FILED
2024 Jul-17 PM 03:20
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

CARA MCCLURE, et al.,
Plaintiffs,

v.

JEFFERSON COUNTY COMMISSION,

Defendant.

Case No. 2-23-cv-00443-MHH
consolidated with
No. 2:23-cv-00503-MHH

(ORAL ARGUMENT REQUESTED)

MCCLURE PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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MCCLURE PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This Court should grant summary judgment to McClure Plaintiffs because Plaintiffs have demonstrated that race predominated in the drawing of the 2021 Enacted Plan without sufficient justification. McClure Plaintiffs have already demonstrated that between 1990 and the 2013, the Commission used racial thresholds without any justification to move voters into and out of districts on the basis of race; under those circumstances, preserving the cores of the Commission's 2013 districts to the greatest extent possible (as Defendant claims the Commission did in the 2021 Enacted Plan) is not race neutral. Doc. 101, pp. 8–14. Moreover, Defendant has not presented any legal basis for its claim that where, like here, core preservation entrenches decades of explicit racial targets absent justification, it is a race neutral districting criterion. Accordingly, this Court should grant summary judgment to Plaintiffs. Plaintiffs have also shown that even if core preservation could be race neutral when based on the 2013 plan, Commission Districts 1 and 3 are *still* outliers in their racial composition even among plans that prioritized population equity and core retention to the same degree the Commission did, evidence which Defendant selectively ignores or mischaracterizes. Def.'s Opp'n to Pls.' Mot. Summ. J., Doc. 99, pp. 7, 8 & fig. 1 (citing Doc. 85-26, p. 4 (Barber Rep.)).

ARGUMENT

I. Plaintiffs Have Standing.

Plaintiffs Cara McClure, the Alabama State Conference of the NAACP (AL NAACP), Greater Birmingham Ministries (GBM), and the Metro-Birmingham Branch of the NAACP have standing to challenge each commission district in the Enacted Plan. In racial gerrymandering claims, Plaintiffs simply need to show that they live in a racially gerrymandered district. *See* Doc. 101, pp. 25–26. Plaintiffs have standing to assert racial gerrymandering claims where they "live in the district that is the primary focus of their . . . claim" or where they provide specific evidence that they "personally, have been subjected to a racial classification." *United States v. Hays*, 515 U.S. 737, 739 (1995). The harm involved in racial gerrymandering is inherent in living in an allegedly gerrymandered district, and no other proof of injury is necessary. *See* Doc. 101, p. 26. Because Plaintiff organizations have members who are registered voters living in each of the five commission districts, Doc. 101, pp. 26 – 27, they have standing to sue in this case.

II. Section 5 Neither Requires Nor Condones Explicit Racial Targets Absent Justification, Nor Does Past Preclearance Preclude a Finding of Racial Gerrymandering.

Defendant misrepresents Plaintiffs' position as a presumption that "race must have predominated when the Commission complied with Section 5 in past decades."

Doc. 99, p. 28. But Section 5 does not require the use of explicit racial targets. *Ala. Legis. Black Caucus v. Alabama (ALBC)*, 575 U.S. 254, 275 (2015).

Instead, Section 5 was designed only to combat "those effects that are retrogressive." *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 472 (1997). Compliance with Section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice." *ALBC*, 575 U.S. at 275. A threshold Black voting age population (BVAP) in a majority minority district is required be preserved only to the extent it is necessary to maintain Black voters' present ability to elect candidates of their choice. *See id.* at 279. The Supreme Court cautioned that a "mechanical interpretation of § 5 can raise serious constitutional concerns," and explained, as an example, that maintaining a Black population at 70% in a district where a percentage of 65% would not have significantly impacted the Black voters' ability to elect their preferred candidate "would be difficult to explain" as constitutional. *Id.* at 277.

To be clear then, Plaintiffs' position is not that race predominated whenever a covered jurisdiction complied with Section 5 of the Voting Rights Act. Plaintiffs' position is that race predominated here, because the Commission used BVAP thresholds far beyond what was necessary to satisfy Section 5's non-retrogression

mandate, thereby packing Black voters into two super-majority Black districts with no adequate justification.

