement.

STATEMENT OF THE CASE

A. Statement of Facts

In October 2021, both houses of the Arkansas General Assembly enacted identical bills reapportioning the state's four congressional districts (herein, the "Reapportionment Law", or simply "the Law"). In that Reapportionment Law, a group of some 21,000 Blacks and other minorities residing in several communities in southern Pulaski County, were extracted from the Second Congressional District and divided among the adjoining First and Fourth Districts.

The Redistricting Law is illustrated by a Redistricting Map showing "fingers" that surgically extended from the First and Fourth Districts into the southern portion of Pulaski County (Second District), wrapped around the largely-Black communities in question, and plucked them from the Second District to become appendages of the First and Fourth Districts. (See 2021 Redistricting Map, App.123a, 124a)

In the same Arkansas Reapportionment Law, in order to compensate for the Second District's loss of the 21,000 Blacks that were "cracked" into the First and Fourth Districts, the Legislature moved Cleburne County (located in north-central Arkansas) in its entirety from the First District into the Second District. Cleburne County has approximately the same population as the Blacks that were "cracked" out of the Second District, but its demographics are 96 percent White, 0.7 percent Black and 3.1% Hispanic. (U.S. Census Bureau, Julys 2022.) Cleburne County ranked 70th of Arkansas's 75 counties in the diversity of its pop-

ulation, according to the U.S. census, while Pulaski County ranked first in the diversity of its population.

The communities of Blacks and other minorities that were "cracked" into the First and Fourth Districts have long been located in the suburbs of Little Rock, Arkansas's capital city and largest metropolitan area, and are well-known. The citizens who live in those communities generally work in Little Rock or other parts of Pulaski County, and share common social, economic, political and other interests and concerns with other citizens of Pulaski County and the Second District, but not with those in the First and Fourth Districts. (See statements herein of State legislative representatives and senators excerpted from recorded legislative session on the Law.)

According to the 2020 census, Blacks constituted 36 percent of the total population of Pulaski County, and 22.6 percent of the Second Congressional District. However, Black candidates for the Second Congressional District office in 2016 and 2020 obtained a significantly larger vote than their percentage of population (App.135a), indicating that White voters in the Second District are willing to vote for a Black candidate for Congress. Ms. Dianne Curry, a Black resident of Little Rock and elected to the Little Rock School Board, was the Democratic nominee for Congress from the Second District in 2016, losing to the Republican incumbent by 58.3% to 36.8%[1] (App.135a). Four years later, Joyce Elliott, a Black schoolteacher in Pulaski County, former member of the Arkansas House of Representatives and current State Senator ran for the Second

[1] A Libertarian Party Candidate and two write-in candidates accounted for another five percent of the vote.

Congressional seat, losing to the incumbent by 55.4% to 44.6% (*Id.*), indicating a growing willingness of White citizens to vote for a Black candidate.

However, in the November 2022 Congressional election, using the Arkansas 2021 Reapportionment Law, the incumbent congressman's margin of victory was significantly higher (60.04%) over Ms. Quintessa Hathaway, a Black (35.26%) and a Libertarian candidate (4.70%). With the absence of the Black vote in the cracked precincts, the Reapportionment Law achieved its intended result.

By contrast to the Second District, the First and Fourth Congressional Districts of Arkansas are geographically larger districts that have little in common with the Second District. The First District is very large, covering the entire east half of Arkansas from Little Rock to the Mississippi River, and from Louisiana to Missouri. With few exceptions, the population centers of the First District tend to be scattered small towns of 10,000 or less. Agriculture is the primary industry in the First District, with thousands of farms ranging from a few acres to thousands of acres. With few exceptions, the Black population is scattered throughout the District.

The Fourth District is also large, covering much of the southern and western portion of the State from central Arkansas to the borders of Louisiana, Texas and Oklahoma. Its primary industries are timber farming and milling, with thousands of acres of prime forestland, and mineral extraction (oil and gas production). As with the First District, the population centers in the Fourth District tend to be scattered small towns of 10,000 or less, none of which are near the areas "cracked" from the First District. Again, with

few exceptions, the Black population is widely scattered throughout the Fourth District.

Oddly enough, considering the unusual configuration of the gerrymandered portion of the Second District, there was no reason provided during the legislative action on the reapportionment bills for this radical surgery on the Second District, other than the need to achieve population balance among the districts. However, numerous congressional maps can be drawn to achieve that population balance without the splitting of counties or reassignment between districts of large segments of minority populations. Instead, the configuration of the gerrymandered part of District 2, and the circumstances surrounding the adoption of the Reapportionment Act raise legitimate concerns – indeed, a "plausible inference" that the motivation for the Act was racially-based.

