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U.S. DISTRICT COURT
N.D. OF ALABAMA

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

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

MCCLURE PLAINTIFFS' REPLY IN FURTHER SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

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The Court should grant Plaintiffs' motion for a preliminary injunction. Defendants fail to rebut the showing that the 2021 plan ("Enacted Plan") for the Jefferson County Commission ("Commission") is an illegal racial gerrymander.

Instead, Defendants focus on unavailing arguments related to the balance of equities. Defendants held elections in November 2022, one year after they adopted the Enacted Plan in November 2021. In July, Defendants held a special election with less than two months' notice. And two more special elections for legislative seats are set for September 26 after just three months' notice. Here, Plaintiffs' motions were filed this July—16 months before the November 2024 elections. Defendants' own experiences prove the feasibility of holding elections next November.

But even crediting Defendants' baseless concerns about holding special elections in November 2024, the solution is not to maintain unconstitutional districts until 2026. Instead, the Court can order special elections on a separate schedule that does not implicate Defendants' alleged concerns related to the 2024 general election.

Further, because Defendants' response to Plaintiffs' motions raises factual disputes, Plaintiffs respectfully request that the Court permit limited discovery and set an evidentiary hearing so that the Court can examine and resolve these disputes.

I. Plaintiffs Have Established a Strong Likelihood of Success on the Merits

Defendants fail to rebut Plaintiffs' showing of a substantial likelihood of success on the merits. Their principal defense is that the Commission's overriding intent was to make as little change as possible to the prior districts. But such intent fails to insulate the Enacted Plan from a charge of racial predominance, because Plaintiffs present compelling evidence that, in creating the Enacted Plan, the Commission unjustifiably perpetuated a racial gerrymander. Pls. Br., ECF 26-1, at 10-20; *see also* Cooper Decl., ECF 26-5; Liu Decl., ECF 26-8. The Commission's motive of retaining the core of previously racially gerrymandered districts is itself direct evidence of racial predominance. *See North Carolina v. Covington*, 138 S. Ct. 2548, 2551 (2018) (enjoining redrawn districts that "retain[ed] the core" of racially gerrymandered districts and still bore the hallmarks of racial predominance); *Jacksonville Branch of the NAACP v. City of Jacksonville*, No. 22-13544, 2022 WL 16754389, at *3 (11th Cir. Nov. 7, 2022) (holding that the intent "to maintain the race-based lines created in the previous redistricting cycle" is "not a legitimate objective"); *Clark v. Putnam Cnty.*, 293 F.3d 1261, 1267 (11th Cir. 2002) (finding that a mapmaker's goal of core preservation was "direct evidence" of racial gerrymandering); *Grace, Inc. v. City of Miami,* No. 1:22-cv-24066-KMM, 2023 WL 4853635, at *2-3 (S.D. Fla. July 30, 2023) (holding that the city's intent to preserve

previously racially gerrymandered districts buttressed a finding of racial predominance).

The fact that the Commission's supermajority-Black districts were created by a consent decree almost 40 years ago does not per se rebut a showing of racial predominance. For example, in *Alabama Legislative Black Caucus v. Alabama*, a racial gerrymandering challenge to Alabama's 2011 legislative plan, Alabama argued that its primary intent was to preserve the cores of districts first adopted in a 1993 consent order to resolve a Voting Rights Act ("VRA") case. 989 F. Supp. 2d 1227, 1242, 1253 (M.D. Ala. 2013) (three-judge court). On appeal, however, the Supreme Court rejected Alabama's core preservation defense. 575 U.S. 254, 274 (2015). And, on remand, the district court enjoined several districts as racial gerrymanders, which resulted in lowering the Black voting-age populations ("BVAPs") in those districts. 231 F. Supp. 3d 1026, 1033-34 (M.D. Ala. 2017) (three-judge court); *see also Clark*, 293 F.3d at 1267-70 (holding that, in the absence of proof that a county had narrowly tailored its districts, simply maintaining certain BVAPs for districts created as a VRA remedy was evidence of racial predominance).

