IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

DR. JULIUS J. LARRY, III **PLAINTIFF**

v. **CASE NO. 4:18-cv-116-KGB-DB-BSM**

STATE OF ARKANSAS, *et al* **DEFENDANTS**

STATE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT (DOC. NO. 36)

COME Now, Defendants, the State of Arkansas, Asa Hutchinson in his official capacity as the Governor of the State of Arkansas, Leslie Rutledge in her official capacity as the Attorney General of the State of Arkansas, Jeremy Gillam in his official capacity as a member of the House of Representatives for the State of Arkansas, and the Arkansas Legislature, in their official capacities (collectively, "State Defendants"), by and through Assistant Attorney General Vincent P. France, and for their Response in Opposition to Plaintiff's Motion for Leave to File an Amended Complaint (Doc. No. 36), state the following:

Rule 15 of the Federal Rules of Civil Procedure governs when a party can file an amended complaint. As a matter of course, a party can file an amended pleading without leave of the court if the amended pleading is filed within 21 days of service or within 21 days after a responsive pleading is required and has been filed. Fed. R. Civ. P. 15(a)(1). Otherwise, a party may file an amended pleading only with either written consent from the opposing party or leave by the court to file the amended pleading. Fed. R. Civ. P. 15(a)(2).

In the case at hand, the State Defendants do not consent to Dr. Larry filing an amended complaint. Although Fed. R. Civ. P. 15(a)(2) states that a "court should freely give leave when justice so requires," the right to amend under Rule 15 is not an absolute right. *Williams v. Little Rock Municipal Water Works*, 21 F.3d 218, 224 (8th Cir. 1994). "A district court may appropriately deny leave to amend 'where there are compelling reasons such as undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment.'" *Moses.com Sec., Inc. v. Comprehensive Software Sys., Inc.*, 406 F.3d 1052, 1065 (8th Cir. 2005) (quoting *Hammer v. City of Osage Beach*, 318 F.3d 832, 844 (8th Cir. 2003)).

In *Moses.com*, the Eighth Circuit upheld the district court's denial of leave to amend, when motions to dismiss had already been briefed and ruled upon and the parties were already conducting discovery. 406 F.3d at 1066. In addition, the Court explained that, although a scheduling order provides a deadline in the future of amending complaints, the scheduling order does not prevent a district court "from finding that an amendment would result in prejudice." *Id*. The Eighth Circuit has also upheld a district court's denial of leave to amend when the proposed amended complaint included new theories of recovery and posed additional discovery requirements. *Hammer*, 318 F.3d at 844. In addition, the Eighth Circuit has found no abuse of discretion when the district court denied leave to a party to amend their complaint, when the amendment required that "extensive additional discovery and trial preparation would be required." *Brown v. Wallace*, 957 F.2d 564, 566 (8th Cir.

1992). Likewise, parties have not been allowed to amend their complaints when the amended complaint contains different legal and factual issues. *Hammer*, 318 F.3d at 845 (citing *Williams*, 21 F.3d at 224-25).

Dr. Larry should not be granted leave to file his amended complaint because it would be prejudicial to the State Defendants. The amended complaint proposed by Dr. Larry fails state a claim and therefore would be futile to grant him leave to file the amended complaint. In his proposed amended complaint, Dr. Larry adds claims regarding the 2nd Congressional District and the 4th Congressional District because he seeks an order from the Court to require that the State of Arkansas to create a minority-majority district. His proposed amended complaint goes so far as to show the Court how such a district might be drawn. Doc. No. 36, p. 6-7. However, the Supreme Court has stated that "Section 2 [of the Voting Rights Act] does not guarantee minority voters an electoral advantage." *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009). Thus, Dr. Larry has no right to the relief he seeks in his proposed amended complaint, and therefore, it would be futile to grant him leave to file his proposed amended complaint. *See Moses.com*, 406 F.3d at 1065.