And especially under these circumstances, Section 5 preclearance correspondence is "direct evidence of the legislature's objective" and relevant to a racial predominance claim. *See Clark v. Putnam Cnty.*, 293 F.3d 1261, 1272 (11th Cir. 2002) (calling preclearance statements "evidentiary 'admissions'" that are probative of racial predominance). This is true even if the constitutionality of a prior plan was not challenged, because impermissible motives may still "taint" the underlying plan. *See Chen v. City of Houston*, 206 F.3d 502, 518 (5th Cir. 2000). The Fifth Circuit in *Chen* rejected the argument that it was "highly prejudicial" to Defendants, who rely on prior plans for redistricting, to allow plaintiffs to challenge their decision to retain the cores of plans as racial gerrymanders when those plans had never been declared unconstitutional, *see* Doc. 99, p. 30. The court explained that limiting such challenges would be "problematic because . . . . the passage of other plans [would] ha[ve] sanitized the intent embodied in the prior plan," and preserve the racial gerrymander. *See id*., 206 F. 3d at 518. Where historical evidence of a legislative body's map drawing demonstrates racial gerrymandering, invoking core retention as a race-neutral factor "could perpetuate racially gerrymandered districts into the future merely by invoking a 'neutral' desire to maintain existing lines." *Jacksonville Branch of NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229,

1288 (M.D. Fla. 2022), *appeal dismissed*, No. 22-13544-HH, 2023 WL 2966338 (11th Cir. Jan. 12, 2023). The same logic applies here: impermissible racial motivation cannot be sanitized or transformed in 2021 simply because such motivations went unchallenged.

Here, the Commission's Section 5 correspondence over three decades demonstrates sustained reliance on a BVAP threshold of 65% or greater in CDs 1 and 2 without justification. Doc. 96, pp. 2–11, 21–24. And Defendant has boasted that "the Enacted Plan kept 95.3% of the County's population in their existing districts," meaning there was little change from the express racial thresholds of super-majority Black districts in excess of 65% in the 2013 Plan. Doc. 99, p. 5.

III. *Alexander* Did Not Hold that Core Retention Immunizes a Prior Racial Gerrymander.

"Core retention" is not an automatic defense to a racial predominance claim under *Alexander*, and it is not a race neutral criterion here. Defendant invokes *Alexander*'s statement that "'core preservation' is a permissible nonracial reason lawmakers may choose a redistricting plan." Doc. 99, p. 18 (citing *Alexander v. S.C. State Conf. of the NAACP*, 144 S.Ct. 1221, 1234 (2024)). But core preservation in *Alexander* was assumed to be a race-neutral criterion only because no one in that case argued that districts whose cores were being preserved were themselves a racial gerrymander. Nothing in *Alexander* suggests that when, as here, core preservation

involves an intentional decision to keep the cores of racially gerrymandered districts, the new plan somehow becomes race neutral.

Alexander was concerned with the "especially difficult" burden that plaintiffs face when they rely on a "circumstantial-evidence-only case" to rebut a partisan-gerrymandering defense. 144 S.Ct. at 1235; *see also id.* ("a State's partisan-gerrymandering defense . . . raises 'special challenges' for plaintiffs"). The *Alexander* Court's discussion of core retention is largely limited to observing that plaintiffs' expert simply did not consider core retention in his simulations. *Id*. at 1245.

As explained in McClure Plaintiffs' opposition to Defendant's motion for summary judgment, when core retention entails districts drawn with impermissible racial motives, core retention is not a race-neutral criterion. *See* Doc. 101, p. 11–14; *see also Covington v. North Carolina*, No. 1:15CV399, 2018 WL 604732, at *4 (M.D.N.C. Jan. 26, 2018) (finding core preservation a redistricting criterion "highly correlated with race" where it preserved a district that a court had found unconstitutional). Nothing in *Alexander* suggests that core preservation is race neutral when, as here, it perpetuates a racial gerrymander unjustified by Voting Rights Act compliance.

Defendant takes issue with Plaintiffs' reliance on *Covington*, which found retaining the cores of remedial districts that preserved racial gerrymanders

unconstitutional. Doc. 99, p. 19; *but see North Carolina v. Covington*, 585 U.S. 969, 973 (2018). Yet, the *Covington* Court's focus on the legislature's "inexplicabl[e]" decision-making is fully relevant here. *Covington*, 585 U.S. at 974. Rather than assessing only the superficial correlation between the shapes and dimensions of the prior and current plans, the Court based its decision on the legislature's failure "to provide any explanation or evidence" to justify retaining a district's high BVAP or why preservation of particular districts required the packing of Black rather than white voters, which "perpetuat[ed] the effects of the racial gerrymander." *See id*. at 973; *see also GRACE, Inc. v. City of Miami*, 685 F. Supp. 3d 1365, 1373 (S.D. Fla. 2023) (describing the court's "evaluation" of "whether the Remedial Plan perpetuated the harms of racial gerrymandering."); *Jacksonville Branch of NAACP v. City of Jacksonville*, No. 3:22-CV-493-MMH-LLL, 2022 WL 17751416, at *14 (M.D. Fla. Dec. 19, 2022), *appeal dismissed*, No. 22-14260-HH, 2023 WL 4161697 (11th Cir. June 6, 2023) (similar).

