FILED
2023 Aug-22 AM 10:20
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

CARA MCCLURE, et al.,
Plaintiffs,

v.

JEFFERSON COUNTY COMMISSION, et al.,
Defendants.

No. 2:23-cv-00443-MHH

(ORAL ARGUMENT REQUESTED)

ALEXIA ADDOH-KONDI, et al.,
Plaintiffs,

v.

JEFFERSON COUNTY COMMISSION, et al.,
Defendants.

No. 2:23-cv-00503-MHH

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS ADDOH-KONDI PLAINTIFFS' COMPLAINT

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REPLY

In response to Defendants' motion to dismiss, Plaintiffs contend they need not allege that a racially discriminatory purpose pervaded the 2021 redistricting process. But they quote Supreme Court cases confirming that a plaintiff must allege a racially discriminatory purpose pervaded redistricting to sustain an Equal Protection Clause claim. *See, e.g.*, Addoh-Kondi MTD Response 2-3, ECF 32.[1] Plaintiffs have not done so here, and their complaint should be dismissed.

I. Every Equal Protection Clause Claim Requires Proof of an Overriding Race-Based Purpose, Whether Benign or Invidious.

Plaintiffs attempt to cabin their complaint's statement that their claim "is not a claim of intentional discrimination," Compl. ¶10, ECF 1, as a statement that their claim is not a claim of *invidious* discrimination. *See* Response 4, ECF 32; *see also id.* at 11 (drawing a distinction between "proof of intentional separation of Black and White residents" from "proof of intentional discrimination"). But then Plaintiffs go on to argue, erroneously, that "it is *not* necessary for Plaintiffs to prove the Defendants drew the Jefferson County Commission districts for a racially discriminatory purpose" for their racial gerrymandering claim. *Id.* at 7 (emphasis added). Defendants agree that Plaintiffs need not allege *invidious* discrimination.

[1] Docket numbers for Addoh-Kondi Plaintiffs' complaint and response to Defendants' motion to dismiss refer to Addoh-Kondi Plaintiffs' docket, No. 2:23-cv-503-MHH (N.D. Ala.), where Addoh-Kondi Plaintiffs filed both. All other ECF numbers refer to the McClure docket, No. 2:23-cv-443-MHH.

But Plaintiffs absolutely must allege intentional discrimination—that is, that the Commission "was motivated by a predominant, overriding desire" to assign voters to districts in the Enacted Plan based on their race—to state an Equal Protection Clause claim. *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995) (citing *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)); *Shaw v. Reno*, 509 U.S. 630, 642-43 (1993) (*Shaw I*) (citing *Feeney*, 442 U.S. at 272, *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). Plaintiffs' complaint does not meet that pleading standard.

A. Every Equal Protection Clause violation requires proof of intentional discrimination. In some redistricting cases, a state actor engages in race-based discrimination for seemingly good reasons. *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305 (2018); *Cooper v. Harris*, 581 U.S. 285 (2017). In others, the race-based discrimination is nothing short of invidious. *See, e.g.*, *White v. Regester*, 412 U.S. 755, 767-69 (1973). The evidence and applicable defenses will vary between these two sets of cases, but they both require the element of intent. *See Shaw v. Hunt*, 517 U.S. 899, 904 (1996) (*Shaw II*) (asking what "motivate[ed] the legislature's decision") (quoting *Miller*, 515 U.S. at 916). In all cases, plaintiffs must allege that the government *acted because of race*. Plaintiffs cannot plausibly state a claim premised on the government's *failure to act*. *See Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178 (2017); *see also Miller*, 515 U.S. at 916 (mere "aware[ness]

of racial demographics" is not sufficient to show "race predominate[d]" (citing *Feeney*, 442 U.S. at 279)). The Equal Protection Clause polices discriminatory acts, not merely discriminatory effects. *See Bethune-Hill*, 580 U.S. at 189; *Feeney*, 442 U.S. at 279.

Plaintiffs' racial gerrymandering claim is no exception to this settled rule. Plaintiffs seemingly agree that they must plausibly allege "'that race was the predominant factor *motivating* the legislature's decision to place a significant number of voters within or without a particular district.'" Response 4, ECF 32 (emphasis added) (quoting *Shaw II*, 517 U.S. at 904). That is because the "constitutional violation" in this case, just like any other, "stems from the '*racial purpose* of state action.'" *Bethune-Hill*, 580 U.S. at 189 (quoting *Miller*, 515 U.S. at 913) (emphasis added). The constitutional violation does not stem from *inaction.* For example, Plaintiffs liken their claim to the racial gerrymandering claim against Texas House District 90 in *Abbott*. Response 4-5, ECF 32. But in *Abbott*, the Texas Legislature's race-based intent was undisputed. Defendants conceded "that race was the predominant factor in the design of HD90." *Abbott*, 138 S. Ct. at 2334. It was the Legislature's "dominant and controlling rationale." *Miller*, 515 U.S. at 913; *accord Shaw II*, 517 U.S. at 903-04. Absent similar allegations of intent here, there is no constitutional violation, not even for "misshapen districts" or "districts that turn

out to be heavily, even majority, minority." *Bethune-Hill*, 580 U.S. at 189; *Easley v. Cromartie*, 532 U.S. 234, 249 (2001) (*Cromartie II*).

