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

ALEXIA ADDOH-KONDI, CYNTHIA BONNER, JA'NELLE BROWN, ERIC HALL, MICHAEL HANSEN, JULIA JUAREZ, CHARLES LONG, WILLIAM MUHAMMAD, FRED LEE RANDAL, TAMMIE SMITH, and ROBERT WALKER,	)	
Plaintiffs,	)	
vs.	)	**Case No: 2:23-cv-00503-MHH**
JEFFERSON COUNTY COMMISSION,	)	
Defendant.	)	

ADDOH-KONDI PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The Defendant Jefferson County Commission has defended this action by contending it was constitutionally free to maintain "districts [that] have been in place since 1985, drawn in response to Voting Rights Act litigation and precleared for decades." (Doc. 41 at 35, Defendant's opposition to motion for preliminary injunction). But the Supreme Court's recent decision in *Alexander v. South Carolina State Conference of the NAACP*, 144 S.Ct. 1221 (2024), says the Commission's acknowledgment that "race played a role in the drawing of district lines" for the purpose of complying with the Voting Rights Act constitutes direct evidence of racial predominance that requires the Commission to satisfy strict scrutiny. 144 S.Ct. at 1234. In the wake of *Shelby County v. Holder*, 570 U.S. 529 (2013), the Commission does not attempt to satisfy strict scrutiny. Consequently, this case is ripe for summary judgment.

In 1985 the Defendant Jefferson County Commission entered into a consent decree that changed the at-large election of three commissioners to the election of five commissioners in single-member districts, two of which were drawn over 65% Black "in order to provide blacks with a greater opportunity to elect black commissioners." (Doc. 91-2, at 3, 1985 Section 5 submission) Blacks were only 33% of Jefferson County's population in the 1980 census when the two majority-

minority districts were drawn. Despite the fact that Blacks are 42.9% of the county's total population in the 2020 census, two districts over 65% Black (78.27% and 66.18%) remain in the 2021 enacted plan. (Doc. 20-10 at 8) The three majority-White districts that were 22.2%, 5.0%, and 6.3 % Black in 1985 had become 30.06%, 32.46%, and 14.27% Black when 2020 census data were overlaid in the 2013 plan. Doc. 20-9 at 8. In the 2021 enacted plan, the three majority-White districts dropped to 27.29%, 28.45%, and 14.15% Black. (Doc. 20-10 at 8)

As the Defendant County Commission said in its 2013 submission to DOJ for preclearance under Section 5 of the Voting Rights Act, the redistricting plans it drew in 1993, 2001, and 2013 maintained Districts 1 and 2 above 65% Black by modifying the racially designed districts in the 1985 plan only as necessary to equalize their populations "without significantly changing the ratio of black and white population within the districts." (Doc. 89-6, at pdf pp. 1081-82)

The District Court approved the 1985 plan as complying with Section 2 of the VRA, and all four plans from 1985 to 2013 received Section 5 preclearance. The admitted uses of an initial racial target of 65 percent in 1985 and the maintenance of this target when redrawing those districts was not necessarily an unconstitutional racial gerrymander, because it was justified by compliance with the VRA. But on June 25, 2013, two months after DOJ precleared the 2013 plan on April 26, 2013,

2013 Section 5 submission, (Doc. 89-6, at pdf p. 10750) the Supreme Court handed down *Shelby County v. Holder*, 570 U.S. 529 (2013), and released the Defendant County Commission from any requirement to comply with Section 5. That meant the plan enacted in 2021 could not perpetuate the racially gerrymandered 2013 plan unless doing so was necessary to comply with Section 2 of the VRA.

Yet perpetuate the 2013 plan is exactly what the Defendant County Commission did. The redistricting plan adopted in 2021 maintains two districts over 65% Black and reduces the Black percentages in the three majority-White districts. The Commissioners established "their policy preference to keep districts the same," (Doc. 41 at 5), and they negotiated among themselves only those modifications of the 2013 plan necessary to restore population equality. (Doc. 89-9, at 25-26, Deposition of Barry Stephenson)

But instead of trying to avoid an Equal Protection violation by contending that maintaining the racially gerrymandered 2013 districts is necessary to comply with Section 2 of the VRA, the Defendant County Commission boldly argues that "nothing in the Constitution prohibited the Commission from following existing district lines as good policy," namely, the policies of "continuity of representation" and "preserving the cores of prior districts." (Doc. 41 at 33) The Defendant County Commission contends the Commissioners' intent in 2013 to enact a "least change"

plan that preserves the 1985 racial design and maintains the 65% target for the two majority-Black districts cannot overcome the presumption of good faith that race did not "dominate" the 2021 Commissioners. *Id*. at 35. Instead, the Defendant County Commission argues, the Plaintiffs have the burden of proving that the 2021 Commissioners "maintained existing lines in the Enacted Plan for race-based reasons." *Id*. at 36.

There is no direct evidence of the current Commissioners' racial intent, says the Defendant County Commission, because they did not say so in public, (Doc. 41 at 36), and this Court must presume that they acted in "good faith." *Id*. at 40. And, because all of the Commissioners and those working on the 2021 plan with them have invoked executive privilege, they cannot be forced to submit to cross-examination about their motives either in depositions or at trial. (Doc. 76)

If the Defendant County Commission's view of the law were correct, it would foreclose any possibility that plaintiff voters could judicially challenge the perpetuation of a longstanding racial gerrymander now or in the future. But Defendant's view of the law is not correct; to the contrary, it contravenes the controlling Supreme Court precedents. The most recent of these precedents was handed down two weeks ago in *Alexander v. South Carolina State Conference of the NAACP*, 144 S. Ct. 1221 (2024), which affirms the principle that the 65% targets

maintained in the 2013 Jefferson County Commission redistricting plan provide the kind of direct evidence showing that racial considerations predominate. "Direct evidence often comes in the form of a relevant state actor's express acknowledgment that race played a role in the drawing of district lines. Such concessions are not uncommon because States often admit to considering race for the purpose of satisfying our precedent interpreting the Voting Rights Act of 1965. See, e.g., *Alabama Legislative Black Caucus v. Alabama*, 575 U. S. 254, 259–260 (2015)." *Alexander*, 144 S. Ct. at 1234 (citing *Cooper v. Harris*, 581 U. S. 285, 291 (2017)).

