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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.,

Defendant.

Case No. 2-23-cv-00443-MHH

MCCLURE PLAINTIFFS' BRIEF AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The McClure Plaintiffs hereby move for summary judgment, pursuant to Federal Rule of Civil Procedure 56, on their claim challenging the constitutionality of the plan adopted by the Jefferson County Commission (the "Commission" or "Defendant") in November 2021, which continues a tradition of separating Black voters, without any sufficient justification, into different voting districts on the basis of race.

Summary judgment is rarely appropriate in voting rights litigation "due to the fact-driven nature of the legal tests required by the Supreme Court and [Eleventh Circuit] precedent." *Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Com'rs*, 775 F.3d 1336, 1348–49 (11th Cir. 2015) ("*Fayette Cnty.*"); *see also Wright v. Sumter Cnty. Bd. of Elections & Registration*, 657 F. App'x 871, 872 (11th Cir. 2016). Summary judgment is also uncommon in cases that turn on legislative motive. *See, e.g., Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) (noting that a legislature's "motivation is itself a factual question" and reversing summary judgment).

Here, however, the undisputed facts show that the Commission chose racial targets to create and maintain Commission Districts (CDs) 1 and 2 with Black populations in excess of 65% ("supermajority Black districts"), consistently and consciously, over multiple decades. The Commission readily admits that the

2021 districts sought to replicate existing district lines, and that this replicated the existing racial composition of those districts in the Enacted Plan.

And, while a legislative body could intentionally create supermajority Black districts if it had a strong basis in evidence to believe doing so was necessary to comply with the Voting Rights Act of 1965 ("VRA"), the summary judgment record leaves no doubt that the Commission had no such strong basis in evidence here. The Commission admits it did not conduct any analysis to determine whether this packing of Black voters into two supermajority districts was necessary to comply with the VRA; did not conduct or consider any racially polarized voting ("RPV") analysis; did not look at Black voter registration or turnout in CD 1, CD 2, or any other district; and did not attempt to determine if districts with lower Black voting age populations ("BVAP") in CDs 1 and 2 would comply with the VRA.

Thus, this Court should grant Plaintiffs summary judgment.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. History of the Challenged Districts

The Commission was established in the 1930s to govern Jefferson County through three members elected at-large for four-year terms. Doc. 85-1, p. MCC01163. In 1984, Black residents of Jefferson County filed a federal court lawsuit, *Taylor v. Jefferson County Commission*, CA 84-C-1730-S (N.D. Ala.), alleging that the at-large system violated the VRA, given that no Black person had

ever been elected to the Commission under the at-large districts, even though Black people made up 33% of the population of the county. *Id*. at MCC01163. The federal district court entered a consent decree on August 17, 1985 (amended October 31, 1985) expanding the Commission to five members, each elected in single-member districts. *Id*. at MCC01163. As part of the consent decree, two districts were majority-Black. Doc. 85-2 (Consolidated Consent Decree); Doc. 26-2 (1985 Consent Decree). The consent decree specifies only that the Commission's districting plan had to change to five single-member districts, even though the decree appended a plan where the Black population was well over 65% in two of those districts. Doc. 85-2, p. 14; Doc. 26-2, pp. MCC00126
–27 ("The five (5) districts from which the commissioners are to be elected are described in Exhibit A, attached hereto."). Nowhere does the decree require Black populations in excess of 65% in CDs 1 and 2, nor in any other district. *See* Doc. 26-2, pp. MCC00126–27.

Defendant also does not dispute that in Section 5 preclearance decisions and Section 2 redistricting lawsuits in the 1980s; parties often relied on the now-defunct 65% rule, whereby majority-Black districts would include at least an additional 5% Black population beyond the majority to account for lower registration and turnout amongst Black voters. Doc. 85-3, ¶ 8 (Cooper Rebuttal Rep.). Nor do they dispute

that in the 1986 Plan, majority-Black CD 1 (65.6% Black) and CD 2 (66.8% Black) were both configured to adhere to that standard. *Id*. ¶ 9.

1. The 1990 Census and Redistricting

While the County has had to adjust district lines after each decennial census, "[s]ince 1986, two of the five single member districts have black majority populations in excess of 65%." Doc. 85-1, p. MCC01163.

At the time of the 1990 U.S. Census, the Black population was 35% of the County. In 1993, in accordance with Ala. Code 1975 § 11-2-1.1, the Commission revised the Commission district boundaries. *Id*. at MCC01131. This revision increased the Black population of CDs 1 and 2 to 73.25% and 68.93%, respectively, *Id*. In the County's submission under Section 5 of the VRA to the Justice Department, the County attorney represented that "[t]he 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." Doc. 85-4, p. MCC01023. With respect to the anticipated effect of the changes in district boundaries, the County represented to the Justice Department that changes would equalize population "without significantly altering the racial ratios." *Id.* at MCC01024. No RPV analysis accompanied the submission. *Id*.

2. The 2000 Census and Redistricting

At the time of the 2000 census, Jefferson County had a total population of 662,047. Doc. 85-1, p. MCC01162. As a result of population migrations, the districts established in 1993 were no longer equally populated. *Id.* In particular, the Black population of the County increased significantly from 35% of the county's population to 39%. *Id*. at MCC01162–63.

In 2001, the Commission enacted a new districting plan, explaining to the Justice Department in Section 5 correspondence that it was drawn "again with two districts containing African American majorities in excess of 65%." *Id*. at MCC01163–67. Under the 2001 adopted plan, the Black population in CDs 1 and 2 were increased to 78.00% and 73.45%, *id.* at MCC01167, with BVAPs of 74.89% and 68.78%, respectively, *id*. at MCC01200. According to the Commission, in correspondence with the Justice Department, to re-arrange the boundaries to comply with the equal population requirement, CDs 1 and 2 "were expanded outward as compared with their previous versions." Doc. 85-1, p. MCC01168. The Commission noted these changes would "bring each district close to the ideal district population without significantly changing the ratio of black and white population within the districts." *Id*. at MCC01167.

