IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
CIVIL DIVISION

DEBORAH SPRINGER SUTTLAR, JUDY GREEN, FRED LOVE, in his individual and official capacity as State Representative, KWAMI ABDUL-BEY, CLARICE ABDUL-BEY, and PAULA WITHERS,

PLAINTIFFS

v. **No. 60CV-22-1849**

JOHN THURSTON, in his official capacity as the Secretary of State of Arkansas and in his official capacity as the Chairman of the Arkansas State Board of Election Commissioners, and SHARON BROOKS, BILENDA HARRIS-RITTER, WILLIAM LUTHER, CHARLES ROBERTS, WENDY BRANDON, JAMIE CLEMMER and JAMES HARMON SMITH III, in their official capacities As members of the Arkansas State Board of Election Commissioners,

DEFENDANTS

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

The Plaintiffs in this action are Black Arkansans who allege that their rights under the Arkansas Constitution have been violated by the General Assembly's systematic efforts to dilute Black voting power throughout the state. Arkansas is the only state in the country with a Black population above 10% that has never elected a Black representative to Congress. The congressional map enacted by the Arkansas legislature following the 2020 Census (the "2021 Map") will continue this trend. Like the map that it replaced, the 2021 Map strategically places counties with the largest Black populations into different districts. It further divides the state's largest county—Pulaski—between three congressional districts, splitting away a disproportionate

number of majority Black precincts from the rest of the county. As a result, Black Arkansans have less opportunity than other members of the Arkansas electorate to elect representatives of their choice to Congress.

Defendants attempt to avoid judicial oversight of the 2021 Map by raising meritless jurisdictional arguments, with the express intent of creating opportunities for appeal. They also mischaracterize Plaintiffs' core allegations and the relief Plaintiffs seek. This Court should reject these efforts to avoid accountability and deny Defendants' motion for judgment on the pleadings.

LEGAL STANDARD

Judgment on the pleadings is disfavored and should be entered only if the pleadings show on their face that there is no merit to the suit. *See Monsanto Co. v. Ark. State Plant Bd.*, 2021 Ark. 103, at 5, 622 S.W.3d 166, 170; *LandsnPulaski, LLC v. Ark. Dep't of Corr.*, 372 Ark. 40, 42, 269 S.W.3d 793, 795 (2007). Courts reviewing a motion for judgment on the pleadings should view the facts alleged in the complaint as true and in the light most favorable to the party seeking relief. *See Monsanto Co.*, 2021 Ark. 103, at 4, 622 S.W.3d at 170. In addition, in this case Defendants failed to plead or otherwise respond to Plaintiffs' Complaint in the time allowed by Ark. R. Civ. P. 12(a)(3). As a result, they admitted the factual averments of Plaintiffs' Complaint by operation of Ark. R. Civ. P. 6(d). The following facts therefore must be considered true.

FACTUAL BACKGROUND

The Arkansas General Assembly enacted the 2021 Map through a rushed and highly unusual process that lacked meaningful safeguards against discrimination. On September 16, 2021, the U.S. Census Bureau released data from the 2020 Census to state redistricting authorities and to the public. Due to changes in Arkansas's population since the 2010 Census, Arkansas's legislative boundaries needed to be redrawn. The Board of Apportionment, which is responsible

for state legislative redistricting in Arkansas, adopted publicly available criteria with rules expressly aimed at curbing racial discrimination. Compl. ¶ 63. The General Assembly, by contrast, failed to publicize any written criteria in advance of the congressional map-drawing process. When criteria eventually were disclosed, they largely mirrored the Board of Apportionment's criteria—with the conspicuous omission of the Board's protections against racial discrimination. *Id.* ¶ 64.

On September 27, 2021, 11 days after the Census data was released, the joint House and Senate State Agencies and Governmental Affairs Committees met to consider congressional maps proposed by state legislators—but excluded consideration of congressional maps proposed by, for example, Senator Joyce Elliott, that would have more accurately reflected the voting strength of Black voters. *Id.* ¶¶ 46, 47. Just two days later, on September 29, the General Assembly reconvened at a special legislative session to consider congressional map proposals. *Id.* ¶ 50. Senator Ricky Hill expressed that he was blindsided by the bills that were introduced. *Id.* The public was also blindsided, having been given only thirty minutes' notice before the bills were to be considered at a public hearing held by the Senate. *Id.* Seven days later, on October 6, 2021, the General Assembly passed Senate Bill 743 and its companion, House Bill 1982, which together enacted the 2021 Map. The 2021 Map systematically slices and dices Black communities in Arkansas, and, in particular, splits Black voters in Pulaski County across three different districts. *Id.* ¶ 56.

Governor Asa Hutchinson refused to sign the 2021 Map into law, explaining that the 2021 Map "reduc[es] the minority population [in the 2nd Congressional District] and split[s] some of [the minority population] from Pulaski County." *Id.* ¶¶ 71-73. Governor Hutchinson also told reporters, "There's nothing wrong with dividing a county to achieve the right population requirements and the constitutional standards . . . What's important is not whether or not you divide

Pulaski County, but *how* you divide Pulaski County if you make that decision to do so . . . I would urge them to keep in mind that you do not want to dilute minority representation or influence in Congressional races." *Id.* ¶ 51. Governor Hutchinson further acknowledged that under the 2021 Map, "the minority population is widely dispersed in the 4th district, the 2nd district, and the 1st district." *Id.* ¶ 10. Governor Hutchinson decided that he would neither sign nor veto the two proposed maps approved by the General Assembly, which would "enable those who wish to challenge the redistricting plan in court to do so." *Id.* ¶ 75. Because the Governor took no action, the 2021 Map became law on November 4, 2021, 20 days after the General Assembly adjourned. It became effective on January 14, 2022.