As will be discussed in subsequent sections of this document, there was very little debate in the Arkansas legislature during the enactment of the reapportionment law. No rationale or explanation for the "carving out" of the areas of southern Pulaski County into Congressional Districts One and Four was provided by the sponsors of the bills or the General Assembly. Other reapportionment bills that had been introduced that did not split the heavily Black populated areas of Congressional District Two, and that accomplished the population goals, were not even discussed.

Many of the members of the Legislature attempted to persuade the majority's leadership to acknowledge the racial impacts of the proposed Reapportionment Law, but to no avail. The Legislature's leadership would not discuss race or explain why the gerrymandered

area in the Second District was drawn so irregularly. However, for the minority members of the Legislature, no explanation was necessary. to quote Representative Monte Hodges, a Black, for example, who stated before the House Committee (App.62a):

> We all know what's going on here. It's no secret. Southeast Pulaski County is being split into three different congressional districts. Before we came down here to draw these maps, we all knew who lived in the southeast quarter of Pulaski County. We all knew who lived in south Little Rock, Rose City, Wrightsville and College Station. It's people who look like me.

B. Case History

The Complaint was filed in the United States District Court for the Eastern District of Arkansas on March 7, 2022. Plaintiffs invoked jurisdiction pursuant to 28 U.S.C. § 1343(a)(4); 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 1331 (Federal Question), and 1357. In addition, Plaintiffs invoked jurisdiction to grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

Pursuant to 28 U.S.C. § 2284, a Three-Judge Panel was appointed to hear the case by the Chief Judge of the United States Court of Appeals on March 29, 2022. The Panel consisted of Judge David R. Stras of the U.S. Court of Appeals Eighth Circuit, Chief District Judge D.P. Marshall, Jr., and District Judge James M. Moody, Jr.

A Motion to Dismiss the Complaint and accompanying Brief were filed by the Defendants on April 12, 2022. A Response to the Motion to Dismiss

and accompanying Brief were filed by the Plaintiffs on May 9, 2022.

A hearing was held on the Motion to Dismiss before the Three-Judge Panel on June 6, 2022. The District Court, in its initial Memorandum and Order entered October 24, 2022, found that the vote-dilution claims are the centerpiece of the complaint, and that such claims have long required a showing of "discriminatory purpose," *i.e.*, the complaint must contain facts that plausibly show, either directly or indirectly, that (i) Arkansas's General Assembly acted with that purpose in mind; and (ii) that race must be the "predominant factor." (App.9a Order 10/24/22) The Panel found that the Complaint failed to show facts plausibly showing that race motivated the General Assembly's decision or that it was the predominant factor behind it. Thus, the Panel granted in part the Defendants' Motion to Dismiss, but allowed the filing of an amended complaint by the Plaintiffs on Counts IV (Equal Protection Clause, 14th Amendment); V (15th Amendment) and VI (Voting Rights Act, Section 2) (*Id.*, App.15a).

Pursuant to the District Court's Order of October 24, 2022 ("the 2022 Order") (App.9a), the Plaintiffs filed a First Amended Complaint on December 12, 2022 (App.31a). The Defendant filed a Motion to Dismiss the Amended Complaint, and on May 25, 2023, the District Court entered its second and final Memorandum and Order dismissing the First Amended Complaint in its entirety. (App.1a) The reasons for dismissal contained in those Memoranda and Orders are the subject of this appeal.

REASONS FOR NOTING PROBABLE JURISDICTION OR SUMMARY REVERSAL

I. THE DISTRICT COURT ERRED IN FINDING THAT THE PLAINTIFFS FAILED TO ALLEGE FACTS THAT STATE A CLAIM UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, THE FIFTEENTH AMENDMENT OR SECTION 2 OF THE VOTING RIGHTS ACT (52 U.S.C. § 10301(A) AND (B)

A. The Standard of the District Court's Review of the Motion to Dismiss

In its Order of October 24, 2022 (App.9a), the District Court set out the standard by which it would review the allegations of the Complaint. That standard followed this Court's opinion in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007) and the Court's subsequent opinion in *Ashcroft v. Iqbal*, 556, U.S. 662, 681 (2009) holding that, although detailed allegations are not required to survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* The plausi-

bility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid*.

This Court has also held that, in evaluating a Motion to Dismiss a complaint under Federal Rule of Civil Procedure 12(b), the Court accepts as true all factual allegations in the complaint in the light most favorable to the nonmoving party. However, the Court need not accept as true a plaintiff's conclusory allegations or legal conclusions drawn from the facts. Wright and Miller, FEDERAL PRACTICE 2nd (1990), Note 3, Sec. 1359 at 311-318; *Cooper v. Pate,* 378 U.S. 546, 84 S.C. 1733 (1964).

