

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

**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.)

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FOR THE ELEVENTH CIRCUIT**

ALEXIA ADDOH-KONDI, 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-00503 (Haikala, J.)

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INTRODUCTION

Proving racial predominance requires evidence, not *ipse dixit*. Plaintiffs say such evidence was “extensive.” McClure Br.11, 32; *see* Addoh-Kondi Br.12. Saying it doesn’t make it so. No different than proceedings in the district court, Plaintiffs offer no response to the Commission’s district-by-district, precinct-by-precinct discussion of non-racial explanations for the 2021 Enacted Plan. And no different than proceedings in the district court, Plaintiffs assume a 65% racial target dictated the design of past districts without evidence for that assumption.

It is no answer to say the district court found that race predominated. That finding warrants no deference when it was “predicated on a misunderstanding of the governing rule of law.” *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986); *see Alexander v. S.C. NAACP*, 602 U.S. 1, 18 (2024) (“If a trial court bases its findings of fact upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard.” (cleaned up)). The decision to relieve Plaintiffs from their demanding evidentiary burden, most recently summarized in *Alexander*, “is a question of law subject to plenary review.” *Abbott v. Perez*, 585 U.S. 579, 607 (2018). And there is little doubt that “an error about [that] relevant law” affected both the district court’s factual and legal conclusions. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015) (*ALBC*). *Alexander* was not “scrupulously applied.” *Contra* McClure Br.26; Addoh-Kondi Br.45. It was waved away in nothing more than a footnote. Op.127 n.44.

At bottom, Plaintiffs' case has never been more than presuming bad faith from an entirely normal redistricting process. The Commission used official census data to redistrict—like every jurisdiction. The Commission used past district lines as the starting point—like many jurisdictions. And before 2013, the Commission communicated with the Department of Justice about redistricting changes as required by §5 of the Voting Rights Act—like many jurisdictions. If that were enough, then seemingly every jurisdiction everywhere has gerrymandered, whether intended or not.

ARGUMENT

I. Plaintiffs have no direct evidence that race predominated.

Plaintiffs say there was “significant direct evidence” of “explicit” use of race in the Commission’s 2021 redistricting process, citing statements of “Commissioners.” McClure Br.30-31, 40. They also presume the Commission’s past VRA compliance likens this case to *Bethune-Hill* or others involving conceded racial targets used during redistricting. McClure Br.33-34; Addoh-Kondi Br.46-48. But no actual evidence supports Plaintiffs’ claims.

A. A single commissioner’s post-vote statement is not evidence that race predominated.

There was not a single mention of race before the Commission adopted the Enacted Plan. Redistricting presentations did not even recount the racial makeup of

districts. Compare DE179-3, DE179-5, DE179-8,¹ with *Jacksonville Branch of the NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229, 1257-63 (M.D. Fla. 2022) (recounting myriad race-based statements in legislative record). The Commission instead discussed retaining their existing constituents, equalizing population, and party politics. See DE179-5 33:14-34:3; DE179-8 33:1-5; 35:21-36:13; 45:8-10.

And yet, McClure Plaintiffs now claim *multiple* “Commissioners” made “statements justifying the district lines on explicitly racial grounds,” McClure Br.31, while Addoh-Kondi Plaintiffs posit “there is no direct evidence of their actual motives,” Addoh-Kondi Br.25. In truth, Commissioners said they wanted to keep districts the same, among other nonracial explanations self-evident in the Enacted Plan. Opening Br.5-7. Plaintiffs’ retelling is fanciful.

1. Multiple “Commissioners” did not make race-based statements. *Contra* McClure Br.27, 29, 30, 31. Not even one Commissioner mentioned race before adopting the Enacted Plan. Plaintiffs contend District 1’s Commissioner Scales spoke of race. McClure Br.14, 31. But she spoke only of partisanship. DE179-8 31:17-22, 33:1-5. Reading her statement about “Democrat versus Republican” and “Democratic” areas,

¹ Page numbers in record citations reflect the blue ECF pagination. 11th Cir. R. 28-5. Transcript citations (DE172, DE173, DE174, DE175, DE179-5, DE179-8) use internal pagination.

id., to be anything other than a statement about party politics is contrary to *Alexander*'s required presumption of good faith. 602 U.S. at 10.²

2. The only mention of race came after the Commission adopted the Enacted Plan in a short statement by District 2's Commissioner Tyson. Responding to criticism that overly "Republican" areas had been added to her district, DE179-8 31:17-22, Commissioner Tyson discussed four discrete areas added to her more than 130,000-person district, *id.* at 39:12-40:23. Hers was not a statement about race alone, let alone a statement that race dictated those discrete changes. She referred to one area only in terms of its "Democratic" politics and the three remaining areas as both "Democratic" and "Black." *Id.* She corroborated the core preservation explanation, saying the core of her district remained the same and then "pull[ed] from ... overpopulated" districts. *Id.* 39:16-18. She discussed reuniting the Oxmoor Valley Community Center (Precinct 2350), explaining that she was pulling "the rest of" that "box" (or precinct) already in her district. *Id.* at 40:1-3; *see* Opening Br.14-15. She discussed adding to the portions of Homewood already in her district: "I pulled from Homewood. I already have that portion of Homewood. All I did was pull the other Democratic part of Homewood." DE179-8 39:22-25.

