No. 23-138

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**

## MOTION TO AFFIRM


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## QUESTIONS PRESENTED

1. Whether this Court should affirm the three-judge district court's unanimous decision that Plaintiffs' complaint failed to plausibly state a claim that Arkansas's congressional redistricting was predominantly motivated by race?

2. Whether this Court should overrule *Bartlett v. Strickland* and allow a Section 2 claim to proceed where Plaintiffs concede they cannot show a minority population sufficiently large and geographically compact enough to constitute a majority in a single-member district, but instead argue for the maintenance of a district's current population demographics based on a prediction that it could in the future become a crossover district?

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## INTRODUCTION

Following the 2020 Census, the Arkansas General Assembly was tasked with redrawing the State's congressional districts. The General Assembly ultimately settled on fairly minor changes designed to rebalance the State's population across Arkansas's four districts, create more compact districts, and reduce the number of counties split between districts.

To achieve that result, the legislature took advantage of the fact that Arkansas's most populous county, Pulaski County, is located in the middle of the State. That county has historically been located entirely within District 2, but in the previous congressional map it shared a border with two underpopulated districts, Districts 1 and 4. So to rebalance the population between those districts (and overpopulated District 3), the General Assembly turned to Pulaski County and split the southeastern corner of the county—which bordered Districts 1 and 4—between Districts 1, 2, and 4. That avoided the need to split additional counties elsewhere and ultimately reduced the overall number of county splits across Arkansas from five to two. It also avoided the need to draw oddly shaped districts, like the upside-down U-shape that had defined the previous map.

Below, Plaintiffs acknowledged those motives drove the legislature's mapping decisions. But they also alleged two other motives. First, they alleged that Arkansas Republicans, having a majority for the first time since Reconstruction, wanted to increase their political advantage in District 2 beyond incumbent Republican Representative French Hill's double-digit victory in 2020. Pulaski County is one of the few Democratic strongholds in Arkansas and splitting its residents

(even the relatively small number involved here) among three districts would reduce its electoral impact.

Second, Plaintiffs alleged that the Republican majority's real purpose was not simply to increase the party's performance, but to reduce the voting power of black Arkansans. As support, they cited the argument of map opponents in the legislature that a majority (if barely) of southeastern Pulaski County residents moved to another district were black and that moving them would have an unfair racial impact. And they alleged that the legislators who supported the map were simply lying when they said that they had not considered race in developing the map.

Plaintiffs sued claiming that the new congressional map violated the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act. After giving Plaintiffs a chance to fix the defects in their complaint, a three-judge district court unanimously dismissed Plaintiffs' complaint. This Court should summarily affirm that decision.

To start, as the district court held, Plaintiffs' Fourteenth and Fifteenth Amendment claims fail as a matter of law because, among other things, they don't allege any sort of direct evidence of a racial motive. Instead, as they did below, Plaintiffs ask this Court to simply infer that race must have predominated over the other permissible motives (population balancing and partisan advantage) alleged in their complaint. But as the district court correctly held, even giving Plaintiffs the benefit of the doubt, Plaintiffs simply didn't do enough to meet the demanding burden of plausibly claiming that race predominated over other permissible considerations. Indeed, Plaintiffs don't allege that Arkansas's congressional districts are oddly shaped, don't allege the map departed from traditional

redistricting principles, or point to statements that could possibly overcome the presumption of legislative good faith. To the contrary, apart from statements by a single legislator, every criticism of the map Plaintiffs recite focuses on the legislature's *failure* to consider race, the map's alleged impact, and the map's partisan slant.

Recognizing that they cannot prevail under existing law, Plaintiffs also ask the Court to overrule its equal-protection precedents and to relax the pleading standard. This Court should decline that invitation and—as the district court did—apply well-established equal protection precedents and summarily affirm.

Finally, this Court should summarily affirm the district court's dismissal of Plaintiffs' Section 2 claims. Indeed, even assuming private plaintiffs can bring a Section 2 claim (and they cannot), as Plaintiffs themselves recognize, Section 2 doesn't require the creation of a crossover district—let alone a district that might at some point in the future become a crossover district.

## STATEMENT OF THE CASE

This case involves challenges to modest revisions to Arkansas's four congressional districts. State law provides that the Arkansas General Assembly is responsible for reapportioning congressional districts after the Census. *See* Ark. Code Ann. 7-2-101 *et seq*. Following the receipt of official census data during the fall of 2021, the General Assembly convened in a special session to consider reapportionment legislation. App.39a.

