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

FUTURE MAE JEFFERS; MARY JEFFERS; HENRY PEACOCK; SHIRLEY HARVELL; REV. RONALD WILLIAMS; PEGGY R. WRIGHT; LAURA LOVE; FRANK SHAW; C.W. CAMPBELL; LEO CHITMAN; ETTA CAMPBELL; PLEZ LUCAS; VICKIE ROBERTSON; JOSEPH PERRY; ELBERT SMITH; SANDRA BAGLEY; NIKKI DISMUKE; ALICE W. VALLEY; LAKETHA BROWN FLUKER; KATRINA HARRELL; CHESTER HARRELL; EDDIE O'NEAL; CHRISTOPHER FRANKLIN; and JACK BERNARD CRUMBLY	PLAINTIFFS

v.   No. 2:12CV00016 JLH

MIKE BEEBE, in his capacity as Governor of Arkansas and Chairman of the Arkansas Board of Apportionment; MARK MARTIN, in his capacity as Secretary of State of Arkansas and as a member of the Arkansas Board of Apportionment; DUSTIN MCDANIEL, in his capacity as Attorney General of Arkansas and a member of the Arkansas Board of Apportionment; and ARKANSAS BOARD OF APPORTIONMENT	DEFENDANTS

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs Future Mae Jeffers, et al., challenge Senate District 24, as drawn by the Board of Apportionment in 2011, and ask that its use be permanently enjoined. They also ask that the Board of Apportionment be ordered to draw a new district that complies with the requirements of § 2 of the Voting Rights Act of 1965. Changes to the boundary of one district also affect the boundary of the adjacent district. Plaintiffs have proposed an alternative map for Senate District 24 that impacts only one other district, Senate District 23, whose use they likewise seek to

enjoin.   That is all—unless the Board of Apportionment requests permission to alter other districts to accommodate the changes they must make to District 24.

The Board had to draw districts that accommodated a 9% state-wide population increase and many population shifts within the state. Two products were therefore necessary, larger districts in terms of population and an adjustment of district lines to accommodate population shifts.

The Black or African-American population increased by about 30,000 between the 2000 Census and the 2010 Census. However, the Black or African-American population decreased as a percentage of the whole by approximately three-tenths of one percent (0.03%), from about 15.7% to about 15.4%. In other words, although the African-American population grew, it grew at a slower rate than did the Hispanic population. The White population was 80% of the state following the 2000 Census and had shrunk to 77% following the 2010 Census. The Hispanic population doubled to 6.4% during the same time.

The African-American population in this state is concentrated in three distinct areas: Pulaski County, Jefferson County and the "Delta." Pulaski, Jefferson, Phillips, Lee, St. Francis, and Crittenden are the Home Counties to approximately 237,000 African Americans, approximately 53% of the total African-American population in Arkansas.

Since the early 1990s there have been four African-American-majority Senate districts in our state. Two of those districts have been in Pulaski County, one district has been in Jefferson County and the remaining district has been in the "Delta." Fifteen percent of 35 Senate seats would be five seats, not four. But before 2010, each U.S. Census showed that the distribution of

the African-American population in Arkansas would not permit an effective fifth state Senate district to be drawn.

Historically, and prior to the court-ordered districts from 1990, senate district lines followed county lines and kept the counties intact. This method, which was required by Article 8, § 3 of the Arkansas Constitution, permitted Crittenden County to be the largest and most influential county in the various senate districts from 1950 until the court-ordered redistricting in 1990. Most of those districts were multi-member districts.

The Board of Apportionment will draw the new district according to the guidance given by this Court. To comply with Article 8, § 3 of the Arkansas Constitution, Plaintiffs seek an order that the new district be composed of convenient, contiguous territory, that it not divide more counties than necessary to meet equal-population requirements, and that its population not deviate from the ideal by more than five percent. To comply with § 2 of the Voting Rights Act, Plaintiffs seek an order that the redrawn District 24, while meeting state constitutional requirements, have a Black voting-age population of at least 58%.

Plaintiffs' proposed map, Jeffers_03, creates a new District 24 composed of convenient, contiguous territory that divides no more counties than District 24 as drawn by the Board, divides fewer precincts, deviates from the ideal population far less than the Board's district, and has a Black voting-age population of 58.41%.

Plaintiffs are confident that, if so ordered, the Board will be able to draw the new districts and have them approved by this Court in time for Secretary of State Martin to conduct the primary election for the affected districts either before or concurrently with the November general election.

I.   HISTORY

A.   The Voting Rights Act of 1965

The Voting Rights Act of 1965 ("VRA") may have been the most effective civil rights legislation in American history because it has given African Americans and other minorities real power: the power to vote and have those votes counted in a way that makes a meaningful impact on the outcome of an election.

1.   VRA Section 2

Section 2 of the Act (codified as amended at 42 U.S.C. § 1973), prohibits a state or political subdivision from imposing any "voting qualification or prerequisite to voting, or standard, practice or procedure [that] results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. "Language minority group" is defined as "American Indian, Asian American, Alaskan Natives or of Spanish heritage."   42 U.S.C. § 1973l(c)(3). The test is whether, "based on the totality of the circumstances," the members of a protected minority "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

Purity of intent will not save a law from attack under § 2 and proof of discriminatory intent is not necessary. The question is whether the law "results in a denial or abridgment" of the right to vote, not whether it was enacted with an intent to discriminate.

Section 2 applies throughout the United States. It has been used to reject redistricting plans on the ground that they discriminated against Blacks, Hispanics, or American Indians and abridged their right to vote by diluting their voting strength.

2.   Vote Dilution Techniques

The three most common techniques for diluting the voting power of a minority group, whether a racial minority or a partisan political minority, have been submerging, cracking, and packing. The Arkansas Board of Apportionment has been accused of using each of the three to dilute the voting power of African Americans.

a.   Multi-Member Districts

Submerging is accomplished by creating multi-member districts.

When a minority population lives in a relatively compact area, surrounded or adjoined by the majority population, a state or city may decide to create a district that includes both populations and provide that, whoever wins a majority in the combined area will win all the seats within it. The minority population is submerged in the majority population and is unable to win any seats.

Section 2 of the Voting Rights Act has been used to dismantle multi-member districts designed to dilute the voting power of a racial or language minority where:

1) the minority is sufficiently large and geographically compact to constitute a majority in a single-member district;

2) the minority is politically cohesive; and

3) in the absence of special circumstances, bloc voting by the White majority usually defeats the minority's preferred candidate.

Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986).

If those three "preconditions" are met, the Plaintiffs must then prove a history of discrimination against the minority in that jurisdiction based on "the totality of the circumstances." If the Plaintiffs are successful, the multi-member district must be broken into single-member districts that include some districts where the minority population has an equal opportunity to elect representatives of their choice.

In *Gingles* and other cases, minorities have been successful in their attacks on multi-member districts. In *Smith v. Clinton*, 687 F. Supp. 1310 (E.D. Ark. 1988), this Court ordered the Arkansas Board of Apportionment to dismantle a 1981 multi-member state House district that had been used to submerge the votes of African Americans in Crittenden County.

b.   Cracking

 "Cracking" is drawing district lines so that the minority population is broken up. If multimember districts are disallowed, the majority may prevent the minority from winning any seats by cracking them. Members of the minority are spread among as many districts as possible, keeping them a minority in every district, rather than permitting them to concentrate their strength enough to elect representatives in some districts. The classic technique has been the pie wedge: a city surrounded by suburbs or farmland is divided into districts, each of which reaches out into the suburbs or farms. The city residents are made a minority of the voting population in each district. The city has many districts, but elects no representatives.

Cracking has been used against racial and language minorities, and § 2 of the Voting Rights Act has been used to stop it. In *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), this Court ordered the Board of Apportionment to redraw its 1981 plans to increase the number of Black-majority Senate districts from one to about three, and increase the number of Black-majority House districts from four to about 13. 730 F. Supp. 196, 198, 217 (E.D. Ark. 1989).

In *Growe v. Emison*, 507 U.S. 25, 40-41 (1993), the Supreme Court held that the three preconditions required by *Gingles* to challenge multimember districts also applied to allegations that a single-member district had been drawn to fragment (or "crack") a minority population.

c.   Packing

If multimember districts are not permitted, and the minority population can't be cracked to prevent them from winning any seats, the majority may decide to pack them.

"Packing" is drawing district boundary lines so that the members of the minority are concentrated, or "packed," into as few districts as possible. They become a supermajority in the packed districts—60, 70, or 80 percent. They can elect representatives from those districts, but their votes in excess of a simple majority are wasted. They are not available to help elect representatives in other districts, so the minority cannot elect representatives in proportion to their numbers in the state as a whole.

In *Jeffers v. Tucker*, 847 F. Supp. 655 (E.D. Ark. 1994), this Court denied a packing challenge to Black-majority districts in the Delta drawn by the Board of Apportionment in 1991.

B.   **Previous Challenges to Arkansas Legislative Districts**

1.   *Smith v. Clinton*

In January 1988, Black residents of Crittenden County brought suit in this Court challenging the use by the 1981 Board of Apportionment of multimember House districts in Crittenden County to submerge the votes of Blacks, in violation of § 2 of the VRA. At issue was a multimember district entirely within the county from which two representatives were elected. This Court found that the Black population within the district was sufficiently large and geographically compact to constitute a majority in one single-member district, that Blacks tended to vote cohesively for the same candidates, and that their preferred candidates were always defeated by Whites voting as a bloc for a White candidate. *Smith v. Clinton*, 687 F. Supp. 1310 (E.D. Ark. 1988).

The Plaintiffs' expert witness, Dr. Allan Lichtman, used both bivariate regression analysis and homogeneous precinct ("extreme case") analysis of nine election contests to determine that voting in elections in Crittenden County was racially polarized. 687 F. Supp. at 1315-16. Those were the same two methods the Supreme Court had relied on in *Thornburg v. Gingles*, 478 U.S. at 52-53. The Court found that, since the elections at issue were for the House of Representatives, the results of previous House elections were the most probative. 687 F. Supp. at 1317. The Court had little interest in contests in which there were no Black candidates. It noted that the Supreme Court, in *Gingles*, 478 U.S. at 52-53, had relied heavily on elections between Black and White candidates. It said that analyzing elections among Whites proves only that "candidates favored by blacks can win, but only if the candidates are white." 687 F. Supp. at 1317-18. The Court took judicial notice that:

> (1) . . . [T]here is a history of racial discrimination in the electoral process in Arkansas. (Citations omitted.) We do not believe that this history of discrimination, which affects the exercise of the right to vote in all elections under state law, must be proved anew in each case under the Voting Rights Act.
>
> (2) We further find that the history of discrimination has adversely affected opportunities for black citizens in health, education, and employment. The hangover from this history necessarily inhibits full participation in the political process.

687 F. Supp. at 1317.

After a two-day trial ending April 26, 1988, the three-judge court set aside the result of the March 8 primary and ordered the Board of Apportionment and Plaintiffs to submit proposed plans for dividing the multimember district into two single-member districts. The Board declined to do so, and objected to the defendants' plan as providing for a 60.55% "supermajority" of Black voting-age population. The Court ordered the Board to implement the 60.55% plan, saying the number greater than a simple majority was necessary in order to compensate for lower voter registration and lower voter turnout among Blacks, whose lower rate of participation in the political process was due, in part, to the effects of the multimember district and, in part, to their lower levels of educational attainment and lower incomes. 687 F. Supp. at 1363.

2.   *Jeffers v. Clinton*

The lead plaintiff in *Jeffers v. Clinton*, M.C. Jeffers, was the husband of the lead plaintiff in this action, Future Mae Jeffers. The *Jeffers* plaintiffs did not limit their challenge to Crittenden County House districts. They challenged both House and Senate districts throughout the state, alleging that more Black-majority districts could have been drawn than were, because concentrations of Black population had been fragmented (what we now call "cracked") into

9

neighboring districts with a White majority. Their expert, Dr. Richard Engstrom, used three methods: single regression, double regression (bivariate regression), and homogeneous-precinct analysis to determine that Blacks voted cohesively and Whites voted sufficiently as a bloc to usually defeat the Black-preferred candidate, except in districts where Blacks were a majority of the voters. The Court repeated its support of these analytical methods and disinterest in elections where there was no Black candidate. 730 F. Supp. 196, 208-09 (E.D. Ark. 1989). With regard to the totality of the circumstances, in a twelve-day trial the Court developed a fuller record of continuing discrimination than it had in the two-day *Smith* trial. Among other findings, it noted that Roy Lewellen, who had been a candidate for the state Senate in 1986, had been warned by the Sheriff not to run and then prosecuted unjustifiably for unrelated activity when he ignored the warning. 730 F. Supp. at 210-11. The Court ordered the Board of Apportionment to redraw Senate and House districts in the eastern and southern parts of the state, but not in Pulaski County or the northwest. Whereas the Board in 1981 had drawn only one Senate district and four House districts with a Black majority, the Court noted that three Senate and 13 House districts could have been drawn and presumed that the Board would draw that number, but did not require it. 730 F. Supp. at 198, 217.

When the Board submitted its remedial plans and plaintiffs objected, the Court held that the Board's plans, for a House district in Lee and St. Francis Counties with a BVAP of 58%, and a House district in Monroe and Phillips Counties with a BVAP of 56%, were legally insufficient to provide Black voters with an equal opportunity to elect candidates of their choice. Rather, the Court ordered adoption of the Jeffers' plans for those districts, with a BVAP of 63% in the first and 64% in the second, because that could be accomplished with districts no less compact and contiguous than those proposed by the Board, and would compensate for Blacks' lower rates of

voter registration and turnout, and their economic and educational disadvantages. 756 F. Supp. at 1198-1200. As the Court explained:

> On a strictly numerical and quantitative view of equality, any district with a BVAP of 50% or higher would be *per se* lawful. We think the Voting Rights Act means something more than this. Suppose two people are in a race, and one of them has had to run the first three laps with a 100-pound weight on his back. Suddenly it occurs to the referee that this is unfair. Something must be done to correct the injustice. Is it corrected just by removing the weight from the disadvantaged runner for the last lap? Of course not. If no more than this is done, equality of opportunity is nothing but an empty promise, a form of words better left unsaid by honest people. Past injustice, especially centuries of it, cannot be ignored. In Justice Blackmun's elegant phrase, "in order to get beyond racism, we must first take account of race." *University of California Regents v. Bakke, 438 U.S. 265, 407, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1977)* (separate opinion).

