FILED
2025 Feb-18 PM 07:09
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

CARA MCCLURE, et al.,	)	
	)	
Plaintiffs,	)	
	)	**Case No.**
v.	)	**2:23-cv-00443-MMH**
	)	
JEFFERSON COUNTY COMMISSION,	)	
	)	
Defendant,	)	
ALEXIA ADDOH-KONDI, et al.,	)	
	)	
Plaintiffs,	)	
	)	**Case No.**
v.	)	**2:23-cv-00503-MMH**
	)	
JEFFERSON COUNTY COMMISSION,	)	
	)	
Defendant.	)	

ADDOH-KONDI PLAINTIFFS' REPLY TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Defendant Commission's proposed findings of fact and conclusions of law reprise the same arguments this Court rejected when it denied the cross-motions

for summary judgment. Memorandum Opinion and Order, Doc. 172.[1] For the most part, the Commission does not attempt to address this Court's reasons for rejecting its arguments, so it provides no basis for reconsidering them.

I. ARGUMENT

The Commission once again contends that its DOJ submissions "in earlier decades" are not direct or circumstantial evidence that the 1993, 2001, and 2013 plans were racially gerrymandered. (Doc. 185, p. 1) This Court has squarely rejected that argument:

> The historical evidence contained in the Section 5 preclearance materials from 1993, 2001, and 2013 provides direct evidence of the Commission's purpose in each of those redistricting cycles. In each, the Commission expressly sought to maintain two of its five single-member districts as black majority districts. With respect to the 2021 Enacted Plan, these letters are probative circumstantial evidence of racial predominance.

Doc. 172, pp. 53-54 (citing *Jacksonville Branch of NAACP v. City of Jacksonville*, No. 22-13544, 2022 WL 16754389, at *3 (11th Cir. Nov. 7, 2022)).

The Commission tries to distinguish *Jacksonville* on grounds that the "lawmakers" there testified to a racial target. (Doc. 185, ¶ 427, p. 123) But this Court found the Commission itself testified to 65% racial targets in its three previous DOJ submissions. "The Commission's 2013 submission to DOJ continued patterns set in

[1] Unless expressly noted otherwise, this brief refers to docket numbers for *Addoh-Kondi et alia v. Jefferson County Commission*, Case No.: 2:23-cv-00503-MHH.

1993 and 2001. (Doc. 85-6). The Commission stated: 'The 2013 plan has two black majority districts, just like the 1993 and 2001 plans. Each of these districts have [sic] majority black populations in excess of 65%, under the 2013, 2001, and 1993 plan.' (Doc. 85-6, p. 1082)." (Doc. 172, p. 53) Nor does the Commission try to distinguish the Supreme Court's affirmation that such representations in Voting Rights Act compliance proceedings are "[d]irect evidence ... that race played a role in the drawing of district lines. ... In such instances, if the State cannot satisfy strict scrutiny, direct evidence of this sort amounts to a confession of error." *Alexander v. South Carolina State Conference of the NAACP*, 602 U.S. 1, 8 (2024).

Faced with this Court's findings about the probative value of the DOJ submissions the Commission erects a straw man, contending Plaintiffs must prove that its attempts to comply with Section 5 of the Voting Rights Act in prior decades were unconstitutional. (Doc. 185, pp. 1-2, 152-53) This Court rejected that framing of the relevant legal standard, saying the question is not whether the earlier plans were unconstitutional, but whether the racial gerrymandering evidenced by their racial targets was narrowly tailored to satisfy the VRA, and whether perpetuating such racial predominance in 2021 was still justified by compliance with the VRA. (Doc. 172, pp. 40-42) Arguably, the Commission had good reason to believe that maintaining two majority-Black districts over 65% was required by Section 2 of the

VRA in 1985 and by Section 5 in 1993, 2001, and 2013. But the Commission did not submit its 2021 plan to strict scrutiny, so the only question is whether it perpetuates the racial predominance evident in the previous plans. (Doc. 172, pp. 44-45.)[2]

The Commission then repeats its argument that proof of racial gerrymandering "requires far more than simply reciting racial demographics...." (Doc. 185, p. 1) But the probative evidence of racial purpose provided by the DOJ submissions is based entirely on demographics, i.e., the Commission's admission that it was drawing district boundaries in ways that maintained two districts with Black majorities above 65%. This Court found that the history of these demographic targets "permits the inference that the Commission continued its decades-long practice in 2021." (Doc. 172, p. 56) And it found that the Commission's least-change approach is evidence that "the 2021 plan largely copied the plan the Commission adopted in 2013." (Doc. 172, p. 60) But because it thought these inferences were an

[2] The Commission argues at ¶¶ 508-509 (Doc. 185) that evidence showing the use of a racial target of 65 percent to create the two majority minority districts does not establish racial predominance under *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 192 (2017). This argument ignores that the Court's discussion of the permissible use of a racial target occurred in the context of satisfying the "strict scrutiny" test as applied to racial gerrymander cases. Contrary to the Commission's position, the Court in *Bethune-Hill* did not uphold the use of an express racial target without inquiring into whether there was a "strong basis in evidence in support of the race based" choice. *Id.* at 194. (*see*, J. Alito concurring, noting the use an express racial target to create a majority minority district requires application of strict scrutiny analysis.) In this case, it is undisputed that the Commission did not seek to establish a strong basis in evidence for maintaining both majority minority districts at or above 65 percent Black population.

inappropriate basis for entering summary judgment in favor of Plaintiffs, this Court set these cases for trial.

