

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

**CHRISTIAN MINISTERIAL ALLIANCE, *et al.*,**

**PLAINTIFFS,**

**v. Case No. 4:23-cv-00471-DPM-DRS-JM (three-judge court)**

**JOHN THURSTON, *et al.*,**

**DEFENDANTS.**

**Defendant's Brief in Support of Motion for Summary Judgment**

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## INTRODUCTION

Redistricting is “a most difficult subject.” *Miller v. Johnson*, 515 U.S. 900, 915 (1995). It “is the politics of politics,” and it rarely leaves everyone (or perhaps anyone) happy. *Thomas v. Bryant*, 938 F.3d 134, 175 (5th Cir. 2019) (Willett, J. dissenting), *on reh’g en banc sub nom. Thomas v. Reeves*, 961 F.3d 800 (5th Cir. 2020). It is because districting decisions are so steeped in politics and intensely local considerations that it “is primarily the duty and responsibility of the State through its legislature or other body, rather than a federal court.” *Chapman v. Meier*, 420 U.S. 1, 27 (1975). And it is why the Supreme Court has recently reiterated a warning that federal courts “must be wary of plaintiffs who seek to transform federal courts into weapons of political warfare that will deliver victories that eluded them in the political arena.” *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1236 (2024) (quotation omitted).

This case is the latest battle in the political war that challengers have waged against the 2021 congressional map (“Enacted Plan”). Plaintiffs challenge the map as a racial gerrymander and dilutive of Plaintiffs’ right to vote. At this stage of the litigation, where Plaintiffs must put proof to their claims, they cannot succeed. The evidence mustered by Plaintiffs shows what Secretary Thurston has explained all along: the General Assembly made what ultimately turned out to be modest changes to the previous districts, despite that prior map (“2011 Plan”) being drawn by the opposite political party, which controlled the Arkansas legislature continuously since 1874. The Enacted Plan has a core retention of over 92%, demonstrating the legislature’s desire to avoid drastic reworkings of the State’s congressional districts. And it results in modest improvements to the partisan outcomes of Congressional District 2 (“D2”), the State’s most competitive district.

Plaintiffs claim that the General Assembly drew its lines based on race. Their burden to prove that claim at this stage is incredibly heavy. To even have a shot they have to meet *Alexander's* alternative-map requirement. They fail because none of their alternative maps reach the same partisan outcome without sacrificing the Enacted Plan's high core retention. That must result in an adverse inference against them, which is insurmountable when the rest of their case is based on circumstantial evidence and speculation. And even that circumstantial evidence falls apart when looked at through the lens of the presumption of legislative good faith that this Court must apply.

The facts in this case are not in dispute, merely how to interpret them. The features of the Enacted Plan and alternative maps are generally agreed upon. The statements made by legislators are public record. The only question is whether the members of the General Assembly were lying when they said they didn't use race to redistrict. The dearth of evidence and the presumption of good faith are an insurmountable barrier for Plaintiffs, and this Court should grant summary judgment in Defendants' favor.

#### **BACKGROUND**

By now, this Court is well familiar with the disputes surrounding Arkansas's congressional redistricting. A few of the high points are worth hitting.

Due to unequal population growth among Arkansas's four congressional districts, the State was required to rebalance the populations. *See Wesberry v. Sanders*, 376 U.S. 1, 8 (1964). That population, under the 2020 census, of the 2011 congressional districts is represented as follows:

*Table IV.C.1: 2011 Enacted Plan Total Population*

2010 Dist	POP Total	POP_WNH	POP_APB	POP_HISP		% WNH	% APB	% HISP
01	716,388	522,936	135,726	28,349		73.0%	18.9%	4.0%
02	769,391	487,210	188,021	53,622		63.3%	24.4%	7.0%
03	839,147	582,100	34,631	130,309		69.4%	4.1%	15.5%
04	686,598	471,304	137,590	44,567		68.6%	20.0%	6.5%
<b>Grand Total</b>	<b>3,011,524</b>	<b>2,063,550</b>	<b>495,968</b>	<b>256,847</b>		<b>68.5%</b>	<b>16.5%</b>	<b>8.5%</b>

Def. Expert Thomas Bryan Rep. 30, attached as Exhibit 1 to Defendants’ Motion for Summary Judgment..<sup>1</sup>

This required changes:

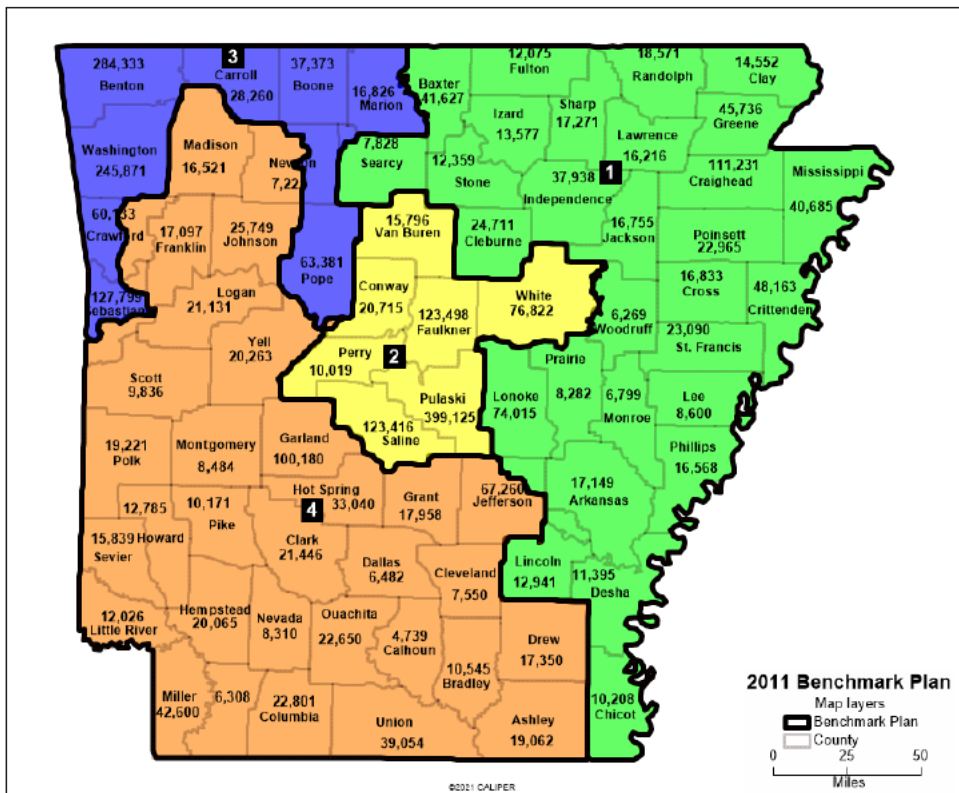
- D1, as it was drawn in 2011, had 716,388 people in 2020: – 36,493 (or -4.8%) below the target of  $\frac{1}{4}$  of the total population of 752,881. This is because D1 included many counties that lost population over the decade, such as Mississippi (-12.5%), St. Francis (-18.3%), Lee (-17.5%), Phillips (-23.8%) and Monroe (-16.6%).
- D2, as it was drawn in 2011, had 769,391 people in 2020: +16,510 (or +2.2%) above the target of  $\frac{1}{4}$  of the total population of 752,881 – driven by the growth of Saline (+15.2%).
- D3 as it was drawn in 2011, had 839,147 people in 2020: +86,266 (or +11.5%) far above the target of  $\frac{1}{4}$  of the total population of 752,881. This is because D3 included many counties that disproportionately gained significant population over the decade, such as Benton (+28.5%) and Washington (+21.1%).
- D4 as it was drawn in 2011, had 686,598 people in 2020: -66,283 (or -8.8%) below the target of  $\frac{1}{4}$  of the total population of 752,881. This is because D4 included many counties that lost population over the decade, such as Lafayette (-17.5%), Hempstead (-11.3%), Ouachita (-13.3%), Calhoun (-11.7%) and Dallas (-20.1%).

Bryan Rep. 28-29. Plaintiffs do not dispute that due to this population change, the General Assembly had to enact a new map to adhere to the one-person, one-vote requirement. (Cooper Dep<sup>2</sup>. 100:2-11, attached as Exhibit 2 to Defendants’ Motion for Summary Judgment).

<sup>1</sup> Throughout this brief, “WNH” refers to “White Non-Hispanic,” “APB” refers to “Any Part Black,” and “HISP” refers to “Hispanic.” “BVAP” refers to “Black Voting Age Population.” “CVAP” refers to “Citizen Voting Population.”

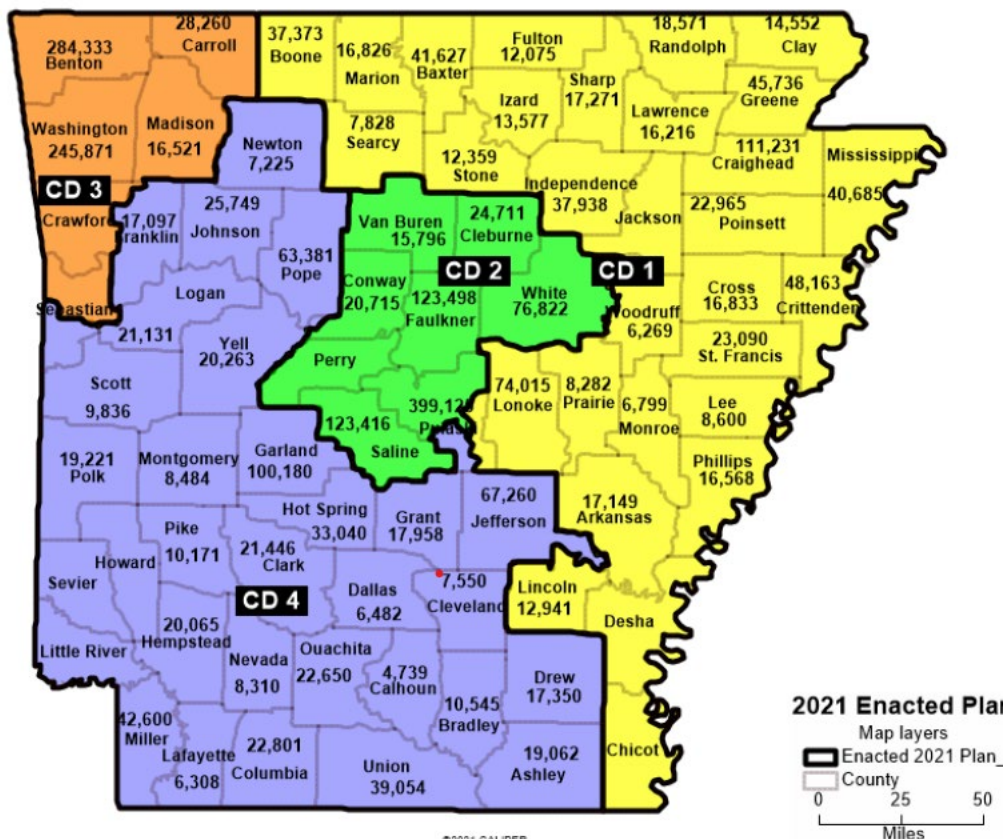
<sup>2</sup> Only a rough version of Mr. Cooper’s deposition transcript is available at this time. Defendant will amend this filing to submit an official transcript of Mr. Cooper’s deposition once it is available.

The 2011 Plan was drawn when the Democratic Party controlled the General Assembly, making 2021 Republicans’ first opportunity to draw congressional district lines since Reconstruction:



Cooper Rep. 25 (Figure 12), attached as Exhibit 3 to Defendants’ Motion for Summary Judgment.

In the Fall of 2021, following the receipt of 2020 Census data, the General Assembly met to adopt a new congressional map. In that process, the General Assembly considered a number of maps and eventually settled on House Bill 1982 and Senate Bill 743, which were enacted as Acts 1114 and 1116.