756 F. Supp. 1198.

The Board's remedial plan for the Senate included a district in portions of Crittenden, Cross, Lee, Phillips, and St. Francis Counties that had a BVAP of 55%. The Court held the district insufficient to remedy the wrong and ordered implementation of the Jeffers plan, which had a BVAP of 60.5%. The Board's objection that it paired two White incumbents in the same district was denied. The Court found that avoiding contests between White incumbents was not a valid reason for rejecting the plaintiffs' district, which was no less compact and contiguous than the district proposed by the Board and had a higher BVAP percentage. 756 F. Supp. at 1200 (Feb. 9, 1990). When the Board submitted another plan, which eliminated the pairing of the two incumbents but increased the BVAP to 62%, the Court approved it. 756 F. Supp. at 1202-03 (Mar. 5, 1990).

3.   *Jeffers v. Tucker*

In *Jeffers v. Tucker*, 847 F. Supp. 655 (E.D. Ark. 1994), plaintiffs alleged that the plan drawn by the Board of Apportionment in 1991 violated § 2 of the VRA because it had two fewer Black-majority districts in the Delta than could be drawn: it packed Black voters into too many districts with a Black voting-age population over 60%. The Board's plan provided for the following districts:

District	BVAP%	Incumbent
HD 94	56.32	Black
HD 95	63.06	Black
HD 97	61.95	White
HD 99	60.10	Black
SD 22	61.91	Black

847 F. Supp. at 661.

Plaintiffs alleged that the 1990 Census showed that an additional House and Senate district could be drawn by lowering the Black voting-age population in two House districts and one Senate district below 60% and using those voters to provide for one additional House district and one additional Senate district with a Black voting-age population over 55%, as follows:

District	BVAP%	Incumbent
HD 38	59.31	None
HD 48	62.67	None
HD 72	55.04	None
HD 74	58.61	None
HD 75	55.24	Black
SD 7	58.05	None
SD 22	60.18	Black

Id.

With respect to the House, plaintiffs argued that 60% supermajorities were no longer necessary where there was no White incumbent. This Court rejected the challenge, saying that districts in excess of 60% were required in order to give Black voters an equal opportunity to elect representatives of their choice. 847 F. Supp. at 661.

With respect to the Senate, the Court did not object to the fact that the plaintiffs' Senate District 7 was slightly below 60%, because it had no incumbent. 847 F. Supp. at 661. Rather, the Court rejected the challenge because, in order to create the District 7, plaintiffs had reduced the Black voting-age percentage in another Black-majority district, reducing its total population below tolerable limits, and had done so with districts that were not compact. Senate District 7 extended "a series of long, slender fingers deeply to the west from the River [cutting] across numerous communities and political subdivisions." The Court concluded plaintiffs had failed to prove the Black population was sufficiently large and geographically compact to constitute a majority in a single-member district, thus failing to establish the first *Gingles* precondition. 847 F. Supp. at 661-62.

C.   **Senate Elections in the Delta – 1962 to 2000**

William K. "Bill" Ingram was a member of the Arkansas Senate from 1963 to 1981. *See* Obituary of Mrs. Magalene McKinnon Ingram, http://www.rollerfuneralhomes.com/services.asp?locid=31&page=odetail&id=26991(visited April 17, 2012); (Beebe Test., May 8, 2012); (McDaniel Test., May 9, 2012). During the time he served in the Senate, Bill Ingram's district included all of Crittenden County. Maps of Arkansas Senate Districts, 1952, 1966, 1981 (Exhibit 14) at 3-5; (McDaniel Test., May 9, 2012). Senator

Bill Ingram died in office, and was succeeded in a special election by his son, W. Kent Ingram,

Jr.. Beebe Dep. at 52 (Doc. 77-1, Mar. 30, 2012).

When Defendant Governor Mike Beebe was first elected to the Arkansas Senate in 1982,

all of Crittenden County was in Senate District 19, represented by Senator Kent Ingram. Map of

Arkansas Senate Districts, 1981 (Exhibit 14) at 5; (Beebe Test. May 8, 2012); (McDaniel Test.,

May 9, 2012); Beebe Dep. at 50-53 (Doc. 77-1, Mar. 30, 2012). Kent Ingram continued to serve

as the senator from Crittenden County until he was defeated by Mike Everett. (Beebe Test., May

8, 2012).

On February 9, 1990, in a case under the Voting Rights Act, the Court ordered that

Crittenden County be divided, with the southern part placed into a new Senate District 30 along

with portions of Cross, Lee, Phillips, and St. Francis Counties. 1990 Senate District 30 had a

Black voting-age population ("BVAP") of 62%, according to the 1980 Census. *See Jeffers v.*

Clinton, 756 F. Supp. at 1202-03 (Mar. 5, 1990). Joint Stipulation of Facts ("JSOF") ¶ 1.

At the Democratic primary held May 29, 1990, Mike Everett defeated W. Kent Ingram,

Jr., 6,474 votes to 5,886 votes, which was 52.38% to 47.62%, for the seat from Senate District

19, which included the northern part of Crittenden County. (Beebe Test., May 8, 2012);

Arkansas Election Results 1990 (Exhibit 70A) at 33; Map of 1989 Court-Ordered State Senate

Districts (Exhibit 14) at 7-8. At the same primary, Roy C. "Bill" Lewellen defeated Paul B.

Benham, 7,248 votes to 6,409 votes, which was 53.1% to 46.9%, for the seat from Senate

District 30, which included the southern part of Crittenden County. JSOF ¶ 2.

At the general election held November 6, 1990, Roy C. "Bill" Lewellen, a Democrat,

defeated Charles L. Robinson, a Republican, 10,009 votes to 4,899 votes, which was 67.1% to

32.9%. JSOF ¶ 3. Senator Bill Lewellen was the first African American state senator to be

elected from the Delta since Reconstruction.   (Lewellen Test., May 7, 2012); *see* Encyclopedia

of Arkansas – Lee County, http://encyclopediaofarkansas.net/encyclopedia/entry-

detail.aspx?entryID=783.

In 1991, the Board of Apportionment redrew the boundaries of 1990 Senate District 30 so

that it that still included portions of Crittenden, Lee, Phillips, and St. Francis Counties, but

excluded Cross County. The 1991 district was numbered Senate District 22. JSOF ¶ 4. Senate

District 22 had a BVAP of 61.9%, according to the 1990 Census. *See Jeffers v. Tucker*, 847 F.

Supp. 655, 661 (E.D. Ark. 1994). JSOF ¶ 5.

In the May 1992 Democratic primary for Senate District 22, Senator Bill Lewellen

defeated L.T. Sims II, 10,573 votes to 2,841 votes. He was unopposed in the November general

election. JSOF ¶ 6.

Senator Lewellen was unopposed for re-election in 1996, JSOF ¶ 7, and was not a

candidate in the 2000 election. JSOF ¶ 8.

II.   RACIALLY POLARIZED VOTING IN THE DELTA – 2000 TO 2010

A.   Dr. Handley's Methods of Analysis

Dr. Lisa Handley has been engaged by the East Arkansas Redistricting Coalition to

establish, with election results over the last decade, the degree of racially polarized voting that

exists in Crittenden, Cross, Lee, Monroe, Phillips, St. Francis, and Woodruff counties in East

Arkansas (often referred to as "the Delta") and the level of Black Voting Age Population

("BVAP") that is necessary for African American voters in the Delta to be able to elect a

candidate of their choice, particularly in 2011 Senate District 24, and provide a report of that

analysis to be entered into evidence in this action.   Consulting Services Agreement, Racially Polarized Voting in East Arkansas (Exhibit 69) at 1 (Feb. 24, 2012).

1.   Creating a Database -- Election Results Tied to Population by Race

Dr. Handley relied on Peter Wattson (counsel of record for Plaintiffs) to supply her with information containing election results alongside demographic racial data from the U.S. Census Bureau.   JSOF ¶ 109; Consulting Services Agreement, Racially Polarized Voting in East Arkansas (Exhibit 69) at 1 (Feb. 24, 2012).

The U.S. Census Bureau's geographic unit for reporting demographic data does not coincide with how election results in Arkansas have usually been tabulated from 2000-2010. The U.S. Census Bureau reports racial demographic information by Voter Tabulation District ("VTD"), whereas election results in Arkansas have typically been reported by "polling place." JSOF ¶ 110.

A polling place is a location, such as a church or fire station, where citizens cast their votes. JSOF ¶ 111.

In some cases, there is no polling place within a precinct; voters who live there must travel to a different precinct to cast their votes.   JSOF ¶ 112.

Official proclamations from county boards of election commissioners show which precincts are assigned to a polling place for a given election. JSOF ¶ 113.

2.   Analyzing Election Results

a.   Most Probative -- Biracial Contests

Biracial contests, that is, contests in which Black and White voters have the ability to choose either a Black or a White candidate to vote for, are the most probative in determining whether voting is racially polarized. (Handley Test., May 8, 2012); *United States v. City of Euclid*, 580 F. Supp.2d 584, 596 n.11 (N.D. Ohio 2008). As a Massachusetts three-judge court said when it chose to give more weight to elections involving both a minority candidate and a White candidate:

> Our decision to accord more weight to multi-race elections is supported not only by common sense but also by the case law. *See Rural West Tenn. African American-Affairs Council v. Sundquist,* 209 F.3d 835, 840-41 (6th Cir.2000) (approving a decision to accord greater weight to results of black-versus-white elections); *Jenkins,* 116 F.3d at 692, 694-95 (affirming a decision to discount same-race elections); *Westwego Citizens for Better Gov't v. City of Westwego,* 872 F.2d 1201, 1208 n. 7 (5th Cir.1989) ("[T]he evidence most probative of racially polarized voting must be drawn from elections including both black and white candidates."); *see generally Vecinos,* 72 F.3d at 988 n. 8 ("[E]llections in which minority candidates run are often especially probative on the issue of racial bloc voting."). We understand that black voters sometimes may consider a white candidate their representative of choice and vice-versa. If no candidate of the voter's race is in the field, however, that support may well represent something less than a true preference. *Cf. Gingles,* 478 U.S. at 68, 106 S.Ct. 2752 (plurality op.) (stating, as a fact, "that race of voter and race of candidate is often correlated"). Indeed, the choice presented to minority voters in an election contested only by two white candidates is somewhat akin to offering ice cream to the public in any flavor, as long as it is pistachio.

Black Political Task Force v. Galvin, 300 F.Supp.2d 291, 305 (D. Mass., 2004. *Accord, Smith v. Clinton*, 687 F. Supp. 1310, 1316-17 (E.D. Ark. 1988).

Looking at it from the other side, the 55% of Whites who voted for Senator Crumbly in the 2006 runoff, and the 78% of Whites who voted for him in the 2010 primary, when there was no White candidate on the ballot, would not be expected to vote for him at those high percentages in 2012, when he has a White opponent.

With the exception of three election contests in old Senate District 16 that featured only Black candidates, Dr. Handley analyzed polarization only in contests featuring a Black candidate and a White candidate. JSOF ¶ 103; (Handley Test., May 8, 2012). Dr. Handley did not consider contests in which the only candidates were White. JSOF ¶ 102.

b.   Most Probative – Endogenous Elections

The past elections that are most probative for predicting future results are elections for the same office by the same electorate. These are called "endogenous" elections. Since Senate District 24 is a legislative district, legislative elections are the endogenous elections in this case, with Senate elections more probative than House elections. (Handley Test., May 8, 2012).

Six different Circuit Courts of Appeal have determined that endogenous elections are the most probative and relevant contests when assessing racially polarized voting. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1021, 1027 (8th Cir. 2006); *Old Person v. Cooney*, 230 F.3d 1113, 1125 (9th Cir. 2000); *Solomon v.Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1227(11th Cir. 2000); *Sanchez v. Colorado*, 97 F.3d 1303, 1324-25 (10th Cir. 1996); *Rollins v. Fort Bend Ind. Sch. Dist.*, 89 F.3d 1205, 1221 (5th Cir. 1996); *NAACP v. City of Niagra Falls*, 65 F.3d 1002, 1015 n.16 (2nd Cir. 1995).

c.   Less Probative – Exogenous Elections

Elections for other offices and by other electorates are "exogenous" elections. *See, e.g.,*
Bone Shirt v. Hazeltine, 461 F.3d 1011, slip op. at 10n.8 (8th Cir. 2006); *Jeffers v. Clinton*, 730
F. Supp. 196, 208 (E.D. Ark. 1989). In this case, statewide, federal, and local elections are
exogenous elections. Because they are for a different office by a different electorate, they have a
different dynamic and are less probative of how the voters for the Senate seat from District 24
will behave. (Handley Test., May 8, 2012).

The different dynamic is that the issues in national, statewide, and local elections tend to
be different from the issues in legislative elections, the resources of the candidates are different,
and the methods of campaigning are different. The expensive, media-intensive campaigns of
Barack Obama and John McCain for President of the United States have little parallel in the low-
budget, low-visibility campaigns of candidates for the Arkansas Senate. In addition, there is
down-ballot voter falloff — once voters have made up their mind about the candidates, many go
to the polls and vote only for president, not for offices farther down the ballot. Likewise, the
campaign needed to win election as a city mayor or county judge is quite different from that
needed to win election as a member of the state Senate.

d.   Three Analytical Techniques

Dr. Handley applied three statistical techniques to the eighteen election contests that met
her race-based criteria: homogenous precinct analysis ("HPA"), bivariate ecological regression
analysis ("BERA"), and ecological inference ("EI"). JSOF ¶ 119. Dr. Handley describes the
three techniques as "complementary." JSOF ¶ 120. She uses all three to analyze each contest,
using each as a check on the others. (Handley Test., May 8, 2012). She does not make

assumptions about a particular contest if one technique shows one thing and another technique shows something dramatically different. JSOF ¶ 121.

The U.S. Supreme Court has considered HPA and BERA to be the "standard in the literature for the analysis of racially polarized voting." *Thornburg v. Gingles*, 478 U.S. 30, 52-53n.20 (1986).

HPA and BERA have been used in almost every voting rights case since *Gingles* that Dr. Handley is aware of. (Handley Test., May 8, 2012).

This Court has endorsed the use of HPA and BERA to analyze racial bloc voting in legislative districts in East Arkansas. *See Jeffers v. Clinton*, 730 F. Supp. 196, 208 (E.D. Ark. 1989); *Smith v. Clinton*, 687 F. Supp. 1310, 1316-17 (E.D. Ark. 1988).

