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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

BOBBY SINGLETON, et al.,

Plaintiffs,

v.

WES ALLEN, et al.,

Defendants.

No. 2:21-cv-1291-AMM
Three-Judge Court

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***SINGLETON* PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY**

Plaintiffs Bobby Singleton et al., through undersigned counsel, respond as follows to Defendants' notice, Doc. 243, of the Supreme Court's decision on May 23, 2024, in *Alexander v. South Carolina State Conference of the NAACP*, 144 S. Ct. 1221 (2024).

Alexander provides additional support for the Singleton Plaintiffs' claims, not for their dismissal. As Defendants acknowledge, Doc. 243 at 4, a plaintiff asserting a racial gerrymander claim bears the burdens of overcoming a partisan gerrymandering defense when the plaintiff must rely *solely* on circumstantial evidence. *Alexander*, 144 S. Ct. at 1235 ("A circumstantial-evidence-only case is especially difficult when the State raises a partisan-gerrymandering defense."). If

there is direct evidence of race as the predominant factor, and "if the State cannot satisfy strict scrutiny, direct evidence of this sort amounts to a confession of error." *Id.* at 1234.

The Court's specific example of "direct evidence of this sort" is exactly the kind of evidence the Singleton Plaintiffs rely on. "Direct evidence often comes in the form of a relevant state actor's express acknowledgment that race played a role in the drawing of district lines. Such concessions are not uncommon because States often admit to considering race for the purpose of satisfying our precedent interpreting the Voting Rights Act of 1965." 144 S. Ct. at 1234 (citing *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 259–260 (2015)). That is the allegation in the Singleton Second Amended Complaint:

> District 7 has been designed to perpetuate the racial gerrymander first created in 1992, by preserving the core of District 7 in the 2011 plan, retaining zero population deviation, and expanding the racially divisive split in Jefferson County, while maintaining one majority-Black voting-age district in an alleged attempt to comply with Section 2 of the Voting Rights Act.

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Doc. 229 at ¶ 68. Complying with Section 2 of the Voting Rights Act may have provided a compelling state interest for the racial gerrymander of CD 7 in 1992. But that does not relieve the State from the burden of showing its continued use in 2023 can satisfy strict scrutiny. See *Allen v. Milligan*, 143 S. Ct. 1487, 1531 (Thomas, J., dissenting) ("Absent core retention, there is no apparent race-neutral reason to insist

that District 7 remain a majority-black district uniting Birmingham's majority-black neighborhoods with majority-black rural areas in the Black Belt.").

Core retention is, indeed, an issue here. Defendants contend they are no longer required to satisfy strict scrutiny in retaining the racial gerrymander of Jefferson County; Defendants contend they need only show that "the 2023 Plan preserves the core of District 7 from preceding plans." Doc. 243 at 7. But, according to established Supreme Court precedent, core retention cannot change a gerrymandered district into one that is not gerrymandered:

> The defendants misunderstand the nature of the plaintiffs' claims. … [I]t is the *segregation* of the plaintiffs—not the legislature's line-drawing as such—that gives rise to their claims. … [T]hey argued in the District Court that some of the new districts were mere continuations of the old, gerrymandered districts. Because the plaintiffs asserted that they remained segregated on the basis of race, their claims remained the subject of a live dispute, and the District Court properly retained jurisdiction.

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North Carolina v. Covington, 585 U.S. 969, 975–76 (2018) (emphasis added). See *Allen v. Milligan*, 143 S. Ct. 1487, 1505 (2023) (majority opinion) ("But this Court has never held that a State's adherence to a previously used districting plan can defeat a § 2 claim. If that were the rule, a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan."); *id.* at 1528 n.10 (Thomas, J., dissenting) ("The District Court disregarded the 'finger' because it has been present in every districting

plan since 1992, including the State's latest enacted plan. *Singleton v. Merrill*, 582 F.Supp.3d 924, 1011 (ND Ala. 2022) (per curiam). But that reasoning would allow plaintiffs to bootstrap one racial gerrymander as a reason for permitting a second.").

When the starting point for redistricting is a map admittedly drawn for a predominantly racial purpose, preserving district cores and protecting incumbent interests is evidence that the line-drawers intended to separate voters by race. *Jacksonville Branch of the NAACP v. Jacksonville*, 635 F. Supp. 3d 1229, 1286 (M.D. Fla. 2022) ("Moreover, as other courts have recognized, by invoking core retention and incumbency protection as the predominant motive behind the shape of the Challenged Districts, the City makes the historical foundation for these districts particularly relevant."); *Jacksonville Branch of the NAACP v. City of Jacksonville*, 2022 WL 16754389, at *3 (11th Cir. Nov. 7, 2022) (an intent "to maintain the race-based lines created in the previous redistricting cycle" is "not a legitimate objective"); *GRACE, Inc. v. City of Miami*, 2023 WL 4942064, at *4 (S.D. Fla. Aug. 3, 2023) ("The Court's analysis of core retention was therefore appropriately limited to an evaluation of whether the Remedial Plan perpetuated the harms of racial gerrymandering, which the Court found it did."); *GRACE, Inc. v. City of Miami*, 2023 WL 4853635, at *2–3 (S.D. Fla., July 30, 2023) (finding of racial gerrymandering was buttressed where the city's "intent was, as expressed, to

