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

CARA MCCLURE, et al.,

Plaintiffs,

v.

JEFFERSON COUNTY COMMISSION, et al.,

Defendants.

No. 2:23-cv-00443-MHH

(ORAL ARGUMENT REQUESTED)

ALEXIA ADDOH-KONDI, et al.,

Plaintiffs,

v.

JEFFERSON COUNTY COMMISSION, et al.,

Defendants,

No. 2:23-cv-00503-MHH

DEFENDANTS' MOTION TO DISMISS
THE MCCLURE PLAINTIFFS' COMPLAINT

Defendants hereby move to dismiss the McClure Plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction and under Rule 12(b)(6) for failure to state a claim. The parties conferred to the extent applicable under the Court's Initial Order, ECF 14.

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INTRODUCTION

In 1985, Voting Rights Act litigation challenging the Jefferson County Commission's system of at-large elections ended with a consent decree. That consent decree expanded the Commission and created five single-member electoral districts for the election of its five commissioners. The U.S. Department of Justice precleared the districts in the 1980s, in the 1990s, in the 2000s, and in the 2010s, pursuant to Section 5 of the Voting Rights Act. No Plaintiffs challenged the districts as unconstitutional then, but they do now. What began as districts drawn to resolve federal Voting Rights Act litigation are now castigated by Plaintiffs as a racial gerrymander. Contrary to that remarkable claim, the Equal Protection Clause means now what it has always meant. Past compliance with the Voting Rights Act is no sin. And Plaintiffs' complaint must be dismissed.

BACKGROUND

I. Jefferson County is Alabama's largest county by population.[1] For more than 50 years, its county commission comprised three members, elected in at-large elections. Letter to U.S. Dep't of Justice Civil Rights Div. ("County Letter") ¶3, ECF 1-2. In 1984, Plaintiffs sued the Commission and alleged that the system of at-large elections violated the Voting Rights Act. Compl. ¶¶13-14, ECF 1. The litigation

[1] "Jefferson County, Alabama," U.S. Census Bureau, https://www.census.gov/quickfacts/geo/chart/jeffersoncountyalabama/PST045222.

ended with a consent decree. *Id.*; *see* Consent Decree, *Taylor v. Jefferson Cnty. Comm'n*, No. 84-c-1730-s (N.D. Ala. Aug. 17, 1985), ECF 1-1.

The *Taylor* consent decree did away with the at-large elections and created five single-member districts. *See* Consent Decree, ECF 1-1. Districts 1 and 2 covered most of Birmingham. Roughly 66% of the population in both Districts 1 and 2 were Black individuals. County Letter ¶¶2, 8, ECF 1-2. The U.S. Department of Justice approved the change to the commission elections pursuant to Section 5 of the Voting Rights Act. *See generally id*; Voting Rights Act of 1965, §5, 79 Stat. 437, 439 (codified at 52 U.S.C. §10304). The Commission's submission for federal preclearance explained that the new five-district configuration created two majority-minority districts for Black voters to have an equal opportunity to elect commissioners of their choice. County Letter ¶¶2, 8, ECF 1-2. The Alabama Legislature later implemented the *Taylor* consent decree by statute, and the five single-member districts remain the manner by which commissioners are elected today. Ala. Code §45-37-72.

II. Every ten years, the Commission updates the district lines after the federal census to adjust for population changes since the last census. Ala. Code §11-3-1.1; *see Gray v. Sanders*, 372 U.S. 368, 379-81 (1963). For nearly thirty years, the U.S. Department of Justice precleared adjustments to district lines, pursuant to Section 5

of the Voting Rights Act. At the time, the Voting Rights Act did not permit Jefferson County or other parts of Alabama to make changes to voting procedures, including redistricting, without federal approval. *See Shelby Cnty. v. Holder*, 570 U.S. 529, 537 (2013). Obtaining Section 5 "'preclearance'" required the County to prove that the change did not have the "'purpose or the effect of denying or abridging the right to vote on account of race or color.'" *Id.* (quoting 79 Stat. 439).

In 2013, the Supreme Court concluded in *Shelby County* that the Voting Rights Act's "coverage formula" in Section 4(b) was unconstitutional as written. 570 U.S. at 557. At the time, section 4(b) decided when jurisdictions, including Alabama, would be subject to Section 5 preclearance. The Court concluded that the coverage formula was too focused "on decades-old data relevant to decades-old problems, rather than current data reflecting current needs." *Id.* at 538-39, 553. The Supreme Court concluded in *Shelby County* that Congress could not constitutionally single out States for preclearance based on such decades-old conditions. *See id.* at 553-54. But the Court "issue[d] no holding on § 5 itself, only the coverage formula." *Id.* at 557.