There is a delicate balance to be achieved in accepting as true all factual allegations in the complaint in the light most favorable to the nonmoving party, and also determining whether the complaint alleges factual content allowing the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. Reasonable judges can differ on such determinations.

Recognizing that to be the case, Plaintiffs respectfully submit that, in evaluating the sufficiency of the Amended Complaint to overcome the Defendant's Motion to Dismiss, the District Court crossed the line between requiring the Plaintiffs to *plead allegations* of wrongdoing with "facial plausibility" and instead required *proof of wrongdoing*. We will review some of the allegations of that First Amended Complaint and the District Court's opinion as to their sufficiency.

B. The District Court Failed to Attribute Any Significance to the Irregular Boundary Lines that were Drawn to Achieve the Cracking of the Black Citizens

Unusual configurations of congressional district boundaries such as that presented by the Arkansas Reapportionment Law have been found by this Court to be sufficient to state a claim for racial discrimination sufficient to enable the plaintiffs to proceed with discovery. *See*, *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511(1993) ("[A] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.") *See also*, *Miller v. Johnson,* 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Allen v. Milligan*, 599 U.S. ___, 143 S.Ct. 1487 (2023); *Shaw v. Hunt,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) ("The plaintiff bears the burden of proving the race-based motive and may do so either through "circumstantial evidence of a district's shape and demographics" or through 'more direct evidence going to legislative purpose." *Miller, supra*, at 916, 115 S.Ct., at 2488.)

A look at the Arkansas 2021 Reapportionment Map (App.124a, 125a) clearly indicates that the two extrusions – one from the First Congressional District on the east, and the other from the Fourth Congressional District on the south into the Second District to extract the 21,000 Blacks – were not customary and legitimate demarcations of geographic areas following

generally accepted criteria for setting of boundaries to achieve population balance, but were carefully crafted and drawn in order to pluck out only certain areas known to have a heavy concentration of Blacks.

The Amended Complaint specifically alleges that the redistricting Bills, and their accompanying map, achieves the "cracking" of over 21,000 Blacks from the Second to the First and Fourth Districts by the creation of irregular and exceptional intrusions from the First and Fourth Districts into the Second District that have no expressed or apparent purpose other than to divide the voting power of the Black community in the Second District. Those allegations are (App.53a):

> 54. A legislative body does not accidentally and randomly adopt a reapportionment law that, with such surgical precision, extends two "fingers" of irregular configuration into a congressional district, and extracts fourteen (14) precincts occupied by long-established neighborhoods containing a large minority population with commonly-known interests and history of voting for Blacks or other candidates favoring Black interests, and extract (crack) them to two adjoining congressional districts with completely different interests, where their votes will be diluted and ineffectual. As Isaac Bashevis Singer, a 1978 Nobel laureate for literature, observed: "We know what a person thinks, not when he tells us what he thinks, but by his actions."
>
> 55. Attached to this Complaint as Exhibit No. 4 is a chart showing that three (3) precincts with 4,958 Black and 2,884 White voters were moved by the Acts from the

> Second District to the First District, and that eleven (11) precincts with 16,301 Black and 8,236 White voters were moved from the Second District to the Fourth District.
>
> 56. Furthermore, to ensure that the removal of some 21,000 Black voters from the Second District would result in the election of the incumbent White Congressman, the Acts adjusted for the loss of that 21,000 Black voters by transferring approximately 24,000 persons from Cleburne County, formerly in the First District, into the Second District's extreme northern border.

It is noteworthy that the District Court did not mention in either of their two Opinions, let alone attempt to explain, the unusual shapes of the two protrusions from the First and Fourth Districts into the Second District. Nor did the District Court consider the significance of the transfer of Cleburne County – with its 96% White population – into the Second District to offset the loss of the 22,000 Blacks and other minorities. When some 21,000 Blacks and other minorities are moved out of one part of a congressional district and, at the same time, about an equal number of Whites are moved into another part of that district, it is, in some parts of the United States, impossible to ignore the probability that race – indeed, racial discrimination – had something to do with it.

Shaw and its progeny also provide that the courts can consider, not only the extraordinary shape of a new congressional district to determine whether racial discrimination may be present, but also other circumstantial evidence. If the irregular and inexplicable shape of the boundary lines that cracked the

Black community in Pulaski County between the First and Fourth Districts, and the simultaneous importation of Cleburne County from the First District into the Second District with approximately the same number of Whites are not enough evidence of discriminatory intent, there is other circumstantial evidence pled in the Amended Complaint and discussed herein that leads to the inescapable conclusion that the majority of the Arkansas Legislature was attempting to accomplish a purpose that they knew was unconstitutional, and which they, therefore, shrouded in secrecy.