As for Plaintiffs' suggestion (at 4) that other equal protection cases are irrelevant, the same Equal Protection Clause applies in all cases. Plaintiffs contend that Defendants have conflated their "*Shaw* claim with an *Arlington Heights* type equal protection claim." Response 1, ECF 32. But when it comes to the required element of a racially discriminatory purpose, the Supreme Court's racial gerrymandering decisions *liken* racial gerrymandering claims to other equal protection claims, including those alleged in *Feeney* and *Arlington Heights*. In *Shaw*, for example, the Court relied on both *Feeney* and *Arlington Heights* for its starting point: that the Equal Protection Clause's "central purpose is to prevent the States from *purposefully discriminating* between individuals on the basis of race." *Shaw I*, 509 U.S. at 642-43 (emphasis added) (citing *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979)) and *Arlington Heights*, 429 U.S. at 266). Again in *Miller*, the Court quoted *Feeney*'s rule that "'discriminatory purpose' … implies more than intent as volition or intent as awareness of consequences" and requires that the decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects.'" 515 U.S. at 916 (quoting *Feeney*, 442 U.S. at 279). As applied to racial gerrymandering claims, the Court cautioned that decisionmakers will "almost always be aware of racial

demographics; but it does not follow that race predominates in the redistricting process" in violation of the Constitution. *Id.* Then again in *Hunt v. Cromartie*, the Supreme Court quoted *Arlington Heights* to explain that in a racial gerrymandering case a court must assess the government's "*motivation*," which entails "a 'sensitive inquiry into such circumstantial and direct evidence *of intent* as may be available." 526 U.S. 541, 546 (1999) (*Cromartie I*) (emphasis added) (quoting *Arlington Heights*, 429 U.S. at 266). In short, the proof of "deliberate segregation" for Plaintiffs' *Shaw* claim requires allegations of *deliberate* action based on race. *Shaw*, 509 U.S. at 641. It is not enough to allege mere awareness with respect to race—let alone inaction with respect to race—to state an Equal Protection Clause claim. *Id.* at 646; *Miller*, 515 U.S. at 916.

B. Applied here, Plaintiffs' complaint does not adequately allege purposeful discrimination. It begins by disclaiming any "intentional discrimination" in the redistricting process. Compl. ¶10, ECF 1. And it ends by alleging the Commission's *failure* to act was unconstitutional: "The direct evidence of racial predominance is the undisputed *failure* of the Commission to consider whether the race conscious design and target populations of the 1985 Consent Decree were still needed …." *Id.* ¶57 (emphasis added). As Defendants' response confirms, their complaint rests on the dismissable theory that the Commission was required to abandon existing district lines because of the resulting effect. *See* Response 10, ECF 32. That effects-based

claim is not the intent-based claim that the Equal Protection Clause requires. *See Bethune-Hill*, 580 U.S. at 189; *Feeney*, 442 U.S. at 279.

The Commission's adherence to prior district lines is constitutional. There is no support for Plaintiffs' argument that Defendants have conceded liability by acknowledging that districts today continue to resemble districts established by the *Taylor* consent decree. Response 7-8, ECF 32. Quoting *Jacksonville Branch of NAACP v. City of Jacksonville*, No. 22-13544, 2022 WL 16754389 (11th Cir. Nov. 7, 2022), Plaintiffs contend that "preserving the cores of existing districts is not a legitimate objective when they 'maintain the race-based lines created in the previous redistricting cycle.'" Response 8, ECR 32. But by its own terms, *Jacksonville* articulates a more modest rule: When a government maintains existing lines *because of race*, race unconstitutionally predominates. *See Jacksonville Branch of NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229, 1257-59, 1290-93 (M.D. Fla. 2022) (summarizing extensive evidence of racial predominance in the form of racial targets in 2021 redistricting). But where, as here, there are no such allegations that Defendants acted because of race, Defendants are "not required to show that [they] 'purged' any improper racial 'taint' from" an earlier redistricting cycle. *Id.* at 1288 (emphasis added). In short, *Jacksonville* itself confirms that nothing in the Constitution required the Commission to depart from existing lines, absent evidence that the Commission was maintaining the district lines *because of race*.