Other courts have likewise endorsed the use of BERA and HPA. *See, e.g., Bone Shirt v. Hazelti*ne, 461 F.3d 1011, slip op. at 9 (8th Cir. 2006) (relying on BERA and HPA); *Old Person v. Cooney*, 230 F.3d 1113, 1123 (9th Cir. 2000) (relying on BERA); *Rural West Tennessee African-American Affairs Council v. Sundquist*, 209 F.3d 835, 839 (6th Cir. 2000) (considering BERA and HPA); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1386 (8th Cir. 1995) (relying on regression analysis).

To refuse to consider BERA and HPA in a § 2 Voting Rights Act case can be reversible error. S*ee Sanchez v. Colorado*, 97 F.3d 1303, 1321 (10th Cir. 1996) (district court rejected plaintiffs' BERA and HPA and erroneously relied on multivariate analysis prepared by defendants' expert, Dr. Jeffrey Zax); *Teague v. Attala County, Miss*., 92 F.3d 283, 290 (5th Cir. 1996); *Houston v. Lafayette County, Miss*., 56 F.3d 606, 611 (5th Cir. 1995).

Professor Gary King's ecological inference technique was developed after *Thornburg v. Gingles*. (Handley Test., May 8, 2012). EI has been used in a number of district court cases and accepted by the Court as well. *Id*. It has been used by the courts to supplement evidence derived from HPA and BERA. *See, e.g., United States v. City of Euclid*, 580 F. Supp.2d 584, 601-02 (N.D. Ohio 2008); *Bone Shirt v. Hazeltine*, 336 F. Supp.2d 976, 1002-03 (2004).

B.   Dr. Jeffrey Zax' Record of Failure

Dr. Lisa Handley has appeared as an expert witness in dozens of Voting Rights Act cases across this country, and is an international expert in election administration. (Handley Test., May 9, 2012). Dr. Jeffrey Zax has no such pedigree. He testified to this Court that his analysis of racially polarized voting has been rejected, either in the trial court or on appeal, in the four cases in which he has appeared as an expert witness. His record of failure in those cases is remarkable.

1.   *Sanchez v. Colorado*

Dr. Zax' first reported appearance as an expert witness in a Voting Rights Act case was *Sanchez v.* Colorado, 861 F. Supp. 1516 (D. Colo. 1994) (no violation of VRA § 2); *rev'd* 97 F.3d 1303 (10th Cir. 1996); *cert. denied*, 117 S. Ct. 1820 (1997).

Plaintiffs were Hispanic residents of the San Luis Valley in south central Colorado who had previously filed an unsuccessful challenge to House District 60 with the Colorado Supreme Court.

Dr. Zax testified as an expert witness for the State. Plaintiffs' expert had used bivariate ecological regression and homogeneous precinct analysis to correlate differences in the racial composition of the electorate with differences in the votes candidates received. Dr. Zax rejected

the use of those methods. Instead, he used multivariate regression analysis to account for the difference in the rate of minority success "explained by something other than the percent of Hispanics." He concluded that other factors that accounted for the difference in Hispanic success included party affiliation, incumbency, gender, socioeconomic factors, platforms, personalities, and campaign financing. 97 F.3d at ¶ 49. He created seven hypothetical contests, the most pertinent of which predicted that a non-incumbent Hispanic Democrat would defeat a non-incumbent Anglo Republican in the district in question. 97 F.3d at ¶ 51. His prediction was belied by an actual election that had occurred some years before. In 1982, a non-incumbent Hispanic Democrat had been defeated by a non-incumbent Anglo Republican in the district in question.

The federal district court chose to rely on Dr. Zax' testimony. It held that plaintiffs failed to establish their § 2 VRA claim. Among the reasons it gave were that: (1) the minority group was not politically cohesive; (2) other reasons besides race may explain voting behavior; and (3) the totality of the circumstances did not establish vote dilution.

The Tenth Circuit reversed. Among other reasons, it held that the evidence submitted by plaintiffs (and rejected by Dr. Zax) showed Hispanic political cohesiveness and Anglo bloc voting. It concluded that the district court erred in considering factors other than race to explain voting behavior and it found that the district court's erroneous view of racial polarization and political cohesiveness prejudiced its analysis of the totality of the circumstances, and submerged critical facts into less relevant factors.

2.   *Old Person v. Cooney*

Dr. Zax' second VRA case of record was *Old Person v. Cooney*, No. CV-96-00004-GF-

PGH (D. Mont. Oct. 28, 1998) (no violation of VRA § 2), *rev'd* 230 F.3d 1113, 1125 (9th Cir. 2000).

Native American residents of Montana's Indian reservations sued the Secretary of State and Governor claiming that: (1) existing state House and Senate districts denied or abridged, on account of race, color, or membership in a language minority group, Native Americans' right to vote, in violation of § 2 of the Voting Rights Act; and (2) the existing redistricting plan was enacted and was being maintained with the racially discriminatory purpose of diluting Native Americans' voting strength in violation of § 2.

Dr. Zax testified as an expert witness for the State. He used bivariate ecological regression analysis to estimate minority and White voting percentages by candidate and by contest for 258 election contests (not necessarily legislative contests) in eight legislative districts. The analysis showed that the Indian-preferred candidate was usually defeated by Whites voting as a bloc. The State argued that the behavior of White voters could be explained by partisan politics — that Indian Democratic candidates lost in districts where White Republicans were in the majority.

Relying on the testimony of Dr. Zax, the district court held that the plaintiffs had not proved that non-Indians usually vote as a bloc to defeat Indian-preferred candidates. It found that most Indians vote as Democrats and in many areas of the state and in many elections that preferred candidates win. Thus, it could not find that the Indians in Montana had less access to the electoral process than did non-Indians.

A three-judge panel of the 9th Circuit found that the district court erred in its application of the third precondition of *Thornburg v. Gingles*, 478 U.S. 30 (1986), in relying in part on the

electoral success of Indian candidates in majority-Indian House Districts when it concluded that White bloc voting in majority-White House Districts was not legally significant. It had permitted Indian success in Indian-majority districts to offset their lack of success in White-majority districts.

The Court of Appeals rejected the State's argument that losses by Indian candidates could be explained by partisan politics and not race, at least where Democratic Indian candidates lose in majority-Republican districts.

For these and other reasons, the district court's decision was reversed and remanded.

3.   *Bone Shirt v. Hazeltine*

Bone Shirt v. Hazeltine, 336 F. Supp.2d 976 (D. S.D. Sep. 15, 2004), *aff'd*, 461 F.3d 1011(8th Cir. Aug. 22, 2006), was Dr. Zax' third reported Voting Rights Act case.

The complaint alleged that the legislative redistricting plan enacted by the South Dakota Legislature in 2001 violated § 2 of the Voting Rights Act by packing American Indians into Senate District 27, where they were 86 percent of the voting-age population, when they were "sufficiently numerous and geographically compact that they would constitute a majority in one or more Senate districts and one or more single-member House districts."

Dr. Zax testified as an expert witness on behalf of the State. He used ecological inference ("EI") to examine elections within Senate District 27. 336 F. Supp., slip op. at 38-43. In his examination with EI, he refused to analyze primary elections, gave no more weight to endogenous elections than exogenous elections, and no more weight to biracial elections than to elections with no Indian candidate   Slip op. at 48. He criticized the plaintiff's expert, Dr. Steven Cole, for using BERA and HPA, saying they were scientifically unsound. Slip op. at 45-49. The

24

court examined the literature and the reports of the two experts, found Dr. Zax' criticisms

without merit, and rejected his conclusions:

> Dr. Zax's criticisms of BERA are the same criticisms he articulated regarding the BERA method in articles he submitted for publication to the American Political Science Review and the Political Analysis journal. Both publications declined to publish Zax's articles. T.VII p. 1991-95. One of the double-blind reviewers of his articles described his discussion of the variance of the estimators as misleading, his simulations were described as incomplete, his criticisms of R-squared were described as skewed, and his presentation was described as sometimes being unfair. Ex. 901. A second reviewer commented that his simulations were made "under assumptions that are rather specialized (or even implausible)[.]" Ex. 930. A third reviewer commented that while he would certainly choose EI over BERA, he believes Zax is "being unduly harsh" in his criticism of BERA. Ex. 854. This reviewer noted that EI is an improvement over BERA, which occurred over the course of time because of recent developments in the science. Id. The court agrees with the third reviewer that EI is an improvement over BERA, but finds that the flaws that exist in BERA are not significant enough to reject the BERA results wholesale.

336 F. Supp.2d at 1002-03.

After a nine-day trial, the court found that the plan violated § 2 of the Voting Rights Act.

The decision of the district court was affirmed by the 8th Circuit. 461 F.3d 1011(8th Cir. 2006).

4.   *United States v. City of Euclid*

United States v. City of Euclid, 580 F. Supp. 2d 584 (N.D. Ohio 2008), was Dr. Zax most

recent reported Voting Right Act case.

The United States sued the City of Euclid, Ohio, alleging that a combination of single-

member districts and slotted, at-large positions for its city council resulted in the dilution of

African-American voting strength in violation of § 2 of the VRA.

Dr. Lisa Handley testified as an expert witness for the United States. She prepared an illustrative single-member district plan that adhered to traditional districting principles and included two districts with African-American voting-age majorities of over 56% and 67%. 580 F. Supp. 2d at 594. The defendant's expert witness, Dr. Zax, argued that Dr. Handley's two districts did not meet the first *Gingles* precondition that the African-American population be sufficiently large and geographically compact to constitute a majority in a single-member district because the majorities were not sufficiently large to ensure election of the minority's preferred candidate. *Id.* The Court found Dr. Zax was attempting to impose a legal requirement where none exists—in the liability phase, a simple majority is sufficient. *Id.*

"Dr. Zax did no independent analysis of election results; he offered no alternate *or* superior method of statistical or election analysis. Instead Dr. Zax's testimony was largely limited to criticisms of the *methodologies* employed by Dr. Handley." 580 F. Supp.2d at 601. The Court rejected Dr. Zax' criticisms for three reasons:

> First, numerous courts . . . have accepted statistical analyses employing the BERA and HPA formulations Dr. Zax finds so flawed, regularly finding that they constitute reliable probative evidence of racial bloc voting.
>
> Second, Dr. Zax's criticisms were overly general. Importantly, he was unable to identify with any specificity the extent to which the estimates produced by the three methodologies used by Dr. Handley were affected by the weaknesses he identified in each approach. While he noted the need to assess margins of error for Handley's calculations, for instance, he could not quantify what those margins of error should be.
>
> Third, while some of Dr. Zax's criticisms of BERA and HPA appear well-taken, they were not ignored by Dr. Handley. . . . Dr. Handley examined the relevant races using HPA, BRA *and* EI, used each of these tests as a check upon the others, and only drew conclusions as to races where all three methodologies were in general agreement.

580 F. Supp.2d at 601-02.

The Court rejected Dr. Zax' bright-line test of polarized voting as occurring only when both White and minority voters each supported opposing candidates at a level greater than 60%. Instead, it adopted Dr. Handley's test—whether minority voters and White voters would elect different sets of candidates if each voted separately. 580 F. Supp.2d at 603.

The Court found that Dr. Zax failed to emphasize adequately the importance of the differing results between elections involving minority candidates and those involving only White candidates. *Id.*

Given all the errors by Dr. Zax, the Court found Dr. Handley's conclusions to be "better grounded both in law and in fact" and relied on them in making its decisions. *Id.*

5.   Conclusion

The theories and arguments of expert witness Dr. Jeffrey Zax are not to be believed. As Dr. Handley said about his four-county model for predicting election results, "Its predictive value is nil." A federal district court relies on Dr. Zax at its peril.

C.   Senate Elections: 1991 Senate District 22 -- 2001 Senate District 16

From 2000 to 2010, voting for the seat from Senate District 22, and its successor, Senate District 16, was racially polarized, and the candidate preferred by African-American voters usually lost. (Handley Test., May 8, 2012). Results of those elections are shown in the following table:

Table 5. Election Results for Senate Districts 22 and 16

Contest	Percent Black VAP (2000-2010)	Racially polarized?	Outcome
2000 Primary in Senate District 22	60%	Yes	Black-preferred candidate (Simes) won
2002 Primary in Senate District 16	55%	Yes	Black-preferred candidate (Simes) lost
2006 Primary in Senate District 16	61%	Yes	Black-preferred candidate (Simes) lost
2006 Runoff in Senate District 16	61%	Yes	Black-preferred candidate (Willis) lost
2010 Primary in Senate District 16	61%	Yes	Black-preferred candidate (Simes) lost

See Handley Decl. (Exhibit 94) at 8 tbl.5.

1.   2000 Elections – Senate District 22

Voting in the May 2000 Democratic primary was racially polarized. African Americans voted cohesively for Alvin Simes, an African American.   Whites bloc voted for Steve Higginbothom, who was White. Depending on the statistical method used to estimate the degree of racial polarization, between 76% and 94.2% of African Americans voted for Simes, and between 73.9% and 97.3% of Whites voted for Higginbothom. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 5 tbl.3. Simes defeated Higginbothom by a margin of 52.8% to 47.2%, which was 5,909 votes to 5,276 votes. JSOF ¶ 11.

At the November 2000 general election, Alvin Simes defeated Carolyn "Brown" Elliott, 11,502 votes to 6,238 votes, which was 65% to 35%. JSOF ¶ 12.

2.   2001 Senate District 16

In 2001, the Board of Apportionment drew Senate District 16 with portions of the same counties — Crittenden, Lee, Phillips, and St. Francis — that contributed to 1991 Senate District 22. JSOF ¶ 13. 2001 Senate District 16 had a BVAP of 55.48%, according to the 2000 Census. JSOF ¶ 14. This was lower than the BVAP% of 1991 Senate District 22, which was 61.9%. *See Jeffers v. Tucker*, 847 F. Supp. 655, 661 (E.D. Ark. 1994).

There was no successful challenge to the reduction of the African-American population as compared with 1991 Senate District 22[1].

Senate District 16, in the decade during which it was redrawn with a lower BVAP%, twice elected an African-American senator, but never the candidate preferred by African American voters; not even once. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 6.