The 2021 Map uses surgical line-drawing to intentionally weaken Black Arkansans' voting power. For example, Pulaski County—which is home to the largest Black population in Arkansas—is divided between three of Arkansas's four congressional districts. This splintering of Pulaski County dilutes Black voting power in Arkansas. While Defendants claim that the 2021 Map made only "modest revisions" to Arkansas's congressional districts, Defs.' Br. in Supp. of Mot. For J. on the Pleadings ("Br.") at 2, 4, the new districts differ significantly from previous maps in ways that contribute to the dilution of Black voting power. For example, under the congressional map passed after the 2010 census, the 2nd Congressional District ("CD-2") had a Black Voting-Age Population ("BVAP") of 20.0%. Compl. ¶ 53. By 2020, the BVAP of the previous CD-2 had grown to 22.6%. *Id.* However, the BVAP of CD-2 remains approximately the same in the 2011 and 2021 Maps because the 2021 Map disperses over 21,000 Black voters who were previously in CD-2, including Plaintiffs Love and Withers, and cracks them between the 1st and 4th Congressional Districts ("CD-1" and "CD-4"). *Id.* ¶¶ 16, 19, 56. All told, fourteen Pulaski

County precincts were removed from CD-2 and placed in either the CD-1 or CD-4. *Id.* ¶ 57. Almost all of these precincts are majority Black.[1]

Plaintiffs are six Black voters who reside in Pulaski County and allege that the 2021 Map violates the Arkansas Constitution—specifically, its Free and Equal Elections Clause, art. II § 3, and its Equal Protection provisions, art. II, §§ 2, 3, & 18—because it intentionally and systematically targets and cracks Black communities in Pulaski County and throughout the state, diluting the votes of Black voters like Plaintiffs relative to other members of the electorate.[2] Plaintiffs seek injunctive and declaratory relief declaring the 2021 Map unconstitutional, enjoining its enforcement, and ordering the adoption of a valid congressional districting plan.

Since Plaintiffs filed their Complaint six months ago, Defendants have sought to delay the adjudication and resolution of Plaintiffs' claims. Instead of answering Plaintiffs' Complaint, Defendants wrongfully removed this action to the U.S. District Court for the Eastern District of Arkansas. Plaintiffs' motion to remand the case back to this Court was granted on July 13, 2022. The next day, Plaintiffs filed a notice of remand in this Court and served Defendants' counsel with the notice pursuant to Ark. R. Civ. P. 12(a)(3). "After remand from federal court, a case stands as if it had never been removed from state court, and what happened in federal court has no bearing on the proceeding in state court." *NCS Healthcare of Ark., Inc. v. W.P. Malone, Inc.*, 350 Ark. 520,

[1] Defendants are correct that "[t]he General Assembly moved fourteen precincts from Pulaski County, not thirteen as Plaintiffs allege." Br. at 21 n.3. This only strengthens Plaintiffs' assertion that a significant number of precincts, most of which were majority-Black, were removed from Pulaski County.

[2] Plaintiffs have not, as Defendants suggest, based their racial vote dilution claim on the 2021 Map's failure to "place Pulaski and Jefferson Counties into the same congressional district." *See* Br. at 2. As the Complaint makes clear, Plaintiffs challenge the 2021 Map because it intentionally, systematically, and without justification dilutes Black voting power. Among the decisions that the map drawers made that evidence this is the choice to methodically split Pulaski County's Black voters across three congressional districts.

526, 88 S.W.3d 852, 856 (2002); *see also B-W Acceptance Corp. v. Colvin*, 252 Ark. 306, 312, 478 S.W.2d 755, 758–59 (1972); *Trinity Universal Ins. Co. v. Robinson*, 227 Ark. 482, 486, 299 S.W.2d 833, 836 (1957). In other words, the motion to dismiss that Defendants filed in federal court had no bearing on this proceeding following its remand to state court.[3] But Defendants did not timely answer Plaintiffs' Complaint or move to dismiss it. Defendants finally filed an Answer on September 1, 2022. The same day, Defendants moved for Judgment on the Pleadings.

ARGUMENT

The motion for judgment on the pleadings should be denied. Defendants' jurisdictional arguments are foreclosed by clear precedent—including, with respect to sovereign immunity, a recent Arkansas Supreme Court decision rejecting a near-identical argument made by these same Defendants. Because this Court is a court of general jurisdiction, it does not need an explicit grant of subject matter jurisdiction to consider this case, and neither sovereign immunity nor the Elections Clause of the U.S. Constitution prevents this Court from determining whether the 2021 Map violates the Arkansas Constitution. On the merits, Plaintiffs have adequately alleged that the 2021 Map was enacted with the purpose and effect of diluting the power of Black voters in

[3] Defendants now allege that, pursuant to the U.S. District Court's May 12 order, Plaintiffs were required to respond to Defendants' motion to dismiss on July 27, 14 days after the case was remanded to state court. Br. at 8. This is contrary both to established law that filings in federal court have no bearing in state court post remand, and to this Court's finding that the district court's remand order "explicitly and fully dispose[d] of any issues remaining to be heard." Aug. 25 Order at 2. And while Defendants correctly assert that federal pleadings may become part of the state record upon remand, Br. at 9, a motion to dismiss is not a pleading, *see* Ark. R. Civ. P. 7, and therefore, did not become part of the state record upon remand.