II. LEGAL STANDARD

A. Summary Judgment

This Court has described the summary judgment standard on numerous occasions as follows:

> "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To demonstrate that there is a genuine dispute as to a material fact that precludes summary judgment, a party opposing a motion for summary judgment must cite "to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). When considering a summary judgment motion, the Court must view the evidence in the record in the

> light most favorable to the non-moving party and draw reasonable inferences in favor of the non-moving party.

Huntsville Golf Development, Inc. v. Brindley, 2017 WL 4076208 at *2 (N.D. Ala., Sept. 14, 2017) (citing *White v. Beltram Edge Tool Supply, Inc*., 789 F.3d 1188, 1191 (11th Cir. 2015)); *accord*, *Cisney v. Johnson*, 2021 WL 3851973 at *1 (N.D. Ala., Aug. 27, 2021) (citing *Asalde v. First Class Parking Sys. LLC*, 898 F.3d 1136, 1138 (11th Cir. 2018))

In all these cases, as in the instant consolidated actions, this Court was confronted with cross motions for summary judgment and summarized authorities discussing the impact of cross motions as follows:

> "In practice, cross motions for summary judgment may be probative of the nonexistence of a factual dispute, but this procedural posture does not automatically empower the court to dispense with the determination whether questions of material fact exist." *Georgia State Conference of NAACP v. Fayette Cty. Bd. of Comm'rs*, 775 F.3d 1336, 1345 (11th Cir. 2015) (internal quotation marks and brackets omitted) (quoting *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 349 (7th Cir. 1983)). " 'The standard of review for cross-motions for summary judgment does not differ from the standard applied when only one party files a motion, but simply requires a determination of whether either of the parties deserves judgment as a matter of law on the facts that are not disputed.' " *Alabama Mun. Ins. Corp. v. Scottsdale Ins. Co.*, 297 F. Supp. 3d 1248, 1252 (N.D. Ala. 2017) (quoting *S. Pilot Ins. Co. v. CECS, Inc*., 52 F. Supp. 3d 1240, 1242–43 (N.D. Ga. 2014)) (citing in turn *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328, 1331 (11th Cir. 2005)). A district court will not grant summary judgment when the parties file cross-motions for summary judgment "unless one of the parties is entitled to judgment as a matter of law on facts that are not genuinely

> disputed." *United States v. Oakley*, 744 F.2d 1553, 1555 (11th Cir. 1984) (quoting *Bricklayers Int'l Union, Local 15 v. Stuart Plastering Co.*, 512 F.2d 1017, 1023 (5th Cir. 1975)).

Cisney v. Johnson, 2021 WL 3851973 at *2

Summary judgment is not often granted in voting rights cases, including those involving constitutional challenges, but "it is irrefutable that a motion for summary judgment can – and should – be granted when the conditions of Rule 56 are met." *Greater Birmingham Ministries v. Alabama Secretary of State*, 992 F.3d 1299, 1317-18 (11th Cir. 2021).

B. Racial Gerrymandering

A claim of racial gerrymandering requires "a two-step analysis." *Cooper v. Harris*, 581 U.S. 285, 291 (2017); accord, *Grace, Inc. v. City of Miami*, __ F.Suppp.3d __, 2024 WL 1563065 (S.D. Fla., April 10, 2024) at *3; *Jacksonville Branch of the NAACP v. City of Jacksonville*, 2022 WL 16754389 at *1 (11th Cir., Nov. 7, 2022. "First, the plaintiff must prove that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Cooper v. Harris*, 581 U.S. at 291 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). "Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny. The burden thus shifts to the State to prove that its race-based sorting of voters serves

a 'compelling interest' and is 'narrowly tailored' to that end." *Shaw v. Reno*, 509 U.S. 630, 643 (1993); *Bush v. Vera*, 517 U.S. 952, 957 (1996); *Cooper*, 581 U.S. at 291 (citation omitted); *accord*, *Alexander*, 144 S. Ct. at 1234. In its order denying the Commission's motion to dismiss, this Court quoted *Miller v. Johnson*, 515 U.S. at 916-17.

At the first step of the analysis, Plaintiffs may rely on direct evidence such as an admitted use of race in the drawing of districts. *See*, *Alexander* 144 S. Ct. at 1234 In the absence of direct evidence, they may prove predominance by showing "that the [governing body] subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." (Doc. 59 at 22) "But it is the *segregation* of the plaintiffs – not the legislature's line-drawing as such – that gives rise to their claims." *North Carolina v. Covington*, 138 S. Ct. 2548, 2553-54 (2018) (emphasis added).

Plaintiffs must adduce evidence of racial predominance on a district-by-district basis, not on the basis of the county as a whole. *ALBC v. Alabama*, 575 U.S. at 262 (citing *Shaw v. Reno*, 509 U.S. 630, 649 (1993); *Bush v. Vera*, 517 U.S. 952, 965 (1996); *Miller v. Johnson*, 515 U.S. at 916)).

"If the plaintiff makes the requisite showing, we move to the second step, where the state 'bears the burden of showing that the design of that district withstands strict scrutiny.'" *Jacksonville Branch of the NAACP v. City of Jacksonville*, 2022 WL 16754389 at *1 (11th Cir., Nov. 7, 2022) (quoting *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022)); accord, *Alexander*, 144 S. Ct. at 1234.

