No. 25-13253-J
(*consolidated with* No. 25-13254-J)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CARA MCCLURE, ET AL,

Plaintiffs-Appellees,

v.

JEFFERSON COUNTY COMMISSION

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Alabama, No. 2:23-cv-00443 (Haikala, J.)

MCCLURE APPELLEES' BRIEF

Kathryn Sadasivan
Brenda Wright
Lauren Carbajal
NAACP Legal Defense and
Educational Fund, Inc.
40 Rector Street, 5th Floor
New York, NY 10006
Tel: (212) 965-2200
Fax: (212) 226-7592
ksadasivan@naacpldf.org
bwright@naacpldf.org
lcarbajal@naacpldf.org

Deuel Ross
Kacey Mordecai
NAACP Legal Defense and
Educational Fund, Inc.
700 14th Street N.W., Ste. 600
Washington, DC 20005
Tel: (202) 682-1300
dross@naacpldf.org
kmordecai@naacpldf.org

December 10, 2025

Counsel for Appellees

(*Additional Counsel listed on inside cover*)

Daniel Hessel
Samuel Davis
Election Law Clinic
Harvard Law School
6 Everett Street, Suite 4105
Cambridge, MA 02138
Tel: (917) 403-4976
dhessel@law.harvard.edu
sadavis@law.harvard.edu

Nicki Lawsen
WIGGINS CHILDS PANTAZIS
FISHER & GOLDFARB, LLC
301 19th Street North
Birmingham, AL 35203
Phone: (205) 341-0498

Additional Counsel for Appellees

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1. Addoh-Kondi, Alexia, *Addoh-Kondi Plaintiff-Appellee*
2. Alabama State Conference of the NAACP, *McClure Plaintiff-Appellee*
3. Bernstein, C'Zar, *Former counsel for Defendant-Appellant*
4. Blacksher, James, *Counsel for Addoh-Kondi Plaintiffs-Appellees*
5. Bonner, Cynthia, *Addoh-Kondi Plaintiff-Appellee*
6. Brown, Ja'Nelle, *Addoh-Kondi Plaintiff-Appellee*
7. Carbajal, Lauren, *Counsel for McClure Plaintiffs-Appellees*
8. Carter, Brittany, *Counsel for McClure Plaintiffs-Appellees*
9. Carroll, Donald, *Counsel for Defendant-Appellant*
10. Clemon, U.W., *Counsel for Addoh-Kondi Plaintiffs-Appellees*
11. Davis, Samuel, *Counsel for McClure Plaintiffs-Appellees*
12. Geiger, Soren, *Counsel for Defendant-Appellant*
13. Greater Birmingham Ministries, *McClure Plaintiff-Appellee*
14. Grisafi, Lily, *Former counsel for McClure Plaintiffs-Appellees*
15. Haikala, Madeline, *United States District Judge (N.D. Ala.)*
16. Hall, Eric, *Addoh-Kondi Plaintiff-Appellee*
17. Hansen, Michael, *Addoh-Kondi Plaintiff-Appellee*
18. Hessel, Daniel, *Counsel for McClure Plaintiffs-Appellees*
19. Juarez, Julia, *Addoh-Kondi Plaintiff-Appellee*
20. Lane, Kathleen, *Former counsel for Defendant-Appellant*
21. Lawsen, Nicki, *Counsel for McClure Plaintiffs-Appellees*

22. Lawson, II, Theodore, *Counsel for Defendant-Appellant*
23. Long, Charles, *Addoh-Kondi Plaintiff-Appellee*
24. McClure, Cara, *McClure Plaintiff-Appellee*
25. Meehan, Taylor, *Counsel for Defendant-Appellant*
26. Metro-Birmingham Branch of the NAACP, *McClure Plaintiff-Appellee*
27. Mordecai, Kacey-Ann, *Counsel for McClure Plaintiffs-Appellees*
28. Muhammad, William, *Addoh-Kondi Plaintiff-Appellee*
29. Randall, Fred, *Addoh-Kondi Plaintiff-Appellee*
30. Rice, Richard, *Counsel for Addoh-Kondi Plaintiffs-Appellees*
31. Ross, Deuel, *Counsel for McClure Plaintiffs-Appellees*
32. Rouco, Richard, *Counsel for Addoh-Kondi Plaintiffs-Appellees*
33. Sadasivan, Kathryn, *Counsel for McClure Plaintiffs-Appellees*
34. Sayer, Marie, *Counsel for Defendant-Appellant*
35. Sheikh, Uruj, *Counsel for McClure Plaintiffs-Appellees*
36. Smith, Tammie, *Addoh-Kondi Plaintiff-Appellee*
37. Strawbridge, Patrick, *Counsel for Defendant-Appellant*
38. Taunton, Michael, *Counsel for Defendant-Appellant*
39. Walker, Dorman, *Former counsel for Defendant-Appellant*
40. Walker, Robert, *Addoh-Kondi Plaintiff-Appellee*
41. Wright, Brenda, *Counsel for McClure Plaintiffs-Appellees*
42. Wyrick, Rachael, *Counsel for Defendant-Appellant*

Plaintiffs-Appellees further state that no publicly traded company or

corporation has an interest in the outcome of the case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

McClure Appellees do not oppose Appellant's request for oral argument and agree that a full presentation of the issues through oral argument may benefit the Court.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Regulations

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §1331 because Plaintiffs alleged a violation of the Fourteenth Amendment to the U.S. Constitution. This Court has jurisdiction under 28 U.S.C. §1292(a) because this matter concerns a timely appeal of a permanent injunction.

INTRODUCTION

In 2021, the Jefferson County, Alabama Commission (the "Commission") enacted a districting plan that intentionally sorted voters based on race to create two districts with super-majority Black voting age-populations ("BVAPs"). The Commission's race-based districting established a 76.3% BVAP in Commission District 1 and a 64.1% BVAP in Commission District 2. DE191:48.[1] At a public hearing on the plan, Commissioners explicitly acknowledged race was central to the design of district lines. For example, one commissioner said she walked around the areas being added to her district to look at "folks in the[ir] face" to "know what [she was] getting," an obvious reference to voters' race. DE191:78-79. She described the race-based reasons that specific precincts were added to her district, District 2, and later admitted it was populated with more African Americans than needed for her to be elected. DE191:79-81,121.

This intentional sorting of voters based on race perpetuated the Commission's decades-long practice of setting and achieving racial targets. From 1993 to 2013, the Commission's express goal was to create "districts containing African American majorities in excess of 65%" in Districts 1 and 2. DE191:102 (recounting Commission correspondence to Justice Department). During this period, the Commission admitted

[1] Appellees' citations to the Supplemental Appendix are labeled "DE" and correspond to docket entries in *McClure v. Jefferson County Commission*, No. 2:23-cv-443. Page citations follow the colon ":" and correspond to the ECF pagination as required by the Eleventh Circuit.

it changed each district to get "close to the ideal district population without significantly changing the ratio of Black and white population within the districts." DE191:27,30,31. Consistent with this goal, the Commission maintained Black populations above 65% in Districts 1 and 2 in each plan it enacted. *Id.* The Commission never considered whether those explicit racial thresholds were necessary to comply with the VRA, as required by the Equal Protection Clause. *Id.*

After four days of trial, the district court found that the largely uncontroverted evidence revealed that the Commission continuously drew noncompact districts that eschewed traditional criteria, split municipalities, and "placed many of the neighborhoods and suburbs to which Black voters moved between 1990 and 2020 into Districts 1 and 2." DE191:37. Based on this extensive testimony, the district court found the Commission had intentionally shifted the boundaries of Districts 1 and 2 to follow Black population growth into suburbs and municipalities outside of downtown Birmingham to achieve its intended racial thresholds in those districts. *Id.*

This finding was based, in part, on the Commission's history of setting and achieving racial targets in each of the five districts, documented in its decades-long pre-clearance correspondence with the Justice Department pursuant to Section 5 of the VRA (§5). But the court did not treat the Commission's correspondence with the Justice Department as dispositive of racial predominance in 2021. Nor does the court's decision suggest that race predominates whenever a covered jurisdiction sought to comply with §5. Rather, the court found the Commission's §5 correspondence evinced

the Commission's intent and achievement of unjustified racial thresholds in prior redistricting cycles, which the Commission perpetuated by retaining the 2013 district lines in 2021. The court further found that, in 2021, the Commission made numerous specific line-drawing choices that could not be explained by its core retention goals, but instead could only be explained by race. *Id.* And while Appellant would later claim that the Commission may have sought to achieve other goals in its redistricting process throughout the intervening decades—for example, anchoring two districts in Birmingham—there is no contemporaneous testimony or any evidence whatsoever supporting that post hoc speculation. DE191:27,30,31,107.

In accordance with *Alexander v. South Carolina State Conference of NAACP*, 602 U.S. 1 (2024), the district court presumed the Commission adopted the 2021 Plan in good faith. Indeed, in denying summary judgment to Plaintiffs, the court carefully examined and repeatedly cited *Alexander*. DE164:62. After trial, the district court again carefully applied the presumption of good faith in weighing the evidence. DE191:90,93,96. Nonetheless, after analyzing testimony from 10 expert and lay witnesses and exhibits spanning thousands of pages, the court concluded in a 139-page decision that race predominated in each of the five 2021 Commission districts, and that the Commission's use of race violated the Constitution. *Id.*

The district court found that direct and circumstantial evidence overcame the heavy presumption of legislative good faith. DE191:8-86. That evidence included the Commissioners' 2021 statements about the use of race; expert analyses of the 2021 and

prior plans identifying the selection of populations to include or exclude based on race; the Commission's statements that it sought and achieved racial thresholds and ratios in districting between 1990 and 2013; and the historic and present-day districts' adherence to traditional districting criteria (or lack thereof). The court also considered Plaintiffs' race-neutral alternative maps that better respected traditional redistricting criteria, such as municipal boundaries, than the 2021 Plan, did not pack Black voters into Districts 1 and 2 *and* that "would not result in a change to the partisan composition of the 2021 plan." DE191:84-85.

The court enjoined use of the 2021 Plan and required the Parties to devise a remedial schedule. DE191:139. Because the district court did not clearly err in concluding that race predominated in the drawing of each of the Commission districts in the 2021 Plan, Plaintiffs respectfully request this Court affirm the order enjoining its use.

STATEMENT OF THE ISSUES

1. Can Appellant establish "clear error" under Federal Rule of Civil Procedure 52(a)(6), to overturn the District Court's comprehensive factual findings, after a full trial on the merits—including direct and circumstantial evidence from lay and expert testimony and exhibits spanning thousands of pages—that race predominated in the drawing of each district in Jefferson County's 2021 redistricting plan, in which Appellant sorted voters based on race to achieve

two districts with 76.3% and 64.1% BVAPs, while ensuring that the remaining three districts had no more than 25.8% BVAPs?

