UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

THE CHRISTIAN MINISTERIAL ALLIANCE, et al.,

Plaintiffs,

v.

STATE OF ARKANSAS, et al.,

Defendants.

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Civil Case No. 4:19-cv-402-JM

INTRODUCTION

The seven justices and twelve judges of the Arkansas Supreme Court and Court of Appeals, respectively, render consequential decisions that directly impact the lives of all Arkansans, yet Black voters are denied the equal opportunity to participate in the process of electing these judges. Black Arkansans' inability to elect their candidates of choice is reflected, in part, by the fact that no Black justice has been elected to the Arkansas Supreme Court since the court's inception—nearly 200 years ago in 1836. Amended Complaint, ECF Doc. 9 [hereinafter "Compl."], at ¶ 30. And no Black judge has *ever* been elected to the Court of Appeals when facing opposition from a white candidate. *Id.* ¶ 48.

Plaintiffs Marion Humphrey, Olly Neal, Kymara Hill Seals, the Christian Ministerial Alliance, and Arkansas Community Institute (together, "Plaintiffs") bring this challenge to Defendants' methods of electing appellate judges to cure the illegal dilution of the voting strength of Black voters, which inhibits their ability to elect their judicial candidates of choice, in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301 ("Section 2"). Compl., ¶¶ 1-3.

Defendants now move to dismiss Plaintiffs' Complaint. *See* Brief in Support of Defendants' Motion to Dismiss, ECF Doc. 22 [hereinafter "Br. in Supp. of Mot. to Dismiss"]. Defendants make three arguments in support of their motion to dismiss. *First*, Defendants argue that Section 2 does not provide a private right of action, and that Plaintiffs' allegations against some (but not all) Defendants—are barred by sovereign immunity. *Second*, Defendants claim that with respect to all Defendants, Plaintiffs fail to adequately plead racially polarized voting and the existence of feasible alternative electoral systems for each court, which are necessary preconditions for a Section 2 claim as delineated in *Thornburg v. Gingles*, 478 U.S. 30, 38, 49-51 (1986). *Third*, Defendants claim that Plaintiffs' proposed remedies—single member districts or cumulative voting—concerning the Supreme Court (not the Court of Appeals) are impermissible as a matter of law. Br. in Supp. of Mot. to Dismiss at 2-8, 20.

As discussed in detail below, these arguments are meritless.

First, courts in this circuit and others have adjudicated Section 2 claims, like those brought here, recognizing that Section 2 provides a private right of action. Courts across the country have similarly held that Congress expressly abrogated state sovereign immunity for claims under the Voting Rights Act.

Second, Defendants fundamentally misunderstand the *Gingles* preconditions and what is required to plausibly allege each one. Plaintiffs plead straightforward Section 2 claims, alleging each of the three *Gingles* preconditions—including the existence of racially polarized voting in eight probative judicial elections and feasible, non-dilutive alternative election systems for each court at issue—as well as myriad additional evidence concerning the totality of circumstances in support of their claims.

Third, in addition to mischaracterizing the nature of Plaintiffs' proposed remedies for the Supreme Court, Defendants seek to impose pleading burdens on Plaintiffs that extend well beyond the obligations required by law. Plaintiffs have satisfied their pleading obligations in proposing viable remedies for the Section 2 violation that they allege against the electoral method for the Supreme Court.

Plaintiffs' Complaint more than adequately alleges that Defendants are liable for Section 2 violations; thus, Defendants' motion to dismiss should be denied in its entirety.

BACKGROUND

The Voting Rights Act of 1965 (the "VRA") was enacted by Congress for the "broad remedial purpose of rid[ding] the country of racial discrimination in voting," including state judicial elections. *Chisom v. Roemer*, 501 U.S. 380, 403-404 (1991) (holding that state judicial elections are within Section 2's scope) (internal citation omitted). In 1982, Section 2 of the VRA was amended to prohibit the use of any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." 52 U.S.C. § 10301(a).

Section 2 outlaws voting practices, such as those for the Arkansas Supreme Court and Court of Appeals, "'that 'interact[] with social and historical conditions' [to] impair" the ability of Black voters to elect their candidates of choice on an equal basis with their fellow voters. *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) (quoting *Gingles*, 478 U.S. at 47). To succeed on a Section 2 claim, Plaintiffs must adequately plead the existence of three preconditions ("*Gingles* preconditions"): (1) the population of Black voters is "sufficiently large and geographically compact to constitute a majority in a single-member district," (*Gingles* I); (2) Black voters are "politically cohesive," (*Gingles* II); and (3) non-Black voters typically vote as a bloc to defeat the

preferred candidates of Black voters (*Gingles* III). *Gingles*, 478 U.S. at 49-51. Though not dispositive, satisfying the three *Gingles* preconditions takes Plaintiffs a "long way towards showing a section 2 violation[.]" *Bone Shirt v. Hazeltine,* 461 F.3d 1011, 1021 (8th Cir. 2006).

Along with this, Plaintiffs must present evidence that the "totality of circumstances," as demonstrated by the congressionally delineated "Senate Factors," demonstrate a Section 2 violation. 52 U.S.C. § 10301(b); *Gingles,* 478 U.S. at 36-37. There is no requirement that Plaintiffs prove a certain number of the Senate Factors, or that a majority of the factors point in a particular direction. *Gingles,* 478 U.S. at 45 (citation omitted). Indicia include the history of official discrimination affecting the right to vote (Senate Factor 1), the existence of racially polarized voting (Senate Factor 2), and the lack of Black elected officials in a jurisdiction (Senate Factor 7). *Id.* at 44-45. Plaintiffs allege numerous key facts demonstrating that Defendants are liable for Section 2 violations.