A. *Arkansas 2020 Redistricting Process*. Reapportionment is required to comply with the constitutional requirement that the populations of a state's congressional districts be as equal "as is practicable." *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964). This is sometimes

referred to as the "one person, one vote" rule. "The 2020 Census showed that the total population of Arkansas was 3,011,524, and, divided among four (4) congressional districts, the ideal population of each district would be 752,881." App.42a-43a.

Due to population growth in Districts 2 and 3, the General Assembly was required to rebalance the population between Arkansas's existing districts to meet the one person, one vote rule. *Id.* This meant redrawing boundaries to significantly reduce District 3's population; substantially reduce District 2's population; and increase the populations of Districts 1 and 4. In addition to drawing districts that met the one person, one vote requirement, the General Assembly also aimed—consistent with judicial precedent—to draw districts that were compact, contiguous, minimized splits between political subdivisions (like counties), preserved communities of interest, avoided pairing incumbents, and otherwise complied with federal law. App.41a-42a.

In that process, the General Assembly considered several maps and ultimately settled on House Bill 1982 and Senate Bill 743, which were numbered as Acts 1114 and 1116. App.77a-79a. The Acts were adopted on October 6, 2021, and the new congressional map became effective on October 13, 2021.

The new districts adopted by the Republican-majority General Assembly did not dramatically differ from the districts adopted by the Democratic majority in 2011. *Compare* App.123a *with* App.124a. In both maps, District 1 comprises the counties in the eastern and northern part of the state; District 2 is made up of central Arkansas counties; District 3 is toward the northwest; and District 4 comprises the remaining counties, mostly in the southern and western parts of

the state. *See* App.123a-124a. This is how Arkansas's congressional maps have looked for decades.

The only substantial difference between the current and prior maps is that the current map reduces county splits. Minimizing splits of political subdivision boundaries—such as counties—is an important redistricting criterion for several reasons, including lessening the burden on election officials creating ballots and keeping communities of shared interests together. App.41a.

The pre-existing 2011 congressional map split a total of five counties: Crawford, Newton, Searcy, and Sebastian, all of which are in the northwest portion of the state, and Jefferson County, one of the State's minority population centers. App.123a. By contrast, the current map splits only two counties. App.124a. Sebastian County remains split between Districts 3 and 4, with slightly different boundaries, and Pulaski County is split between Districts 1, 2, and 4. Pulaski and Sebastian are the State's largest and fourth-largest counties by population, respectively. Pulaski County is also located in the center of Arkansas, and it shares a boundary with six other counties. App.124a. Sebastian County is located along the western edge of the state, less than one hundred miles from Benton and Washington Counties, Arkansas's second and third most populous counties. *Id.* These factors make it difficult for a map drawer to avoid splitting Sebastian or Pulaski Counties without incurring a substantial number of splits elsewhere, as was the case with the 2011 congressional map.

Particularly relevant here, however, those adjustments barely changed the district's racial demographics.[1] Those changes are electorally insignificant as well—Republican incumbent Representative French Hill won District 2 by over ten points in the 2020 election when his opponent was a prominent State Senator. App.134a-135a. The 2016 election and 2022 elections resulted in 20-plus-point victories against less well-known opponents. *Id.* The relatively minor demographic changes to District 2's southeastern border thus did not impact election results.

Plaintiffs don't dispute the congressional map's overall compliance with traditional redistricting criteria. The current map—aside from splitting fewer counties—is also significantly more compact. App.124a. Indeed, it eliminated the elongated and oddly shaped upside-down "U" that previously constituted District 3. *See* App. 123a.

*B. Procedural History*. No plaintiff sued to block the use of the current maps for the 2022 election cycle. In fact, Plaintiffs, a number of black Arkansans, did not file this lawsuit until March 7, 2022—nearly five months after the congressional map became effective and long after any relief would have been possible for the next election. *See Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (staying injunction of Alabama's

[1] *See* R. Doc. 34-4 (Plaintiffs' figures indicating that approximately 11,120 white and 21,259 black individuals were moved out of Pulaski County, while 23,000 predominantly white residents of Cleburne County were moved in, resulting in very little change to the racial makeup of a 752,881 ideal population district). Prior to redistricting, District 2 was around "22.6 percent" black, Statement at 4, and that number did not fall below 20% after redistricting.

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

1. Plaintiffs' original complaint brought seven claims under federal and state law. The factual basis for those various claims was the same. Plaintiffs alleged that splitting portions of Pulaski County into different districts—and achieving near-perfect population equality and minimizing the total number of county splits—was racially motivated. Yet they did not allege that there was any direct evidence of that motive, save for statements by Republican legislators that maintained race was *not* a factor in their redistricting decisions. *See* App.51a.