C. The District Court Erred in Failing to Adequately Consider Statements of Legislators Showing Legislative Intent to Improperly Redistrict Based On Race

The Amended Complaint added numerous specific facts (including excerpts of verbatim quotations) of legislators who ramrodded the reapportionment law through the Arkansas General Assembly in two days' time, virtually without debate or explanation of its provisions.

Those facts demonstrate that the complete lack of explanation or discussion by the legislative leaders on the purpose of or necessity for the gerrymandering of the 21,000 Blacks from the Second District was attributable – not to their lack of racially discriminatory purpose – but to their desire to avoid discussion of race altogether in an effort to hide that purpose, including avoiding any discussion of the obvious impact that the Bills would have on the minorities in the affected areas. The apparent strategy of frequently disclaiming consideration of race in the reapportion-

ment discussions was to avoid talking about something that they were nevertheless doing.

The District Court's May 25, 2023 Order briefly reviewed the extensive excerpts of dialogue of the legislators contained in the Amended Complaint regarding race being an issue in the reapportionment Bills, but the District Court dismissed that dialogue as showing no racial motivation by the legislative leaders, stating "The problem is that they [the quoted statements of legislators in the Amended Complaint] mostly contradict the inferences of racial discrimination the plaintiffs ask us to draw." (App.2a-3a)

To support that finding, the Opinion quotes one of the Bills' sponsors as saying "I don't think we've looked at maps at all across the state to decide whether something was African-American or white or whatever the case may be." And further, the Opinion quotes "the statement of another legislator, a committee chair, who declared that the General Assembly was not 'using racial demographics to draw maps.'" (*Id.*, App.3a) The District Court's acceptance at face value of those disclaimers by the Bills' sponsor and the chairman of the committee reviewing the legislation, without putting those statements in a context, is, with all due respect, naïve.

The context of those statements by Senator English (one of the Bills' sponsors) and Senator Rapert (chair of the Senate Committee with jurisdiction over the Bills) is that they are deliberately oblivious responses to pointed questions or statements from other legislators about the highly discriminatory impact of the proposed Reapportionment Law on Blacks. The Amended Complaint alleges that, in that context, Senators English, Rapert and other legislative leaders

were disclaiming considerations of race under the belief that such disclaimers would prohibit a court from voiding the reapportionment bill.

Put in context, it becomes apparent that the intent of the Reapportionment Law was to dilute the concentration of Black voters in District 2, and that Senators English and Rapert were deliberately avoiding discussing race. The following paragraphs from the Amended Complaint, and the contemporaneous statements of other various Representatives and Senators show that the racial intent of the Bills was brought up frequently, and was ignored or deflected by Senators English and Rapert (App.51a):

> 49. Senator English and other members of the leadership in the Legislature anticipated litigation over this redistricting plan, and were aware of the argument that lack of intent to racially jerrymander – may be a potential defense. As a result, they claimed that they deliberately failed to consider the impact of their actions on minority race voters. They claimed to ignore race, believing that by doing so, a redistricting plan could not be overturned regardless of the impact on an affected minority. That majority also refused to even discuss race as a factor in determining a reapportionment plan, notwithstanding that it is a legitimate and legal factor for consideration, and efforts of other legislators – particularly Black legislators – to discuss that factor.
>
> 50. During the October 6 discussion of the New Map in the Senate Committee, Senator Clarke Tucker (Pulaski County) pointed out

that, according to the Bureau of Legislative Research, the portions of Pulaski County being cracked from the Second to the First District were composed of 34 percent white, 58 percent Black, and 4 percent Hispanic, and those cracked from the Second to the Fourth District were 30 percent white, 46 percent Black and 22 percent Hispanic. The Bill's sponsor, Sen. Jane English, replied that "I don't think we've looked at any maps at all across the state to decide whether something was African-American or white or whatever the case may be."

51. That claim of not having given any consideration to the impact of the redistricting on Blacks and other minority voters, voting blocks, or communities of common interest, was echoed frequently by Senator Jason Rapert, Chairman of the Senate Committee on State Agencies and Government Affairs. For example, in response to comments being made and questions asked by Senator Tucker regarding the racial "cracking" of Second District minority communities between the First, Second and Fourth Districts during the Senate Committee meeting on the afternoon of Tuesday, October 5, 2021, Senator Rapert stated:

> Senator Tucker, we said it many times – we're not using racial demographics to draw maps, so if you're going to always revert back to discussion of that, you're *de facto* using racial demographics to draw maps.