² Regarding Plaintiffs' suggestion that Commissioners knew nothing of the politics of the areas they represent because the mapping software did not include political data, Plaintiffs ignore that Commissioners had run for office before and would be intimately familiar with county politics. *Infra* II.B.2.a.

Plaintiffs zero in on Commissioner Tyson's saying she "looked at the folks in the[ir] face" in Ross Bridge and Bessemer, contending those words prove racial considerations predominated over all others. McClure Br.17 (quoting DE179-8 40:21-22). But Commissioner Tyson said she "looked at the folks" in the context of saying "I know what I'm getting," not that race was the reason for adding those areas. DE179-8 40:13-23. More fundamentally, Commissioner Tyson's discussion of racial demographics can only be understood as hyperbole. There is no dispute that the BVAP of those Ross Bridge and Bessemer precincts were 50.6%, 79.4%, and 39.6% respectively, DE179-16 at 23-24, not "99% Black," DE179-8 40:7-23. Nor is there any dispute that District 2 overall added more white residents, causing District 2's BVAP to *decline*. DE179-19; DE179-16 at 22. Even Plaintiffs' expert testified that he could not conclude race predominated when looking at District 2 alone. DE172 84:6-12.

This post-vote statement by a single Commissioner, representing the only district where BVAP declined, is not direct evidence of any predominant racial purpose by the Commission. At most, it showed Commissioner Tyson's awareness of racial demographics in three areas in her district. She did not say race was the *reason* for those discrete changes to District 2, only that she knew the demographics (and politics) of those areas. Lawmakers will "almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process." *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *see also Allen v. Milligan*, 599 U.S. 1, 30-31 (2023).

Even if Commissioner Tyson’s statement could be read as evincing something more than an awareness of race, it is an even thinner reed for a finding of racial gerrymandering than the “modicum of evidence” found lacking in *Easley v. Cromartie*, 532 U.S. 234, 257 (2001) (*Cromartie II*). There, a legislator’s statement also referred to partisanship and race together. *Id.* at 253 (describing “need for ‘racial and partisan’ balance”). The Supreme Court concluded “the phrase shows that the legislature considered race along with other partisan and geographic considerations,” and thus “says little or nothing about whether race played a *predominant* role” over partisanship. *Id.* Here too, Commissioner Tyson discussed not just race but also politics for the few areas addressed in her post-vote statement.

Such statements look nothing like the direct evidence in *Cooper v. Harris*, where representatives “repeatedly” expressed their goal of creating a majority-minority district with an explicit “50 percent” BVAP target thought necessary for VRA compliance. 581 U.S. 285, 299, 310, 312 (2017); *see also, e.g., Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 182 (2017) (deploying 55% BVAP target for challenged redistricting). *Contra* McClure Br.30. There is no similar evidence here. The Commission deployed no VRA targets as a predominant criterion during redistricting. DE174 706:16-22. Indeed, Plaintiffs continue to fault the Commission for not conducting a racially polarized voting analysis to inform such targets. McClure Br.10, 27; Addoh-Kondi Br.49.

Moreover, the passing statement was by *one* commissioner about *one* district. It cannot be imputed to the Commission as a whole. *LWV of Fla. v. Fla. Sec’y of State*,

32 F.4th 1363, 1373 (11th Cir. 2022). Plaintiffs would distinguish *League of Women Voters* because the Florida Legislature comprises “hundreds of legislators.” McClure Br.31. But whatever the size, multimember legislative bodies contain individual lawmakers who operate independently and “exercise their judgment”; they are not “mere dupes or tools.” *Brnovich v. DNC*, 594 U.S. 647, 689-90 (2021); see *Thai Meditation Ass’n of Ala. v. City of Mobile*, 980 F.3d 821, 836 (11th Cir. 2020). Nor is a statement about District 2 evidence of racial purpose for other districts. *ALBC*, 575 U.S. at 262. Plaintiffs’ proof must be “district-by-district.” *Id.* But Plaintiffs offered no further proof for District 2, Opening Br.14-17; 41-45, let alone any other district, Opening Br.17-18, 45-47.

3. All that remains is McClure Plaintiffs’ cited hearsay testimony regarding conversations with Commissioner Tyson well after redistricting was complete and redistricting litigation was underway throughout the State. See McClure Br.17. Over the Commission’s objection, Plaintiffs testified they had conversations with Commissioner Tyson about how she “had more Black voters in her district than she needed to get elected.” *Id.* Even if true, there is no “affirmative obligation . . . to avoid creating districts that turn out to be heavily, even majority, minority.” *Cromartie II*, 532 U.S. at 249. The Commission was not obligated to reduce the concentration of Black voters in a district to the minimum required to elect a Black candidate. *Id.* Indeed, that would be the very sort of racial tinkering that the Constitution condemns. *Miller*, 515 U.S. at 916.

B. Past §5 correspondence is not evidence that race predominated.

Plaintiffs repeat the error that permeates the decision below: that five anodyne §5 letters sent to DOJ were “direct evidence of the Commission’s intent” to gerrymander in past cycles. Op.104; McClure Br.33; Addoh-Kondi Br.46. The §5 letters are not direct evidence of any predominant racial purpose in past decades, nor can they condemn the present decade’s Enacted Plan.