In addition, contrary to Defendant's arguments, the reasoning of cases such as *Covington* and *Grace* is not limited to instances in which a court has already found that a prior plan was unlawfully gerrymandered. *See Jacksonville Branch of NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229, 1288 (M.D. Fla. 2022), *appeal dismissed*, No. 22-13544-HH, 2023 WL 2966338 (11th Cir. Jan. 12, 2023) (noting that although the City Council asserted core preservation as a race-neutral factor, the

only core Commissioners sought to protect in some districts was the "Black racial majority"). The evidence *in this record* establishes that the Commission's 2013 and previous plans were based on a deliberate decision to maintain CDs 1 and 2 as super-majority Black districts in excess of 65% BVAP and that the Commission conducted no analysis or investigation to determine whether the express racial assignments in those plans were justified in order to comply with the Voting Rights Act. *See infra* Part III. The record therefore provides a fully adequate basis to determine that the Commission's prior plans reflect unlawful racial predominance, thus eliminating these plans as a lawful basis on which to create a plan in 2021.

Defendant also relies on intentional discrimination cases to argue that the Commission's racial gerrymandering over the past three decades is irrelevant in this racial gerrymandering case. *See, e.g.*, Doc. 99, pp. 1, 10–11, 21. But intentional discrimination claims under *Arlington Heights* are analytically distinct from racial gerrymandering claims, and the case law that Defendant relies on is wholly inapposite here. *Compare Shaw v. Reno*, 509 U.S. 630, 644–49 (1993), *and Covington*, 585 U.S. at 973, *with* Doc. 99, pp. 16, 27–28. Here, the central inquiry is the constitutionality of the Commission's decision to perpetuate a racial gerrymander by retaining the cores of districts drawn to achieve explicit racial targets absent justification. *See Jacksonville Branch of NAACP v. City of Jacksonville*, No. 22-13544, 2022 WL 16754389, at *3 (11th Cir. Nov. 7, 2022) (citing *North Carolina v.*

Covington, 138 S. Ct. 2548, 2551 (2018) (per curiam)); *cf. ALBC*, 575 U.S. 254, 274–75 (2015) (explaining that core preservation does not itself negate a claim of racial gerrymandering).

Defendant relies on *Greater Birmingham Ministries* to assert that "[w]hatever one thinks of those earlier redistricting efforts, the relevant inquiry is what happened in 2021, and 'the precise circumstances surrounding the passage of the 2021 districts." Doc. 99, p. 1 (quoting *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F. 3d 1299, 1325–26 (11th Cir. 2021)). But their surgical quotation disguises the fact that *Greater Birmingham Ministries* was not a racial gerrymandering or even a redistricting case, but an intentional discrimination case involving a statewide voter identification law which is inapposite here. *See* 992 F. 3d at 1318. Even if *Greater Birmingham Ministries* was about racial gerrymandering claims, it would reveal nothing about a circumstance in which Commissioners knew the cores of prior electoral districts were race-based and chose to retain them to the greatest extent possible anyway.

In *Greater Birmingham Ministries*, the court found that statements by a former legislator who did not sponsor the voter identification law about an unrelated bill were of limited value in evaluating the motives of current legislators in enacting a voter identification law. *Id.* at 1323. But the Court acknowledged that "earlier statements can sometimes provide evidence of discriminatory intent," particularly

where the statements are made by the bill sponsor about the bill challenged. *Id.* (citing *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, (11th Cir. 1987); *Carrollton Branch of NAACP*, 829 F.2d at 1552. Finally, even if core retention were a race-neutral criterion here (and it is not), Plaintiffs' expert has also presented a set of simulated maps (Simulation Set 5) testing whether core retention fully explains the racial composition of the Enacted Plan. Doc. 85-24, ¶¶ 19, 23–24 (McCartan Rep.); *cf. Alexander*, 144 S.Ct. at1240 (plaintiffs' failure to "submit an alternative map" that achieves the same "districting goals" as the lawmaker justifies an adverse inference against Plaintiffs' claims).

The Commission admits that these illustrative plans in Simulation Set 5 prioritize "population equality and core retention about the same as the Commission." Doc. 99, p. 7. These simulations *are* alternative maps, contrary to Defendant's assertion that "Plaintiffs' experts failed to put themselves in the shoes of the Commission" and that their "failure to consider core retention betrays a blinkered view of the redistricting process." Doc. 99, p. 14.[1] The illustrative plans in

[1] Defendant also mischaracterizes Mr. Cooper's testimony. He testified that his map drawing software made him "generally aware" of the racial makeup of VTDs that were over 30% Black, but he would not "get into the extreme detail of the precincts involved and the underlying Black versus white VAP." Doc 90-14, pp. 143–44. Mr. Cooper testified that Illustrative Plan E, which contained a third-majority Black district, was a direct response to Defendant's expert Barber's argument that Cooper's plans were not indicative of gerrymandering. Plan E shows that the Black population in Jefferson County is sufficiently numerous and geographically compact to constitute a majority in three of the five Commission districts. Doc. 89-6, ¶ 28 & n.13; Doc. 90-14, p. 35. He testified in his deposition that the plan's 66% core retention was on par for such