So too here. After the census, the Commission could have conducted a "functional analysis" to assess whether the VRA required supermajority-Black and white districts. *See Ala. Legis. Black Caucus*, 575 U.S. at 276. But Defendants offer no evidence that, before passing the Enacted Plan, the Commission examined

whether the VRA required Districts 1 and 2 to retain Black supermajorities, nor do Defendants explain any need for white supermajorities in the other three districts. Rather, Plaintiffs' undisputed expert evidence shows that smaller majority-Black districts will still perform for Black-preferred candidates. Pls.' Br. ECF 26-1, at 18-19; *see also Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (affirming that the VRA did not require retaining majority-Black districts where there was evidence that white crossover voting would usually result in the election of Black-preferred candidates). Defendants' insistence that their overriding goal was to preserve the cores of plans tracing back to 1985, when those districts are packed with Black voters in a manner not required by the VRA, supports that race was Defendants' predominant motive.[1]

Defendants' effort to rebut Plaintiffs' other direct and circumstantial evidence of racial predominance is similarly unavailing. Defendants argue that the Commissioners' statements about the race of the voters being moved into and out of districts should be discounted as merely showing a desire to protect incumbents and maintain partisan advantages. Defs. Br. 39, ECF 36. But the use of race "remains suspect even if race is meant to function as a proxy for other (including political) characteristics" and is unconstitutional even if "legislators use race … with the end

[1] Defendants also cite their purported goal to "'equalize population'" as a defense against racial predominance. Defs. Br. 37, ECF 36 (citing Stephenson Dec. ¶12, ECF 51). But as Plaintiffs have explained, see Pls.' Br. 12, ECF 26-1, the one-person-one-vote rule is not a factor considered in a racial predominance analysis; "it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met." *Ala. Legis. Black Caucus*, 575 U.S. at 272-73.

goal of advancing their partisan interests." *Cooper v. Harris*, 581 U.S. 285, 308 n. 7 (2017). Defendants' statements about the race of voters who it sought to move into certain districts support that race predominately motivated their decisions. Defendants' motive to protect incumbents by maximizing specific racial populations in the districts is itself suspicious since "[i]ncumbency protection achieved by using race as a proxy is evidence of racial gerrymandering." *Clark*, 293 F. 3d at 1272.

Defendants also suggest that there can be no finding of racial predominance unless all commissioners openly discussed race. Defs.' Br. 39, ECF 36. This is incorrect. "A plaintiff's task . . . is simply to persuade the trial court—*without any special evidentiary prerequisite*—that race . . . was the 'predominant consideration in deciding to place a significant number of voters within or without a particular district.'" *Cooper*, 581 U.S. at 318 (quoting *Ala. Legis. Black Caucus*, 575 U.S. at 263 (emphasis added)). In any event, the racial statements of two commissioners were made before the full Commission and concern the entire Commission's intent in drawing the Enacted Plan. *See, e.g.*, *Jacksonville,* 2022 WL 16754389, at *4 (relying on a single lawmaker's testimony to find that the entire legislative body engaged in racial gerrymandering); *Clark*, 293 F. 3d at 1267 (same). Commissioner Knight stated that the Enacted Plan was a collaborative effort and, under each of the proposed plans, the racial demographics of Districts 3, 4 and 5 would remain the same. Jefferson Cnty. Com'n Meeting Transcript Nov. 4, 2023 at 44:17-45:3, ECF

27-1 ("Comm'n Nov. Meeting Tr."). The overtly racial statements help to show that the Commission decided to move voters predominately based on their race.

And beyond the Commissioners' statements, circumstantial evidence reveals that "[r]ace was the criterion, that in the [Commission's] view, could not be compromised." *Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899, 907 (1996). The Commission moved enough Black voters into and out of the districts to preserve the existing racial percentages—which strongly suggests that race was its predominate motive. See *Ala. Legis. Black Caucus,* 575 U.S. at 273-74. Indeed, as shown below, the BVAPs in the Enacted Plan are nearly identical to the BVAPs in the 2011 plan.

	2011 Plan BVAP	2021 Enacted Plan BVAP
District 1	78.30%	78.27%
District 2	69.02%	66.18%
District 3	30.06%	27.29%
District 4	32.46%	28.45%
District 5	14.15%	14.15%

That Plaintiffs' expert drew alternative plans that both better adhered to traditional redistricting principles, Cooper Decl. ECF 26-5, at ¶11-12, and did not run afoul of the VRA, Lui Decl., ECF 26-8, at 8-10, offer further circumstantial evidence that race predominated in the Enacted Plan. Defendants have not rebutted this evidence.