Moreover, the map[1] proposed by Dr. Larry (a color version is attached hereto as Exhibit 1; Dr. Larry wants the Court to create the district in blue) is by its very nature designed to create a gerrymandered district based upon race, which ironically is exactly what Dr. Larry is originally challenging. Dr. Larry claims that

[1] Dr. Larry gets his proposed map from a website called "FiveThirtyEight;" and the specific map used by Dr. Larry can be found at the following link: https://projects.fivethirtyeight.com/redistricting-maps/arkansas/#MajMin.

the map he proposes is a "way to remedy the racial gerrymandering that has been institutionalized in the 1st Congressional District since Arkansas became a state." Doc. No. 36, p. 7, ¶ 11. Frankly, Dr. Larry's proposed map is hypocritical, because he is claiming that the 1st Congressional District is the result of racial gerrymandering, yet he wants to replace it with a district that he admits and is quintessentially racial gerrymandering. "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993) (quoting *Brown v. Board of Education,* 347 U.S. 483 (1954)). Dr. Larry admits that the district is drawn based upon race. *See* Doc. No. 36, p. 7 ¶ 11.

Additionally, Dr. Larry claims that the new district he proposes is a "large contiguous geographically compact area to constitute a majority-minority district…" Doc. No. 36, p. 7 ¶ 11. Only by the most liberal definition of contiguous (and the possible use of a magnifying glass) can one claim that the district proposed by Dr. Larry as being a contiguous area. *See* Exhibit 1, (district shaded in blue). More importantly, the proposed congressional district is definitively not a "geographically compact area," because it stretches from the south-west corner of Arkansas to the north-east corner of Arkansas with numerous fingerlings. Consequently, on its face, the proposed map does not satisfy the requirement that the minority group is geographically compact. *See Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). Accordingly, Dr. Larry should not be granted leave to file his proposed amended complaint because it would be futile.

Another fatal flaw with Dr. Larry's proposed amended complaint is he again attempts to represent other individuals although he is a *pro se* plaintiff (Doc. No. 36, p. 2), an issue this Court has already addressed (Doc. No. 30, p. 6). Based upon the use of the plural "plaintiffs" and plural pronouns when referring to the "plaintiffs" in his proposed amended complaint, it is evident that Dr. Larry still believes he is able to represent others in addition to himself. Because Dr. Larry's proposed amended complaint fails to cure deficiencies in his original complaint, his motion for leave to file an amended complaint should be denied. *See Moses.com*, 406 F.3d at 1065. Likewise, allowing Dr. Larry leave to amend would be unfairly prejudicial to the State Defendants who have already filed motions to dismissed, which the Court has ruled on and they have been conducting discovery. *See Id*. at 1066.

The third issue with Dr. Larry's proposed amended complaint is he seeks to challenge two additional congressional districts in Arkansas (the 2nd Congressional District and the 4th Congressional District). *See* Doc. No. 36, p. 11, ¶ 18.a. First, as with Dr. Larry's challenge to the 1st Congressional District, Dr. Larry also lacks standing to bring his amended claim regarding the 4th Congressional District. Without standing to bring the amended claim, it would be futile to allow Dr. Larry to amend his complaint. *See Moses.com*, 406 F.3d at 1065. Second, to allow Dr. Larry to add two additional congressional districts would prejudice the State Defendants because it would significantly add to the complexity of the case and to the amount of discovery that would be required. *See Brown*, 957 F.2d at 566.

Finally, by allowing Dr. Larry to amend to add two additional congressional districts would be prejudicial because it creates different legal and factual issues. *See Hammer*, 318 F.3d at 845.

The relief Dr. Larry seeks in his proposed amended complaint—an order "cancelling the Fall (November 2018) Congressional elections until a new congressional district map is adopted," Doc. No. 36, p. 11, ¶ 18.f.—is prejudicial on its face in two ways. First, this relief would require an even more expedited litigation schedule for this case. Second, it seeks an extreme form of relief that has significant consequences for the State Defendants and the citizens of the State of Arkansas as well as national ramifications over the status of the congressional seat and whether the incumbent congressional delegate would retain authority to vote in Congress. This requested relief is unduly prejudicial to the State Defendants. Accordingly, the State Defendants respectfully request that the Court deny Dr. Larry's motion to leave to file an amended complaint.

