FILED
2023 Aug-22 AM 10:27
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

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REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS McCLURE PLAINTIFFS' COMPLAINT

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REPLY

Plaintiffs' case rests on the theory that it was unconstitutional for the Jefferson County Commission to maintain existing district lines. But their complaint does not plausibly allege that the Commission did so based on a "predominant, overriding" racial purpose. *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995). Without sufficient allegations that race predominated in the 2021 Enacted Plan, there is no plausible violation of the Equal Protection Clause. There was nothing illegitimate about the Commission's policy of largely following their existing district lines, first formed in response to Voting Rights Act litigation. Plaintiffs' complaint should be dismissed.

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I. Plaintiffs Have Not Adequately Alleged Race Predominated

Plaintiffs' Equal Protection Clause claim requires plausible allegations that "[r]ace was the criterion that … could not be compromised" in the 2021 Enacted Plan. *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (*Shaw II*). The complaint must plausibly allege that the new districts are "unexplainable on grounds other than race." *Easley v. Cromartie*, 532 U.S. 234, 241-43 (2001) (*Cromartie II*) (quotation marks omitted). That showing of racial predominance is an intent-based standard, not an effects-based standard. What offends the Constitution is "racial purpose," not "misshapen districts" or even "districts that turn out to be heavily, even majority, minority." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189 (2017); *Cromartie II*, 532 U.S. at 249. And that racial purpose must truly predominate;

"aware[ness] of racial demographics," without more, is not enough. *Miller*, 515 U.S. at 915-16.

A. Plaintiffs' Allegations of Racial Predominance Are Conclusory.

Plaintiffs contend that their complaint adequately alleges that Defendants' "central focus" in the 2021 redistricting was "shifting Black voters around to maintain supermajority-minority districts." Response 14, ECF 28 (quoting Compl. ¶58, ECF 1). That conclusory, standalone allegation about the Commission's "central focus" is insufficient. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). It does not follow from Plaintiffs' factual allegations in their complaint.

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The factual allegations in Plaintiffs' complaint do not support Plaintiffs' conclusory allegation that race predominated in the 2021 Enacted Plan. As for the 2021 redistricting cycle, Plaintiffs' complaint alleges that the only criteria were "ensur[ing] near exact population equality amongst Commission districts" and establishing precincts of contiguous and compact areas. Compl. ¶¶37, 41, 68, ECF 1. The complaint shows that the Commission met its stated goal, with no district exceeding +/-1% of the ideal population for a commission district. *Id.* ¶¶41, 45, 57. The complaint shows that the Commission did so by leaving the existing districts largely intact while adding contiguous areas around the perimeters of underpopulated districts to return them to population equality. *Id.* ¶22. Plaintiffs' complaint recites the geographic features of the resulting districts, but Plaintiffs agree that

geography pre-existed this redistricting plan "for two decades." *Id.* ¶¶76-79; *see also* Response 16-17, ECF 28. The complaint faults the Commission for "*re-enact*[*ing*] contorted districts that capture far-flung Black populations…." Compl. ¶27, ECF 1 (emphasis added). At bottom, the complaint rests on the Commission's failure to change existing districts by reducing the Black population in Districts 1 and 2. *Id.* ¶95 ("The Commission did not need to *maintain* two supermajority Black districts…." (emphasis added)).

Based on those allegations about past redistricting plans, Plaintiffs' complaint repeatedly asserts that race predominated in the 2021 Enacted Plan. *Id.* ¶¶22, 74-75, 82, 84-85, 87, 89, 95. The Court is "'not bound to accept as true'" such "'a legal conclusion couched as a factual allegation.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). And here, while the complaint details the demographics of the 2021 districts, *id.* ¶¶82-89, the complaint shows that individuals of all races were added to and removed from districts to return them to near-perfect population equality. *See* Defs. Mot. to Dismiss 5-9, ECF 19 (discussing Compl. ¶¶22-23, 82-89, ECF 1); *accord* Response 8, ECF 28. In particular, Plaintiffs' complaint shows that most voters added to District 2 were white voters, resulting in a substantial decline in Black Voting Age Population (BVAP) in that district. *See* Compl. ¶¶23, 84, ECF 1. Plaintiffs' own allegations belie their alleged theory that the Commission "selectively ensur[ed] the voters added to District

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2 were Black people," *id*. ¶57. *See SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, 32 F.4th 1347, 1362 (11th Cir. 2022) ("specific allegations … govern over the general allegation"); *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1205-06 (11th Cir. 2007) ("Our duty to accept the facts in the complaint as true does not require us to ignore specific factual details of the pleading in favor of general or conclusory allegations.").