3.   2002 Elections – Senate District 16

In the May 2002 Democratic primary for Senate District 16, voting was racially polarized. African Americans voted cohesively for African-American Senator Alvin Simes and Whites bloc voted for White Steve Higginbothom. Depending on the statistical method used to estimate who voted for whom, between 64.9% and 98.8% of African Americans voted for Simes, and between 75.4% and 84.4% of Whites voted for Higginbothom. (Handley Test., May 8,

---

[1] Dale Charles and Jimmie Wilson filed suit against the Board of Apportionment (Mike Huckabee and Mark Pryor) on May 22, 2002. The case was assigned to a three-judge panel. On September 30, 2002, the suit was dismissed for failure to prosecute. The defendants were never served with the summons and complaint. (USDC 2:02-cv-68 GH)

2012); Handley Decl. (Exhibit 94) at 5 tbl.3. Simes lost to Higginbothom, 4,299 votes to 6,079

votes, which was 36.5% to 51.6%. African American candidate Gordon McCoy received 12% of

the votes.   JSOF ¶ 15; Handley Decl. (Exhibit 94) 5-6. Bloc voting by Whites defeated Simes,

the candidate of choice for African Americans. (Handley Test., May 8, 2012); Handley Decl.

(Exhibit 94) at 5.

In the November 2002 general election, Steve Higginbothom defeated write-in candidate

Rose McGee 14,034 votes to 1,555 votes, which was 90% to 10%. JSOF ¶ 16.

### 4.	2006 Democratic Primary – Senate District 16

Senator Steve Higginbothom did not seek re-election in 2006. JSOF ¶ 21.

The May 2006 Democratic primary election for Senate District 16 featured only African-

American candidates. The three candidates received votes as follows:

Candidate	Votes	Percentage
Representative Arnell Willis	3,923	34.6%
Jack B. Crumbly	3,882	34.2%
Alvin Simes	3,544	31.2%

JSOF ¶ 22.

Voting was racially polarized. Bloc voting by Whites defeated Alvin Simes, the

candidate of choice for African Americans. (Handley Test., May 8, 2012); Handley Decl.

(Exhibit 94) at 5. The voting pattern by race is shown in the following table:

Contest and Candidates	Candidate Information	Estimate of the Percent of White and Black Voters Casting a Vote for Each of the Candidates

30

	Race	Actual Percent of Vote	White Voters			Black Voters		
			Homog Precinct	Bivariate Regress	Ecological Inference	Homog Precinct	Bivariate Regress	Ecological Inference
Simes	AA	31.2	21.8	21.7	15.6	55.2	56.1	54.4
Willis	AA	34.6	33.7	38.1	43.7	23.3	35.7	24.6
Crumbly	AA	34.2	44.6	40.2	40.0	21.5	8.1	21.2
Turnout (% VAP)			*18.6*	*26.4*	*25.9*	*7.4*	*6.8*	*15.9*

See Handley Decl. (Exhibit 94) at 5 tbl.3.

In the June 2006 runoff election, voting was racially polarized. Jack B. Crumbly, an

African American, defeated Representative Arnell Willis by 68 votes (4,768 votes to 4,700

votes), which was 50.4% to 49.6. JSOF ¶¶ 23, 198.

The voting pattern by race is shown in the following table:

Contest and Candidates	Candidate Information		Estimate of the Percent of White and Black Voters Casting a Vote for Each of the Candidates					
	Race	Actual Percent of Vote	White Voters			Black Voters		
			Homog Precinct	Bivariate Regress	Ecological Inference	Homog Precinct	Bivariate Regress	Ecological Inference
Crumbly	AA	50.4	53.2	56.7	55.1	57.1	32.3	45.3
Willis	AA	49.6	46.8	43.3	44.4	42.9	67.6	53.9
Turnout (% VAP)			*8.7*	*19.5*	*21.0*	*6.0*	*4.6*	*11.5*

(Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 5 tbl.3.

Mr. Crumbly was unopposed in the 2006 general election. JSOF ¶ 26.

5.   2010 Democratic Primary – Senate District 16

Voting in the May 2010 Democratic primary for Senate District 16 was racially polarized. African Americans voted cohesively for Alvin L. Simes and Whites bloc voted for Senator Jack B. Crumbly. Depending on the statistical method used to estimate who voted for whom, between 51.1% and 61.6% of African Americans voted for Simes and between 72.1% and 82.6% of Whites voted for Crumbly. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 6 tbl.3. Bloc voting by Whites defeated Simes, the candidate of choice for African Americans. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 6 tbl.3.

The voting pattern by race is shown in the following table:

Contest and Candidates	Candidate Information		Estimate of the Percent of White and Black Voters Casting a Vote for Each of the Candidates					
	Race	Actual Percent of Vote	White Voters			Black Voters		
			Homog Precinct	Bivariate Regress	Ecological Inference	Homog Precinct	Bivariate Regress	Ecological Inference
May 2010: Sen Dist 16								
Crumbly	AA	65.6	72.1	82.6	78.1	43.5	38.3	48.6
Simes	AA	34.4	27.9	17.4	21.4	56.5	61.6	51.1
Turnout (% VAP)			*27.1*	*17.1*	*25.6*	*25.5*	*10.5*	*13.0*

Handley Decl. (Exhibit 94) at 6 tbl.3.

Senator Crumbly was unopposed in the 2010 general election. JSOF ¶ 26.

D.   Other Legislative Elections in the Delta – 2002 to 2010

From 2002 to 2010, in every legislative election in the seven Delta counties that included both an African American and a White candidate, voting was racially polarized. The candidate preferred by African Americans usually lost. In fact, the African-American-preferred candidate was defeated in every contest that did not occur in a majority-Black legislative district — and sometimes lost contests in majority-Black districts as well. *See* Handley Decl. (Doc. 70-2) 6.

The contests during that time where there was at least one African American candidate, other than for Senate District 16, are summarized in the following table:

**Table 6: Election Results for Additional State Legislative Contests
in the Delta Counties Area**

Contest	Percent Black VAP	Racially polarized?	Outcome
Senate District 17			
2004 Primary in Senate District 17	26.9	Yes	Black-preferred candidate (Jones) lost
House District 13			
2002 Primary in House District 13	52.8	Yes	Black-preferred candidate (Willis) lost
2004 Primary in House District 13	52.8	Yes	Black-preferred candidate (Willis) won
2010 Primary in House District 13	58.7	Yes	Black-preferred candidate (Weaver) lost
House District 51			
2010 Primary in House District 51	34.8	Yes	Black-preferred candidate (Gilchrest) lost
House District 52			
2004 Primary in House District 52	57.7		Contest with only Black candidates, not analyzed in report
2010 Primary in House District 52	59.9		Contest with only Black candidates, not analyzed in report (Murdock received over 61.8% of vote thus was probably at least the Black-preferred candidate)
House District 53			
2006 Primary in House District 53	33.9	Yes	Black-preferred candidate (Joiner) lost
House District 54			
2004 General in House District 54	65.8	Yes	Black-preferred candidate (Davis) won (3 contests with only Black candidates not analyzed in report)

See Handley Decl. (Exhibit 94) at 6, 9 tbl.6.

1.   Senate District 17 — 2004 Democratic Primary

The portions of Crittenden, Lee, and St. Francis Counties that were not included in 2001 Senate District 16, were included in Senate District 17, along with all of Cross, Monroe, and Woodruff Counties and the portions of Phillips County that were not included in Senate District 16 or 5. JSOF ¶ 28. 2001 Senate District 17 had a BVAP of 27%, according to the 2000 Census. JSOF ¶ 29.

Steve Jones is the only African American who ever was a candidate for senator from 2001 Senate District 17. He did not win. *See* Handley Decl. (Exhibit 94) at 2 tbl.1, 5 tbl.3, 9 tbl.6.

In the May 2004 Democratic primary for Senate District 17, voting was racially polarized. African Americans voted cohesively for Steve Jones and Whites bloc voted for Senator Jim Luker. Depending on the statistical method used to estimate who voted for whom, between 65.5% and 82.6% of African Americans voted for Jones and between 61.5% and 80.8% of Whites voted for Luker. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) 5 tbl.3. Jones lost to Luker by 5,192 votes to 8,288 votes, which was 38.5% to 61.5. JSOF ¶ 31. Bloc voting by Whites defeated Jones, the candidate of choice for African Americans. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) 5 tbl.3.

2.   House Districts 13, 51, 52, 53, 54, 57

Between 2002 and 2010, five house districts in the Delta counties had an election contest with at least one African American candidate: House Districts 13 and 51 to 54. *See* Handley Decl. (Exhibit 94) at 2 tbl.1. House District 57 did not have a contest that included an African-American candidate.

The success of African American candidates in these House districts is correlated to the Black voting-age population in the district — the higher the percent Black VAP, the more success the candidates have had, as shown in the following table:

Summary of Results for State House Contests in Delta Area Counties

State House District (listed by Percent Black VAP)	Percent Black VAP (2000-2010)	Success Rate of black-preferred candidates in contests that included African American candidates
State House 53	20.6-33.9	0% (0/1)
State House 57	21.1-20.8	No Black candidates
State House 51	31.7-34.8	0% (0/1)
State House 13	52.8-58.7	33% (1/3)
State House 52	57.7-59.9	100% (2/2)
State House 54	65.8-65.1	100% (1/1) (3 contests not analyzed)

(Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 10 tbl.7.

Just as with the contests in 2001 Senate Districts 16 and 17, voting in these five House districts has been racially polarized. In every contest with both an African-American candidate and a White candidate, African-American voters have always preferred a candidate different from the one preferred by Whites. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 4-6 tbl.3.

a.   House District 13

2001 House District 13 is all of Phillips County. JSOF ¶ 32. According to the 2000 Census, it had a BVAP of 52.88%. JSOF ¶ 33.

(1)   2002 Elections

In the 2002 Democratic primary for House District 13, voting was racially polarized. African Americans voted cohesively for Representative Arnell Willis and Whites bloc voted for Barbara King. Depending on the statistical method used to estimate who voted for whom, between 79.1% and 92.4% of African Americans voted for Willis and between 86.6% and 88.6% of Whites voted for King. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 5 tbl.3. Willis lost to King by less than 100 votes (2,576 votes to 2,667 votes), which was 49.1% to 50.9%. JSOF ¶ 34. Bloc voting by Whites defeated Willis, the candidate of choice for African Americans. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 5 tbl.3.

Representative King was unopposed in the November 2002 general election. JSOF ¶ 35.

(2)   2004 Elections

In the 2004 Democratic primary for House District 13, voting was racially polarized. African Americans voted cohesively for Arnell Willis and Whites bloc voted for Clark Hall. Depending on the statistical method used to estimate who voted for whom, between 77.4% and 92.6% of African Americans voted for Willis and between 80.4% and 81.5% of Whites voted for Hall. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 5 tbl.3. Willis defeated Hall by 3,419 votes to 2,631 votes, which was 56.5% to 43.5%. JSOF ¶ 36. Bloc voting by African Americans defeated Hall, the candidate of choice for Whites. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 5 tbl.3.

Willis was unopposed in the November 2004 general election. JSOF ¶ 37.

(3)   2006 Elections

In the May 2006 Democratic primary for House District 13, African American candidate Chalk S. Mitchell came in third behind White candidates Bill Brandon and Clark Hall, as follows:

Candidate	Votes	Percentage
Bill Brandon	1,780	36.2%
Clark Hall	1,778	36.1%
Chalk S. Mitchell	1,365	27.7%

See 2006 Election Results, Primary, State Representative District 13 Democrat,

http://www.sos.arkansas.gov/electionresults/index.php?ac:show:contest_statewide=1&elecid=120&contestid=169.

The results of the May 2006 primary in Phillips County were reported at the county level only, so it is not possible to determine whether African Americans and Whites voted cohesively or whether they tended to vote for different candidates. JSOF ¶ 38.

In the June 2006 runoff, Clark Hall defeated Bill Brandon, 2,002 votes to 1,990 votes, which was 50.15% to 49.85%. JSOF ¶ 39.

(4)   2010 Elections

According to the 2010 Census, the BVAP for House District 13 was 58.7%. JSOF ¶ 40.

In the May 2010 Democratic primary for House District 13, voting was racially polarized. African Americans voted cohesively for African-American candidate Johnny Weaver

and Whites bloc voted for White Representative Clark Hall. Depending on the statistical method used to estimate who voted for whom, between 63% and 65.7% of African Americans voted for Weaver and between 95.7% and 100% of Whites voted for Hall. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 6 tbl.3. Weaver lost to Hall by 1,355 votes to 3,326 votes, which was 29% to 71.1%. JSOF ¶ 41. Bloc voting by Whites defeated Weaver, the candidate of choice for African Americans. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 6 tbl.3.

Hall was unopposed in the November 2010 general election for House District 13. JSOF ¶ 42.

b.   House District 51

2001 House District 51 consists of Monroe County and portions of Lee, Phillips, and Woodruff Counties.   JSOF ¶ 43. According to the 2010 Census, the BVAP for House District 51 was 34.8%. JSOF ¶ 44.

In the May 2010 Democratic primary for House District 51, voting was racially polarized.   African Americans voted cohesively for African American candidate Norman Gilchrest and Whites bloc voted for White candidate Marshall Wright.   Depending on the statistical method used to estimate who voted for whom, 73.8% of African Americans voted for Gilchrest and between 55.8% and 67.8% of Whites voted for Wright. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 6 tbl.3. Gilchrest lost to Wright by 2,515 votes to 2,898 votes, which was 46.5% to 53.5%. JSOF ¶ 45. Bloc voting by Whites defeated Gilchrest, the candidate of choice for African Americans. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 6 tbl.3.

c.   House District 52

House District 52 consists of the portions of Lee and St. Francis Counties that are not included in House District 51. JSOF ¶ 46. According to the 2000 Census, the BVAP for House District 52 was 58%. JSOF ¶ 47.

(1)   2004 Elections

The May 2004 Democratic primary election for House District 52 featured only Black candidates, according to Dr. Handley. The winner did not face a Republican opponent. The BVAP of this district was higher than 55%. JSOF ¶ 48. African American Nancy Duffy Blount defeated African American Reginald Murdock, 2,578 votes to 2,395 votes, which was 51.8% to 48.2%. JSOF ¶ 50.

Dr. Handley did not analyze this contest because of time constraints and her belief that there was no White candidate. JSOF ¶ 51.

Nancy Duffy Blount was unopposed in the November 2004 general election. JSOF ¶ 52.

(2)   2006 Elections

In 2006, Nancy Duffy Blount was unopposed in both the May primary and the November general election. JSOF ¶ 53.

(3)   2008 Elections

In 2008, Nancy Duffy Blount was unopposed in both the May primary and the November general election. JSOF ¶ 54.

(4)   2010 Elections

According to the 2010 Census, the BVAP of House District 52 was 59.9%. JSOF ¶ 55.

In 2010, Nancy Duffy Blount was not a candidate for House District 52. In the May primary, Reginald Murdock, an African-American candidate, defeated Elizabeth Johnson, an African-American candidate, by 2,819 votes to 1,743 votes, or 61.8% to 38.2%. JSOF ¶ 56.