Defendants have presented no evidence that the districts had to maintain white or Black supermajorities. Dr. Liu's effectiveness analysis demonstrates that the BVAP supermajorities in Districts 1 and 2 were, in fact, unnecessary to comply with

the VRA. Liu Decl., ECF 26-8, at 4-10. Rather, majority-Black districts with much lower BVAPs are sufficient in Jefferson County to overcome racially polarized voting and provide Black voters with an opportunity to elect candidates of their choice under the VRA. *Id*. Defendants did not conduct a functional analysis of the BVAP necessary to satisfy the VRA before passing the Enacted Plan. *See Abbott v. Perez*, 138 S. Ct. 2305, 2334-35 (2018) (affirming that a state failed to show that the VRA justified racial gerrymandering where its legislature "pointed to no actual 'legislative inquiry' that would establish the need for its manipulation of the racial makeup of the district"). The Commission never set out to show that it had "good reasons" to find that the VRA required supermajority districts. *Cf. Abbott*, 138 S. Ct. at 2332 (affirming that a state had "good reasons" to believe that the VRA required a majority-minority district); *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 195-96 (2018) (same). Because Defendants fully failed to conduct this analysis, Defendants cannot show that the districts were narrowly tailored to satisfy the VRA.

Defendants' other arguments are similarly meritless. They contend that Plaintiffs must demonstrate that Defendants intentionally sought to diminish Black voters' electoral power. Defs. Br. 28, ECF 36. But Defendants mistake racial gerrymandering claims for intentional vote dilution claims. Racial gerrymandering claims are agnostic as to electoral results or group voting strength. They focus on whether a significant number of voters were sorted by race, "regardless of []

motivation[]" and regardless of effect on voting power. *Shaw v. Reno* ("*Shaw I*"), 509 U.S. 630, 645 (1993). By contrast, intentional vote dilution claims consider whether a state purposefully "enacted a particular voting scheme . . . 'to minimize or cancel out the voting potential of racial or ethnic minorities.'" *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (citation omitted). The two claims are "'analytically distinct.'" *Id*. (citation omitted). Plaintiffs have shown that the Commission sorted voters predominantly based on race and so need not prove that the Commission also sought to dilute the Black voting strength.

Defendants also argue that, because the Court must presume the Commission's good faith, it cannot find a racially predominant motive here. Defs. Br. 40-41, ECF 36. This is false. *Abbott*, 138 S. Ct. at 2324 -25. This presumption yields where, as here, Plaintiffs meet their burden based on the sensitive inquiry into legislative motive needed to show racial predominance. *See id.* at 2335 (applying this presumption and affirming that a state engaged in racial gerrymandering).

II. The Equities Favor Plaintiffs.

A. There Is No Insuperable Obstacle to Holding Special Elections Under a Remedial Commission Plan in Conjunction with the 2024 Elections.

Requiring Plaintiffs to vote in unconstitutional districts constitutes irreparable harm, and the "the public has no interest in enforcing unconstitutional redistricting plans." *Jacksonville*, 2022 WL 16754389, at *5. Rather, "the public interest is served when constitutional rights are protected." *Democratic Exec. Comm. of Fla. v. Lee*,

915 F.3d 1312, 1327 (11th Cir. 2019). And, where, as here, the "administrative burden" or "costs" on the Commission are "negligible," a preliminary injunction to protect "franchise-related rights" is "without question in the public interest." *See Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005).

This Court has a "duty to cure illegally gerrymandered districts through an orderly process in advance of elections." *Covington*, 138 S. Ct. at 2553. For that reason, Defendants' argument that it is too late to hold a special election for county commission districts in November 2024 is wrong. Defendants assert the possibility of confusion over different "ballot styles" that may be needed once a new county redistricting plan is implemented (Defs.' Br. 9, 17, ECF 36); yet they state that the ballot styles for the 2024 elections will not be finalized until "*the end of December 2023*." *Id.* at 8 (emphasis added). In granting Plaintiffs' motions, the Court could easily order relief in time for address ballot styles well before December 2023 by adopting a remedial plan by early October.

