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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**

MCCLURE, et al., *Plaintiffs*, v. JEFFERSON COUNTY COMMISSION, et al., *Defendants.*	Civil Case No. 2:23-cv-00443

MCLURE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65(a), Plaintiffs Cara McClure, Greater Birmingham Ministries on behalf of its members, and the Alabama State Conference of the NAACP and Metro-Birmingham Branch of the NAACP on behalf of their members, (collectively, "Plaintiffs") move for a preliminary injunction to halt further use of the November 4, 2021 redistricting plan ("Enacted Plan") adopted by the Jefferson County Commission ("Commission"), and to direct the implementation of a lawful redistricting plan that complies with traditional redistricting principles and does not unconstitutionally segregate voters based predominately based on race into two supermajority Black districts and three supermajority white districts.

Plaintiffs also seek relief in the form of special elections for the Jefferson County Commission to be held under a new, lawful redistricting plan in conjunction with the upcoming November 5, 2024 statewide general elections. Plaintiffs ask that it set its own deadlines for candidate filing and, if necessary, primary elections either in conjunction with statewide primaries in March 2024 or on a later date. Candidates *See League of United Latin Am. Citizens v. Perry*, No. CIV. 2:03-CV-354, 2006 WL 3069542, at *1 (E.D. Tex. Aug. 4, 2006) (three-judge court) (setting a special election to align with a November general election, but establishing dates separate from the state election calendar for a candidate filing deadline and primary election).

As grounds for their motion, Plaintiffs would show, based on the expert reports of William A. Cooper and Dr. Baodong Liu, the other exhibits attached to this motion, and as more fully set out in their Memorandum of Law supporting this motion, as follows:

1. There is a substantial likelihood that Plaintiffs will prevail on the merits. Both direct and circumstantial evidence establish that the Commission's predominant purpose in adopting the Enacted Plan was to segregate voters based on race in a manner that is not justified by a compelling state interest. *See Cooper v. Harris*, 137 S. Ct. 1455, 1463-64 (2017). But the Commission conducted no pre-enactment analysis to determine whether maintaining Districts 1 and 2 as supermajority Black districts was necessary to comply with Section 2 of the Voting

Rights Act. 52 U.S.C. 10301. Moreover, the Commission provides no justification for its race based assignment of voters to establish the three supermajority white districts.The Enacted Plan therefore cannot survive strict scrutiny, and violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as enforced through 42 U.S.C. § 1983.

2. Plaintiffs and their members will suffer irreparable harm unless the preliminary injunction is granted. *Jacksonville Branch of the NAACP v. City of Jacksonville,* No. 22-13544, 2022 WL 16754389, at *5 (11th Cir. Nov. 7, 2022).

3. The equities favor Plaintiffs. Absent an injunction, Plaintiffs and their members will be forced to vote in districts that have been racially gerrymandered in a manner not narrowly tailored to further a compelling governmental interest and that violates Plaintiffs' constitutional rights. By contrast, Defendants will suffer no cognizable harm from entry of an injunction and scheduling a special election. There are many months before the November 5, 2024 general elections; the Court can set dates well before then for candidate filing deadlines and primary elections. Further, an order requiring special elections for the Commission in conjunction with the November 2024 elections will minimize any administrative burdens that might otherwise result from holding special elections.

4. The public interest will be served by entry of a preliminary injunction. It is against the public interest for Jefferson County residents to be governed by

representatives elected under an unconstitutional, racially gerrymandered redistricting plan.

WHEREFORE, Plaintiffs request that the Court

A. Schedule an expedited evidentiary hearing on their motion for preliminary injunction, and thereafter enjoin future elections under the Enacted Plan;

B. Adopt a remedial plan under which special elections for the Jefferson County Commission may be held in conjunction with the regularly scheduled 2024 general elections; and

C. Grant such other and further relief that the Court deems just and proper.

Respectfully submitted,

DATED this 21st day of July, 2023

/s/ Deuel Ross
Deuel Ross*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th Street N.W. Ste. 600
Washington, DC 20005
(202) 682-1300
dross@naacpldf.org

Brenda Wright*
Brittany Carter*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
bwright@naacpldf.org
bcarter@naacpldf.org

/s/ Sidney M. Jackson
Sidney M. Jackson (ASB-1462-K40W)
Nicki Lawsen (ASB-2602-C00K)
WIGGINS CHILDS PANTAZIS FISHER & GOLDFARB, LLC
301 19th Street North
Birmingham, AL 35203
Phone: (205) 341-0498
sjackson@wigginschilds.com
nlawsen@wigginschilds.com

Attorneys for McClure Plaintiffs

**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system, which provides electronic notice of filing to all counsel of record.

This 21st day of July 2023.

/s/ Deuel Ross
COUNSEL FOR PLAINTIFFS

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JEFFERSON COUNTY COMMISSION, et al.,

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MCCLURE PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Cara McClure, Greater Birmingham Ministries on behalf of its members, and the Alabama State Conference of the NAACP and Metro-Birmingham Branch of the NAACP on behalf of their members (collectively, "Plaintiffs") seek a preliminary injunction to halt further use of the redistricting plan adopted by the Jefferson County Commission (the "Commission") in November 2021, and to direct the creation of a lawful plan that complies with traditional redistricting principles and does not intentionally pack Black voters based predominately on race into two supermajority Black commission districts. They also seek relief in the form of special elections to be held under the new, lawful redistricting plan in conjunction with the upcoming November 2024 statewide elections. As Plaintiffs demonstrate herein, all Commission Districts constitute racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as enforced through 42 U.S.C. § 1983.