1. Section 5 letters are not evidence of past racial intent.

There is no dispute that the county switched from at-large elections to single-member districts to elect its commissioners four decades ago due to concerns about the racial effects of the at-large scheme. *See Yeldell v. Cooper Green Hospital*, 956 F.2d 1056, 1058 (11th Cir. 1992). There is likewise no dispute that the 1985 consent decree “did not require the Commission to maintain any racial target or threshold” for those newly adopted single-member districts. McClure Br.6; *accord* Op.14.³ Nor is there any dispute that between 1985 and 2013, the county sent letters to DOJ reporting the results of that initial single-member district plan and subsequent redistricting changes, as §5 then required. Opening Br.4. None of the above amounts to evidence of racial predominance. Opening Br.48-51. So Plaintiffs resort to a fiction, repeatedly asserting the Commission had a “practice of setting and achieving racial targets” over those years. McClure Br.27,

³ *Contra* Addoh-Kondi Br.11, this Court’s description of the consent decree in *Yeldell*, 956 F.2d at 1058, simply observed that it replaced at-large elections, not that the superseding single-member districts were “purposefully designed” with racial intent.

29, 34, 35; *accord* Addoh-Kondi Br.2, 47, 48. There is an absence of evidence for that assertion.

There is nothing unique about the county's §5 letters. Little different than the §5 letters rejected as evidence of gerrymandering in *Chen v. City of Houston*, 206 F.3d 502, 518-19 (5th Cir. 2000), the county simply recounted racial demographics as relevant to the “anticipated effect” of redistricting, distinct from any *ex ante* racial purpose. DE169-2 at 2; DE169-3 at 3; DE169-6 at 10-11; DE169-111 at 9. That simple “history” of sending letters regarding redistricting changes, as §5 required, is not evidence of unconstitutional racial purpose. *Chen*, 206 F.3d at 519; *see* Opening Br.48-51.

Nothing in the county's §5 letters supports Plaintiffs' contentions of “express” racial goals, or “maintenance of mechanical racial targets,” or “substantial” and “explicit” “evidence of the Commission's own intent.” *See, e.g.*, McClure Br.1, 36, 37.⁴ Search the §5 letters and the only language regarding what Commissioners “intended” was the intent to equalize population. DE169-6 at 10; DE169-111 at 8. Echoing the district court, Plaintiffs contend the following is all they need to show racial purpose: §5 letters said redistricting “equalize[d] the total population ... without significantly altering the racial ratios.” DE169-3 at 3; Addoh-Kondi Br.47; *see also* McClure Br.2, 35. But the county made that statement in the context of discussing the “anticipated *effect*”

⁴ That absence of evidence makes *Bethune-Hill*, involving an undisputed racial target, inapposite. 580 U.S. at 193. With no VRA targets here, there is no reason to ask whether the Commission had “good reasons” or “a strong basis in evidence” to think such targets were necessary. *Contra, e.g.*, McClure Br.37; Addoh-Kondi Br.49.

of redistricting, not intent or purpose. DE169-3 at 3 (emphasis added); *see also* DE169-2 at 2; DE169-6 at 11; DE169-111 at 8-9. Just as saying “I drove to the supermarket without hitting pedestrians” is not evidence of attempted vehicular manslaughter, the county’s saying redistricting occurred “without significantly altering the racial ratios” is not evidence of intended racial purpose.

Plaintiffs’ invocation of *Clark v. Putnam County*, 293 F.3d 1261 (11th Cir. 2002), only underscores the absence of evidence here. The *Clark* letters described the county’s intent “in exclusively racial terms.” *Id.* at 1268. The preclearance letters explained that the county’s mapdrawer was instructed to keep districts’ BVAPs “as high as possible.” *Id.* The letters admitted the county “maximized” Black voting strength, which the mapdrawer accomplished by including “every continuous census block which would have the effect of increasing the black percentage in the two majority black voting districts.” *Id.* at 1267-68.

Nothing in Jefferson County’s §5 letters approaches *Clark*. There was no basis for the district court to presume racial intent from the letters’ statements regarding “effect” alone. *Miller*, 515 U.S. at 914 (“impact alone is not determinative”); *Alexander*, 602 U.S. at 20 (racial demographics as a “side effect” of nonracial redistricting decisions are not evidence of racial gerrymandering). Whatever 65% “rule of thumb” Plaintiffs and *amici* say DOJ employed, the question is whether Commissioners, during redistricting, subordinated nonracial considerations to any such racial target. Neither Plaintiffs nor *amici* offer any evidence that the Commission did so in past decades. Rather, the

evidence was that Districts 1 and 2 have always covered most of Birmingham, resulting in two majority-Black districts, and otherwise followed roadways and other boundaries. Opening Br.9, 11-17. That racial “side effect” of prioritizing the county’s largest city and community of interest does not render the districts unconstitutional. *Alexander*, 602 U.S. at 20. Even Plaintiffs’ expert agreed that a district can result in 65% BVAP “without thinking about race at all.” DE172 183:21-184:3.

Plaintiffs’ contrary theory comes with no limiting principle. If §5 letters that simply recount racial demographics of districts decades ago were evidence of maintaining race-based “targets,” McClure Br.35, then there is evidence of racial purpose for every previously covered jurisdiction across the country. Addoh-Kondi Plaintiffs seemingly embrace that sweeping theory, contending those many jurisdictions need “only” survive strict scrutiny and “justify” their districts. Addoh-Kondi Br.49. But that would simply perpetuate the “disparate treatment” for previously covered jurisdictions condemned as unconstitutional in *Shelby County v. Holder*, 570 U.S. 529, 536, 557 (2013).