There is both direct and circumstantial evidence in the instant case of the Commission's predominant purpose to perpetuate the race-based districts in use since the 1985 consent decree plan drew Commission districts that divided municipality and precinct boundaries for the explicit purpose of creating two districts over 65% Black. In fact, the Commission bases its defense in this action on the admitted purpose of every redistricting plan since 1985 to make as little change as possible to the racial composition of the original districts and to keep them above 65% Black. But those admitted racial gerrymanders were arguably justified by the compelling state interest in complying with Section 5 of the Voting Rights Act. In the wake of *Shelby County v. Holder* that justification is no longer available, and the Defendant Commission does not contend that perpetuating the intentionally race-based districts is necessary to comply with Section 2 of the VRA.

C. Core Retention and Incumbent Protection As Justification For Racially Gerrymandered Map

The only grounds on which the Defendant Commission attempts to justify keeping the 2013 plan's race-based district lines are preserving the cores of districts and protecting incumbents' interests in preserving continuity of representation. These considerations, however, cannot change a gerrymandered district into one that is not gerrymandered:

> The defendants misunderstand the nature of the plaintiffs' claims. … [I]t is the *segregation* of the plaintiffs--not the legislature's line-drawing as such-that gives rise to their claims. … [T]hey argued in the District Court that some of the new districts were mere continuations of the old, gerrymandered districts. Because the plaintiffs asserted that they remained segregated on the basis of race, their claims remained the subject of a live dispute, and the District Court properly retained jurisdiction.

North Carolina v. Covington, 585 U.S. 969, 975-76 (2018) (emphasis added). This is true even if, as in *Covington*, the current Commissioners allegedly did not take race into account when they maintained the 2013 gerrymandered district lines. *Id*. at 976.[1]

[1] The Defendant County Commission has attempted to distinguish *Covington* on the ground that the district court had already held that the district lines, as originally drawn, were racially gerrymandered. That is a distinction without a difference, as the Defendant here admitted in its 2013 Section 5 submission to DOJ that Jefferson County Commission's district lines were drawn for a predominantly racial purpose.

When the starting point for redistricting is a map admittedly drawn for a predominantly racial purpose, preserving district cores and protecting incumbent interests is evidence that the line-drawers intended to separate voters by race. *Jacksonville Branch of the NAACP v. Jacksonville*, 635 F. Supp. 3d 1229, 1286 (M.D. Fla. 2022) ("Moreover, as other courts have recognized, by invoking core retention and incumbency protection as the predominant motive behind the shape of the Challenged Districts, the City makes the historical foundation for these districts particularly relevant."); *Jacksonville Branch of the NAACP v. City of Jacksonville*, 2022 WL 16754389, at *3 (11th Cir., Nov. 7, 2022) (an intent "to maintain the race-based lines created in the previous redistricting cycle" is "not a legitimate objective"); *GRACE, Inc. v. City of Miami*, 2023 WL 4942064, at *4 (S.D. Fla., Aug. 3, 2023) ("The Court's analysis of core retention was therefore appropriately limited to an evaluation of whether the Remedial Plan perpetuated the harms of racial gerrymandering, which the Court found it did."); *GRACE, Inc. v. City of Miami*, 2023 WL 4853635, at *2-3 (S.D. Fla., July 30, 2023) (finding of racial gerrymandering was buttressed where the city's "intent was, as expressed, to preserve previously-drawn race-based lines of the Commission Districts in the 2022 redistricting process") (citation omitted); *Covington v. North Carolina*, 283 F. Supp. 3d 410, 431 (M.D. N.C. 2018) ("[E]fforts to protect incumbents by seeking to

preserve the 'cores' of unconstitutional districts … have the potential to embed, rather than remedy, the effects of an unconstitutional racial gerrymander ….''), aff'd in relevant part and reversed in part on other grounds, 585 U.S. 969 (2018); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 561 n.8 (E.D. Va. 2016) ("In any event, maintaining district cores is the type of political consideration that must give way to the need to remedy a *Shaw* violation."); *Vera v. Richards*, 861 F. Supp. 1304, 1336 (S.D. Tex. 1994), aff'd sub nom. *Bush v. Vera*, 517 U.S. 952 (1996) ("Incumbent protection is a valid state interest only to the extent that it is not a pretext for unconstitutional racial gerrymandering."); see *Allen v. Milligan*, 143 S. Ct. 1487, 1505 (2023) (majority opinion) ("But this Court has never held that a State's adherence to a previously used districting plan can defeat a § 2 claim. If that were the rule, a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan.").

III. UNDISPUTED FACTS ENTITLE PLAINTIFFS' TO JUDGMENT AS A MATTER OF LAW

A. Direct Evidence of Racial Predominance

1. *The 1985 Plan*

On November 18, 1985, the Jefferson County Attorney sent a letter to DOJ[2] submitting for preclearance under Section 5 of the Voting Rights Act,[3] a change in the structure of the Jefferson County Commission. (Doc. 91-2, 1985 Section 5 submission) It enclosed a Consent Decree entered August 19, 1985, and amended October 31, 1985, in an action claiming the at-large election scheme violated Section 2 of the Voting Rights Act,[4] *Taylor v. Jefferson County*, CA-84-C-1730-S (N.D. Ala.), with supporting census and voter registration data and maps. (*Id.* at pdf pp. 5-50) The Consent Decree changed the composition of the Commission from three members, who had been elected at large since 1931, to five members elected from single-member districts. (*Id.* at pdf p. 3)

The 1985 Section 5 submission letter stated that the population of Jefferson County was 33-1/3% black, and two of the districts "are drawn in order to provide blacks with a greater opportunity to elect black commissioners." (Doc. 91-2, at pdf p. 3, 1985 Section 5 submission) "**Commission District One (1) will contain**

[2] The Section 5 submission letters marked as exhibits were obtained from the Department of Justice by undersigned counsel pursuant to a freedom of information request. *See* Doc. 91-1, Exhibit A.

[3] Then codified at 42 U.S.C. § 1973c; now codified at 52 U.S.C. § 10304.

[4] Then codified at 42 U.S.C. § 1973; now codified at 52 U.S.C. § 10301.