Plaintiffs' circumstantial allegations were practically nonexistent, too. Plaintiffs did not dispute that District 2 didn't really change that much from the 2011 map drawn by a Democrat-dominated legislature and that District 2 had to be redrawn because it was overpopulated by more than 16,000. App.43a. Indeed, Plaintiffs did not deny that splitting portions of Pulaski County into underpopulated Districts 1 and 4 was critical to achieving population equality. Nor did they dispute that those modest mapping changes resulted in no more than a negligible difference in District 2's racial demographics. *See* App.74a. Nor did Plaintiffs dispute that even if Pulaski County had remained whole, it still wouldn't have been possible to draw a majority-minority congressional district in Arkansas.

Yet Plaintiffs nevertheless claimed that the General Assembly's congressional map had the purpose and effect of diluting black voting strength. They brought a total of seven claims (six federal; one state) against three defendants (the State of Arkansas, the Governor, and the Secretary of State). The vast majority of those claims were entirely novel constitutional claims that

Plaintiffs have now abandoned. Plaintiffs' Section 2 claim was little better since they did not allege that they meet—in fact, concede they cannot show—the three *Gingles* preconditions. And Plaintiffs' equal protection claims failed because they didn't even bother to dispute the valid, non-racial reasons why the General Assembly drew the district at issue. So Arkansas sought dismissal.

The district court agreed. App.9a. It dismissed all of Plaintiffs' novel claims under various federal and state constitutional provisions that Plaintiffs do not raise here. *See* App.18a-20a. The court dismissed Plaintiffs' Section 2 claim based on Plaintiffs' admissions that they could not meet the *Gingles* preconditions. App.22a-23a. The Arkansas Secretary of State was the only defendant to remain in the litigation—the State of Arkansas and the Governor were dismissed. App.24a-25.

The district court also dismissed Plaintiffs' Fourteenth and Fifteenth Amendment claims because Plaintiffs had failed to allege facts supporting a plausible inference that race was a predominant motive for the 2021 map. App.9a.[2] Having no factual allegations directly establishing the legislature's motive, Plaintiffs asked the district court to draw favorable inferences from various circumstantial allegations to impute a racial motive to the legislature's redistricting decisions.

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[2] Arkansas disputed whether a vote-dilution claim of the sort Plaintiffs raise exists under the Fifteenth Amendment, but the district court "assumed[]" that it does and that "both claims have the same elements." App.18a. Plaintiffs don't differentiate between the Fourteenth and Fifteenth Amendment claims in their Jurisdictional Statement, so Arkansas likewise addresses them together. If the Court were to note probable jurisdiction, Arkansas would continue to argue that such a vote-dilution claim is not cognizable under the Fifteenth Amendment.

The first is that there were twenty-six other maps on the table during the process, and Plaintiffs pointed to six that did not split Pulaski County. The district court concluded that "[f]our of the maps [we]re nonstarters because they would have invited" a one-person-one-vote challenge due to their high population variance. App.13a. And Plaintiffs "d[id] not explain how the rejection of the two other maps shows a discriminatory purpose" rather than "mere awareness" of "its impact." App.13a-14a.[3]

Next, Plaintiffs pointed to "after-the-fact comments of Governor Asa Hutchinson and Little Rock Mayor Frank Scott, Jr." App. 14a. But Plaintiffs failed to allege "that either one worked with the General Assembly on reapportionment or otherwise knew why it selected one map over the others." *Id.* And "both spoke about the map's effects, not the purpose behind it." Moreover, even if those statements could be stretched to allow "an inference of racial bias," Plaintiffs could not "plausibly show that it was the predominant factor" due to the two "obvious alternative explanations" alleged in the complaint, including adherence to traditional redistricting principles and partisan gerrymandering. App.14a-15a (cleaned up).

Finally, Plaintiffs alleged that the "map itself," and its splitting of "southern and eastern Pulaski County into two congressional districts" showed a racial motive. App.15a. The district court concluded that Plaintiffs' allegations were at best "consistent with racially motivated redistricting," but did nothing to plausibly establish that was the predominant motive as opposed to the other motives Plaintiffs also alleged. *Id.*

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[3] Plaintiffs' filing here doesn't dispute this conclusion.

Thus, the district court concluded that Plaintiffs fell "a few specific factual allegations short of pleading a plausible vote-dilution claim." App.17a. But because the court thought it was "possible" that Plaintiffs could "still plead one," the district court granted Plaintiffs leave to amend. *See* App.18a.