2. Section 5 letters are not evidence of present-day racial intent.

Whatever the §5 letters reveal (or don’t reveal) about past redistricting plans, they are not evidence that race predominated in 2021. The *Alexander* plaintiffs made the same argument that past §5 compliance infected the present-day plan. *S.C. NAACP v. Alexander*, 649 F. Supp. 3d 177, 190 (D.S.C. 2023). The argument did not even merit mention

in the Supreme Court’s decision. Instead, “core preservation” was a nonracial explanation for the present-day plan. *Alexander*, 602 U.S. at 7, 27.

Even if Addoh-Kondi Plaintiffs were right to assume that past §5 compliance was riddled with unconstitutionality, Addoh-Kondi Br.49-50, “past discrimination” is not “current intent.” *Greater Birmingham Ministries v. Sec’y of State for Ala.*, 992 F.3d 1299, 1325 (11th Cir. 2021). Carrying forward past officials’ intent to “condemn government action” today “that is not itself unlawful” violates the presumption of legislative good faith. *Abbott*, 585 U.S. at 603.⁵ Without “evidence that the [Commission’s] aim was to gain acceptance of plans that it knew were unlawful,” Plaintiffs cannot “overcome the presumption of legislative good faith” and infer present intent based on those past plans. *Id.* at 605, 608. *Contra* Addoh-Kondi Br.49.

II. Plaintiffs have no other evidence that race predominated.

Without direct evidence, Plaintiffs had to rule out “alternative explanations,” leaving only race to explain the Enacted Plan. *Alexander*, 602 U.S. at 8-9; *see Shaw v. Reno*, 509 U.S. 630, 644 (1993) (*Shaw I*) (gerrymandered districts are “unexplainable on grounds other than race”). Rather than show how they met that burden, Plaintiffs continue to argue that applying *Alexander* here would “transform[] the law of racial gerrymandering.” Addoh-Kondi Br.46. But *Alexander* is simply the latest in the Supreme

⁵ *Contra* Addoh-Kondi Br.50-51, there is no basis for limiting *Abbott*’s rule against treating past discrimination as “original sin,” 585 U.S. at 603, for discriminatory intent claims but not gerrymandering claims when both derive from the same Equal Protection guarantee. Opening Br.52 n.20.

Court’s line of cases explaining a plaintiff’s evidentiary burden to prove racial gerrymandering. *See Alexander*, 602 U.S. at 7-8. By its own terms, *Alexander* applies to all racial gerrymandering cases, not only those involving national political parties. *Contra* Addoh-Kondi Br.53-54.⁶ When a plaintiff fails to “rule out” core retention as a nonracial explanation for the racial demographics of a redistricting plan, *Alexander*, 602 U.S. at 27, they have failed to show that a district is “unexplainable on grounds other than race.” *Shaw I*, 509 U.S. at 644. If any nonracial criterion explains a plan, a plaintiff has not shown that “race for its own sake ... was the legislature’s dominant and controlling rationale.” *Miller*, 515 U.S. at 913. Thus, the “possibility” of *any* “plausible” non-racial explanation—whether national party politics, core retention, or some other factor—is “dispositive.” *Alexander*, 602 U.S. at 20; *see, e.g., id.* at 27. Had the district court held Plaintiffs to that evidentiary standard, as *Alexander* requires, the district court would have concluded Plaintiffs lose.

A. Plaintiffs’ experts ignored *Alexander*.

Plaintiffs contend “comprehensive expert evidence” showed racial predominance. McClure Br.27. But little different than the expert evidence rejected in *Alexander*, Plaintiffs’ experts did not “control” for or “rule out” nonracial redistricting considerations. *Alexander*, 602 U.S. at 27.

⁶ Assertions that the Commission offered no “partisanship” defense are baffling. McClure Br.38; Addoh-Kondi Br.58. Incumbency protection and other political motivations explain the Enacted Plan. *E.g.* Opening Br.29-32.

1. Plaintiffs’ “illustrative” plans ignore *Alexander*.

Plaintiffs’ “illustrative” maps are not evidence of racial predominance. *Contra* McClure Br.40, Addoh-Kondi Br.31. They show only that the Commission could have prioritized nonracial considerations differently—*e.g.*, keeping nearly all municipalities whole despite unwieldy municipal annexations or splintering Birmingham or not equalizing population within +/-1% of ideal. Opening Br.18-19. Such alternatives, which fail to control for the Enacted Plan’s nonracial features, cannot rule out nonracial explanations for the Plan’s resulting racial demographics. *See Alexander*, 602 U.S. at 10, 34. For instance, it is little surprise that the racial demographics of the Enacted Plan (keeping Birmingham mostly whole in two districts) differ from the racial demographics of Cooper D (cracking large portions of Birmingham across four districts). *Id.* at 24; *see* DE173 315:11-15.⁷ Cooper D simply proves different racial “side effect[s]” result, *Alexander*, 602 U.S. at 20, from prioritizing (or de-prioritizing) the county’s largest city.

Plaintiffs have no response to these arguments—at least none based in evidence. Their insistence that illustrative plans would not change the partisan makeup of the Commission, McClure Br.40, is belied by the record. The Fairfax plan changed the Republican Commission President’s district into a Democratic one. DE169-106; DE172 179:18-20. Cooper D would have drawn another Republican Commissioner out of his

⁷ Cooper D moved 14% of Birmingham into District 4 and 4.6% into District 5, while the Enacted Plan kept nearly 95% of Birmingham in Districts 1 and 2. Opening Br.19.

district. DE173 328:13-14.⁸ Beyond that, none of Plaintiffs’ alternative maps mirrored the Enacted Plan’s core retention. Opening Br.18-19.⁹ Failing to control for core retention to “at least” the same levels as the Enacted Plan “means [the Court] cannot rule out core retention” as a “plausible explanation for the differences between” the illustrative plans and the Enacted Plan, little different than plaintiffs’ experts’ same error in *Alexander*, 602 U.S. at 27, 33.