Cooper Rep. 35 (Figure 21)

The most notable feature of the Enacted Plan is the close similarity to the 2011 plan, despite it being the first congressional map drawn by Republicans. This is not surprising given that “[l]awmakers do not typically start with a blank slate; rather, they usually begin with the existing map and make alterations to fit various districting goals.” *Alexander*, 144 S. Ct. 1245. “Core retention recognizes this reality.” The parties agree that the Enacted Plan has a core retention of over 92%. As explained in greater detail below, the Enacted Plan is an improvement over the 2011 Plan in terms of traditional redistricting criteria such as compactness, contiguity, minimizing splits of political subdivisions, preserving communities of interest, avoiding pairing incumbents, and core retention.

The most notable change from the 2011 Plan is that the Enacted Map reduces the number of counties split from five to two. It accomplishes this by splitting Pulaski County, the State’s largest county, into three districts—D1, D2, and D3. That split is the focus of Plaintiffs’ challenge.

*Procedural History*

Plaintiffs brought this lawsuit—the third, overall—challenging the congressional districts as a racial gerrymander. Last year Secretary Thurston moved to dismiss, arguing that the Amended Complaint failed to state a plausible claim of racial discrimination. The Court denied dismissal, largely due to Plaintiffs’ creative pleading decision to omit any mention of partisanship from their complaint. *Christian Ministerial All. v. Thurston*, 714 F. Supp. 3d 1093, 1096 (E.D. Ark. 2024). Plaintiffs have identified four expert witnesses in this case: William Cooper (demographer/cartographer), Dr. Baodong Liu, PhD (political scientist), Dr. Traci Burch (political scientist), and Ryan Smith (historian). Defendants have identified Thomas Bryan (demographer/cartographer).

Discovery has concluded, and Secretary Thurston now moves for summary judgment.

**SUMMARY-JUDGMENT STANDARD**

A court should grant summary judgment if the evidence demonstrates that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Secretary Thurston, as the moving party, bears the initial burden of demonstrating the absence of a genuine dispute for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If he meets that burden, Plaintiffs must come forward with specific facts that establish a genuine dispute of material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc).

A genuine dispute of material fact is presented only if the evidence is sufficient to allow a reasonable factfinder to return a verdict in favor of Plaintiffs. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court must view the evidence in the light most favorable to the Plaintiffs and must give them the benefit of all reasonable inferences that can be drawn from the record. *Spencer v. Jackson Cnty., Mo.*, 738 F.3d 907, 911 (8th Cir. 2013). If Plaintiffs fail to present evidence sufficient to establish an essential element of a claim on which they bear the burden of proof, then Secretary Thurston is entitled to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 322-23.

Applying that standard, this Court should grant summary judgment to Secretary Thurston.

#### ARGUMENT

#### **I. Plaintiffs cannot meet their demanding evidentiary burden to prove racial gerrymandering.**

“[G]iven the complex interplay of forces that enter a legislature’s redistricting calculus, [the Supreme Court] ha[s] repeatedly emphasized that federal courts must exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.” *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1233-34 (2024) (cleaned up). “Such caution is necessary because federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.” *Id.* at 1234 (cleaned up). The “burden of proof on the plaintiffs” alleging racial gerrymandering is thus “a demanding one.” *Easley v. Cromartie*, 532 U.S. 234, 241 (2001).

“To untangle race from other permissible considerations,” a plaintiff must “show that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.” *Alexander*, 144 S. Ct. at 1234 (internal quotation marks omitted). This means that a plaintiff must show “that the State subordinated race-

neutral districting criteria such as compactness, contiguity, and core preservation to racial considerations.” *Id.* (internal quotation marks omitted).

“A circumstantial-evidence-only case is especially difficult when the State raises a partisan-gerrymandering defense.” *Id.* at 1235. “That is because partisan and racial gerrymanders are capable of yielding similar oddities in a district’s boundaries when there is a high correlation between race and partisan preference.” *Id.* (internal quotation marks omitted); *see also Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (“[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact.”). “To prevail, a plaintiff must disentangle race from politics by proving that the former drove a district’s lines.” *Alexander*, 114 S. Ct. at 1235 (cleaned up). The plaintiff bears the burden of “ruling out the competing explanation that political considerations dominated the legislature’s redistricting efforts.” *Id.* “If either politics or race could explain a district’s contours, the plaintiff has not cleared its bar.” *Id.*

This burden is made all the more difficult by the “starting presumption that the legislature acted in good faith.” *Id.* Ordinarily “[t]he burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before he may find in favor of the party who has the burden to persuade the judge of the fact’s existence.” *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (cleaned up). But in a racial gerrymandering case, the “presumption of legislative good faith directs district courts to draw the inference that cuts in the legislature’s favor when confronted with evidence that could plausibly support multiple conclusions.” *Alexander*, 144 S. Ct. at 1235-36. This presumption applies at every

“stage[] of litigation,” including summary judgment. *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995).

Thus, a plaintiff’s proffered facts must not just support an inference of “a racial motive” but must be “sufficient to support an inference that can overcome the presumption of legislative good faith.” *Alexander*, 144 S. Ct. at 1241. Where both racial and partisan motivations are alleged, the plaintiff must “rule out the possibility that politics drove the districting process.” *Id.* at 1243. Where the plaintiff fails to do so, “that possibility is dispositive.” *Id.* at 1241.

After discovery, the evidence shows that the General Assembly was motivated to equalize the population of the four districts, reduce the number of split counties, secure a greater partisan advantage in D2 over the previous Democrat-drawn map, and otherwise make minimal changes to the preexisting lines. Plaintiffs have failed to adduce even a scintilla of evidence that the General Assembly was motivated by race, rather than other permissible reasons, when it adopted the Enacted Plan.

Plaintiffs fail at the outset because they did not meet *Alexander*’s alternative-map requirement showing that the General Assembly could have accomplished what the Enacted Plan did in terms of high core retention and better partisan outcomes, while maintaining a significantly greater racial balance. Indeed, every one of Plaintiffs’ alternative map fail to match the core retention of the Enacted Plan. As demonstrated below, the only way Plaintiffs were able to come up with even one alternative map that meets or exceeds that partisan performance of the Enacted Plan was by making much more drastic changes to the previous plan than the General Assembly was willing to. But that map does not rule out the plausible alternative explanation that the General Assembly was not interested in shuffling a quarter of the State’s population between districts, as one of Plaintiffs’ alternative maps required. Plaintiffs’ failure on this requirement

means this Court must draw an adverse inference against them, one that is dispositive given the lack of any other evidence supporting a racial motive.

Plaintiffs also failed to establish any direct evidence of a racial motive, either in the public statements by legislators or from the former Chair of the Senate State Agencies Committee, Senator Jason Rapert, whom the Court allowed them to depose. These statements all belie the notion that race was a motive of the Republican legislators who voted for the Enacted Plan. Instead, they show that the General Assembly was chiefly motivated simply to balance the population and reduce county splits. And the legislators' statements do not rule out (and in some instances support) a partisan motivation.

The features of the map itself also defeat any claim that it is a racial gerrymander. Aside from Plaintiffs' complaint of the Enacted Plan's racial impact, there is no dispute that the Enacted Plan is an improvement on all traditional redistricting criteria as compared to the 2011 Plan. The demographic features of the State show that the southeast corner of Pulaski County is uniquely suitable to the three-way split the General Assembly chose. There is simply no other place where a significant number of Democratic voters could be moved from D2 while otherwise making minimal changes to the district's configuration. Plaintiffs' claim that the split singled out black voters for worse treatment than white voters is contradicted by the fact that there are no significant blocs of white Democratic voters located near the border of D2 in any other location—certainly not in an area where they can be split to balance three congressional districts at the same time. Plaintiffs' burden is to disentangle race from politics, and the geography of the map precludes them from doing that here.

Finally, Plaintiffs' attempt at showing a racial motive via circumstantial evidence fails. The best they could come up with is a statistical analysis by political scientist Dr. Baodong Liu,

purporting to show that race is a better predictor than partisan preference for whether a given voter living in D2 was kept within the district or assigned elsewhere. But the plaintiffs in *Alexander* offered Dr. Liu’s exact methodology—presented by Dr. Liu himself—and the Supreme Court rejected it because it doesn’t take into account how legislatures actually draw maps. His “county envelope” method ignores all geographical considerations in attempting to show a greater statistical association with race, rather than party. The Supreme Court held that this precluded reliance on Dr. Liu’s methods, and this Court is thus compelled to reject them.

The analysis of Plaintiffs’ other political scientist, Dr. Traci Burch, is similarly problematic. She collected and reviewed voluminous evidence regarding the districting process, including legislators’ statements, and opines that partisan considerations cannot explain the outcome of the districting process. The problem is that the Supreme Court has made clear that the presumption of legislative good faith precludes a factfinder from drawing an inference of racial motivation from circumstantial evidence unless that is the only inference that can be drawn. Dr. Burch admits that’s not how she conducted her review of the evidence, and her opinion must therefore be discarded.

The remaining circumstantial evidence is just as weak. As this Court previously explained in the last challenge to the congressional map, nothing in the redistricting process points to race as a motivating factor instead of other permissible considerations.

Plaintiffs cannot meet their extraordinarily high burden, and judgment in Defendant’s favor is therefore warranted.

- A. The Court is required to draw an adverse inference against Plaintiffs because they failed to produce an alternative map showing that the General Assembly could have achieved its political objectives in a manner comparably consistent with traditional districting criteria while producing a significantly greater racial balance.**

The Supreme Court held in *Alexander* that a district court “critically err[s] by failing to draw an adverse inference against” a plaintiff “for not providing a substitute map that shows how the State could have achieved its legitimate political objectives” in its districting decisions “while producing significantly greater racial balance.” 144 S. Ct. at 1249 (cleaned up). The alternative maps must also be “comparably consistent with traditional districting principles,” *id.* at 1235, including, as relevant here, “core preservation,” *id.* at 1234. Indeed, the Supreme Court faulted the plaintiffs in *Alexander* for failing to “control[] for this metric by restricting the core retention in [plaintiffs’ experts simulated maps] to at least [the same core retention as the enacted map]” because the Court could not “rule out core retention as another plausible explanation for the difference between the Enacted Plan and the” alternative maps. *Id.* at 1245.

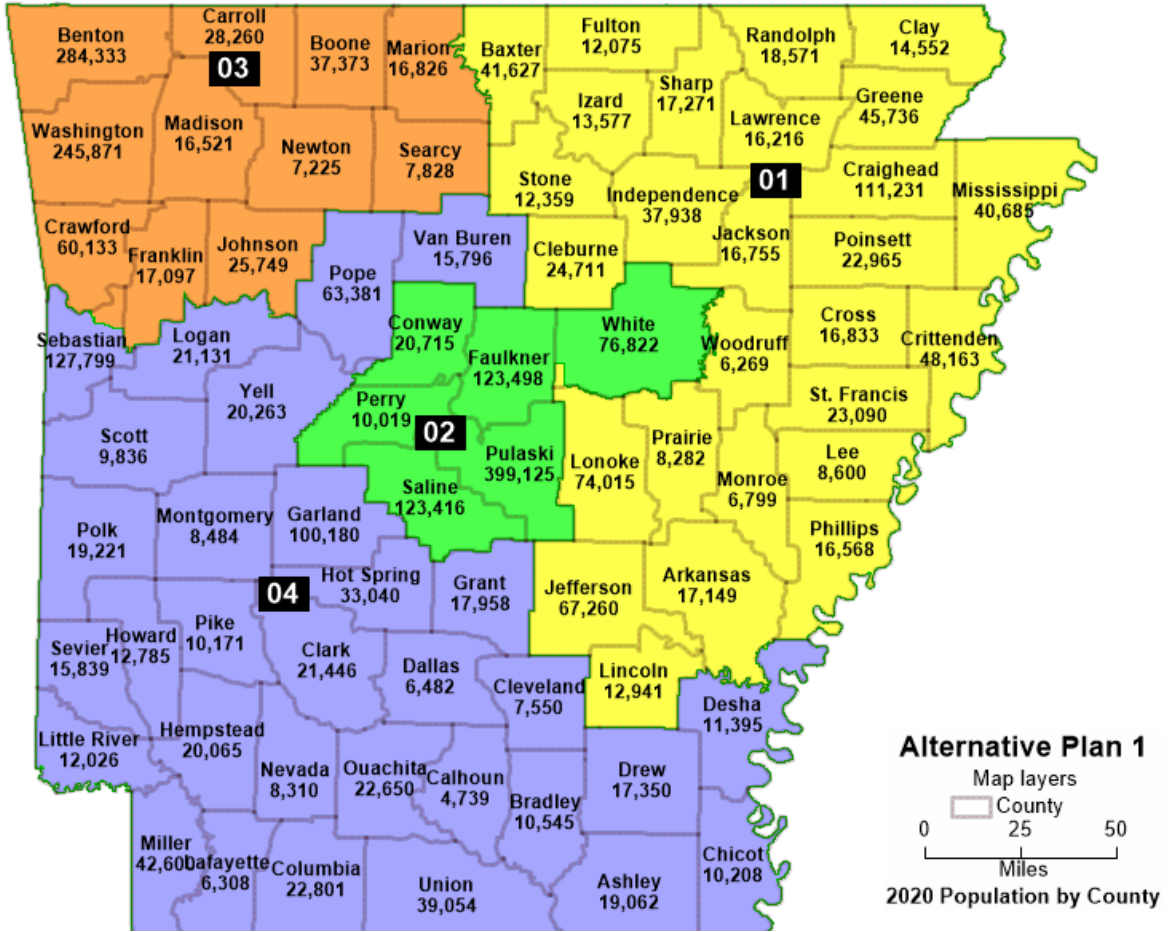
The Supreme Court explained that this “adverse inference may be dispositive in many, if not most, cases where the plaintiff lacks direct evidence or some extraordinarily powerful circumstantial evidence such as the strangely irregular twenty-eight-sided district lines in *Gomillion v. Lightfoot*.” *Id.* at 1250. This case is no different as Plaintiffs’ have no direct evidence of a racial motive, nor is the Enacted Plan comparable to the obvious and egregious racial gerrymander in *Gomillion*. *See id.* at 1273 (Kagan, J. concurring) (“The majority must go back 65 years, to the most grotesque racial gerrymander in the U. S. Reports, to find a case based on circumstantial evidence that could have survived its adverse inference.”).