65.6% blacks. District Two (2) will contain 66.8% blacks. Accordingly, blacks will have a greater opportunity to elect 2/5 or 40% of the County Commission positions." *Id*. (emphasis added) The amended Consent Decree stated that "the parties through their attorneys have informed the Court that variations between the precincts - boxes and the Commission districts in the Consent Decree were more extensive than the parties realized but that they have agreed to a modification." (*Id.* at pdf p. 13) The enclosures showed that many legislative precincts, census tracts, and block groups had to be split along racial lines to conform to the Commission District lines. (*Id*. at pdf pp. 29-45) Several municipalities appear to have been split between districts, but the exact number cannot be ascertained from this exhibit.

The Assistant U.S. Attorney General by letter dated January 13, 1986, interposed no objection to "the increase from three to five commissioners, the change in the method of election from at large to five single-member districts, and the districting plan in Jefferson County, Alabama...." (Doc. 91-2, at pdf p. 51, 1985 Section 5 submission) The first primary elections for Jefferson County Commissioners were held in June 1986, the general elections in November 1986, and the members elected took office in January 1987. (*Id*. at pdf p. 3)

2. *The 1993 Plan*

Following the 1990 census, the Legislature by statute authorized the Commission to redraw the district lines, and the Commission did so by resolution on October 19, 1993. (Doc. 89-4, at pdf p. 3, 1993 Section 5 submission) The Jefferson County Attorney submitted this change for Section 5 preclearance by letter to DOJ dated October 26, 1993. (*Id*. at pdf p. 2) The letter states that Districts 1 and 2 had lost population, while Districts 3, 4, and 5 had gained population. "The change in district boundaries will bring each district close to the ideal district population, without significantly changing the ratio of black and white population within the districts." (*Id.* at pdf p. 3)

The 1993 Section 5 submission showed that District 1 was 15.52% under-populated and its black population had risen from 65.62% Black under the 1980 census to 72.58% under the 1990 census. District 2 was 6.2% underpopulated, and its Black population had risen from 66.81% under the 1980 census to 80.40% under the 1990 census. District 3 was only 1.13% over-populated, and its Black population had risen from 22.17% to 22.89%. District 4 was the most over-populated at 13.32%, but its Black population had increased from 4.98% to 7.48%. District 5 was 7.27% over-populated, and its Black population also had increased, from 6.26% to 10.74%., (Doc. 89-4, at pdf p. 110, 1993 Section 5 submission)

The plan drawn in 1993 raised the Black population in District 1 from 72.58% to 73.25%, while the Black population of District 2 was lowered from 80.40% to 68.93%. The Black populations of the three majority-White districts were all slightly lowered. (Doc. 89-4, at pdf p. 111) "The anticipated effect of the change is to nearly equalize the total population residing within the five Commission Districts without significantly altering the racial ratios." (*Id*. at pdf p. 4)

3. *The 2001 and 2003 Plans*

The Commission retained outside counsel, Albert Jordan, to seek Section 5 preclearance for the redistricting plan it adopted October 30, 2001. (Doc. 89-1, at pdf p. 7, 2001 Section 5 submission) The November 20, 2001, submission letter noted that the Black population of Jefferson County had risen from 35% in the 1990 census to 39% in the 2000 census. (*Id*. at pdf p. 7) "Since 1986 two of the five single member districts have black majority populations in excess of 65%. Since their establishment, each of these two majority black districts has elected a black candidate to the Commission." (*Id*. at pdf p. 8) Mr. Jordan contended the 2001 plan "does not have the purpose or effect prohibited by Section 5 of the Voting Rights Act of 1965. Though the October 30, 2001 Resolution was adopted over the disagreement among members of the Commission, it establishes single member districts, again with two of the districts containing African-American majorities in

excess of 65%. Furthermore, the disagreement was not along racial lines." (*Id*. at pdf p. 8)

Once again Districts 1 and 2 were under-populated, and the three majority-White districts were over-populated. (*Id.* at pdf pp. 12, 43-46) Nevertheless, the 2001 plan equalized populations "without significantly changing the ratio of black and white population within the districts." (*Id*. at pdf p. 12) Mr. Jordan told DOJ: "The anticipated effect of the change on members of racial or language minority groups is insignificant. A comparison of the 2001 district plan with the 1993 plan shows that there is no retrogressive purpose or effect. The 2001 plan has two black majority districts, just like the 1993 plan. **Each of these districts has majority black populations in excess of 65%, under both the 2001 plan and under the 1993 plan**." *Id.* (emphasis added)

The controversy concerned which incumbent Commissioner would have to run against an expected challenge from Larry Langford, the popular Black Mayor of the City of Fairfield. Under the 1993 plan Fairfield had been split between Districts 2 and 3. Mr. Jordan characterized the conflict among three competing plans in explicitly racial terms:

> In Plan 1, Langford was located in District 3, which is composed overwhelmingly of white voters. The incumbent in District 3 is white. In Plan 2, Langford was located in District 1, which is composed overwhelmingly of black voters. The incumbent in District 1 in this

> plan is black. In Plan 3, Langford was located in District 5, which is composed overwhelmingly of white voters. The incumbent in District 5 in this plan is white.