2. The amended complaint fared no better, and dismissal with prejudice followed. The only new factual allegations Plaintiffs added were contemporary statements by legislators, mostly opponents of the adopted map. App. 2a. The district court concluded that these statements did not help Plaintiffs because "they mostly contradict the inferences of racial discrimination" that Plaintiffs asked the court to draw. App.2a-3a. For one, the sponsors of the adopted map disclaimed reliance on race during the debates. App.3a. And "even opponents of the new congressional map did not think racial animus played a role." *Id.* (mentioning specific examples). Those statements "belie[d] the notion that race played a role in drawing the map, much less a predominant one." *Id.* (cleaned up).

To be sure, Plaintiffs added allegations of "two accusations of racial bias" by opponents of the map who were not involved in its creation. *Id*. But the district court concluded those allegations "fail[ed] to create a plausible inference that the legislature as a whole was imbued with racial motives," at least "when the statements themselves are contradictory and members of both parties have claimed the opposite was true." *Id.* (cleaned up). And the district court held that it could not simply "draw a negative inference from the absence of racially charged rhetoric" and the fact that "[m]ost legislators did not mention race." App. 3a-4a. Because the district court was required to presume the legislature "acted 'in good faith,'" App.4a

(quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)), it could not "simply leap to the conclusion that they were lying about their motives," *id*.[4]

Plaintiffs' final claim was that the court should simply infer a racial motive from the map's alleged discriminatory impact. But the district court held that, even assuming Plaintiffs' impact allegations were true, "the complaint itself identified reasons for it besides race" that "ma[d]e a predominant racial motive implausible." App.5a. Both "achieving numerical equality between the districts" and "pure partisan gerrymandering, designed to bolster the Republican Party's electoral prospects across Arkansas" were "obvious alternative explanations" identified in the complaint. *Id.* (cleaned up). Plaintiffs failed to plead facts giving rise to a plausible allegation that race predominated over those other considerations, so the district court granted dismissal with prejudice. *Id.*

Plaintiffs timely appealed. This Court should summarily affirm.

## ARGUMENT

### I. This Court should summarily affirm because Plaintiffs failed to plausibly allege that race was the predominant motivation for the General Assembly's modest revisions to Arkansas's congressional districts.

Rule 12(b)(6) serves as an "important mechanism for weeding out meritless claims." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). Its function is

[4] Plaintiffs also alleged that the "rushed" legislative process and Arkansas's racial history evidenced a predominant racial motive. The district court rejected those arguments, App. 4a-5a, and Plaintiffs don't challenge that conclusion here.

especially important in constitutional challenges to redistricting litigation, where a plaintiffs' burden is extraordinarily high and federal-court inquiry into the sensitive political issues surrounding redistricting is especially intrusive. *See Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). The district court properly dismissed this case at the pleadings stage, and this Court should summarily affirm.

"Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Where plaintiffs allege racial gerrymandering, "the burden of proof on the plaintiffs . . . is a demanding one." *Easley v. Cromartie*, 532 U.S. 234, 241 (2001). To prevail, a plaintiff must prove that race was not simply "*a* motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the legislature's districting decision." *Id.* (citation and internal quotation marks omitted). Because of (1) the "evidentiary difficulty" of distinguishing "between being aware of racial considerations and being motivated by them," (2) "the sensitive nature of redistricting," and (3) "the presumption of good faith that must be accorded legislative enactments," courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916.

Plaintiffs' complaint provides at least three potential motivations for the decision to split Pulaski County along its southeastern edge between Districts 1, 2, and 4. Plaintiffs allege that decision was motivated by race. Yet as the district court recognized, Plaintiffs' complaint also evidences "obvious alternative explanations" for that decision, including balancing population in the most expedient manner while reducing the

number of county splits—which the map reduced from 5 to 2—and partisan gerrymandering. App.5a (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009) (brackets omitted)). In order to "nudge[] their claim[]" of racial gerrymandering "across the line from conceivable to plausible," Plaintiffs were required to plead "enough facts" to establish that the General Assembly acted with a predominantly racial motive rather than the "natural explanation" that it acted in good faith and sought population equality or partisan political advantage. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007). And even after being granted leave to amend, Plaintiffs didn't overcome that hurdle. *See* App.5a.

Plaintiffs now claim that the district court did not sufficiently consider three sets of factual allegations that they say make their race-discrimination claim plausible: (1) the configuration of Districts 1, 2, and 4 in southeastern Pulaski County; (2) various statements made during the redistricting process by legislators and other officials; and (3) the alleged racial impact of the redistricting. But the district court considered all three and correctly concluded that none point toward a racial—rather than permissible—motive.

A. *Boundary lines*. Plaintiffs first claim that District 2's shape itself supports their allegation that the General Assembly intentionally drew race-based districts. Plaintiffs bringing such a claim face an extremely high bar. Only in "exceptional cases" will "a reapportionment plan . . . be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to segregate voters on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 646-47 (1993) (cleaned up).