BACKGROUND

I. History of the Challenged Districts

Before 1985, the Jefferson County Commission was composed of three commissioners who were elected at-large county-wide. No Black person was ever elected to the Commission under this at-large scheme. In 1984, a federal lawsuit challenged the at-large election system under Section 2 of the Voting Rights Act of 1965 (VRA). At the time, Black residents of Jefferson County comprised about 33%

of the total population. ECF No. 1-1, Exhibit A, at 2. In 1985, the VRA lawsuit was settled by consent decree. *See generally* Ex. A, Consent Decree, *Taylor v. Jefferson County Commission*, No. cv 84-c-1730-s (N.D. Ala., Aug. 17, 1985).

Beginning with the November 1986 general election, the Consent Decree expanded the Commission from three to five members, each elected from single-member districts. ECF No. 1-1 at 2. The Consent Decree established two majority-Black districts where Black voters would have an opportunity to elect candidates of choice to the Commission: District 1 had a Black population of 65.6%, and District 2 had a Black population of 66.8% based on the 1980 census. The Consent Decree does not require that the Black population percentages, nor the boundaries of the districts described therein, must remain unchanged, nor that Districts 1 and 2 must maintain Black supermajorities.

Since their creation in 1986, Districts 1 and 2 have always elected Black commissioners. In the last decade, Black candidates from these districts have won elections with over 65% of the vote.[1] No Black commissioners have ever been elected from Districts 3, 4, or 5.

[1] In 2010, Commissioners from Districts 1 and 2 (CD 1 and CD 2) won with 88.81% and 99.29% of the vote, respectively. In 2014, elected commissioners from CD 1 and CD 2 won with 99.76% and 93.51% of the vote, respectively. In 2018, elected commissioners from CD 1 and CD 2 won with 98.70% and 99.05% of the vote, respectively. In 2022, elected commissioners from CD 1 and CD 2 won with 98.78% and 98.99% of the vote, respectively. Ex. B, General Election Summary Reports 2010–2022, at 6, 9, 15, 19.

In recent years, courts have continued to find discrimination and racial polarization in the county and its municipalities. *See, e.g.*, *Jones v. Jefferson Cnty. Bd. of Educ.*, No. 2:19-CV-01821-MHH, 2019 WL 7500528, at *2–3 (N.D. Ala. Dec. 16, 2019); *Ala. State Conf. of the NAACP v. Pleasant Grove*, No. 2:18-cv-02056-LSC, 2019 WL 5172371, at *1–2 (N.D. Ala. Oct. 11, 2019).

II. 2021 Jefferson County Commission's Redistricting Process

The Commission is the chief governing body of Jefferson County, Alabama, and possesses a wide range of responsibilities that includes administering elections. The Commission's election administration duties include "creating election precincts, determining poll locations, securing election machines, and providing adequate funding for elections," appointing poll workers, and appointing the chair of the Board of Registrars. *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1122 (N.D. Ala 2020); *see, e.g.*, Ala. Code § 17-4-1; Ala. Code §§ 17-6-2(a)-(b), 17-6-4(a); Ala. Code § 17-8-1; Ala. Code § 17-11-2; Ala. Code §§ 17-16-1, 17-16-90; Ala. Code § 45-37-110.

After the release of 2020 census data, the Commission began its redistricting process in October 2021. *See* Ala. Code §§ 11-3-1.1, 45-37-72(b). The Commission worked with the Jefferson County Board of Registrars, including Chair Barry Stephenson and consultants Laura Foster and Laura Smith, to develop the proposed plans and Enacted Plan. On November 4, 2021, the Commission adopted a new map.

The statements of the Commissioners and Enacted Plan reveal that racial considerations predominated in the mapmaking process.

A. The Commission's Redistricting Criteria

On October 5, 2021, the Commission shared a PowerPoint presentation with the public that explained its redistricting criteria. Citing *Reynolds v. Sims,* 377 U.S. 533 (1964), the presentation on redistricting stated that the Commission was bound by federal law to ensure near exact population equality among the Districts, Ex. C, at 1, falling within plus or minus 1% population variance. *Id*. at 10.

Alabama law requires the governing body of each county to establish electoral districts composed of "contiguous, compact area[s] having clearly defined and clearly observable boundaries coinciding with visible features readily distinguishable on the ground such as designated highways, roads, streets, or rivers or be coterminous with a county boundary." Ala. Code § 17-6-2(b); Ex. C, at 8. Electoral districts should also conform to the most recent census tract and block map. Ala. Code § 17-6-2(a); *see* Ex. D, 14:5-14.

B. 2020 Census Data

According to the U.S. Census, the population of Jefferson County increased by 2.2%, from 658,466 in 2010 to 674,721 in 2020. The Black population from

280,083 in 2010 to 289,515 in 2020[2]— comprising 43% of the population; the white population decreased from 52% of the county population in 2010 to 48% in 2020. The overall minority population increased from 48.33% in 2010 to 51.94% in 2020. Ex. E, ¶16. This table shows the 2020 Census population breakdowns by race:

	Black	White	Hispanic
Total Population (%)	42.91	48.06	5.17
Voting Age Population (%)	41.46	50.42	4.29

Id. at fig. 2.

C. The October 5, 2021 Work Session

The Commission first discussed redistricting publicly at a Pre-Commission Work Session on October 5, 2021. All five Commissioners were in attendance. During the Work Session, Board of Registrars Chair Barry Stephenson gave a presentation on redistricting. *See* Ex. F, 26:25–27:7.. The presentation included an overview of the redistricting process under state and federal law, the Commission's criteria, 2020 census data, and three potential redistricting plans.