(Doc. 89-1, at pdf p. 14, 2001 Section 5 submission) Ultimately, the Commission adopted Plan 2, "which meant that Langford, a black, would not be running against a white incumbent in a majority white district. Rather, he would be running against a black incumbent in a majority black district." *Id.*

The adopted 2001 plan eliminated the split of Fairfield, and Mr. Jordan pointed out how it also "eliminated almost all the division" of the cities of Irondale, Leeds, Tarrant, and Fultondale. (Doc. 89-1 Id. at pdf p. 16) The Commission's submission to DOJ included a copy of the resolution the City of Fairfield had adopted urging the Commission not to divide it between two districts: "the citizens of the City of Fairfield have a common political interest and represents a unique and distinct political community; and ... putting Fairfield in two (2) commission districts will fragment the Fairfield's political community and dilute the voting strength of its city election...." (Doc. 89-1 Id. at pdf p. 57) By letter dated January 29, 2002, DOJ granted preclearance to the 2001 redistricting plan. 2001 Section 5 submission, (Doc. 89-1, at pdf p. 104)

But that did not end the Larry Langford controversy. Langford won the District 1 seat in 2002, but the 2001 manipulation of precincts left a few Black voters

unhappy they had been moved into a majority-White district. As a result of the settlement of a lawsuit filed by five voters, on December 23, 2003, the Commission modified the 2001 plan. The Commission's Section 5 submission letter, dated February 3, 2004, said the settlement would "allow two of the plaintiffs to be in District 2, instead of District 5, and this change was one of their objectives in filing the action. Whole voting boxes were precincts used in the re-assignment to facilitate administration. The change in District 3 by losing a voting box to District 5 occurred to replace lost population that was given to District 2." (Doc. 89-5, at pdf p. 5, 2004 Section 5 submission)

The 2004 submission letter goes on say "the anticipated effect of the change on members of racial or language minority groups is insignificant. ... The adjustments do not alter the boundaries of District 1, which is majority black. The alteration of the boundaries of District 2 has no significant effect on the racial make-up of District 2, however, over 4000 voters are moved. Each of these districts has majority black populations in excess of 65%, under both the 2001 plan and after the December 2003 adjustments. The black population of District 5 drops from 11.9% to 8.2%." *Id*. at pdf p. 6. [5]

[5] 8.2% was the Black voting-age population of District 5. It was 8.68% Black in total population. 2004 Section 5 submission, Doc. 89-5 at pdf p. 193.

According to news reports the Commission attached to its submission letter, about 2,500 mostly Black voters in the Wenonah Elementary and Henry Crumpton boxes were moved from District 5 to District 2, and 2,300 mostly White voters in the Shades Crest Baptist Church precinct were moved from District 3 to District 5. (Doc. 89-5, at pdf pp. 198-99) The 2003 modification left District 1 at 78.00% Black, District 2 at 73.45% Black, District 3 at 17.14% Black, District 4 at 15.29% Black, and District 5 at 8.68% Black in total population. (*Id*. at pdf pp. 194-95) DOJ precleared these changes by letter dated April 1, 2004. (Doc. 89-5, at pdf p. 218)

4. *The 2013 Plan*

After the 2010 census, the Commission adopted a new plan on February 14, 2013. Tony Petelos, Chief Executive Officer for the Commission, sent a Section 5 submission letter to DOJ on March 1, 2013. (Doc. 89-6, at pdf p. 1076) It noted that the Black population of Jefferson County had increased from 39% in the 2000 census to 41% in the 2010 census and said, "Since 1986, two of the five single member districts have black majority populations in excess of 65%. Since their establishment, each of these two majority black districts has elected a black candidate to the Commission." *Id.*

Mr. Petelos repeated the Commission's 2001 justification for maintaining this racial target, saying that the 2013 plan "does not have the purpose or effect

prohibited by Section 5 of the Voting Rights Act of 1965. Though the February 14, 2013 Resolution was adopted over the disagreement among members of the Commission, it establishes single member districts, again with two of the districts containing African-American majorities in excess of 65%. Furthermore, the disagreement was not along racial lines." (Doc. 89-6, at pdf p. 1077) In his letter Mr. Petelos brings up to date the history of elections since 1986 showing that two Black and three White Commissioners had been elected every time. (*Id.* at pdf pp. 1077-79)

Finally, Mr. Petelos' letter brings up to date the language in the 2001 submission letter that shows the racial objectives of the 1985 Consent Decree have been maintained consistently over three decades: "The anticipated effect of the change on members of racial or language minority groups is insignificant. A comparison of the 2001 district plan with the 1993 plan shows that there is no retrogressive purpose or effect. The 2001 plan has two black majority districts, just like the 1993 plan. Each of these districts has majority black populations in excess of 65%, under both the 2001 plan and under the 1993 plan." (Doc. 89-6, at pdf p. 1082) And a chart tracks the super-majority Black percentages maintained in Districts 1 and 2 after each census since 1990. *Id.*

Similar to the 2001 submission letter, the 2013 submission letter describes the changes made in terms of cities that were split, specifically Birmingham, Bessemer, Forestdale, Midfield, Center Point, and Homewood. (Doc. 89-6, at pdf p. 1082) And it identified Barry Stephenson, Chairman of the Board of Registrars of Jefferson County, as the person who "assisted the Commissioners" in developing the 2013 plan. (*Id*. at pdf p. 1082)

The 2013 submission letter attached "[a] map of the precincts established with demographic breakdown per district, and a complete listing of the precincts." (Doc. 89-6 at pdf p. 1083) Twenty pages of precinct changes are attached under several memos from Barry Stephenson dated March 29, 2013. *Id.* at pdf pp. 1089-1108. The "2013 redistricting plan and realignment of voting precincts for Jefferson County, Alabama," were precleared by DOJ in a letter dated April 26, 2013, signed by the Chief of the Voting Section. 2013 Section 5 submission. (Doc. 89-6, at pdf p. 1108) A few months later, *Shelby County v. Holder* was handed down on June 25, 2013 which invalidated Section 4 of the VRA and thus relieved covered jurisdiction from the obligation of seeking preclearance under Section 5.

5. *The 2021 Plan*

It is undisputed that the Commissioners drew the 2021 plan themselves and tried to preserve the 2013 district boundaries as much as possible. Barry Stephenson made this a clear as he could in his deposition:

> Well, it was their plan. I explained to them it was their plan. They could do with it whatever they wanted. The indication from the commissioners were they liked their current districts. And they started using the base map, the districts that they currently had, to either add or subtract populations so we could get to that population equalization number. So that's the route they chose.