Beyond amending his complaint, Dr. Larry also seeks to add additional parties, which is governed by Rule 20 of the Federal Rules of Civil Procedure. In addition to satisfying the requirements of Rule 15 to amend a pleading, a plaintiff must also satisfy Rule 20 when the plaintiff seeks to add additional parties. 4 James Wm. Moore, et al., *Moore's Federal Practice* § 20.02[2][a][ii] (3d ed. 2004). To add a party as a permissive joinder, "(1) a right to relief must be asserted by, or against, each plaintiff or defendant relating to or arising out of the same transaction or occurrence, or series of transactions or occurrences; and (2) some question of law or

fact common to all the parties must arise in the action." *Mosely v. General Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974). This determination requires the court to consider the particular facts of each case. *Id.*

In the case at hand, Dr. Larry seeks to transform his case completely with new factual and legal scenarios now that his case is before a three-judge panel. Additionally, he also seeks to add new plaintiffs, who the Court has already ruled that Dr. Larry cannot represent.

From his proposed amended complaint, Dr. Larry does not clearly identify the new plaintiffs but simply provides their names. Doc. No. 36, p. 2. Dr. Larry only provides a generic claim that the new plaintiffs are citizens and registered voters by stating that "[t]he Plaintiffs are each and all residents, citizens and registered voters who voted within Little Rock; Pulaski; Arkadelphia; Phillips; and Helena, Arkansas." Doc. No. 36, p. 5, ¶ 7. This provides little insight as to the actual identity of the new plaintiffs that Dr. Larry seeks to join as permissive joinders and it provides more questions than answers for this case. The confusion exists because Little Rock is in Pulaski County and Helena is in Arkansas County; however, Arkadelphia is in Clark County not Philips County. This distinction is vitally important because whereas Philips County is in the 1st Congressional District, Clark County is in the 4th Congressional District. Thus, Dr. Larry's proposed amended complaint fails to provide adequate information as to the identities of the new plaintiffs and the Court should deny Dr. Larry's motion to add additional plaintiffs pursuant to Fed. R. Civ. P. 20(a)(i).

Moreover, the new proposed plaintiff who is from Arkadelphia has no connection to the claims that Dr. Larry made in his original complaint. As noted above, Arkadelphia is in Clark County, which is in the 4th Congressional District and Clark County is not contiguous to either the 1st Congressional District or the 2nd Congressional District. Thus, the proposed plaintiff does not meet the criteria for a permissive joinder because he or she does not have a common question of facts or law to Dr. Larry. *See Mosely*, 497 F.2d at 1333. Consequently, this Court should deny Dr. Larry from adding any additional parties.

Fundamentally, Dr. Larry, after his case reached a three-judge panel, seeks to morph his case into something totally new. Yet as shown above, Dr. Larry fails to meet the requirements of Rule 15 and Rule 20 of the Federal Rules of Civil Procedure. Allowing Dr. Larry to amend his complaint would be futile based upon the proposed amended complaint on its face because of the nature and type of relief he seeks based upon the map he proposes. Finally, Dr. Larry should not be allowed to file an amended complaint, because his proposed amended complaint involves different legal and factual issues that would be prejudicial for Defendants to defend. *See Hammer*, 318 F.3d at 845

WHEREFORE, the State Defendants respectfully request that the Court deny Dr. Larry's Motion for Leave to File an Amended Complaint (Doc. No. 36) and grant them any just and proper relief.