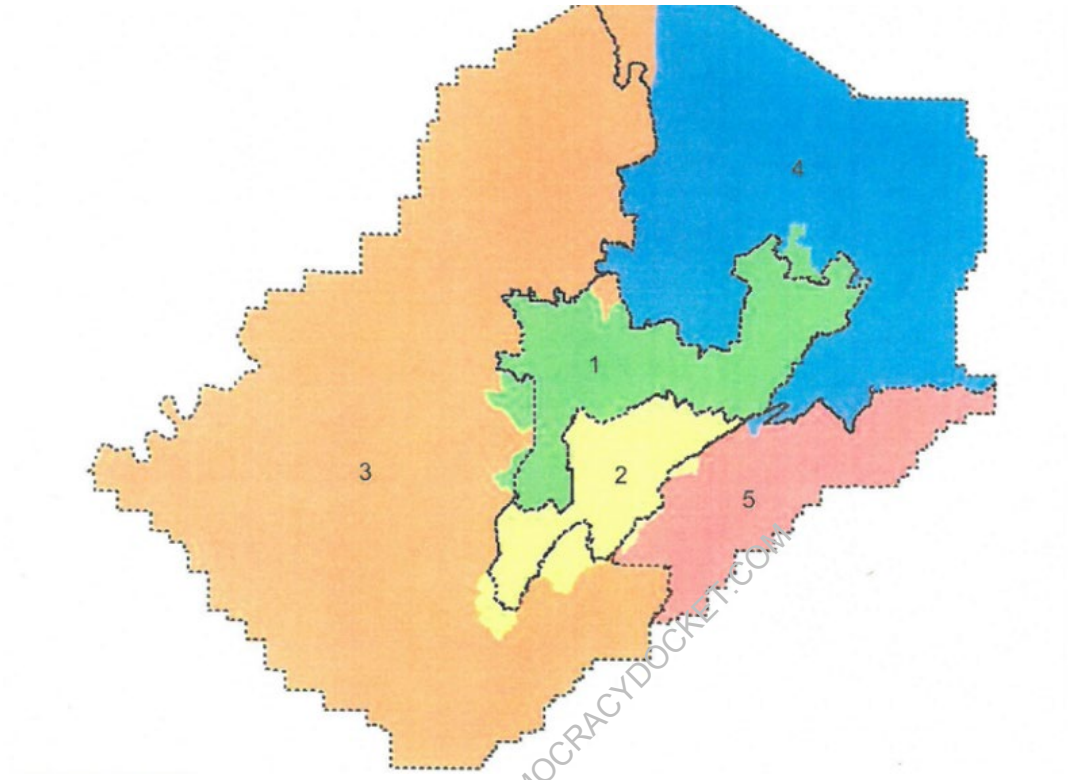
III. The Jefferson County Commission began its redistricting process anew after the 2020 census. Compl. ¶35, ECF 1. The census revealed a 2.2 percent population increase county-wide, but the growth was not uniform across the county.

Id. ¶¶35, 42. Shown below, Districts 1 and 2 each lost thousands of residents while the population of Districts 3, 4, and 5 grew since the 2010 census. *Id.* ¶42.

Between October and November 2021, the Commission considered three proposals to adjust for the population changes and made them available for public viewing. *Id.* ¶¶48-49. To bring the districts back to population equality, the Commission's three proposals abided by a +/- 1% rule, where the population of the districts were all within 1% of 134,944 people (or the county's total population divided across five districts, or "ideal" population). *Id.* ¶¶37, 41; *see* Commission Meeting, Jefferson County Commission at 18:44 (Nov. 4, 2021), https://jccal.new.swagit.com/videos/147366 (statement of Barry Stephenson). All three proposals adhered to existing district lines, adjusting only for population loss in some districts and growth in others over the decade. *See* Commission Meeting at 20:30, 21:50, 22:30 (showing three proposals' adherence to existing district lines); *see also, e.g.*, Compl. ¶22, ECF 1 (showing Enacted Plan's district lines against pre-2021 districts).

The Commission held a public hearing in November 2021, where members of the public and Commissioners spoke on the plans. *Id.* ¶50. By a 4-to-1 vote, the Commission adopted "Plan 1," which was Commissioner Tyson's proposal. *Id.* ¶¶54, 56. Commissioner Tyson represents District 2. *Id.* ¶54.

The adopted redistricting map, or the "Enacted Plan," is reproduced below:



Id. ¶22. The green, yellow, orange, blue, and red shaded areas above demarcate the 2021 Enacted Plan's lines. The dotted lines show the old boundaries from the existing districts, adopted after the 2010 census. As the comparison shows, the 2021 redistricting plan largely tracks the existing boundaries.

District 1: To equalize population, the Enacted Plan added more than 12,000 individuals to District 1 for a total population of 135,524 people, or only 0.43% above the ideal district population. *Id.* ¶¶41-42, 45. The complaint alleges that what it describes as District 1's "flattened 'Z' shape" is "attributable only to racial predominance." *Id.* ¶82. As shown in Plaintiffs' complaint, District 1's shape did not

materially change between 2011 and 2021. *Id.* ¶22. The shape goes back at least "two decades," according to Plaintiffs. *Id.* ¶76. The complaint also alleges that the Enacted Plan splits Irondale and Center Point between districts along racial lines. *Id.* ¶83. The complaint alleges that the resulting Black Voting Age Population (BVAP) in District 1 is 76.34%, which is less than the percentage of 2021 registered Black voters in District 1 before the line changes (79.51%). *Id.* ¶¶23, 83.[2] Based on these allegations, the complaint concludes that Black voters in District 1 are unconstitutionally "pack[ed]." *Id.* ¶22.