Here, Defendants' at-large method of electing Supreme Court justices—in concert with pronounced levels of racially polarized voting—denies Black voters the opportunity to elect their judicial candidates of choice. *See generally* Compl. Defendants maintain this electoral system despite the fact that (1) the Black voting-age population is sufficiently numerous and geographically compact to form a majority of the voting-age population in a single-member district; (2) Black voters are politically cohesive in their voting patterns; and (3) candidates preferred by Black voters are routinely defeated by white-bloc voting. *Id*. ¶¶ 40-41; 43-56.

With regard to the Court of Appeals, Defendants' current method of election, which employs a mix of single and multimember districts—along with stark levels of racially polarized voting—dilutes the voting strength of Black voters by unnecessarily "packing" or "cracking" the Black population to provide only one single-member district, instead of two, where Black voters

may have the opportunity to elect a candidate of their choice. Compl., at ¶¶ 1-3; 35. Defendants maintain this electoral system despite the fact that (1) the Black population is sufficiently numerous and geographically compact to form a majority of the voting-age population in two single-member districts; (2) Black voters are politically cohesive in their voting patterns; and (3) candidates preferred by Black voters are routinely defeated by white-bloc voting. *Id.* ¶¶ 40, 42-56.

STANDARD OF REVIEW

To adequately plead a Section 2 vote dilution claim, Plaintiffs "need only allege 'enough facts to state a claim to relief that is plausible on its face.'" *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 45 n.12 (2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although a complaint must contain "more than labels and conclusions," or "a formulaic recitation of the elements of a cause of action," Plaintiffs need not provide "detailed factual allegations." *Twombly*, 550 U.S. at 555. A motion to dismiss should be denied where the facts set forth in Plaintiffs' complaint "allow[] the court to draw the reasonable inference that the defendant is liable . . . ." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In addition, "[a] motion to dismiss is not a device for testing the truth of what is asserted or for determining whether the plaintiff has any evidence to back up what is in the complaint." *Hardy v. Bartmess*, 696 F. Supp. 2d 1008, 1013 (E.D. Ark. 2010). This court must accept as true all facts Plaintiffs plead and grant all reasonable inferences from the pleadings in Plaintiffs' favor. *Gallagher v. City of Clayton*, 699 F.3d 1013, 1016 (8th Cir. 2012).

For the reasons set forth below, Plaintiffs have plausibly alleged facts necessary to draw an inference of Defendants' liability under Section 2.

ARGUMENT

I. Congress Established a Private Right of Action Under Section 2 and Plaintiffs' Section 2 Claims Against Defendants Are Not Barred by Sovereign Immunity.

Defendants contend that Section 2 does not expressly create a private right of action. Yet federal courts – including in this circuit – have recognized, to the contrary, that private actors are able to bring claims pursuant to Section 2. *See, e.g., Jeffers v. Tucker*, 839 F. Supp. 612 (E.D. Ark. 1993) (three-judge court). Defendants further contend that even if there was a private right of action under Section 2, three of the six defendants – the State of Arkansas, the Board of Election Commissioners, and the Board of Apportionment (together "Arkansas") – are protected from suit by sovereign immunity. Br. in Supp. of Mot. to Dismiss at 3-7. They are wrong. Federal courts have consistently held that Congress abrogated state sovereign immunity for VRA claims.

The baselessness of Defendants' arguments is clear given that this Court previously adjudicated a similar Section 2 challenge to the method of election for Arkansas' trial courts. In that case, Black Arkansan voters, similar to here, argued that the electoral method for the trial courts diluted their vote. The State admitted liability under Section 2, resulting in the creation of multiple judicial subdistricts. *Hunt v. Arkansas*, No. PB-C-89-406, 1991 WL 12009081, *1-2 (E.D. Ark. Nov. 7, 1991).

To Defendants' first point that Congress "did not expressly create a private cause of action for Section 2 violations," Br. in Supp. of Mot. to Dismiss at 5, 7, the Eighth Circuit has explicitly found to the contrary. "Congress amended the [VRA] in 1975 to reflect the standing of 'aggrieved persons' to enforce their right to vote." *Roberts v. Wamser*, 883 F.2d 617, 621 (8th Cir. 1989) (quoting U.S.C. § 10302); *see also Morse v. Republican Party of Virginia*, 517 U.S. 186, 232-33 (1996) (recognizing that the 1975 amendments "provide[d] the same remedies to private parties as had formerly been available to the Attorney General alone[]" and that the Court has entertained private VRA suits); *see also, e.g., Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F. 3d 924 (8th Cir. 2018) (Section 2 lawsuit by private minority plaintiffs against

defendant school district). Defendants' piecemeal reliance on *Morse* to argue that Section 2 does not provide a private right of action only serves to underscore the weakness of their argument. *Morse*, 517 U.S. at 232 ("'the existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965.'") (quoting S. Rep. No. 97-417, at 30)).

In regard to Defendants' argument that Arkansas is protected by sovereign immunity, the Fifth and Sixth Circuit Courts have held that Congress validly abrogated state sovereign immunity in Section 2 of the V, and therefore, plaintiffs were not barred from bringing such a claim against the state. *Mixon v. Ohio*, 193 F.3d 389, 398 (6th Cir. 1999); *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017) (three-judge court) ("The VRA, which Congress passed pursuant to its Fifteenth Amendment enforcement power, validly abrogated state sovereign immunity."); *see also Lewis Governor of Alabama*, 896 F.3d 1282, 1294 (11th Cir. 2018), *reh'g en banc granted on other grounds*, 914 F.3d 1291 (11th Cir. 2019) ("Congress validly abrogated state sovereign immunity in § 2 of the Voting Rights Act; therefore, the Eleventh Amendment does not prohibit the plaintiffs claim against the State."). Similarly, district courts have repeatedly held that the VRA lawfully abrogates state sovereign immunity. *See, e.g.*, *Ga. State Conference of the NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1275 (N.D. Ga. 2017) (three-judge court); *Terrebonne Parish NAACP v. Jindal*, 154 F. Supp. 3d 354, 359 (M.D. La. 2015); *Hall v. Louisiana*, 983 F. Supp. 2d 820, 829-30 (M.D. La. 2013); *Verity v. Scott*, No. 2:12-CV-609-FTM-38, 2014 WL 3053171, at *6 (M.D. Fla. July 7, 2014); *Reaves v. United States DOJ*, 355 F. Supp. 2d 510, 515 (D.D.C. 2005) (three-judge court); *Dekom v. New York*, No. 12-cv-1318, 2013 WL 3095010, at *10 (E.D.N.Y. Jun. 18, 2013), *aff'd*, 583 F. App'x 15 (2d Cir. 2014).