Respectfully submitted,

By: */s/ Vincent P. France*
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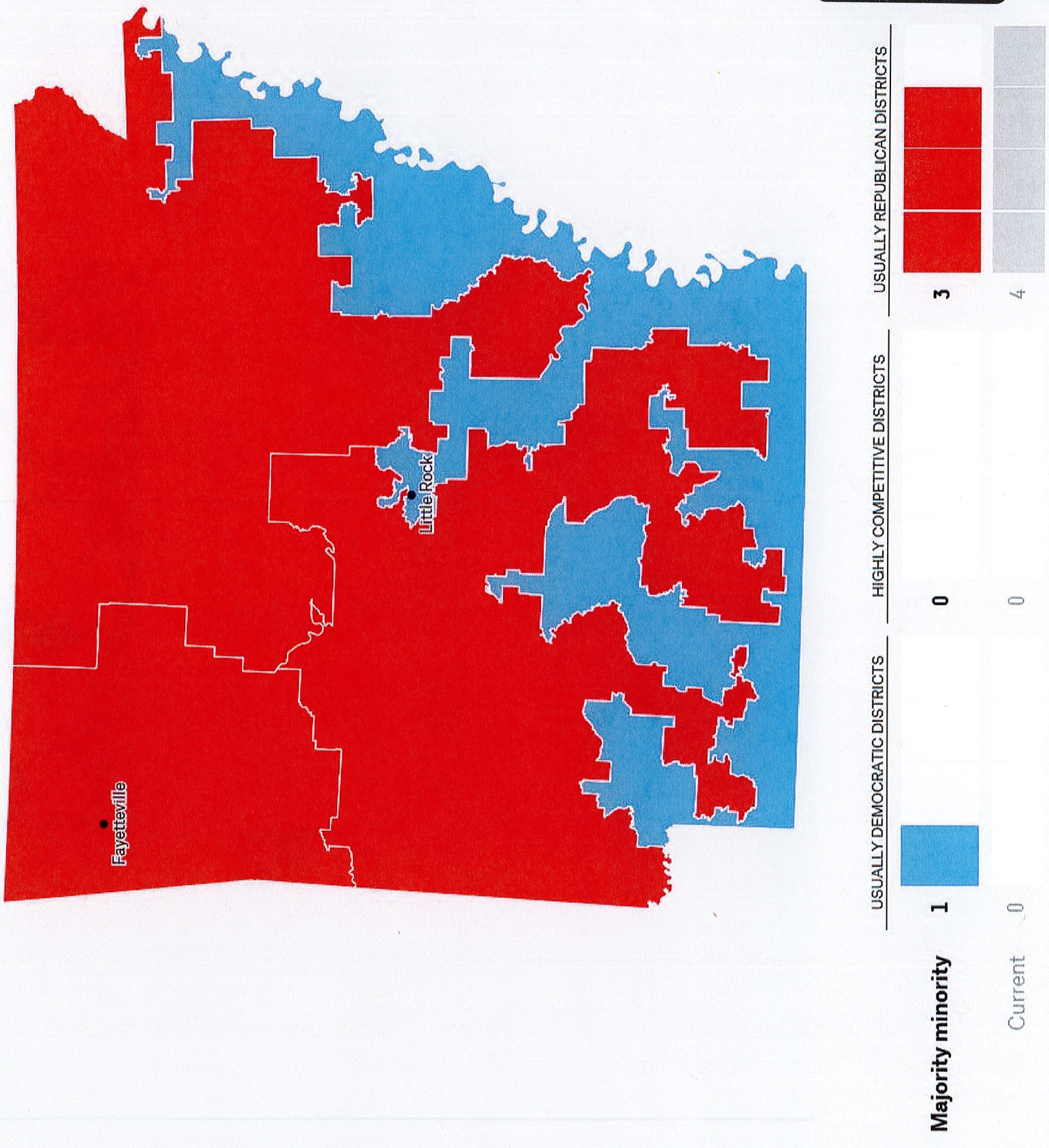
Certificate of Service

I, Vincent P. France, hereby certify that on June 14, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system.