The trial testimony of Barry Stephenson and Dr. Michael Barber reaffirmed that the Commission maintained the 2013 plan to an extremely high degree, and the objective evidence provided by Anthony Fairfax showed how movement of predominantly Black population from Districts 3, 4, and 5 to Districts 1 and 2 was necessary to preserve the racial targets. Thus, the testimony and documents received at trial provide conclusive evidence that the 2021 plan perpetuated the racial predominance in the 2013 districts.

With respect to the testimony of Mr. Fairfax, the Defendant does not credibly challenge his testimony regarding how the 2021 enacted plan moved Black population into district 1 and 2 with the effect of maintaining the Black population at or above 65 percent. The Commission does not dispute that the 2021 plan added five times the amount of Black population than White into District 1. (Doc. 186, ¶ 167) For example, Mr. Fairfax credibly testified that the Commission split the East Pinson Valley Center in a way that moved a substantial Black population that used to be in District 4 into District 1. According to Fairfax, the population moved from District 4 to District 1 from East Pinson Valley was 86.18 percent Black. (Doc. 186, ¶ 168)

Likewise, the Enacted Plan also split the Dolomite West Field Community Center precinct by shifting voters out of District 3 into District 1. Again, the population moved into District 1 from District 3 as a result of this split was 86.60 percent Black and 8.18 percent White. (Doc. 186, ¶ 171) Mr. Fairfax credibly testified that with respect to the VTD splits a "pattern exist of only selecting portions that have this high significant black population." (1/13 Tr. p. 144:3-6)

Though the Commission speculates that these splits simply reflects a desire to add more of Birmingham into District 1 (including parts of Commissioner Scales former City council district), there is no evidence supporting this as a reason. Indeed, Commissioner Scales voted against this plan. Moreover, this post hoc explanation is undermined by the fact that there was no concern about keeping other predominately White municipalities in the same district and avoiding municipal splits. Indeed, Mr. Fairfax showed that the enacted 2021 plan had more census place (municipalities) splits (i.e. 25 census place splits) than existed in the pre-2021 plan (i.e. 22 census place splits). (1/13 Tr. 51; PX 131 Table 15, ¶ 102, pp. 47-48) In particular, the Commission did not hesitate to split the municipality of Center Point when it moved the entirety of the Center Point Community Center precinct (total population of 6,202 voters) with a Black population of 80.86 percent from District 4

into District 1. (Doc. 186, ¶ 172) [3]

Finally, the Commission criticizes Mr. Fairfax's testimony as simply focusing on the racial demographics of the populations shifted from the three majority White districts to the two majority Black districts. (Doc. 185, ¶ 29) But this criticism ignores the context of the specific decisions to add population to Districts 1 and 2. The racial composition of the populations moved into District 1 and 2 ensured that these districts would remain with Black populations at or above 65 percent. In other words, the racial composition of the population shifts strongly supports the conclusion that the 2021 enacted plan aimed at maintaining the racial demographics established in the 1985 consent decree when the majority minority districts were first created.[4]

Perversely, the Commission's response to this damning perpetuation evidence is to embrace it as a defense. It contends that invoking core retention immunizes its 2021 plan from a finding of racial predominance. It concedes that "[t]he racial

[3] The pattern Mr. Fairfax identified in the splitting of VTDs also finds expression in the inclusion of whole VTDs in district 1. For example, in addition to moving Center Point Community Center, the enacted plan also moved the Brookside Community Center precinct out of District 1 into District 3. (Doc. 186, ¶ 173)

[4] With respect to the demographics of the population shifted between district 2 and district 5, the Commission glosses over the fact that approximately two-thirds of the population moved out of district 5 (i.e. 4,787 out of 7,555) was actually moved into district 4 and not district 2. And that 80.74 percent of the population moved from District 5 to District 4 was White. (1/13 Tr. p. 43:6-9; PX 131 Table 11) Fairfax noted the peculiarity of this movement because District 4 was not underpopulated and the population moved increased District 4's percentage of White population.

demographics of districts did not materially change before and after redistricting." (Doc. 185, ¶ 426, p. 122) But this is merely a constitutionally permissible "side effect." *Id*.[5]