District 2: The Enacted Plan added more than 13,000 individuals to District 2 for a total population of 134,737 people, or only 0.15% below the ideal district population. *Id.* ¶¶41-42, 45. The complaint alleges that 41% of the individuals moved into District 2 are Black, *id.* ¶84, meaning most individuals moved into District 2 are not Black. The complaint alleges that "specific Black neighborhoods were selected for inclusion in District 2, splitting these neighborhoods and individuals between adjacent Districts 5 and 3 on the basis of race." *Id.* The

[2] Plaintiffs' complaint includes allegations about the total "any part Black population" and "2021 registered Black voter percentage" in each district before the line changes, but not allegations about the Black Voting-Age Population before the line changes. *See id.* ¶23 ("[T]he old post-2010 districts under the black dotted line, has an any part Black population of 78.27% in District 1, 66.18% in CD 2, 27.29% in CD 3, 28.45% in CD 4, and 14.15% in CD 5. The Hispanic population in the Enacted Plan is 4.9% in CD 1, 5.94% in CD 2, 3.56% in CD 3, 6.8% in CD 4, and 4.6% in CD 5. The 2021 registered Black voter percentage was 79.51% in CD 1, 70.88% in CD 2, 24.93% in CD 3, 26.09% in CD 4, and 10.09% in CD 5.").

complaint alleges that the resulting BVAP in District 2 is 64.11%, which is less than the percentage of 2021 registered Black voters in District 2 before the line changes (70.88%). *Id.* ¶¶23, 84. Based on these allegations, the complaint concludes that Black voters in District 1 are unconstitutionally "pack[ed]." *Id.* ¶22.

District 3: The Enacted Plan removed thousands of individuals from District 3 for a total population of 133,762 people, or only 0.88% below the ideal district population. *Id.* ¶¶41-42, 45. The complaint alleges that what it calls District 3's "contorted 'E' shape" is "attributable to racial predominance in the line drawing of the District." *Id.* ¶85. As shown in Plaintiffs' complaint, District 3's shape did not materially change between 2011 and 2021. *Id.* ¶22. The shape goes back at least "two decades," according to Plaintiffs. *Id.* ¶76. The complaint alleges that during the 2021 redistricting process, "selective portions of the residents of Homewood were moved out of District 3 based on their race, including the predominantly Black neighborhoods of Oxmoor and Rosedale," *id.* ¶85, but District 3, on the county's west side, is not contiguous with Homewood, *id.* ¶76; *see also* "Commission Districts 2021," Jefferson County, Alabama, https://perma.cc/9E4P-XVGR; "Jefferson County Precincts," Jefferson County, Alabama, https://perma.cc/U4EW-TZAR. The complaint alleges that the resulting BVAP in District 3 is 25.80%, which is slightly more than the 2021 registered Black voter percentage in District 3 before

the line changes (24.93%). *Id.* ¶¶23, 86. Based on these allegations, Plaintiffs conclude that the Enacted Plan unconstitutionally "cede[d] Black voters from District[] 3" or "strips Black voters from … district[] 3 … for the predominately racial motive of achieving certain racial targets in the Challenged Districts." *Id.* ¶¶22, 75.

District 4: The Enacted Plan moved thousands of individuals from District 4 to neighboring District 1, which needed to grow by more than 12,000 individuals after the 2020 census. *Id.* ¶¶41-42, 88. That helped repopulate District 1 but left District 4 underpopulated. *See id.* To equalize population in District 4, residents were moved from the north side of neighboring District 5, which was overpopulated. *Id.* ¶¶22, 41-42, 89. The complaint acknowledges that roughly 20 percent of individuals added to District 4 are non-white. *Id.* ¶88. Under the Enacted Plan, the resulting total population of District 4 was 136,078 people, or only 0.84% more than the ideal district population. *Id.* ¶¶41-42, 45. The complaint alleges that the resulting BVAP in District 4 is 25.74%, as compared to the 26.09% of registered Black voters in existing District 4 before the line changes. *Id.* ¶¶23, 88. Based on these allegations, the complaint concludes that the Enacted Plan "cede[d] Black voters" from District 4 and "render[ed] the Black communities in Districts 4 and 5 ineffectively low in population to achieve their shared interests." *Id.* ¶¶75, 88.

District 5: The Enacted Plan removed thousands of individuals from District 5 for a total population of 134,620 people, or only 0.24% less than the ideal district population. *Id*. ¶¶41-42, 45. The complaint alleges that the Commission moved that excess population to Districts 4 and 2, which share large borders with District 5. *Id.* ¶¶22, 89. Repeating allegations about District 3, the complaint alleges that "[t]he Enacted Plan splits Homewood between Districts 2 and 5, carving out the Black neighborhoods of Oxmoor and Rosedale to place these Black residents into District 2." *Id.* ¶89; *compare id.* ¶85 (alleging that Homewood residents "were moved out of District 3 based on their race" including "neighborhoods of Oxmoor and Rosedale," even though District 3 is not contiguous to Homewood). The complaint alleges that the resulting BVAP in District 5 is 13.99%, exceeding the percentage of registered Black voters before the line changes in District 5 (10.09%). *Id.* ¶¶23, 89.

After the Commission adopted these boundaries in November 2021, each of the five districts reelected its incumbent commissioner in November 2022. District 1 reelected Lashunda Scales. District 2 reelected Sheila Tyson, after she defeated a primary challenger.[3] District 3 reelected Jimmy Stephens, who defeated a third-party candidate in the general election.[4] District 4 reelected Joe Knight. And District 5

[3] *2022 Official Summary Report*, Jefferson County Ala. Probate Court (May 24, 2022), https://perma.cc/H7M5-BK4W.

[4] *Unofficial Election Night Results*, Jefferson County Ala. Board of Registrars (Nov. 8, 2022), https://perma.cc/399K-NPT3.

reelected Steve Ammons. Compl. at 7, 16, ¶¶1-5, 38, ECF 1. Commissioner Ammons has since vacated his seat, and a special election for District 5 will occur on July 18.[5]

III. Seventeen months after the Commission adopted new district lines in November 2021 and five months after the November 2022 elections, the McClure Plaintiffs sued. The complaint alleges all five districts violate the Fourteenth Amendment's Equal Protection Clause. According to the complaint, "[a]ll three plans" considered by the Commission "would have packed Black voters into supermajority-Black Commission Districts 1 and 2." *Id.* ¶46.