Arkansas to elect their preferred representatives in contravention of the Arkansas Constitution's robust protection of the right to vote. These allegations are sufficient to defeat Defendants' motion.

I. This Court has subject-matter jurisdiction over Plaintiffs' claims.

A. The Arkansas Constitution confers original jurisdiction to this Court.

This Court has subject-matter jurisdiction under Amendment 80 to the Arkansas Constitution and the Arkansas Declaratory Judgment Act. Ark. Code Ann. § 16-111-101, *et seq.* Under Amendment 80, circuit courts are "the trial courts of original jurisdiction of all justiciable matters not otherwise assigned pursuant to this Constitution." Ark. Const. amend. 80 § 6(A); *see also Young v. Ark. Dep't of Hum. Servs.*, 2012 Ark. 334, at 3 ("Amendment 80 provides that the circuit courts are the trial courts of general jurisdiction [for matters] not otherwise assigned."). Accordingly, an affirmative grant of jurisdiction over congressional redistricting cases is not necessary; so long as those matters are not assigned to another court (and they are not), they are properly before this Court. Defendants' argument that this court lacks subject-matter jurisdiction because the Arkansas Constitution does not *specifically grant* circuit courts power to hear congressional redistricting cases, Br. at 12, is incorrect. This Court has jurisdiction over Plaintiffs' claims. *See Catlett v. Beeson*, 240 Ark. 646, 647–58, 401 S.W.2d 202, 203 (1966) (affirming Pulaski County trial court's jurisdiction over challenge that Arkansas statute defining boundaries of congressional districts violated provisions of Arkansas Constitution).

Defendants argue that the fact that the Arkansas Constitution gives the Arkansas Supreme Court original jurisdiction over cases concerning *state legislative* redistricting, Br. at 12 (citing Ark. Const. art. VIII, § 5), somehow means that a specific grant of jurisdiction is necessary for congressional redistricting. But that argument has no merit. The Arkansas Supreme Court, in contrast to the circuit courts, is not one of general jurisdiction. *Compare* Ark. Const. amend. 80,

§ 2(D) (vesting original jurisdiction in Arkansas Supreme Court for specified matters), *with* § 6(A) (vesting circuit courts with original jurisdiction over "all justiciable matters not otherwise assigned pursuant to this Constitution."). Accordingly, for the Arkansas Supreme Court to have original jurisdiction in disputes concerning state legislative redistricting, an affirmative grant of jurisdiction is required. The Constitution's silence about congressional redistricting does not mean that no Arkansas court can hear cases about congressional redistricting. It simply means that the constitutional default applies: the circuit courts have original jurisdiction.

B. Defendants' Elections Clause argument is baseless.

The Elections Clause of the U.S. Constitution does not strip Arkansas courts of jurisdiction to review whether the Arkansas General Assembly has violated the Arkansas Constitution. Defendants' interpretation of the federal Elections Clause is contrary to over a century of unbroken U.S. Supreme Court precedent and should be rejected—as it has been by every court in which it has been raised. *See, e.g.*, *Harper v. Hall*, 868 S.E.2d 499, 551–52 (N.C. 2022) (finding same Elections Clause theory that Defendants urge here not only unsupported, but also "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and [a theory that] would produce absurd and dangerous consequences"); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 370 & n.2 (Fla. 2015).

The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." U.S. Const. art. I, § 4. An unbroken line of U.S. Supreme Court precedent stretching back over 100 years makes clear that state courts play an important role in adjudicating redistricting issues: "Nothing in [the Elections] Clause instructs . . . that a state legislature may prescribe regulations on the time, place, and manner

of holding federal elections in defiance of provisions of the State's constitution." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817–18 (2015); *see also, e.g.*, *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (recognizing that "*state constitutions* can provide standards and guidance for *state courts* to apply" in adjudicating the constitutionality of congressional maps) (emphasis added); *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964) ("[N]othing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws . . . from the power of courts to protect the constitutional rights of individuals from legislative destruction"); *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916) (holding that state legislatures may not enact laws under the Elections Clause that violate "the Constitution and laws of the state").

The U.S. Supreme Court's decision in *Growe v. Emison*, 507 U.S. 25 (1993)—written by Justice Scalia—makes clear that state courts have a significant role to play in congressional redistricting. "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Id.* at 33 (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam)). Reversing the district court below, *Growe* explained that the district court erred in "ignoring the . . . legitimacy of state judicial redistricting." *Id.* at 34. The Arkansas Supreme Court likewise has affirmed the power of Arkansas courts to apply the Arkansas Constitution to decide the constitutionality of Arkansas statutes setting the boundaries of congressional districts, *see generally Catlett*, 240 Ark. 646, 401 S.W.2d 202, and has applied the Free and Equal Elections Clause in reviewing the manner of conducting and financing congressional primary elections, *see Adams v. Whittaker*, 210 Ark. 298, 195 S.W.2d 634 (1946). Defendants' argument that the General Assembly may draw congressional boundaries

unconstrained by judicial review squarely contradicts this binding precedent and should be rejected.