2. Does *Alexander v. South Carolina State Conference of the NAACP*, 602 U.S. 1 (2024) require a plaintiff to disprove any purported justification a legislative body in theory could have been motivated by, even where unsupported by any evidence, not advanced by any legislator and offered solely by counsel after discovery ended?

STATEMENT OF THE CASE

I. Historical Background

Between 1931 and 1985, the Commission consisted of three commissioners elected at-large by all residents of Jefferson County. DE191:9; DE85-1:8. No Black candidate was ever elected to the Commission during that time, even though, by the 1980s, Black residents accounted for one-third of the County's population. *Id.*

In 1984, Black residents challenged the at-large system under §2 of the VRA. *Taylor v. Jefferson Cnty. Comm'n*, CA 84-C 1730-S (N.D. Ala. 1984), DE191:9. The parties entered a consent decree in 1985 so that "blacks will have a greater opportunity to elect 2/5 or 40% of the County Commission positions." DE169-2:2; DE191:11. The decree established five single-member districts with Black population majorities in Districts 1 (65.6% Black population) and 2 (66.8% Black population). DE169-2:2,19,20 (Commission's 1985 §5 submission regarding consent decree); DE191:14 *see also Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1058 (11th Cir. 1992) (discussing this history).

The consent decree did not require the Commission to maintain any racial target or threshold.

Until 2013, §5 of the VRA required the Commission to submit proposed changes to its redistricting plans to the U.S. Department of Justice ("DOJ") for preclearance review to ensure that the plan was not retrogressive, *i.e.*, did not worsen the position of Black voters. DE169-3. Under §5, covered jurisdictions were prohibited from making changes that would, for example, diminish Black voters' opportunities to elect their candidates of choice—but §5 *never* required jurisdictions to maintain particular BVAP percentages or to pack Black voters into districts unless doing so was demonstrably necessary to comply with its non-retrogression mandate. *See, e.g.*, *Cooper v. Harris*, 581 U.S. 285, 316 (2017). To justify its continued use of racial targets, the Commission needed a strong basis in evidence to believe that maintaining BVAP thresholds of 65% was reasonably necessary for Black voters to maintain their ability to elect their candidates of choice. *See, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 193 (2017). As its §5 correspondence illustrates, the Commission never assessed whether its BVAP thresholds were required to preserve Black voters' opportunity to elect candidates of choice in two districts.

1990 Redistricting

In 1993, the Commission sought and achieved 65% Black population thresholds in Districts 1 and 2. DE191:19; DE169-3:109-10. But the Commission's 1993 submission to the DOJ offered no justification whatsoever for those thresholds. The

Commission did not assess Black voter registration or turnout, nor did it conduct a racially polarized voting ("RPV") analysis. Instead, the Commission stated only that "[t]he change in district boundaries [would] bring each district close to the ideal district population, without significantly changing the ratio of black and white population within the districts." DE191:20; DE169-3:2.

2000 Redistricting

After the 2000 Census, the Commission's redistricting plan increased District 1's Black population to 82.13% and District 2's Black population to 76.70%. DE169-6:11. In its 2001 letter to the DOJ, the Commission explained that the new districting plan was drawn "again with two districts containing African American majorities in excess of 65%." DE191:24-27. Again, the Commission offered no explanation for packing more Black voters into Districts 1 and 2: the Commission's DOJ submission failed to include any analysis of whether achieving its racial thresholds was necessary for VRA compliance. DE169-6:11; DE191:100-01. The Commission explained that the boundaries of Districts 1 and 2 "were expanded somewhat outward, as compared with their previous versions," to bring "each district close to the ideal district population without significantly changing the ratio of black and white population within the districts." DE85-1:12; DE191:27. At the time, one Commissioner argued that the redistricting plan was designed to "maintain a white majority," and a candidate for office argued that the plan diluted "the voting strength of black voters." DE169-6:49-51; DE191:29.

2010 Redistricting

The Commission's 2010 redistricting plan perpetuated its unjustified 65% racial thresholds: Districts 1 and 2 were repacked with 76.14% and 73.39% BVAP, respectively, despite net population losses in both districts. DE169-5:1081. The Commission represented to the DOJ that "[t]he 2013 plan has two black majority districts, just like the 1993 and 2001 plans," each of which "have majority black populations in excess of 65%." DE85-6:1077, 1082; DE191:31. It stated, once again, that its changes were intended to bring "each district close to the ideal district population without significantly changing the ratio of black and white population within the districts." DE169-5:1080-81; DE174:227; DE191:31. Again, the Commission offered no analysis or evidence indicating that it had any basis for believing that prioritizing racial thresholds was necessary to preserve Black voters' opportunity to elect their candidates of choice in Districts 1 and 2. *Id.*

Barry Stephenson, the Chairman of the Jefferson County Board of Registrars and the Commission's 30(b)(6) witness, "coordinate[d] the [redistricting] process." DE174 tp. 217:9-16. He was the only witness to testify about the Commission's 2013 process; he confirmed that the Commission did not conduct any RPV or functional analysis to inform the racial thresholds the Commission set. DE174 tp. 227:2-4. Two Commissioners who participated in the Commission's 2013 redistricting effort and correspondence with the DOJ—District 3 Commissioner Stephens and District 4

Commissioner Knight—remained on the Commission for the 2020 redistricting cycle. DE191:109 n.42; DE169-11:37.

2020 Redistricting

In 2021, the Commission maintained racial thresholds in Districts 1 and 2 by expressly carrying forward the 2013 plan drawn to achieve those unsupported racial targets. *See* DE85-11:12-42; DE174:226; DE163-10:46-47; DE179-16:7; DE191:47; DE170-16:9-10. Districts 1 and 2 retained approximately 90% of their 2013 populations, and Districts 3, 4, and 5 maintained almost all of their 2013 populations. DE163-31:7 tbl.1; DE179-16:7; DE191:47. Indeed, in terms of racial demographics, the 2021 Plan closely resembles every plan enacted by the Commission since the 1990 Census, each of which contained districts drawn to maintain target ratios of Black and White voters. *E.g.*, DE169-3:110; DE169-6:42-45; DE169-111:9; DE169-4:191-92; DE191:47. The 2021 Plan split three more municipalities and 51 more voting districts than the 2013 plan and approximated the 2013 plan's splitting of more than 100 precincts. DE169-107:47-48; DE191:118. As detailed below, where the Commission departed from its 2013 baseline, its line-drawing choices were predominantly based on race.

The Commission initially drew three plans, using the same software it used in 2013. DE169-12:10-16; DE191:47. The software provides racial and ethnic data, but not elections data or political party affiliation, because Alabama voters cannot register to vote by political party. DE174:211-12; DE191:47. Mr. Stephenson testified that the

VRA never "came up" during his interactions with the Commissioners. DE164:22-23; DE85-9:29. Once again, the Commission conducted no analysis that would indicate it was necessary to continue packing Black voters into Districts 1 and 2. DE85-9:30-31.

Mr. Stephenson also testified to his observations, given the software and information he provided to the Commissioners, about the redistricting process generally. He testified that the Commissioners paid no attention to municipal lines when redistricting because annexations cause a "constant flux of change" to cities' boundaries. DE174:212-13. Notably, the three proposed plans "varied the placement" of two predominantly Black communities, Ensley and Midfield, in Districts 1 and 2, but preserved the boundaries of Districts 3, 4, and 5. DE174:173 tp. 666; DE191:41-42.

The Commission left little room for public input during its redistricting process. At a work session, Mr. Stephenson presented the Commission's three proposed plans, and the Commission voted to advance them without public comment. DE174:205-06; DE191:42. At the next work session, the Commission voted to conduct a public hearing on November 4, with the proposed maps available for public inspection for two weeks preceding the hearing. DE169-14:3-5; *see also* DE174:169 (detailing public inspection period). At the public hearing, the Commission adopted the 2021 Plan, which placed parts of the City of Birmingham into each of the five districts, DE179-16:9; DE191:46. Districts 1 and 2 in the plan maintain each district's BVAP supermajority and stretch beyond Birmingham to capture primarily Black populations. DE179-16:9; DE191:46.

II. Litigation and Trial

In April 2023, Plaintiffs sued the Commission and moved for a preliminary injunction, which the district court denied. DE54. In June 2024—more than two years before the November 2026 elections—the parties cross-moved for summary judgment. The court denied summary judgment to both parties based on the presumption of legislative good faith described in *Alexander*. DE164. Still, the district court acknowledged the direct evidence and "significant circumstantial evidence of the role race played in the boundaries the Commission selected in the [2021] Plan." DE164:62.

Over a four-day bench trial, Plaintiffs presented extensive lay and expert evidence. DE191:84-85. Mr. William Cooper presented illustrative plans that did not pack Black voters into Districts 1 and 2 and better adhered to traditional redistricting principles, such as compactness, contiguity and respect for political subdivisions—including municipal and place splits—while maintaining similar core-retention levels to the 2021 Plan. DE191:52-55. Mr. Cooper explained that the 2021 Plan continued a tradition of "packing" Black-voters into two supermajority districts, while "cracking" Black voters across the three remaining districts. DE172:287; *id.* at 258:14-23. The court concluded from these plans that it is possible to comply with traditional redistricting principles and maintain a high core retention score without packing Black supermajorities into Districts 1 and 2. DE172:278:23–279:3; DE172: 279:15–280:4.

Dr. Baodong Liu used ecological inference, a reliable and widely-accepted statistical method for estimating support for political candidates among racial groups,

to examine RPV in Jefferson County. DE191:82. Dr. Liu found that voting in Jefferson County is extremely racially polarized. For example, in recent elections, nearly all Black voters (92% or greater) and only a small minority of White voters (between 9.3% and 22.4%) voted for the Black-preferred candidate. DE191:82-83. But in examining the 2021 Plan, Dr. Liu found that Black-preferred candidates won 87% of the votes cast in Districts 1 and 2—far more than necessary for these districts to elect a Black candidate of choice. DE191:84-85.