Despite this clear precedent, Defendants argue that Section 2 does not provide the "unmistakable clarity required to abrogate the State's sovereign immunity from private-party

suits." Br. in Supp. of Mot. to Dismiss at 5. The cases cited by Defendants do not support their argument. For example, Defendants rely on *Blatchford*, but this case stands only for the undisputed proposition that a clear statement of congressional intent is necessary to abrogate state sovereign immunity. *Blatchford v. Native Vill. of Noatak & Circle Vill*., 501 U.S. 775, 786 (1991) (stating, in a case regarding 28 U.S.C.S. § 1362, not Section 2, that a "clear legislative statement" is necessary for congressional abrogation). Courts have recognized clear statement of the VRA—specifically its prohibition against "any State or political subdivision" discriminating against voters on the basis of race or color—represents an "unmistakably clear" statement of Congress' intent to abrogate state sovereign immunity for claims arising under the VRA. *Mixon v. Ohio*, 193 F.3d at 398; *Terrebonne*, 154 F. Supp. 3d at 359.

Defendants' argument that Congress did not abrogate sovereign immunity based on the lack of an express abrogation clause in the statute is unpersuasive. *See* Br. in Support of Mtn. to Dismiss, Br. in Supp. of Mot. to Dismiss at 6. Even if a statute lacks an express abrogation clause, that does not end the court's inquiry. To determine whether the "abrogation clause" abrogates sovereign immunity, the Court must look to the statute as a whole. *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1024 (11th Cir. 1994), *aff'd*, 517 U.S. 44 (1996). In *Seminole Tribe*, the Indian Gaming Regulatory Act did not have an express abrogation clause. Nonetheless, in reviewing the entire text of the remedial statute and reading each part in conjunction with the other, the Court found that an intent to abrogate was "unmistakably clear." 517 U.S. at 56. Similarly, while the Family Medical Leave Act also does not contain an abrogation clause, the Court found that it too satisfied the clear statement rule based upon a holistic reading of its provisions. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727 (2003); *see also Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73-74 (2000) (holding that, despite lacking an abrogation clause, the Age

Discrimination in Employment Act's text clearly abrogated state sovereign immunity because it allowed relief "against any employer (including a public agency)").

The clear language of Section 2 forbids "*any State*" from imposing a "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." 52 U.S.C. § 10301 (emphasis added). "[R]ead as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit." *Kimel*, 528 U.S. at 74. Here, the text of Section 2 and the entirety of the VRA make unmistakably clear Congress's intent to abrogate sovereign immunity. In the words of the Sixth Circuit—in a case that Defendants inexplicably cite for their untenable claim that Section 2 does not abrogate sovereign immunity, ECF 22 at 4—"[w]ith respect to whether Congress intended to abrogate the States' sovereign immunity under the Voting Rights Act, we believe the language and purpose of the statute indicate an affirmative response." *Mixon*, 193 F.3d at 398.

Congress' intent to abrogate sovereign immunity is without question. Plaintiffs' claims against Arkansas for a violation of Section 2 should proceed.

II. Plaintiffs Have Plausibly Alleged Each of the *Gingles* Preconditions in Support of Their Section 2 Claims.

Section 2 claims by nature involve "fact-intensive" analyses, *Gingles*, 478 U.S. at 46, necessitating a "comprehensive, not limited, canvassing of relevant facts." *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994). A proper analysis therefore requires the court to consider evidence that is not available at the motion to dismiss stage. *See Wilson v. Huckabee*, No. 2:06-cv-00132, 2007 WL 1020466 at *4 (E.D. Ark. March 30, 2007) (explaining that Section 2 cases "require a searching practical evaluation," and this searching evaluation is not feasible at the motion to dismiss stage) (internal citation omitted). Thus, it is not a surprise that "most cases under section

2 have been decided on summary judgment or after a verdict, and not on a motion to dismiss." *Metts v. Murphy*, 363 F. 3d 8, 11 (1st Cir. 2004) (en banc); *see also Ala. State Conference of the NAACP v. State*, 264 F. Supp. 3d 1280, 1289 (M.D. Ala. 2017) (denying motion to dismiss and noting "cases most heavily relied on by Defendants [to support their motion to dismiss] were decided after lengthy bench trials and based on extensive evidentiary records.").

At the pleading stage, Plaintiffs need not *prove* each of the *Gingles* preconditions, but instead, sufficiently allege these facts so that a reasonable inference can be made. While federal courts do require more than a "the-defendant-unlawfully-harmed-me accusation" at the pleading stage, *Iqbal*, 556 U.S. at 678, they "do not require heightened fact pleading of specifics" needed to support a claim at later stages of litigation. *Twombly*, 550 U.S. at 570.