As for the Enacted Plan, Plaintiffs allege that "[r]ace predominated the packing of Districts 1 and 2, as well as the stripping of Black voters from Districts 3, 4, and 5." *Id.* ¶74. Plaintiffs allege that the Enacted Plan "inflate[d] the BVAP percentages of Districts 1 and 2" by "intentionally lower[ing] the BVAPs of adjacent majority white, Districts 3 and 4." *Id.* ¶72. But Plaintiffs' own allegations show the opposite: that the BVAP percentages of the Enacted Plan's Districts 1 and 2 were *less than* the percentage of registered Black voters in those existing districts before the line changes. *Compare id.* ¶23, *with id.* ¶¶83-84. And the BVAP percentages of

[5] Legal Notice, Judge of Probate James P. Naftel, II (June 8, 2023), https://perma.cc/GBA7-AUYD.

the Enacted Plan's Districts 3, 4, and 5 *exceeded* or were roughly the same as the percentage of registered Black voters in the existing districts before the line changes:

District	Existing District - 2021 Black Registered Voters	Enacted District - Black Voting Age Population
District 1	79.51%	76.34%
District 2	70.88%	64.11%
District 3	24.93%	25.80%
District 4	26.09%	25.74%
District 5	10.09%	13.99%

See id. ¶¶23, 83-84, 86, 88-89.

As for Plaintiffs' allegations about population deviation, *id.* ¶¶57, 71, Plaintiffs' alleged numbers show that each district was within 1% of the ideal population, and Districts 1 and 2 were two of the three districts closest to ideal population:

2021 Enacted Plan District	Total Persons	% Deviation From Ideal
District 1	135,524	+ 0.43%
District 2	134,737	- 0.15%
District 3	133,762	- 0.88%
District 4	136,078	+ 0.84%
District 5	134,620	- 0.24%

See id. ¶¶41, 45.

Elsewhere, Plaintiffs' complaint agrees that what it calls the Districts' "contorted" shapes are not new. The complaint alleges that "*for two decades*," the County's districts have been "contorted … to allow Districts 1 and 2 to cover Black

populations in central Birmingham while also reaching out and capturing more far-flung Black neighborhoods from the surrounding suburbs." *Id.* ¶76 (emphasis added). According to the complaint, "the Commission *re-enacted* contorted districts"—*i.e.*, followed the existing district lines. *Id.* ¶75 (emphasis added). The complaint concludes that this is sufficient evidence that race predominated without a compelling government interest. *Id.* ¶90.

Plaintiffs ask the Court to "enjoin the Defendants and their agents from using the racially gerrymandered map" and "[s]et an immediate and reasonable deadline for the Jefferson County Commission to adopt and enact a constitutional districting plan" that "ends the packing of Black people into supermajority-Black Commission Districts 1 and 2, and does not strip Black people from Commission Districts 3, 4, and 5." *Id.* at 34.

STANDARD OF REVIEW

At the motion-to-dismiss stage, the Court is limited to the Plaintiffs' pleadings, attached exhibits, materials incorporated by reference in the complaint, and matters of which the Court may take judicial notice. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007); *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000. The Court must accept as true all well-pleaded facts but not Plaintiffs' legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The

Court need not accept as true factual claims that are internally inconsistent. *SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, 32 F.4th 1347, 1362 (11th Cir. 2022); ("The specific allegations … govern over the general allegation[s] …."); *see also Battle v. Cent. State Hosp.*, 898 F.2d 126, 130 n.3 (11th Cir. 1990); *Johnson v. Skoog*, 5:14-cv-1217-RDP–JHE, 2015 WL 9948265, at *3 (N.D. Ala. Oct. 23, 2015). Rather, Plaintiffs must support each conclusion with well-pleaded factual allegations. *Iqbal*, 556 U.S. at 678. These facts must support a "reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Plaintiffs must do more than plead facts that are "'merely consistent with' a defendant's liability," because such pleadings "stop[] short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

ARGUMENT

Plaintiffs' claims must be dismissed against Defendants. First, the organizational Plaintiffs fail to adequately allege an Article III injury-in-fact for standing, without which Plaintiffs cannot challenge all five districts. Second, Plaintiffs cannot establish Article III-required redressability, and the individual

Commissioners are not properly named Defendants. Third, Plaintiffs' allegations do not plausibly allege that the Commission drew the 2021 districts based predominantly on race and should be dismissed for failure to state a claim upon which relief could be granted.

I. Plaintiffs Have Not Established Standing to Challenge Each District.

Plaintiffs must clearly allege each element of standing, including an injury-in-fact, traceable to the defendant, and redressable by a favorable decision. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016); *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018); *see also League of United Latin Am. Citizens v. Abbott*, 604 F. Supp. 3d 463, 482-83 (W.D. Tex. 2022) ("*LULAC*"). In the redistricting context, a plaintiff ordinarily cannot challenge a redistricting plan on a plan-wide basis and instead must establish standing to challenge a particular district. *See Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 262-63 (2015) (those who live in the "district attacked" have "standing to pursue a racial gerrymandering claim"); *Shaw v. Hunt*, 517 U.S. 899, 904 (1996) (*Shaw II*). Racial gerrymandering is "a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*." *Ala. Legis. Black Caucus*, 575 U.S. at 262-63 (emphasis in original). And Plaintiffs' standing is likewise "district specific." *Gill*, 138 S. Ct. at 1930; *see Ala. Legis. Black Caucus*, 575 U.S. at 263-64.