Dr. Cory McCartan demonstrated that the racial composition of Districts 1, 2, and 3, DE169-26:8n.10, in the 2021 Plan were extreme statistical outliers, rebutting simulation evidence presented by Defendant's expert, Dr. Michael Barber. DE191:61. Dr. McCartan used Dr. Barber's simulated plans to determine that the BVAPs of Districts 1 and 2 were higher than 95.1% and 96.6% of corresponding districts in Dr. Barber's race-neutral simulations, and that District 3's BVAP was lower than 99.7% of corresponding districts. DE169-26:9; DE191:55-56. Dr. McCartan also used a summary statistic to measure the Commission's packing of Black voters into two districts while cracking them from a third, finding that the 2021 Plan had a higher "packing-cracking score" than 99.8% of Dr. Barber's simulations: a finding even Dr. Barber would consider "a significant deviation from a fair outcome." DE191:56; DE175: tp. 90:5-91:20. Dr. McCartan also used a computer algorithm to generate thousands of simulated

plans[2] to analyze whether any other districting criteria such as avoiding municipal splits or core retention could explain the racial composition of the 2021 Plan, ultimately concluding that they could not. DE191:57-58; DE174 tp. 62:5-63:4.

The court heard, but did not credit, testimony from the Commission's expert Dr. Barber, who opined that core retention explained the 2021 Plan based on his set of simulated maps and statistical analysis. DE191:109,110. Dr. Barber conceded that "the 2013 Districts 1 and 2 were both substantially Black at the time of their creation in 2013" and that "any map that seeks to build new districts by making as few changes as possible to the old districts will inherit much of that racial composition." DE170-16:9-10.

Mr. Stephenson testified about the Commission's overall redistricting process and data, but acknowledged "it was their plan and not," his. DE174 tp. 210:5-8-14. His testimony about specific changes made to the boundary lines in 2021 was based solely on his personal observations. The Commissioners "had full discretion to decide which areas to add to or subtract from" their districts, DE174 tp. 210:5-8-14, and Mr. Stephenson stated he could not speak to their reasons or motives about "why a particular area [in the plan] would move." DE174:191:24-192:6; DE191:41; DE174 tp. 155:22-156:3, 193:24-194:3. Mr. Stephenson and Dr. Barber both, more generally,

[2] Simulation analysis involves using a computational algorithm to produce a large volume of districting plans. DE179-16:44. The user can instruct the algorithm to follow or ignore certain criteria when drawing the maps. *Id.* The set produced by the algorithm provides a comparator to a given enacted plan. *Id.* at 45.

opined that the Commissioners were prioritizing core retention in adopting a "least changes" plan. DE191:109.

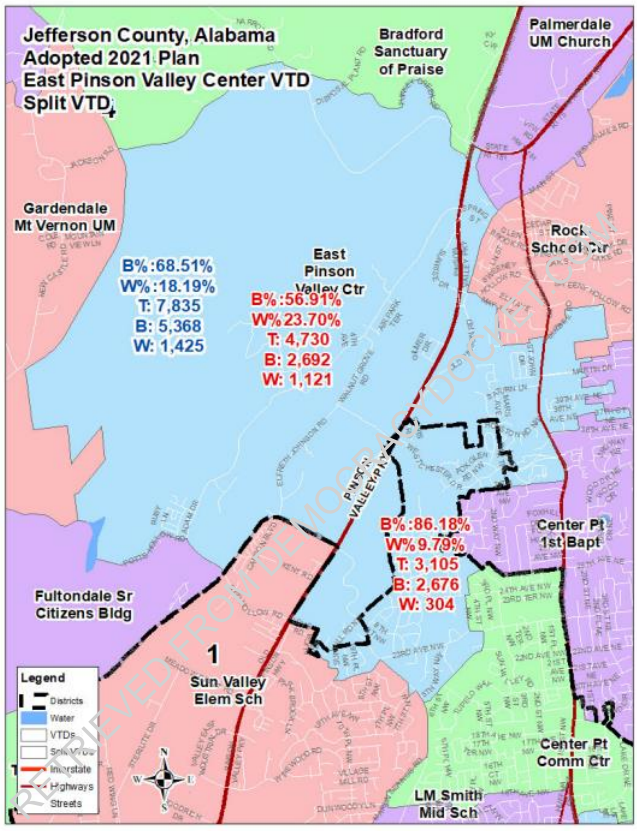
Based on the above testimony, along with the historical context that produced the boundaries the Commission sought to perpetuate, and a careful examination of changes made to the lines of each district, described below, the district court concluded that race predominated in the drawing of each Commission District. DE191:128.

District 1

The district court relied on direct evidence that race predominated in District 1. At a public hearing on the proposed plans, District 1 Commissioner Scales remarked on the composition of her district: "We speak of Democratic versus Republican. *You figure out what that looks like*." DE169-11 tp. 31:21-22 (emphasis added). She then described several new communities added to her district by their purported political affiliation, describing them as "highly Democratic." *Id.* at tp. 33:1-5. Yet the Commission did not have partisan political data available to it when redistricting, DE191:120. Its mapping software did, however, include racial data. *Id.* Given this context, the district court found that District 1 Commissioner Scales's descriptions of the purported political demographics of her district were a proxy for race that "underscore[d] the predominant role of race" in redrawing District 1. *Id.;* DE191:120.

The district court also considered changes the Commission made to District 1's boundary lines. Of the 13,073 people moved into District 1, 77% were Black and 15.6% were White. DE191:62; DE172 tp. 32:13-21,273:22-25. To achieve this result, the

Commission split precincts along racial lines to shift predominantly Black populations into District 1. DE191:122. For example, the Commission split the East Pinson Valley precinct along racial lines between Districts 1 and 4—86.18% of the East Pinson Valley residents moved into District 1 were Black. *Id*; DE172 tp. 36:1-25; DE169-107:27 fig.4.



By contrast, of those residents who remained in District 4, 56.91% were Black and 23.70% were White. *Id.* Had the Commission added the whole East Pinson Valley precinct to District 1, the District's BVAP would have decreased. DE191:123; DE169-107:26-27 fig. 4.

The district court also found that every whole precinct moved into District 1 was majority-Black. DE191:23; DE172 tp. 38:24–39:1; DE159-34:8 tbl.1. At the same time, the Commission moved the Brookside Community Center precinct, which was only 24.2% Black, from District 1 to District 3—even though District 3 was overpopulated. DE163-31:13 fig.3. Moving Brookside Community precinct into District 3—instead of all or part of a majority Black precinct—contradicted Defendant's claim that all precincts contiguous to District 1 were majority-Black and thus that race was irrelevant to the movement of precincts into that District. DE191:124–25.

Additionally, the court credited the testimony and analysis of Plaintiffs' experts. Dr. Liu's analysis refuted Defendant's argument that geographic proximity explained precinct movements by finding that, even among adjacent precincts, a precinct's BVAP predicted the precinct's movement into District 1 to a statistically significant degree. DE191:126; DE169-22:4. Dr. McCartan's "hatch map analysis," which compared the assignment of a precinct to a district in the 2021 Plan with the precinct's district assignment in thousands of race-neutral simulations, yielded the same conclusion. DE169-26:11; DE191:71,130. This analysis showed that every precinct assigned to District 1 in the 2021 Plan, including the East Pinson Valley Center, Center Point Community Center, Dolomite West Field Community Center, and Minor Fire Station, is in a district with a statistically significantly higher BVAP compared to its average district assignment in race-neutral simulated plans. DE169-26:11.

District 2

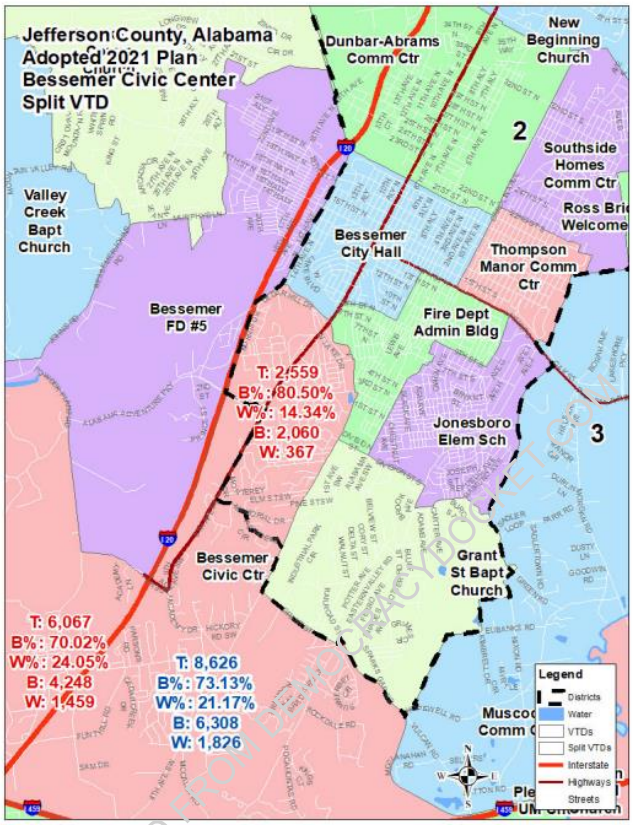
As in District 1, direct evidence undergirded the district court's finding that race predominated in the drawing of the district's lines. At a public hearing, District 2 Commissioner Tyson explained the movement of precincts into her district in explicitly racial terms, stating:

> "I pulled—Rosedale [which] is a 99.2% Black community. 99.2%...[and] Mountain View...which is 89% Democratic and Black ... You know how I know? Because I got up and I went over there…and knocked on the doors and seen for myself. I went to Bessemer… 99 percent Democratic, 99 percent Black. Don't believe everything you hear. You know how I know*? I got up, walked over there myself, and I looked at the folks in they face.* And I know what I'm getting." DE179-8 tp. 39:16–40:23 (emphasis added).

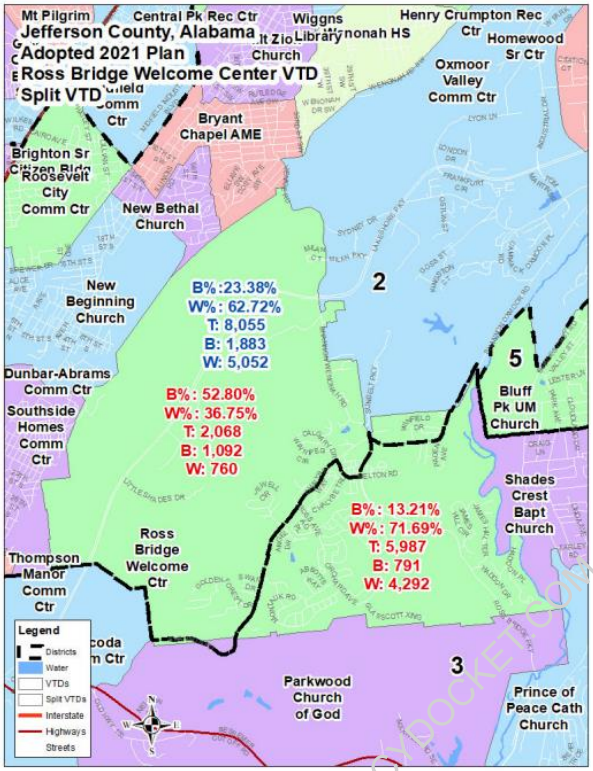
Commissioner Tyson later stated that she had more Black voters in her district than she needed to get elected. DE191:121.