C. Sovereign immunity was waived and would not apply even if preserved.

Defendants' failure to timely answer the Complaint constitutes a waiver of sovereign immunity as a defense to this action. Ark. R. Civ. P. 8(d). The Arkansas Supreme Court has unequivocally determined that sovereign immunity is treated as an affirmative defense that a party must raise in a lawsuit. "We therefore treat sovereign immunity like an affirmative defense that a party must first raise below." *Perry v. Payne,* 2022 Ark. 112, at 2 (*citing Walther v. FLIS Enters., Inc.,* 2018 Ark. 64, at 5, 540 S.W.3d at 267) (footnote omitted). Five Justices joined in this statement of the law, while Justice Wynne concurred on the basis that sovereign immunity did not apply to bar the remedy sought in the case, and Justice Womack dissented from the Court's statement of the law. *Id.*

The majority of the Court in *Perry* explained further:

> The constitution contains no explicit mandate that immunity under article 5, section 20 be treated like an affirmative defense, as a question of subject-matter jurisdiction, or something in between. But a majority of this court has adopted the view that the immunity should be treated like an affirmative defense. This is our law. No sound argument has been raised that would permit us to ignore stare decisis and, volte-face, suddenly treat sovereign immunity as implicating subject-matter jurisdiction.

Id. at n.3.

Defendants here did not raise sovereign immunity—or any affirmative defense—in the time and manner required by law. Because they did not raise sovereign immunity in this case, it is not properly an issue before this Court. Nor can the Defendants use "sovereign immunity" as grounds to seek an immediate interlocutory appeal, as they say they want to do, and thereby delay this case. *See* Ark. Sup. Ct. R. 6-2 ("Appeals Prosecuted for Purposes of Delay"); *see also* Ark. R.

Civ. P. 12(c) (court has discretion to defer hearing and determination of purported Rule 12(c) motions until trial).

Even if the issue were not waived (which, under Supreme Court precedent, it clearly is), Defendants' claim of sovereign immunity in this case is meritless. As Defendants acknowledge, Br. at 14, Arkansas law permits lawsuits against state officials to enjoin "actions that are illegal, are unconstitutional or are ultra vires." *Martin v. Haas*, 2018 Ark. 283, at 7, 556 S.W.3d 509, 515 (quotation omitted). This includes cases such as this in which Plaintiffs have "alleged that specific acts violate the Free and Fair Election Clause [and] the Equal Protection Clause[s]" and seek "declaratory and injunctive relief regarding the alleged conflict between the [2021 Map] and the Arkansas Constitution." *Thurston v. League of Women Voters of Ark.*, 2022 Ark. 32, at 6–7, 539 S.W.3d 319, 322 ("*Thurston*").

Indeed, *Thurston* involved most of the same Defendants and substantially similar claims. In that case, Plaintiffs sought to enjoin enforcement of voting restrictions based on alleged violations of many of the same constitutional provisions at issue here. In a decision earlier this year, the Arkansas Supreme Court clarified that where a Plaintiff seeks "declaratory and injunctive relief" based on an alleged conflict between a statute and the Arkansas Constitution, sovereign immunity presents no barrier. *Id.*[4] Just as in *Thurston*, sovereign immunity is not a viable defense to Plaintiffs' claims.

II. The Free and Equal Elections Clause of the Arkansas Constitution protects Arkansans from vote dilution on the basis of race.

Arkansas courts have repeatedly affirmed that the Free and Equal Elections Clause of the Arkansas Constitution provides strong protections against infringements on the fundamental right

[4] Defendants have apparently raised a sovereign immunity defense despite it being plainly foreclosed by *Thurston* in the hopes of raising an issue that allows them to seek interlocutory

to vote. The Free and Equal Elections Clause states that "Elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted whereby such right shall be impaired or forfeited, except for the commission of a felony, upon lawful conviction thereof." Ark. Const. art. III, § 2. As Defendants themselves point out, since at least 1883, the Arkansas Supreme Court has found that this provision must be robustly enforced in the context of voting rights. *See* Br. at 15–16 (collecting cases in which the Free and Equal Elections Clause has applied to fraud and voter intimidation, protection of the secret ballot, and addressing wrongs that result in election uncertainty); *see also Martin v. Kohls*, 2014 Ark. 427, at 17, 444 S.W.3d 844, 854 (Goodson, J., concurring) ("Through [the free and equal elections] provision, it is clear that the people of Arkansas jealously guarded the right of suffrage and restricted the General Assembly from enacting any law impairing such right.").