Plaintiffs do not claim that District 2 on the whole is so irregularly shaped that it plausibly leads to an

inference of racial intent. Instead, Plaintiffs focus on the shape of the three-precinct strip moved from District 2 to District 1 and the eleven-precinct strip moved to District 4. *See* Statement 11. They claim that these areas in Pulaski County's southeast corner "were not customary and legitimate demarcations of geographic areas following generally accepted criteria for setting of boundaries to achieve population balance . . . ." *Id.* at 11-12. But their complaint doesn't identify anything about District 2 that contravenes traditional districting principles.

It is undisputed that District 2 was overpopulated relative to Districts 1 and 4. *See* App.42a-43a. The 2021 congressional map splits Pulaski County along the southeastern border that it shares with both Districts 1 and 4. *See* App.124a-125a. This arrangement allowed the legislature to balance the population of three congressional districts by splitting a single county—thereby reducing the number of overall county splits from five to two. *See* App.123a-App.125a. And because Pulaski County is the only populous county in District 2 that shares a border with both Districts 1 and 4, the General Assembly could not accomplish this feat without splitting Pulaski County along that shared border in its southeastern corner. *See id.*

There is nothing "highly irregular" about shifting existing district boundaries to reduce county splits. *Shaw*, 509 U.S. at 646. Nor is there anything unusual about the precincts that the General Assembly moved. The selected precincts ensured that Districts 1 and 4 only minimally encroached into Pulaski County—leaving the vast majority of the county in a single district. And contrary to Plaintiffs' allegations that precincts were selected for racial (or even partisan reasons), two majority-white, Republican-leaning precincts were

among the eleven moved into District 4. *See* App. 130a-131a (listing demographics and election returns of precincts 126 and 127); 2021 Ark. Act 1116, Sec. 1 (amending Ark. Code Ann. 7-2-105(a)(2) to add precincts 103, 104, 105, 124, 125, 126, 127, 131, 132, 133, and 135 to District 4).

Plaintiffs further argue here that these boundary lines "have no expressed or apparent purpose other than to divide the voting power of the Black community in the Second District." Statement 12. But Plaintiffs' complaint also gives other plausible motivations. First, it acknowledges that the split "was claimed to be necessary to achieve numerical equality between the Districts." App.71a. And second, it alleged that the new boundaries were simply a "partisan gerrymander[]." App.32a. Given Plaintiffs' own claim, as the district court explained, Plaintiffs' complaint failed to plausibly allege that race was a predominant motivating factor. To the contrary, as the district court explained, "[e]ven if the new map is 'consistent with' racially motivated redistricting, it does not "*plausibly* establish this purpose" on its own because the changes are also consistent with a desire to balance the population and win a partisan advantage. App.15a (quoting *Iqbal*, 556 U.S. at 681).

Finally, Plaintiffs make much of Cleburne County being moved from District 1 to District 2. Statement 13-14. They don't suggest that the addition of Cleburne County to District 2 rendered its shape irregular. Nor could they. Instead, they imply that Cleburne County was moved to facilitate more black voters in southeastern Pulaski County being moved out of District 2.

But here, too, population equality is an obvious alternative explanation. As Plaintiffs concede, District 3 became overpopulated and had to shrink geographically.

App.42a-43a. That necessitated the transfer of multiple counties in northwest Arkansas from District 3 to underpopulated District 1. *Compare* App.123a *with* App.124a. That change left District 1 overpopulated by about 16,000 people.[5] While Cleburne County is largely white, so is every other county bordering District 2 that could have been moved from District 1.[6] Moreover, moving Cleburne County into District 2 maximized compactness relative to other possible District 1 counties—and by moving parts of southeastern Pulaski County into another district that could be achieved without splitting additional counties.

Ultimately, neither the General Assembly's decision to split a small portion of Pulaski County or to move Cleburne County is so "highly irregular" as to be explainable by race alone. *Shaw*, 509 U.S. at 646. And against that backdrop, the district court correctly concluded that nothing about District 2's design gives rise to a plausible allegation of a predominant racial motive. This Court should summarily affirm.

B. *Statements of legislators*. Plaintiffs next rely on various statements made by members of the General Assembly during the redistricting debates. The district court concluded that none of the statements cited by Plaintiffs moved the needle toward a plausible

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[5] *See* Statement 12-13 (excerpting complaint allegations of Cleburne County's population being "approximately 24,000" and the three precincts moved from District 2 to District 1 totaling about 8,000 people). Thus, removing the District 1/District 2 split, and moving Cleburne County back to District 1, would leave District 1 overpopulated by approximately 16,000.