2. Plaintiffs’ simulations arguments ignore *Alexander*.

Plaintiffs continue to ignore the most probative simulations evidence—evidence offered by their own expert, Dr. McCartan, showing the Enacted Plan was no outlier compared to simulations mirroring the core retention of the Enacted Plan. Opening Br.20. The district court made the same error, finding Districts 1 and 2 were “outliers” compared to simulations, Op.58, when Plaintiffs’ expert himself testified the opposite was true, Opening Br.31-32.

⁸ McClure Plaintiffs (at 28, 40) cite the district court’s claim that Cooper A, B, and C maintained the Commission’s current political makeup. *See* Op.85. But these plans ignored core retention and splinter Birmingham. DE179-16 at 43; DE173 315:11-18. Nor did Plaintiffs offer any political evidence for those plans. Citing only a different expert’s different analysis about voters’ ability to elect “Black preferred candidates” in only Cooper B, with nothing about party politics and nothing about Cooper A or C, Op.85 (citing DE169-21 at 7), the district court clearly erred. *See Ellard v. Ala. Bd. of Pardons & Paroles*, 928 F.2d 378, 382 (11th Cir. 1991).

⁹ Compared to the Enacted Plan’s 95.3% core retention, DE169-26 at 14, Fairfax’s plan was 68.2%, and Cooper’s plans ranged from 61.9% to 85.74%. DE179-16 at 43; DE85-3. Those differences are disqualifying. Opening Br.30; *see Alexander*, 602 U.S. at 27 (faulting 14% discrepancy).

Rather than answer for what their expert’s own simulations showed, Plaintiffs rely on simulations created by Dr. Barber before *Alexander*—simulations Dr. Barber plainly warned did not mirror the core retention of the Enacted Plan. *See* McClure Br.45-46; DE179-16 at 49-50. *Alexander* then clarified such simulations could not prove racial gerrymandering. *Alexander*, 602 U.S. at 27. Consistent with *Alexander*, Plaintiffs had at their disposal an alternative set of high core retention simulations created by their own expert, Dr. McCartan. And yet, for the bespoke “packing-cracking” score that McClure Plaintiffs continue to laud (at 46), Dr. McCartan relied on Dr. Barber’s simulations for his initial assumptions underlying the design of that score.¹⁰ Tellingly, Dr. McCartan testified on cross that he hadn’t read *Alexander*, not even the portion about experts’ simulations. DE174 631:16-632:6 (“I don’t think I read the opinion at all.... I find most Supreme Court decisions pretty dense for a nonlegal mind like me.”). Had Dr. McCartan simply heeded *Alexander* and used his *own* high core retention simulations, Dr. McCartan would have had no basis to deem the Enacted Plan’s Districts 1 and 2 as

¹⁰ Dr. McCartan assumed Districts 1 and 2 could be deemed “packed,” while District 3 was “cracked” by comparing the Enacted Plan to non-core retention simulations, *not* his own high core retention simulations. DE174 595:23-596:1, 608:23-609:2. Dr. McCartan never used the “packing-cracking” score before in litigation. DE174 606:7-14. It flouts not just *Alexander* but also *ALBC*, 575 U.S. at 262, by treating individual districts as an undifferentiated whole using “simple arithmetic.” DE174 595:13-15. For instance, if District 1’s BVAP were 65%, District 2’s BVAP were 55%, and District 3’s BVAP were 30%, the “packing-cracking” score would be 30% = $[(65\% + 55\%)/2] - 30\%$. *See* DE174 595:16-596:4.

“packed” outliers. Opening Br.20 n.13.¹¹ In other words, Dr. McCartan loaded the dice by ignoring his own simulations and instead using simulations agnostic to the existing district lines. *Alexander* deemed that reversible error. 602 U.S. at 27, 33. This Court should too.

Contrary to McClure Plaintiffs’ framing (at 48), these simulations arguments are not a “disagreement” over whether Dr. McCartan or Dr. Barber was more credible. The district court made no credibility findings based on the comparative demeanor of experts.¹² The district court’s error was something else entirely: relying on analyses that ignored *Plaintiffs’* expert’s simulations, even though those were the only simulations mirroring the core retention of the Enacted Plan.

3. Plaintiffs’ other expert evidence ignores *Alexander*.

No other expert evidence offered by Plaintiffs satisfies *Alexander’s* rule that Plaintiffs rule out nonracial explanations for the Enacted Plan. 602 U.S. at 9-10. The foundation of Mr. Fairfax’s analysis was that a mapdrawer could “accidentally” gerrymander. DE172 117:1-8. Even if a mapdrawer did not consider race at all, he believed race could still predominate. DE172 77:19-78:4. But racial gerrymandering requires a showing of

¹¹ Contrary to McClure Plaintiffs’ bald assertion (at 48) that Dr. McCartan’s high core retention simulations showed the Enacted Plan was an “outlier,” Dr. McCartan himself testified repeatedly that Districts 1 and 2 were not outliers when measured against his simulations. Opening Br.20, 31.