There is thus nothing "brazen[]" or "defiant" (Response 10) about Defendants' position that districts today can continue to resemble districts from past redistricting plans. Adhering to existing district lines to prioritize continuity of representation between an incumbent and her constituents remains a common and legitimate goal in redistricting, so long as race is not the overriding and predominant rationale for doing so. *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *Montiel v. Davis*, 215 F. Supp. 2d 1279, 1283-84 (S.D. Ala. 2002) (three-judge court) ("race-neutral districting criteria" include "preservation of the cores of existing districts"); *Abrams v. Johnson*, 521 U.S. 74, 99-100 (1997) (affirming State's interest in "maintaining core districts"); *White v. Weiser*, 412 U.S. 783, 791 (1973) ("maintaining existing relationships between incumbent congressmen and their constituents"). Nothing required the Commission "to find some other compelling state interest to justify" maintaining existing district lines, Response 9, ECF 32. Strict scrutiny would not apply when race is "*a* motivation" in drawing a district, let alone when race is no motivation. *Bush v. Vera*, 517 U.S. 952, 958-59 (1996) (plurality).

The remedial-stage decisions from the *Covington* and *Jacksonville* redistricting litigation are not to the contrary. *See* Response 5-6, 8, ECF 32. In both, the concern was that proposed remedial-stage plans looked too much like challenged plans at the liability stage. *See North Carolina v. Covington*, 138 S. Ct. 2548, 2553

(2018) (per curiam) ("Here, in the remedial posture in which this case is presented, the plaintiffs' claims that they were organized into legislative districts on the basis of their race did not become moot simply because the General Assembly drew new district lines around them." (emphasis added)); *Jacksonville Branch of NAACP v. City of Jacksonville*, No. 3:22-cv-493-MMH-LLL, 2022 WL 17751416, at *17 (M.D. Fla. Dec. 19, 2022), *aff'd*, No. 22-14260, 2023 WL 119425 (11th Cir. Jan. 6, 2023). In *Covington*, the Supreme Court ruled that remedial districts could not be "mere continuations of the old, gerrymandered districts" that the Supreme Court had just affirmed as unconstitutional. 138 S. Ct. at 2553; *accord Jacksonville*, 2023 WL 119425, at *1; *see also id*. at *6 (Newsom, J., dissenting) ("acknowledg[ing] that the Supreme Court has not yet squarely addressed whether and to what extent the usual rules [for Equal Protection Clause clams] carry over to the consideration of the interim remedial plans like the one before us"). The discussion of similarities between districts in these remedial-stage decisions, as relevant to the question of remedies, cannot be extrapolated to a rule that the government can never legitimately follow existing district lines. Unlike *Covington* and *Jacksonville*, there has been no such finding of unconstitutionality here. No voter had contested the Commission's longstanding lines as a racial gerrymander until Plaintiffs' suits.

Nor does *Shelby County v. Holder*, 570 U.S. 529 (2013), call into question the constitutionality of today's districts. Plaintiffs' cited cases stand for the

unremarkable proposition that jurisdictions are no longer automatically subject to §5 preclearance after *Shelby County*. Response 8, ECF 32 (collecting cases).[2] *Shelby County* did not transform districts previously drawn to comply with the Voting Rights Act from constitutional to unconstitutional overnight. *Shelby County* "issue[d] no holding on §5 itself" and "in no way affect[ed] the permanent, nationwide ban on racial discrimination in voting found in §2." 570 U.S. at 557. Before and after *Shelby County*, governments have been told that they can simultaneously comply with the Constitution and the Voting Rights Act; the two are not mutually exclusive. *See, e.g.*, *Allen v. Milligan*, 143 S. Ct. 1487, 1511-12 (2023) (plurality); *Johnson v. DeGrandy*, 512 U.S. 997, 1016-17 (1994) (explaining that §2 does not require the maximization of majority-minority districts, which would raise constitutional concerns). The Commission's districts are one such example.