Thus, to avoid an adverse inference ending their case at the start, Plaintiffs were required to come up with at least one map that meets or outperforms the Enacted Plan on (1) racial outcomes, (2) core retention, and (3) partisan outcomes. Plaintiffs’ proffered demographic expert,

Mr. Cooper, produced three alternative maps, all of which fail *Alexander*'s requirement. In sum, Alternative Plan 1, attached as Exhibit 4 to Defendants' Motion for Summary Judgment, does worse on core retention and significantly worse on partisan outcomes, Alternative Plan 2 (attached as Exhibit 5 to Defendants' Motion for Summary Judgment) does significantly worse on core retention and worse on partisan outcomes, and Alternative Plan 3 (attached as Exhibit 6 to Defendants' Motion for Summary Judgment), while doing better on partisan outcomes, does miserably worse on core retention. Additionally, though none of the alternative maps split Pulaski County, all still fail the requirement to demonstrate a significantly greater racial balance than the Enacted Plan. Plaintiffs allege that "fewer than 16,510 residents needed to be moved out of Arkansas's Second Congressional District to achieve one person, one vote parity after the 2020 Census." *See* Am. Compl. ¶¶ 2, 54, 134. However, none of the alternative plans offered by Plaintiffs support this claim. In fact, all three plans move significantly more of the APB population from their previous district than the Enacted Plan does. Plans 2 and 3 actually reduce the APB population in D2 relative to the 2011 plan, and Plan 3 (the only one to actually match the partisan outcomes of the Enacted Plan) required moving 884,000 people (over a quarter of the State) to achieve an merely equivalent APB population to the Enacted Plan.

### **1. Alternative Plan 1**

Cooper's first alternative plan does not satisfy *Alexander*'s alternative-map requirement because it does not match the core retention or partisan outcomes of the Enacted Plan.



Cooper Rep. 38 (Figure 23).

Cooper describes Alternative Plan 1 as a “least change plan” that “prioritizes core retention without splitting Pulaski County.” Cooper Rep. ¶ 66.

***Racial outcomes***

In his Alternative Plan 1, Cooper balances the population of D2 by removing Van Buren County, without splitting Pulaski County. Cooper reports the population demographics of the map as follows:

**Figure 24: Alternative Plan 1– 2020 Census**

District	Population	Deviation	% Deviation	% 18+ Black	% 18+ Latino	% 18+ NH White
1	752932	51	0.01%	19.83%	3.02%	73.14%
2	752901	20	0.00%	23.15%	5.85%	65.75%
3	752850	-31	0.00%	2.49%	12.38%	75.01%
4	752841	-40	-0.01%	15.14%	6.89%	72.26%

Cooper Rep. 39.

Defense expert Thomas Bryan provides more specific statistics for D2 in Cooper’s Alternative Plan 1:

**Table IV.A.3: Cooper’s Alt1 Plan D2**

Population	Total	WNH	APB	Hispanic	% WNH	% APB	% HISP
Total	752,901	472,275	187,854	53,093	62.7%	25.0%	7.1%
VAP	580,289	381,551	134,314	33,951	65.8%	23.1%	5.9%
CVAP	564,071	398,467	134,787	15,718	70.6%	23.9%	2.8%

Bryan Reb. Rep. 19, attached as Exhibit 7 to Defendants’ Motion for Summary Judgment.

Cooper’s BVAP for D2 in Alternative Plan 1 is 23.15%, higher than both the 2011 Plan (22.64%) and the Enacted Plan (20.33%). *See* Cooper Rep. 36, Figure 22.

### **Core retention**

Cooper reports the map-wide core retention as 87.53%. Cooper Rep. 40. Bryan calculates both the total and differential core retention for Cooper’s Alternative Plan 1 as follows:

**Table VI.1: Overall Core Retention by Plan**

Plan	Total	WNH	APB	Hispanic
<b>2021 Enacted</b>	92.2%	91.5%	94.5%	93.0%
<b>Alt 1</b>	87.6%	88.0%	87.2%	86.6%

Bryan Reb. Rep. 28 (Enacted Plan figures included for comparison).

As compared to the Enacted Plan, Cooper’s Alternative Plan 1 moves more people of all races from their previous district. Because the only change in D2 from the 2011 Plan to

Cooper’s Alternative 1 is the removal of Van Buren County, APB core retention in D2 is nearly one hundred percent. But to accomplish that Cooper moves significant numbers of APB voters out of D3 and D4:

Alt 1	Total	WNH	APB	Hispanic
D1 Retained	687,505	507,726	124,529	26,862
D1 Moved	28,880	15,210	11,195	1,486
D1 Total	716,385	522,936	135,724	28,348
<b>D1 Core Retention</b>	<b>96.0%</b>	<b>97.1%</b>	<b>91.8%</b>	<b>94.8%</b>
D2 Retained	752,901	472,275	187,854	53,093
D2 Moved	16,490	14,935	167	529
D2 Total	769,391	487,210	188,021	53,622
<b>D2 Core Retention</b>	<b>97.9%</b>	<b>96.9%</b>	<b>99.9%</b>	<b>99.0%</b>
D3 Retained	660,318	459,765	21,266	105,029
D3 Moved	178,829	122,335	13,365	25,280
D3 Total	839,147	582,100	34,631	130,309
<b>D3 Core Retention</b>	<b>78.7%</b>	<b>79.0%</b>	<b>61.4%</b>	<b>80.6%</b>
D4 Retained	536,613	376,126	98,602	37,549
D4 Moved	149,988	95,178	38,990	7,019
D4 Total	686,601	471,304	137,592	44,568
<b>D4 Core Retention</b>	<b>78.2%</b>	<b>79.8%</b>	<b>71.7%</b>	<b>84.3%</b>
Total Retained	2,637,337	1,815,892	432,251	222,533
Total Moved	374,187	247,658	63,717	34,314
Total	3,011,524	2,063,550	495,968	256,847
<b>Total Core Retention</b>	<b>87.6%</b>	<b>88.0%</b>	<b>87.2%</b>	<b>86.6%</b>

Bryan Reb. Rep. 42.

As Bryan’s analysis shows, the core retention in Cooper’s Alternative Plan 1 (which moves 374,187 people in total) is worse than the Enacted Plan (which moves 234,113 people). Alternative Plan 1 moves 13,365 APB from D3 and 38,990 APB from D4. Map-wide Cooper thus moves 63,717 APB out of their previous districts—twice as many as the Enacted Plan, which only moved 27,093. *See* Bryan Reb. Rep. 28.

***Partisan outcome***

Cooper’s Alternative Plan 1 does significantly worse than the Enacted Plan on partisan outcomes—so much so that Cooper didn’t even report those figures in his report. Bryan calculated the partisan outcomes of Alternative Plan 1, as compared to both the 2011 Plan and Enacted Plan, using multiple races from the 2022 elections:

***Table VII.A.1 2022 Republican Performance in D2 by Plan***

<b>2022 Race D2 Results</b>	<b>2011 Enacted</b>	<b>2021 Enacted</b>	<b>Cooper Alt1</b>
Senate	57.2%	59.1%	56.6%
Congressional	58.1%	60.0%	57.6%
Governor	53.5%	55.5%	52.9%
Attorney General	59.5%	61.5%	58.9%
Secretary of State	58.6%	60.6%	58.0%

Bryan Reb. Rep. 30.

While the Enacted Plan improves the partisan outcome of D2, Cooper’s Alternative Plan 1 results in *worse* partisan outcomes. This is especially notable given that the 2011 Plan was enacted by a Democrat-controlled General Assembly, with 2021 being Republicans’ first modern opportunity to draw Arkansas’s congressional districts. This non-starter partisan result is not surprising, given that Cooper admitted in his deposition that “the purpose of alternative plan one . . . was not to focus on partisan performance at all[.]” (Cooper Dep. 221:24-25; *see also id.* 118:18-19 (“I was not looking at partis [sic] advantage at all in alternative plan one.”))

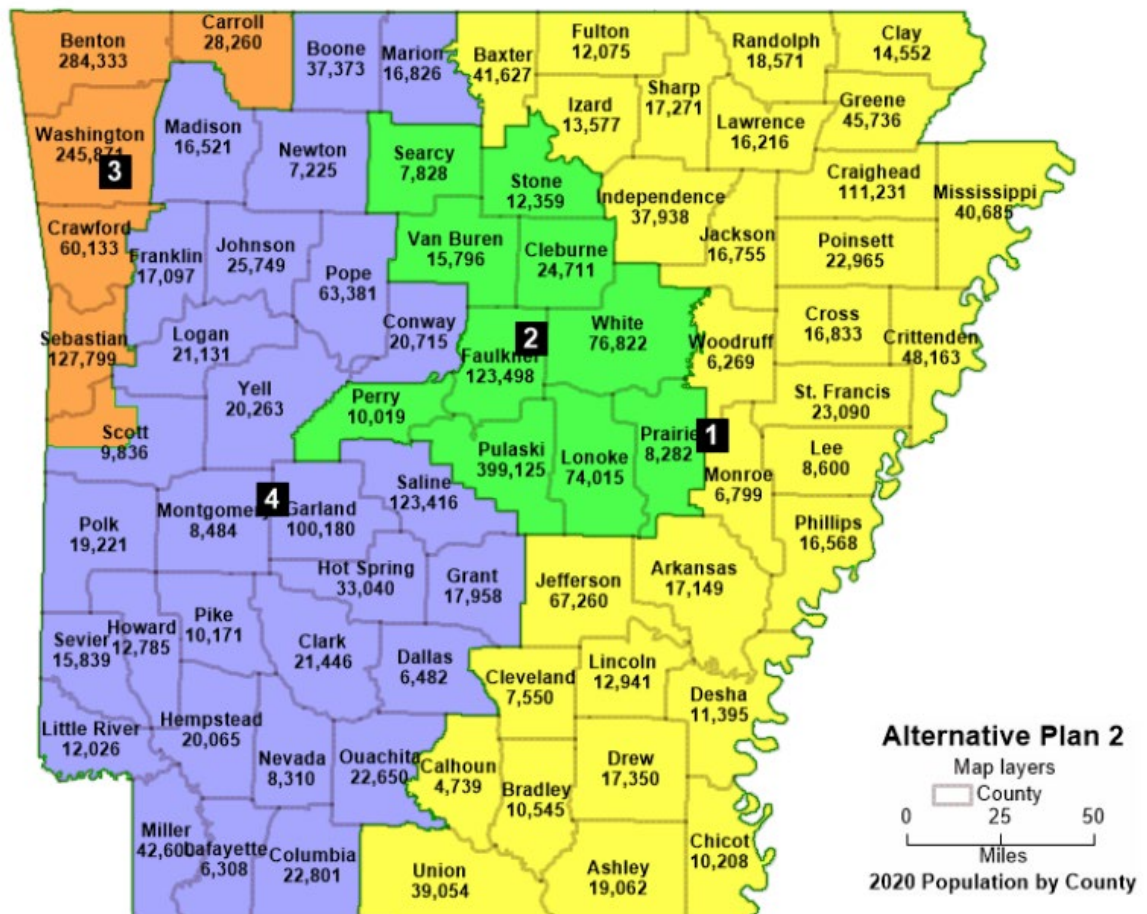
Thus, Cooper’s Alternative Plan 1 fails to match the core retention and partisan outcomes of the Enacted Plan, meaning those features cannot be ruled out as plausible explanations as to why the General Assembly did not enact a map with the same racial balance as Alternative Plan 1. *See Alexander*, 144 S. Ct. at 1245. Moreover, Alternative Plan 1, despite not splitting Pulaski County and resulting in an overall higher APB% in D2, fails the requirement of demonstrating a