Indeed, Defendants' own schedule for adopting a new redistricting plan in 2021 confirms that a remedial plan can be put in place before this December. In 2021, the Commission discuss proposed plans on October 5, and a public hearing was held on October 7, and the Enacted Plan was passed on November 4—all in less than a month. *See* Jefferson Cnty. Comm'n Pre-Meeting Work Session Tr. (Oct. 5, 2021), Ex. F, ECF 27-2; Jefferson Cnty. Comm'n Res. 2021-862 (Oct. 7, 2021), Ex.

G, ECF 26-6; Comm'n Nov. Meeting Tr., Ex. D, ECF 27-1. Although the Enacted Plan was adopted in November 2021, Defendants were able to hold elections a year later in November 2022. If this Court orders new special elections and adopts a new lawful remedial plan in September or October 2023, there is unquestionably more than enough time to hold special elections in November 2024.[2] *See Jacksonville*, 2022 WL 16754389, at *2 (declining to stay an order requiring the adoption of a remedial plan "five months prior to the elections for a single county").

For the same reasons, Defendants' argument that federal courts should not "alter election rules on the eve of an election," Defs.' Br. 15, ECF 37, is unavailing. An injunction issued in August 2023 is not "the eve of an election," which is over a year away. *See Jacksonville*, 2022 WL 16754389, at *2 (concluding that four months before an election is the "outer bounds" of what could be the "eve of an election").

Defendants' effort to invoke "laches" based on *Miller v. Board of Commissioners of Miller County*, 45 F. Supp. 2d 1369 (M.D. Ga. 1998), is equally misplaced. In *Miller*, the court denied a motion for a preliminary injunction filed just two weeks before an election. *Id*. at 1373. But the *Miller* Court also noted that denying the pre-election injunction would not unduly harm plaintiffs because the Court could later set aside the election results and order special elections under a

[2] Nor does it matter that primary elections are scheduled for March 2024. The primary elections are still six months away and can also be held under a new remedial plan.

new remedial plan. *Id.* at 1372. That is precisely the relief Plaintiffs are seeking here. Moreover, laches is not at issue because Plaintiffs' continuing injury is suffered anew each time Defendants hold elections under the illegal Enacted Plan. *See Garza v. Cnty. of Los Angeles*, 918 F. 2d 763, 772 (9th Cir. 1990); *Smith v. Clinton*, 687 F. Supp. 1310, 1312-13 (E.D. Ark. 1988) (three-judge court), *aff'd mem.*, 488 U.S. 988 (1988). Defendants' other authorities are also inapposite. *See White v. Daniel*, 909 F.2d 99, 102-103 (4th Cir. 1990) (barring a challenge to 1981 plan because it was filed after the 1988 elections, the last election before the next census); *Chestnut v. Merrill*, 377 F. Supp. 3d 1308, 1314-18 (N.D. Ala. 2019) (similar); *see also Sanders v. Dooly Cnty.*, 245 F.3d 1289, 1290 (11th Cir. 2001) (barring injunctive relief where a case was filed six years after the plan's enactment). Plaintiffs' filing suit just five months after the first election under the Enacted Plan does not show an undue delay.

Defendants place heavy emphasis on a scheduling order recently entered in *Chandler v. Allen*, No. 2:21-cv-1531, a challenge to Alabama's 2022 legislative redistricting plan for the State House and Senate districts, which set a trial date in 2024 rather than ordering special elections in 2024. Defs.' Br. 20, ECF 36. But *Chandler* involves a challenge to numerous legislative districts across the State, and revising that map and holding special elections in multiple districts would obviously

present more complicated logistics than holding special elections in a single county.[3] *Cf. Jacksonville*, 2022 WL 16754389, at *2 (rejecting the notion that requiring changes to districts in one county over five months before elections is burdensome).

Defendants are also incorrect in arguing that special elections cannot be ordered unless Plaintiffs have sought relief prior to the first regularly scheduled under the challenged redistricting plan. Defendants cite cases where the plaintiffs *did* seek relief before the first election under the challenged plan,[4] but such cases *do not* establish that the plaintiffs *must* challenge plans at that initial stage to win relief.