Applied here, GBM and NAACP have failed to establish standing to challenge all five districts. *See Arcia v. Fl. Sec'y of State*, 772 F.3d 1335, 1341-42 (11th Cir. 2014); *see, e.g.*, *LULAC*, 604 F. Supp. 3d at 483-85. Until the organizations establish associational standing to challenge each district,[6] GBM's and NAACP's allegations about their organizational missions are insufficient to establish standing to challenge any district, and the remaining individual Plaintiff has standing to challenge only District 2. *See* Compl. ¶11*, ECF 1.[7]

GBM asserts that it "provides emergency services to people in need and engages people to build a strong, supportive, engaged community." *Id.* ¶12*. GBM highlights its "political participation," including "actively oppos[ing] local and state laws, policies" and "communicat[ion]" with members to increase voter turnout. *Id.* ¶13*. Likewise, Metro-Birmingham NAACP and Alabama NAACP allege that they aim to "ensure the political, educational, social, and economic equality of all

[6] GBM and NAACP's allegations are also insufficient to establish associational standing. The complaint alleges generally that the associations have thousands of members without adequately specifying what member(s) they have in the challenged districts. *See* Compl. ¶¶14*, 17*, 19*, ECF 1; *Ga. Republican Party v. Sec. and Exch. Comm'n*, 888 F.3d 1198, 1203-04 (11th Cir. 2018); *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (cannot rely on "statistical probability"); *see, e.g.*, *LULAC*, 604 F. Supp. 3d at 483-85. During the parties' meet-and-confer over this motion, *see* Initial Order, ECF 14, the parties agreed that Plaintiffs would supplement these allegations with evidence of particular members in each of the challenged districts. Defendants therefore preserve the associational standing argument but will not press it in this motion in light of that agreement.

[7] Plaintiffs' complaint numbering restarts at page 7. Defendants use an asterisk for paragraphs preceding page 7.

persons," participate in lawsuits, and promote voter turnout. *Id.* ¶¶16*, 18*. Each organizational plaintiff alleges that the Enacted Plan harms their members "living and voting in unconstitutionally racially gerrymandered districts," *id.* ¶¶14*, 17*, 19*, but they do not allege harm to their respective missions or activities.

If Plaintiffs intend to proceed on a theory of organizational standing, then these allegations are insufficient. They must show that the organizations' activities have been impaired or that there has been a drain or diversion of resources. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Arcia*, 772 F.3d at 1341 (requiring showing that organizations must "divert personnel and time to educating potential voters on compliance with the laws" and otherwise "assisting voters"). Such allegations are absent from Plaintiffs' complaint. *See, e.g.*, *LULAC*, 604 F. Supp. 3d at 483.

II. The Named Defendants Cannot Redress Plaintiffs' Injury.

Plaintiffs' complaint requests both declaratory relief that the Enacted Plan is unconstitutional and injunctive relief to stop Defendants "from using the racially gerrymandered map." Compl. at 34, ECF 1. Plaintiffs name the Commission and the individual commissioners as Defendants.[8]

[8] When Defendants conferred with Plaintiffs, *see* Initial Order, ECF 14, Defendants requested that Plaintiffs substitute the commissioners for a county elections official. Plaintiffs stated without further explanation they would not do so.

A. Plaintiffs must show that their equal-protection injury is likely to be redressed by the judicial relief they seek. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). Plaintiffs cannot do so here because their complaint fails to name any county officials who administer elections. *See Haaland v. Brackeen*, 143 S. Ct. 1609, 1639 (2023). They instead named the individual commissioners, none of whom administers elections. *See* Ala. Code §17-1-3(b) (probate judge is the "chief elections official" of the county), §17-11-2 (establishing the circuit clerk as the absentee election manager), §17-9-1 (requiring the sheriff to preserve order at elections); *see also, e.g.*, *People First of Alabama v. Merrill*, 479 F. Supp. 3d 1200, 1210 (N.D. Ala. 2020) (finding voting laws traceable to and redressable by probate judges); *Jones v. Jefferson Cnty. Bd. of Edu.*, 2:19-cv-1821-MHH, 2019 WL 7500528, *1 (N.D. Ala. Dec. 16, 2019) (describing probate judge as responsible for the administration of the elections for the board of education). Because the commissioners are not carrying out elections, a prospective injunction against a commissioner to stop "using" it, in Plaintiffs words, does not redress Plaintiffs' alleged injury.

Injunctive relief against a commissioner cannot give plaintiffs the legally enforceable relief they seek from the future use of the redistricting plan in elections, any more than an injunction against a state legislator could give plaintiffs legally

enforceable relief from the future use of a statewide redistricting plan. *See Haaland*, 143 S. Ct. at 1639; *Lewis v. Gov. of Alabama*, 944 F.3d 1287, 1301 (11th Cir. 2019) (finding no redressability where the named official had "no enforcement role whatsoever"). To the extent Plaintiffs seek injunctive relief and something more than purely advisory declaratory relief, they must name those responsible for carrying out elections pursuant to the Enacted Plan, not those who enacted it. *See Scott v. Taylor*, 405 F.3d 1251, 1256-57 & n.8 (11th Cir. 2005). Short of that, the complaint must be dismissed for failure to establish Article III-required redressability. *Haaland*, 143 S. Ct. at 1639-40 ("It is a federal court's judgment, not its opinion, that remedies an injury; thus it is the judgment, not the opinion, that demonstrates redressability. The individual petitioners can hope for nothing more than an opinion, so they cannot satisfy Article III."),

B. The individual commissioners should also be dismissed as improperly named Defendants for an independent reason. Alabama law vests the Jefferson County Commission as a whole with responsibility for redistricting. Ala. Code §§11-3-1.1, 11-3-1.2; *see also Cook v. Cnty. of St. Clair*, 384 So.2d 1, 5 (Ala. 1980) (noting that a county acts through its "governing body, the county commission"). There is no reason for also naming the individual commissioners themselves in their official capacity. *See Smitherman v. Marshall Cnty. Comm'n*, 746 So.2d 1001, 1005 (Ala.