Indeed, in recent decisions, courts have consistently denied motions to dismiss Section 2 cases at the pleading stage based on allegations comparable to, or less detailed than, Plaintiffs' allegations here. *See, e.g.*, *Hall v. Louisiana*, 974 F. Supp. 2d 978, 992 (M.D. La. 2013) (holding that plaintiff "pled sufficient claims to satisfy the *Gingles* factors" where it alleged relevant racial demographics, dilution of Black voting strength, and white-bloc voting defeating Black voters' preferred candidates); *Tigrett*, 855 F. Supp. 2d at 762-63 (W.D. Tenn. 2012) (denying motion to dismiss where "the [c]omplaint explicitly pleads the *Gingles* factors, and Plaintiffs have pled sufficient facts, such as the history of racial discrimination in Tennessee, to allow the Court to discern factual support for each of the *Gingles* factors"); *cf. Harris v. City of Texarkana*, No. 4:11-cv-4124, 2015 WL 128576 at *5 (W.D. Ark 2015) (finding, *after a bench trial*, that plaintiff failed to satisfy the first *Gingles* precondition "after many attempts to draw" a majority-minority map).

Here, Plaintiffs have sufficiently alleged facts plausibly demonstrating that each of the three *Gingles* preconditions are satisfied. The cases Defendants cite urging the court to grant the

motion to dismiss are therefore inapposite. *See, e.g.*, *Ga. State Conference of the NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1280 (N.D. Ga. 2017) (three-judge court) (finding that, unlike here, "plaintiffs did not allege *any* facts" to support one of the *Gingles* preconditions (emphasis added)). Accordingly, the Court should reject Defendants' invitation to impose proof requirements that are inappropriate at the pleading stage of litigation.

a. Black Arkansan Voters are Sufficiently Large and Geographically Compact. (*Gingles* I Precondition)

Plaintiffs sufficiently allege the first *Gingles* precondition: that Black Arkansans are "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50.

With respect to the Supreme Court, Plaintiffs plead that "Arkansas' Black population is sufficiently numerous and geographically compact to provide for the creation of single-member districts for electing members of the Arkansas Supreme Court in which Black voters in at least one district would constitute a majority of the voting-age population. A majority-Black single-member district for electing a member of the Supreme Court can be drawn that satisfies traditional redistricting principles." Compl. ¶ 41. Similarly, for the Court of Appeals, Plaintiffs specifically plead that the Black population is numerous and compact enough "to provide for the creation of two-single member districts for electing members of the Arkansas Court of Appeals in which Black voters would constitute a majority of the voting-age population in each district. Two majority-Black single-member districts for electing two members of the Court of Appeals can be drawn that satisfy traditional redistricting principles." Compl. ¶ 42.

Further, the pleadings contemplate that the majority-Black remedial districts would be based around the current Court of Appeals District 7, which is comprised of counties in the eastern

and southeastern Delta region of Arkansas.[1] Plaintiffs plead that District 7 is now a single-member district, comprised of a plurality of Black voters, approximately 49 percent, while the six remaining districts are majority-white. Compl. ¶ 34-35. Plaintiffs plead that approximately 15 percent of the voting-age population in Arkansas is Black and that the Black population is generally concentrated in "Little Rock, or in the eastern and southeastern Delta region of the state." Compl. ¶¶ 21-23. Thus, Plaintiffs have demonstrated that Black Arkansans are sufficiently geographically compact to satisfy for *Gingles* I.

Defendants incorrectly argue that Plaintiffs are required to plead a heightened specificity as to *Gingles* I. *See* Br. in Supp. of Mot. to Dismiss at 16-17. Indeed, this Court denied a motion to dismiss in a similar Section 2 challenge to the method of election for the Supreme Court because "the allegations that African-Americans have been elected to the Court of Appeals [District 7] and not to the Supreme Court [were] sufficient to raise inferences that . . . the minority group is sufficiently large and geographically compact . . ." *Wilson v. Huckabee*, No. 2:06-cv-00132, 2007 WL 1020466, at *4 (E.D. Ark. March 30, 2007). Here, the Complaint is far more detailed than the complaint in *Wilson*, insofar as Plaintiffs explicitly allege that the Black population of the State is sufficiently numerous and compact enough to draw remedial districts. Compl. ¶¶ 41, 42.

Instead of accepting Plaintiffs' pleadings as true, Defendants make their own assumptions about the facts necessary to create a majority-Black district. Br. in Supp. of Mot. to Dismiss at 16-

[1] A map of the Court of Appeals Districts, which is provided on the Arkansas courts' government website, demonstrates the fact that District 7 is comprised of counties in the eastern and southeastern Delta region of Arkansas. *See* Arkansas Judiciary. Court of Appeals Districts Map. https://www.arcourts.gov/courts/court-of-appeals/map. Accordingly, the court can take judicial notice of this fact. *See Williams v. Emp'rs Mut. Casualty Co.*, 845 F.3d 891, 903-04 (8th Cir. 2017) (concluding that district court did not abuse discretion in taking judicial notice of a fact sheet published by a government agency because, under Federal Rule of Evidence 201, "facts 'not subject to reasonable dispute'" can be judicially noticed.") (quoting Fed. R. Evid. 201).

17. Defendants argue it is not "conceivable" to create a majority-Black district, (ECF at 17), after they assert unsupported statistical inferences for hypothetical remedial districts. Br. in Supp. of Mot. to Dismiss at 16. Defendants' argument that a compact majority-Black district cannot be created presents a factual dispute that cannot be resolved on a motion to dismiss. Defendants' assumptions should not be accepted as true and are inappropriate at the pleading stage. *Gallagher*, 699 F.3d at 1016 (holding courts must "accept as true all facts pleaded by the non-moving party and grant all reasonable inferences from the pleadings in favor of the non-moving party"). At present, it is enough that Plaintiffs have plausibly alleged that single-member districts with a majority-Black population are conceivable—let alone the areas for *where* and *how* they may be drawn. *See* Compl. ¶¶ 21-23.