Courts across the country have held that congressional redistricting—the process that determines where voters vote and whether they have an opportunity to determine election outcomes—implicates the right to vote. An election cannot be "free and equal" when the votes of certain voters are not afforded equal weight. The Pennsylvania Supreme Court has recognized that "the plain and expansive sweep of the words 'free and equal'" are "indicative of the framers' intent that *all aspects* of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral

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appeal in the event this Court denies their motion, which would further delay these proceedings. *See Thurston*, 539 S.W.3d at 320 (considering interlocutory appeal from denial of motion to dismiss based on sovereign immunity). They have no grounds to seek an interlocutory appeal here. The Arkansas Rules of Appellate Procedure allow for interlocutory appeal of "[a]n order denying a *motion to dismiss or for summary judgment* based on the defense of sovereign immunity or the immunity of a government official." Ark. R. App. P. 2(a)(10) (emphasis added). A motion for judgment on the pleadings is neither a motion to dismiss nor a motion for summary judgment.

process for the selection of his or her representatives in government." *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018) (emphasis added). Other States likewise have concluded that free and fair elections require fair voting power and political participation. *See Harper*, 868 S.E.2d at 542 ("[F]or an election to be free and the will of the people to be ascertained, each voter must have substantially equal voting power and the state may not diminish or dilute that voting power . . ."); *Szeliga v. Lamone*, No. C-02-CV-21-001816, slip op. at 27 (Md. Cir. Ct. Mar. 25, 2022) (striking down a legislatively enacted congressional map as a violation of Maryland's Free Elections Clause, and noting that "[t]he pivotal goal of the Free Elections Clause [was] to protect the right of political participation in Congressional elections") (attached as Exhibit 1). Defendants do not cite any contrary precedent from any state.

Instead, Defendants claim that such authority is irrelevant to the determinations of Arkansas courts. Plaintiffs do not argue that the authority from other courts interpreting similarly-worded constitutional clauses is binding, but it is certainly persuasive. But even more notably, Defendants fail to cite any Arkansas precedent that supports their position. They quote *Davidson v. Rhea*, 221 Ark. 885, 256 S.W.2d 744 (1953), for the proposition that the Arkansas Supreme Court has "consistently held" that the Free and Equal Elections clause places no constraints on the General Assembly's ability to enact any election law it chooses. Br. at 17. But this is a misreading of *Davidson*, which itself makes clear—consistent with the long line of Arkansas authority that Plaintiffs discuss above—that the General Assembly's power to prescribe election rules *is subject to the requirements of the Free and Equal Elections Clause*. *See Davidson*, 221 Ark. at 888, 256 S.W.2d at 746. Moreover, in upholding the statute at issue in that case, the Arkansas Supreme Court found that the law "applie[d] equally to all electors without discrimination, and one elector therefore possesses all of the rights, and no more, of every other elector." *Id.* In *Davidson* itself,

the Arkansas Supreme Court cited Pennsylvania's Free and Equal Elections Clause as persuasive authority for the "test of the constitutional freedom of elections." *Id.* Again, the Pennsylvania Supreme Court has interpreted that state's Free and Equal Elections Clause to restrict the legislature's ability to gerrymander congressional districts in order to diminish the strength of disfavored votes. *See League of Women Voters of Pa.*, 178 A.3d at 804. The same cannot be said in this case, in which Plaintiffs allege that the congressional map specifically targets and disadvantages Black voters, rendering their votes unequal to those of other, similarly situated voters. And because Plaintiffs alleged such in their Complaint, the Court at this stage must accept as true that the 2021 Map specifically targets and disadvantages Black voters. *See Monsanto Co.*, 2021 Ark. 103, at 4, 622 S.W.3d at 170.

Defendants also inexplicably argue that, because courts have established that the Free and Equal Elections Clause protects the right to vote in some contexts, it can *only* protect the right to vote in those specific contexts. Br. at 15–16. Again, they cite no caselaw to support this proposition, and in fact, the opposite is true. Arkansas courts have broadly interpreted the Free and Equal Elections Clause to safeguard the rights of individual Arkansans to exercise the "free exercise of the right of suffrage" against impairment by the "civil" "power." Ark. Const. art. III, § 2. Earlier this year, for example, the Circuit Court of Pulaski County in *League of Women Voters v. Thurston* denied the State's motion to dismiss and proceeded to hold a full trial, after which it held that four voter suppression laws enacted in 2021 violated the Free and Equal Elections Clause. No. 60CV-21-3138, slip op. ¶ 15 (Pulaski Cnty. Cir. Ct. Mar. 24, 2022) ("all four Challenged Provisions . . . violate the Free and Equal Elections Clause") (attached as Exhibit 2).

Defendants also are wrong about the standard this Court should apply when reviewing Plaintiffs' constitutional claims. Defendants argue that strict scrutiny is inapplicable to claims