The Chair of the County Board of Registrars, Barry Stephenson, stated that pursuant to Alabama law, the redistricting plans would be drawn and adopted by the

[2] These numbers are based on defining "African-American" to refer to persons who are single-race Black or Any Part Black under Census classifications (*i.e.*, persons of two or more races and some part Black), including Hispanic Black. Ex. E, fig. 1. The numbers used by the Commission -- 281,326 BVAP in 2020 compared to 276,525 in 2010 – were slightly different because they were based on a different definition of Black population. Moreover, the overall minority population increased from 48% in 2010 to 52% in 2020, reflecting the combined growth in Black and Latino population. *Id*. ¶ 16.

Commission, not the Board of Registrars, County Managers, or County Attorneys. *Id*. at 27:19–28:6; *See* Ala. Code. § 11-3-1.1(a).

Board of Registrars Chair Stephenson further stated that, outside of their public meetings and work sessions, the Commissioners had viewed the three redistricting proposals and determined which parts of the county will be added to or removed from their respective districts. Ex. F, at 33:24–34:3.

The Commission's equal population target for each district, based on 2020 Census data, was 134,944, with a +/- 1% population variance. *Id*. at 28:12-19. Based on 2020 census data, the population of each district prior to redistricting was:

	Population
District 1	122,689
District 2	121,372
District 3	142,776
District 4	142,111
District 5	145,773

Board of Registrars Chair Stephenson listed the population variance and population adjustments to achieve the target population in each district:

	Population variance	Population adjustments to achieve target population
District 1	9.1% underpopulated	+ 12,255
District 2	10.1% underpopulated	+ 13,572
District 3	5.8% overpopulated	-7,832
District 4	5.3% overpopulated	-7,167
District 5	8.0% overpopulated	-10,829

According to the Commission, the population for each district under the three proposed plans would be:

	Plan 1	Plan 2	Plan 3
District 1	135,524	134,982	134,982
District 2	134,737	135,279	135,699
District 3	133,762	133,762	133,762
District 4	136,078	136,078	136,078
District 5	134,620	134,620	134,620

The 2021 registered Black voter percentage was 79.5% in CD 1, 73.90% in CD 2, 27.78% in CD 3, 29.85% in CD 4, and 10.30% in CD 5. Ex. E, Cooper Decl. Ex. D-2 2011 Benchmark 2020.

Commissioner Stephens stated that he believed the proposed plans were "uncontroversial" and that the Commission should be able to decide in one month, by early November 2021.

D. The November 4, 2021 Public Hearing & Adoption of Enacted Plan

On November 4, 2021, the Commission held the only public hearing on the proposed redistricting plans.[3] Commissioners spoke in explicitly racial terms about their desire to split cities, towns and precincts to maintain the Black voting age population of their respective districts. *See e.g.*, Ex. E, at 39:16–40:19 (discussing

[3] At the Oct. 7, 2021 meeting, the Commissioners voted to conduct a public hearing on Nov. 4, 2021, and to make the proposed maps available for public inspection for two weeks prior to the public hearing. *See* Ex. G, (authorizing public hearing and publication of redistricting maps); *see also* Ala. Code § 11-3-1.1(c).

conversations between Commissioners about moving areas with majority Black voters from Districts 3 and 5 into Districts 2 to maintain BVAPs). Commissioner Scales (CD1) suggested that, despite having the opportunity to vote for a plan that would result in equitable population distributions across all districts, the numeric differences between populations added to Commission Districts 1 and 2 in Plan 1, which was the plan supported by the rest of the Commissioners, had racial implications even though the Commissioners often spoke in partisan terms publicly:

> I heard about numbers and equity. Plan 1 actually gives District 1 787 more citizenry than it does for District 2. Plan 2 gives District 2 297 more than District 1. Plan 3 would give District 2 717 more than District 1. … On Plan 1, District 2 will have to take in a portion of Homewood. District 2 will also have to take in a portion of Ross Bridge and Lakeshore and Oxmoor Valley.

Ex. G, at 30:11-15 (statement of Lashunda Scales, Commissioner, CD 1).

Her next words took a twist toward racial implications. "We speak of Democratic versus Republican," she said. "You figure out what that looks like." *Id*. at 31:21-22 (statement of Lashunda Scales, Commissioner, CD 1).

In the same hearing, Commissioner Tyson (CD2) said "All I got was the Mountain View part which is hooked to Oxmoor. It's a new subdivision which is 89 percent Democratic and [B]lack. . . .I got the part that was behind the civic center and the part that's over there by the police department. 99 percent Democratic, 99 percent Black." *Id*. at 40:10-22 (statement of Sheila Tyson, Commissioner, CD 2).

The Commissioners could not have been looking at party registration when they were identifying which voters to add to their districts, but would have instead seen the race of voters in particular Census Blocks. The Alabama voter file does not contain voter registration by party, because voters do not list or register by political party when registering to vote. The file does include the race/ethnicity of the voters in the voter file.[4]

Ultimately, Commissioners Ammons, Knight, Tyson, and Stephens voted in favor of adopting Plan 1, while Commissioner Scales voted against it. Plan 1 thus became the Enacted Plan. *See* Ex. H, Jefferson County Commission, Resolution 2021-929 (Nov. 4, 2021). The Enacted plan had a population deviation of 1.73%, which exceeded the target of +/-1%.

The racial demographics under the Enacted Plan are:

	Black (%)	Hispanic (%)	White (%)
District 1	78.27	4.01	15.66
District 2	66.18	5.94	24.64
District 3	27.29	3.56	64.21
District 4	28.45	6.80	61.05
District 5	14.15	4.60	74.92

Ex. E, Ex. C-2_Jefferson_County_AL 2021_Plan (by Latino, the report refers to Hispanic as is typically understood by US Census).