The District Court, in finding that these statements of the legislative leaders were innocuous, completely overlooked or discounted the statements of opponents of the Bills to which those leaders were responding and that are included in the Amended Complaint. Plaintiffs will show herein that, during the discussion that occurred on these bills, the Bills' opponents – both Black and White – uniformly pointed out that (i) the effect of the bills would be to "crack" a substantial number of Blacks from their close-knit neighborhoods in the Second District into the First and Fourth Districts, where their effectiveness as a cohesive force for advocacy of their interests would be diminished; and (ii) that the failure of the White legislative leaders to discuss race meant, in reality, that the bills were all about race.

Paragraph 65 of the Amended Complaint (App. 58a) contains statements of members of the Arkansas Legislature recorded during sessions of the Arkansas House and Senate considering the Reapportionment Bills. The following are excerpts of those statements (all italics added):

House Session
Oct. 6, 2021

Rep. Jamie Scott [a Black]: Colleagues, today I'm asking that we look beyond intent, that we look at the impact of what we do here. The impact is not unclear; it is not unknown. We know what these maps do. . . . .

> This map cuts and distorts Pulaski County into three congressional districts. . . . *We have a choice in this body. We will see the racial impacts for what they are or we will ignore*

them, because it's very convenient for us to do so. Well, that's a choice for each of you, but I urge you to reconsider and do the right thing.

Rep. Fred Love [a Black]: [W]henever you talk about race it really goes to the core. . . . First, *nobody wants to be intentionally accused of actually disenfranchising or doing anything for race*, but, as Representative Scott said and as Representative Ennett said, *you cannot ignore what's going on here. If we would just take a step back and look at the communities that this map is impacting, you would see the disparate impact*, and you would know that race cannot be ignored when you look at this.

I ask you just take a step back and look at this map and truly understand that this is impacting real communities. They're real African-American communities. Let's go back to the drawing board and do better.

Rep. Joy Springer [a Black]: *The districts have been manipulated based solely on race*. . . . So the record is clear. This is a clear case of gerrymandering based upon race.

Rep. Megan Godfrey [a White]: I represent a racially and ethnically diverse legislative district and, as a white representative, that's a responsibility I take very seriously.

We continue to hear that *the communities of color and Arkansas will be hurt by this map*. Therefore, I will be voting no, even though it won't impact my own community in

> northwest Arkansas. What matters to me and what should matter to all of us more than the narrow interests of our own districts in our own politics and our own limited experiences is that all Arkansas voices be taken seriously.

Rep. Monte Hodges [a Black]: I'm going to talk about *race*. I'm going to talk about reality, and racism is reality. . . . This is about lives. This is about people. This is about doing the right thing.

> We all know what's going on here. It's no secret. Southeast Pulaski County is being split into *three* different congressional districts. *Before we came down here to draw these maps, we all knew who lived in the southeast corner of Pulaski County. We all knew who lived in south Little Rock, Rose City, Wrightsville and College Station.* It's people who look like me . . . .
>
> [T]he precincts that this map moves to the First and Fourth districts are 65% and 70% nonwhite respectively. This means that *neighbors, churchgoers, classmates and co-workers living in the same communities are going to have completely different representation*. I live in Blytheville, Mississippi County. I can tell you we don't need the same things that people in Rose City do. This map completely ignores their needs.

Rep. Nicole Clowney [a Black]: We had a colleague earlier stand up here and say that he was tired of racism being injected—allegations of racism—being injected into this debate. I actually hadn't heard anybody make allegations of racism. I heard us talking about race . . . .

Representative Tollett stood down here and talked about the importance of keeping row-crop farmers together, condensing their political power. Representative Pilkington did the same thing. That is what we all do. We want folks who have the same interests to be kept together.

I am sorry that conversations about race may feel inconvenient to some members of this body, but I guarantee you that *the impacts of race and racism are even worse for our colleagues of color* . . . .

Rep. Tippi McCullough [a White]: None of us wanted our county split up. I think we're better than this. None of us want our city split up. I think we did have maps and I think we could have maps that achieve all of those goals, that work out for the best for all of us.

Often when we hear that something's not about race, it's about race. I just suggest that we listen to the folks who know what they're talking about. Thank you.

House of Representatives General Session
October 7, 2021

Rep. Fred Love [a Black]: This map adversely impacts African **Americans**.

> I did not know that my house was drawn into the Fourth Congressional District. *If we were talking about communities that have likenesses and share likenesses, parts of Little Rock do not belong in the Fourth Congressional District. The interests are totally different.*

Senate General Session
October 7, 2021

Sen. Joyce Elliott [a Black]: [W]e've heard a great deal about . . . the issue of race. People who are listening and people in this body need to be very, very clear that just as we deliberately—deliberately as we should—consider the other criteria, we absolutely can and should do consider race as a part of what we're doing.