Viewing these facts in the light most favorable to Plaintiffs, they more than plausibly allege that Black voters are sufficiently large and geographically compact to comprise a majority of a single-member district for the Supreme Court, or two (rather than one) single-member districts for the Court of Appeals.

b. Black Arkansans Are Politically Cohesive and Their Candidates of Choice Are Usually Defeated by White-Bloc Voting. (*Gingles* II and III Preconditions)

Together, *Gingles* II and *Gingles* III ask: (1) do Black and white voters tend to "vote differently," i.e., whether there is racially-polarized voting ("RPV"), *Gingles*, 478 U.S. at 54 n. 21, and (2) do the candidates preferred by Black voters "usually" lose to candidates preferred by white voters, *Harvell v. Blytheville Sch. Dist. No*. 5, 71 F.3d 1382, 1385 (8th Cir. 1995) (en banc). Racially polarized voting is a *factual question*, "peculiarly dependent upon the facts of each case," and not suitable for dismissal without factual development. *Gingles*, 478 U.S. at 77-79 (citation omitted). Plaintiffs have plausibly alleged both these preconditions necessary to sustain claims of vote dilution under Section 2. Compl. ¶¶ 43-45.

Gingles II is satisfied where the minority group is politically cohesive, meaning a significant number usually vote for the same candidates. *Gingles*, 478 U.S. at 51. This can be demonstrated by a "consistent relationship between [the] race of the voter and the way in which the voter votes . . ." *Id.* at 54 n. 21 (alteration in original) (citations and internal quotation marks omitted).

Plaintiffs plead that Black Arkansans are politically cohesive, including in eight elections in which there was significant support from Black voters for the same Black candidate. Specifically, Plaintiffs allege that Black voters were cohesive in three judicial elections: (1) 2004 race for Supreme Court; (2) 2006 race for Supreme Court; and (3) 2008 race for Court of Appeals, Compl. ¶¶ 46-48, and five non-judicial elections[2]: (1) 2018 race for Lieutenant Governor; (2) 2014 race for State Auditor; (3) 2012 Presidential election; (4) 2008 Presidential election; and (5) 2008 Presidential primary contest. Compl. ¶¶ 51-55. Accepting these allegations of Black political cohesion in these races as true, Plaintiffs sufficiently plead *Gingles* II.

Plaintiffs also plead that "the white majority typically votes in a bloc to defeat the minority preferred candidate," satisfying the third *Gingles* precondition. *Bone Shirt v. Hazeltine*, 461 F.3d,

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[2] Courts frequently consider evidence from exogenous (here, non-judicial) elections to supplement that from endogenous (here, judicial) elections, particularly where there are few biracial endogenous elections to analyze. *See Bone Shirt*, 461 F.3d at 1021; *Citizens for a Better Gretna*, 834 F.2d at 502-03 (5th Cir. 1987) (affirming consideration of exogenous elections as additional evidence of bloc voting in a case with "sparse relevant statistical data" from endogenous elections); *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201 at 1207 (5th Cir. 1989) (reversing district court for "declin[ing] to consider evidence of [racially polarized voting] derived from elections other than the [endogenous] elections").

However, Plaintiffs cannot be denied relief because the lack of Black candidates has created a sparsity of evidence on racially polarized voting in endogenous elections. "To hold otherwise would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress sought to remove." *Westwego Citizens for Better Gov'*t, 872 F.2d at 1209 n.9.

1011, 1020 (8th Cir. 2006). In each of the judicial (endogenous) and non-judicial (exogenous) races in the Complaint,[3] Plaintiffs plausibly allege that the candidates preferred by Black voters received significant or overwhelming support from Black voters but were defeated by the candidate supported by the white majority. Compl. ¶¶ 47-55. Accepting these allegations as true, Plaintiffs plausibly allege that the white-bloc vote usually defeats candidates preferred by Black voters.

Altogether, Plaintiffs plausibly allege that "[j]udicial and other elections in Arkansas are characterized by pronounced levels of racial polarization, with non-Black voters consistently defeating Black-preferred candidates when given a choice of Black or non-Black candidates," satisfying the *Gingles* II and III preconditions. Compl. ¶ 45; *see Wilson v. Huckabee*, No. 2:06-cv-00132, 2007 WL 1020466, *4 (denying motion to dismiss and finding *Gingles* preconditions sufficiently alleged where plaintiff pled history of race discrimination, and election of Black candidate to Court of Appeals but not Supreme Court); *see also Luna v. County of Kern*, No. 116-CV-00568, 2016 WL 4679723, at *5 (E.D. Cal. Sept. 6, 2016) (denying a motion to dismiss where the allegations that Latinx voters supported specific Latinx candidates and that white bloc voting defeated those candidates were sufficient to state a claim); *Lopez v. Abbott*, No. 2:16-CV-303, 2017 WL 1209846, at *6 (S.D. Tex. Apr. 3, 2017) (same).

Nonetheless, Defendants argue that Plaintiffs' Complaint is inadequate for the following reasons: (1) Plaintiffs' allegations of Black political cohesion are conclusory (Br. in Supp. of Mot. to Dismiss at 18); and (2) *Gingles* III requires Plaintiffs to "show that across *all* appellate judicial

[3] Because political cohesiveness is implicit in racially polarized voting, evidence of political cohesiveness and racially polarized voting can be demonstrated with the same evidence, including actual elections. *See Bone Shirt*, 461 F.3d at 1020.

elections in Arkansas, including those between two white candidates" white-bloc voting defeats Black-preferred candidates (Br. in Supp. of Mot. to Dismiss at 9 (emphasis in original)).

These arguments are meritless.

First, Plaintiffs have alleged more than legal conclusions in support of *Gingles* II. *See e.g.*, Compl. ¶¶ 46- 48; 51-55. The cases relied on by Defendants are inapposite. *See NAACP v. Snyder*, 879 F. Supp. 2d 662 (E.D. Mich. 2012), and *Broward Citizens for Fair Dists. v. Broward County*. No. 12-60317-CIV, 2012 WL 1110053 (S.D. Fla. Apr. 3, 2012). Neither of these cases support their argument that Plaintiffs' allegations are insufficient. First, in *Snyder*, the plaintiffs pled that the Latinx minority and the non-Latinx majority voted together, thus, failing to demonstrate minority political cohesion and that the majority votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate. 879 F. Supp. 2d at 674-75. Plaintiffs' Complaint suffers from no such blatant defect. *See* Compl. ¶¶ 43, 44. In *Broward Citizens for Fair Districts*, the plaintiffs did not support their allegation of minority political cohesion with any election contests as examples, as Plaintiffs have here. *Cf. Broward*, 2012 WL 1110053 *with* Compl. ¶¶ 46-48; 51-55.