“significantly greater racial balance” than the Enacted Plan, given that this configuration required moving over twice as much of the State’s APB population out of their previous district. *Id.* at 1249 (quotation omitted). That shortcoming is especially relevant because, as noted above, one of Plaintiffs’ chief complaints about the Enacted Plan is that it moved more population than necessary in order to balance D2. *See, e.g.,* Am. Compl. ¶¶ 2, 54, 134.

Alternative Plan 1 thus cannot save Plaintiffs from an adverse inference under *Alexander*.

## 2. Alternative Plan 2

Cooper’s second alternative plan also fails to meet *Alexander*’s alternative-map requirement because it fails to match the core retention or political outcome of the Enacted Plan.



Cooper Rep. 41 (Figure 26).

Cooper claims in his report that “Alternative Plan 2 demonstrates that, even if the legislature prioritized partisan goals over traditional redistricting criteria, splitting Pulaski County was still unnecessary.” Cooper Rep. ¶ 70. However, in his deposition, Cooper admitted that this isn’t true; in fact, he didn’t prioritize partisan goals at all when drawing this plan. (See Cooper Dep. 223:14-18 (“Q. So alternative plan 2 prioritizes partisan goals over traditional redistricting criteria? A. No. It does not.”); see also Cooper Dep. 119:12-14 (similarly denying he had to “sacrifice other traditional principles” in drawing Alternative Plan 2.))

### ***Racial outcome***

In Alternative Plan 2, Cooper balances the population of D2 by removing Conway and Saline Counties and adding in counties to the east and south previously in D1. He reports the map-wide demographics as follows:

**Figure 27: Alternative Plan 2– 2020 Census**

District	Population	Deviation	% Deviation	% 18+ Black	% 18+ Latino	% 18+ NH White
1	752774	-107	-0.01%	24.00%	3.26%	69.15%
2	752455	-426	-0.06%	22.26%	5.41%	67.05%
3	753369	488	0.06%	3.56%	13.88%	71.60%
4	752926	45	0.01%	10.77%	5.65%	78.27%

Cooper Rep. 42.

Bryan again provides more specific information as to D2:

**Table IV.A.4: Cooper’s Alt2 Plan D2**

Population	Total	WNH	APB	Hispanic		% WNH	% APB	% HISP
Total	752,455	483,064	180,379	49,027		64.2%	24.0%	6.5%
VAP	581,465	389,851	129,445	31,458		67.0%	22.3%	5.4%
CVAP	566,120	405,281	129,638	15,760		71.6%	22.9%	2.8%

Bryan Reb. Rep. 19. In this plan, the BVAP D2 is 22.3%, higher than the Enacted Plan (20.33%), *see* Cooper Rep. 36, Figure 22, but is notably lower than Alternative Plan 1 (23.15%), *see* Cooper Rep. 39, Figure 24, and the 2011 Plan (22.64%).

***Core retention***

Cooper reports the map-wide core retention of Alternative Plan 2 as 80.31%. Cooper Rep. 40. Bryan calculates both the total and differential core retention for Cooper’s Alternative Plan 2 as follows:

***Table VI.1: Overall Core Retention by Plan***

Plan	Total	WNH	APB	Hispanic
2021 Enacted	92.2%	91.5%	94.5%	93.0%
Alt 1	87.6%	88.0%	87.2%	86.6%
Alt 2	80.4%	78.6%	81.7%	88.2%

Bryan Reb. Rep. 28.

As compared to the Enacted Plan and to his Alternative Plan 1, Cooper’s Alternative Plan 2 moves more people of all races from their previous district. Bryan reports the more granular differential core retention data as follows:

Alt 2	Total	WNH	APB	Hispanic
D1 Retained	589,741	414,690	128,986	23,558
D1 Moved	126,644	108,246	6,738	4,790
D1 Total	716,385	522,936	135,724	28,348
<b>D1 Core Retention</b>	<b>82.3%</b>	<b>79.3%</b>	<b>95.0%</b>	<b>83.1%</b>
D2 Retained	625,260	374,317	173,641	44,229
D2 Moved	144,131	112,893	14,380	9,393
D2 Total	769,391	487,210	188,021	53,622
<b>D2 Core Retention</b>	<b>81.3%</b>	<b>76.8%</b>	<b>92.4%</b>	<b>82.5%</b>
D3 Retained	717,506	479,160	31,407	122,503
D3 Moved	121,641	102,940	3,224	7,806
D3 Total	839,147	582,100	34,631	130,309
<b>D3 Core Retention</b>	<b>85.5%</b>	<b>82.3%</b>	<b>90.7%</b>	<b>94.0%</b>
D4 Retained	487,705	354,511	71,380	36,134
D4 Moved	198,896	116,793	66,212	37,783
D4 Total	686,601	471,304	137,592	44,568
<b>D4 Core Retention</b>	<b>71.0%</b>	<b>75.2%</b>	<b>51.9%</b>	<b>81.1%</b>
Total Retained	2,420,212	1,622,678	405,414	226,424
Total Moved	591,312	440,872	90,554	59,772
Total	3,011,524	2,063,550	495,968	256,847
<b>Total Core Retention</b>	<b>80.4%</b>	<b>78.6%</b>	<b>81.7%</b>	<b>88.2%</b>

Bryan Reb. Rep. 43.

This analysis shows that Cooper moved 6,738 APB from D1, 14,380 from D2, 3,224 from D3, and a startling 66,212 (nearly 50% of the APB) from D4. The APB population moved from D2 to D4 under Alternative Plan 2 (14,380) is nearly as much as under the Enacted Plan (16,678). *See* Bryan Rep. 101. Overall, Cooper moves 90,554 APB from their previous district—over three times the 27,091 moved under the Enacted Plan. *See* Bryan Reb. Rep. 28.

### ***Partisan outcome***

Cooper's Alternative Plan 2 performs better for Republicans than Alternative Plan 1, but still worse than the Enacted Plan. Cooper reports the results of the 2020 Trump/Biden race as resulting in a 55.7/44.3% head-to-head win for Trump, versus 56.7/43.3% under the Enacted Plan. Cooper Rep. 43. Bryan provides more detailed breakdown using additional races:

*Table VII.A.1 2022 Republican Performance in D2 by Plan*

2022 Race D2 Results	2011 Enacted	2021 Enacted	Cooper Alt1	Cooper Alt2
Senate	57.2%	59.1%	56.6%	58.1%
Congressional	58.1%	60.0%	57.6%	59.4%
Governor	53.5%	55.5%	52.9%	54.6%
Attorney General	59.5%	61.5%	58.9%	60.5%
Secretary of State	58.6%	60.6%	58.0%	59.5%

Bryan Reb. Rep. 30.

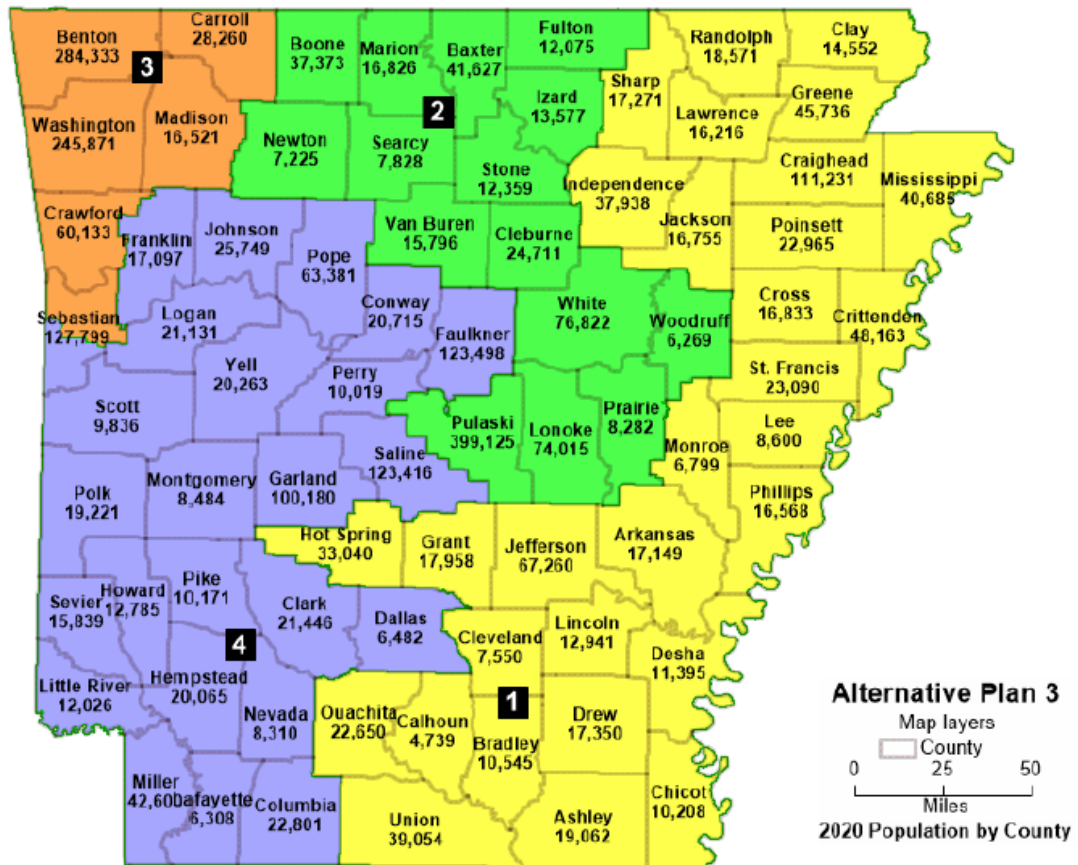
While Alternative Plan 2 is an improvement over Alternative Plan 1, it does not reach the same level of partisan advantage as the Enacted Plan. That is not surprising, as Cooper acknowledged in his deposition that in drawing Alternative Plan 2, he only “wanted to get to a level that is about the same as the enacted plan,” (Cooper. Dep. 118:22-23), despite his understanding that *Alexander* requires a plaintiff to “to show that you could draw a plan that would match or exceed the partisan advantage” of an enacted plan, (*id.* 118:5-6).

Thus, Cooper’s Alternative Plan 2 fails to match the core retention and partisan outcomes of the Enacted Plan, meaning those features are plausible explanations as to why the General Assembly did not enact a map with the same racial balance as Alternative Plan 2. Moreover, Alternative Plan 2, despite not splitting Pulaski County, cannot satisfy the requirement of demonstrating a “significantly greater racial balance,” *Alexander*, 144 S Ct. at 1249 (quotation omitted), than the Enacted Plan because Alternative Plan 2 required moving more than *three times* as much of the State’s APB population out of their previous district compared to the Enacted Plan. Alternative Plan 2 cannot save Plaintiffs from an adverse inference under *Alexander*.