Plaintiffs elaborate on the conclusory assertion that race predominated in their response to Defendants' motion to dismiss. Their response contends that "Commissioners … spoke in explicitly racial terms about their desire to split cities, towns and precincts to maintain the Black voting age population of their respective districts." Response 15, ECF 28 (cross-referencing Response 8). There are no allegations to support that assertion. Near the cross-referenced page in Plaintiffs' response, Plaintiffs discuss a single statement from the public hearing, where Commissioner Scales spoke in explicitly *political* terms: "'We speak of Democratic versus Republican…. You figure out what that looks like.'" *Id.* at 7-8 (quoting Compl. ¶¶61-62, ECF 1). Plaintiffs speculate her statement had "racial implications." *Id.* at 7 (citing Compl. ¶61, ECF 1). Plaintiffs' re-interpretation of that explicitly political statement is not "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Nor would it be sufficient to allege that race predominated. Alleged facts that show mere "aware[ness]" of an area's politics or racial demographics are not

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tantamount to alleged facts that show race predominated. *Miller*, 515 U.S. at 915-16 (lawmakers will "almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process").

B. Plaintiffs' Arguments about Adherence to Existing District Lines Are Unsupported by Precedent.

What's left of Plaintiffs' complaint are Plaintiffs' allegations that the Commission did something wrong by following existing district lines. *See* Response 13-14, ECF 28. Those allegations, without more, fail to state a claim for violation of the Equal Protection Clause. Adhering to existing district lines remains a common and legitimate goal in redistricting. *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 (1973) ("maintaining existing relationships between incumbent congressmen and their constituents"). It does not matter that voters in the resulting districts are predominantly of one race or another. The Constitution "does not place an *affirmative* obligation upon [lawmakers] to avoid creating districts that turn out to be heavily, even majority, minority." *Cromartie II*, 532 U.S. at 249 (emphasis in original).

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Plaintiffs' allegations are missing the essential element that the Commission adhered to existing district lines *because of race*. Absent that predominant "racial purpose," the Constitution does not prohibit keeping existing districts even if they are "misshapen" or are predominantly Black or white. *Bethune-Hill*, 580 U.S. at 189; *Cromartie II*, 532 U.S. at 249. Plaintiffs' cited cases illustrate that point. Consider *Clark v. Putnam County*, 293 F.3d 1261 (11th Cir. 2002). In *Clark*, the constitutional defect was not merely the County's adherence to existing lines. The constitutional defect arose from the County's conceded racially predominate goals. *Id.* at 1267 ("County d[id] not deny that it set out to maintain its two majority black voting districts, nor that it used race as a basis for assigning voters to those districts."). The mapdrawer was instructed to make "black general populations and voter age populations as high as possible" and "to maximize the black voting strength in Districts One and Two." *Id.* at 1267 (quotations omitted); *accord GRACE, Inc. v. City of Miami*, No. 1:22-CV-24066-KMM, 2023 WL 4853635, at *2 (S.D. Fla. July 30, 2023) ("[E]xamining the contemporaneous statements of various Commissioners and examining the sequence of events leading to the passage of the 2022 Enacted Plan, Magistrate Judge Louis found that race predominated in the drawing of each of the five commission districts[.]"); *Abbott v. Perez*, 138 S. Ct. 2305, 2334 (2018) (conceding that race predominated in Legislature's redraw of house district). Similarly in *Jacksonville Branch of NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229

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(M.D. Fla. 2022), there was extensive evidence that race predominated in the form of racial targets in the 2021 redistricting cycle. *Id.* at 1290-93.

Plaintiffs have no similar allegations of racial predominance here. *See* pp. 2-5, *supra*. Their conclusory assertions that the Commission's "central focus" was "to maintain supermajority-minority districts," Response 14, ECF 28 (quoting Compl. ¶58, ECF 1), is belied by the particular allegations in their complaint. The Commission's stated goal was equalizing population by adding or removing a small fraction of residents at the border of each district, with varying effects on the resulting demographics. *See, e.g.*, Response 8, ECF 28 (showing roughly 60% of voters moved into District 2 were white, and roughly 20% of voters moved into District 4 were Black); Defs. Mot. to Dismiss 5-9, ECF 19 (discussing how Black voters decreased in District 2, increased in District 4 and 5, and remained roughly the same in Districts 1 and 3). Plaintiffs cannot plausibly allege that circumstances surrounding the 2021 Enacted Plan resemble the evidence of racial targets and other racially predominant aspects of the redistricting processes in Plaintiffs' cited cases. And because there are no similar allegations that race predominated in the Jefferson County Commission's decision to largely retain the existing districts, *Jacksonville* confirms that Defendants are "*not* required to show that [they] 'purged' any improper racial 'taint' from" an earlier redistricting cycle. 635 F. Supp. 3d at 1288 (emphasis added). Nothing required the Commission to depart from existing lines.