[4] Alabama keeps a "computerized statewide voter registration list" containing "the name and registration information of every legally registered voter in the state." Id. § 17-4-33(a), (a)(9). This information includes "the name, address, ... voting location," and "voting history of each registered voter." Ala. Code § 17-4-33(a)(2), (4).

There is no record of the Commission conducting a racial-polarization analysis for any of the Commission districts, nor an inquiry into whether, without including large supermajorities of Black voters in Districts 1 and 2, the Commission could be liable under VRA § 2.

III. The Challenged Districts

Under the Enacted Plan, the Black Voting Age Populations (BVAPs) of each district are 76.34% for District 1 and 64.11% for District 2, with the Black VAP in Districts 3, 4 and 5 being 25.80%, 25.74%, and 13.99%, respectively. Ex. E, fig. 4. The BVAPs in the Enacted Plan are similar to the BVAP data from the 2010 redistricting plan. Ex. E, *compare* Ex. C-2 (Population Summary Report of 2021 Adopted Plan), with Ex. D-2 (2010s Benchmark Plan – 2020 Data).

ARGUMENTTo obtain a preliminary injunction, Plaintiffs must show: (1) a substantial likelihood of success on the merits; (2) irreparable injury absent an injunction; (3) that the equities favor Plaintiffs; and (4) that the injunction favors the public interest. *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005). Because all criteria are met here, the Court should issue an injunction.

IV. Plaintiffs are Likely to Prevail on the Merits.

A. The Enacted Plan Is a Racial Gerrymander.

Racial gerrymandering claims require a two-step inquiry. First, Plaintiffs must prove that race was the predominant factor in placing "a significant number of voters within or without a particular district." *Cooper v. Harris*, 137 S. Ct. 1455, 146364 (2017) (citation omitted). Plaintiffs may rely on "'direct evidence' of legislative intent, 'circumstantial evidence of a district's shape and demographics,' or a mix of both." *Id*. at 1464. Second, if race did predominate, strict scrutiny applies, and Defendants bear the burden of proving that the use of race was "narrowly tailored" to satisfy a "compelling interest," such as compliance with the VRA. *Id*.

This inquiry demands a district-specific analysis, though county-wide evidence may be relevant. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 262–63 (2015) ("*ALBC*"). Here, the evidence shows that race predominated in the Commission's decision to place a significant number of Black voters within and without the districts created by the Enacted Plan. Defendants cannot show that the packing and cracking of Black voters in these districts was narrowly tailored to satisfy the VRA or another compelling interest.

1. Race Predominated in Drawing the Challenged Districts.

Race predominates where the legislature "'subordinated traditional race-neutral districting principles . . . to racial considerations.'" *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017). "Race may predominate even when a reapportionment plan respects traditional principles." *Id*. at 798. The possibility "that

other considerations may have played a role in . . . redistricting does not mean that race did not predominate." *Clark v. Putnam Cty.*, 293 F.3d 1261, 1270 (11th Cir. 2002). Plaintiffs need only show the intent to "segregate voters on the basis of race." *See Shaw v. Reno*, 509 U.S. 630, 669 (1993) ("*Shaw I*"). A government's decision to segregate voters based on race is subject to strict scrutiny even if it is motivated by seemingly "benign" redistricting criteria, *id.* at 653, such as a mistaken interpretation of the VRA, *Cooper*, 137 S. Ct. at 1472, the desire to retain the cores of prior districts, *North Carolina v. Covington*, 138 S. Ct. 2548, 2551 (2018), or an attempt to protect incumbents, *Clark*, 293 F.3d at 1271–72. The one-person-one-vote rule is not a factor to consider in this analysis; it is a background rule against which redistricting takes place. *ALBC*, 575 U.S. at 273.

Race-conscious redistricting is not *per se* unconstitutional, *Covington*, 138 S. Ct. at 2554 (citing *Miller v. Johnson*, 515 U.S. 900, 916 (1995)), nor does every attempt to draw a majority-minority district invite strict scrutiny, *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality). Rather, a judicial determination of whether race predominated in a specific district requires a "holistic analysis." *Bethune-Hill*, 137 S. Ct. at 800. This "inquiry concerns 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 did not." *Id.* at 799. Statements from lawmakers who "expressly adopted and applied a policy of prioritizing mechanical racial targets"

can offer direct evidence that "race motivated the drawing of particular lines." *ALBC*, 135 S. Ct. at 1267; *see also Cooper*, 137 S. Ct. at 1468. In addition, "evidence concerning the shape and demographics" of the districts can provide sufficient circumstantial evidence that "the districts unconstitutionally sort voters on the basis of race." *Covington*, 138 S. Ct. at 2553.

Here, direct and circumstantial evidence overwhelmingly proves that race was the predominant factor motivating the design of the Enacted Plan.

With respect to direct evidence of racial predominance, the Commission deliberately sought to maintain Districts 1 and 2 as packed majority-Black districts, without narrowly tailoring the design and demographics of the districts to comply with VRA § 2, 52 U.S.C. § 10301. *See ALBC*, 135 S. Ct. at 1273.