Dr. Handley believes that both candidates were African American. She did not analyze this contest because of time constraints and her belief there was no White candidate. JSOF ¶ 57.

Reginald Murdock was unopposed in the November 2010 general election. JSOF ¶ 58.

d.   House District 53

House District 53 is in Crittenden County and consists of portions of West Memphis and its adjacent cities and towns. JSOF ¶ 59. According to the 2000 Census, the BVAP of House District 53 was 21%. JSOF ¶ 60. According to the 2010 Census, the BVAP of House District 53 was 33.9%. JSOF ¶ 61.

In the May 2006 Democratic primary for House District 53, voting was racially polarized. African Americans voted cohesively for African American Basil L. Joiner and Whites bloc voted for White Representative Denny Sumpter. Depending on the statistical method used to estimate who voted for whom, between 81.4% and 81.9% of African Americans voted for Joiner and between 80% and 100% of Whites voted for Sumpter. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 5 tbl.3. Joiner lost to Sumpter by 439 votes to 682 votes, which was 39.2% to 60.8%. JSOF ¶ 62. Bloc voting by Whites defeated Joiner, the candidate of choice for African Americans. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 5 tbl.3.

e.   **House District 54**

House District 54 consists of the portions of Crittenden County that are not included in House District 53. JSOF ¶ 63. According to the 2000 Census, the BVAP of House District 54 was 66%. JSOF ¶ 64. According to the 2010 Census, the BVAP of House District 54 was 65.1%. JSOF ¶ 70.

(1)   **2004 Elections**

The 2004 Democratic primary election for House District 54 featured only Black candidates, according to Dr. Handley. The winner prevailed in the general election against a Republican opponent. JSOF ¶ 65.

In the May 2004 Democratic primary for House District 54, Dr. Handley believes there were three African-American candidates. The candidates received votes as follows:

Candidate	Votes	Percentage
Phillip Carter	743	37.1%
Otis L. Davis	703	35.1%
Vickie Miles-Robertson	555	27.7%

JSOF ¶ 66.

Dr. Handley did not analyze this contest because of time constraints and her belief there was no White candidate. JSOF ¶ 67.

In the June 2004 runoff for House District 54, Davis defeated Carter, 798 votes to 721 votes, or 52.5% to 47.5%. JSOF ¶ 68.

In the November 2004 general election for House District 54, voting was racially polarized. African Americans voted cohesively for African American Democrat Otis L. Davis. Whites bloc voted for White Republican Ray Nassar. Depending on the statistical method used to estimate who voted for whom, between 89% and 94.2% of African Americans voted for Davis and between 55% and 59.6% of Whites voted for Nassar. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 4 tbl.2. Davis defeated Nassar by 5,112 votes to 2,425 votes, which was 67.8% to 32.2%. JSOF ¶ 69. Bloc voting by African Americans caused Davis, the candidate of choice for African Americans, to defeat Nassar. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 4 tbl.2.

(2)   2010 Elections

The 2010 Democratic primary election for House District 54 featured only Black candidates, according to Dr. Handley. The winner did not face a Republican opponent. JSOF ¶ 71.

In the May 2010 Democratic primary for House District 54, Dr. Handley believes all four candidates were African American. The candidates received votes as follows:

Candidate	Votes	Percentage
Fred Smith	1,034	39.3%
James Pulliaum	695	26.4%
Gary Tobar	494	18.8%
D'James Rogers II	410	15.6%

JSOF ¶ 72.

Dr. Handley did not analyze this contest because of time constraints and her belief there was no White candidate. JSOF ¶ 73.

In the June 2010 runoff for House District 54, African-American candidate Fred Smith defeated African-American candidate James Pulliaum, 1,960 votes to 1,705 votes, which was 53.5% to 46.5%. JSOF ¶ 74.

Dr. Handley did not analyze this contest because of time constraints and her belief there was no White candidate. JSOF ¶ 75.

E.   **Statewide Elections in the Delta – 2002 to 2010**

From 2002 to 2010, in the seven Delta counties there were six statewide election contests that included at least one African-American candidate. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 2-3 tbl.1.

In all but one of those contests, voting was racially polarized: African Americans in the Delta counties voted cohesively for one candidate and Whites bloc voted for a different candidate. The candidate preferred by African Americans usually lost, due to bloc voting by Whites. The one exception was the 2002 Democratic primary for lieutenant governor. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 3-6 tbls.2-3.

1.   **2002 Lieutenant Governor**

In the 2002 Democratic primary for lieutenant governor, both African Americans and Whites voted cohesively for African American candidate Ronald Sheffield.   (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 4 tbl.3. Sheffield defeated White candidate Kurt Dilday, 61,379 votes to 205,502 votes, which was 77% to 23%. JSOF ¶ 78; (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 4 tbl.3.

In the 2002 general election for Lieutenant Governor, voting was racially polarized. While African Americans again voted cohesively for Sheffield, Whites bloc voted for Republican Win Rockefeller. Depending on the statistical method used to estimate who voted for whom, between 89.7% and 95% of African Americans voted for Sheffield and between 66.9% and 71.6% of Whites voted for Rockefeller. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 3 tbl.2. Sheffield lost to Rockefeller, 318,592 votes to 477,062 votes, which was 40% to 60%. JSOF ¶ 81. Bloc voting by Whites defeated Sheffield, the candidate of choice for African Americans. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 3 tbl.2.

2.   2004 Supreme Court Chief Justice

In the 2004 judicial election for Chief Justice, voting was racially polarized. African Americans voted cohesively for African-American candidate Wendell L. Griffen and Whites bloc voted for White candidate Jim Hannah. Depending on the statistical method used to estimate who voted for whom, between 69.1% and 75.5% of African Americans voted for Griffen and between 67.1% and 69.8% of Whites voted for Hannah. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 4 tbl.3. Griffen lost to Hannah, 114,835 votes to 191,695 votes, which was 37.5% to 62.5%. JSOF ¶ 84. Bloc voting by Whites defeated Griffen, the candidate of choice for African Americans. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 4 tbl.3.

3.   2006 Supreme Court Associate Justice

In the 2006 judicial election for Associate Justice of the Supreme Court, voting was racially polarized. African Americans voted cohesively for African-American candidate Wendell L. Griffen and Whites bloc voted for White candidate Paul E. Danielson. Depending on

the statistical method used to estimate who voted for whom, between 66.9% and 72.5% of African Americans voted for Griffen and between 62.4% and 65.9% of Whites voted for Danielson. Handley Decl. (Exhibit 94) at 4 tbl.3. Griffen lost to Danielson, 132,789 votes to 177,406 votes, which was 42.8% to 57.2%. JSOF ¶ 88. Bloc voting by Whites defeated Griffen, the candidate of choice for African Americans. Handley Decl. (Exhibit 94) at 4 tbl.3.

4.   2008 Presidential Democratic Primary

In the 2008 Democratic presidential primary, voting was racially polarized. African Americans voted cohesively for African-American candidate Barack Obama and Whites bloc voted for White candidate Hillary Clinton. Depending on the statistical method used to estimate who voted for whom, between 76% and 79.8% of African Americans voted for Obama and between 84.4% and 88.2% of Whites voted for Clinton. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 4 tbl.3. Obama lost to Clinton, 82,476 votes to 220,136 votes, which was 26.3% to 70.1%. JSOF ¶ 90. Bloc voting by Whites defeated Obama, the candidate of choice for African Americans. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 4 tbl.3.

5.   2008 Presidential General Election

In the 2008 general election for U.S. President, voting was racially polarized. African Americans voted cohesively for African-American Democratic candidate Barack Obama and Whites bloc voted for White Republican candidate John McCain. Depending on the statistical method used to estimate who voted for whom, between 95.9% and 100% of African Americans voted for Obama and between 73.3% and 76.8% of Whites voted for McCain. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 3 tbl.2.

The maps labeled "Arkansas Delta, 2008 General Election Polling Place Areas – BVAP% and Votes," show the number of votes received by Obama and McCain at each polling place in the seven Delta counties and the percentage of the Black voting-age population in the area where those voters reside. (Exhibits 74 to 78). Additional maps (Exhibits 74A to 78A) show the same information, but also show the names of the polling places and, on the inset maps of various cities, show selected highways and streets, as was projected from Plaintiffs' laptop during the trial.

Obama lost to McCain, 42,310 votes to 638,017 votes, which was 38.9% to 58.8%. JSOF ¶ 92. Bloc voting by Whites defeated Obama, the candidate of choice for African Americans. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 3 tbl.2.

F.   Analytical Conclusion – the Three *Gingles* Preconditions Have Been Met

Defendants have conceded that Plaintiffs have met the first *Gingles* precondition: the African-American minority in the Delta is sufficiently large and geographically compact to constitute a majority in a single-member district. 2011 Senate District 24 and numerous other plans drafted by the Secretary of State and Plaintiffs have shown that an African-American voting-age majority district can be drawn.

Dr. Handley's foregoing analysis of election results in the Delta during the last decade has shown that Plaintiffs have met the second and third *Gingles* preconditions: the African-American minority in the Delta is politically cohesive, and, in the absence of special circumstances, such as where African Americans constitute a majority in the jurisdiction, bloc voting by the White majority usually defeats the minority's preferred candidate.

III.   **THE TOTALITY OF THE CIRCUMSTANCES**

     A.   **Section 2 of the Voting Rights Act**

Having established the *Gingles* preconditions, Plaintiffs must further show that:

> based on the totality of the circumstances . . . the political
> processes leading to nomination or election in the State or political
> subdivision are not equally open to participation by members of a
> class of citizens protected by [§ 2] in that its members have less
> opportunity than other members of the electorate to participate in
> the political process and to elect representatives of their choice.
> The extent to which members of a protected class have been
> elected to office in the State or political subdivision is one
> circumstance which may be considered: *Provided*, That nothing in
> this section establishes a right to have members of a protected class
> elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (b).

As the Court said in *United States v. City of Euclid*, 580 F. Supp.2d 584, 604-05 (N.D.

Ohio 2008):

> "[I]t is the rare case for minority plaintiffs to satisfy the *Gingles'*
> preconditions and fail to overcome defendants' evidence that other
> factors rebut that initial proof." [Citing *Sanchez v. Colorado*, 97
> F.3d 1303, 1322 (10th Cir. 1996)]. . . . [T]here is no requirement
> that any particular number of Senate Factors be proved; instead
> "the question [of] whether the political processes are 'equally
> open' depends upon a searching practical evaluation of the 'past
> and present reality,' and on a 'functional' view of the political
> process." *Gingles*, 478 U.S. at 45 (citation omitted). The *Gingles*
> Court found that the second and seventh Senate Factors are the
> most important Senate Factors in a vote dilution case. 478 U.S. at
> 48 n.15. The remaining Senate Factors "are supportive of, but *not
> essential to*, a minority voter's claim." *Id*.

B.   The Senate Factors

The court in *Euclid* discussed each of the Senate Factors in turn and how they applied to the facts in that case. 580 F. Supp.2d at 604-12. The following section uses the *Euclid* court's legal outline to show how the Senate Factors apply in this case.

1.   Senate Factor One – History of Official Discrimination

The first Senate Factor requires a showing of a history of official discrimination that "touched" a minority group's voting rights or otherwise affected their ability to participate in the democratic process. *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417 at 28-29).

In 1988, this Court took judicial notice that:

(1) . . . [T]here is a history of racial discrimination in the electoral process in Arkansas. (Citations omitted.) We do not believe that this history of discrimination, which affects the exercise of the right to vote in all elections under state law, must be proved anew in each case under the Voting Rights Act.

(2) We further find that the history of discrimination has adversely affected opportunities for black citizens in health, education, and employment. The hangover from this history necessarily inhibits full participation in the political process.

Smith v. Clinton, 687 F. Supp. 1310, 1317 (E.D. Ark. 1988).

In his testimony, Defendant Governor Beebe acknowledged that the history of official discrimination against minorities in the State of Arkansas is well established. He also acknowledged that there remain educational and achievement gaps of great significance between the majority population and the minority population, causing disproportionate suffering to African Americans in Arkansas. (Test., May 8, 2012).

49

2.   Senate Factor Two – Racial Polarization

Senate Factor Two is "the extent to which voting in the elections of the state or political subdivision is racially polarized." *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417 at 28-29).

Dr. Handley's testimony was that voting was racially polarized in all but one of the 18 contests she analyzed. Lay witnesses provided numerous detailed accounts of how voting was racially polarized in the cities, counties, and legislative districts with which they are familiar. Even Defendant Governor Beebe acknowledged that voting in the Delta is racially polarized, just as it has always been. (May 8, 2012). The combined effect of this statistical expert testimony and the anecdotal evidence has been to prove by a preponderance of the evidence that voting in the Delta is highly racially polarized.

3.   Senate Factor Three – Enhancing Mechanisms

The third Senate Factor requires a showing that there is a voting procedure in place that may enhance vote dilution. *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417 at 28-29).

Absentee ballots have been a preferred method for elderly, poor, and poorly educated African Americans in the Delta to vote, because the voter could have a family member or trusted friend help them read the application and go through it, mark their ballot, and simply put it in the mail. (Crumbly Test., May 9, 2012). Restricting the use of absentee voting inhibits these African Americans from voting.

In November 1998, Robert Miller was elected the first African-American mayor of Helena, in Phillips County; Brian Miller, an African-American, was elected City Attorney of Helena; Johnny Weaver was elected the first African-American mayor of West Helena; Andre

Valley, an African American, was elected City Attorney of West Helena; and Larry Bryant was elected the first African-American mayor of Forrest City, in St. Francis County. *Id.*

At the next session of the General Assembly, in January 1999, Representative Barbara King of Phillips County, who is White, introduced a bill that became Act 1368 of the 1999 General Assembly, which restricted the use of absentee ballots. *Id.* Over the next several years, Representative King introduced and secured the enactment of additional bills to restrict the use of absentee ballots. *See, e.g.,* Act 1586 (1999); Act 471 (2001); Act 273 (2003); Act 1202 (2003); Act 1275 (2003).

In 1999, Johnny Weaver and Derwood King (Durwood King) sued over absentee ballots in separate cases. *See King v. Whitfield*, No. CIV 98-311 (Cir. Ct. Phillips Cty, Mar. 2, 1999); *Weaver v. Porter,* No. CIV 98-330 (Cir. Ct. Phillips Cty, Mar. 2, 1999) (Exhibits 97 and 98). Weaver won his challenge and became Mayor of West Helena. King lost his challenge and was ousted as Municipal Judge in Helena. Weaver is Black. King is White.