### 3. Alternative Plan 3

Notably, Alternative Plan 3 was offered for the first time in Cooper’s rebuttal report. That alternative plan likewise fails to meet *Alexander*’s alternative-map requirement because, although it matches the partisan outcome of the Enacted Plan, it fails to reach the Enacted Plan’s

high core retention. *See Alexander*, 144 S. Ct. 1245 (faulting expert where the Enacted Plan retains 83% of District 1's core, but the average map produced by Dr. Imai's model scored 69% on the core-district-retention metric”).



Cooper Reb. Rep. 7 (Figure 1), attached as Exhibit 8 to Defendants’ Motion for Summary Judgment.

Cooper admits his initial report inexplicably failed to include any alternative map that matches or exceeds the partisan outcome of the Enacted Plan. (Cooper Dep. 118:10-119:11). Cooper claims that “Alternative Plan 3 is drawn to achieve a similar partisan advantage as the Enacted Plan, while adhering to traditional redistricting principles within the context of this lawsuit.” Cooper Reb. Rep. 7. He accomplishes this by “adding a different set of whole counties

into CD 2—that is, without splitting neighborhoods (white or Black) in Pulaski County or elsewhere in a reconfigured CD 2.” Cooper Reb. Rep. ¶ 8 (emphasis omitted).

***Racial outcome***

In Alternative Plan 3, Cooper significantly reorganizes the State’s congressional districts. Cooper reports the demographics of the plan as follows:

**Figure 2: Alternative Plan 3 – 2020 Census**

District	Population	Deviation	% Deviation	% 18+ Black	% 18+ Latino	% 18+ NH White
1	752874	-7	0.00%	25.57%	3.32%	67.63%
2	753910	1029	0.14%	20.35%	4.91%	69.49%
3	753219	338	0.04%	3.56%	13.89%	71.62%
4	751521	-1360	-0.18%	11.07%	6.08%	77.36%

Cooper Reb. Rep. 8.

Bryan provides more detailed information for D2 as follows:

**Table IV.A.5: Cooper’s Alt3 Plan D2**

Population	Total	WNH	APB	Hispanic	% WNH	% APB	% HISP
Total	753,910	502,907	166,175	45,019	66.7%	22.0%	6.0%
VAP	587,695	408,411	119,594	28,863	69.5%	20.3%	4.9%
CVAP	572,445	421,272	120,711	15,311	73.6%	21.1%	2.7%

Bryan Supp. Rep. 8.

Cooper’s BVAP for D2 in Alternative Plan 3 is 20.35%, lower than the BVAP under the 2011 Plan (22.64%), Cooper Rep. 36, Figure 22, Alternative Plan 1 (23.15%), Cooper Rep. 39, and Alternative Plan 2 (22.6%), Cooper Rep. 42, Figure 27, and basically identical to the Enacted Plan (20.33%), Cooper Rep. 36, Figure 22.

**Core retention**

Cooper reports the map-wide core retention for Alternative Plan 3 as 73.53%.<sup>3</sup> Cooper Reb. Rep. 9, Figure 3. Bryan reports both the differential core retention data as follows:

**Table VI.1: Overall Core Retention by Plan**

Plan	Total	WNH	APB	Hispanic
<b>2021 Enacted</b>	92.2%	91.5%	94.5%	93.0%
<b>Alt 1</b>	87.6%	88.0%	87.2%	86.6%
<b>Alt 2</b>	80.4%	78.6%	81.7%	88.2%
<b>Alt 3</b>	70.6%	67.3%	75.0%	83.8%

Bryan Supp. Rep. 13, attached as Exhibit 9 to Defendants' Motion for Summary Judgment.

Cooper's Alternative Plan 3 moves more people of all races than the Enacted Plan or his two other alternative plans—totaling at least a quarter of the entire State. Bryan reports the more granular differential core retention data as follows:

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<sup>3</sup> The difference between Cooper and Bryan's total core retention figures is attributable to Cooper making an error in his rebuttal report in calculating core retention for Alternative Plan 3. Instead of using the 2011 Plan as the baseline for measuring core retention, Cooper appears to have used the Enacted Plan. *Compare* Alternative Plan 1, Ex. 8, Alternative Plan 2, Ex. 8 *with* Alternative Plan 3, Ex. 8.

Alt 3	Total	WNH	APB	Hispanic
D1 Retained	516,193	349,030	126,545	21,924
D1 Moved	200,192	173,906	9,179	6,424
D1 Total	716,385	522,936	135,724	28,348
<b>D1 Core Retention</b>	<b>72.1%</b>	<b>66.7%</b>	<b>93.2%</b>	<b>77.3%</b>
D2 Retained	491,743	272,675	156,597	37,153
D2 Moved	277,648	214,535	31,424	16,469
D2 Total	769,391	487,210	188,021	53,622
<b>D2 Core Retention</b>	<b>63.9%</b>	<b>56.0%</b>	<b>83.3%</b>	<b>69.3%</b>
D3 Retained	711,327	473,955	31,334	122,314
D3 Moved	127,820	108,145	3,297	7,995
D3 Total	839,147	582,100	34,631	130,309
<b>D3 Core Retention</b>	<b>84.8%</b>	<b>81.4%</b>	<b>90.5%</b>	<b>93.9%</b>
D4 Retained	407,794	294,120	57,386	33,857
D4 Moved	278,807	177,184	80,206	10,711
D4 Total	686,601	471,304	137,592	44,568
<b>D4 Core Retention</b>	<b>59.4%</b>	<b>62.4%</b>	<b>41.7%</b>	<b>76.0%</b>
Total Retained	2,127,057	1,389,780	371,862	215,248
Total Moved	884,467	673,770	124,106	41,599
Total	3,011,524	2,063,550	495,968	256,847
<b>Total Core Retention</b>	<b>70.6%</b>	<b>67.3%</b>	<b>75.0%</b>	<b>83.8%</b>

Bryan Supp. Rep. 20.

This analysis shows that Cooper moved 9,179 APB from D1, 31,424 from D2, 3,297 from D3, and 80,206 (nearly 60% of the APB) from D4. The APB population moved from D2 to D4 under Alternative Plan 3 (31,424) is nearly twice as much as under the Enacted Plan (16,687). *See* Bryan Rep. 101. Overall, Cooper moves 124,106 APB from their previous district, four-and-a-half times the 27,091 moved under the Enacted Plan. *See* Bryan Reb. Rep. 28.

### ***Partisan outcome***

Cooper's Alternative Plan 3 performs better for Republicans than both the 2011 Plan and the Enacted Plan. Cooper reports the partisan outcome of 2020 and 2022 races as follows:

Metric	2021 Enacted	Alternative 2	Alternative 3
2020 Election (Head-to-Head)			
CD 2 R – Trump	56.7%	55.7%	58.3%
CD 2 D – Biden	43.3%	44.3%	41.7%
<b>Republican Margin</b>	13.4%	11.4%	<b>16.6%</b>
2022 Election (Head-to-Head)			
CD 2 R – Boozman	60.00%	60.0%	60.82%
CD 2 D – James	40.00%	40.0%	39.18%
<b>Republican Margin</b>	20.00%	20.0%	<b>21.64%</b>

Cooper Reb. Rep. 9-10 (Figure 5).

Bryan reports similar results as follows:

*Table VII.A.1 2022 Republican Performance in D2 by Plan*

2022 Race D2 Results	2011 Enacted	2021 Enacted	Cooper Alt1	Cooper Alt2	Cooper Alt3
Senate	57.2%	59.1%	56.6%	58.1%	61.4%
Congressional	58.1%	60.0%	57.6%	59.4%	63.0%
Governor	53.5%	55.5%	52.9%	54.6%	58.2%
Attorney General	59.5%	61.5%	58.9%	60.5%	63.5%
Secretary of State	58.6%	60.6%	58.0%	59.5%	62.7%

Bryan Supp. Rep. 14.

This is the only plan Cooper creates that is able to match the partisan advantage of the Enacted Plan. But as the map and the core retention discussion above show, he is only able to do that by significantly reconfiguring the entire congressional map.

Cooper’s Alternative Plan 3 fails to match the core retention of the Enacted Plan, meaning that feature is a plausible explanation as to why the General Assembly did not enact a map with the same racial balance as Alternative Plan 3. Moreover, Alternative Plan 3, despite not splitting Pulaski County, cannot satisfy the requirement of demonstrating a “significantly greater racial balance,” *Alexander*, 144 S Ct. at 1249 (quotation omitted), than the Enacted Plan because Alternative Plan 3 (1) does no better than the Enacted Plan in terms of D2 APB population, and (2) required moving over four-and-a-half times as much of the State’s APB population map-wide

out of their previous district compared to the Enacted Plan, including nearly twice the APB population as the Enacted Plan moves out of D2. Alternative Plan 2 cannot save Plaintiffs from an adverse inference under *Alexander*.

\* \* \*

To avoid an adverse inference, Plaintiffs were required to present an alternative map that matches the Enacted Plan’s core retention and partisan outcome, while achieving a greater racial balance. None of their maps accomplish that, and the only map to succeed at *any* of those three requirements is Alternative Plan 3’s superior partisan outcome. Plaintiffs have thus failed to “rule out core retention as another plausible explanation for the difference between the Enacted Plan and the” alternative maps. *Alexander*, 144 S. Ct. at 1245.

**B. All the available direct evidence points away from a racial motive.**

The Supreme Court has recognized that “[o]utright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence.” *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999). That is true here. As this Court recognized in the first case considering a racial gerrymandering challenge to Arkansas’s congressional map, “[t]here is no smoking gun here: neither the plan’s sponsors nor other members of the General Assembly provided a rationale or explanation for the new map other than equalizing the number of voters across Arkansas’s four congressional districts.” *Simpson v. Hutchinson*, 636 F. Supp. 3d 951, 956 (E.D. Ark. 2022) (*Simpson I*) (cleaned up). That hasn’t changed after discovery.

***Sen. Rapert***

The only direct evidence of the legislative motives behind the Enacted Plan adduced in discovery comes from former Senator Jason Rapert. Sen. Rapert served as the Chair of the Sen-

ate State Agencies Committee during the congressional redistricting. (Rapert Dep. 6:11-19, attached as Exhibit 10 to Defendants’ Motion for Summary Judgment.) He posted the following on X (formerly Twitter) on March 29, 2024:



Doc. 46-3 at 2. The Court held that this post waived Sen. Rapert’s legislative privilege about the matters covered and required him to sit for a deposition by written questions. Doc. 53 at 7. His deposition testimony is the only direct evidence as to what any Republican legislator intended to accomplish in the congressional redistricting.

Sen. Rapert testified that “to [him], the process was always about math. How do we get the population to be as close as we can to equalize.” (Rapert. Dep. 8:6-8.) He also “wanted to make sure that [the legislature] disrupted the least counties possible in doing that . . . .” (*Id.* 8:15-16.) The desire to split fewer counties drove the three-way split of Pulaski: “The fact is that the boundaries of three congressional districts clearly met around Pulaski County and being the most populous county in the state, that is the logical and easiest place to get that population separated where its manageable.” (*Id.* 20:20-24).

Sen. Rapert testified unequivocally that, based on his personal knowledge, “[t]he only people that ever brought up race in this process was the Democrat activists, the Democrat politicians that were purposefully trying to make the process falter.” (*Id.* 11:19-22.) He “did not think that race should be a factor or would be a factor in our maps. They weren’t.” (*Id.* 12:25-13:1; *see also id.* 18:12-14 (“I never once considered and do object and find it insulting that people would say that anything we did was based upon race. It was not.”)).

Because of that, Sen. Rapert “never asked for [or] looked for during the process anything that would be racial demographic data as we got to the maps.” (*Id.* 15:23-25.) Indeed, only after what would become the Enacted Plan was completed did Sen. Rapert “ask[] the Bureau of Legislative Research to produce . . . the actual percentages based upon racial make up in the four districts after the 2011 maps as compared to the 2021 map we were doing then.” (*Id.* 16:6-9.) In Sen. Rapert’s view, there was “[v]irtually no difference whatsoever in that. They were virtually the same.” (*Id.* 16:9-10.)