The district court also analyzed the changes to the boundaries of District 2, finding that the Commission altered the district to "follow Black population growth beyond the City of Birmingham." DE191:110-11. The Commission expanded District 2 to include parts of Bessemer and Homewood, both of which experienced Black population growth in recent years. DE172 tp. 211-12, 211:21-212:4; DE173 tp. 190:1-3; DE191:113. The move of part of Bessemer into District 2, in particular, "cut so

deeply into Bessemer that the parts that remain[ed] in CD3" were no longer contiguous. DE169-107:30; DE169-108:24.



Additionally, the Commission moved a total of seven whole or partial precincts into District 2. DE169-107:39-40. Two of these precincts, Bessemer Civic Center and Ross Bridge Welcome Center, were split along racial lines. DE191:68. The Bessemer split moved 2,559 individuals, 80.50% of whom were Black, from Bessemer into District 2. *Id.*; DE169-107:29; DE191:68. And although the Ross Bridge precinct is 23.38% Black, 52.8% of the residents moved into District 2 were Black while the portion left in District 3 was only 13.21% Black. *Id.*



These splits also did not follow municipal boundaries, "suggest[ing] that the Commission did not prioritize the integrity of political subdivisions when redistricting in 2021." DE191:118. While two majority-White precincts, Homewood and Grant Street Baptist Church, were placed into District 2, these precincts "did not meaningfully alter [District 2's] heavily Black demographic" and both had growing Black populations. DE191:130. Ultimately, despite significant population loss, District 2's BVAP remained near the longstanding 65% BVAP threshold, at 64.11%. DE169-107:39; DE169-108:107. And the district court noted that the Commission never attempted to establish whether a BVAP that high was necessary for Black voters to elect a candidate of their choice. DE191:129.

The court also credited the testimony and analysis of Plaintiffs' expert witnesses. Dr. McCartan's analysis demonstrated that District 2's BVAP was higher than 96.6% of the corresponding districts in Dr. Barber's full simulation set, making its racial composition an outlier. DE191:130; DE169-26:9. Dr. McCartan's hatch map analysis also showed that the precincts surrounding the Bessemer, Ross Bridge, Rosedale, and Oxmoor neighborhoods were similarly assigned to districts with lower BVAPs in nearly all simulated plans, making their assignment in the 2021 Plan a statistically significant outlier even when prioritizing core retention. DE191:71; DE169-26:16.

Defendant's witnesses, Dr. Barber and Mr. Stephenson, speculated about the Commission's decision-making in District 2. Dr. Barber speculated that the Commission could have sought to "reunite" the Oxmoor Valley Community Center precinct in District 2. DE191:76. Mr. Stephenson observed that a precinct split along racial lines placed the "residential" portion in District 2 and the rural portion in District 3. DE174 tp. 692:15-17. However, the court found that these were post hoc justifications unsupported by any record evidence. DE191:131.

District 3

The district court similarly analyzed changes to District 3's boundaries in 2021, finding that race predominated in the drawing of this district. The Commission's boundary changes in 2021 reduced District 3's BVAP from 28.6% to 25.829%. DE191:131; DE179-16:31; DE169-107:41-42. The Commission moved 10,550 people from District 3 into Districts 1 and 2, 61.45% of whom were Black.

DE191:71. As in other districts, the Commission moved and split district precincts and municipalities to achieve this result.

Even though the Commission needed to remove population from District 3 to achieve its equal population goals, it moved voters into District 3 from District 4, about 90% of whom were White. DE169-107:41. DE169-72:1-2; DE172 tp. 276:9–11. The Commission moved the majority-Black Minor Fire Station precinct from District 3 into District 1. DE191:131-32. It also moved the majority-White Brookside Community precinct from District 1 to District 3 which allowed it to "add to [District 1] precincts that were more than 50% Black." DE191:132.

And it split three 2013 precincts along racial lines. The sections of the Bessemer Civic Center and Ross Bridge precincts that remained in District 3 had significantly higher White populations than the portions moved into District 2. DE169-107:31. In Ross Bridge, the 2021 Plan removed Black residents from District 3 while retaining the portion that was 71.69% White. *Id.* The Commission's decision to split the Dolomite West Field Community Center precinct and move the section that was 86.60% Black into District 1 meant that other, less heavily Black neighborhoods remained in District 3. *See* DE191:131;169-109:9tbl.1.

The district court credited expert testimony showing that District 3 was a statistical outlier and that the Commission could have achieved its core retention goal without intentionally removing Black voters from Districts 1 and 2. Dr. McCartan's simulation analysis showed that District 3's BVAP was lower than the

BVAP of 99.7% of the race-neutral districts in Dr. Barber's simulations. DE191:132. His "hatch map" analysis, *see supra* p. 167, demonstrated that precincts in the central and southwestern portions of District 3 that were moved into Districts 1 and 2 in the 2021 Plan were in a district with a higher BVAP than at least 95% of race-neutral simulated plans. *Id.* at 133; DE169-26:11. Although the Commission needed to remove people from District 3 to equalize population, it added them instead, splitting the Warrior City Hall precinct and moving 1,445 persons, 90.52% of whom were White, from District 4 into District 3. DE191:132; DE199-107:40 tbl.11. The Commission had alternative options for precinct movements to equalize District 3's population. DE191:133. It could have moved the Minor Fire Station, Adamsville Baptist Church, and Mulga Town Hall precincts from District 3 to District 1, instead of the portions of precincts it chose which had higher Black populations. *Id.*; DE172:198-99; DE179-13. Had the Commission done so, it could have achieved its purported population goals while removing fewer Black voters from District 3. DE191:133.

District 4

In finding that race predominated in the drawing of District 4, the district court carefully examined the changes the Commission made to the district to maintain its White majority. In addition to the changes detailed above, the Commission "removed from District 4 all or part of the district's two most Black precincts." DE191:134. Dr. McCartan's "hatch map" analysis, *supra* p. 167, demonstrated that the Commission

placed the East Pinson Valley and Center Point Community precincts into a district that had a greater Black population than 95% of the districts those precincts were assigned to in race-neutral simulations. DE191:134-35.

Defendant attempted to justify these alterations as necessary to achieve population equality, but the district court found this "unconvincing" because the Commission took more voters out of District 4 and split and moved more precincts than necessary to achieve this result. DE191:135. Despite being overpopulated, the Commission added areas that were overwhelmingly White to District 4 while removing mostly Black residents and placing them in District 1. DE191:135-136. For example, the Commission moved voters from District 5 to District 4, only 8.6% of whom were Black. *Id.* Moreover, the Tarrant City Hall and Center Point Community Center precincts are nearly equal in population, but the Center Point Community Center precinct is 80.86% Black and Tarrant City Hill is only 50.72% Black. DE191:134-35; *see also* DE169-107:35. Had the Commission moved the Tarrant City Hall precinct into District 1 instead of Center Point, it could have achieved its population goals while removing fewer Black voters from District 4 and avoided splitting the Center Point precinct. *Id.*; DE169-107:33; DE169-108:23; DE179-13.

District 5

Finally, in finding that race predominated in District 5, the district court found that the Commission removed the two precincts "containing …the only concentrated Black populations in CD5." DE191:137. These precincts included Afton Lee

Community Center (the only precinct in District 5 with a BVAP above 50%) and the Oxmoor Valley Community Center (the precinct with the second highest BVAP in District 5). DE191:136-37; DE179-16:38 fig.15. The Commission also moved the McElwain Baptist Church precinct (8.56% BVAP) from District 5 to District 4 which "boosted" District 4's White population "without significantly altering District 5's supermajority White population." DE191:137.

The district court did not credit Dr. Barber's speculation that the Commission placed Oxmoor Valley in District 2 to reunite a previously split precinct because this theory directly conflicted with Mr. Stephenson's testimony that it would be difficult for the Commission to avoid political subdivision splits when redistricting. DE191:137, n.49; DE174 tp. 212:12-16; DE175 tp. 48:17–49:5.

The court found that race, rather than politics or any traditional redistricting criteria, explained the Commission's precinct movements and splits, and that the Commission moved Black voters between districts to sustain Black supermajorities in Districts 1 and 2 while maintaining White majorities in Districts 3, 4, and 5. DE191:133. Summarizing its findings, the district court explained that if the "Commission had adhered to traditional redistricting principles, the Black population in Districts 1 and 2 would have fallen." DE191:119. Instead, the Commission created "supermajority-Black populations in Districts 1 and 2 at the expense of traditional redistricting criteria," redrawing the boundaries of adjoining Districts 3, 4, and 5 to facilitate the packing of Districts 1 and 2. *Id.* at 131-34. Because the Commission "ha[d]

not attempted to make" a showing that its use of race overcame "the daunting requirements of strict scrutiny," the district court concluded that each district in the Commission's 2021 Plan violated the Fourteenth Amendment. DE191:138.

STANDARD OF REVIEW

In a racial gerrymandering case, a district court's "findings of fact—most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for clear error." *Cooper v. Harris*, 581 U.S. 285, 293 (2017) (citations omitted). Under the "clear error" standard, an appellate court "may not reverse 'just because [it] would have decided the [matter] differently'" *Id.* (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)). Rather, a "finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Cooper*, 581 U.S. at 293 (citation omitted).

Factual findings grounded on an error of law are, of course, not entitled to deference on appeal. *See Abbott v. Perez*, 585 U.S. 579 (2018). However, as explained below, the district court's factual findings hew directly to the governing legal standard set out in *Abbott, Alexander*, and all relevant Supreme Court precedent. *See infra* at 32-59. Accordingly, the district court's racial predominance findings "warrant[] significant deference on appeal." *Cooper*, 581 U.S. at 293.

SUMMARY OF ARGUMENT

Appellant cannot meet its demanding burden of showing that the district court clearly erred in its factual findings, which are based on robust direct and circumstantial

evidence. Nor did the district court commit legal error in its racial predominance analysis. The district court's finding that race predominated in the Commission's drawing of districts in 2021 was amply supported by record evidence, and its conclusion that the Commission engaged in unconstitutional racial gerrymandering is entirely consistent with settled Supreme Court precedent.