> *For us to continue to hide behind the guise of "I don't know anything about racial impact—I don't know anything about it all" says "we don't want to deal with it*." It is not racism to ask us to think about this. The courts have deliberately said that we can and we should. I want you to understand that. However you vote is how you vote, but I do not want this notion to continue that

we don't have the right to do this. We have been very clear and very comfortable about considering every other criteria. This is one of them. Thank you.

Sen. Clarke Tucker (Pulaski County) [a White]: [T]he way this bill has been presented in committee and on the floor is that the First District had lost population and the Second District had gained population. Then *why would it make sense to take an entire county, Cleburne County, out of the First District and put it into the Second District*?

The answer seems fairly obvious to me, and that's to account for the portion of Pulaski County that's being moved from the Second District into the First District and, of course, we know that a portion of Pulaski County is also being moved from the Second into the Fourth.

They're separated from the majority of their county. They're isolated in that way. They're a small piece of the county isolated from the rest of the congressional district, so they're left on their own to fend for themselves. . . . Not every project that we do, but on a lot of projects we work with members of Congress to make sure that they get done in the best way possible. When we have three congressional districts, it's going to make that process more complicated and more cumbersome.

So I believe this map hurts Pulaski County as a whole, but it hurts even more the portions that are being split off into the First

> and Fourth congressional districts. And all for what?
>
> **Sen. Linda Chesterfield (Pulaski County) [a Black and a Plaintiff herein]**:I know surely the fact that in the last congressional race in the Second Congressional District a black woman launched a credible race against the incumbent. How dare she? How dare the folks in my Senate district support her overwhelmingly. How dare they be proud to see someone who looks like them and has a history like theirs vie for one of the highest positions in this country. How dare they want their state to join the other former Confederate states in having black representation. *That desire and that hope is being squashed here today by the map that you are presenting for our consideration. The state Senate district I represent is being punished—punished for being majority black and Hispanic, punished for being Democratic*. . . . So we're going to make sure that the Senate district I represent in Pulaski County has its voice diminished.

These excerpts of statements of members of the Arkansas General Assembly recorded during consideration of the Bills shows that the Amended Complaint alleges facts sufficient to show with "facial plausibility" that racial discrimination was, whether admitted by the legislative leaders or not, a predominant factor in the adoption of that bill.

This Court and numerous other Federal courts have frequently acknowledged that outright admissions of impermissible racial motivation in redistricting cases are infrequent, and thus racial motivation is difficult to prove. That is because, their actions to the

contrary, no legislator likes being exposed as, referred to or thought of as a racist. Notwithstanding the majority of the Arkansas General Assembly's refusal to discuss the racial composition of the various districts, the fact that race was a motivation in the "cracking" of the 22,000 Blacks from the Second District to the First and Fourth Districts was voiced by members in the Arkansas General Assembly House and Senate – of both races – during the debate on the Bills, and no dispute of or response to those objections was heard.

When the two identical Redistricting Bills reached the desk of Governor Asa Hutchinson, he announced that he refused to sign them into law because he had serious reservations that the changes made in the Bills violated the constitutional rights of the persons who were "cracked" from the Second District, stating (App.74a):

> I am concerned about the impact of the redistricting plan on minority populations. While the percentage of minority populations for three of the four congressional districts do not differ that much from the current percentages, the removal of minority areas in Pulaski County into two different congressional districts does raise concerns.

Nevertheless, in deference to the legislators who sponsored and voted for the bills, he stated that he would allow them to become law without his signature rather than vetoing them, stating: "This will enable those who wish to challenge the redistricting plan in court to do so."

The Hon. Frank Scott, two-term Mayor of the City of Little Rock, and a Black – further evidence of

the electability of Black citizens in central Arkansas – was very insightful in his criticism of the "cracking" of the Black voters from the Second District to the First and Fourth Districts, stating (App.75a):

> I am deeply concerned about the gerrymandering along racial lines happening in our community, which was designed to dilute the voices of the residents of Little Rock. This plan sent to the Governor today for his signature separates the communities south of I-30 from the rest of the city, and those neighborhoods are predominantly Black and Hispanic. It is essential that we respect communities of interest in districting, and there is no more fundamental community of interest than a city like Little Rock. Additionally, it is illogical to split Arkansas' capital city into two congressional districts. I am hopeful our state's judicial system will correct this flawed attempt at redrawing the boundaries." (Italics added)

The District Court noted these statements of then-Governor Hutchinson and Mayor Scott in its October 24, 2022 Opinion (App.9a, 14a), but discounted their importance, stating:

> Absent, however, are allegations that either one worked with the General Assembly on reapportionment or otherwise knew why it selected one map over the others. And even if they had knowledge, the deeper difficulty is that both spoke about the map's effects, not the purpose behind it. [Compl. ¶¶29, 39]. So, at most, these statements show a racial impact, not a racial purpose.