¹² The only mention of Dr. Barber’s “credib[ility]” was when the court rejected non-racial explanations for District 2 as “post-hoc speculations.” Op.131. Writing off expert testimony as “post-hoc speculation[]” was contrary to *Alexander*. *Infra* II.B.2.c; Opening Br.35.

“racial purpose.” *Miller*, 515 U.S. at 913. Plaintiffs must show that the lines were drawn “because of” race. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

Mr. Cooper similarly thought that demographics alone were proof enough that the Commission’s past plans “track[ed]” Black voters. DE172 264:25-265:6. But *Alexander* rejects such bad-faith presumptions. In *Alexander*, evidence showed that the challenged district “stayed around 17%” BVAP before and after redistricting. 602 U.S. at 20. But “the mere fact that District 1’s BVAP stayed more or less constant proves very little” because that may be simply a “side effect” of a nonracial goal. *Id.* Presuming otherwise presumes bad faith. Opening Br.25-26.

Dr. Liu’s opinions were not probative for a different reason. Dr. Liu conducted what could only be understood as a VRA analysis, not a racial gerrymandering analysis. Opening Br.21; *see also* DE173 400:20-23 (agreeing nearly all previous expert testimony was in §2 cases). His testimony about racially polarized voting and “wasted votes” might pertain to §2 claims, DE173 408:23-25, but had little relevance to Plaintiffs’ burden of untangling nonracial explanations from racial ones. If anything, Dr. Liu proved race and politics are tightly correlated in Jefferson County, DE173 409:20-410:1, 414:14-19, making it all the more important for Plaintiffs to disentangle politics from race. *Alexander*, 602 U.S. at 20. The district court erred by relieving Plaintiffs of that burden. *E.g.*, Op.127 n.44.

B. All that remains is evidence of racial demographics, and demographics alone are not enough.

What's left of Plaintiffs' case are Plaintiffs' observations about the Enacted Plan's racial demographics. But if *Alexander's* presumption of good faith means anything, it is that race-predominant redistricting cannot be presumed from racial demographics alone. Nonracial redistricting priorities will have racial "side effect[s]." *Alexander*, 602 U.S. at 20. It was Plaintiffs' burden to rule them out. *Id.* But after discovery, cross-motions for summary judgment, a four-day bench trial, stay briefing, and appellate briefing, Plaintiffs still have no response to the Commission's district-by-district, precinct-by-precinct explanations. *See* Opening Br.36-46.

1. Plaintiffs never ruled out that racial demographics were simply a "side effect" of core retention or other nonracial criteria.

The undisputed evidence shows that core retention explains the Enacted Plan, and it is clear error to say otherwise. Opening Br.29-30. Contrary to McClure Plaintiffs' retelling (at 45-46), their own expert testified that Districts 1 and 2 were *not* outliers when compared to his high core retention simulations. DE174 633:14-20, 641:20-22. His own analysis showed that districts in simulated plans mirroring the core retention of the Enacted Plan also mirrored the racial demographics of the Enacted Plan. DE179-17 at 2-4. With Dr. McCartan's high core retention simulations, Plaintiffs proved (rather than disproved) that the Enacted Plan's racial demographics were simply

a “side effect” of core preservation. *Alexander*, 602 U.S. at 20; *see, e.g., id.* at 27, 33 (faulting experts for failing to rule out core retention for this reason).

In response, Plaintiffs invite this Court to repeat the district court’s error. Plaintiffs contend the Enacted Plan “perpetuate[s]” past racially predominant districts and core preservation is not “legitimately race-neutral” given the Commission’s §5 compliance. Addoh-Kondi Br.49; *see* McClure Br.41-42. As explained, *supra* Part I.B, Plaintiffs have no evidence that §5-era districts were gerrymandered or that the Enacted Plan “perpetuate[d]” any non-existent gerrymander. *Contra* Addoh-Kondi Br.49. Plaintiffs’ arguments are no different than the *Alexander* plaintiffs, who contended South Carolina perpetuated a §5-era split of Charleston. *Alexander*, 649 F. Supp. 3d at 190. In the face of that argument, *Alexander* said that “core preservation” is a legitimate redistricting goal and faulted plaintiffs’ experts for not ruling it out. 602 U.S. at 7, 27. The Supreme Court did not demand South Carolina start with a “blank slate.” *Id.*