1999). No one Commissioner can unilaterally decide upon a redistricting plan, nor can any one commissioner decide whether elections are run pursuant to the Enacted Plan.

As for Plaintiffs' requested relief that this Court "require" the Commissioners to enact a new redistricting plan, Compl. at 34, federal courts do not "require" lawmakers to remedy constitutional violations with new laws. Federal courts *permit* lawmakers to replace redistricting plans if the courts conclude the existing plan is unconstitutional. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (op. of White, J.) (explaining that federal courts should "afford a reasonable opportunity for the legislature"—or here, the Commission—to adopt "a substitute [redistricting] measure rather than for the federal court to devise and order into effect its own plan"). But the nature of federal courts' remedial power is directed toward the officials executing the law, not those who wrote it. Federal courts in Section 1983 actions enjoin executive officials from enforcing unconstitutional laws; they do not compel lawmakers to rewrite them. *See Jacobson v. Florida Sec'y of State*, 974 F.3d 1236, 1255 (11th Cir. 2020) ("Our power is more limited: we may 'enjoin executive officials from taking steps to enforce a statute.'" (quoting Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 936 (2018))). There is thus no basis

for naming the individual commissioners as Defendants and they should be dismissed.

III. Plaintiffs Have Not Plausibly Alleged an Equal Protection Clause Violation.

In addition to the complaint's jurisdictional defects, the complaint also fails to state a plausible Equal Protection Clause claim. In any Equal Protection Clause case, a plaintiff must prove that the defendant intentionally discriminated, for it is that "*purposeful discrimination*" that "is 'the condition that offends the Constitution.'" *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (emphasis added) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Edu.*, 402 U.S. 1, 16 (1971)). Showing "a racially disproportionate impact" is not enough. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977). The guarantee of "equal laws" is distinct from a guarantee of "equal results." *Feeney*, 442 U.S. at 273.

A. Plaintiffs' Factual Allegations Do Not Plausibly Show that Race Predominated in the Creation of the 2021 Enacted Plan.

Plaintiffs "bear[] the burden of proving the race-based motive," which in this redistricting case means "'that race was the predominant factor motivating the [lawmakers'] decision to place a significant number of voters within or without a particular district.'" *Shaw II*, 517 U.S. at 905 (quoting *Miller v. Johnson*, 515 U.S.

900, 916 (1995)); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (noting that the challenger's burden of proof "takes on special significance in districting cases"). They must prove that a redistricting plan "*purposefully* distinguishes between voters on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (*Shaw I*) (emphasis added). That entails showing that the Commission "subordinated" traditional race-neutral districting principles (for example, "compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests") to instead sort voters on the basis of race. *Miller*, 515 U.S. at 916. A plaintiff can meet this burden with "'direct evidence' of legislative intent, 'circumstantial evidence of a district's shape and demographics,' or a mix of both." *Id.* But a plaintiff cannot simply rely on past discrimination as sufficient circumstantial evidence. *See Birmingham Ministries v. Sec'y of State*, 992 F.3d 1299, 1325 (11th Cir. 2021) (rejecting circumstantial evidence of "old, outdated intentions of previous generations" and "racist history" as sufficient to invalidate 2011 voting law). Nor is proof of "intent as awareness of consequences" or a "racially disproportionate impact" sufficient. *Feeney*, 442 U.S. at 279; *Arlington Heights*, 429 U.S. at 264-65; *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915-16 (2020) (plurality). Plaintiffs must prove the decisionmaker "selected or reaffirmed a particular course of action at least in part '*because of*,' not merely '*in*

spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279 (emphasis added).

Applied here, the complaint repeatedly concludes that race was the "predominate motive" in the creation of the 2021 Enacted Plan. Compl. ¶¶22, 74-75, 82, 84- 85, 87, 89, 90, 95, 105-06, ECF 1. But Plaintiffs' legal conclusion that "race predominated" is not entitled to deference at the motion-to-dismiss stage. *See Iqbal*, 556 U.S. at 678, 680-81; *see also Ga. Ass'n of Latino Elected Offs., Inc. v. Gwinnett Cnty. Bd. of Reg. & Elections*, 36 F.4th 1100, 1123 (11th Cir. 2022). No well-pleaded facts support that legal conclusion.

Based on Plaintiffs' own allegations, the "'obvious alternative explanation,'" *Iqbal*, 556 U.S. at 682, is that the Commission did the unremarkable and constitutional thing of following existing district lines. Plaintiffs acknowledge that the 2021 Enacted Plan used the "2010 map as a baseline." Compl. ¶65, ECF 1. Allegations that the Commission intentionally redistricted based on existing lines are not tantamount to allegations that the Commission intentionally redistricted based on race. *Feeney*, 442 U.S. at 279; *Arlington Heights*, 429 U.S. at 264-65.

1. Plaintiffs' allegations about the racial demographics of districts are not sufficient to state a plausible Equal Protection Clause. To begin, Plaintiffs' overarching theory about changed demographics contradicts the facts alleged.