On the other hand, Sen. Rapert did not refute the possibility of partisan motivations playing a role. He recalled that “[i]f partisanship was ever discussed, I would say it would just be a side note that somebody made about that.” (*Id.* 24:7-9.) Further, he specifically recalled pulling up partisan data using Dave’s Redistricting and noted that there were “tons of people that were trying to utilize that” at the time. (*Id.* 24:11-14.)

### ***Other legislators***

The other available direct evidence of legislators’ motivation cuts against race driving the process. As this Court has previously recognized, to the extent any Republican legislators mentioned race during the redistricting process, they denied that it was a proper consideration. *Simpson II*, 2023 WL 3993040, at \*1. In her report, Plaintiffs’ expert Dr. Burch collects many of

these statements. *See* Burch Rep. 42, attached as Exhibit 11 to Defendants’ Motion for Summary Judgment, (Sen. Ballinger opining that “if we’re talking about race, there’s a lot better chance that we’re going to draw something that is unconstitutional”); *id.* (Sen. Garner commenting that “blatantly drawing a district for racial reasons, I think, gets us both in constitutionally [*sic*] issues with the federal government and is a bad way to look at drawing maps”). Other statements by Republican legislators expressed frustration at the introduction of race into the discussion by Democratic colleagues. *See id.* at 48-49 (Rep. Ray: “A map comes out of the committee with lines on a map, it gets called racist. . . . It’s a cheap political trick designed to score cheap political points. And that’s how I feel about it.”); (Rep. Wooten: “And like Representative Ray, I’m sorry to see race introduced in this body as a factor in this consideration. There’s not one thing in the rules or laws that apply to the drawing of this map that mentions race.”).

By contrast, a number of Republican legislators openly discussed partisan considerations during the districting process. Dr. Burch collects many of these statements in report as well. *See, e.g.,* Burch Rep. 51 (Rep. Gonzales: “It’s my understanding that if we can draw up these lines based on party affiliation, and that is more likely to hold up in court that drawing them along lines of race.”); *id.* at 52 (Sen. Johnson: “I think it’s absolutely about politics . . . . I don’t see any other real thing. This is about politics, and the courts have ruled carefully that redistricting is a political thing.”); *id.* at 53 (Rep. Pilkington: “[W]e actually could have made these districts redder, but didn’t. When you look at the average Orvis ratings in congressional districts, it’s about 62-63 percent Republican across the state. This map actually is bluer than the average of most districts when you look at the 2nd congressional district. . . . We could have actually gone way harsher if we wanted to.”).

\* \* \*

In sum, the available direct evidence of the General Assembly’s motive refutes the notion that race played any role in process leading to the Enacted Plan. Instead, Pulaski County’s large population and position at the juncture of three congressional districts provided the legislature with an expedient way to balance those three districts while reducing the overall number of counties split. As between race and partisan concerns, Republican legislators understood partisanship to be a permissible districting purpose and were aware of the partisan advantage of the Enacted Plan relative to the 2011 Plan.

**C. The features of the Enacted Plan itself do not evidence a racial motive.**

The Supreme Court has “recognized that, as a practical matter, challenges will often need to show that the State’s chosen map conflicts with traditional redistricting criteria.” *Alexander*, 144 S. Ct. at 1234 (cleaned up). The Enacted Plan doesn’t do that. Instead, the Enacted Plan represents an improvement over the 2011 Plan in all respects.

The General Assembly did not adopt any particular redistricting criteria, but they were advised by the Bureau of Legislative Research on population equality and “several other traditional redistricting criteria that courts and other states have used for redistricting.” Burch Rep. 26. “These include compactness, contiguity, preservation of counties and other political subdivisions, preservation of communities of interest, preservation of the cores of prior districts, and avoiding pairing incumbents.” *Id.* at 27. Plaintiffs’ expert Cooper testified the principles presented to the legislature in anticipation of the redistricting process are those “you would want to consider” and did not include any factor that was improper. (Cooper Dep. 14:14-15:20, 101:2-12); *see also* Cooper Dep. Ex.6, attached as Exhibit 12 to Defendants’ Motion for Summary Judgment.

Cooper’s own analysis shows the improvement between the 2011 Plan and the Enacted Plan:

Metric	2011 Benchmark	2021 Enacted
Total Split Counties*	5	2
Total County Splits*	10	5
VTD Splits*	1	0
Split Municipalities*	5	6
Municipal Splits*	10	6
Core-based Statistical Area splits*	13	12
Unified School District splits*	100	84
One-person, one-vote (deviation)*	20.26%	0.09%
DRA Compactness higher=better)#	41	59
Core Retention	NA	92.16%
Incumbent Conflicts	0	0
CD 2 BVAP	22.64%	20.33%

Cooper Rep. 18 (Figure 7).

Relative to the 2011 Plan, the Enacted Map reduces political subdivision splits, improves compactness, avoids pairing incumbents, achieves satisfactory population equality, and preserves overwhelmingly the core of prior districts. None of this is in dispute. Indeed, the only aspect of the Enacted Plan that Plaintiffs claim subordinates traditional redistricting criteria to other considerations is the three-way split of Pulaski County. *See* Am. Compl. ¶¶ 162-87. As the Court noted in its motion-to-dismiss opinion, the Complaint discusses splits of “[s]chool districts, judicial subdistricts, church congregations, and neighborhoods[.]” *Christian Ministerial All. v. Thurston*, 714 F. Supp. 3d 1093, 1097 (E.D. Ark. 2024).

As Bryan explains in his report, splits of these smaller geographies are simply a direct result of splitting counties and, more generally, drawing plans using voting tabulation districts (“VTDs”), because all of these various boundaries do not always align perfectly. “By using 2020 VTDs to draw their plan and by splitting Pulaski County– the splits of other geographies such as places and school districts are by geographic definition. There is no way to split a

county without also impacting splits of other geographies.” Bryan Rep. ¶ 113. Another complicating factor is that geographies do not always align. “By drawing a district that aligns with one kind of geography, one can be forced to split another.” *Id.* ¶ 111.

Bryan’s report represents this graphically:

*Table VI.E.1 Percent of Coincident Geography in Arkansas*

	County	Place	USD	VTD
County	100%	2.5% ①	79.4% ②	100% ③
Place		100%	3.4% ④	57.8% ⑤
USD			100%	56.9% ⑥
VTD				100%

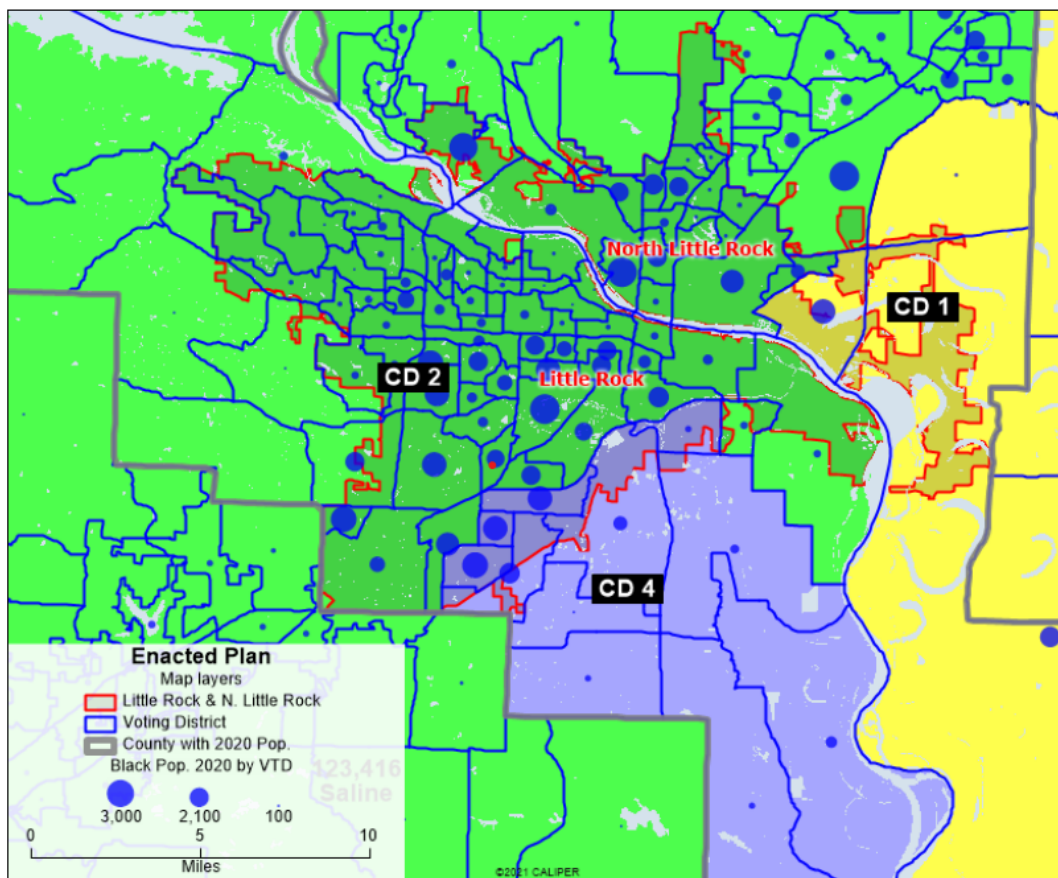
Bryan Rep. 49.

He goes on to explain: “This demonstrates that there is very low coincidence of the different geographies Plaintiffs complain are split by the 2021 Enacted Plan, which shows that even when following one type of geography (such as counties) other types of smaller inclusive geographies (such as school districts) can be split.” *Id.* ¶ 112. Cooper does not contest this explanation for the splits of smaller geographies.

Plaintiffs’ Complaint centers on the three-way split, but as this Court previously recognized, even if the Enacted Plan’s “split[ of] the black community in southern and eastern Pulaski County into two congressional districts . . . is ‘consistent with’ racially motivated redistricting, it does not ‘plausibly establish this purpose’ on its own.” *Simpson I*, 636 F. Supp. at 957 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009)) (emphasis omitted). Indeed, the southeast corner of Pulaski County sits at a unique juncture of three congressional districts, making it practical to balance three districts’ populations with only one split county.

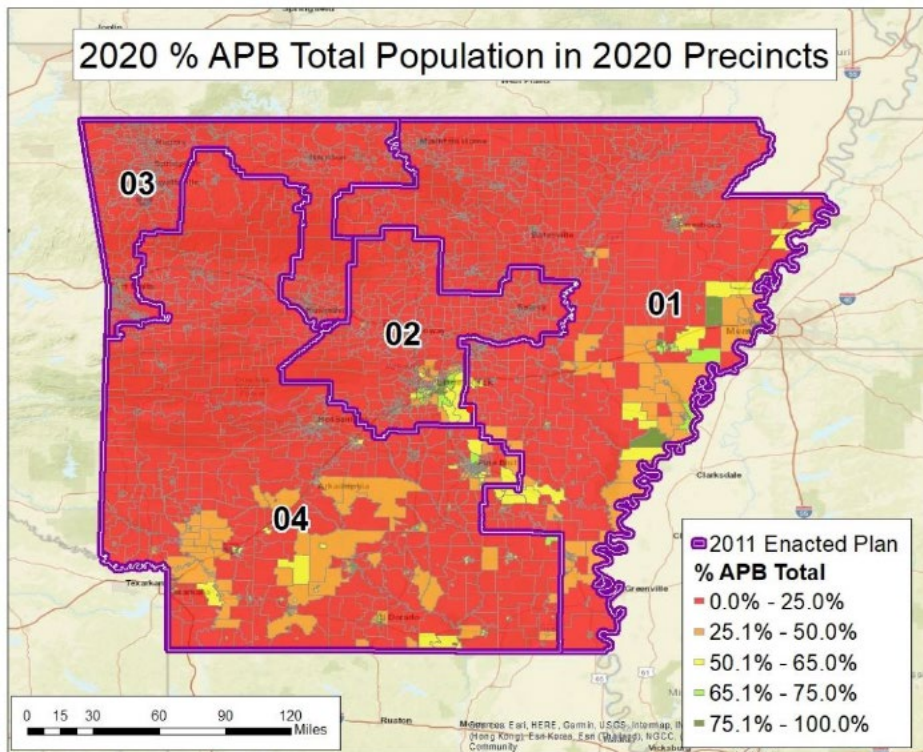
As Cooper recognizes, the southeast corner of Pulaski County a minority-heavy area:

Figure 18: Black Population Distribution – Little Rock and N. Little Rock



Cooper Rep. 32 (Figure 18).