[6] *See* U.S. Census Bureau, Quick Facts https://www.census.gov/quickfacts/fact/table/prairiecountyarkansas,woodruffcountyarkansas,jacksoncountyarkansas,independencecountyarkansas,stonecountyarkansas,searcycountyarkansas/PST045222 (last visited Oct. 30, 2023); App.123a.

allegation of racial motive, and for good reason. "The problem is that the[se statements] mostly contradict the inferences of racial discrimination the plaintiffs ask [this Court] to draw." App.3a.

To start, there are the statements from legislators—which (with a sole exception) disclaim race as a motivating factor. Of these, the only statements Plaintiffs quote by Republican legislators (who voted for the map) deny that race was a criterion for redistricting. *See* App.51a.

Then, there are statements that Plaintiffs cite from Democratic legislators. But these too underscore everyone's understanding that the map wasn't motivated by race. *See* App.63a (Rep. Clowney) ("I actually hadn't heard anybody make allegations of racism . . . ."); App.65a (Rep. Fred Love) ("When we have conversations on race as I said, they were going to be sensitive, and here we were discussing race. We said, you know, people said people were racist, and people said this. *Nobody said any of those things.*"); App.66a (Rep. Love) ("Now, as I said, that doesn't go to me saying what the intent of this map is, but the impact[.] . . I did not say, Mrs. Speaks, just because you proposed this map that you are a racist. I did not say that. But I want you to go to the impact of this map. . . . It's going to disenfranchise African-American communities, regardless of their intent."); App.66a-67a ("This map does absolutely what it is not supposed to do. It doesn't mean that you sat there and said, 'Well, let's pull out all the African American folks and take them out.'"). Indeed, Plaintiffs allege that only a single legislator, Rep. Joy Springer, described the congressional map as being "manipulated based solely on race." App.61a.

To the contrary, many of the statements the complaint cites criticize the Republican majority for

*not* being sufficiently conscious of race. For instance, Plaintiffs cite Rep. Fred Love's statement that "[r]ace *can* be taken into account. We don't have to look at it as a negative thing." App.60a. Rep. Jamie Scott's statement urging the legislature to "look beyond intent" and instead "look at the impact of what we do here." App.58a-59a. And Sen. Joyce Elliot's assertion that, "[J]ust as we deliberately . . . consider the other criteria, we absolutely can and should [] consider race as a part of what we're doing. To say things like 'I don't see race and we didn't consider race' is against everything that we are allowed to do, according to the courts." App.66a.

And ultimately, Plaintiffs' complaint demonstrates that Democratic criticism of the map largely focused on the perceived partisan—not racial—intent behind the map. *See* App.63a (Rep. Monte Hodges) ("Any partisan advantage you gain by this map is worth little compared with the negative effects that this will have on the black communities in Pulaski County. So ask yourself, is it worth it to have a little partisan gain at the sake of those communities?"). For instance, Plaintiffs tellingly cite Sen. Linda Chesterfield's statement that "The people I represent feel that this is a hellish map. It is prejudiced. It is hyperpartisan, and it's petty." App.69a.

Given those statements, the district court correctly held that Plaintiffs did not plausibly allege a predominantly racial motive. Indeed, as the district court recognized, Plaintiffs, at best, effectively asked the court "to draw a negative inference from the absence of racially charged rhetoric." App.4a. And Plaintiffs' Jurisdictional Statement effectively does the same thing, simply asserting that the legislators' representations that they weren't motivated by race were

"deliberately oblivious responses" to concerns about the map's alleged racial impact—that is, that they are lies. Statement 16. Of course, Plaintiffs' factual allegations must be construed in their favor. But given the presumption of legislative "good faith," the district court was correct to conclude that it could not "simply leap to the conclusion that the[ sponsors] were lying about their motives." App. 4a. (citing *Abbott*, 138 S. Ct. at 2324 ).

That is especially true where, like here, the statements by opponents of the congressional map mostly contradict—rather than support—Plaintiffs' allegations of racial motives. And even the one or two contrary statements that Plaintiffs cite don't change the analysis because they don't suggest that "the legislature as a whole was imbued with racial motives." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (quotation omitted).

Lastly, Plaintiffs reference statements made by Governor Asa Hutchinson and Little Rock Mayor Frank Scott, Jr. criticizing the map. But as the district court concluded, those criticisms were not relevant because Plaintiffs do not allege "either one worked with the General Assembly on reapportionment or otherwise knew why it selected one map over the others." App.14a. Consequently, as the district court held, those statements don't bear on the question of whether the legislature had a predominantly racial motive in drawing district lines.