(Doc. 89-9, at 25, Barry Stephenson Dep.) The Commissioners negotiated among themselves in the map room, where they could look at each change and ask "What would this precinct look like if it came into my district? What would it look like, my population number, if it left my district?" *Id.* at 26. According to Stephenson, this was an "ongoing process." *Id.* Their goal was core retention. *Id.* They started with the districts in which they were elected in 2018 and which were still in place when the redistricting process started in 2021. *Id.* at 27. "The Voting Rights Act did not come up. The commissioners themselves drew the plans. We did not discuss the Voting Rights Act." *Id.* at 29. They did not hire an expert or conduct any kind of analysis to determine whether their plan complied with the Voting Rights Act. *Id.* at 27-28. They did not look at black voter registration or turnout data. *Id*. at 28-29.

Thus, Plaintiffs are entitled to summary judgment based solely on this direct evidence. The circumstantial evidence discussed in the following section of this brief

provides additional support for summary judgment, but it is not necessary that this Court address it.

B. Circumstantial Evidence of Racial Predominance

The circumstantial evidence of racial predominance is provided primarily in the reports and testimony of Plaintiffs' expert map drawer, (Doc. 91-3, Anthony Fairfax Expert Report; Doc, 91-4, Appendices to Fairfax report; Doc. 91-5, Fairfax rebuttal report and Doc. 91-6, Appendix to Fairfax rebuttal report) Mr. Fairfax concludes that "the evidence is clear that the movement of population from the Pre 2020 to the Adopted 2021 Plan relates to a pattern predominated by race." (Doc. 91-3, at 51, Fairfax expert report).

1. *Demographic Changes*.

Between the 2010 and 2020 censuses, Jefferson County's total population grew from 658,466 to 674,721, an increase of 16,255 persons or 2.47%. Black population grew by 9,432 persons, increasing from 42.54% to 42.91% of county population. (Doc. 91-3, at 13, Fairfax expert report) White population declined, however, from 340,213 to 324,252 persons, dropping Whites from 51.67% to 48.06% of Jefferson County's total population. (*Id.* at 14 and Table 1) The Latino population also grew from 25,488 to 34,856 persons, increasing the Latino percentage of county population from 3.87% to 5.17%. *Id.* at 13. But Latinos are

only 1.49% of Jefferson County's citizen population; the citizen population is 43.39% Black and 53.11% White. (*Id.* at 16)

Once again, Districts 1 and 2 were under-populated and Districts 3, 4, and 5 were over-populated. (Doc. 20-9, at pdf p. 8) Even though the 2013 plan already reflected the accumulated segregation produced by maintaining two majority-Black districts above 65%, (*see*, Doc. 91-3, at 17), the 2021 plan added more Blacks than Whites to District 1 and removed more Blacks than Whites from Districts 3 and 4. (Doc. 91-3, at 21) Under-populated District 2 had to absorb 6,593 persons from over-populated District 5. (Doc. 91-4, Appendix E, at pdf p. 242) District 5 was only 14.2% Black, so of the 6,593 shifted to District 2 only 1,372 were Black and 4,136 were White. (Doc. 20-9 at pdf p. 8 (showing 14.2% Black Total Pop.) and Doc. 91-4, at pdf p. 242 (showing demographics of population moved from District 5 to District 2)) Nevertheless, the Commissioners managed to keep District 2 above 65% Black at 66.18%. (Doc. 91-3, Fairfax Report, Table 5 at 17)

2. *Precinct Changes*.

The Defendant Commission contends that the movement of precincts made to create the 2021 plan can be explained as an effort to equalize population among the districts. But the Supreme Court has said, "an equal population goal is not one factor among others to be weighed against the use of race to determine whether race

'predominates.' Rather, 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." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 272 (2015) (emphasis in original).

Mr. Fairfax's analysis "included a district-to-district change comparison and whether VTDs were split or wholly added or removed along racial lines. The analysis focused on racial populations (specifically Black and White) that were added, removed, and overall changed from the Pre 2020 to the Adopted 2021 Plans." (Doc. 91-3, at 19) He analyzed all the VTDs (voter districts) that were split or moved from the 2013 plan to create the 2021 plan. (*Id.* at 24-41) [6]

Table 8 in Mr. Fairfax's report lists all the VTDs that were split to shift population from Districts 3, 4, and 5 to Districts 1 and 2. (Doc. 91-3, at 31) In the two split VTDs that shifted population to District 1, 86.31% of the shifted population were Black, while only 9.32 % were White. *Id.* at 31-32. In the four split VTDs that

[6] Mr. Fairfax explained: "VTDs are for the most part, approximate geographic areas of local precincts. In this instance, the 2020 Precincts were available at the time of the development of the Adopted 2021 Plan and in general followed VTD boundaries. However, even if VTDs do not exactly coincide with the 2020 Precincts, VTDs have the advantage of always following census geography and blocks." (Doc. 91-3, at 9-10)

shifted population to District 2, 53.60% were Black, while 35.86% were White. *Id.* at 32. Mr. Fairfax's report contains maps and closer examination of these split precincts. *Id.* at 24-31.

Table 9 in the Fairfax report lists the three whole VTDs that were added to District 1 and the two split VTDs that added more than 100 persons to District 1. (Doc. 91-3, at 38). It shows that only one added whole VTD was less than 50% Black, Hoover Met Stadium. But "the VTD had a low amount of only 948 persons. Thus, only one out of the five VTDs shifted to District 1 was majority White and contained a Black percentage less than 64% Black (See Table 9)." *Id*.

However, as Mr. Fairfax noted in his rebuttal report, in 2020 and 2023, Hoover Met Stadium precinct was merged with Baptist Church of McAdory precinct. (Doc. 91-5, at 7) Leading Mr. Fairfax to conclude that "it is now apparent that every precinct that was added to District 1 was majority Black (See Table 1)" and reinforcing the "opinion that race guided the plan development process." (*Id.* at 7)

"Three whole VTDs were shifted to District 2, from non-majority Black districts, with one majority White (Homewood Excpt. Foundation), another majority Black (Afton Lee Comm Ctr), and the third predominantly White (Grant St Bapt Church)." (Doc. 91-3, at 38, Fairfax expert report) Table 10 shows both the whole

VTDs and the split VTDs that added population to District 2. *Id*. at 40. District 3 contributed one of the whole VTDs and two split VTDs. The whole VTD, Grant St Bapt Church, was 43.68% Black and 44.65% White. The split VTDs contributed majority-Black populations.