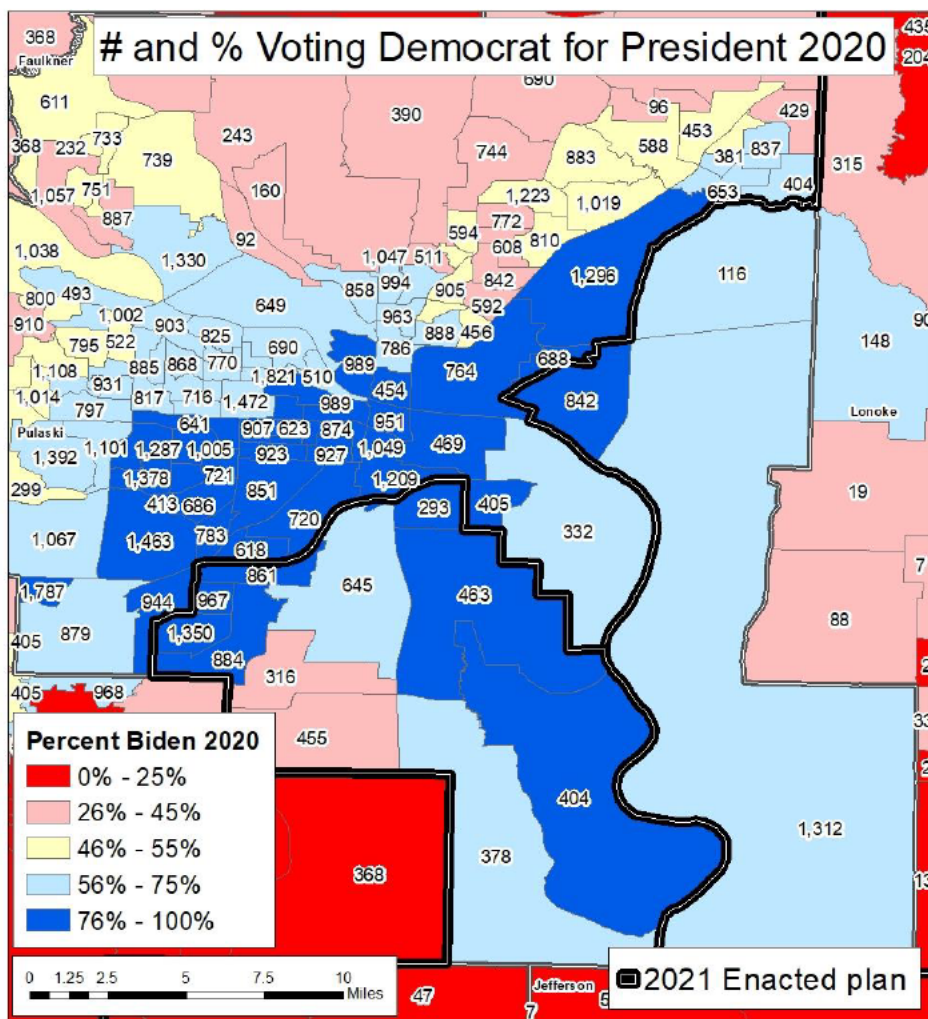
This holds true when looking at the State as a whole:



Bryan Rep. 31

This corner of Pulaski County is also much more heavily Democratic than even the immediately surrounding part of the county:

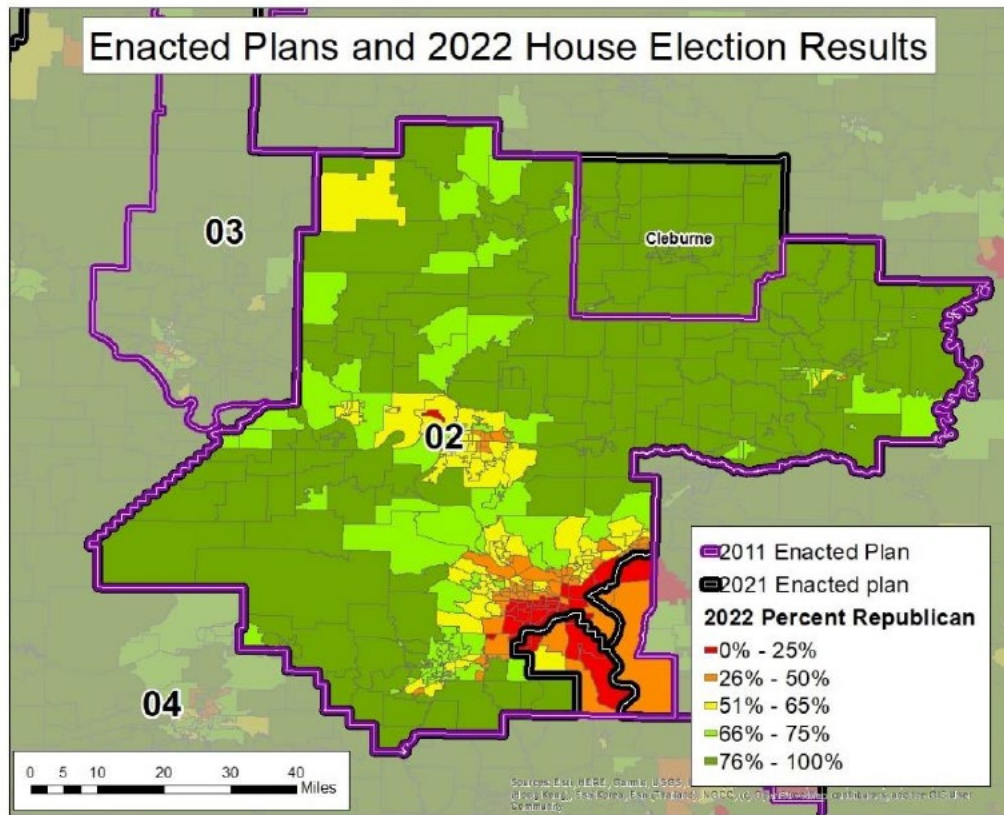
Figure VIII.B.3 Democratic Presidential Votes by Precinct - 2020



Bryan Rep. 69.

And it is also much more heavily Democratic than the county as a whole:

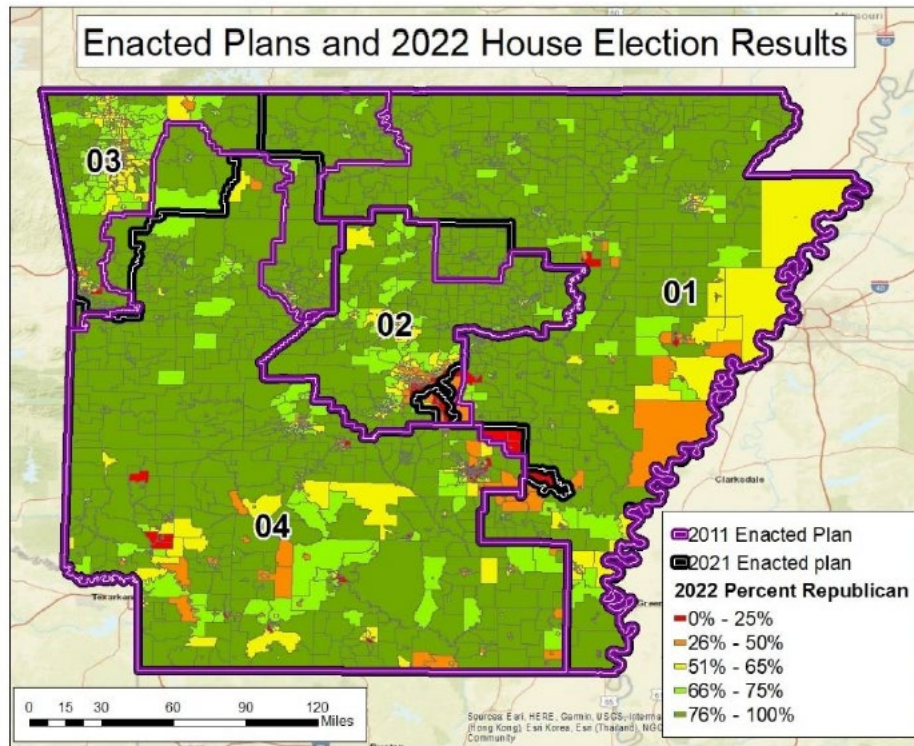
Figure VIII.B.2 District 2 2022 Election Congressional Results: Percent Republican



Bryan Rep. 68.

This area of Pulaski County further stands out even on a statewide basis:

Figure VIII.B.1 Arkansas 2022 Election Congressional Results: Percent Republican



Bryan Rep. 67.

These data confirm what Defendant has argued all along. Because of its unique location along the district border, the southeast corner of Pulaski County is the only area where a significant number of Democratic voters can be moved out of D2 to another district. It also happens to be a minority-heavy area, in contrast to other Democratic areas of Pulaski County which have a higher white population but are further from the district’s borders.

\* \* \*

In sum, rather than subordinating traditional redistricting principles to racial considerations, the General Assembly improved the performance of Arkansas’s congressional districts across the board. Indeed, performance of the Enacted Plan on traditional redistricting criteria demonstrate that this is not the “exceptional case[]” where “a reapportionment plan may 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) (quoting *Gomillion*, 363 U.S. at 341); *see also id.* at 647.

Nor is the three-way split in the southeast corner of Pulaski County. As the demographic data show, there is no easier location to remove a significant number of Democratic voters from D2 into another district, let alone while simultaneously balance the population in three districts. The geographic features of D2 do not allow Plaintiffs to disentangle race from the plausible partisan motivations behind the configuration of the district.

**D. The circumstantial evidence does not support a racial motive.**

Lacking direct evidence of racial discrimination, Plaintiffs must turn to circumstantial evidence to establish the General Assembly’s motive. Given the presumption of legislative good faith, their burden is extraordinary. They come nowhere close to meeting it.

**1. *Alexander* rejected the exact methodology Dr. Liu offers in this case.**

In its motion-to-dismiss opinion, the Court allowed the case to proceed based on Plaintiffs’ allegation that “black and white voters ‘with the same party preferences were sorted differently among the relevant districts.’” *CMA*, 714 F. Supp. 3d at 1097 (citing Am. Compl. ¶ 22). Specifically, Plaintiffs alleged that “[t]he new map removed black Democrats from the second district ‘at a notably higher rate’ than white Democrats” and “did the same for black and white unaffiliated voters.” *Id.* (citing Am. Compl. ¶ 189). The Court predicted that “[a]ctually proving it may turn out to be a challenge[,]” and that “[i]t may turn out that geography rather than race played the predominant role in the General Assembly’s decision,” *id.* at 1098.

Plaintiffs’ attempt to disentangle race from politics comes from Dr. Liu’s statistical methodology. He uses a “county envelope” method to measure the relative correlations between race and party and whether a given voter was retained in D2 or moved. He concludes based on his

statistical analysis that race has a higher correlation with voters being moved out of D2 than partisan preference, and race is thus a statistically better explanation for Enacted Plan's configuration than partisan preferences.

The problem for Plaintiffs is that Dr. Liu employed this exact methodology in *Alexander*, and the Supreme Court unequivocally rejected it as “plainly flawed” because it fails to account for geography. *Alexander*, 144 S. Ct. at 1248. The Supreme Court rejected the methodology of two experts—one of them being Liu himself—using a “county envelope” analysis. The Court explained that the methodology “did not control for contiguity or compactness” because it “assume[s] that a precinct could be moved into or out of [one district] regardless of its distance from the line between that district and [its neighboring district].” *Id.* at 1245-46. In reality, precincts “that are not close to the district line could not have been moved without making [the district] less contiguous or compact.” *Id.* at 1246.