under the Free and Equal Elections Clause, Br. at 18, but point to no authority to counter the Arkansas Supreme Court's clear warning that "[w]hen a statute infringes upon a fundamental right, it cannot survive unless 'a compelling state interest is advanced by the statute and the statute is the least restrictive method available to carry out [the] state interest.'" *Jegley v. Picado*, 349 Ark. 600, 632, 80 S.W.3d 332, 350 (2002). Voting is a fundamental right under Arkansas law. *See, e.g.*, *Ivy v. Republican Party of Arkansas*, 318 Ark. 50, 56 n.2, 883 S.W.2d 805, 808 n.2 (Ark. 1994); *Pritchett v. City of Hot Springs*, 2017 Ark. 95, 10, 514 S.W.3d 447, 454 (Hart, J., dissenting) ("Moreover, when there is an impingement on fundamental right, such as the right to vote, we must undertake a strict-scrutiny analysis, and that impingement must be the least restrictive method available."); *League of Women Voters v. Thurston*, No. 60CV-21-3138, slip op. at 14 (Pulaski Cnty. Cir. Ct. Mar. 24, 2022) (concluding that the "right of suffrage is a fundamental right in a free and democratic society"). Indeed, Defendants themselves have previously "acknowledge[d] that voting is a fundamental right." *Thurston*, No. 60CV-21-3138, slip op. at 14 (Pulaski Cnty. Cir. Ct. Mar. 24, 2022). Applying strict scrutiny also is consistent with the practice in other states with similar provisions to Arkansas's Free and Equal Elections Clause in their constitutions. *See, e.g.*, *Harper*, 868 S.E.2d at 552 (holding that "the General Assembly triggers strict scrutiny under the free elections clause and the equal protection clause of the North Carolina Constitution when . . . it deprives a voter of his or her fundamental right to substantially equal voting power"); Order Granting Permanent Injunction at 27, *Szeliga v. Lamone*, No. C-02-CV-21-001816 (Anne Arundel Cnty. Cir. Ct. Mar. 25, 2022) (noting that Maryland's "Free Elections Clause has been broadly interpreted to apply to legislation that infringes upon the right of political participation by citizens of the State").

As a final refuge, Defendants misrepresent the Arkansas Supreme Court's order in *Thurston v. League of Women Voters of Ark.*, CV-22-190 (Ark. Apr. 1, 2022), a per curiam order (attached as Exhibit 3) in which the court issued a stay without opinion. The Arkansas Supreme Court's order did not alter the conclusion of the Circuit Court of Pulaski County, which found that the voter suppression laws at issue in that case "must be analyzed according to the strict scrutiny standard of review that has been the established judicial standard for testing the validity of governmental measures that infringe on fundamental rights." *Thurston*, No. 60CV-21-3138, No. 60CV-21-3138, slip op. at 15 (Pulaski Cnty. Cir. Ct. Mar. 24, 2022). The Circuit Court further held that "[t]he settled conviction that the right to vote is fundamental and that alleged infringement 'must be carefully and meticulously scrutinized' dictates the conclusion that the Anderson-Burdick 'balancing test' urged by Defendants is inappropriate for assessing the constitutionality of" those voting laws. *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533 (1964) (redistricting case)). That conclusion remains undisturbed.

Plaintiffs here—Black voters from Pulaski County—allege that their fundamental right to vote has been impaired by the manner in which Arkansas's 2021 congressional districts were drawn. While the Arkansas Supreme Court has never addressed this particular claim, its robust Free and Equal Elections Clause jurisprudence supports finding that such a claim is cognizable.[5] And for all of the reasons discussed, Plaintiffs have stated a claim under that provision of the Arkansas Constitution, which regulates the General Assembly's drawing of congressional districts.

[5] While Defendants argue that *federal* courts should be cautious in recognizing novel claims under state law, Br. at 16 (citing cases from federal courts of appeals), this appears to be a leftover statement from their motion to dismiss filed in federal court. Plaintiffs are asking this *state* court to protect their rights under the Arkansas Constitution.

III. The 2021 Map violates Plaintiffs' rights to equal protection under the Arkansas Constitution.

A. Plaintiffs' vote-dilution claim is cognizable under the Arkansas Constitution.

Plaintiffs have adequately pleaded that the 2021 Map violates equal protection as guaranteed by the Arkansas Constitution. When an equal protection challenge implicates a "suspect classification," such as a classification based on race, it "warrant[s] strict scrutiny." *Howton v. State*, 2021 Ark. App. 86, at 7, 619 S.W.3d 29, 35. Further, statutes that impede on a fundamental right protected by the Arkansas Constitution are subject to strict-scrutiny review. *See supra* Section II; *see also Jegley*, 349 Ark. at 632, 80 S.W.3d at 350. As stated above, the right to vote is a fundamental right. *See Ivy*, 318 Ark. at 54–55, 883 S.W.2d at 808 n.2; *Pritchett*, 2017 Ark. 95, at 10, 514 S.W.3d at 454 (Hart, J., dissenting) ("Moreover, when there is an impingement on fundamental right, such as the right to vote, we must undertake a strict-scrutiny analysis, and that impingement must be the least restrictive method available."). "When a statute infringes upon a fundamental right, it cannot survive unless 'a compelling state interest is advanced by the statute and the statute is the least restrictive method available to carry out [the] state interest.'" *Jegley*, 349 Ark. at 632, 80 S.W.2d at 350 (quoting *Thompson v. Ark. Soc. Servs.*, 282 Ark. 369, 374, 669 S.W.2d 878, 880 (1984)). No compelling state interest justifies the 2021 Map's racial vote dilution. Compl. ¶ 100. Even if this Court determines that less exacting scrutiny applies, there is no legitimate state interest in the 2021 Map's assault on Black voting power in Arkansas. Compl. ¶ 101; *see also Jegley*, 349 Ark. at 635, 80 S.W.3d at 352 (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.")).