Here, Plaintiffs have provided eight specific elections that support their allegations. This is consistent with what the court will consider at trial in assessing political cohesiveness: "actual events" and "practical politics." *Jeffers v. Clinton*, 730 F. Supp. 196, 208 (E.D. Ark. 1989). [4]

Second, Defendants claim that Plaintiffs must "show that across *all* appellate judicial election in Arkansas, including those between [only] white candidates" that Black-preferred

[4] *Jeffers* at 208 ("In making this finding we rely primarily on actual events and practical politics . . . The black candidate lost every one of [the biracial State Legislature] races. . . . The fact is that there is a strong tendency for white voters to vote for white candidates when there is a black candidate in the race. Black voters behave in exactly the same fashion.")

candidates are usually defeated by the white majority. Br. in Supp. of Mot. to Dismiss at 19 (emphasis in original)).

Defendants do not cite a single case to support their argument that *every* election contest must be analyzed to plausibly plead *Gingles* II and III. That is because Defendants' position is foreclosed by precedent. The Supreme Court has instructed that "[t]he number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances," and "statistics from only one or a few elections . . . [do] not foreclose a vote dilution claim." *Gingles*, 478 U.S. at 57 n. 25. In *Gingles*, the Supreme Court affirmed a finding of racially polarized voting based on data from "three election years." *Id.* at 61. Likewise, the Eighth Circuit recently affirmed a finding of a Section 2 violation where the plaintiffs presented evidence from five biracial endogenous elections (and defendants then presented evidence related to seven additional non-biracial endogenous elections). *Mo. State Conference of the NAACP*, 894 F. 3d at 935-36; *see also Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1113-1114, 1119 (5th Cir. 1991) (evidence from one endogenous election and five exogenous elections was sufficient to show, and in fact "unmistakably demonstrate[d]," RPV).

Defendants also make much of the Complaint's focus on interracial (also known as biracial) elections between Black and white candidates.[5] But, not all contested elections have equal probative value, and as the Eighth Circuit has held: "interracial elections are the best indicators of whether the white majority usually defeats the minority candidate." *Bone Shirt*, 461 F.3d at 1020–

[5] Defendants fault Plaintiffs for relying on Judge Griffen's election races in support of *Gingles* II and III. Defendants' efforts to discount the probative value of Judge Griffen's election races, Br. in Supp. of Mot. to Dismiss at 1, are factual arguments inappropriate at the pleading stage. Plaintiffs have plausibly pled that Black voters voted cohesively for Judge Griffen in the three elections in which he ran and was defeated each time by white-bloc voting. Compl. ¶¶ 46-48.

21; *see also Nipper v. Smith*, 39 F.3d 1494, 1540 (11th Cir.1994) (holding "most probative evidence of whether minority voters have an equal opportunity to elect candidates of their choice is derived from elections involving [minority] candidates") (internal quotations and citation omitted). Indeed, the Supreme Court in *Gingles* "relied exclusively on interracial legislative contests." *Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 4040 n. 19 (E.D. Mo. 2016).

When analyzing the *Gingles* preconditions, the candidates preferred by Black voters are most clear when the voters have a choice between both white and Black candidates. *See Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503 (5th Cir.1987) ("*Gingles* is properly interpreted to hold that the race of the candidate is in general of less significance than the race of the voter—but only within the context of an election that offers voters the choice of supporting a viable minority candidate."). For this reason, along with the Eighth Circuit, other circuit courts have also held that biracial elections are the most probative evidence of whether Black voters have an equal opportunity to elect candidates of their choice. *See, e.g., Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503-04 (5th Cir. 1987) ("[I]mplicit in the *Gingles* holding is the notion that black preference is [to be] determined from elections which offer the choice of a black candidate."); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 553 (9th Cir. 1998) (holding "minority vs. non-minority election is more probative of racially polarized voting than a non-minority vs. non-minority election"); *E. Jefferson Coal. for Leadership & Dev. v. Parish of Jefferson*, 926 F.2d 487, 493 (5th Cir. 1991) ("The district court did not err by limiting its investigation of racial polarization to elections involving black candidates."); *see also* City of *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1559 (11th Cir.1987).

The chief concern of Section 2 is whether Black voters can elect a candidate of their choice, not whether white candidates can attract Black voters' support in an all-white election. *Stallings*, 829 F.2d at 1559. Necessarily, when white candidates are the only options in election races, some white candidates will be supported by a large percentage of Black voters. Thus, a finding that Black voters supported a white candidate in an all-white field does not provide the court with any information about the tendency of white-bloc voting to defeat Black candidates. *Westwego Citizens for Better Gov't*, 872 F.2d at 1208 n.7.

Citing an out-of-circuit precedent, Defendants also argue that Plaintiffs must address, at the pleading stage, *all* judicial elections because the majority of Arkansas' judicial elections involve contests between white candidates. Br. in Supp. of Mot. to Dismiss at 10. But the case cited by Defendants, *Lewis v. Alamance County*, does not support their argument. 99 F.3d 600 (4th Cir. 1996). Instead, in *Lewis*, the Court held at summary judgment (not the pleading stage) that a "sufficient" number of elections had not been analyzed. 99 F.3d at 604, 605-06. Moreover, even the *Lewis* court recognized that elections with only white candidates may have less evidentiary value than biracial elections. *See id.*, at 610 n.8. *Lewis* cannot, in any event, overcome the controlling precedent from the Supreme Court and the Eighth Circuit, which recognizes that *Gingles* II and III may be satisfied by showing racially polarized voting in a smaller number of elections, and that biracial elections are the most probative.