It is undisputed that, in 1984, a consent decree to resolve litigation under the VRA resulted in five single-member districts for the Jefferson County Commission, with the express purpose of creating two districts with over 65% BVAP. *See* Ex. A. Defendants admit that, in drawing the Enacted Plan, the Commission was intent on following existing district lines. *See* Defs.' Mot. to Dismiss, ECF No. 19 at 5 (all three proposals considered by the Commission "adhered to existing district lines"); *see also id*. at 25. Maintaining the existing district lines perpetuated packed, supermajority Black districts that unnecessarily segregate voters by race, with Districts 1 and 2 having BVAPs of 76.34% and 64.11%, respectively. Nothing in the

Consent Decree, the VRA, nor state law required Defendants to maintain districts with such large BVAP supermajorities.

Indeed, the Commission's intent to maintain existing district lines, rather than providing a defense to the Commission's liability for racial gerrymandering, is instead evidence that race predominated in drawing the Enacted Plan. Even Section 5 of the Voting Rights Act, which, prior to *Shelby County v. Holder*, 570 U.S. 529 (2013), prohibited retrogression in minority voting strength, did not require "maintaining the same population percentages in majority-minority districts as in the prior plan," *ALBC*, 135 S. Ct. at 1272–73. It was "satisfied if minority voters retain the ability to elect their preferred candidates." *Id*. at 1273; *see also Covington*, 138 S. Ct. at 2551 (affirming district court's decision to enjoin districts that "retain[ed] the core shape" of previously racially gerrymandered districts, because the redrawn districts continued to bear the hallmarks of racial predominance). As the district court in *Covington* explained, if the legislature "*chooses* to rely on redistricting criteria highly correlated with race, like preserving the 'cores' of unconstitutional districts," it cannot leapfrog the conclusion that race predominated. *Covington v. North Carolina*, No. 1:15 CV399, 2018 WL 604732, at *4 (M.D.N.C. Jan. 26, 2018) (emphasis in original); *cf. also Allen v. Milligan*, 143 S. Ct. 1487, 1505 (2023) (concluding that a State's adherence to the core of a previous districting plan is not a defense to a VRA § 2 claim).

The Commission's desire to maintain the cores of the existing districts shows a racially predominant motive because the Commissioners did not merely "opt[] to preserve district cores, but rather . . . their intent was . . . to maintain the race-based lines created in the previous redistricting cycle." *Jacksonville Branch of NAACP v. Jacksonville*, No. 22-13544, 2022 WL 16754389, at *3 (11th Cir. Nov. 7, 2022). Circumstantial evidence also establishes that Districts 1 and 2 were drawn in a way that used race to pack Black voters. As compared to other potential maps, the Enacted Plan splits municipalities and VTDs (precincts) in a way only explainable by Defendants' racially predominant packing. Ex. E, Cooper Decl.¶¶19-22. The specific decision to split these municipalities and/or VTDs provides strong evidence that race predominated in drawing the Enacted Plan. *See, e.g.*, *Cooper*, 137 S. Ct. at 1477–78 (relying on expert testimony about the race of the voters moved in redistricting); *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 148 (E.D. Va. 2018) (three-judge court) ("*Bethune-Hill II*") (similar).

Moreover, the predominance of race in drawing Districts 1 and 2 naturally led to some voters being moved to or from Districts 3, 4, and 5 predominately because of race. *See Bethune-Hill v. Va. State Bd. of Elections*, 368 F. Supp. 3d 872, 879 (E.D. Va. 2019) ("*Bethune-Hill III*"). The Enacted Plan preserves the core of prior plans in which the BVAP of these districts was kept at less than 30%. Ex. F, Cooper

Decl, Ex. D-2. Yet, expert analysis reveals that the low BVAPs in these districts do not flow from neutral redistricting rules, but rather race-based choices. *Id*. ¶¶ 27-43.

Without the predominate use of race in the Enacted Plan, a different plan premised on traditional redistricting criteria, such as avoiding splits of precincts, cities, towns, municipalities, and communities of interest, would more naturally place additional Black voters in districts outside of Districts 1 and 2. *Id*. ¶¶ 27-41. Only the predominate use of race to divide majority-Black cities and precincts to maintain supermajority Black districts with BVAPs above 60% explains the Enacted Plan's design of Districts 1 and 2. Likewise, the Commission's desire to maintain supermajority white Districts 3, 4, and 5 helps to explain the splits of precincts and towns in those districts to artificially inflate the white populations. This is clear evidence of racial predominance. *See S.C. State Conf. of NAACP v. Alexander*, No. 3:21-cv-03302-MGL-TJH-RMG, __F.Supp.3d__, 2023 WL 118775, at *8 (D. S.C. Jan. 6, 2023), *prob. juris. noted*, 143 S. Ct. 2456 (May 15, 2023) (moving VTDs with high black populations out of particular districts was evidence of racial gerrymandering).

In earlier decades, a threshold of 65% Black VAP was thought necessary as an across-the-board threshold to enable Black voters to elect candidates of their choice. *See, e.g., Smith v. Clinton*, 687 F. Supp. 1361, 1362–63 (E.D. Ark.) (three-judge court), *aff'd,* 488 U.S. 988 (1988); *United Jewish Orgs. of Williamsburgh, Inc.*

v. Carey, 430 U.S. 144, 164 (1977). The consent decree that first established the majority Black districts for the Commission in 1985, Ex. A, was no doubt based on this understanding. But the Commission could not lawfully assume that a 65% percent threshold was still necessary today. *ALBC,* 135 S. Ct. at 1272–73.