In response, Plaintiffs argue that what was constitutionally permissible before *Shelby County* is no longer permissible now. But the Constitution has not changed. And Plaintiffs' argument (at 8) that the Commission's "compliance with Section 5

[2] *Voketz v. City of Decatur* explains that "formerly covered jurisdictions *may* alter their voting procedures" without first seeking §5 preclearance. 904 F.3d 902, 908 (11th Cir. 2018) (emphasis added). Similarly, in *Thompson v. Attorney General of Mississippi*, the court again confirmed the discretion given to legislative bodies, concluding that the voting laws previously deemed unenforceable without preclearance could now be enforced as "validly enacted laws." 555 F. Supp. 3d 297, 306 (S.D. Miss. 2021). And in *Smith v. Hosemann*, the court lifted a pre-*Shelby County* injunction under Federal Rule of Civil Procedure 60(b)(5) and permitted the State of Mississippi to proceed with a previously enjoined map. 3:01-cv-855, 2022 WL 2168960, at *7 (S.D. Miss, May 23, 2022).

of the Voting Rights Act" before *Shelby County* was "a compelling state interest to justify retaining its racially designed districts" misunderstands the Supreme Court's Voting Rights Act decisions in two ways. First, noted above, *Shelby County* did not do away with §5; it did away with §4's automatic coverage formula. 570 U.S. at 557. Second, the Supreme Court has only ever "assumed" without deciding that Voting Rights Act compliance is a compelling state interest that could justify an otherwise gerrymandered redistricting plan. *Cooper*, 581 U.S. at 292 (2017); *see Bethune-Hill*, 580 U.S. at 193; *Abbott*, 138 S. Ct. at 2315; *see also, e.g.*, *Allen*, 143 S. Ct. at 1511-12 (plurality) (avoiding question of whether VRA compliance was a compelling interest by rejecting arguments of unconstitutional racial predominance in Plaintiffs' *Gingles* 1 plans). Before and after *Shelby County*, plaintiffs brought racial gerrymandering claims against jurisdictions attempting to comply with §5. *See, e.g.*, *Miller*, 515 U.S. at 924-26 ("the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting" for §5 "brings the Act … into tension with the Fourteenth Amendment"); *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 279 (2015) (rejecting strict scrutiny analysis with respect to §5 claim). If Plaintiffs here similarly believe that the Commission's past compliance with §5 was unconstitutional, that's a constitutional claim Plaintiffs could and should have raised decades ago. They did not. And their claims predicated on that theory

now are barred by laches. *See* Defs.' Mot. to Dismiss Addoh-Kondi Pls. Compl. 13-14, ECF 20.

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Plaintiffs' complaint does not plausibly allege that race predominated in the 2021 redistricting process. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676-78 (2009) (pleadings must contain "sufficient factual matter to show" that Defendants acted "for the purpose of discriminating on account of race, religion, or national origin"); *see also Lewis v. Bentley*, 2:16-cv-690, 2017 WL 432464, at *11 (N.D. Ala. Feb. 1, 2017) ("Without specific factual allegations of an intent to discriminate on the part of any particular legislators, Plaintiffs' equal protection claims fail."). The complaint instead rests on the theory that the Commission *failed* to act, and that is not enough. *See, e.g.*, Compl. ¶10, ECF 1 (stating that claim does not rest on allegations of intentional discrimination or dilution); *id.* ¶57 (alleging "failure" to consider alternatives); Response 10-11, ECF 32 (discussing illustrative plans as better redistricting alternatives than that chosen by the Commission). Nothing in the Constitution required the Commission to depart from its existing lines to adopt a redistricting plan with fewer municipal splits or different dispersion of Black or white voters. *See Bethune-Hill*, 580 U.S. at 189 (Constitution prohibits "racial purpose" not "misshapen districts" alone); *Cromartie II*, 532 U.S. at 249 (Constitution does not prohibit "districts that turn out to be heavily, even majority,

majority" absent evidence of racial predominance). Plaintiffs' arguments that there would have been alternative ways to redistrict falls well short of a plausible allegation that race was the Commission's "predominant, overriding" motivation underlying the 2021 Enacted Plan. *Miller*, 515 U.S. at 917.

II. Plaintiffs Sued the Wrong Defendants.

Plaintiffs' arguments (at 12-13) that they have named the proper Defendants are inconsistent with the nature of the Court's remedial power. Any remedy for Plaintiffs would entail "enjoin[ing] executive officials from taking steps to enforce" the district lines in future elections. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1255 (11th Cir. 2020). The Court "can exercise that power only when the officials who enforce the challenged statute are properly made parties to a suit." *Id.*