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preserve previously-drawn race-based lines of the Commission Districts in the 2022 redistricting process") (citation omitted); *Covington v. North Carolina*, 283 F. Supp. 3d 410, 431 (M.D.N.C. 2018) ("[E]fforts to protect incumbents by seeking to preserve the 'cores' of unconstitutional districts … have the potential to embed, rather than remedy, the effects of an unconstitutional racial gerrymander …."), *aff'd in relevant part and reversed in part on other grounds*, 585 U.S. 969 (2018); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 561 n.8 (E.D. Va. 2016) ("In any event, maintaining district cores is the type of political consideration that must give way to the need to remedy a *Shaw* violation."); *Easley v. Cromartie*, 532 U.S. 234, 262 n.3 (2001) (Thomas, J., dissenting) (stating on behalf of four Justices that "the goal of protecting incumbents is legitimate, even where … individuals are incumbents by virtue of their election in an unconstitutional racially gerrymandered district ... is a questionable proposition," but noting that the question was not presented to the Supreme Court or district court and, therefore, that the Court had not addressed it); *Vera v. Richards*, 861 F. Supp. 1304, 1336 (S.D. Tex. 1994), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996) ("Incumbent protection is a valid state interest only to the extent that it is not a pretext for unconstitutional racial gerrymandering.").

Alexander also reaffirms that a plaintiff can establish racial predominance by

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showing that the Legislature used race as a proxy for partisan politics. 144 S. Ct. at 1234 n.1 (citing *Miller v. Johnson*, 515 U.S. 900, 914 (1995); *Cooper v. Harris*, 581 U.S. 285, 291 (2017)). Defendants did not raise a partisan gerrymandering defense until they moved to dismiss Count II in the Singleton Second Amended Complaint. Doc. 233 at 2–3. Party politics did not come up in the legislative debates over the Singleton and Smitherman plans, and it is not listed in the enacting statute as a redistricting criterion. In this respect, the instant case is the opposite of *Alexander*, where "the Republican-controlled legislature ... made it clear that it would aim to create a stronger Republican tilt in District 1." 144 S. Ct. at 1237. In contrast, Alabama's criteria included race (keeping Mobile and Baldwin counties together based on their "Spanish and French colonial heritage") but not partisan advantage.

A question in the Legislature always was whether the Singleton crossover districts would perform as opportunity districts for Black voters. Only after the Second Amended Complaint pointed out how the Singleton Plan did a better job of meeting the standards set out in the statute enacting the 2023 plan did Defendants concede, as they do in their *Alexander* notice, that the Singleton Plaintiffs' "alternative plans contain two reliably Democratic 'crossover districts.'" Doc. 243 at 7.

Of course, any crossover opportunity district in today's Alabama will be a

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Democratic district. So Defendants' assertion of a partisan defense is a categorical attack on crossover districts that, as Plaintiffs allege in Count II of their Second Amended Complaint and in their brief opposing the motion to dismiss, is a continuation of "Alabama's unbroken policy of suppressing efforts of Black voters to form electoral coalitions with White voters and the use of political parties as the main instrument for maintaining White solidarity." Doc. 236 at 13.

Since the Civil War, race has always been used as a proxy for gaining partisan power in Alabama. In support of that allegation, on May 17, 2024, Plaintiffs exchanged with Defendants' counsel the attached reports of Alabama historians Dr. R. Volney Riser, and Dr. Kari Frederickson. These expert history reports are important additions to the evidence of unconstitutional racial gerrymandering and intentional racial discrimination. They also support the Singleton Plaintiffs' claim in Count III of their Second Amended Complaint that the 2023 plan violates Section 2 of the Voting Rights Act; in particular, the Senate Report factors of a "history of voting-related discrimination," official actions that promote racially polarized voting, the exclusion of Black citizens from candidate slating processes, "the use of overt or subtle racial appeals in political campaigns," and a "tenuous" policy underlying the 2023 Congressional redistricting plan. *Thornburg v. Gingles*, 478 U.S. 30, 44–45 (1986).

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Finally, it is important to keep in mind that *Alexander* was about weighing competing inferences after a trial, while here this Court is addressing Defendants' motion to dismiss. *Alexander* did not purport to change the bedrock rule that the plaintiffs get all reasonable inferences in their favor on a motion to dismiss.

Conclusion

The motion to dismiss the Second Amended Complaint should be denied.

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Respectfully submitted,

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