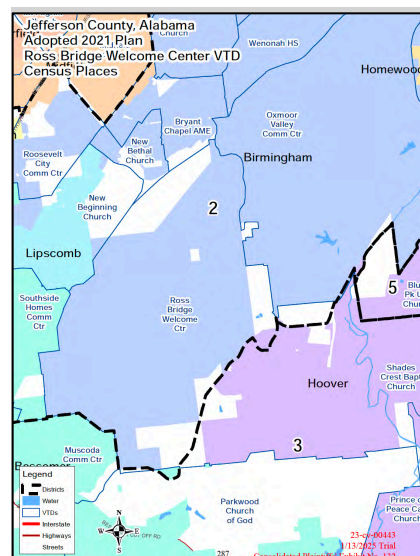
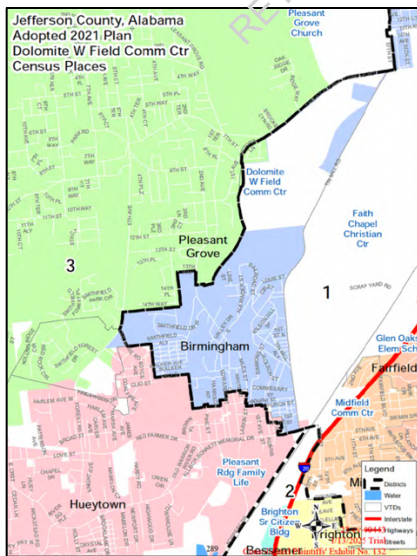
Nor can Plaintiffs liken this case to *Covington*, *Clark*, or *Jacksonville*. *Contra* McClure Br.44; Addoh-Kondi Br.51. The discussion of core retention in *North Carolina v. Covington*, 585 U.S. 969 (2018), was at the remedial stage. The Supreme Court had already affirmed that districts were racially gerrymandered. *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *summarily aff’d*, 581 U.S. 1015 (2017). When the legislature’s remedial plan “retained the core shape of districts that [the courts] had earlier found to be unconstitutional,” the Supreme Court said that was no good. *Covington*, 585 U.S. at 972-73 (cleaned up). *Covington* stands for the unremarkable rule that after a

constitutional violation is found, lawmakers cannot reenact the same districts at the remedial stage. But here, before a constitutional violation is found, *Alexander* confirms that “core preservation” remains a lawful, nonracial redistricting priority that Plaintiffs must rule out. 602 U.S. at 6-7, 27, 33.

As for *Clark* and *Jacksonville*, there was extensive evidence in the legislative record that race was the criterion that could not be compromised. In *Jacksonville*, lawmakers said their “goal would be to get everybody, you know, down to 60 percent or below,” referring to racial demographics, and that changes were made to “bring those numbers down.” 635 F. Supp. 3d at 1256-57. *Jacksonville*’s “issue was not” core preservation “but rather that [lawmakers]’ intent was ... to maintain the race-based lines created in the previous redistricting cycle.” 2022 WL 16754389, at *3 (11th Cir. Nov. 7, 2022). Contrary to McClure Plaintiffs’ spliced quote, it was that racial “intent” that was “not a legitimate objective,” not core retention itself. Similarly in *Clark*, the county’s express goal was to “maintain its two majority black voting districts” by “us[ing] *race* as a basis for assigning voters to those districts” and adding “every contiguous census block available *which would have the effect of increasing the black percentage*” to the core of existing districts. 293 F.3d at 1267 (emphasis added). Plaintiffs identify no analogous evidence here, because there is none. *See, e.g.*, Opening Br.14 (discussing how changes *decreased* BVAP).

2. Nonracial explanations for the Enacted Plan are not “post hoc.”

Plaintiffs have no response to the Commission’s nonracial explanations for every district change, other than to contend the district court was right to ignore them and this Court should too. Opening Br.36-47. But every nonracial explanation is confirmed by the legislative record, expert evidence (including Plaintiffs’ experts), and the map itself, contrary to McClure Plaintiffs’ suggestion (at 48) that a defendant could defeat a racial gerrymandering claim “even without evidence.” Plaintiffs would have the Court ignore nonracial explanations as simple as the following: Undisputed evidence that the 89-person Brookside precinct moved from District 1 to District 3 to make it easier for those residents to vote. DE179-16 at 12. Undisputed evidence that the line between District 3 and District 4 shifted to follow I-65 instead of a creek bed. DE172 163:23-164:11. Or unmistakable visual evidence that showed how District 1 and 2’s expanded lines followed Birmingham municipal boundaries:



DE169-108 at 236, 238. These are but a few examples. For the following reasons, neither Plaintiffs nor the district court had a basis for ignoring such nonracial explanations, especially not after *Alexander*.

a. As for politics, there was no need for Commissioners to have access to sophisticated political data for that explanation to be plausible. Plaintiffs insist that Commissioners could have known nothing about the politics of areas they represent because the mapping software used by the county did not include partisanship data. McClure Br.30-31, 39; Addoh-Kondi Br.57.¹³ But every Commissioner previously ran for office in partisan elections. DE174 670:7-17, 689:10-17, 697:20-698:6; *see also id.* at 689:18-20 (noting that Commissioner Tyson performed well in the Bessemer area in her primary), 670:18-24 (noting the Commissioner Scales formerly represented an area in northeastern Birmingham on the City Council). The suggestion that Commissioners were unaware of county politics is implausible at best. *See Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality op.) (noting political data can come from “legislators’ experience”). Presuming that the Commissioners used the racial data provided by the census itself as a proxy for politics violates the presumption of good faith. *See Alexander*, 602 U.S. at 10. Only the

¹³ McClure Plaintiffs repeatedly emphasize that redistricting software gave Commissioners access to racial data. But it is the *census* itself that gives lawmakers everywhere access to racial data. Plaintiffs cannot presume the Commissioners, merely because they (like everyone else) had access to census data, made race the criterion that cannot be compromised. *See Alexander*, 602 U.S. at 10-11 (requiring presumption of good faith); *see also Miller*, 515 U.S. at 916 (It “does not follow” from racial awareness “that race predominates.”).

most jaundiced view of the Commissioners would turn the political explanations offered for changes to the Enacted Plan, Opening Br.29-30, into racial ones.