Defendants are incorrect that the Arkansas Constitution's equal protection provisions prohibit only intentional discrimination. Equal protection under the Arkansas Constitution prohibits both intentional discrimination and discrimination through disparate impact. "The guarantee of equal protection serves to '[protect] minorities from discriminatory treatment at the hands of the majority. Its purpose is not to protect traditional values and practices, but to call into question such values and practices when they operate to burden disadvantaged minorities.'" *Jegley*, 349 Ark. at 632, 80 S.W.3d at 350 (quoting *Commonwealth v. Wasson*, 842 S.W.2d 487, 499 (Ky. 1992)). The right to equal protection guaranteed by Arkansas's Constitution prohibits "dissimilar treatment." *Id.* Such claims do not require a showing of intent.

Moreover, rights guaranteed by the Arkansas Constitution are sometimes broader than, rather than coextensive with, comparable federal constitutional rights. When the federal constitution provides inadequate protection, the Arkansas Supreme Court has stated that it "will provide more protection under the Arkansas Constitution than that provided by the federal courts." *See State v. Sullivan*, 348 Ark. 647, 652, 74 S.W.3d 215, 218 (2002) (interpreting state prohibition on unreasonable searches to provide greater protections than the Fourth Amendment to the U.S. Constitution); *see also, e.g.*, *State v. Brown*, 356 Ark. 460, 467, 156 S.W.3d 722, 727 (2004) ("[T]his court has made it abundantly clear that . . . we are not bound by the federal interpretation of the [federal constitution] when interpreting our own law."); *Jegley*, 349 Ark. at 631, 80 S.W.3d at 349 ("We have recognized protection of individual rights greater than the federal floor in a number of cases.").

Defendants cite three cases in support of their argument that the equal protection provisions of the Arkansas Constitution are coextensive with their federal counterparts. None are persuasive. The first two have no bearing on the issues in this case; neither involves race discrimination, much

less addresses whether laws with discriminatory effect are prohibited by the Arkansas Constitution. Additionally, neither even considered whether the rights guaranteed by Arkansas's equal protection guarantees are broader than those in the U.S. Constitution. *See Talbert v. State*, 367 Ark. 262, 239 S.W.3d 504 (2006); *Staggs v. Staggs*, 277 Ark. 315, 641 S.W.2d 29 (1982). In *Talbert v. State*, a minister convicted of sexual assault argued that the statute under which he was convicted—which prohibits members of the clergy from abusing their positions of authority to engage in sexual activity—violated his equal protection rights by singling out members of the clergy. 367 Ark. 262, 265, 270–71, 239 S.W.3d 504, 508, 512 (2006). Reasoning that the same tiered scrutiny analysis applies under Arkansas's Equal Rights Amendment as the Equal Protection Clause of the U.S. Constitution, the court held that the challenge failed because there was a rational basis for the classification *Id*. In *Staggs v. Staggs*, the court held that an Arkansas law that distinguishes between those who acquire a life estate in land by virtue of dower or curtesy, and those who acquire a life estate in land by virtue of will or deed, violates neither "Article II, §§ 3 and 18 of the Constitution of Arkansas, nor . . . similar provisions of the Constitution of the United States." 277 Ark. 315, 316–17, 641 S.W.2d 29, 30–31 (1982). It said nothing about the relationship between those two sources of law. Neither *Talbert* nor *Staggs* concerns the scope of the protections provided by either the Arkansas or U.S. constitutions.

The third case that Defendants cite for this point is the only one of the three that informs whether the guarantees of Arkansas's Equal Protection Clause are broader than those in the U.S. Constitution. As Defendants concede, the Arkansas Supreme Court has "[o]n occasion . . . provide[d] more protection under the Arkansas Constitution than that provided by the federal courts under the United States Constitution." Br. at 20–21 (quoting *Maiden v. State*, 2014 Ark. 294, at 17, 438 S.W.3d 263, 275). In short, the rights guaranteed by Arkansas's Equal Protection

Clause are *not* coextensive with the rights guaranteed by the federal Equal Protection Clause; they are broader. And this is so particularly where Arkansas's guarantee of equal protection is applied to Arkansas's Free and Equal Elections Clause, which has no clear analogue under the U.S. Constitution. Therefore, regardless of whether the federal Equal Protection clause would support Plaintiffs' claims here, Plaintiffs have alleged a cognizable claim under the Arkansas Constitution.

B. Though not required, Plaintiffs have adequately pleaded intentional discrimination.

Even if this Court finds that Arkansas's Equal Protection Clause prohibits only intentional discrimination, Plaintiffs have plead the requisite intent. According to Plaintiffs' Complaint, the legislature "intentionally and systematically targeted and further cracked the Black population in the state by surgically removing majority Black precincts . . . within Pulaski County from" CD-2, Compl. ¶ 56, and "racial data was considered—at times, exclusively—throughout the map-drawing process," *id.* ¶ 60. Accepting these factual allegations as true and viewing them in the light most favorable to Plaintiffs, *Monsanto Co.*, 2021 Ark. 103, at 5, 622 S.W.3d at 170, Plaintiffs' Complaint sufficiently alleges intentional discrimination. *See, e.g., Green v. Scurto Cement Const., Ltd.*, 820 F. Supp. 2d 854, 856 (N.D. Ill. 2011) (plaintiff sufficiently plead intentional discrimination where complaint alleged that defendants "have been discriminatory in their application of the referral system on account of Plaintiffs' race").