District 5 was only 14% Black, but it contributed to District 2 its one majority Black whole VTD, Afton Lee Comm Ctr. (Doc. 91-3, at 40) The three split VTDs moved from District 5 to District 2 were heavily White. *Id.*

Mr. Fairfax summarized the population shifts to District 2: "Even though the total of seven whole and split VTDs added to Pre 2020 Plan's District 2 is only 40.95% Black, the resultant District 2 in the Adopted 2021 Plan remains fairly high at 66.18%. The size of Black and White populations added to District 2 are almost comparable to each other, with neither in the majority. Almost 41% (40.95%) of the population added were Black, while 46% (46.47%) were White. The result is that District 2 decreases its Black percentage by only 2.83% and remains above 65%." (Doc. 91-3 at 38-39)

Table 11 in the Fairfax report summarizes the population shifts out of Districts 3, 4, and 5. (Doc. 91-3, at 40) Even though only 16.10% of the population moved out of District 5 was Black, that was enough so that all three majority-White districts increased in White percentage. *Id*. at 41.

Finally, Mr. Fairfax summarized the evidence of racial gerrymandering on pages 42-43 of his report (Doc. 91-3):

> 90. Evidence exists of racial gerrymandering during the development of the Adopted 2021 Plan.
>
> A pattern exists in Districts 1, 3, and 4 of adding a greater amount of Black population than White population to the majority Black districts and removing a greater amount of Black population than White population from the majority White districts. To accomplish this:
>
> a) The majority Black District 1 adds population of split VTDs along racial lines with practically all of the portions added greater than 80% Black.
> b) The majority Black District 1 adds population of whole VTDs with the majority of them greater than 80% Black where other options exist.
> c) The majority White District 3 removes population from split VTDs with each of the portions between 52.80% to 86.60% Black.
> d) The majority White District 4 removes population from a split VTD that is 86.18% Black and a whole VTD that is 80.86% Black.
>
> 91. Evidence exists of minimizing the decrease in Black percentage in District 2, including splitting VTDs along racial lines and whole VTDs greater than 50% Black. To accomplish this:
>
> a) The majority Black District 2 adds population of split VTDs along racial lines with half of them between than 52.80% and 80.50% Black.
> b) The majority Black District 2 adds a comparable amount of Black and White population with neither in the majority. The population added includes a combination of a majority Black split and whole VTDs such that the Adopted 2021 Plan's district remains above 65% at 66.18% Black.
>
> 92. Although District 5 decreases and removes less of the Black population than the White population, evidence exists that the

> White percentage of the district increased from the Pre 2020 to Adopted 2021 Plans. To accomplish this:
>
> a) The majority Black District 5 removes a population that is 16.10% Black while District 5's population of the Pre 2020 Plan is 14.70% Black. The result is a decrease in the Black percentage and an increase in the White percentage in District 5 of the Adopted Plan.

3. *Mr. Fairfax's Illustrative Plan*

To demonstrate how the Commission's 2021 plan subordinated to race traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions, Mr. Fairfax drew an Illustrative plan that achieves population equality while minimizing the number of municipalities that are divided between Commission districts. (Doc. 91-3, at 43-44; Doc. 20-18; Doc. 20-2)

The Illustrative Plan has (i) a lower population deviation, 1.05%, than does the enacted 2021 Plan's population deviation of 1.72% (Doc. 91-3, at 45), (ii) has contiguous districts (*Id.* at 44), and (iii) by most measures of compactness, outperforms both the 2013 and 2021 enacted plans. (*Id*. at 46-47). Most importantly, the Illustrative Plan splits only 4 Census Places, compared with 22 in the 2013 Plan and 25 in the 2021 Plan. (Doc. 91-3 at 48, Table 15) According to Mr. Fairfax, "[w]hen analyzing only cities, towns, and villages [instead of Census Places], the 2021 Adopted Plan split 22, while the Pre-2020 Plan split 19, and [the] illustrative

plan continues to split only four." (Doc. 91-5, at 6, Fairfax rebuttal report)(brackets added)

Yet the Illustrative Plan still produces two majority-Black districts at 60.55% and 63.56% BVAP and one district at 48.51% BVAP. (Doc. 20-18 at 10; *see also* Doc. 20-22 at 2) Thus, there can be no doubt that a plan drawn strictly according to race-neutral, traditional districting criteria, without resort to drawing lines based on race, can comply with Section 2 of the Voting Rights Act.

IV. ARGUMENT

The Jefferson County Commission's 2013 Section 5 submission, like all the submissions preceding it back to 1985, is exactly the kind of direct evidence of racial gerrymandering *Alexander* identifies. *Alexander v. South Carolina State Conference of the NAACP*, 144 S.Ct. 1221, 1234 (May 23, 2024). The Court held that such an "express acknowledgment that race played a role in the drawing of district lines" violates the Equal Protection Clause unless the Commission can satisfy strict scrutiny. *Id.* "Under this standard, we begin by asking whether the State's decision to sort voters on the basis of race furthers a compelling governmental interest." Id. (citing *Cooper v. Harris*, 581 U.S. at 292). According to *Cooper*, "[t]he burden thus shifts to the State to prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end. This Court has long assumed that one

compelling interest is complying with operative provisions of the Voting Rights Act of 1965." 581 U.S. at 292. The Commission did its best to keep all the racially gerrymandered 2013 districts and made no attempt to satisfy strict scrutiny.