Defendants' arguments do not overcome Plaintiffs' allegations of racially polarized voting.

In addition to the *Gingles* preconditions, Plaintiffs have also alleged, though Defendants ignore, abundant evidence that in the totality of circumstances, social and historical conditions interact with the voting practices to impair the ability of Black voters to elect their candidates of choice. Compl. at ¶¶ 50, 60-61, 68.

Plaintiffs plausibly allege the "two factors [that] predominate" in the totality-of-circumstances analysis: "the extent to which voting is racially polarized and the extent to which minorities have been elected under the challenged scheme." *Bone Shirt*, 461 F.3d at 1022 (internal quotation omitted); *see also Gingles*, 478 U.S. at 48 n. 15; Compl. ¶ 60.

In sum, Plaintiffs adequately allege the *Gingles* preconditions and the totality of circumstances. Should the Court, however, decide otherwise and grant Defendants' motion to dismiss, Plaintiffs request leave to amend the Complaint to cure any alleged defect. *See* Fed. R. Civ. P. 15(a)(2).

III. Plaintiffs' Plead an Adequate Section 2 Remedy.

Defendants argue that Plaintiffs failed to plead an adequate remedy for the Supreme Court[6] because this Court lacks the authority to order the creation of single-member majority-Black districts or cumulative voting. With regard to single-member districts, Defendants argue that they are inappropriate because "districting would sever the link between justices' statewide jurisdiction and the large majority of the State," *i.e.* "linkage." Br. in Supp. of Mot. to Dismiss at 21. With respect to cumulative voting, Defendants assert that "[n]o court has ordered cumulative voting in judicial elections under Section 2." Br. in Supp. of Mot. to Dismiss at 23. None of Defendants' arguments are well-founded.

At this stage in the proceedings, Plaintiffs are required to plead "a *potentially* viable and stable solution" but "not necessarily to present the final solution to the problem." *Bone Shirt*, 461

[6] Notably, while Defendants make arguments on the merits of Section 2 liability for both the Court of Appeals and the Supreme Court, Defendants do not challenge the remedies sought for the method of electing Court of Appeals judges. *See generally* Br. in Support of Mtn. to Dismiss at 20-24. *See also id*. at 20 ("[T]his Court should dismiss Plaintiffs' claim to the extent it relates to *the Arkansas Supreme Court* because Plaintiffs have failed to plead a remedy that this Court can order." (emphasis added)).

F.3d at 1019 (citation omitted). As such, an in-depth analysis of the relative merits of each proposed remedy is simply not proper at the liability stage. "The Court may consider, at the *remedial* stage, what type of remedy is possible . . . . But this difficulty should not impede the judge at the liability stage of the proceedings." *Id.* at 1019 (quoting *Dickinson v. Ind. State Election Bd.*, 933 F.2d 497, 503 (7th Cir. 1991)). Accordingly, this Court should reject Defendants' arguments.

First, Defendants' assert that Plaintiffs "may not fashion districts for courts that States choose to elect at-large," because the State has a "powerful" interest in linking the court's jurisdictional boundaries with the electoral base. Br. in Supp. of Mot. to Dismiss at 20-21. Yet, the Supreme Court has made clear that the mere assertion of a linkage interest is insufficient to defeat a Section 2 claim. *See Houston Lawyers' Ass'n*, 501 U.S. 419, 427 (1991) ("[T]hat interest does not automatically, and in every case, outweigh proof of racial vote dilution.").

Nevertheless, the question of whether the State's alleged linkage interest outweighs proof of vote dilution is appropriately resolved at the remedy stage—not on a motion to dismiss—after the development of the factual record. *See Terrebonne Par. Branch NAACP v. Jindal*, 274 F. Supp. 3d 395, 451 (M.D. La. 2017) ("[A] court must weigh this linkage interest against proof of vote dilution . . . .").

Second, this Court has the authority to order cumulative voting. Courts have ordered cumulative voting remedies after finding a jurisdiction liable for Section 2 violations. *See, e.g., Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 219 F. Supp. 3d 949, 961-62 (E.D. Mo. 2016) (holding cumulative voting for School District board members was appropriate to remedy a Section 2 violation); *U.S. v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 452 (S.D.N.Y. 2010) (collecting cases adopting cumulative voting as a valid remedy); *see also Cottier v. City of*

Martin, 551 F.3d 733, 743 (8th Cir. 2008), *vacated* (adopting cumulative voting as an appropriate remedy). Even Defendants appear to implicitly recognize the inconsistency of their own argument, stating in back-to-back sentences that "[t]his Court lacks the power to order" cumulative voting, but then conceding that other courts "have ordered cumulative voting as a remedy." Br. in Supp. of Mot. to Dismiss at 23.

Importantly, no United States Supreme Court precedent rejects the creation of districts or cumulative voting as potential remedies to address Section 2 violations, including for challenges to judicial elections. Fundamentally, the question in each of the cases that Defendants rely on was whether the remedy was appropriate on the merits, not whether the Court had authority to order the remedy. *See, e.g., U.S. v. Vill. of Port Chester*, 704 F. Supp. 2d at 447-53 (weighing different remedies and ordering cumulative voting). Defendants mistakenly interpret this to mean that the Court cannot order certain remedies. But whether the Court has the authority to order such a remedy and whether it chooses to exercise that authority are different questions to be answered at a different stage of the litigation. On a motion to dismiss, there can be no question that federal district courts have the authority to order the creation of districts, cumulative voting, or any other "workable solution" as a remedy for a Section 2 violation. *Bone Shirt*, 461 F.3d at 1019.