Simulation Set 5 show that the Commission could have achieved its population equality and core preservation objectives without packing Black voters into CD1 and cracking Black voters out of the "[third]-most-Black district of the enacted plan (CD3)." Doc. 85-24, ¶ 19. This is so even though, as Defendant acknowledges, there "are simply not that many ways in which a person could draw a map that retains the 2013 district populations as well as the enacted plan does." Doc. 89-2, p. 1 (Barber surrebuttal).

Simulation Set 5 proves that even prioritizing the Commission's purported goals, and, like Dr. Barber, considering only plans with two majority-Black districts,[2] the racial composition of the Enacted Plan's CDs 1 and 3 remain outliers in how many Black voters are packed into CD 1 and how Black voters are cracked out of CD3,[3] which evidences racial predominance. Doc. 85-24, pp. ¶ 48 ("[N]o other redistricting criteria, up to and including a hard constraint on the number of majority-Black districts. . . . can explain the enacted plan's statistically extreme packing of Black voters into CD1 and CD2, and its cracking of Black voters in the other districts, especially CD3."). Moreover, this demonstrates racial predominance

plans "because you generally have to make more dramatic changes" in plans drawn to comply with the Voting Rights Act. Doc. 90-14, pp. 35, 98.

[2] "[A]t the instruction of counsel," Dr. Barber only considered "simulations that produced at least two majority-Black districts due to VRA considerations." Doc. 85-14, p. 46 & n.40.

[3] Dr. McCartan's simulation ensemble labels "CD 3" as the district with the third highest Black population out of the five Commission Districts.

even assuming arguendo that the Commission's use of racial thresholds to move voters into and out of CDs 1 and 2 for over three decades was irrelevant. Doc. 85-24, ¶¶. 20, 45, tbl. 2 (in simulations that prioritized population equality and core retention about the same as the Commission, the "Enacted Plan [is] more extreme than" 90.72% of 120,000 simulations in CD 1, and 98.49% of 120,000 simulations in CD 3.).

It is also not accurate to argue, as the Commission does, that the Enacted Plan resembles "simulations [that] gave no consideration to race," Doc. 99, p. 7, since Defendant's expert explicitly *only* considered simulations with at least two majority Black Commission districts due to "VRA considerations." Doc. 85-14, p. 46 & n.40. As Dr. McCartan explained, only considering "simulated plans that meet certain racial criteria is equivalent to running a simulation analysis with the same racial criterion included as part of map-drawing" and "changes the population of plans that the simulations aim to represent, [which] introduces racial considerations into the analysis." Doc. 85-24, ¶¶ 3(a), 30. This is particularly true here because the Commission was not attempting to comply with, or even considering, the Voting Rights Act. Doc. 85-9, tp. 28:10-29:22 (Stephenson Dep.). Defendant has thus offered zero race-neutral evidence in support of its claim that the 2021 plan is not based on racial information since the sole expert they rely on was explicitly told to consider only plans with certain race-based information. Doc. 85-14, p. 46 & n.40.

And for the reasons articulated in McClure Plaintiffs' response in opposition to the Commission's summary judgment motion, *see* Doc. 101, pp. 20-23, this Court should exclude or disregard self-serving evidence the Commission has presented in the second-hand testimony of Defendant's expert, Dr. Barber, and the Chair of the Board of Registrars, Barry Stephenson, about the Commissioners' motivations in drawing specific district lines in the Enacted Plan. Doc. 101, pp. 20–24; *League of Women Voters of Fla., Inc. v. Lee,* No. 4:21CV186-MW/MAF, 2022 WL 610400 at *2 (N.D. Fla., Jan. 4, 2022) (granting motion to exclude evidence or testimony about legislative intentions, motivations and activities where legislators invoked legislative privilege as a shield to block depositions and withhold discovery as to their intentions and communications).

In sum, Defendant's argument that core retention explains the configuration of the Enacted Plan does not preclude a finding of racial predominance because core retention is not a race neutral redistricting criterion here. It is indisputable that the Commission sought to preserve, to the greatest extent possible, a racially gerrymandered plan without justification. Therefore, Plaintiffs are entitled to judgment as a matter of law.

CONCLUSION

For the foregoing reasons, this Court should GRANT McClure Plaintiffs' motion for summary judgment.

Dated: July 17, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2024, I served the foregoing document with the Clerk of Court using the Court's ECF system, thereby serving all counsel who have appeared in this case.

/s/ Kathryn C. Sadasivan
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