2. The Challenged Districts Are Not Narrowly Tailored.

Because Plaintiffs have demonstrated that race predominated in the challenged districts, strict scrutiny applies, and Defendants bear the burden of proving that the racial predominance was narrowly tailored to serve a compelling interest. *Cooper*, 137 S. Ct. at 1464. "[O]ne compelling interest is complying with operative provisions of the Voting Rights Act of 1965." *Id.* There is a "significant state interest in eradicating the effects of past racial discrimination." *Shaw I*, 509 U.S. at 656. But "race-based" districting is "narrowly tailored" to advance the VRA only when the jurisdiction has "good reasons" for drawing the *specific* majority-Black districts at issue. *ALBC*, 135 S. Ct. at 1274. A jurisdiction will have "good reasons" if it conducts a "pre-enactment analysis with justifiable conclusions" of what the VRA demands *before* placing a significant number of minorities into a district. *Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018).

Here, Plaintiffs accept that the Commission had good reasons to draw some majority-Black districts, but they contend that the Commission lacked "good reason" for drawing the *specific* packed versions of Districts 1 and 2 in the Enacted Plan.

During its 2021 redistricting process, the Commission never conducted the pre-enactment analysis necessary to justify its predominant use of race to place supermajorities of Black voters into Districts 1 and 2 while keeping Black voters out of Districts 3, 4, and 5 in a manner that prevented those districts from exceeding a 30% threshold. Rather, the Commission kept District 1 and 2's BVAP at 76.34% and 64.11%, respectively, even though these percentages were well in excess of the BVAP needed to allow Black voters to elect candidates of choice in those districts. Exh. E, Cooper Decl., fig. 4; Ex. I, Expert Report of Baodong Liu, Ph.D. (July 21, 2023) ("Liu Report"), Tbl. 3 (showing that Black voters' support for Black candidates in Districts 1 and 2 was 16-17 percentage points higher than needed for the Black-preferred candidate to win). In other words, the Commission kept the BVAP percentage of Districts 1 and 2 static even though the VRA "d[id] not require a covered jurisdiction to maintain a particular numerical minority percentage" in a district. *ALBC*, 135 S. Ct. at 1272.

Rather, the VRA requires redistricting bodies to ask: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" *Id*. at 1274. The supermajority BVAPs in Districts 1 and 2 do not result from any pre-enactment effort by the Commission to answer that question or otherwise narrowly tailor the districts by determining whether their BVAP is too high or too low to maintain those districts as effective

districts for Black voters. In fact, expert analysis confirms that the BVAP percentages in Districts 1 and 2 are far higher than needed to allow the election of Black-preferred candidates. Ex. I, Liu Report, Tbl 3.

While the Court does "not insist that a legislature guess precisely what percentage" BVAP is needed, a state must have a "strong basis in evidence" for the BVAP of a challenged district. *ALBC*, 135 S. Ct. at 1273–74. Thus, the Enacted Plan's use of race to maintain high BVAPs in Districts 1 and 2, which have "long elected to office black voters' preferred candidate," cannot be narrowly tailored absent a pre-enactment effort to explain "just why" the Enacted Plan needs to use race "predominately to maintain" its elevated BVAP. *Id.* at 1274. But Defendants conducted no pre-enactment analysis at all. "[A] legislature undertaking a redistricting must assess whether the new districts it contemplates (not the old ones it sheds) conform to the VRA's requirements." *Cooper*, 137 S. Ct. at 1471.

Had the Commission conducted racial polarization or elections analyses, it would have seen that the high BVAPs in Districts 1 and 2 were not narrowly tailored to comply with the VRA. Dr. Liu determined that Districts 1 and 2 would remain effective with a BVAP as low as 54% in District 1 and 55% in District 2., despite the existence of significant racial bloc voting. Ex. I, Liu Report, Tbl.2. The Commission's failure to conduct proper analyses led it to rely on a racial target and needlessly pack Black voters in just those two districts.

"[I]n the absence of any investigation into what § 2 might require," Defendants "lack[ ] any basis to argue that [they] had good reasons to believe § 2 of the VRA required . . . race-based boundaries." *Navajo Nation v. San Juan Cnty.*, 929 F.3d 1270, 1289 (10th Cir. 2019); *see also Abbott*, 138 S. Ct. at 2334 (the state lacked a "good reason" where it failed to analyze racially polarized voting or conduct more than cursory reviews of election results); *Cooper*, 137 S. Ct. at 1490 & n.5 (statewide polarization analyses were insufficient to justify the BVAPs of specific districts).

As to Districts 4, 5, and 6, Defendants have not cited and cannot cite the VRA or any other compelling government interest that justifies their predominant use of race to segregate white voters in these districts and the Commission's cracking of Black voters to accomplish this goal. *Cf. League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2008) (*LULAC*) (concluding that the state's cracking of cohesive minority voters in a manner that prevented the formation of an additional effective minority district violated Section 2 and "could give rise to an equal protection violation"). As such, none of the five challenged districts survive strict scrutiny and all should be enjoined as racial gerrymanders.

B. Plaintiffs Have Standing to Challenge the Enacted Plan in all Five Districts.

The Alabama NAACP, GBM, and Metro-Birmingham NAACP each have associational and organizational standing. A group establishes associational standing when: "a) its members would otherwise have [the] standing to sue in their own right;

b) the interest[] it seeks to protect are germane to the organization's purpose;[] c) neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). "Where, as here, an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the organization operates." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2158 (2023). And if there is one plaintiff "who has demonstrated standing to assert these rights as his own," the court "need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977).