Turning to Dr. Lui's use of the “county envelope” method, the Court described it as similarly “highly unrealistic” because he too failed to account for contiguity and compactness. *Id.* at 1248. The Court explained that Dr. Lui's methodology “treated each voter as an independent unit that [the State] could include or exclude from [a district],” but “[n]o mapmaker who respects contiguity and compactness could take such an approach.” *Id.* That is because “[t]o accurately reflect the districting process, an analysis would have to pay attention to whether a voter's neighbors were moved too.” *Id.* According to the Court, “[t]his defect alone is sufficient to preclude reliance on Dr. Liu's” methodology. *Id.*

In his deposition, Dr. Liu confirmed that the methodology he used here to attempt to disentangle race from politics is exactly what he did in *Alexander*, with the same fatal flaws:

Q. A voter's geographic proximity to the border of Congressional District 2 is not a variable that you considered, correct?

A. Correct.

Q. The effect of moving precincts on the . . . contiguity . . . of a district is not a variable you considered; is that correct?

A. It is correct.

Q. Okay. Same with the assignment of a voter's neighbors. That's also not a variable that you considered; is that correct?

A. Correct.

(Liu Dep. 99:1-20, attached as Exhibit 13 to Defendants' Motion for Summary Judgment).

Like in *Alexander*, Dr. Liu's methodology is "plainly flawed" because it treats each precinct in Pulaski County as equally available to be moved to another district, no matters its distance from the district border. *Alexander* requires this Court to give Dr. Lui's opinions no weight.<sup>4</sup>

**2. Dr. Burch's "content analysis" of the circumstantial evidence departs from *Alexander*.**

Plaintiffs offer Dr. Burch as a Political Science expert opining on the following *Arlington Heights* factors: "[T]he sequence of events leading up to the enactment of the redistricting plan, the procedural or substantive deviations from the normal decision-making process, and contemporaneous statements by the decision-makers." Burch Rep. 4. She purports to "examine any indications in the record regarding the foreseeability of any discriminatory impact of HB1982/SB743, the availability of less discriminatory alternatives to the enacted congressional

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<sup>4</sup> The Supreme Court in *Alexander* dealt with Dr. Liu's opinions as a matter of weight, not reliability under *Daubert*. The Eighth Circuit has similarly explained that when the district court sits as the finder of fact, "[t]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself." *David E. Watson, P.C. v. United States*, 668 F.3d 1008, 1015 (8th Cir. 2012) (alteration in original) (quoting *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir.2005)). "Thus, . . . Daubert 's application" is "relax[ed] . . . for bench trials." *Id.*

redistricting bills during the legislative process, and reasons offered for the enactment of the bills.” *Id.*

Her methodology, as she explains it, is “analyzing legislative hearings and debates, newspaper articles, and other records and administrative documents.” *Id.* Her report doesn’t explain what she claims to do when she analyzes these sources. When asked to define what her method of analysis is, she answered, “I would characterize it as pretty similar to, for instance, content analysis.” (Burch Dep. 33:22-23, attached as Exhibit 14 to Defendants’ Motion for Summary Judgment.) When further pressed to describe how she actually goes about doing content analysis, she simply circled back to “cast[ing] a wide net” with respect to the sources she analyzes. (*Id.* 34:6-24.) At no point did Dr. Burch explain how her “analysis” differs from what a factfinder is tasked with doing in a case like this. (*See id.* 29:15-32:18.)

In any case, Dr. Burch’s opinions are ultimately irrelevant because she failed to assess the districting process through the lens of the presumption of legislative good faith, as required by *Alexander*. Indeed, she couldn’t even explain what the presumption is:

Q. Are you familiar with what *Alexander* says about a presumption of legislative good faith?

A. I have heard that, yes.

Q. What is your understanding of what that means?

...

A. My understanding is not much beyond the -- there was a -- the -- sorry, the Supreme Court said that there's a presumption of legislative good faith. So I don't exactly know what that means or if there's a test or whatever that's accompanied that.

Q. So then when you were doing your Arlington Heights analysis here, were you applying a presumption of legislative good faith?

...

A. No. I was just looking, again, at the specific questions as the -- the specific factors that I was looking at and reporting those.

(Burch Dep. 28:16-29:13.)

In assessing and opining on the General Assembly's motivation for its districting decisions, Dr. Burch fails to apply the presumption of legislative good faith, which is to "draw the inference that cuts in the legislature's favor when confronted with evidence that could plausibly support multiple conclusions." *Alexander*, 144 S. Ct. at 1236. In fact, Dr. Burch repeatedly does the opposite, going out of her way to impute ill will to the General Assembly based on evidence that is equivocal at most. *See, e.g.*, Burch Rep. 52 (describing discussion of partisanship as "demonstrate[ing] the pattern of using partisan motivations as a shield to deflect concerns about racial motivations"); *id.* 54 (describing legislators' statements that "they were unaware of the racial makeup of the affected areas of Pulaski County when it was drawn" and "that they did not use race when drawing the maps" as simply "another way to deflect criticism about the racial effects of the enacted plan").

While Dr. Burch's collection of background material may be useful, her ultimate opinions about whether the evidence in this case points to a racial motivation underlying the Enacted Plan must be disregarded for failing to apply the proper standard.

**3. The remaining considerations under the *Arlington Heights* factors do not support a racial motive.**

Applying the presumption of legislative good faith, none of the evidence Plaintiffs may present points to an impermissible racial motive rather than a permissible motive such as traditional redistricting principles, including partisan outcomes.

Plaintiffs make much of the sequence of events leading up to the passage of the Enacted Plan, including the "rushed" process. *See* Burch Rep. 6-24. But as this Court held in rejecting

that same claim in *Simpson*, “the brevity of the legislative process” cannot, on its own, “give rise to an inference of bad faith—and certainly not an inference that is strong enough to overcome the presumption of legislative good faith.” *Simpson II*, 2023 WL 3993040, at \*2 (cleaned up). And “even assuming the General Assembly departed from the normal procedural sequence during the redistricting process, nothing suggests that it did so to accomplish a discriminatory goal.” *Id.* (cleaned up). That has not changed with more detailed recitation of the timeline of events leading up to the passage of the Enacted Plan. Plaintiffs cannot show that anything regarding the sequence of events rules out non-racial explanations.

Dr. Burch’s report also collects evidence regarding the purported goals of various legislators. Burch Rep. 25-37. It is, of course, true that no map enacted as a result of political compromise could satisfy each articulated criterion of every legislator who commented publicly about their redistricting goals. But Plaintiffs cannot show that any of these purported shortcomings in a map that a majority of the General Assembly ultimately approved point to race rather than simple legislative compromises.

Plaintiffs also offer evidence that various legislators were aware of the racial impact of the Enacted Plan. Burch Rep. 38-50. This Court has already addressed this claim, holding that “[t]his argument does not work.” *Simpson II*, 2023 WL 3993040, at \*2. Because of the good-faith presumption, even if legislators were “aware of race when they drew the district lines,” courts “cannot simply leap to the conclusion that they were lying about their motives.” *Id.* (cleaned up). To be sure, opponents of the map expressed their concerns over what they believed would be a racial impact; “[b]ut mere awareness” of such an impact “is not enough.” *Simpson I*, 636 F.Supp.3d at 956. To establish that race was the predominant motive, Plaintiffs must bring

forth facts “showing that the General Assembly selected or reaffirmed a particular course of action at least in part because of its impact on” black Arkansans. *Id.* (cleaned up). They’ve failed to do so here.

Finally, Plaintiffs submitted an expert report by Ryan Smith, a doctoral candidate whose research specialty is history related to incarceration, not politics or redistricting. In any case, Arkansas’s history of racial discrimination cannot justify an inference that the General Assembly discriminated based on race in adopting the Enacted Plan. The Supreme Court has explained that “past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.” *Abbott v. Perez*, 585 U.S. 579, 603 (2018) (quoting *Mobile v. Bolden*, 446 U.S. 55, 74 (1980)) (internal quotation marks omitted). The “ultimate question remains whether a discriminatory intent has been proved in a given case.” *Id.* “The ‘historical background’ of a legislative enactment is ‘one evidentiary source’ relevant to the question of intent.” *Id.* (quoting *Vil. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)). “But [the Court has] never suggested that past discrimination flips the evidentiary burden on its head.” *Abbott*, 585 U.S. at 604.

This Court has already rejected this type of historical argument as applied to the Enacted Plan, noting that “a history of discrimination fails to establish discriminatory intent, at least when it is not reasonably contemporaneous with the adoption of the new map.” *Simpson II*, 2023 WL 3993040, at \*2 (cleaned up). And Plaintiffs here identify no such contemporaneous discrimination.

\* \* \*

Plaintiffs lack any circumstantial evidence that can overcome the presumption of legislative good faith. Plaintiffs bear the burden to rule out any permissible inference that can be drawn

in favor of the General Assembly's districting decisions. They've failed to do so here, and summary judgment is appropriate.

## **II. Plaintiffs' vote-dilution claim likewise fails.**

The Supreme Court recently explained that a "vote-dilution claim is 'analytically distinct' from a racial-gerrymandering claim and follows a 'different analysis.'" *Alexander*, 144 S. Ct. 1252 (quoting *Shaw*, 609 U.S. at 645). "A plaintiff pressing a vote-dilution claim cannot prevail simply by showing that race played a predominant role in the districting process." *Id.* "Rather, such a plaintiff must show that the State "enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities.'" *Id.* (quoting *Miller*, 515 U.S. at 911. "In other words, the plaintiff must show that the State's districting plan "has the purpose and effect" of diluting the minority vote. *Id.* (quoting *Shaw*, 609 U.S. at 645). Plaintiffs cannot show either a racial motivation or dilutive effect.

The Court should resolve Plaintiffs' vote-dilution claim the same way it did in *Simpson*. There, because the plaintiffs were "[m]issing . . . facts plausibly showing that race motivated the General Assembly's decision" at all, *Simpson I*, 636 F. Supp. 3d at 955-56, there was no need to separately analyze the vote-dilution claim. So to here. Accounting for the presumption of legislative good faith, Plaintiffs have adduced no evidence that the legislature was motivated to any degree by race. Their vote-dilution claim should fail alongside their racial gerrymandering claim for that reason alone.

Plaintiffs have also failed to show that the Enacted Plan produces a dilutive effect. As another three-judge court recently recognized, "there is a dearth of Supreme Court authority on what is required to prove dilutive effect with respect to congressional districts under the Fourteenth or Fifteenth Amendments." *Common Cause Fla. v. Byrd*, No. 4:22-CV-109-AW-MAF, 2024 WL 1308119, at \*27 (N.D. Fla. Mar. 27, 2024) (collecting cases). Lower-court cases have

agreed that, at a minimum, a plaintiff must show “a practical effect on the minority group’s ability to elect representatives of choice.” *Cano v. Davis*, 211 F. Supp. 2d 1208, 1249 (C.D. Cal. 2002), *aff’d*, 537 U.S. 1100 (2003); *see also Perez v. Abbott*, 253 F. Supp. 3d 864, 944 (W.D. Tex. 2017) (holding that in a vote-dilution claim, “plaintiffs still must show some discriminatory effect”); *Georgia State Conf. of NAACP v. State*, 269 F. Supp. 3d 1266, 1281 (N.D. Ga. 2017) (requiring a plaintiff to meet the same standard as in a Section 2 claim).

Plaintiffs cannot demonstrate that the splitting of Pulaski County had any practical effect on their ability to elect a candidate of their choice. Bryan’s analysis shows this by modeling election outcomes if all 13 precincts in Pulaski County that were moved out of D2 were added back. Bryan Rep. ¶¶ 132, 167. Even assuming those precincts had a 100% registration and turnout rate and voted entirely for French Hill’s opponent, it would not have made a difference in the 2022 D2 race. *Id.* ¶ 167. In reality the impact would have been even smaller than in Bryan’s modeling. Plaintiffs’ vote-dilution claim therefore fails.

**CONCLUSION**

For the foregoing reasons, the Court should grant summary judgment in favor of Defendants.

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