Defendants cite *Williams v. McCoy* for the proposition that merely stating a legal violation without factual support fails to satisfy fact-pleading requirements, but in that case, the plaintiff alleged a due process violations without alleging any facts that would prove a due process violation. Br. at 21 (quoting 2018 Ark. 17, at 5, 535 S.W.3d 266, 269). That is simply not the case here, where the Complaint specifically alleges that the General Assembly rejected criteria to protect against racial discrimination and instead made race a primary consideration. Furthermore,

as the U.S. Supreme Court has explained, the disparate impacts of an official action "may provide an important starting point" when "[d]etermining whether invidious discriminatory purpose was a motivating factor." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). By pleading that the 2021 Map disparately impacts Black voters in a systematic manner, that it intentionally targets Black populations for dispersal across districts, and that map-drawers considered racial data—at times, exclusively—Plaintiffs have alleged facts sufficient to state a claim for intentional discrimination (a burden they do not need to meet).

C. Remedying the deprivation of Plaintiffs' constitutional rights would not violate equal protection.

Defendants mischaracterize Plaintiffs' requested relief in this case. Plaintiffs do not argue that the General Assembly should draw congressional districts "explicitly based on race," Br. at 25, nor do Plaintiffs ask that this Court "command the General Assembly to create a map combining Pulaski and Jefferson Counties," Br. at 23–24. Plaintiffs request that the Court (1) declare that the 2021 Map violates the Arkansas Constitution's Free and Equal Elections Clause as well as the various equal protection provisions of the Arkansas Constitution; (2) enter a permanent injunction against Defendants from implementing the 2021 Map; and (3) order the adoption of a congressional plan that does not violate these constitutional protections, including specifically a map that does not unconstitutionally dilute the vote of Black voters in Arkansas.

Courts adjudicate challenges like this one to congressional plans every redistricting cycle. Defendants in those cases have made this argument before, and courts have rejected it. This Court should do the same. In crafting a remedy, race may be taken into account to the extent that doing so is necessary to ensure that the map does not dilute the voting power of Black Arkansans. *See Stephenson v. Bartlett*, 180 F. Supp. 2d 779, 785 (E.D.N.C. 2001) (rejecting argument about potential conflict with federal law where "plaintiffs are merely 'seeking an alternative

apportionment plan which also fully complie[s] with federal law but varie[s] from the defendants' plan only in its interpretation of state law.'") (alterations in original). And Defendants cannot allege a conflict between Plaintiffs' desired remedy and federal law based on mere speculation or possibility. When, as here, "it is unknown whether plaintiffs' attempt to enforce the provisions of the [Arkansas] constitution would run afoul of federal voting law," any implication of a conflict has been disregarded as "speculative." *Common Cause v. Lewis*, 358 F. Supp. 3d 505, 511 (E.D.N.C. 2019), *aff'd*, 956 F.3d 246 (4th Cir. 2020) (quotation omitted). As Defendants point out, the Supreme Court has made clear that "districting maps that sort voters on the basis of race" are valid when "narrowly tailored to achieving a compelling state interest." *Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (quoting *Miller v. Johnson*, 515 U.S. 900, 904 (1995), and citing *Shaw v. Reno*, 509 U.S. 630, 643 (1993)). Courts furthermore may permit consideration of race where doing so is narrowly tailored to ensure compliance with laws prohibiting practices such as racial vote dilution.[6] *See, e.g.*, *Cooper v. Harris*, 197 L. Ed. 2d 837, 137 S. Ct. 1455, 1464 (2017).

At bottom, Defendants argue that the consideration of race—*any* consideration of race—conflicts with equal protection law. This is incorrect. "[T]he Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution." *Crawford v. Bd. of Educ.*, 458 U.S. 527, 538 (1982). Under Defendants' theory, the Equal Protection Clause would prohibit remedying any state action that disadvantages racial minorities, because such a challenge would necessarily consider race. Defendants' position

[6] Defendants attempt to recast Plaintiffs' action as one arising under the federal Voting Rights Act to suggest (erroneously) that Plaintiffs seek "a so-called crossover district" as part of the requested relief, which Defendants claim is not permissible under that Act. Br. at 23–25. But as explained above, Plaintiffs allege state law claims solely arising under the Arkansas Constitution.

would effectively insulate any racially discriminatory law from review. If, for example, the General Assembly were to pass a law requiring the use of separate water fountains for Black and white Arkansans, and a plaintiff brought suit requesting injunctive relief that would "allow Black Arkansans to use the same water fountains as white Arkansans," the remedy would violate the equal protection principles under Defendants' theory because it would require the consideration of race. This radical position is simply not the law. Equal protection has never been interpreted to prevent state courts from remedying racial discrimination. Quite the opposite. And in the redistricting context in particular, courts have long found that it is permissible for legislatures to consider race among other criteria to ensure compliance with a law prohibiting odious practices such as racial vote dilution. *See, e.g.*, *Cooper*, 137 S. Ct. at 1464.

Here, the Court should permit consideration of race to the extent necessary to ensure that Arkansas's congressional districting maps comply with the requirements of the Arkansas constitution. But such a remedial map need not, and should not, be explicitly based on race. Instead, the appropriate remedial map is one that does not unconstitutionally discriminate against Black voters to dilute their voting power. The Court should order the enactment of a congressional plan based on traditional redistricting criteria such as compactness and contiguity that does not dilute the voting power of Arkansas's Black population.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion for Judgment on the Pleadings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2022, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the parties.

/s/ Jess Askew III
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