Contrary to Appellant's argument, the district court scrupulously applied *Alexander* to the evidence in this case—starting with the presumption of legislative good faith and then closely examining whether the racial demographics of the challenged plan could be the byproduct of the Commission's effort to achieve a legitimately race-neutral objective. But *Alexander* did not require the district court to credit the Commission's post hoc explanations for its redistricting choices. Because the Commission did not assert partisanship as a justification for its line-drawing choices and did not have access to partisan data during the 2021 redistricting process—and because Plaintiffs presented direct evidence that the district court credited in finding racial predominance—Plaintiffs were not required to present an alternative plan that maintained the exact same partisan breakdown as the challenged plan. Regardless, Plaintiffs put forward alternative plans that better adhered to traditional districting criteria and maintained the partisan composition of the 2021 Plan without packing Black voters into Districts 1 and 2. DE191:84-85. Accordingly, the district court's finding that race predominated was wholly consistent with the Supreme Court's guidance in *Alexander*.

The direct evidence supporting the district court's racial predominance finding illustrated the Commission's reliance on race: Commissioners for Districts 1 and 2 explicitly referred to race in justifying specific line-drawing choices the Commission made in 2021. The circumstantial evidence further confirmed that the 2021 Plan's district lines were inexplicable on grounds other than race: the district court credited comprehensive expert evidence, including alternative maps. DE191:84-85. Plaintiffs' expert evidence also showed plan-wide, and at the district and precinct level, that the 2021 Plan was an outlier even among thousands of simulated plans that accounted for Appellant's purported redistricting goals, including core retention. DE191:58-61. Appellant's own expert confirmed, in his scholarship and prior testimony, that the 2021 Plan was an outlier and a "significant deviation from a fair outcome." DE191:55-57.

Moreover, consistent with controlling precedent, the district court appropriately determined that core retention was not a race-neutral redistricting criterion under the circumstances of this case. The district court found that the Commission's four-decade practice of setting and achieving racial targets, without ever conducting a functional analysis to determine whether those targets were required to comply with the VRA, was powerful circumstantial evidence of the Commission's intent in 2021. DE191:95; *see Clark v. Putnam Cnty.*, 293 F.3d 1261, 1268 (11th Cir. 2002). That factual finding was particularly apt because the Commission in 2021 explicitly sought to retain the district lines drawn in 2013. Indeed, one Commissioner who participated in the drawing of the

2013 plan announced the Commission's intention in 2021 to retain those prior district lines to the highest degree possible. DE191:40-42,105; DE163-10:46,14-47.

Further, the district court found that core retention could not explain the Commission's specific line-drawing choices in 2021. The district court carefully examined the Commission's movement of district boundaries, splitting of precincts, and splitting of municipalities across several decades and again in 2021. Based on extensive expert testimony, the district court concluded that these choices drastically departed from all traditional redistricting criteria and were explicable only by the Commission's desire to pack Black residents into Districts 1 and 2. Finally, the district court properly did not credit Appellant's speculations offered for the first time in litigation—like a desire to anchor districts in the City of Birmingham—which were wholly unsupported by the evidence.

The district court faithfully applied controlling precedent, and its careful factual findings are entitled to clear error deference. This Court should affirm the district court's permanent injunction.

ARGUMENT

I. The District Court Correctly Applied the Governing Legal Standard.

Throughout this case, the district court consistently applied the governing legal standard for assessing racial gerrymandering claims reiterated in *Alexander v. South Carolina State Conference of the NAACP*, 602 U.S. 1 (2024). The district court presumed the legislature's good faith, placed the burden on Plaintiffs to prove by direct and

circumstantial evidence that race predominated in the Commission's drawing of the 2021 district lines, and closely examined traditional redistricting criteria the Commission purported to rely on. Based on its careful weighing of the direct and circumstantial evidence, including evidence that the Commission could have achieved its asserted redistricting objectives without packing Black voters into two districts, the district court concluded that race predominated over all non-racial redistricting criteria in 2021. DE191:93; *see also id.* at 88-93. This approach disentangled race from other redistricting criteria as mandated by *Alexander*, and the district court's ultimate finding that race predominated in the creation of the 2021 Plan was wholly consistent with *Alexander*.

II. The District Court Appropriately Weighed Direct and Circumstantial Evidence to Find that Race Predominated in the 2021 Plan.

Ample direct and circumstantial evidence supported the district court's conclusion that race predominated in the drawing of the 2021 Plan. This evidence included Commissioners' own statements and the data available to them; evidence demonstrating the Commission's intent to set and achieve racial targets in previous plans that the 2021 Plan replicated; and simulation evidence demonstrating that the 2021 Plan was an outlier in terms of racial demographics, even when accounting for core retention. Based on this evidence and the district court's analysis of the 2021 Plan on a district-by-district and precinct-by-precinct basis, the court concluded that race predominated in the drawing of each district. DE191:61-76. Appellant's

characterization of the evidentiary record—and of the district court's careful weighing of that record—is simply divorced from reality.

A. The District Court Did Not Clearly Err in Finding Direct Evidence of Racial Predominance.

The district court properly relied on significant direct evidence of the Commission's race-based motive for enacting the 2021 Plan. Direct statements by legislators involved in drafting a challenged redistricting plan are undeniably evidence supporting a finding of racial predominance. In *Cooper v. Harris*, the Supreme Court confirmed that legislators' statements describing the "racial considerations" that drove their line-drawing choices were direct evidence that "evince[d] intentionality' as to [the challenged district's] racial composition." 581 U.S. at 311; *see also Alexander*, 602 U.S. at 8 ("Direct evidence often comes in the form of a relevant state actor's express acknowledgment that race played a role in the drawing of district lines."); *Clark,* 293 F.3d at 1267 (relying on Commissioners' statements as direct evidence of race-based apportionment).

Here, Commissioners were explicit in explaining their redistricting choices on racial grounds. After voting to approve the 2021 Plan, District 2 Commissioner Tyson, explained that she had "pulled [in] Rosedale ... a 99.2 percent Black community," which created an oddly shaped boundary line in District 2. *See, e.g.*, DE191:79, 81, 120-122. This Commissioner further explained that she had walked around her district to look at "folks in the[ir] face" to "know what [she was] getting," *id.* at 77-79, and later stated

there were more Black voters in District 2 than she needed to get elected, DE191:121. District 1 Commissioner Scales explained changes made to her district by describing the purported partisan breakdown of certain precincts—even though she had access to racial data, not partisan affiliation, in the redistricting process— and said, of the Commissioners' use of partisan terms: "You figure out what that *looks like*." DE169-11 tp.at 31:21-22 (emphasis added).

Here, statements justifying the district lines on explicitly racial grounds were made by Commissioners discussing the changes made to their own districts. These are a far cry from the statements in the sole case Appellant's cite in their effort to gainsay Plaintiffs' direct evidence, *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363 (11th Cir. 2022) ("*LWV*"). There, a single member of the Florida legislature—a body of hundreds of legislators—made an ambiguous statement, which did not even mention race, about the potential consequences of an election law. *See id.* at 1373. The district court's inference based on one ambiguous statement in *LWV* was particularly inappropriate given the court's failure to even "mention[]" the legislative presumption of good faith, in stark contrast to the district court here. *Id.* And while it is true that Commissioners here at times referred to both the race of voters and their partisan affiliation, it is undisputed that the Commission had only racial data, but not political data, in the 2021 redistricting process. *See* DE191:47; *see also Bush*, 517 U.S. at 962. Thus, the district court could only conclude from District 1 Commissioner Scales's statements about the purported partisan and racial distribution of areas added to her district that

she was using "race ... as a proxy for political characteristics, a racial stereotype requiring strict scrutiny." *Bush v. Vera*, 517 U.S. 952, 968 (1996).

The significant direct evidence of racial motive and the absence of any partisan gerrymandering defense makes this case unlike *Alexander*, which was a "circumstantial-evidence-only case," *Alexander*, 602 U.S. at 9, and *Easley v. Cromartie*, where the direct evidence was "extremely weak," *Alexander*, 602 U.S. at 10 (quoting *Cooper*, 581 U.S. at 321). In those cases, in the absence of meaningful direct evidence, plaintiffs were required to "produce ... an alternative map showing that a rational legislature sincerely driven by its professed partisan goals would have drawn a different map with greater racial balance" to overcome the presumption of good faith. *Id.* Here, however, Plaintiffs' direct evidence and the lack of a plausible partisanship defense renders the alternative map requirement inapt—though, notably, Plaintiffs *have* offered alternative plans that maintain the partisan composition of the Commission without packing Black voters into Districts 1 and 2.

B. The District Court Did Not Clearly Err in Concluding there was Significant Circumstantial Evidence of Racial Predominance.

The district court did not err in crediting extensive circumstantial evidence that race predominated in 2021. Appellant's arguments to the contrary are without merit for three reasons. First, given the Commission's invocation of core retention as a justification for the 2021 Plan, the district court correctly treated the Commission's §5 correspondence describing prior plans' maintenance of explicit racial thresholds as

relevant circumstantial evidence supporting a finding of racial predominance in 2021. Second, the district court correctly found based on extensive circumstantial evidence, including Plaintiffs' illustrative plans, that any purported partisan goals could not explain the racial demographics of the 2021 Plan. DE191:52-58. Third, the district court correctly found that core retention was not a race-neutral goal, in view of the history of previous districting plans, and that even if it were, the Commission made numerous specific line-drawing choices that could only be explained by race.

i. The Commission's §5 Correspondence Provides Strong Circumstantial Evidence of the Commission's Racial Motives in 2021.

The Commission's reliance on core retention to explain the 2021 Plan's district lines made the rationale for the existing lines relevant to the racial predominance inquiry. DE191:105. Accordingly, the district court did not err in considering the Commission's past §5 correspondence with the DOJ, which reflected a decades-long effort to attain racial thresholds and maintain racial ratios in the districts, as evidence of racial predominance. The district court treated this correspondence as "direct evidence of the Commission's intent in 1985, 1993, 2001, 2004, and 2013" and as "powerful circumstantial evidence of the continuation of a pattern of using race to set the boundaries of the Commission's districts in 2021." DE191:104 (citing *Miller v. Johnson*, 515 U.S. 916, 919 (1995)). Appellant wrongly asserts that the district court "misapprehends the standard for racial predominance" and "flip[s] the presumption of good faith" by relying on the Commission's past §5 correspondence as circumstantial

evidence of present-day racial gerrymandering. Appellant's Br. 47-48. In fact, these findings were supported by the record and consistent with settled precedent.