Indeed, courts have ordered special elections precisely because they deemed this to be a *better* solution than postponing elections under a challenged plan. For example, Defendants cite *Wright v. Sumter County Board of Elections,* 361 F. Supp. 3d 1296 (M.D. Ga. 2018), *aff'd*, 979 F.3d 1282 (11th Cir. 2020), as holding that "the court 'would not be imposing an early election' or 'truncat[ing] elected officials' terms 'under a rushed schedule.'" Defs.' Br., ECF 36, at 24. But the *Wright* court's comment was explaining its decision why ordering special elections the following year would make more sense than enjoining the upcoming elections. 361 F. Supp. at

[3] Moreover, the plaintiffs in *Chandler* had not actually filed a motion for preliminary injunctive relief at the time the court was considering its scheduling order.
[4] *See, e.g., Navajo Nation v. San Juan Cnty.*, No. 2:12-cv-00039, 2017 WL 6547635 (D. Utah Dec. 21, 2017); *Jacksonville Branch of NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229 (M.D. Fla. 2022).

1305 (noting that candidate qualifying had already occurred). Special elections are also the appropriate relief here.

B. If Special Elections in Conjunction with the 2024 Elections Pose a Problem, the Court Can Order Special Elections at a Separate Time.

Defendants claim that it would be too confusing or burdensome to hold elections under a remedial plan in conjunction with the November 2024 general elections—which are 16months away. This defense is unavailing for multiple reasons. First, as Defendants admit, the November 2024 elections already includes "numerous national, statewide, and local elections." Defs.' Br. 16. Even in 2026, the Commission elections will overlap with congressional, gubernatorial, State House and Senate and numerous other statewide and local elections. Ex. P, ECF 43-1. Second, special elections are common in Jefferson County. When a commissioner resigned in May, Defendants successfully held a special election only six weeks later. Ex. Q, ECF 43-2. Similarly, special elections for two House seats are set for September 26 for the vacancies announced only in June and May. Ex. R, ECF 43-3; *see also* Ex. S, ECF 43-4 (announcing a special election only 90 days beforehand).

Third, even if the Court does credit Defendants' arguments, the Court could instead order special elections on a separate date before or after November 2024. This would eliminate any alleged confusion and is authorized under Alabama law. *See* Ala. Code 17-15-1(4) (providing for special election to be held "when any

vacancy occurs" that is not otherwise provided for by Alabama law). This would require only a nonpartisan general election and maybe a runoff. *Id*. § 45-37-72.27.

Defendants assert that it would be "unprecedented" to hold Commission elections without a partisan primary. Defs.' Br. 18. This is false. Defendants held a special election for the Commission just last month without a partisan primary as provided for in Alabama law. Ala. Code § 45-37-72.27. Nothing in Alabama law dictates a different procedure for special elections where the vacancy occurs because the Court finds that a redistricting plan violates the Fourteenth Amendment. *See* Ala. Code 17-15-1(4) (requiring a special election "when any vacancy occurs").

Courts have the board authority to order special elections to remedy violations of federal law. *See, e.g.*, *United States v. Dallas Cnty. Comm'n*, 850 F. 2d 1433, 1441-42 (11th Cir. 1988); *Adamson v. Clayton Cnty. Elections & Registration Bd.*, 876 F. Supp. 2d 1347, 1358 (N.D. Ga. 2012); *League of United Latin Am. Citizens v. Perry*, No. CIV. 2:03-CV-354, 2006 WL 3069542, at *1 (E.D. Tex. Aug. 4, 2006).

Racial gerrymanders "cause society serious harm," *Miller*, 515 U.S. at 912, and the State's "[f]rustration of federal statutes and prerogatives are not in the public interest," *United States* v. *Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012). Thus, the harm of using unlawful maps though the 2026 election substantially outweigh any intrusion into state sovereignty. *See Navajo Nation*, 2017 WL 6547635, at *19; *see also United States v. Osceola Cnty.*, 474 F. Supp. 2d 1254, 1256 (M.D. Fla. 2006).

CONCLUSION

Accordingly, Plaintiffs respectfully request that the Court grant their motion for preliminary injunction against the Enacted Plan.

Respectfully submitted,

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