Thus, to the extent that the contemporaneous statements Plaintiffs reference shed any light on the General Assembly's motive, those statements merely show that the map's supporters denounced the use of race in redistricting and some opponents denounced race-neutral districting. And neither demonstrates a

racial motive—let alone one that predominated over partisanship or traditional redistricting factors.

C. *Intent versus impact*. Plaintiffs argue that the district court should have inferred a racial motive from the map's alleged disparate racial impact. Statement at 27-28. But the district court correctly held that Plaintiffs' "complaint itself identified reasons for" the disparate effects "besides race." App.5a. Achieving numerical equality and partisan gerrymandering were both "obvious alternative explanations" identified by Plaintiffs, and the allegations in their complaint failed to disaggregate these explanations from their racial-motive theory. *Id.* (quoting *Iqbal*, 556 U.S. at 682) (quotation and alterations omitted).

Given these competing—and legally permissible—alternative motivations, the district court was correct to conclude that a "predominant racial motive" was "implausible" on the facts alleged. App.5a (emphasis omitted).

D. *Relaxed standard of review*. Even at the pleadings stage, redistricting plaintiffs face a demanding burden. Apparently recognizing that they cannot prevail under this Court's redistricting precedents, Plaintiffs advocate for a "reduced" burden at the pleading stage to account for the "secretive or nefarious efforts and methods used by legislators to deprive minorities of their equal opportunity to vote or elect their preferred candidates." Statement 33. Plaintiffs apparently urge the Court to adopt something akin to the *McDonnell Douglas* burden shifting framework as a pleading standard, allowing, they say, redistricting challengers to move past the motion-to-dismiss stage based on bare, conclusory allegations of racial motivations without any factual support, so that they might uncover through discovery a hidden racial motive.

There are two major problems with that approach. First, *McDonnell Douglas* isn't a pleading standard, but an evidentiary burden-shifting framework for summary judgment in employment discrimination proceedings. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 510 (2002). Plaintiffs don't even attempt to explain how it could be recast as a pleading standard, especially in the context of redistricting challenges. Nor do Plaintiffs explain how such a standard would apply where the complaint itself alleges nondiscriminatory reasons for the allegedly discriminatory action—here, population balancing and partisan gerrymandering.

Second, Plaintiffs' relaxed pleading proposal would be a dramatic and unwarranted overhaul of this Court's redistricting case law. This Court has recognized that redistricting "is primarily the duty and responsibility of the State," not the federal government. *Abbott*, 138 S. Ct. at 2324. "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions," so federal courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race" and must "presume[]" the legislature's "good faith." *Miller*, 515 U.S. at 915-16. A plaintiffs' burden to show that a "legislature's motive was predominantly racial, not political" or some other reason "is a 'demanding one.'" *Easley*, 532 U.S. at 241 (quoting *Miller*, 515 U.S. at 928). This Court has cautioned that this demanding burden of proof and "the intrusive potential of judicial intervention into the legislative realm" must inform a court's assessment of "the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed." *Miller*, 515 U.S. at 916-17.

A "relaxed" pleading standard is incompatible with that precedent, and Plaintiffs offer no compelling reason—indeed, no reason at all—to overrule a line of authority dating back at least to *Miller* establishing the demanding burden of proof a redistricting plaintiff faces, even at the motion-to-dismiss stage. This Court should affirm.

* * *

The district court faithfully applied this Court's equal-protection precedents, and its decision should be summarily affirmed.

## II. This Court should summarily affirm because Plaintiffs—by their own admission—cannot prevail unless this Court overrules *Bartlett v. Strickland* and reinterprets Section 2 to require the preservation of districts that might, in the future, become a crossover district.

Section 2 of the Voting Rights Act prohibits voting practices that "result[] in a denial or abridgment of the right . . . to vote on account of race or color." 52 U.S.C. 10301(a). Such a denial or abridgment is only established if the members "of a class of citizens . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* 10301(b).[7]

[7] Arkansas argued below that there is no private right of action to enforce Section 2, but the district court did not reach that issue. It instead "assume[d] without deciding that there is one" and dismissed on the merits based on Plaintiffs' concession that they could not prevail under current precedent. App.23a. In the event the Court were to note probable jurisdiction, Arkansas would argue that Section 2 doesn't provide a private right of action.

This Court has established three "necessary preconditions" for proving that an electoral districting scheme "operate[s] to impair minority voters' ability to elect representatives of their choice." *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). These preconditions do not "standing alone, . . . prove dilution." *Johnson v. DeGrandy*, 512 U.S. 997, 1012 (1994). But they are "necessary preconditions for a claim that the use of multimember districts constitute[s] actionable vote dilution under § 2." *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009) (plurality op.). Indeed, "unless *each* of the three *Gingles* prerequisites is established, 'there neither has been a wrong nor can be a remedy.'" *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017) (quoting *Growe v. Emison*, 507 U.S. 25, 41 (1993)).