The Commission's core retention defense depends on its attempt radically to extend to all racial gerrymandering cases the "special challenges" plaintiffs must overcome when the drafters are "sincerely driven" by partisan goals that it professes publicly. *Alexander*, 602 U.S. at 10. The Commission argues that *Alexander* "distills the ground rules for *any* racial gerrymandering claim," (Doc. 185, p. 2), so that even here, where no partisan gerrymander defense has been alleged, (Doc. 172, p. 54), Plaintiffs must rule out every possible non-racial explanation for the way the districts are drawn. (Doc. 185, ¶ 421, p. 120) Including core retention, the factor *Alexander* criticized those plaintiffs' experts for failing to rule out. 602 U.S. at 7, 26-27, 33. This Court refused to extend *Alexander*'s holding beyond the partisan gerrymander context it explicitly addresses. To show that race was the predominant factor in a redistricting plan, this Court held, "a plaintiff must prove that the State 'subordinated' race-neutral districting criteria such as compactness, contiguity, and

[5] The "side effects" argument presumes there's no evidence that the criterion used in the redistricting process perpetuated a prior racial gerrymander. As the Supreme Court indicated in *Abbott v. Perez*, 585 U.S. 579, 604 (2018) use of a criterion that perpetuates a prior racial gerrymander may violate the Equal Protection Clause even though the criterion appears racially neutral.

core preservation to 'racial considerations.'" (Doc. 172, p. 44) (citing *Alexander*, 602 U.S. at 7 and quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

By urging this Court to extend *Alexander*'s "special challenges" to all gerrymandering cases, it is apparent that the Commission is hoping the partisan "*possibility*" standard will make it *impossible* for plaintiff voters ever to prove racial gerrymandering. Citizens separated by race would have to "rule out the possibility" that some non-racial reason explains the way districts are drawn. (Doc. 1985, ¶ 453, p. 131) The map makers could invoke legislative privilege and the presumption of good faith and demand that every racial gerrymander claim be dismissed. This approach is flatly inconsistent with the Supreme Court's teaching that in a racial predominance inquiry the focus is on the "the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality do not." *Bethune-Hill v. Va. State Bd of Elections*, 580 U.S. 178, 189-190 (2017)

Not only does the Supreme Court foreclose a defense based on possible (as opposed to actual) considerations, but the Commission's radical argument is a perversion of what *Alexander* holds and the important distinction the Supreme Court has made between partisan gerrymandering and racial gerrymandering. The Court has ruled that partisan gerrymandering is constitutional, not because it is good for

democracy,[6] but because the lack of judicially manageable standards make such claims nonjusticiable in federal court. "Thus, as far as the Federal Constitution is concerned, a legislature may pursue partisan ends when it engages in redistricting. By contrast, if a legislature gives race a predominant role in redistricting decisions, the resulting map is subjected to strict scrutiny and may be held unconstitutional." *Alexander*, 602 U.S. at 6.

Racial gerrymandering claims not only are justiciable, they invoke the duty of federal courts to enforce the core purpose of the Fourteenth Amendment. Chief Justice Roberts' majority opinion in the case that held partisan gerrymandering claims to be nonjusticiable emphasizes this distinction:

> "[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion." Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.

Rucho v. Common Cause, 588 U.S. 684, 709-10 (2019) (quoting *Shaw v. Reno*, 509

[6] "Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts." *Rucho*, 588 U.S. 684, 719 (2019).

U.S. 630, 650 (1993)). The Defendant Commission's refusal to acknowledge the constitutional importance of eliminating racial classifications is further evidence of its purpose to maintain – without compelling justification – the racial segregation created by its previous redistricting plans.

II. CONCLUSION

In the view of the *Addoh-Kondi* Plaintiffs, this case does not present a difficult question. The 1985 consent decree clearly established two majority minority districts with a racial target of 65 percent Black population. The Commission's subsequent Section 5 submissions establish by a preponderance of the evidence that the Commission redrew its districts every ten years with the purpose of maintaining the racial demographics of districts 1 and 2 at or above 65 percent Black population, regardless of the overall changes in the County's demographics. The adoption of a "least change" criterion and the clear objective of maintaining the racial demographics of districts 1, 2 and 3 perpetuated the Commission's race-based districts.

Rather than defend the maintenance of two majority minority districts as needed to comply with the VRA, the Commission invoked legislative privilege. The decision not to defend the districts as permissible race-based redistricting tacitly acknowledges that there is no strong basis in evidence for maintaining the creation

of two majority-minority districts with Black populations at or above 65 percent.

Indeed, the Commission's only expert offered no opinions on whether two majority-minority districts with Black population at or above 65 percent was needed to ensure that Black voters had an opportunity to elect their preferred candidates of choice. By contrast, all of the Plaintiffs' experts credibly testified that Black populations in excess of 65 percent as found in the 2021 enacted plan were not needed to ensure that the county's Black voters had an opportunity to elect their preferred candidate of choice. The Equal Protection clause does not permit the blind perpetuation of electoral districts that separated voters on the basis of race without a strong basis in evidence for continuing such districts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2025, a true and correct copy of the foregoing was served on all counsel of record through the Court's CM/ECF filing system.

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