Plaintiffs conclude that the Enacted Plan unconstitutionally "inflate[d]" the number of Black voters in Districts 1 and 2 and "intentionally lowered" the number of Black Voters in Districts 3, 4, and 5. Compl. ¶72; *see also id.* ¶¶83-89. Plaintiffs' own allegations contradict that narrative. *See SA Palm Beach, LLC*, 32 F.4th at 1362 ("[T]aking the allegations of a "complaint as true does not require us to ignore specific factual details of the pleading in favor of general or conclusory allegations[.]" (quoting *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1205-06 (11th Cir. 2007))). Detailed above, *supra*, pp. 10-11, Plaintiffs' allegations show that the percentage of Black voters in Districts 1 and 2 *decreased*, while the percentage of Black voters in Districts 3, 4, and 5 *increased* or remained roughly the same. *Compare* Compl. ¶23, ECF 1, *with id.* ¶¶83-84, 86, 88-89.

Nor is Plaintiffs' tabulation of voters moved in and out of districts for purposes of restoring population equality sufficient to state a claim that the Commission redistricted *because of* race. *See id.* ¶¶83-89. For example, the complaint acknowledges that most individuals moved into District 2, which Plaintiffs conclude is unconstitutionally packed, were *not* Black. *Id.* ¶84 (alleging 41% of individuals moved into District 2 were Black). And the complaint shows that District 2's BVAP decreased substantially. *Id.* ¶¶23, 84. Those allegations cannot be squared with the complaint's conclusory allegations that the Commission

intentionally split Homewood based on race to "pack[]" Black voters in District 2. *Id.* ¶¶85, 89. For another example, the complaint acknowledges that the percentage of Black voters in District 5 increased because most of the individuals moved out of District 5 were white residents, *id.* ¶¶88-89, which contradicts the complaint's conclusion that the Enacted Plan unconstitutionally "cede[d] Black voters" from District 5, *id.* ¶75.

Especially in light of these allegations, Plaintiffs cannot merely observe that some individuals of all races were moved in and out of districts and then label it "purposeful discrimination." Plaintiffs' allegations establish that voters of different races were moved in and out of districts to restore population equality. Plaintiffs contest the "racially disproportionate impact" of the resulting plan, but those are not allegations of intentional discrimination. *Arlington Heights*, 429 U.S. at 264-65; *Feeney*, 442 U.S. at 279; *Regents of the Univ. of Cal.*, 140 S. Ct. at 1915-16 (rejecting disparate impact claim because of an obvious neutral explanation); *Iqbal*, 556 U.S. at 681-82 (same).

2. That leaves Plaintiffs' overarching theory that the Commission violated the Equal Protection Clause by redistricting based on existing district lines, which Plaintiffs equate with redistricting based on race. For example, the complaint alleges that the "bizarre" and "serpentine" and "zig-zagging" shapes of districts is evidence

that race predominated. Compl. ¶¶ 81-82, ECF 1. And the complaint faults the Enacted Plan for splitting municipalities. *See, e.g.*, *id.* ¶¶83, 87-88.[9] But the complaint readily acknowledges that these features of the Enacted Plan are not new, and that the Enacted Plan used the past plans as its baseline. *Id.* ¶76; *see also id.* ¶65 ("[A]ll of the maps actually proposed by the Commission began with the 2010 map as a baseline."); *id.* ¶67 ("[T]he Commission continued to use the 2010 map as a baseline…."). And Plaintiffs' visual illustration of the districts shows it. *See id.* ¶22.

The Commission's intent to follow existing district lines is not the "'[d]iscriminatory purpose'" that a plausible Equal Protection Clause claim requires. *Feeney*, 442 U.S. at 279. At best, allegations that the Commission followed the existing district lines are allegations that the Commission redistricted with some *awareness* that the resulting racial demographics of the districts would resemble

[9] Plaintiffs' other allegations about municipal splits resist another "'obvious alternative explanation.'" *Iqbal*, 556 U.S. at 682. Plaintiffs fault the Enacted Plan for splitting large municipalities including Irondale (2020 population 13,497), Center Point (2020 population 16,406), Homewood (2020 population 26,414), and Birmingham (2020 population 200,733). Compl. ¶¶67, 83, 85, 87, 89, ECF 1. Those allegations ignore that keeping those large municipalities whole would have caused districts to be overpopulated or would have required substantial changes to remove other municipalities from longstanding district configurations. *See* "Irondale city, Alabama," U.S. Census Bureau, https://www.census.gov/quickfacts/irondalecityalabama; "Center Point city, Alabama," U.S. Census Bureau, https://www.census.gov/quickfacts/centerpointcityalabama; "Homewood city, Alabama," U.S. Census Bureau, https://www.census.gov/quickfacts/homewoodcityalabama; "Birmingham city, Alabama," U.S. Census Bureau, https://www.census.gov/quickfacts/birminghamcityalabama; *see* Compl. ¶44, ECF 1 (population figures).

those in past plans. *See id*. But awareness falls short of stating a claim that the Commission unconstitutionally redistricted "'because of'" race in November 2021. *Id*. "'Discriminatory purpose' … implies more than intent as volition or intent as to awareness of consequences." *Id.*

3. Nothing in the Constitution required the Commission to abandon the existing district lines, and thereby abandon continuity of representation from one redistricting cycle to the next. *See, e.g.*, *White v. Weiser*, 412 U.S. 783, 797 (1973) (district boundaries that follow past boundaries and thereby "minimize[] the number of contests between present incumbents does not in and of itself establish invidiousness" (internal quotations omitted)); *Vieth v. Jubelirer*, 541 U.S. 267, 359-60 (2004) (Breyer, J., dissenting) (discussing downsides of volatility when continuity of representation is diminished). Nor does the Constitution require regularity of a district's shape or minimization of municipal splits without some well-pleaded facts that those irregularities were the means of intentional racial discrimination. *Shaw I*, 509 U.S. at 646. Plaintiffs have none here.