Courts routinely consider §5 submissions to assess a legislature's intent. *See Alexander*, 602 U.S. at 8 ("States often admit to considering race for the purpose of satisfying [the U.S. Supreme Court's] precedent interpreting the [VRA]."") (citation omitted); *see also Clark*, 293 F.3d at 1272 (describing preclearance statements as "evidentiary 'admissions'" that are probative of racial predominance). Here, the submissions reflect decisions that "expressly adopted and applied a policy of prioritizing mechanical racial targets," which offers "evidence that race motivated the drawing of particular lines." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 267 (2015) ("*ALBC*"); *see also Cooper*, 581 U.S. at 300-01 (noting that the district court "could hardly have concluded anything but" racial predominance in the face of "an announced racial target"); *cf. Bethune-Hill*, 580 U.S. at 191 ("[T]here may be cases where challengers will be able to establish racial predominance ... by presenting direct evidence of the legislative purpose."). The Commission's explicit reliance on racial targets thus demonstrates far more than a "mere awareness" of race in its prior redistricting processes. *Contra* Appellant's Br. 49.

In *Clark v. Putnam County*, this Court inferred racial predominance from a §5 submission which "describe[d] the reapportionment" of two districts "in exclusively racial terms." 293 F.3d at 1268. There, a county sought to create two voting districts in which Black voting strength was "maximized" because "since 1982, two county

commissions and school board districts have been represented by black representatives elected from majority black districts." *Id.* Here, too, the Commission sought to avoid "significantly changing the ratio of black and white population within the districts," DE169-3:2, consistently ensuring "districts have majority black populations in excess of 65% under the 2013, 2001, and 1993 plan[s]," DE169-111:9. These submissions indicated—and other evidence confirmed—that these racial targets had a direct and significant impact on the Commission's line-drawing choices. And the court's treatment of the submissions followed the Supreme Court's racial gerrymandering jurisprudence. *See, e.g., ALBC*, 575 U.S. at 267 ("That [a legislature] expressly adopted and applied a policy of prioritizing mechanical racial targets … provides evidence that race motivated the drawing of particular lines in multiple districts in the State."). There is no clear error in the district court's reliance on this extensive evidence to support its findings of racial predominance. *See U.S. v. Newman*, 614 F.3d 1232, 1238 (11th Cir. 2010); *contra* Appellant's Br. 48.

Appellant's attempt to dismiss these submissions as discussing solely "the anticipated effect of redistricting changes" and not the Commission's intent is silly. The submissions demonstrate the Commission intended to maintain racial targets after each census even if the *reason* they had that intent was to comply with §5's effect-based requirements. DE164:55 ("[T]he Commission did not share its plans with DOJ as a gesture of beneficent federalism."); DE191:104-05.

The Commission's language in the submissions echoes what the Commission was obliged to report to the DOJ under 28 C.F.R. § 51.27, the provision governing §5 submissions. The submissions are "organized" to respond to the statute's itemized criteria. DE169-111:4; DE169-6:7; DE169-4: 2-3; DE169-3:1-3. The *statute*'s "effects" language does not negate the substantial—and often explicit—evidence of the Commission's own intent. *Cf. Finalca Casa De Bolsa, C.A. v. Bank of Am., N.A.*, No. 10-20306-CIV, 2010 WL 1540050, at *4 (S.D. Fla. Apr. 19, 2010) (failing to use the word "intent is not determinative as long as the act complained of speaks for itself").

Appellant's reliance on *Chen v. City of Houston* is misplaced. In *Chen*, legislators drew a plan in 1991 in response to a preclearance denial. 206 F.3d 502, 519 (5th Cir. 2000). This 1991 plan "formed the template" of the 1997 challenged plan. But Plaintiffs could not prove race motivated the city's line drawing in either plan because the evidence demonstrated only that the city "abandoned its initial plan … and ultimately adopted a system that met the DOJ's requirements" by establishing minority-majority districts. *Id.* There was no evidence that the city used any racial target at all to meet DOJ's pre-clearance demands. *Id.* at 514. The Fifth Circuit concluded, based on the foregoing, that "abandonment of an original plan by itself does not demonstrate that race predominated." *Id.* at 520. And the plaintiffs "failed to offer any evidence" demonstrating that the adopted plan was inconsistent with "traditional districting principles." *Id.* Thus, the record in *Chen* lacked the clear, unequivocal statements in *this* record of an express legislative intent to maintain a districting plan

that set and achieved racial thresholds. DE191:47 ("Districts 1 and 2 retained approximately 90% of their 2013 populations, and Districts 3, 4, and 5 maintained almost all of their populations from the 2013 plan."); DE170-16:9-10; DE169-3 (1993); DE169-6 (2001); DE169-4 (2004); DE169-111 (2013).

Appellant deploys a parade of horribles, arguing that the district court's use of §5 correspondence as circumstantial evidence of intent in 2021 will ensure both that "compliance with §5 is mutually exclusive with compliance with the Fourteenth Amendment," and that "the constitutionality of every majority-minority district in every jurisdiction previously covered by §5" will be questioned. Appellant's Br. 50. Appellant attacks a straw man: it is the Commission's maintenance of unjustified racial targets that Plaintiffs challenge, not the mere fact of §5 compliance. DE191:105-07. The U.S. Supreme Court has already clearly held that the maintenance of mechanical racial targets is not justified by §5's non-retrogression mandate without "good reasons" and a "strong basis in evidence." *ALBC*, 575 U.S. at 278-79. The Commission failed to make any such showing here.

Moreover, Plaintiff-Appellees' challenge is not to the creation of majority-minority districts or a suggestion that doing so violates the Fourteenth Amendment. The parties agree that strict scrutiny does not apply to every creation of a majority-minority district, nor does it apply simply because "redistricting is performed with the consciousness of race." *Bush*, 517 U.S. at 958, 962 . The practical implication of the district court's decision is not that race predominates whenever a covered

jurisdiction complied with §5 of the VRA; it is that the Commission's use of racial thresholds to pack Black voters into two districts without any strong basis in evidence to suggest such race-based districting was required by the VRA over the course of several decades—and reenactment of those district lines in 2021—provided strong circumstantial evidence of racial gerrymandering in 2021.

ii. Partisanship Cannot Explain the 2021 Plan.

The district court did not misapply *Alexander* in finding that the Commission relied on race not partisanship in drawing district lines in 2021. *Contra* Appellant's Br.

Appellant admits it has not asserted a partisan-gerrymandering defense, and the undisputed evidence makes clear that such a defense would be impossible to muster given the information available to the Commissioners during redistricting. *See supra* p. 9-10. Moreover, in stark contrast to *Alexander*–where an alternative map was required because the plaintiffs provided no direct evidence of racial gerrymandering--here, the district court's decision was grounded on significant direct evidence of racial motive in the drawing of specific district lines. *See supra* pp. 14,17-18. Moreover, Plaintiffs presented alternative maps that comparably adhered to traditional districting criteria and would not have changed the partisan composition of the 2021 Plan. DE191:85.

In *Alexander*, the district court failed to assess whether partisanship rather than race explained the South Carolina legislature's redistricting choices. 602 U.S. at 19. But there, partisanship plausibly explained the legislature's actions because the evidence showed the mapmaker "used only political data," not racial data, "in drawing the

Enacted Map." *Id.* Thus, evidence in *Alexander* substantiated the contention that redistricting choices were *actually* motivated by "partisan aim," and that the Enacted Map's racial composition was in fact "a side effect of the legislature's partisan goal." *Id.* at 20.

Here, by contrast, it is undisputed that "[t]he Commission did not have partisan political data available to it when redistricting, but its mapping software included racial data." DE191:120 (citing DE174:211-12); *compare Alexander*, 602 U.S. at 22-23 (fact that mapmaker had access to "refined, sub-precinct-level political data that accounted for voter turnout and electoral preferences" undermined racial gerrymandering claim); *see also Bush*, 517 U.S. at 962 (fact that mapmaker used detailed racial data, but not political data, supported subjecting map to strict scrutiny). Indeed, Appellant has acknowledged that the Commission did not raise a political gerrymandering defense at any stage of the litigation; that doing so would be difficult given Alabama law preventing registration by party; and that the Commission did not have elections data when redistricting. DE57; DE58; DE156 tp. 87:12-16, 91:1-11. As the Supreme Court reiterated in *Alexander*, a legislature may not "use[] 'race as a proxy' for 'political interest[s].'" 602 U.S. at 7 n.1 (quoting *Miller*, 515 U.S. at 914). By the same token, where the undisputed evidence demonstrates that the Commission considered racial but not political data in drawing its districts, the Commission cannot use the incidental political effects of its choices to excuse its reliance on race. *See Clark v. Putnam Cnty.*, 293 F.3d 1261, 1271-72 (11th Cir.

2002) (a traditional redistricting goal "achieved by using race as a proxy is evidence of racial gerrymandering").

The only evidence of partisanship in this case comes from the statements of the Commissioners for Districts 1 and 2, both of whom are Democrats, who spoke of partisanship only in connection with and as a proxy for race. *See supra* pp. 14,17. Every one of Plaintiffs' alternative maps ensured two safe Democratic seats and better complied with traditional redistricting principles without the racial effects of the 2021 Plan. *See supra* p. 11; *Alexander*, 602 U.S. at 10 (alternative map showing "that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" is strong evidence of racial gerrymandering) (internal citation omitted).

To assuage any lingering doubt, several of Plaintiffs' alternative maps would have ensured the maintenance of the partisan balance of the Commission, guaranteeing three safe Republican districts. DE191:85. The district court credited expert evidence demonstrating that Plaintiffs' alternative maps better respected traditional redistricting criteria such as compactness, contiguity, minimizing political subdivision splits, and respect for municipal boundaries than the 2021 Plan, and "would not result in a change to the partisan composition of the 2021 plan." DE191:84-85, 119. For example, Plaintiffs' expert demonstrated that even though the margin was closer in a third district, the Black preferred candidates (who were Democrats) would lose every election in three districts under one of Plaintiffs' alternative plans. *Id.*; DE169-21:7. This plan

did not pack Black voters into two districts, split fewer municipalities, kept most of Birmingham residents in Districts 1 and 2, and would not have split VTDs. DE169-37; DE169-64:1,11. This constitutes strong evidence that race rather than partisanship drove the districting decisions—plugging the evidentiary gap that doomed the *Alexander* plaintiffs. *See* 602 U.S. at 34 ("[A]n alternative map can 'go a long way' toward helping plaintiffs disentangle race and politics").