Mayor Scott affirmatively stated that "the gerrymandering along racial lines . . . was *designed* to dilute the voices of the residents of Little Rock." (Italics added) Mayor Scott may have information available to the Plaintiffs through discovery regarding the manner in which the reapportionment law was "designed" to dilute the Black vote in Pulaski County. Thus, the District Court erred in its dismissal of the statements of Governor Hutchinson and Mayor Scott as irrelevant.

In discounting the statements of Gov. Hutchinson and Mayor Scott – two officials who, because of their offices, maintain close connections with the members of the Arkansas General Assembly and its deliberations – the District Court ignored the plain language of those statements as possible evidence of intent, and imposed a far greater burden on the Plaintiffs than simply alleging facts that state a claim with facial plausibility. Instead of accepting the allegations of the Complaint and First Amended Complaint as true, the District Court evaluated the allegations in the Complaint and Amended Complaint for veracity.

D. The District Court Erred in Considering Only Intent and Not Effect of The Legislation

The District Court's conclusion that the statements discussed above "show a racial impact, not a racial purpose" ignores the fact that evidence of one's intent or purpose may be shown through the effects of one's acts. *See*, *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449, 464, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979) in which this Court stated:

> [A]ctions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose. . . . Adherence to a particular policy or practice, "with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.

While the *Penick* case cited above involved the use of foreseeable impact to show a discriminatory intent in school desegregation, the principle announced by the Court is no less applicable to or appropriate for voter discrimination cases. No legitimate governmental purpose for the gerrymandering of the Second District is apparent or was offered by the promoters of the Law, and the foreseeable and anticipated impact of the gerrymandering strongly lends itself to imputation of that result having been intended by those promotors.

E. The District Court Erred in Dismissing the Plaintiffs' Voting Rights Act Claim (52 U.S.C. § 10301(a))

Aside from the dismissal of the two constitutional claims under Amendments 14 and 15, the District Court erred in dismissing the Voting Rights Act claim on the basis that Plaintiffs failed to sufficiently allege discriminatory intent (which Plaintiffs also claim was erroneous as argued above).

Section 2 of the Voting Rights Act (App.27a)– the statutory claim in Plaintiffs' Amended Complaint

– was amended in 1982 to prohibit the enforcement of any "standard, practice, or procedure" that "results in a denial or abridgement of the rightof any citizen of the United States to vote on account of race or color, or" membership in a racial or language minority group. 52 U.S.C. § 10301(a) (Underlining added). Thus, Section 2 of the VRA creates a "results" test, rather than an "intent" test.

The Amended Complaint in this case alleges that the 2021 Arkansas Reapportionment Law is a standard, practice or procedure that is an "abridgement" – a limitation or restriction – of the right to vote on account of race, as prohibited by the VRA. There is nothing in the VRA that requires an allegation or evidence of *intent* to create or perpetuate such abridgment.

Plaintiffs are aware of the decision of this Court in *Thornberg v. Gingles*, 478 U.S. 30, 478 U. S. 30 (1986) and following decisions, *Growe v. Edmison*, 507 U.S. 25 (1993), *Johnson v. De Grandy*, 512 U.S. 997 (1994), *Bartlett v. Strickland*, 556 U.S. 1 (2009), and *Allen v. Milligan*, 599 U.S. ____, 193 S. Ct. 1487 (June 8, 2023) in which this Court found that the three "preconditions" (the *Gingles* Factors") must be met.

The first of those preconditions is that the racial minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district. Plaintiffs further acknowledge that the racial minority group who are involved in this case cannot meet that precondition in Arkansas Congressional District 2, or in a district that might be reasonably drawn upon current minority populations and their distributions.

Plaintiffs, however, question the applicability of the *Gingles* factors to this case. Plaintiffs are attempting to preserve their status quo, which is a racial presence in the Second District that is growing in size and influence, and, given time and the demonstrated willingness of White voters to cast their ballots for qualified Black candidates, will eventually be capable of electing candidates and passing issues of their preference. This presents a dilemma in which the Arkansas reapportionment law has abridged the voting strength of the Black community in District 2, but the Black community cannot rely upon the VRA because of judicially-imposed restrictions not contained in the VPA.

Plaintiffs are also aware that those preconditions, while cited in numerous cases are also highly controversial and frequently criticized. *See*, *Gingles in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims*, NYU L.R., April 2005, 312. The issue of constitutional significance of vote dilution claims remains unresolved. *See Growe v. Emision*, 507 U.S 25, 41 (1993) at Note 5: "*Gingles* expressly declined to resolve whether, when a plaintiff alleges that a voting practice or procedure impairs a minority's ability to influence, rather than alter election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice . . . We do not reach that question in the present case either: Although the Emison plaintiffs alleged both vote dilution and minimization of vote influence (in the 1983 plan), the District Court considered only the former issue in reviewing the state court's plan."