The Defendant County Commission carried forward, with "least" changes, the 2013 district lines undisputedly drawn for predominantly racial purposes. It is the carrying forward of race-driven lines, not the carrying forward of any taint or ill intent, that makes a racial gerrymander. The shape and demographics of the five Jefferson County Commission districts are sufficient to carry the Plaintiffs' evidentiary burden. See *Jacksonville*, 635 F. Supp. 3d at 1288 ("To apply core preservation in the way the City asserts in this case would mean that once enacted, a legislature could perpetuate racially gerrymandered districts into the future merely by invoking a 'neutral' desire to maintain existing lines. This is not what *Abbott* holds.") (footnote omitted).

Mr. Stephenson testified that "[r]ace never came up" in his conversations with the Commissioners. (Doc. 89-9, at 27) "If they discussed it amongst themselves, I don't know." *Id*. at 28. And neither do we. Plaintiffs have no way of finding out what the Commissioners actually talked about among themselves, because they have invoked legislative privilege. But, as the Commission's expert, Dr. Michael Barber says in his report, core retention was "the primary consideration," (Doc. 89-14 at pp.

10, 42) and the Commissioners' primary objective was to "retain the old districts to a very high degree." *Id*. at 5. And, as Dr. Barber says, "any map that seeks to build the new districts by making as few changes as possible to the old districts will inherit much of that racial composition." (*Id*. at 9-10)

In his rebuttal report, Plaintiffs' expert map drawer, Anthony Fairfax, agreed: "if the mapdrawer's objective was to continue to maintain the high Black percentages (greater than 65%) of the two majority Black districts, the least change approach was a perfect plan development technique to do so." (Doc. 91-5, at 6, Fairfax rebuttal report)

So, regardless of what else was in the Commissioners' minds, the Defendant Commission admits that they intended to perpetuate districts that the Commission had conceded in four decades of Section 5 submissions to be racially gerrymandered in order comply with the Voting Rights Act. The Commission cannot rely on core retention or consistency of representation alone to justify the continued segregation of Black and White voters. *North Carolina v. Covington*, 585 U.S. at 975-76; *see also, supra*, pp. 11-12 (citing cases for the proposition that core retention cannot justify maintenance of racially gerrymandered districts). The Commission should have conducted an appropriate analysis to assess whether the VRA requires

perpetuating two intentionally drawn majority minority districts to give Black residents an equal opportunity to elect candidates of their choice.

As the Supreme Court just reaffirmed in *Alexander*, "if the [Commission] cannot satisfy strict scrutiny, direct evidence of this sort amounts to a confession of error." 441 S. Ct. at 1234. Thus, Plaintiffs are entitled to summary judgment based solely on the direct evidence. The circumstantial evidence provides additional support for summary judgment, but it is not necessary that this Court address it.

As a matter of fact and law, the circumstantial evidence compels the conclusion that race was the predominant factor motivating the Commission's decision to place a significant number of voters within or without all five Commission districts.

The demographic changes among districts are summarized in Table 7 of Mr. Fairfax's report (Doc. 91-3, at 2):

Table 7 – Population Changes in Commissioner Districts
From the Pre 2020 to the Adopted 2021 Plans for Jefferson County, AL

District	Black %	Added	Removed	Change	Black	White
1	>65%	13,073	149	12,924	10,069	2,038
2	>65%	13,626	37	13,589	5,565	6,306
3	<30%	1,597	10,711	-9,114	-6,441	-1,850
4	<30%	4,886	10,867	-5,981	-7,408	1,536
5	<30%	11	11,429	-11,418	-1,785	-8,030

Source: Maptitude for Redistricting Core Constituencies report using Census Bureau 2020 data (See Appendix E)
Note: Negative numbers reflect population removed.

This is the same kind of table Mr. Fairfax submitted in another racial gerrymander case, *Finn v. Cobb County Bd. of Elections and Registration*, 2023 WL 9184893 (N.D. Ga., December 14, 2023), at *8. That district court relied on the demographic changes displayed in Mr. Fairfax's table to conclude that "race played a dominant role in the configuration of the Enacted [Map]." *Id.*

The combination of demographic changes and the selection of precincts to split or add whole to Districts 1 and 2 is more than sufficient to conclude that race was the predominant factor in the way the Commissioners equalized population among all five districts.

The Commission does not contend – nor could it reasonably contend – that its efforts to retain the racially gerrymandered 2013 districts "to a very high degree," Barber expert report, (Doc. 89-14 at 60, is necessary to comply with the Voting Rights Act. Jefferson County is no longer subject to the preclearance requirement of Section 5. And Plaintiffs' expert map drawer has demonstrated that it is not necessary to maintain race-based lines in order to comply with Section 2. Indeed, the Defendant Commission does not even attempt to show that it can satisfy strict scrutiny.

V. CONCLUSION

For the above stated reasons, the Plaintiffs' motion for summary judgment should be granted and the Court should enjoin any future elections using the 2021 Commission map and require the Commission to implement a map consistent with the Court's findings of fact and conclusions of law.

Respectfully submitted,

/s/ *James Uriah Blacksher*
James U. Blacksher
825 Linwood Road
Birmingham, AL 35222
Tel. (205) 612-3752
Fax. (205) 845-4395

/s/ *Richard P. Rouco*
Richard Rouco
Quinn Connor Weaver
Davies & Rouco, LLP
2 - 20th Street North Ste. 930
Birmingham, AL 35203
Tel. (205) 870-9989
Fax. (205) 803-4143
rrouco@qcwdr.com

/s/ *U. W. Clemon*
U. W. Clemon
2001 Park Place
10th Floor
Birmingham, AL 35203
Tel. (205) 506-4524
uwclemon1@gmail.com

/s/ *Richard Rice*
Richard Rice
The Rice Firm, LLC
115 Richard Arrington Jr. Blvd. N.
Birmingham AL 35203
Birmingham, AL 35201
Tel. (205) 618-8733 ext. 101
rrice@rice-lawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2024, a true and correct copy of the foregoing was served on all counsel of record through the Court's CM/ECF filing system.

/s/ *Richard P. Rouco*
Richard Rouco