McClure Appellees' proposed remedial plan—which remedied the identified gerrymanders while maintaining a +/- 1% population deviation, protected incumbents, and ensured the partisan composition of the Commission would remain unchanged—further demonstrates that race rather than partisanship drove the district lines in the 2021 Plan. DE213.

iii. *Core Retention Is Not a Race Neutral Justification for the 2021 Plan.*

The district court considered the Commission's asserted reliance on core retention and correctly determined, consistent with *Alexander,* that it failed to undermine a finding of racial predominance, for two reasons. First, the district court concluded that, given the context of the Commission's prior districting efforts, core retention was not a legitimately race-neutral criterion here. Second, the district court concluded that even if core retention could be treated as legitimately race-neutral under the circumstances here, it does not explain the Commission's 2021 districting decisions. Both conclusions are legally consistent with *Alexander* and amply supported by the

district court's factual findings, based on an appropriate weighing of the record evidence.

a) The District Court Appropriately Credited Record Evidence Showing that Core Retention Was Not a Race-Neutral Criterion in 2021.

While Appellant notes "preserving the cores of prior districts" is, generally, a criterion that a legislature may lawfully prioritize in redistricting, *Karcher v. Daggett*, 462 U.S. 725, 740 (1983), that ignores the Supreme Court's subsequent note of caution: a criterion may justify districting choices only if it is truly "nondiscriminatory." *Id.* Where, as here, there *is* evidence that prior districts were drawn based on unjustified racial targets, a legislature cannot insulate its plan from judicial scrutiny by asserting a desire to carry forward those unlawful districts. As the Supreme Court recently explained in the §2 context, the Court "has never held that a State's adherence to a previously used districting plan can defeat a" challenge to a new districting plan. *Allen v. Milligan*, 599 U.S. 1, 22 (2023). "If that were the rule, a State could immunize from challenge a ... redistricting plan simply by claiming that it resembled an old racially discriminatory plan." *Id.* This logic holds true here.

The district court's treatment of core retention was also compelled by this Court's decision in *Clark*. In *Clark*, this Court characterized a mapmaker's testimony that her "predominant consideration in crafting the plan was to maintain the core of the existing majority minority districts and strive toward a 60% black VAP" as evidence that "racial considerations drove the [challenged] redistricting." 293 F.3d at 1267. There,

as here, a legislature that had consistently maintained a racial target "by the deliberate manipulation of district lines" could not avoid liability by pointing to core retention, because retaining the cores of prior districts where race predominated simply perpetuated the prior race-based lines. *Id.* at 1268. More recently, in *Jacksonville Branch of NAACP v. City of Jacksonville*, a motion panel of this Court reaffirmed that "preserv[ing] district cores ... is not a legitimate objective" for a legislature when used "to maintain the race-based lines created in the previous redistricting cycle." No. 22-13544, 2022 WL 16754389 at *3 (11th Cir. Nov. 7, 2022). There, as here, evidence that the choice to prioritize core retention was "made to maintain racial borders drawn in" the previous redistricting cycle supported a finding of racial predominance. *Id.*

The district court carefully examined the Commission's prior redistricting cycles and, based on its specific line-drawing choices and §5 correspondence with DOJ, found that the Commission acted with an "intent … to maintain a specific racial threshold" in multiple districts in its 2013 plan. DE191:105. Based on this finding, the district court concluded that "core retention in this case does not represent a race-neutral redistricting criterion." *Id.* at 127.

The district court's conclusion followed precedent establishing that core preservation does not insulate a racial gerrymander from challenge because it does "not address the question of how the 'cores' of these oddly shaped districts came to be in the first place, only why they have remained so." *Jacksonville Branch of NAACP v. Jacksonville*, 635 F. Supp. 3d 1229, 1280 (M.D. Fla. 2022). "'That's the way we've always

done it' may be a neutral response, but it is not a meaningful answer." *Id.* (internal citation omitted). Moreover, core preservation "is not directly relevant to the origin of the new district inhabitants." *ALBC*, 575 U.S. at 274 (emphasis in the original). Thus, the Commission's adherence to a prior districting plan is not a meaningful defense to a racial gerrymandering claim in these circumstances. That is the basic premise of *Covington*: where there is evidence that a prior map is racially gerrymandered, a legislature that prioritizes "preserv[ing] features of the previous[]" map is still engaged in unconstitutional racial gerrymandering. *North Carolina v. Covington*, 585 U.S. 969, 973-74 (2018). As in *Clark*, *Jacksonville*, and *Covington*, because the Commission "chooses to rely on redistricting criteria highly correlated with race, like preserving the 'cores' of unconstitutional districts," it cannot leapfrog the origins of the cores. *Covington v. North Carolina*, No. 1:15-CV-00399, 2018 WL 604732, at *4 (M.D.N.C. Jan. 26, 2018). Appellant's argument that preserving the cores of prior districts precludes a finding of racial gerrymandering misapprehends the law.

b) The District Court Appropriately Credited Record Evidence Showing that Core Retention Could Not Explain the Commission's Districting Choices in 2021.

Even if core retention were a legitimate race-neutral criterion for the Commission in 2021, the district court correctly found that specific redistricting choices the Commission made were inconsistent with its asserted prioritization of core retention. The district court credited the testimony of Dr. Cory McCartan based on simulation analysis he conducted "to test the extent to which core retention explained

the racial demographics of the Commission's 2021 plan." DE191:7. Plaintiffs called Dr. McCartan for the purpose of rebutting the simulation testimony of the Commission's expert, Dr. Barber. *Supra* pp. 12-13. Federal courts regularly credit simulation evidence to assess whether the demographics of a challenged district can be explained by a legislature's asserted legitimate redistricting goal, or whether an impermissible aim predominated. *See, e.g.*, *Jacksonville*, 635 F. Supp. 3d at 1278 (crediting simulation analysis showing that "race played a significant role beyond the purpose of adhering to the traditional and other redistricting criteria"). By expressly accounting for all traditional redistricting criteria the Commission claimed to have relied on, Dr. McCartan's simulation analysis corrected for conceptual deficiencies the Supreme Court identified in previous cases, where expert simulations "ignored certain traditional districting criteria" and failed to "accurately represent[] the districting process." *Milligan*, 599 U.S. at 33-34; *see also Alexander*, 602 U.S. at 24 (expert testimony not probative when based on simulations that "do not replicate the 'myriad considerations' that a legislature must balance as part of its redistricting efforts").

Dr. McCartan compared each enacted district's BVAP share to the BVAP share of its corresponding district in the 100,000 simulated plans produced by Dr. Barber. DE169-26:8-9,30. He found the 2021 Plan placed more Black voters in District 1 than 95.12% of Dr. Barber's simulated plans; more Black voters in District 2 than 96.60% of Dr. Barber's plans; and fewer Black voters in District 3 than 99.72% of Dr. Barber's plans. *Id.* Dr. McCartan concluded that Districts 1, 2, and 3 "are statistically significant

outliers in their BVAP shares" and it would be "very unusual" to have a plan with a "more extreme racial composition" than the 2021 Plan. DE169-26:9. Dr. Barber acknowledged these facts on cross-examination. DE157-30:9; DE175 tp. 127:13-24. He also acknowledged that in previous testimony he deemed a plan that was more extreme than 99.9% of his simulations to be an outlier that represented "a significant deviation from a fair outcome." DE191:57; DE175 tp. 148:5–149:20.

After conducting this district-by-district analysis, Dr. McCartan used these results to calculate a "combined packing-cracking score" that measured the degree to which Black voters were "packed" (by increasing the BVAP of the two most-Black districts) and "cracked" (by reducing the BVAP in the third-most-Black district in a plan) as he had found in the 2021 Plan. DE174 tp. 77:6–12; DE191:56-57. Dr. McCartan then compared the 2021 Plan's combined packing-cracking score to 120,000 simulated maps that accounted for traditional redistricting criteria and prioritized maintaining high core retention scores (the "core retention, strong" simulation set). *Id.* at 57. Dr. McCartan's analysis showed that the 2021 Plan's combined packing-cracking score "was more extreme than 98.49% of randomly generated plans under the strong core retention specification." *Id.* at 58. The district court credited Dr. McCartan's testimony based on his simulation analysis (in addition to other evidence) in finding that race predominated in the drawing of Districts 1, 2, and 3. DE191:122-132. The district court's assessment of "the credibility of expert testimony" is afforded substantial deference on appeal. *Bellitto v. Snipes*, 935 F.3d 1192, 1209 (11th Cir. 2019). "Where there

are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Fla. Int'l Univ. Bd. of Trs. v. Fla. Nat'l Univ., Inc.*, 830 F.3d 1242, 1255 (11th Cir. 2016) (quoting *Holladay v. Allen*, 555 F.3d 1346, 1354 (11th Cir. 2009)).

Appellant's claim that the district court "clearly err[ed]" in finding that "the Enacted Plan was an outlier compared to" the plans Dr. McCartan generated in his core retention strong simulation set because the court "cited nothing" in support, Appellant's Br. 31, is baseless. Appellant contends that the district court could not rely on Dr. McCartan's "packing-cracking score" because "the governing law requir[es] district-specific proof," *id.* at 32 n.17, but the packing-cracking score *is* district-specific; it is predicated on a district-level statistical analysis demonstrating that each of the three most-Black districts is statistically significant outlier in its racial composition when compared to race-neutral simulated plans. DE191:56,57; DE174 tp. 74:10–23, 597:24–598:21. And "[v]oters, of course, can present [jurisdiction-wide] *evidence* in order to prove racial gerrymandering in a particular district." *ALBC*, 575 U.S. at 263. The packing-cracking score is certainly probative of racial predominance, especially in light of other evidence.

Appellant also, once again, tries to draw a false analogy between this case and *Alexander*, arguing that Plaintiffs' experts failed to produce maps that prioritized core retention to the same extent as the 2021 Plan. *See* Appellant's Br. 30. That is simply wrong: each of Dr. McCartan's 120,000 "core retention, strong" simulations retained between 89% and 96.5% of district cores, close to or exceeding the performance of the

2021 Plan on this criterion. DE191:57. In comparison, the expert simulations presented in *Alexander* retained just 69% of district cores on average—three standard deviations lower than the enacted plan's score of 83%. 602 U.S. at 27. Because Plaintiffs' expert's simulations closely approximated the 2021 Plan's core retention, the district court could, and did, rely on that evidence to characterize the 2021 Plan as an "outlier." Appellant's argument is nothing more than a disagreement with the district court's choice to credit Dr. McCartan—an invitation to "reweigh or examine the evidence anew" that this Court is "not permitted" to accept. *Bellitto*, 935 F.3d at 1208.