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For similar reasons, Plaintiffs' reliance on *North Carolina v. Covington*, 138 S. Ct. 2548 (2018) (per curiam), is misplaced. Citing *Covington*, Plaintiffs argue that the Commission "cannot defend a racial gerrymander based on … the desire to retain the cores of prior districts." Response 12, ECF 28. But *Covington* is a remedial-stage case, and its remedial-stage rule is inapplicable here. *Covington* establishes that after a court affirms that challenged districts are racially gerrymandered at the liability stage, a proposed remedy that merely copies the racially gerrymandered district lines is inadequate. 138 S. Ct. at 2553 ("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)). This case is on different footing. There has been no such finding of unconstitutionality here. The districts have existed for decades without challenge. And nothing in the Constitution precluded the Commission from re-enacting them while adjusting for slight changes in population.

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Contrary to Plaintiffs' claims, the "obvious alternative explanation" for the districts is the Commission's legitimate desire to follow the existing district lines. *Twombly*, 550 U.S. at 567. Plaintiffs fail to "plausibly establish" the racially predominant purpose necessary for their Equal Protection Clause claim. *Iqbal*, 556 U.S. at 681; *accord Lewis v. Bentley*, No. 2:16-cv-690-RDP, 2017 WL 432464, at *13

(N.D. Ala. 2017) ("Where, as here, there are legitimate reasons supporting the legislature's decision, 'only the clearest proof [of illicit motive] will suffice.'" (quoting *Smith v. Doe*, 538 U.S. 84, 92 (2003))).

C. Plaintiffs' Strict Scrutiny Arguments Are Inapplicable.

Plaintiffs' remaining arguments are about strict scrutiny and VRA requirements. Response 18-20, ECF 28. With respect to strict scrutiny, if race did not predominate in the Commission's 2021 redistricting process, then the Commission need not satisfy strict scrutiny to keep the existing districts. 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).

With respect to the VRA, Plaintiffs' fault the Commission for not "inquir[ing] into whether the VRA *required* supermajorities of Black voters in Districts 1 and 2" and argue that "supermajority Black districts are unnecessary." Response 19, ECF 28 (emphasis added). But the relevant question for Plaintiffs' constitutional claim is not what the VRA does and does not *require*; it is what the Constitution *permits*. The Constitution permitted the Commission to follow existing district lines. *See* pp.5-8, *supra*. Absent plausible allegations that race predominated in the Commission's decision to do so, Plaintiffs' complaint should be dismissed for failure to state a claim.

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II. Plaintiffs Sued the Wrong Defendants.

Plaintiffs' response regarding proper defendants echoes arguments made by the Addoh-Kondi Plaintiffs. *See* Response 23-26, ECF 28; Addoh-Kondi Response 12-13, *Addoh-Kondi v. Jefferson Cnty. Comm'n*, No. 2:23-cv-00503-MHH (N.D. Ala.), ECF 32. Defendants incorporate by reference their arguments in reply. *See* Reply In Support of Defs. Mot. to Dismiss Addoh-Kondi Compl. 12-15, ECF 41. In short, §1983 remedies entail "enjoin[ing] executive officials from taking steps to enforce" district lines in future elections. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1255 (11th Cir. 2020). And while Defendants agree that Plaintiffs need not name "an unlimited number of defendants," Response 25-26, ECF 28, Plaintiffs must name a relevant election official, not only lawmakers who adopted the challenged plan. *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 these existing districts"). To be sure, the Commission has the authority to "alter the boundaries of the districts." Ala. Code §11-3-1.1. But it is not the body charged with conducting elections. *See* Ala. Code §17-1-3(b) (probate judge is

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County's "chief elections official"), §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).

With respect to the individual Commissioners, Plaintiffs cite nothing for the claim that Commissioners individually "share" election responsibilities with other election officials. *See* Response 23-24, ECF 28. The cited Alabama statutes address the *Commission*'s role in supplying and funding elections. *Id*. The individual Commissioners cannot give Plaintiffs the legally enforceable relief they seek any more than an injunction against a state legislator could give a plaintiff relief in a challenge to a statewide redistricting plan. *See* Defs. Mot. to Dismiss 18, ECF 19. They would be 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, 1064-65 (D. Ariz. 2014) (three-judge court). At the very least, the individual commissioners should be dismissed as redundant of the County Commission. *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

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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”).

III. The Court Need Not Reach the Parties’ Standing Arguments at this Time.

After Defendants filed their motion to dismiss, the associational plaintiffs supplemented their initial disclosures with declarations containing redacted names of members residing in each Commission district. *See* Response 23 n.5, ECF 28. Because those declarations purport to identify specific members in each of the challenged districts, Defendants agree that Plaintiffs have sufficiently established associational standing for the motion-to-dismiss stage, and that the Court need not reach Defendants’ arguments about organizational standing. *See Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 263-64 (2015) (requiring members in each district); *League of United Latin Am. Citizens v. Abbott*, 604 F. Supp. 3d 463, 482-83 (W.D. Tex. 2022) (requiring pleadings to identify specific members rather than generalized allegations of members in each district).

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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
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