Justice O'Connor addressed those issues in her concurrence in *Gingles* and in *Growe v. Emison*, 507 U.S. 25 (1993).

Justice Brennan, writing in *Gingles,* focused on elections and clear victories. He differentiated between dilution of the vote by creation of multi-member districts as a form of vote dilution, which can impair a numerically sufficient minority block's ability to elect the representatives of their choice, and a claim brought by a minority group that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to influence elections.

Justice O'Connor, concurring in the judgment, takes a more nuanced approach to vote dilution. Justice O'Connor considered reapportionment on a broader scale, beyond simple electoral victories. She urged an inquiry that looked beyond the outcome of the general election in a particular district and concluded that the newly created *Gingles* test was one too strict.

> [I]f a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, the minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice. *Gingles*, *supra*, 106, at note 2/11.

This same vision of politics, focusing on the distinction between ability to influence and the ability to elect, has found forceful expression in Justice O'Connor's majority opinion in *Georgia v. Ashcroft*, 539 U.S. 461 (2003) discussing coalition districts. She also emphasized the myriad ways in which individuals can impact the electoral process without winning the election outright.

Plaintiffs submit that the circumstantial evidence alleged in this case gives rise to the inference that Plaintiffs were targeted because of their race because of the strong showing of Blacks, Dianne Curry and Joyce Elliott, against the incumbent U.S. Representative, French Hill, because of their ability to forge a coalitions that crossed racial lines, and thus were segregated by reapportionment to the hinterlands of the First and Fourth congressional districts in order to dilute their influence in future elections. Granting the Motion to Dismiss in this case deprived them effectively of participation in the pull, haul, and drag of the political system.

To not apply the VRA to Plaintiffs claims in this case is to nullify reliance upon the VRA in all but a few cases with limited factual circumstances. Yet, the VRA does not contain such preconditions. They are judicially imposed. The Court has not simply interpreted the VRA, it has rewritten it, and in the process, much confusion has resulted concerning the law of voting rights and reapportionment. The Court should revisit whether those preconditions should be reinterpreted in this clear case of voter dilution.

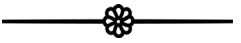
F. The Burden on Plaintiffs at the Pleading Stage of Voting Rights Cases Should Be Less Rigid than in Other Cases

As noted above, this Court and others have long recognized that reapportionment and other voting rights cases often involve secretive or nefarious efforts and methods by legislators to deprive minorities of their equal opportunity to vote or elect their preferred candidates. For that reason, the burden on the plaintiffs at the initial pleading stage of such a case should be reduced to allow for discovery to flesh out inferences of wrongdoing.

A classic example of a "relaxed" early pleading standard In cases where the facts (such as intent) are difficult to gain without the aid of discovery is the standard in employment discrimination cases, as exemplified by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *McDonnell Douglas* held that, in suits alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and related statutes, until the defendant furnishes a non-discriminatory reason for the adverse action it took against the plaintiff, the plaintiff needs to present only minimal evidence supporting an inference of discrimination in order to prevail. Ultimately, the plaintiff will be required to prove that the employer-defendant acted with discriminatory motivation. However, in the first phase of the case, the *prima facie* requirements are relaxed.

The rationale for this exception Is that fairness requires that the plaintiff be protected from early-stage dismissal for lack of evidence demonstrating the employer's discriminatory motivation before the

employer set forth its reasons for the adverse action it took against the plaintiff. That reasoning is equally applicable to reapportionment and voting rights discrimination cases, and the "relaxed" early pleading standard should be adopted for them.



CONCLUSION

The District Court erred in finding that the Plaintiffs failed to allege facts stating claims against the Defendant by:

1. Failing to give consideration to the irregular and inexplicable configuration of the intrusions into the Second District from the First and Fourth Districts by which over 20,000 Blacks in the Second District were "cracked" to the First and Fourth Districts, as allowed by *Shaw v. Reno*, *supra*.

2. Failing to give adequate and correct consideration to the statements of members of the Arkansas General Assembly supporting a "plausible inference" that the majority of the General Assembly was motivated by racial considerations in adopting the Reapportionment Law; and

3. Considering only the intent of the Legislature, but not the impact of the legislation on the affected Black population.

The burden on the Plaintiffs to allege intent, if required, should be less at the early pleading stage of the litigation in order to allow the Plaintiffs to gain

the benefit of discovery. Finally, the Court should determine that the *Gingles* Factors do not apply to the facts presented in this case.

The Order of the District Court of May 25, 2023, dismissing Counts IV through VI of the Amended Complaint, should be summarily reversed, or the Court note probable jurisdiction.

Respectfully submitted,

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