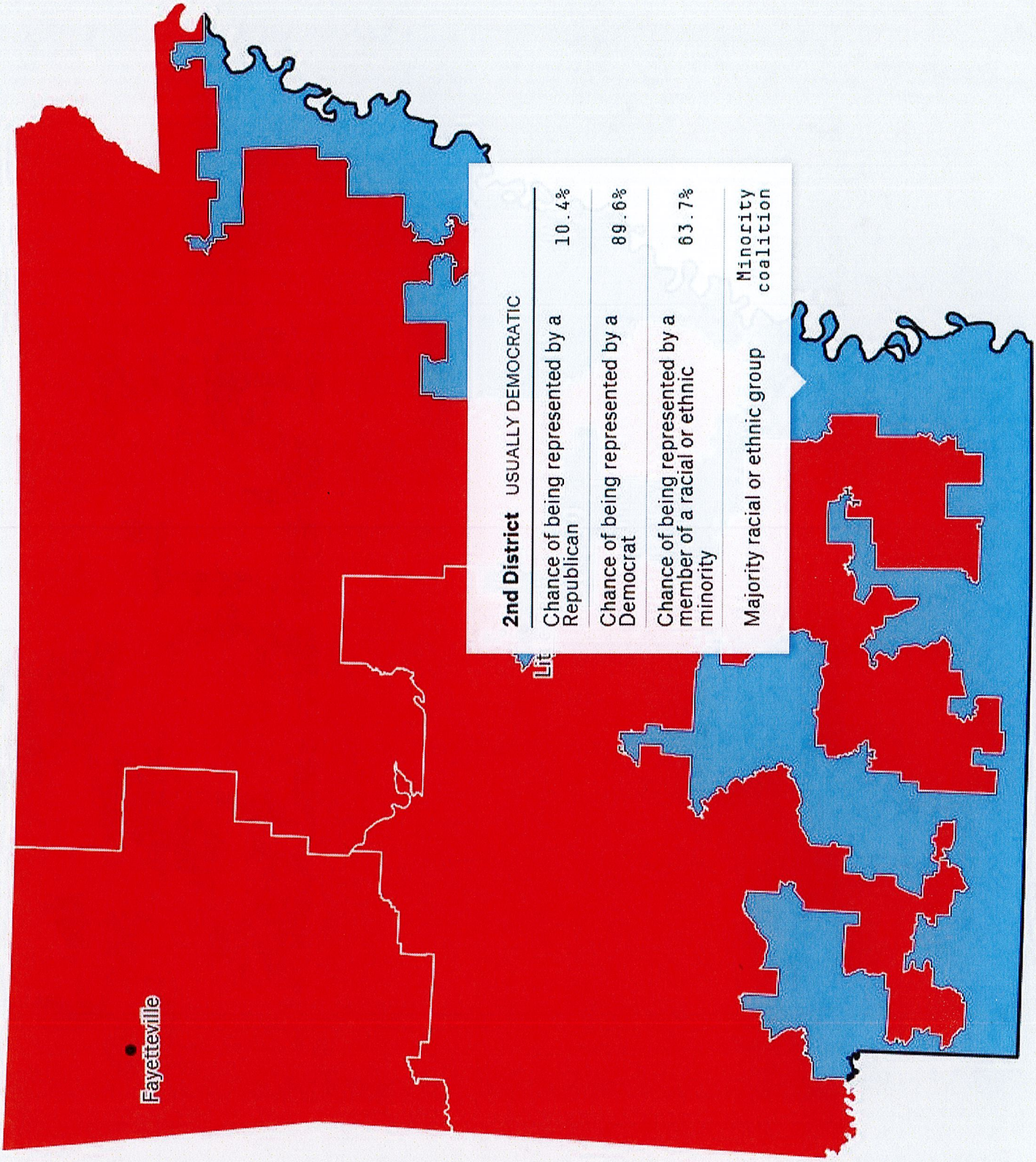
I, Vincent P. France, hereby certify that on June 14, 2018, I mailed the foregoing document by U.S. Postal Service to the following non-CM/ECF participant:

Julius J. Larry, III
2615 West 12th St.
Little Rock, AR 72202

/s/ Vincent P. France
Vincent P. France



https://projects.fivethirtyeight.com/redistricting-maps/arkansas/#MajMin



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