Here, all three organizations have members who are registered voters who reside in the racially gerrymandered Districts 1, 2, 3, and 4, and two of the organizations have members who are registered voters who reside in all five racially gerrymandered districts. Plaintiffs, therefore, have adequately established "standing to challenge the legislature's action." *United States v. Hays*, 515 U.S. 737, 744–45 (1995); *see* Ex. J, Douglas Decl. ¶ 5;Ex. K, Simelton Decl. ¶ 6; Ex. L, Crosby Decl. ¶ 6. This lawsuit is also germane to these organizations' goals of eliminating racial discrimination in voting. *See* Ex. J, Douglas Decl. ¶¶ 3-4; Ex. K, Simelton Decl. ¶¶ 2-4; Ex. L, Crosby Decl. ¶ 4. And the constitutional claims asserted and relief

requested do not require the participation of individual members. *See Greater Birmingham Ministries v. Sec'y of State for State*, 992 F.3d 1299, 1316 (11th Cir. 2021) (holding that GBM and the Alabama NAACP had standing to challenge allegedly discriminatory voting laws). The Enacted Plan requires Plaintiffs and their members to vote in unconstitutional districts drawn by the Commission in a manner where race was the predominant motive, without a compelling state interest in drawing the challenged districts--this is sufficient to establish Plaintiffs' standing to challenge each district. *See ALBC*, 135 S. Ct. at 1269–70 (concluding that an organization can establish standing in a racial gerrymandering lawsuit by identifying members who are voters that live in the challenged districts).

V. The Threat of Irreparable Harm and the Equities Favor Relief in the Form of Special Elections.

Any loss of constitutional rights is presumed to be an irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Because race was the Commission's predominant motive in drawing the challenged districts, but was not used in a narrowly tailored manner, Plaintiffs still suffer from the state's "offensive and demeaning" conduct, *Miller*, 515 U.S.at 912, which "bears an uncomfortable resemblance to political apartheid." *Shaw I*, 509 U.S. at 647. "[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action

to [e]nsure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). This is not an unusual case.

Rather, the equities favor Plaintiffs because of their particularly strong interest in exercising their right to vote free from a racially discriminatory districting scheme that dilutes their vote. *See, e.g., LULAC*, 548 U.S. at 440–41 (striking down a congressional plan as violative of Section 2). Racial discrimination is "odious to a free people whose institutions are founded upon the doctrine of equality." *Shaw I*, 509 U.S. at 643 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

Because Plaintiffs are very likely to succeed on their racial gerrymandering claim, the remedy is clear: Defendants must adopt a plan that does not pack Black voters into just two supermajority Black districts, but instead draw districts that better comply with traditional redistricting principles, decreases the BVAP in Districts 1 and 2 to narrowly tailor those districts, and revises Districts 3, 4, and 5 so that Black voters are no longer artificially denied electoral influence in additional districts. If the Commission fails to quickly adopt a new plan, this Court can order a remedial plan. *See Covington*, 138 S. Ct. at 2550 (ordering a plan after the state failed to act).

When a district court finds unjustified racial discrimination, it has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

Louisiana v. United States, 380 U.S. 145, 154 (1965); *see also United States v. Paradise,* 480 U.S. 149, 184 (1987) (noting it is within a district court's discretion to craft remedies for racial discrimination). Indeed, it would be unusual for a court to not take appropriate action to ensure that no further elections are conducted under an unconstitutional districting plan. *See, e.g.*, *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 361 F. Supp.3d 1296, 1305 (M.D. Ga. 2018), *aff'd*, 979 F.3d 1282 (11th Cir. 2020) (ordering special elections); *Navajo Nation v. San Juan Cnty.*, 2:12-CV-00039, 2017 WL 6547635, at *19 (D. Utah Dec. 21, 2017), *aff'd*, 929 F.3d 1270 (10th Cir. 2019) (same).

When considering whether to grant a special election as a remedy for unlawful redistricting schemes, courts weigh three non-exhaustive factors: (1) "the severity and nature of the . . . violation"; (2) "the extent of the likely disruption to the ordinary processes of governance if early elections are imposed"; and, (3) "the need to act with proper judicial restraint when intruding on state sovereignty." *North Carolina v. Covington*, 581 U.S. 486, 488 (2017).

Courts in this Circuit tasked with remedying unlawful voting maps have considered comparable factors even prior to *Covington*. *See, e.g.*, *Ga. State Conf. of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1347-48, 1350 (N.D. Ga. 2015) (ordering a special election after considering the time and resources expended, recognizing the "additional efforts [required] on the part of the [Board of

Commissioners]," and concluding that the "harm Plaintiffs would suffer by way of vote dilution outweigh[ed] the harm to the [Board of Commissioners]"); *Adamson v. Clayton Cnty. Elections & Registration Bd.*, 876 F. Supp. 2d 1347, 1358 (N.D. Ga. 2012) (ordering a special election after considering the "irreparable injury [of] having [] voting rights infringed," and harm to the public that the unlawfully elected body could not legally function). *See also Arbor Hill Concerned Citizens v. Cnty. of Albany*, 357 F.3d 260, 262 (2d Cir. 2004) ("When the court has determined that there has been a VRA violation, ... [t]he scope of its power to remedy [the] violation is defined by principles of equity.").

The *Covington* factors are satisfied here. First, the McClure Plaintiffs have alleged serious violations of their fundamental right to vote. Racial gerrymandering has long been recognized as a particularly egregious affront to democracy. Not only do racially gerrymandered districting schemes "bear[] an uncomfortable resemblance to political apartheid," they cause "serious harm" to society. *Shaw I*, 509 U.S. at 657; *see also Miller*, 515 U.S. at 912. Here, absent a special election, unlawfully elected Commissioners will serve until 2026.[5]

[5] Moreover, Jefferson County's redistricting scheme risks the appearance of illegitimacy. The *McClure* Plaintiffs—and all Jefferson County taxpayers—suffer ongoing irreparable injury by having the actions of any commissioner elected under the unconstitutional districting scheme subject to legal challenges. *See Adamson*, 876 F. Supp. 2d at 1358 (discussing the irreparable harm to taxpayers of having to pay for legal fees to defend against such challenges).