4.   Senate Factor Four – Candidate Slating

The fourth Senate Factor requires a showing that members of a minority group have been denied access to a candidate slating process. *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417 at 28-29). There is no slating process at work in the Delta.

5.   Senate Factor Five – Socio-Economic Disparity

The fifth Senate Factor requires a showing that the minority group bears the effects of discrimination in such areas as education, employment and health, which hinders their ability to participate effectively in the political process. *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417 at 28-29). Socioeconomic "disparities are the effects of discrimination to which the Senate Factor refers." *Bone Shirt*, 336 F. Supp. 2d at 1038.

Many witnesses, including Defendant Governor Beebe, acknowledged that the Delta is perhaps the poorest region in Arkansas. It has very little manufacturing, with the economy primarily agrarian. (Crumbly Test., May 9, 2012). Every county but Crittenden, which was essentially unchanged, lost population from 2000 to 2010. *See* Percent Change in Total Population; Arkansas by County; April 1, 2000 – April 1, 2010 (Exhibit 33). Its schools are struggling, and the area is basically depressed. (Crumbly Test., May 9, 2012).

6.   Senate Factor Six – Overt or Subtle Racial Appeals

The sixth Senate Factor inquires into whether Delta elections have been characterized by overt or subtle racial appeals. *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417 at 28-29). Racial appeals can take a variety of forms, from the use of racially-charged campaign issues, *Williams v. City of Dallas*, 734 F. Supp. 1317, 1348 (N.D. Tex. 1990), to candidates using photographs of their African-American opponents on their campaign literature, *McDaniels v.Mehfoud*, 702 F. Supp. 588, 595 (E.D. Va. 1988). It is not necessary to prove that racial appeals are a permanent or exceedingly pervasive feature of a jurisdiction's elections; instead, courts have found the existence of this factor based on a handful of salient incidents. *See, e.g., Bone Shirt*, 336 F. Supp. 2d at 1041 (finding racial appeals based mostly on two newspaper articles, in 1978 and 2002, focusing on allegations of voter fraud by American Indians); *United States v. Alamosa County*, 306 F. Supp. 2d 1016, 1025-26 (D. Colo. 2004) (finding racial appeals based on three elections where candidates identified own ethnicity); *Magnolia Bar Ass'n, Inc. v. Lee,*793 F. Supp. 1386, 1410 (S.D. Miss. 1992) (finding racial appeals in Mississippi's judicial elections based on evidence from three elections).

Representative Keith Ingram (Test., May 8, 2012) took responsibility for having distributed two flyers in his campaign for 2011 Senate District 24, one featuring him with

respected White community leaders and another featuring him with respected Black community leaders. He described how his campaign was able to target mailings to very specific audiences, but professed not to know to what audiences the two different flyers had been mailed. Linda White, Phillips County Clerk, identified the address to which each flyer had been mailed, as shown on the flyer: the flyer featuring White leaders had been mailed to an address in a White neighborhood in Helena-West Helena; the flyer featuring Black leaders had been mailed to an address across the street from her home in a Black neighborhood. (Test., May 8, 2012).

Defendant Governor Beebe acknowledged that political campaigns in Arkansas in certain instances have been overtly race based. (Test., May 8, 2012).

7.   Senate Factor Seven – Success Rate of African-American Candidates

The seventh Senate Factor, the extent to which members of the minority group have been elected to public office in the jurisdiction, is the only Senate Factor expressly referenced by Congress in the statutory language of § 2. *Gingles*, 478 U.S. at 37 (quoting S. Rep. No.97-417 at 28-29).

While testimony at the trial showed that several African Americans have been elected to public office in the Delta, those electoral successes have come almost exclusively in legislative districts, counties, cities, or wards where African Americans are a majority of the voting-age population. If the majority is not significantly more than 53%, the African-American candidate usually loses.

Witnesses Leo Chitman, Roy C. "Bill" Lewellen, Vicki Robinson, Reginald Murdock, Peggy Robinson Wright, and Eddie O'Neal (all on May 7, 2012), Linda White and Shirley Harvell (both on May 8, 2012), and Joseph Perry (May 9, 2012), all told how they and their friends and associates who are African American have run for elected office in the Delta and

been defeated, some of them many times, as Blacks vote for Blacks and Whites vote for Whites. Bloc voting by Whites has defeated them.

From 2002 to 2010, in every legislative election in the seven Delta counties that included both an African American and a White candidate, the candidate preferred by African Americans usually lost. In fact, the African-American-preferred legislative candidate was defeated in every contest that did not occur in a majority-Black legislative district — and sometimes lost contests in majority-Black districts as well. *See* Handley Decl. (Doc. 70-2) 6.

8.   Additional Senate Factor – Unresponsiveness

A significant lack of responsiveness on the part of elected officials to the particularized needs of the African-American community is probative in establishing a § 2 violation. S. Rep. 417 at 29.

9.   Additional Factor – Lack of Proportionality

An additional factor to consider in the totality of the circumstances is whether minority voters form effective voting majorities in a number of legislative districts that are roughly proportionate to their respective shares in the voting-age population. *DeGrandy*, 512 U.S. at 1014 n.11; *see also Rural W. Tenn.*, 209 F.3d at 842. The Sixth Circuit has stated that when the lack of proportionality is present along with racial bloc voting and the failure to elect minorities, these three factors "simply overwhelm those factors that might favor" the defense. R*ural W. Tenn.*, 209 F.3d at 844.

10.   Since the early 1990s there have been four African-American-majority

Senate districts in Arkansas. Two of those districts have been in Pulaski County,

one district has been in Jefferson County and the remaining district has been in the "Delta." The 2010 Census reported that African Americans are about 14.3% of the state's voting-age population. Black Population, 18 Years and Over, Number and Percent of County Population 18 Years and Over; Arkansas by County: 2010 (Exhibit 59). Fourteen percent of 35 Senate seats would be five seats, not four. Before 2010, each U.S. Census showed that the distribution of the African-American population in Arkansas would not permit an effective fifth state Senate district to be drawn. But to reduce the number of districts from four to three would be retrogression in a plan that has not yet achieved proportionality.**Additional Factor – Racial Separation**

An additional indication of the importance of race in elections is the degree of separation between Whites and African Americans. *United States v. Charleston County*, 316 F. Supp. 2d 268, 291; *see also Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 342 (N.D. Tex. 1983) ("It is clear to the Court that a major reason for the white majority's lack of familiarity with many black candidates is the severe de facto segregation of housing in Terrell."). This factor, therefore, looks to the level of racial interaction that exists in Delta schools, churches, neighborhoods, and businesses. *See Charleston County*, 316 F. Supp. 2d at 291 (looking to racial separation that exists "socially, economically, religiously, in housing and business patterns"). Residential, educational, and religious separation has meant that African Americans and whites, who live in different neighborhoods, attend different churches, and go to different schools, grow up in largely separate social networks. This pattern of racial separation necessarily contributes to the racially polarized voting patterns observed in Delta local elections.

In the Delta counties, there are lingering effects from state-sanctioned racial discrimination. There are still largely Black and White neighborhoods, with Black and White neighborhood schools. These neighborhoods were designed with the approval of local and even state government to keep races of people separated. Whites have been removing their children from the public schools and enrolling them in private and religious schools. The living patterns have interplay into all of the other facets of life, including school attendance, church attendance, and political party affiliation. (Leo Chitman Test., May 7, 2012).

C.   Conclusion

This analysis of the Senate Factors shows that the political processes leading to nomination or election in 2011 Senate District 24 are not equally open to participation by African Americans and that they have less opportunity than other members of the electorate to participate in the political process and to elect a senator of their choice.

To anyone familiar with the political environment in the Delta, as the members of the Defendant Board of Apportionment undoubtedly were, it should have been obvious that, when the population counts from the 2010 Census arrived in the Spring of 2011, the Board needed to draw a new Senate district in the Delta that was an effective African-American district.

What did the Board do?

IV.   2010 CENSUS

A.   State of Arkansas

The 2010 Census showed that the population of Arkansas had grown by 9.1% since 2000, JSOF ¶ 143, but that the growth was not evenly distributed across the state. For example, Benton County in the northwest increased by 44.3%, JSOF ¶ 145, but Monroe County in East

Arkansas decreased by 20.5%. Percent Change in Total Population; Arkansas by County; April 1, 2000 – April 1, 2010 (Exhibit 33).

This uneven growth meant that the land area of Senate districts in the northwest had to shrink, in order to take in less population, while the land area of districts in the East had to grow, to take in more population, in order to meet one-person, one-vote requirements.

The differences in growth rates across the state of the Black population were even greater than the differences in the growth rates of the total population. Whereas the state population of Blacks had increased by 7.4%, Percent Change in Black Population; Arkansas by County, April 1, 2000 – April 1, 2010 (Exhibit 34), the Black population of Benton County had increased by 347.4 %, *Id.*, and the Black population of Woodruff County in East Arkansas had decreased by 25.8%. *Id.* Changes in Senate district boundaries to meet equal-population requirements would have to consider also the different racial balance in the areas affected.

B.   Senate District 16

The 2010 Census reported that Senate District 16 had a population of 68,732, which was 14,580, or 17.5%, less than the ideal population of 83,312.   JSOF ¶ 163.   To meet equal population requirements, so that the population of Senate District 16 was no more than five percent below the ideal, its boundaries needed to be redrawn to add at least 10,415 people, to bring its population up to at least 79,147.   JSOF ¶ 164.   Because its Black voting-age population had increased, relative to its White population, the BVAP of District 16 had increased from about 55% in 2000 to 61% in 2010.   JSOF ¶ 27.

The 2010 Census reported that the population of District 16 included the following, classified by race:

Table 8 – District 16 Population by Race

Total Population

White	Black	White %	Black %
21,622	45,252	31%	66%

Voting-age Population

White	Black	White %	Black %
18,183	30,602	36%	61%

JSOF ¶ 166.

The 2010 Census reported that the White and Black racial classifications of District 16, allocated by county, were approximately as follows:

Table 9 – District 16 Population by Race by County

Total Population

	White	Black	White %	Black %
Crittenden	3,410	16,101	17%	81%
Lee	2,934	4,970	36%	61%
Phillips	4,568	10,375	30%	68%
St. Francis	10,710	13,806	42%	54%
Total	**21,622**	**45,252**	**31%**	**66%**

Voting-age Population

	White	Black	White %	Black %
Crittenden	2,888	10,309	22%	77%
Lee	2,573	3,737	40%	58%
Phillips	3,775	6,814	35%	63%
St. Francis	8,947	9,742	46%	50%
Total	**18,183**	**30,602**	**36%**	**61%**

JSOF ¶ 167.

To keep its BVAP around 61%, the population added to District 16 to meet equal-population requirements would have to include at least as many Blacks as Whites.

About 73% of the 2010 voting-age population of District 16 was in Lee, Phillips, and St. Francis Counties. *See* Table 9, above. Those three counties had been a major part of each of the

predecessors of 2001 Senate District 16: 1991 District 22 (Exhibit 71) and 1990 District 30 (Exhibit 14 at 7-8). Phillips, Lee, and St. Francis counties have the first, second, and fifth highest percentage of African-American population of any counties in the state. Black Population, Number and Percent of County Total Population; Arkansas by County: 2010 (Exhibit 60). Their 2010 Black voting-age populations for the whole county, including portions not in Senate District 16, were as follows:

    a. St. Francis County   48.2%. JSOF ¶ 158.

    b. Lee County   52.9%. JSOF ¶ 159.

    c. Phillips County   58.7%. Black Population, 18 Years and Over, Number and Percent of County Population 18 Years and Over; Arkansas by County: 2010 (Exhibit 59).

Adding population from those three counties to District 16 would tend to keep its BVAP up.

About 27% of the 2010 voting-age population of District 16 was in Crittenden County; 77% of it was Black. *See* Table 9 above. Crittenden County had been divided in 1990, so that its Black-dominated South could become part of the first Black-majority Senate district in East Arkansas since Reconstruction. *See* JSOF ¶ 1. In 2011, the part of Crittenden County that was not already in District 16 was 68% White. *See* 2001 Adopted Senate Map (Exhibit 8); Senate 2001 Dist. Statistics, Dist. 17 (Exhibit 82). Adding more of Crittenden County to District 16 would tend to bring its BVAP down.

60

V.   DRAWING 2011 DISTRICT 24

A.   Arkansas Board of Apportionment

Under the Arkansas Constitution, Article 8, § 1, the members of the Arkansas Board of Apportionment in 2011 were Governor Mike Beebe, Attorney General Dustin McDaniel, and Secretary of State Mark Martin.   JSOF ¶ 169.   The only employee of the Board was its Coordinator, Joe Woodson.   (Woodson Test., May 7, 2012); (Beebe Test., May 8, 2012). Governor Mike Beebe served as chair of the Board and supervisor of Joe Woodson.   (Beebe Test., May 8, 2012).

B.   Crumbly Discussions with the Governor and Attorney General

Plaintiff Jack B. Crumbly is an African-American state senator whose residence is in Senate District 24 under the plan adopted by the Board of Apportionment in 2011. JSOF ¶ 174.

On or about April 4, 2011, Senator Crumbly presented to Defendant Governor Mike Beebe, by emailing to his Coordinator of the Board of Apportionment, Joe Woodson, a proposed map for the successor of District 16 labeled "Crumbly 1" (Exhibit 4) that had a BVAP of 57.2%. (May 7, 2012) (Wilson); (Crumbly Test., May 9, 2012). The "Crumbly 1" map emailed to Joe Woodson (Exhibit 4) proposed to alter the boundaries of District 16 by moving further west into St. Francis and Lee counties and further south into Phillips County, areas with high concentrations of African-American voters.

Between July 14 and 21, 2011, Senator Crumbly had four conversations with Defendant Governor Mike Beebe concerning the boundaries of the district that would succeed District 16 and provided him with additional maps that responded to concerns he raised in those conversations. At least one of the four occurred during each of the times on or about July 14 to

15, July 18 to 19, and July 20 to 21. Crumbly Dep. (Doc. 70-5) at 68-78; Crumbly Decl. (Doc. 70-3) ¶ 10.

During the conversations between July 14 and 21, Defendant Governor Mike Beebe assured Senator Crumbly that the successor to District 16 was the first Senate district drawn by the Defendant Board of Apportionment, and that his concerns would be addressed by the Board in its map for that area. (Crumbly Test., May 9, 2012).