The relevant question, then, is whether relevant elections officials are a party to the suit. Here, Plaintiffs have named the legislative body that "alters the boundaries of the districts," and the individual Commissioners as the lawmakers who drew, debated, and enacted the redistricting plan. Ala. Code §§11-3-1.1, 11-3-1.2. The Commission's election-related tasks cited in Plaintiffs' response are related to handing off those district lines to the probate judge and the provision of election equipment. *See* Response 13, ECF 32. But the Commission is not the body responsible for determining which candidates are qualified to run in which districts, or which voters are assigned to vote in which districts, as Plaintiffs' response

acknowledges. *Id.* at 12. Rather, if the Court were to order that elections be held pursuant to a court-drawn plan, the officials responsible for carrying out that injunctive relief would be the Jefferson County Election Commission, led by the probate judge as the County's "chief elections official." Ala. Code §17-1-3(b); *see* Ala. Code §17-9-1 (requiring the sheriff to preserve order at elections), §17-8-1 (appointing board consists of probate judge, clerk, and sheriff and appoints inspectors and precinct election officials), §17-6-4 (district lines are filed with the probate judge), §17-13-5 (probate judge oversees candidate qualifying and primary election ballots); *see also, e.g.*, *People First of Alabama v. Merrill*, 479 F. Supp. 3d 1200, 1210 (N.D. Ala. 2020) (challenge to absentee ballot law properly filed against probate judges).

As *Haaland v. Brackeen* confirms, plaintiffs are expected to name the correct officials so that they are formally "bound by the judgment." 143 S. Ct. 1609, 1639-40 (2023) ("federal court's judgment, not its opinion, [] remedies an injury"). And in a redistricting case, the correct defendants are ordinarily those who administer elections, not those who drew the lines. *See Scott v. Taylor*, 405 F.3d 1251, 1256-57 & n.8 (11th Cir. 2005) ("Board of Elections is the only defendant in this case which has any role with respect to the relief sought…, *i.e.*, prospective relief seeking to enjoin the enforcement of the challenged voting district and a declaration as to its legality."); *Smith v. Cobb Cnty. Bd. of Elections & Registrations*, 230 F. Supp. 2d

1313, 1315 (N.D. Ga. 2002) ("enjoin[ing] the defendant Board of Elections from conducting elections in accordance with the existing districts").

Plaintiffs liken the redressability issues here to those in *Utah v. Evans*, 536 U.S. 452 (2002), but there was no mismatch between the relief sought in *Evans* and the Defendant named. In *Evans*, Utah sought a re-count of the census and named the Secretary of Commerce, overseeing the census, as the Defendant. *Id.* at 459. Here, Plaintiffs seek to enjoin the use of the Enacted Plan in future elections, but they have not named the elections officials, *supra*.

Finally, Plaintiffs argue that Commissioners are properly named because they will be answerable to "an injunction that … requires the Commissioners to adopt or implement a new commission district map …." Response 13, ECF 32. But the Commissioners are immune from liability for their past legislative acts. *See Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 734 (1980); *see, e.g.*, *Harris v. Arizona Independent Redistricting*, 993 F. Supp. 2d 1042, 1064 (D. Ariz. 2014) (three-judge court). For that reason and others, §1983 remedies take the form of enjoining the elections officials charged with enforcing the redistricting resolution, not requiring lawmakers to re-write them. *See Jacobson*, 974 F.3d at 1255; *see, e.g.*, *Harris*, 993 F. Supp. 2d at 1064-65 (dismissing redistricting commissioners who "ha[d] no direct connection to implementing the final legislative map"). To be sure, in redistricting cases, as a matter of comity, lawmakers have long

been given the first opportunity to enact a new redistricting plan. *See Ramos v. Koebig*, 638 F.2d 838, 843-44 (5th Cir. 1981) (holding "the district court erred in passing upon the constitutionality of the plan before affording the City Council an opportunity to follow the procedures necessary to enact a valid legislative plan" (citing *Wise v. Lipscomb*, 437 U.S. 535 (1978) (op. of White, J.))). But if lawmakers fail to do so, a court-ordered map follows, not contempt proceedings against the lawmakers. *See id.* At the very least, the individual commissioners should be dismissed as redundant of the County Commission itself. *See Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991) ("Because suits against a municipal officer sued in his official capacity and direct suits against municipalities are functionally equivalent, there no longer exists a need to bring official-capacity actions against local government officials…."); *Welch v. Laney*, 57 F.3d 1004, 1009 (11th Cir. 1995) ("[W]here a plaintiff brings an action against a public official in his official capacity, the suit is against the office that official represents, and not the official himself," and a "claim against the commissioners in their official capacity was thus a claim against the Cullman County Commission").

CONCLUSION

Defendants respectfully request that the Court dismiss Plaintiffs' complaint.

Dated: August 22, 2023

Respectfully submitted,

/s/ Taylor A.R. Meehan

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2023, I served the foregoing document with the Clerk of Court using the Court's ECF system, thereby serving all counsel who have appeared in this case.

/s/ Taylor A.R. Meehan

Taylor A.R. Meehan

Counsel for Defendants