Second, there will be minimal disruption to the governance of elections should the court order remedial maps. When assessing disruption to the ordinary processes of governance, a court should consider the perspective of the people who have been deprived of constitutionally adequate representation. *Ga. State Conf. of the NAACP*, 118 F. Supp. 3d at 1347 (rejecting defendants' arguments that the court should wait to call a special election until after a trial on the merits because "this would not undo the harm to [the] [p]laintiffs during the period between the upcoming election and the subsequent special election."). Here, Plaintiffs are seeking special elections to be held concurrently with upcoming federal elections in November 2024, minimizing additional cost and disruption to the ordinary course of county election administration. *See Navajo Nation*, 2017 WL 6547635 at *18 (finding no significant disruption where special elections proceed alongside regularly scheduled elections).

Third, in this case, principles of judicial restraint do not weigh against ordering a special election. While a court should do its best to minimize intrusion on state sovereignty, it must also consider the critical importance of constitutionally drawn district maps. *See Navajo Nation*, 2017 WL 6547635, at *19. The key consideration is whether the remedy is disproportionate to the constitutional violation. *Id.* Here, the fundamental rights at stake and the irreparable harm imposed by unlawful maps remaining in effect until the 2026 election substantially outweigh a special election's intrusion into state sovereignty. *Id.*; *see also United States v.*

Osceola Cnty., 474 F. Supp. 2d 1254, 1256 (M.D. Fla. 2006) (rejecting County redistricting plan that would "perpetuate[] the vote dilution that [the] case s[ought] to resolve" and approving plan that required special elections).

With respect to any purported administrative burdens, the Commission can act quickly. During the 2021 redistricting process, plans were presented on October 5, a public hearing was approved on October 7, and the Enacted Plan was chosen on November 4—all in less than a month. *See* Ex. F; Ex. G; Ex. H. If the Commission fails to pass a lawful map expeditiously, this Court can exercise its authority to draw interim maps. *See Wright*, 979 F.3d at 1304 (affirming the imposition of a remedial map drawn by special master); *Larios v. Cox*, 305 F. Supp. 2d 1335, 1342 (N.D. Ga. 2004) (three-judge court) (requiring a state to redraft congressional maps eight months before the general election and retaining jurisdiction for the court to draw an interim plan if the legislature failed to act in time). In either scenario, upcoming elections would go forward with a constitutionally valid map with minimal burden to Defendants, while protecting the constitutional credibility of the electoral process.

Indeed, the primaries are over eight months away, and the general election is still over 15 months off. Filing deadlines for Commission candidates can be shifted a few weeks with relatively little, if any, disruptions, and no adverse impact on voters. As "sovereignty lies with the people . . . inconvenience to legislators elected under an unconstitutional districting plan resulting from such legislators having to

adjust their personal, legislative, or campaign schedules to facilitate a [constitutional redistricting] does not rise to the level of a significant sovereign intrusion." *Covington v. North Carolina*, 270 F. Supp. 3d 881, 895 (M.D.N.C. 2017) (three-judge court). "[T]he harm [Plaintiffs] would suffer by way of vote dilution outweighs the harm" or other potential inconveniences to Defendants. *Ga. State Conf. of the NAACP*, 118 F. Supp. 3d at 1348. At most, administrative deadlines may have to be shifted to assure constitutionally compliant maps are applied in the 2024 statewide elections. *See Wright*, 979 F.3d at 1287 (affirming a remedial order that altered election dates); *United States v. Dallas Cty. Comm'n*, 850 F.2d 1433, 1437 (11th Cir. 1988) (tolling a qualification period until the entry of a remedial plan); *see also Larios*, 305 F. Supp. 2d at 1343 (noting the court's authority to extend election-related deadlines). Finally, the "protection of the Plaintiffs' franchise-related rights is without question in the public interest." *Cox*, 408 F.3d at 1355. Racial gerrymanders "cause society serious harm," *Miller*, 515 U.S. at 912, and the State's "[f]rustration of federal statutes and prerogatives are not in the public interest," *United States* v. *Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012). The public interest favors a court-ordered remedy to these discriminatory districts to protect the fundamental rights of all Alabamians—whatever their race.

CONCLUSION

Accordingly, Plaintiffs respectfully request that the Court schedule an expedited evidentiary hearing on their motion for preliminary injunction, to the extent needed to resolve any factual issues, and that the Court grant their motion and set a schedule for Defendants to develop a remedial plan to be used in special elections to be held in conjunction with the 2024 statewide elections.

Respectfully submitted,

/s/ Deuel Ross
Deuel Ross*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th Street N.W. Ste. 600
Washington, DC 20005
(202) 682-1300
dross@naacpldf.org

Brenda Wright*
Brittany Carter*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
bwright@naacpldf.org
bcarter@naacpldf.org

*Admitted *Pro hac vice*

DATED this 21st day of July, 2023

/s/ Sidney M. Jackson
Sidney M. Jackson (ASB-1462-K40W)
Nicki Lawsen (ASB-2602-C00K)
WIGGINS CHILDS PANTAZIS FISHER & GOLDFARB, LLC
301 19th Street North
Birmingham, AL 35203
Phone: (205) 341-0498
sjackson@wigginschilds.com
nlawsen@wigginschilds.com

Attorneys for McClure Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system, which provides electronic notice of filing to all counsel of record.

This 21st day of July 2023.

/s/ Deuel Ross
COUNSEL FOR PLAINTIFFS