When Defendant Board of Apportionment released the new plan to the public, on or about July 19, 2011, Senator Crumbly concluded that the concerns of African-American voters in District 16 had not been met. He sought an additional meeting with the Governor. Crumbly Decl. (Doc. 70-3) ¶ 14.

On or about July 20, 2011, at a meeting in the Governor's Office, Defendant Governor Mike Beebe assured Senator Crumbly that Senate District 24 had been the first Senate district drawn by the Defendant Board of Apportionment and that his concerns about the district had been addressed by the Board. (Crumbly Test., May 9, 2012).

At that meeting, Senator Crumbly disagreed and attempted to present to Defendant Governor Beebe two additional proposed maps of proposed District 24, composed of contiguous territory and meeting equal-population requirements, but with a BVAP percentage higher than in the plan released by the Board but lower than the plan proposed by Senator Crumbly in April:

    a. CrumblyBLRFallback (Exhibit 72) with a BVAP of 55.4%.

    b. CrumblyGovOption1 (Exhibit 73), with a BVAP of 55.4%.

(Crumbly Test., May 9, 2012).

Defendant Governor Beebe refused to look at either map. (Crumbly Test., May 9, 2012).

C.   Role of Secretary of State

Defendant Secretary Martin submitted his own plan of apportionment, which included a Black voting-age population of 56.1% for the area that most closely reflects the boundaries of old Senate District 16 and new Senate District 24. JSOF ¶ 177.

There is no evidence that Defendant Secretary Martin intentionally discriminated against Plaintiffs. JSOF ¶ 180.   There is no evidence that Defendant Secretary Martin intentionally discriminated in any of his actions as a member of the Board of Apportionment. JSOF ¶ 181.

D.   Adoption of the 2011 Plan

On July 29, 2011, Defendant Board of Apportionment met and by a 2-1 vote adopted the current maps for the state's 35 Senate districts and 100 House of Representatives districts. JSOF ¶ 178.   Governor Mike Beebe and Attorney General Dustin McDaniel voted in favor of the plans; Secretary of State Mark Martin voted against them. JSOF ¶ 179.

VI.   DESCRIPTION OF SENATE DISTRICT 24

The 2011 adopted plan includes in Senate District 24 parts of St. Francis, Lee, and Phillips counties. It also includes parts of St. Francis and Lee counties in Senate District 23 and part of Phillips County in Senate District 25. *See* BOA 2011 Senate Map (Exhibit 65).

Rather than moving west to take in all or more of St. Francis and Lee counties, the boundaries of 2011 District 24, as compared to 2001 District 16, have been moved north to take in all of Crittenden County. *See* BOA 2011 Senate Map (Exhibit 65).

Plaintiffs' Comparison Map of 2011 SD 24 and 2001 SD 16 (Exhibit 3) shows the areas of 2011 District 24 that overlap with 2001 District 16. It shows that Defendant Board of Apportionment drew District 24 to include the rest of Crittenden County, as well as Parkin and Tyronza in Cross County, which had not been included in 2001 District 16.

Whereas African Americans made up about 66% of the total population of 2001 District 16, and about 61% of its voting-age population, the areas of Crittenden County in 2011 District 24 that were not in 2001 District 16 are about two-thirds White. The following table shows the approximate numbers:

Table 10 – Crittenden County Whites Added

Total Population

	Population	White	Black	White %	Black %
District 16					
Crittenden	19,864	3,410	16,101	17%	81%
Added	31,038	20,036	9,950	65%	32%
District 24					
Crittenden	50,902	23,446	26,051	46%	51%

Voting-Age Population

	18+Pop	White	Black	White %	Black %
District 16					
Crittenden	13,421	2,888	10,309	22%	77%
Added	22,672	15,371	6,654	68%	29%
District 24					
Crittenden	36,093	18,259	16,963	51%	47%

JSOF ¶ 228.

Since District 16 needed only about 10,000 more people to meet equal-population requirements, adding more than 30,000 people from Crittenden County meant that about 20,000

people needed to be removed from some other part of the district. Crumbly Decl. (Doc. 70-3) ¶ 20.

Defendant Board of Apportionment chose not to include in 2011 District 24 about 15,000 people in St. Francis County who had been included in 2001 District 16. The population omitted consisted of slightly more Whites than Blacks, as shown in the following table:

Table 11 – St. Francis County Whites and Blacks Removed

Total Population

	Population	White	Black	White %	Black %
District 16					
St. Francis	25,558	10,710	13,806	42%	54%
Omitted	15,062	7,198	7,101	48%	47%
District 24					
St. Francis	10,496	3,512	6,705	33%	64%

Voting-Age Population

	18+Pop	White	Black	White %	Black %
District 16					
St. Francis	19,509	8,947	9,742	46%	50%
Omitted	11,952	6,079	5,230	51%	44%
District 24					
St. Francis	7,557	2,868	4,512	38%	60%

Senate 2001_District Statistics for District 16 (Exhibit 80); Senate 2011_Dist 24_District Statistics (Exhibit 84).

A voting-age population of approximately 11,952 in St. Francis County that had been included in 2001 District 16 is not included in 2011 District 24. JSOF ¶ 229.

Senator Crumbly resides in St. Francis County.   JSOF ¶ 230. St. Francis County is his base of political support. Removing 11,952 of the voters in his base county removed 61% of his voting base. *See* Senate 2001_Dist 16_Plan Components (PSW)_County_VAP (Exhibit 82); Senate 2011_Dist 24_Plan Components (PSW)_County_VAP (Exhibit 86); (Crumbly Test., May 9, 2012).

Defendant Board of Apportionment, in drawing the Senate plan adopted July 29, 2011, did not remove voters from the base county of any other Democratic member of the Arkansas Senate who is seeking re-election in 2012. Crumbly Decl. (Doc. 70-3) ¶ 24

The boundaries of 2011 District 24 in Lee and Phillips counties also differ from those in 2001 District 16. Those differences affect fewer people than in Crittenden and St. Francis counties, but they include omitting the African-American communities of Haynes and Rondo in Lee County and some African-American neighborhoods in Helena-West Helena in Phillips County. *See* BOA 2011 Adopted Map (Exhibit 65).

The resulting District 24 was left by Defendant Board of Apportionment with the largest population of any Senate district: 87,147, which is 3,835, or 4.6%, more than the ideal. JSOF ¶ 233.

As drawn by Defendant Board of Apportionment, the African-American population of 2011 District 24, as compared with 2001 District 16, was reduced from 66% of the total population and 61% of the voting-age population to 57% of the total population and 53% of the voting-age population, as shown in the following table:

Table 12 – District 24 Population by Race

Total Population

White	Black	White%	Black%
35,227	49,716	40%	57%

Voting-Age Population

White	Black	White%	Black%
28,132	33,137	45%	53%

See Senate 2011_Dist 24_District Statistics (Exhibit 84).

District 24's African-American voting-age population of slightly less than 53% is six percent less than the 59% needed to equalize turnout between African Americans and Whites on election day. *See* (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 7-8 tbl.4..

VII.   JEFFERS PLAINTIFFS' PROPOSED DISTRICT 24

A.   **Jeffers_01**

The Arkansas Senate District 24 Jeffers_01 Proposal map (Exhibit 18) is similar to the maps provided to Defendant Governor Beebe as described above. Rather than adding high

concentrations of Whites by moving north into Crittenden County, it moves west into St. Francis and Lee counties and south into Phillips County, uniting the African-American communities in the Delta, rather than dividing them as 2011 District 24 does. Crumbly Decl. (Doc. 70-3) ¶ 30.

How the three different plans — 2001 District 16, 2011 District 24, and Jeffers_01 District 24 — affect African-American voters in the Delta is illustrated in the map "Arkansas Senate, Jeffers_01 District 24, 2011 District 24, 2001 District 16 Black Voting Age Population % of Census Block" (Exhibit 4). The 2010 Census figures for the three plans are shown in the following table:

Table 13 – Population by Race: 2001 Dist. 16, 2011 Dist. 24, Jeffers_01 Dist. 24

Total Population

	White	Black	White %	Black %
2001 District 16	21,622	45,252	31%	66%
2011 District 24	35,227	49,716	40%	57%
Jeffers_01 District 24	27,397	52,657	33%	64%

Voting-Age Population

	White	Black	White %	Black %
2001 District 16	18,183	30,602	36%	61%
2011 District 24	28,132	33,137	45%	53%

Jeffers_01 District 24	22,823	35,749	38%	59%

JSOF ¶ 232.

Plaintiffs' proposed plan, Jeffers_01 (Doc. 1-1), has a BVAP of 59.49%. It has a lower population deviation than 2011 District 24 (-1,105 or -1.33% vs. 3,835 or 4.60%). It splits the same number of counties (4) as 2001 District 16 and 2011 District 24 do. JSOF ¶ 233. It splits fewer precincts (3) than 2011 District 24 (13). Senate 2001_District Statistics for District 16 (Exhibit 80); Senate 2011_Dist 24_District Statistics (Exhibit 84); Jeffers_01_District Statistics (Exhibit 91).

B.   Jeffers_03

Plaintiffs' proposed plan, Jeffers_03 (Exhibit 1), has a BVAP of 58.41%. It is a statewide plan, but impacts only one other district—Senate District 23. Jeffers_03 District 24 has a lower population deviation than 2011 District 24 (867 or 1.04% vs. 3,835 or 4.60%). District 24 splits the same number of counties (4) as 2001 District 16 and 2011 District 24 do and splits fewer counties (5) than 2011 District 23 does (6). JSOF ¶ 234.

Jeffers_03 District 24 (Exhibit 1) splits fewer precincts (9) than 2011 District 24 does (13). Jeffers_03 District 23 splits fewer precincts (6) than 2011 District 23 does (10). Senate 2001_District Statistics for District 16 (Exhibit 80); Senate 2001_District 16 Plan Components (PSW) (Exhibit 83); Senate 2011_Dist 24_District Statistics (Exhibit 84); Senate 2011_Dist 24_Plan Components (PSW) (Exhibit 87); Senate 2011_Dist 23_Plan Components (PSW) (Exhibit 88); Jeffers_03_Dists23-24_District Statistics (Exhibit 89); Jeffers_03_Dists23-24_Plan Components (PSW) (Exhibit 90).

In his deposition in this case, Defendant Governor Beebe expressed his concern that Senator Crumbly's 2011 proposals for Senate District 24 had caused the adjacent District 23 to be "too elongated" and thus not respect communities of interest. Beebe Dep. (Doc. 77-1) 20:25-21:4 (Mar. 30, 2012).

Defendant Governor Beebe expressed the same concern about Districts 23 and 24 in Jeffers_03. Beebe Dep. (Doc. 77-1) 57-70 (Mar. 30, 2012).

C.   Jeffers_04

Plaintiffs' proposed plan Jeffers_04, (Exhibit 2) (April 5, 2012), was created in response to the criticism of Jeffers_03 by Defendant Governor Beebe at his deposition. As compared to Jeffers_03, Jeffers_04 does not change District 24. Rather, it moves Crittenden County from District 23 to District 22, where it joins Mississippi County and part of Craighead County, and moves Poinsett County from District 22 to District 23 to rebalance the populations. District 23 becomes more compact than in the adopted plan. All districts remain composed of contiguous territory and meet equal-population requirements. The BVAP of District 24 remains at 58.41%, as in Jeffers_03.

VIII.   INTENTIONAL DISCRIMINATION BASED ON RACE

Representatives Jerry R. Brown, Clark Hall, and Keith Ingram are all White Democratic incumbents residing in 2001 Senate District 17 during their 2011-12 term. JSOF ¶ 235.

Representatives Brown and Hall are serving their third term in the House, and thus are term-limited from running for the House again in 2012. JSOF ¶ 236.

Senator Jim Luker is serving his third term in the Senate, and thus is term-limited from running for the Senate again in 2012. JSOF ¶ 237.

Representative Keith Ingram is currently serving his second term in the Arkansas House of Representatives, and thus is not term-limited from running for the House again in 2012. JSOF ¶ 238.

The 2011 Senate plan for Districts 23 and 24, as drawn by Defendant Board of Apportionment, places Representative Jerry R. Brown in the successor to 2001 District 17, which is 2011 Senate District 23. JSOF ¶ 239.

Representatives Hall and Ingram reside in Senate District 24, along with Senator Crumbly. JSOF ¶ 240.

Representative Brown is the lone incumbent able to run for the Senate in District 23, since the current incumbent, Senator Jim Luker, is term-limited from running in 2012. Crumbly Decl. (Doc. 70-3) ¶ 42.

During his deposition, in response to a question, Senator Crumbly testified as follows:

Q Okay. Okay. Senator, new topic.

Do you believe that in proposing and voting for the senate plan that the board adopted, the senate districting plan, do you believe that Governor Beebe intended to engage in purposeful discrimination?

A My answer to that would have to be yes.

Q Why do you believe that?

A In previous conversations -- and I've even been quoted in the paper of saying that this was not about me, it's much larger than I am. It's about trying to ensure that this particular area with this concentration of African-American people and basically the only one in the region where you have concentrations enough to actually almost have a 60 percent black voting-age population senate district only exists in parts of these four counties, certainly.

And the reason I say it was intent, when you present a person with maps, with evidence, if the Bureau of Apportionment, if their director was given maps back in April, if you visited with them, you've shown them, you tried to tell them, you even try to compromise; and then when people -- it's all no, no, no, then I have no other conclusion except to say that, okay, yeah, that -- that would be my reason for saying yes.

Crumbly Dep. (Doc. 70-5) at 104-105.

During his deposition, Senator Crumbly also testified that

it may just be coincidence that – that Clark Hall and Keith Ingram got placed in the new proposed District 24. It's also – may be just coincidence that the northern part of Crittenden County got added to Senate District 24. And – but that's quite a coincidence that all of that happens just coincidentally, that both Clark Hall and Keith Ingram are put into the new Senate District 24 and somehow Jerry Brown got left over in 23 all by himself. I just think that's coincidence.

Crumbly Dep. (Doc. 55-15), at 116.

During his deposition, Senator Crumbly testified that he "is sure" that Governor Beebe had reasons other than purposeful discrimination for rejecting the boundaries that Senator Crumbly proposed for the new district. Crumbly Dep. (Doc. 55-15), at 104-105.

During his deposition, Senator Crumbly testified that General McDaniel might have had some reason other than purposeful discrimination to propose and vote for the new Senate districts. Crumbly Dep. (Doc. 55-15), at 108.

74

During his deposition, Senator Crumbly testified that the purpose of adopting the new Senate districts is a question that one would "have to ask General McDaniel and the Governor." Crumbly Dep. (Doc. 55-15), at 108.