At bottom, Appellant's argument is radical in its sweep: in Appellant's view, a district court clearly errs anytime it concludes that race predominated in the drawing of a district if the legislature's redistricting process happens to advance *any* other redistricting criterion to *any* extent—even without evidence that the legislature actually prioritized that criterion. That's certainly not what the Supreme Court held in *Alexander*. Racial gerrymandering plaintiffs must "demonstrate that race *drove* the mapping of district lines," not that the legislature's actions resulted in a map that sacrifices every other possible redistricting criterion in its pursuit of racial targets. 602 U.S. at 11. The central question is "whether race predominated in the drawing of a district 'regardless of the motivations' for the use of race." *Id.* at 38 (quoting *Shaw v. Reno*, 509 U.S. 630, 645 (1993)); *see also Bethune-Hill*, 580 U.S. at 190 ("[A] conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition ... to establish a claim of racial gerrymandering."). Yet

Appellant's standard would permit a legislature to justify a map solely by reference to incidental consequences of its race-predominant districting. The district court did not err in refusing to bless the Commission's impermissible reliance on race simply because it resulted—unsurprisingly given the Commission's history of racial gerrymandering—in a plan that resembled its prior maps.

iv. *The District Court Appropriately Found the Commission's Movement of Precincts in 2021 and Splitting of Municipalities Between Districts Over Several Decades Provides Additional Circumstantial Evidence of Racial Gerrymandering in 2021.*

The district court also assessed the Commission's movements and splitting of precincts in 2021, and splitting of municipalities across several decades, as additional evidence of racial predominance.

The court found based on extensive expert testimony that the Commission drastically departed from traditional criteria and that these departures were explicable only by the Commission's movement of Black residents into Districts 1 and 2. DE191:118. In 2021, the Commission split four more precincts on top of the one precinct split in the 2013 plan. DE164:24; DE85-9:35, 84. The court found that the Commission increased the number of census place splits from 22 in the 2013 plan to 25 in the 2021 Plan. DE191:118; DE169-107:46; DE175 tp. 148:15–23. The 2021 Plan also split Brighton, Fultondale, Homewood, Hoover, Midfield, Irondale, Bessemer, Center Point, Trussville, Leeds, and Tarrant, municipalities to which Black residents have moved from Birmingham since the 1990s. DE191:118; DE169-108:117–29. For

most of these municipalities, the Commission placed large portions of their Black populations into Districts 1 and 2 at the same time it sought explicitly to achieve racial thresholds in those districts. DE191:118. The Commission's splitting of municipalities and precincts along racial lines, both in 2021 and in previous redistricting, supported the district court's conclusion that key traditional districting principles were necessarily subordinated to race to achieve the Commission's race-based goals. *See supra* pp. 14-24. *ALBC*, 575 U.S. at 266 (splitting of precincts and county lines in majority Black districts evidence of racial gerrymandering); *Covington v. North Carolina*, 316 F.R.D. 117, 145, 160 (M.D.N.C. 2016) (splitting more precincts and in a more complicated manner strongly suggests race predominated), *aff'd*, 581 U.S. 1015 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 148 (E.D. Va. 2018) (split subdivisions indicate racial predominance); *see also GRACE v. City of Miami*, 730 F. Supp. 3d 1245, 1283–86 (S.D. Fla. 2024). The court's treatment of these facts as evidencing racial predominance is entirely consistent with, and indeed required by, established precedent.

III. The District Court Did Not Err in Refusing to Credit Appellant's Post-Hoc Justifications, Which Were Unsupported by Evidence.

The only justifications for the district lines offered by the Commission in 2021 were to equalize population within a +/-1% population variance and to retain the 2013 districts to the highest degree possible. DE191:40-42,105; DE163-10:46,14-47. Recognizing that neither explains the race-based districting decisions in the 2021 Plan, Appellant offers pure speculation to explain how the Commission drew the 2021

district lines. But "[t]he racial predominance inquiry concerns the *actual* considerations that provided the essential basis for the lines drawn," and "post hoc justifications the legislature in theory could have used but in reality did not" have never precluded a finding of racial predominance. *Bethune-Hill*, 580 U.S. at 189-90 (emphasis added). As the district court appropriately determined, the facts of this case contravene Appellant's asserted post-hoc justifications.

Appellant attempts to justify the 2021 Plan by reference to a purported desire to anchor districts in Birmingham, but no evidence supports this assertion. No commissioner or any §5 correspondence ever mentioned any attempt to anchor two districts in Birmingham. DE169-2; DE169-3; DE169-6; DE169-111. Moreover, the Commission's 30(b)(6) witness, Mr. Stephenson, denied that the Commission sought to keep municipalities together in the 2021 Plan because cities were "always growing and annexing and changing their own city boundaries," which made such considerations impractical. DE174 tp. 188:21-189:1; 212:14-213:15. The district court's summary judgment opinion appropriately rejected the Commission's attempt to distort history, *see* DE164:54–55, and it explained in its post-trial findings that it "cannot be reconciled with the historical record or with precedent," DE191:108.

Appellant also attempts to transform Mr. Stephenson's personal observations about the 2021 Plan into evidence of motivations he testified were not expressed by the Commissioners themselves. DE174 tp. 190:2-192:6,193:24-194. For example, Appellant faults the district court for "never mention[ing]" that, in splitting the

Bessemer Civic Center precinct along racial lines between Districts 2 and 3, one part of the precinct is more rural and allegedly District 2 Commissioner Tyson had past electoral success there. Appellant's Br. 42. But the district court had no cause to mention either. Both were observations offered only by Mr. Stephenson, who disclaimed any ability to speak to the Commissioners' intent. DE191:41; DE174:155-56 tp. 648:22-649:3, 193:24-194:3. No Commissioner testified, and the court could not properly rely upon speculation by Mr. Stephenson that either explanation was relevant to the splitting of that precinct or any other. DE174 tp. 683:2-684:11; 686:24-687:3.

Appellant claims that the portion of Bessemer added to District 2 in the 2021 Plan was "an area where Commissioner Tyson outperformed in a runoff election before redistricting." Appellant's Br. 41-42. But "[i]n deciding issues on appeal [this Court] consider[s] only evidence that was part of the record before the district court." *Selman v. Cobb Cnty. Sch. Dist.*, 449 F.3d 1320, 1332 (11th Cir. 2006). Regardless, this unsupported expansion of Mr. Stephenson's testimony, even if it had been introduced at trial, bears no relevance to the Commission's decision to split the Bessemer Civic Center precinct between Districts 2 and 3. It came from the mere observation of Mr. Stephenson at the prompting of counsel, and even in that testimony, Mr. Stephenson only stated that he thought Commissioner Tyson outperformed the incumbent "[i]n the Bessemer area." DE174:196 tp. 689:18-20. Even if Mr. Stephenson's observations could be substituted for the actual considerations motivating the Commission's line drawing, his statement does not support the conclusion that the splitting of a precinct

wholly within Bessemer was motivated by the performance of one Commissioner in that area generally. *See also*, *Bethune-Hill*, 580 U.S. at 189-90 ("The racial predominance 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.").

Similarly, Appellant wrongly argues that "[o]ther political explanations also went ignored" by the district court, citing Appellant's expert's claim that District 1 expanded to cover neighborhoods in District 1 Commissioner Scales's former Birmingham City Council district and her church. Appellant's Br. 32. But the district court appropriately found that Dr. Barber's opinions regarding District 1 were unsupported by the record because Dr. Barber never spoke to the Commissioners, had no actual knowledge of the Commissioners' motives or decisions, and because District 1 Commissioner Scales said she did not participate in the creation of the 2021 Plan and voted *against* the plan. DE191:125,128.

By contrast, the evidence substantiated that the Commission's *actual* considerations in the redistricting process included an explicit focus on race and an acknowledged desire to maintain the cores of districts that had been drawn based on race, which does not and cannot insulate the 2021 Plan from a racial gerrymandering claim. *See supra* pp. 43-51; DE170-16:9-10; *Covington*, 585 U.S. at 976-78 (districts racially gerrymandered even though legislature instructed map drawer not to look at race when crafting remedial map because remedial districts were "mere continuations of the old,

gerrymandered districts."); *Jacksonville Branch of NAACP*, 2022 WL 16754389, at *3 (affirming district's finding of racial predominance based on finding that legislature's "intent was . . . to maintain the race-based lines created in the previous redistricting cycle"); *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 544-45 (E.D. Va. 2015*) aff'd in part and vacated in part*, 580 U.S. 178 (2017). Appellant's attempt to distract from this evidence through shifting post-hoc justifications—dreamed up by counsel and laundered through the testimony of individuals who lacked knowledge of the Commissioners' motivations–cannot supplant the district court's careful factual findings and warranted legal conclusions.

CONCLUSION

For the foregoing reasons, the district court correctly applied controlling precedent to the robust direct and circumstantial evidence in this case to find that race predominated in each of the 2021 districts enacted by the Jefferson County Commission. This Court should affirm the district court's permanent injunction.

Dated: December 10, 2025

Respectfully submitted,

/s/ Kathryn Sadasivan
Kathryn Sadasivan
Brenda Wright
Lauren Carbajal
NAACP Legal Defense and
Educational Fund, Inc.
40 Rector Street, 5th Floor
New York, NY 10006

Nicki Lawsen (ASB-2602-C00K)
WIGGINS CHILDS PANTAZIS
FISHER & GOLDFARB, LLC
301 19th Street North
Birmingham, AL 35203
Phone: (205) 341-0498
Fax: (205) 254-1500
nlawsen@wigginchilds.com

Tel: (212) 965-2200
Fax: (212) 226-7592
ksadasivan@naacpldf.org
bwright@naacpldf.org
lcarbajal@naacpldf.org

Deuel Ross
Kacey Mordecai
NAACP Legal Defense and
Educational Fund, Inc.
700 14th Street N.W., Ste. 600
Washington, DC 20005
Tel: (202) 682-1300
dross@naacpldf.org
kmordecai@naacpldf.org

Daniel Hessel
Samuel Davis
Election Law Clinic
Harvard Law School
6 Everett Street, Suite 4105
Cambridge, MA 02138
Tel: (917) 403-4976
dhessel@law.harvard.edu
sadavis@law.harvard.edu

Counsel for Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 32(a)(7)(B) because it contains 12,686 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft® Word for Microsoft 365 MSO (Version 2508 Build 16.0.19127.20192) 64-bit in 14-point Garamond font.

/s/ Kathryn Sadasivan
Kathryn Sadasivan

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2025, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system thereby serving all counsel of record.

/s/ Kathryn Sadasivan
Kathryn Sadasivan