Defendants attempt to steer the Court into a decision on the merits as to whether districts and cumulative voting are proper remedies in this case. Plaintiffs, however, are required only to include "a demand for the relief sought, which may include relief in the alternative or different types of relief" under Rule 8(a)(3). Moreover, Section 2 jurisprudence requires allegations of only a "plausible remedy," for which "the burden at this stage is far from onerous" such that "Plaintiffs need only demonstrate facial plausibility." *Ala. State Conference of the NAACP v. Alabama,* 264 F. Supp. 3d at 1285 (holding that "[s]ubdistricting is a facially plausible remedy at this stage" in a

case challenging at-large appellate judicial elections). "Whether or not Plaintiffs can prevail, single-member districts are often the remedy of choice sought in vote dilution cases arising from at-large election systems," and, as a result, "Plaintiffs have adequately alleged a remedy that will, if imposed, redress their injury." *Lopez v. Abbott*, 2017 U.S. Dist. LEXIS 50216 (addressing a challenge to judicial appellate elections in Texas). Here, Plaintiffs' demand for relief in its Complaint fulfills this requirement and is consistent with other similar judicial election challenges under Section 2.

Further, Plaintiffs are aware of no decision holding that the proposed remedies for a Section 2 violation should be dismissed on a Rule 12(b)(6) motion. In fact, *none* of the cases Defendants rely on to argue that this Court should dismiss Plaintiffs' claim for failure to plead a remedy actually dismissed claims on that ground; instead, in *all* of the cases the review of the remedy occurred after a bench trial or on an appeal.[7] A day will come when the parties will argue the relative merits of whether the proposed remedies – or, alternatively, some other "workable solution" – are appropriate to rectify the Section 2 violation here, but that day is not today. As Defendants must concede, the overwhelming tide of the law precludes dismissal.

Finally, Defendants' hyperbolic claims that the proposed remedies to a Section 2 violation would "abolish a particular form of government" and that Plaintiffs are asking the Court to "use its imagination to fashion a new system" are entirely without merit. Br. in Supp. of Mot. to Dismiss at 24. Plaintiffs have not requested an upheaval of the state judiciary. Plaintiffs' proposed remedy

[7] *Nipper*, *Bone Shirt*, *Cousin*, *Milwaukee Branch*, *Southern Christian*, *LULAC*, *Vill. of Port Chester*, and *Cottier* all denied motions to dismiss, allowed discovery, and proceeded to multi-day bench trials before deciding the merits of the Section 2 claims. *Shaw v. Reno*, 509. U.S. 630 (1993) was before the Supreme Court on a motion to dismiss, but was, at its core, not a Section 2 case. *Id.* at 656 (stating that the Section 2 arguments "were not developed below and the issues remain open for consideration on remand").

is consistent with prior remedies under Section 2, including remedies for a Section 2 violation related to judicial elections in Arkansas. *See* Compl. ¶ 64; *Hunt v. Arkansas*, No. PB-C-89-406, 1991 WL 12009081 (E.D. Ark. Nov. 7, 1991). Plaintiffs seek an appropriate remedy to correct the Section 2 violations of judicial electoral methods that have prevented Black Arkansans from electing their candidates of choice to the State's Supreme Court and Court of Appeals. Even if the court is ultimately concerned that the proposed remedies would, as Defendants assert "fundamentally alter the administration of justice in Arkansas" Br. in Supp. of Mot. to Dismiss at 22, it is certainly not a legitimate basis to require dismissal of the entire complaint before first adjudicating on the merits. The court can craft an appropriate remedy from those proposed by the parties only *after* finding a Section 2 violation. *See, e.g., Montes v. City of Yakima*, No: 12-CV-3108-TOR2015, U.S. Dist. LEXIS 194284 (E.D. Wash. Feb. 17, 2015) (debating competing proposals from Plaintiffs and Defendants on how to remedy a Section 2 violation); *Terrebonne Par. Branch NAACP v. Edwards*, 3:14-cv-69, 2019 WL 3337899, at *1 (M.D. La. July 25, 2019) (adopting remedial plan recommended by Special Master who was appointed to assist the court after the court issued its liability ruling for a Section 2 violation).

It is ironic that Defendants trumpet the 145-year longevity and the "strong advantage to incumbents" provided by its current judicial electoral methods. Br. in Supp. of Mot. to Dismiss at 23-24.[8] That is precisely the point of Plaintiffs' complaint. Since Reconstruction, the State of

[8] Regarding cumulative voting, Defendants' concern that the proposed remedy could "open the possibility that the entire Arkansas Supreme Court could turn over every eight years, leaving Arkansans with no continuity from election to election" is similarly unfounded. Br. in Supp. of Mot. to Dismiss at 24. The U.S. House of Representatives could, theoretically be completely turned over every two years but there remains significant continuity. The determination of the specific remedy for a particular Section 2 violation, however, is appropriate only at the remedial stage of the case. *See Bone Shirt*, 461 F.3d at 1022 ("When a Section 2 violation is found, the district court is responsible for developing a constitutional remedy."); *see also Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d at 934 ("And, only after "a Section 2 violation

Arkansas has run its Supreme Court elections in such a way as to systematically prevent Black voters' voices from being heard and to maintain white incumbency. *See* Compl. ¶¶ 61-68 (detailing Arkansas's long, sordid history of racial discrimination). Resetting this draconian outcome is exactly the result required if the Court finds a Section 2 violation (and consistent with Plaintiffs' properly pled remedies). *See, e.g., Mo. State Conference of the NAACP*, 219 F. Supp. 3d at 954 (holding that it is "legally unacceptable on its face" to "maintain[] the current electoral system" after the court found a Section 2 violation).

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

Respectfully submitted on September 13, 2019,

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is found" should a district court turn to the task of "developing a constitutional remedy.")(citation omitted).

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CERTIFICATE OF SERVICE

I certify that on September 13, 2019, I filed the foregoing Memorandum of Law in Opposition To Defendants' Motion To Dismiss electronically via the Court's CM/ECF system, which will send a copy to all counsel of record.

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