During his deposition, Senator Crumbly testified "that only" the Governor and Attorney General can answer whether they voted for the new Senate districts for the purpose of discriminating based on race. Crumbly Dep. (Doc. 55-15), at 110-11.

During this deposition, Senator Crumbly also testified:

> [C]an I speak for the Governor? The answer to that's no. But the end result of him not changing after given opportunity and opportunity to provide, and with his testimony even over his objection that's already recorded, he said that the final senate district was drawn -- because a question that was asked the Governor, was this district drawn to dilute the BVAP, and he said no, it was really designed to maximize the . . . black voting-age population. And I can . . . tell that the final one, he said, was . . . done to do that. And by ending up with 52.88 percent and the Secretary had one that was 56 percent, our Exhibit 3 shows that just by it -- Plaintiffs' Exhibit 6 and also Martin Exhibit 2, that you have the potential of drawing a district with 58.41 by just simply exchanging areas between two senate districts with a very, very simple solution of swapping the area between Senate District 23 and 24 that are adjacent to one another. So to say that statement . . . that would maximize the . . . black voting-age population, would be hard to believe when the end result was only a district that was created that had 52 percent and the current old Senate District 16, when it was formed, had 55 percent; and by the time the 2000 census -- if the 2010 census numbers were applied, it had a black voting-age population of 61 percent. So then to lower it down to 52 percent, how could you say that that was trying to maximize the BVAP?

Crumbly Dep. (Doc. 70-5) at 168-169.

On September 14, 2011, Representative Jerry R. Brown announced his intention to run for the Arkansas Senate from District 23. JSOF ¶ 241.

On October 17, 2011, Representative Clark Hall announced his intention to run for Congress from the First Congressional District. JSOF ¶ 242.

On January 16, 2012, Representative Keith Ingram announced his intention to run for the Arkansas Senate from District 24. JSOF ¶ 243.

Defendant Board of Apportionment drew 2011 Senate District 24 so that the number of voters in the base counties of White incumbents was increased, while the number of voters in the base county of the African-American incumbent was reduced. Crumbly Decl. (Doc. 70-3) ¶ 46.

Senator Crumbly's base county is St. Francis. As compared to 2001 Senate District 16, the number of voters in St. Francis County within 2011 Senate District 24 was reduced by 11,592, as shown in Table 11 above.

The base county of White Representative Keith Ingram is Crittenden. As compared to 2001 Senate District 16, the number of voters in Crittenden County within 2011 Senate District 24 was increased by 22,672, as shown in Table 10 above.

Crittenden County has been divided into two or more Senate districts ever since this Court, in *Jeffers v. Clinton*, 756 F. Supp. 1195 (E.D. Ark. February 9, 1990), ordered that it be divided to create a Senate district in which African Americans had an equal opportunity to elect a candidate of their choice. *See* Crumbly Decl. (Doc. 70-3) ¶ 53.

One of the reasons Defendant Governor Beebe gave Senator Crumbly for wanting to put all of Crittenden County into 2011 Senate District 24 was that it had been split for over the last 20 years. Crumbly Decl. (Doc. 70-3) ¶ 54.

Crittenden County has 58% of the voting-age population of Senate District 24 (36,073 out of 62,666). JSOF ¶ 244.

IX.   CREATING AN EFFECTIVE MINORITY DISTRICT

Plaintiffs have established that the Defendants are liable for having violated § 2 of the Voting Rights Act. The appropriate remedy is to order the Board of Apportionment to draw a new Senate District 24 where African Americans have an equal opportunity to participate in the political process and elect a senator of their choice. To do that, they will need an effective African-American district. What kind of a district is that?

A.   Liability Phase

The voting-age population needed in the remedy phase is not the same as the majority voting-age population needed in the liability phase. In the liability phase, a simple majority of voting-age population is required as one of the preconditions for proving a violation. *Bartlett v. Strickland*, 556 U.S. 1 (2009). Defendants' argument that "there is no liability under § 2 *if* the minority-race voters constitute a majority in the district at issue" is flat wrong. (Emphasis added.) The law after *Bartlett* is that there is no liability under § 2 *unless* the minority-race voters constitute a majority in the district at issue. For § 2 liability, a simple majority is a floor, not a ceiling.

B.   Remedy Phase

Once liability is established, the inquiry shifts to the share of the population required to provide the minority with "a realistic opportunity to elect officials of their choice. . . ." *Kirksey v. Board of Supervisors of Hinds County*, 402 F. Supp. 658, 676 (S.D. Miss. 1975), *aff'd* 528 F.

2d 536 (5th Cir. 1976), *rev'd*, 554 F.2d 139 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968

(1977). It requires a "searching practical evaluation of the 'past and present reality,'" S. Rep.

No. 417, 97th Cong., 2d Sess. 28, *reprinted* in 1982 U.S. Code Cong. & Admin. News 177, 205,

to determine, in the real world, what it takes to elect their chosen candidate. It may be a

supermajority, or it may be less than a simple majority, depending on the circumstances.

1.   More Than a Simple Majority

A simple majority of the total population, or even of the voting-age population, is usually

not enough. *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984). This is because African

Americans of voting age tend to register to vote and turn out to vote at a lower rate than Whites.

The court in *Ketchum* rejected a plan that provided for districts with only a simple majority of

minorities of voting age. To a simple majority of voting-age population, the court added 5% for

a lower registration rate and 5% for a lower turnout rate, owing partly to "circumstances of low

income, low economic status, high unemployment, poor education and high mobility," resulting

in districts with a supermajority of 60% or more voting-age population. 740 F.2d at 1413-14.

The same approach was followed by this court in *Smith v. Clinton*, 687 F. Supp. 1361, 1363

(E.D. Ark. 1988), *Jeffers v. Clinton*, 756 F. Supp. 1195, 1198 (E.D. Ark. 1990), and *Little Rock

Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 831 F. Supp. 1453, 1465 (1993).

Over the years, many courts have continued to require a supermajority of the voting-age

population. *See, e.g.*, *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1023 (8th Cir. 2006).

2.   Based on Actual Election History

Still, there is no fixed rule that applies to all cases, and each case must consider the

particular set of circumstances prevailing at the time in the jurisdiction in question. When voter

registration rates are known and, in particular, when turnout rates are known, those actual

historical rates are used.

In determining the majority needed to elect a candidate, courts analyze the results of past

elections, usually over the last decade and preferably in the same jurisdiction. At the beginning

of a decade, new boundary lines are drawn. A decision on their validity must often be made

before any elections have been run in the new district. The analysis of legislative and other

elections in the Delta over the past decade, as set forth in section II, above, provides the Court

with the information it needs to determine what is needed in the Delta to create an effective

African-American Senate district.

3. Dr. Handley's Analysis

In the seven Delta counties that are the focus of this action, African-American turnout, as

a percentage of the voting-age population, is consistently lower than White turnout rates. The

table below lists the turnout rates by race for the elections analyzed in Dr. Handley's declaration.

**Table 4. Percent Black Voting-age Population Needed to
Equalize Black and White Turnout on Election Day**

	Turnout Rates by Race (EI estimates)		Percent Black VAP Needed to Produce Equivalent Numbers of Black and White Voters on Election Day
	Percent Black	Percent White	
General Elections			
2002 Lieutenant Governor	26.8	37.6	58.4
2008 US President	22.6	43.3	65.7
2004 State House District 54	30.7	26.2	46.0

	Turnout Rates by Race (EI estimates)		Percent Black VAP Needed to Produce Equivalent Numbers of Black and White Voters on Election Day
	Percent Black	Percent White	
Primary Elections			
2002 Lieutenant Governor	19.5	28.8	59.6
2004 State Supreme Court Chief Justice, Place 1	20.1	27.2	57.5
2006 State Supreme Court Associate Justice, P5	18.2	25.4	58.3
2008 US President	18.0	15.2	45.8
2000 Senate District 22	22.0	29.3	57.1
2002 Senate District 16	16.3	23.5	59.0
2002 House District 13	17.5	26.3	60.0
2004 Senate District 17	26.9	33.5	55.5
2006 House District 53	6.1	1.4	18.7
2006 Senate District 16	15.9	25.9	62.0
2006 Runoff Senate District 16	11.5	21.0	64.6
2010 Senate District 16	13.0	25.6	66.3
2010 House District 13	14.8	35.1	70.3
2010 House District 51	23.2	24.0	50.8

(Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 7-8 tbl.4.

Determining the percentage Black voting-age population needed to produce an equivalent number of African American and White voters on Election Day is a simple mathematical calculation.   The last column in the table above indicates the result of this calculation for all of

the primary and general election contests examined in Dr. Handley's declaration. (Handley

Test., May 8, 2012); Handley Decl. (Exhibit 94) at 7-8 tbl.4.

In 12 of the 18 contests considered (67%), a Black voting-age population over 57% is

required to produce the same number of African-American and White voters on Election Day.

(Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 7-8 tbl.4.

In Senate District 16, the Black percentage needed is at least 59% in all four elections

analyzed. (Handley Test., May 8, 2012); Handley Decl. (Exhibit 94) at 7-8 tbl.4.

The plans "Crumbly Max" (Exhibit 4B) (59.95% BVAP) and Jeffers_01 (Exhibit 18)

(59.49% BVAP), show that it is possible to create a Senate district in the Delta that meets the

requirements of both the Arkansas Constitution and § 2 of the Voting Rights Act. Other plans,

such as Jeffers_03 (Exhibit 1) (58.41% BVAP) and Jeffers_04 (Exhibit 2) (58.41% BVAP),

show that it is possible to come close to a 59% BVAP with districts that are even more compact

and regular than Crumbly Max or Jeffers_01. The Board of Apportionment, if ordered to do so,

may be able to draw an even better district. This Court should give them that opportunity.

X.   CONCLUSION

For Plaintiffs to prevail in this case they do not need to establish that the Arkansas Board

of Apportionment acted with a discriminatory purpose; it is sufficient to prove that 2011 Senate

District 24 has a discriminatory effect. *Bush vs. Vera*, 517 U. S. 952, 976 (1996); *Gingles*, 478

U.S. at 35-36.

Prevailing in this case will not guarantee the Plaintiffs success at the ballot box. *Johnson*

v. De Grandy, 512 U.S. 997, 1014 n. 11 (1994). There is a guarantee of a level playing field,

which includes equal opportunity for victory at the polls as enjoyed by others. *Vecinos de Barrio Uno v. City of Holyoke*, 72. F.3d 973, 979 (1st Cir. 1995).

In proving their case, the Plaintiffs face substantial hurdles as are present in all Voting Rights Cases. In *Gingles*, *supra*, the Supreme Court limned three threshold conditions, also called preconditions, elements, factors and prongs, which must be fulfilled in order to successfully show vote dilution. First, the Plaintiffs must show that they are a part of a minority group that is "sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. 50. Second, the Plaintiffs must show that the Plaintiffs are "politically cohesive." *Id*. at 51. Third, Plaintiffs must show that the "white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority's preferred candidate running unopposed -- usually to defeat the minority's preferred candidate." *Id*. (citation omitted).

Completing the *Gingles* three-step pavane does not guarantee victory for the Plaintiffs. This court must look to the totality of the circumstances to determine whether the Plaintiffs prevail. In reviewing the totality of the circumstances assessment, this Court should be guided by the litany of factors listed in the Senate report which accompanied the amended Voting Rights Act. *Gingles*, 478 U.S. 43-46.

One factor for this Court to consider is proportionality. By proportionality we mean the relationship between the number of majority minority voting districts and the minority group's share of the relevant population. *De Grandy*, 512 U.S. at 1000, 1014 n. 11. Key in this Court's assessment of the factors, is whether the challenged district, Senate District 24, deprives

minority voters of an equal opportunity to participate in the electoral process and to elect candidates of their choice.

Finally, it is a rare case where the Plaintiffs can establish the *Gingles* prongs and not prevail in the case. *See Sanchez v. Colorado*, 97 F.3d 1303, 1310 (10th Cir. 1996). *See also*, *Solomon v. Liberty County Com'rs*, 166 F.3d 1135 (11th Cir. 1999); *Teague v. Attala County*, 92 F.3d 283, 293 (5th Cir. 1996); *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995); and *Jenkins v. Red Clay Consol. Sch. Dist. Bd. Of Educ*., 4 F.3d 1103, 1135 (3d. Cir. 1993).

The *Gingles* preconditions have been established. The only prong truly questioned by the Defendants in this case was the third prong. Therefore, Plaintiffs came forward with evidence showing that White bloc voting is sufficient to usually defeat the minority preferred candidate as has happened in District 16 (now District 24) for the last ten years. Plaintiffs have proved their case. They deserve an appropriate remedy.

Respectfully Submitted,
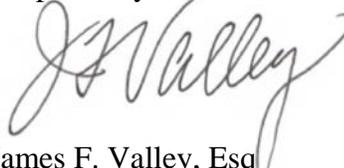
James F. Valley, Esq
J F VALLEY ESQ PA
P O BOX 451
423 RIGHTOR STREET, SUITE 3
HELENA-WEST HELENA, AR 72342-0451
(870)338-6487 X 7 Telephone
(866)786-9885 Phone and Fax
james@jamesfvalley.com Email

Peter S. Wattson, Esq.
5495 Timber Lane
Shorewood, MN 55331

peterwattson@gmail.com

(952) 457-6328 (cell)
(952) 474-7988 (home)
(952) 474-7988 (fax)

CERTIFICATE OF SERVICE

I, James F. Valley, certify that on May 15, 2012, consistent with the requirements of FRCP 5, I served a complete copy of this document with any attachments to counsel as listed below:

Attorneys for Honorable Mike Beebe and
Honorable Dustin McDaniel:

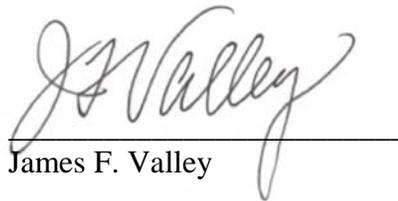Mr. David Curran, Esq.
david.curran@arkansasag.gov

C. Joseph Cordi, Jr
joe.cordi@arkansasag.gov

Mr. Warren Readour, Esq.
warrenr@arkansasag.gov

Attorneys for Honorable Mr. Martin:
Mr. W. Asa Hutchinson, Esq.
asa@ahlawgroup.com

Mr. W. Asa Hutchinson, III, Esq.
Ahutchinson@ahlawgroup.com

Ms. Kristi Hunter, Esq.
Khunter@Ahlawgroup.com

_____
James F. Valley