To be sure, the government cannot "immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan," *Allen v. Milligan*, 143 S. Ct. 1487, 1505 (2023), but Plaintiffs cannot plausibly allege those are the circumstances here. The districts' origins are

the *Taylor* consent decree, which resolved Voting Rights Act litigation. *Supra*, pp. 2-3. In the decades thereafter, the U.S. Department of Justice repeatedly precleared the districts—confirmation that they did not have the "purpose" or "the effect of denying or abridging the right to vote on account of race or color." 52 U.S.C. §10304(a). It strains all credulity to contend that those past district lines, drawn in compliance with the Voting Rights Act, were "an old racially discriminatory plan," *Milligan*, 143 S. Ct. at 1505, that the Commission could not constitutionally follow this redistricting cycle.

But perhaps Plaintiffs do intend to press such a remarkable legal theory—that the *Taylor* consent decree and the Commission's past compliance with the Voting Rights Act was an unconstitutional "'original sin.'" *Abbott*, 138 S. Ct. at 2324. Dismissal would still be warranted for these three reasons: ***First,*** a complaint predicated on such a theory would be inexcusably delayed. *See Chestnut v. Merrill*, 377 F. Supp. 3d 1308, 1315 (N.D. Ala. 2019) (quoting *Venus Lines Agency Inc. v. CVG Int'l Am., Inc.*, 234 F.3d 1225, 1230 (11th Cir. 2000)); *see also, e.g.*, *Sanders v. Dooly Cnty.*, 245 F.3d 1289, 1290-91 (11th Cir. 2001) (concluding the unreasonable delay barred injunctive relief). Plaintiffs could have raised such an Equal Protection claim at any point after the *Taylor* consent decree, and at least before the Commission used the existing plans as its baseline this redistricting cycle.

See, e.g., *Chestnut*, 377 F. Supp. 3d at 1315. But here, Plaintiffs allowed decades of elections to pass and waited more than seventeen months *after* the Commission's most recent redistricting to challenge the Enacted Plan. ***Second***, the Supreme Court has never embraced what Plaintiffs would have to embrace here: that past compliance with Sections 2 and 5 of the Voting Rights Act is incompatible with compliance with the Constitution. *See Milligan*, 143 S. Ct. at 1516-17 (rejecting constitutional challenge); *Shelby Cnty.*, 570 U.S. at 557 (clarifying that constitutional holding applied to §4(b)'s coverage formula, not §5). ***Third***, even if the Commission's past compliance with the Voting Rights Act were unconstitutionally discriminatory, any such constitutional defect would not carry through to the present redistricting plan, which had the constitutional purpose of adjusting existing district lines for population equality. The Supreme Court in *Abbott* rejected that such "past discrimination" could "in the manner of original sin, condemn government action"—here, redistricting based on existing district lines—"that is not itself unlawful." 138 S. Ct. at 2324 (cleaned up); *see also, e.g.*, *Birmingham Ministries*, 992 F.3d at 1325; *Johnson v. Gov. of State of Fla.*, 405 F.3d 1214, 1223-24 (11th Cir. 2005).

The complaint's allegations do not plausibly allege the Commission acted "'because of'" race, versus "'because of'" prior district lines. *Feeney*, 442 U.S. at 279. The Court can dismiss Plaintiffs' claim on this ground.

B. The Constitution Did Not Require the Commission to Intentionally Remove Black Voters from Districts 1 and 2.

Lurking in Plaintiffs' complaint is the notion that the Commission had an affirmative obligation to redistrict based on race. Plaintiffs' complaint suggests that the Commission did not do *enough* to intentionally remove Black voters from Districts 1 and 2 and replace them with white voters. *See* Compl. ¶¶6*, 70, 96-97, ECF 1. Plaintiffs allege that "[t]he Commission did not need to *maintain* two supermajority Black districts," meaning the Commission should have taken race-based action to reduce these alleged supermajorities, and that the Commission should have addressed that "the Black communities in Districts 4 and 5 [are] ineffectively low in population." *Id.* ¶¶69, 88, 95 (emphasis added).

There is no constitutional basis for requiring the Commission to take that race-first approach to redistricting. *See Shaw I*, 509 U.S. at 641. The Constitution does not permit, let alone require, the Commission to redistrict in a way that maximizes majority-Black districts by intentionally diluting the existing Black population in Districts 1 and 2. *See Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994); *see also, e.g.*, *Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1249 (2022). Had the

Commission intentionally removed Black voters from Districts 1 and 2 to achieve Plaintiffs' preferred racial balance, or otherwise redistricted to hit new racial targets, those voters presumably would have had a claim against the Commission for *violating* the Equal Protection Clause. *See Cooper v. Harris*, 137 S. Ct. 1455, 1468 (2017). To the extent Plaintiffs' claims can be read as claims that the Commission did not redistrict on the basis of race *enough*, the Constitution requires no such thing. *See Rice v. Cayetano*, 528 U. S. 495, 517 (2000) ("'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'").

CONCLUSION

For these reasons, the Court should dismiss Plaintiffs' complaint for lack of jurisdiction and for failure to state a claim.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2023, 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.

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