b. As for Mr. Stephenson’s testimony offering further plausible explanations, his testimony was not mere “speculation,” *contra* McClure Br.52. His testimony that parts of Bessemer remaining in District 3 were “more rural,” that Commissioner Stephens lived in South Bessemer, or that Commissioner Tyson performed well in the portions of Bessemer already in District 2 in her 2018 runoff election were all based on his personal knowledge, having spent nearly all of his life in Jefferson County, and decades of experience as a county employee. DE174 689:18-20, 692:15-17, 725:21-23; *see* DE174 649:7-650:18.¹⁴ There is no basis for ignoring such explanations offered by the very person who facilitated the Commission’s mapdrawing process. *See* DE174 703:13-14 (explaining that he “coordinat[ed]” the redistricting process); *see also, e.g., Abbott v. League of United Latin Am. Citizens*, No. 25A608, --- U.S. ---, 2025 WL 3484863, at *1 (U.S. Dec. 4, 2025) (faulting district court for “construing ambiguous direct and circumstantial evidence against the legislature”); *Alexander*, 602 U.S. at 37 (noting staffer’s experience gave him a “wealth of knowledge about who lives in which parts of the state”).

¹⁴ *Contra* McClure Br.52, the Commission did not claim that Commissioner Tyson performed well in portions of Bessemer not in District 2 during the 2018 run-off. Rather, because Commissioner Tyson performed well in the parts of Bessemer that were then in District 2, it was no surprise that she would add more of Bessemer to District 2 in the Enacted Plan. Opening Br.16-17, 41-42.

c. As for expert testimony, experts too can offer nonracial explanations so long as they are “plausible.” *Alexander*, 602 U.S. at 27. For just a few examples, Dr. Barber observed that Commissioner Scales previously represented areas added to the northeast side of District 1, where she previously served on the city council, and he further opined that adding former constituents in this way was consistent with common political priorities in redistricting. DE175 772:13-19.¹⁵ He observed how the Enacted Plan kept nearly all of Birmingham in Districts 1 and 2, how precincts added to District 1 were all Birmingham-area precincts rather than nearby non-Birmingham precincts, or how lines changed to follow natural geography or reunite a previously split precinct. *See, e.g.*, DE175 758:23-759:2; 767:6-8; 784:14-785:5; 789:6-10. The district court legally erred by disregarding such testimony as “speculation.” Op.128, 131.

There is nothing speculative about the Commission’s reliance on such expert evidence for alternative explanations. Plaintiffs’ own expert, Mr. Fairfax, testified he did the same as a defense-side expert in Louisiana redistricting litigation. DE172 169:8-170:9 (agreeing his opinion that race did not predominate was based on his own observation of municipal lines and the location of LSU). Mr. Fairfax agreed that alternative explanations could be based on what an expert knew to be “common” in redistricting, not from personal interviews with lawmakers. DE172 170:10-19.

¹⁵ This same change appeared in every proposed plan, undermining McClure Plaintiffs’ assertion (at 53) that it is implausible because Commissioner Scales voted against the chosen plan.

Plaintiffs' own experts, moreover, either identified or did not contest nonracial explanations for the Enacted Plan. Not just Dr. Barber but also Mr. Fairfax agreed that reunifying the Oxmoor Valley Community Center (Precinct 2350) was a nonracial explanation for that change to District 2. DE175 784:24-785:5 (Barber); DE172 95:2-10 (Fairfax). Similarly, Mr. Fairfax also agreed that bringing large portions of a municipality into the same district, as the Enacted Plan does with Birmingham, Bessemer, and Homewood, is common, DE172 82:20-23; 178:2-12, and Mr. Cooper agreed that Birmingham is a community of interest, DE173 314:8-14. Mr. Fairfax also observed how it was "apparent from the map" where boundaries moved to follow the interstate, DE172 164:5-11, and how precinct splits were "explainable by Birmingham's municipal lines," DE172 143:25-144:5. In short, Plaintiffs' experts provided these and other non-racial explanations for the Enacted Plan, and Plaintiffs have no answer for them.

d. Finally, Plaintiffs contend the nonracial explanations offered by the Commission are "speculation" because Commissioners themselves did not testify. McClure Br.50-51; *see* Addoh-Kondi Br.25. But Commissioners need not waive legislative privilege to defend against Plaintiffs' §1983 suit. *See Pernell v. Fla. Bd. of Governors of State Univ.*, 84 F.4th 1339, 1343-44 (11th Cir. 2023). And while McClure Plaintiffs say (at 52-53) that it was "appropriate[]" for the district court to disregard Dr. Barber because he "never spoke to the commissioners," and that Mr. Stephenson's testimony could be similarly disregarded because he "disclaimed any ability to speak to the Commissioners' intent," these witnesses offered their own testimony based on their own expertise and

experience. *Supra* II.B.2.b-c. Based on their testimony, even the district court found that precincts added to District 1 “each contain Birmingham neighborhoods.” Op.62. That and other readily observable nonracial explanations for the Enacted Plan are not “post hoc justifications.” *Contra* McClure Br.54; Addoh-Kondi Br.33. They are simply what *Alexander* calls “plausible explanation[s],” defeating Plaintiffs’ partisan gerrymandering claims. 602 U.S. at 27.

CONCLUSION

This Court should reverse the decision below and vacate the permanent injunction.

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Dated: December 31, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7) because it contains 6,494 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 2016 in 14-point Garamond font.

Dated: December 31, 2025

/s/ Taylor A.R. Meehan

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I filed this brief on the Court's electronic filing system, which will email everyone requiring notice.

Dated: December 31, 2025

/s/ Taylor A.R. Meehan

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