To satisfy the first necessary precondition, a plaintiff must allege that a minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. This Court has made clear that the first precondition is not satisfied by anything less than an actual majority. In *Bartlett*, the Court held that Section 2 "does not mandate creating or preserving crossover districts," *i.e.*, a district "in which minority voters make up less than a majority of the voting-age population" but is "large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett*, 556 U.S. at 23 (plurality op.).

Plaintiffs conceded below that, under *Bartlett*, they cannot meet the first *Gingles* precondition because it is not possible to draw a majority-minority congressional district in Arkansas. *See* App.6a ("The point is that the plaintiffs have candidly admitted that there is no way they can state a claim under § 2 of the Voting

Rights Act."); *accord* Statement 29. They do not claim on appeal that the district court erred following governing precedent in dismissing their VRA claim on that basis. Rather, they ask the Court to "revisit whether" the *Gingles* "preconditions should be reinterpreted" in order to dramatically overhaul Section 2 liability. Statement 30.

Plaintiffs argue that *Gingles* one should not bar their claim because they are not seeking a majority-minority district but "are attempting to preserve the[] status quo" of a "growing" black population that, with sufficient white crossover over vote, "will eventually be capable of electing candidates and passing issues of their preference." *Id.* In other words, Plaintiffs are asking the Court to interpret Section 2 to permanently ratchet a district's minority-population on the theory that future demographic shifts might alter a district's makeup and lead to a crossover district.

This Court has already flatly rejected the notion that Section 2 provides a right to the preservation of a crossover district that could be configured based on the current population. *See Barlett*, 556 U.S. at 14-15 (plurality op.). Yet Plaintiffs go further and ask the Court to interpret Section 2 to require the maintenance of current population balances on the theory that a *future* crossover district might arise. Statement 30. They cite no case where this Court has held that Section 2 liability may be premised on anything other than current population metrics (and there is none). Indeed, Plaintiffs essentially ask this Court to not only overrule *Bartlett* but adopt a more expansive view of Section 2 liability than even the *Bartlett* plaintiffs sought. Plaintiffs offer no compelling reason to do so.

That is because the text of Section 2 "requires a showing that minorities have less opportunity than

other members of the electorate to elect representatives of their choice," *Bartlett*, 556 U.S. at 14 (cleaned up), and a sub-majority minority group has "no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength." *Id.* A contrary rule would "entitle[] minority groups to the maximum possible voting strength," *id.* at 15-16, contravening Section 2's admonition that minority voters are not entitled to election outcomes "in numbers equal to their proportion in the population." 52 U.S.C. 10301(b). And if that's true, it's even more true that a minority population is not entitled to Section 2 relief based on hypothetical future election opportunities.

Overruling *Bartlett* (and essentially abandoning the first *Gingles* precondition altogether) would upend decades of settled expectations on the part of legislative officials primarily responsible for redistricting and courts reviewing their decisions. *Gingles*'s majority-minority requirement in particular "draws clear lines for courts and legislatures alike." *Bartlett*, 556 U.S. at 17. And courts "'are inherently ill-equipped' to 'make decisions based on highly political judgments' of the sort that crossover-district claims would require." *Id.* (quoting *Holder v. Hall*, 512 U.S. 874, 894 (1994) (Thomas, J., concurring in judgment)). "Reapportionment . . . is primarily the duty and responsibility of the States, not the federal courts," and adherence to "the *Gingles* factors help[s] ensure that remains the case." *Allen v. Milligan*, 559 U.S. 1, 29 (2023) (cleaned up).

Just last term *Allen* reaffirmed this Court's adherence to the *Gingles* preconditions in adjudicating Section 2 cases. It rejected calls to "remake [its Section] 2 jurisprudence anew," *Allen*, 599 U.S. at 23, noting that "Congress has never disturbed [the Court's] under-

standing of § 2 as *Gingles* construed it," *id.* at 19. "Congress is undoubtedly aware" of the Court's precedent, and "[i]t can change that if it likes." *Id.* at 39. "But until and unless it does, statutory *stare decisis* counsels [the Court] staying the course." *Id.*

At bottom, Plaintiffs cannot win unless this Court overrules *Bartlett* (and perhaps *Gingles* itself), and they offer neither a compelling reason to do so nor a workable standard to replace this Court's decades-long approach. This Court should summarily affirm the district court's rejection of Plaintiffs' Section 2 claim.

## CONCLUSION

The judgment of the district court should be summarily affirmed.

Respectfully submitted,

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