Following the 2001 redistricting, a lawsuit was again filed asserting that the new district lines diluted the Black voting strength of the county in violation of

Section 2 of the VRA. *Knott, v. Jefferson Cnty. Comm'n.*, No. CV-02-T-0030-S (N.D. Ala.). Because the case was brought by a Commissioner, and some of the dispute centered around the placement of a popular political candidate, the case was dismissed following the Commission's adoption on December 23, 2003, of a plan that made adjustments to three voting boxes affecting approximately 10,000 people in three of the five districts. Doc. 85-4, p. MCC01263. These changes did not affect CD 1, and with respect to CD 2, the Commission stated in its correspondence under Section 5 to the Justice Department that "[t]he alteration of the boundaries of District 2 ha[d] no significant effect on the racial make-up of District 2" and that each of CDs 1 and 2 retained "majority black populations in excess of 65% under both the 2001 plan and after the December 2003 adjustments." *Id*. at MCC01264. No RPV analysis accompanied the submission. *Id*.

3. The 2010 Census and Redistricting

Following the 2010 U.S. Census, the population of Jefferson County was 658,466. Doc. 85-6, p. MCC02552. The County's Black population again increased during the intervening decade from 39% after the 2000 Census to 41% according to the 2010 Census. *Id*. Based on the 2010 Census, CDs 1 and 2 were underpopulated, while CDs 3, 4, and 5 were overpopulated. *Id*. at MCC02557. In its submission to the Justice Department, the Commission again represented that the new districting plan established single-member districts "with two of [the] districts containing

African-American majorities in excess of 65%." *Id*. at MCC02553. The Commission made changes to the districts to "bring each district close to the ideal district population without significantly changing the ratio of black and white population within the districts." *Id*. at MCC02557. In its submission to the Justice Department, the Commission stated that "[t]he 2013 plan has two black majority districts, just like the 1993 and 2001 plans," each of which "have majority black populations in excess of 65%, [in] the 2013, 2001 and 1993 plan." *Id*. at MCC02558. No RPV analysis accompanied the submission. *Id*.

4. The 2020 Census and the 2021 Redistricting Process

According to the 2020 Census, Jefferson County's population was 674,721, an increase of 2.2% from 2010 when the population was 658,466. *See* Doc. 85-7, p. MCC00160–61 (County Commission Redistricting Based on 2020 Census). Between 2010 and 2020, Jefferson County's non-Hispanic white population decreased while the Black and Latino populations increased.

2010 to 2020 Census Population by Race and Ethnicity

All Ages	**2010**	**% of Total Pop**	**2020**	**% of Total Pop.**	**Pop. Change 2010-2020**
Total Population	658,466	100.00%	674,721	100.00%	16,255
NH white	340,213	51.67%	324,252	48.06%	-15,961
Total Minority Pop.	318,253	48.33%	350,469	51.94%	32,216
Latino	25,488	3.87%	34,856	5.17%	9,368

Any Part Black	280,083	42.54%	289,515	42.91%	9,432

See Doc. 85-8, p. 6, Fig. 1 (Cooper Rep. (Corrected)).

Jefferson County's voting age population is now 50.42% non-Hispanic white, 41.46% Black, and 4.29% Latino. *See id.*, at 8, Fig. 2.

In October 2021, the Commission began its redistricting process. *See* Ala. Code §§ 11-3-1.1, 45-37-72(b). Prior to any public meeting of the Commission, the individual Commissioners and their staff and agents worked with the Jefferson County Board of Registrars and Probate Court to develop three potential redistricting plans. Doc. 85-9, tp. 18:7-20:6, 20:14–21:13 (Barry Stephenson, Jefferson Cnty. Comm'n 30(b)(6) Dep. (Aug. 28, 2023)) hereinafter ("Comm'n 30(b)(6) Dep."); *see* Doc. 85-10. In drawing the three proposed plans, the Commission intentionally sought to maintain the racial composition of existing district lines. Doc. 85-11, pp. 39–40. The Commission did not hire an expert to conduct a RPV analysis. Doc. 85-9, tp. 28:7-9 (Comm'n 30(b)(6) Dep.).

The software used by the Commission in drawing the Enacted Plan cannot show political party affiliation or elections data because the state's voter registration file does not include a voter's political party affiliation, but it does include the race of each voter. *Id*. at 22:10–23:9. Defendant does not dispute that while drawing the three proposed plans, the Commission could see racial and ethnic data, including

with respect to the precincts being moved, which is generated by the software the Commission used. *Id.* at 21:14–22:9, 24:9-12.

In a 2021 resolution adopting the Enacted Plan, the Commission stated, "the 2020 federal decennial census has been released and said census reflects that population shifts have occurred with Jefferson County which make the alteration of the boundaries of the single member districts appropriate." Doc. 85-12, p. 2. The Commission stated that it aimed to achieve a per district population of 134,944 to comply with the one-person, one-vote principle. Doc. 85-11, tp. 12:6-25. The Commission used a +/-1% population variance as its target for population equality, even though that is stricter than the one-person, one-vote requirements of the U.S. Constitution. *See Ala. Legis. Black Caucus v. Alabama* ("*ALBC*"), 575 U.S. 254, 259 (2015); Doc. 85-7, pp. MCC00166–67; Doc. 85-9, tp. 76:6–77:2 (Comm'n 30(b)(6) Dep.); *see* Doc. 85-10; Doc. 85-27. Prior to the redistricting process, CDs 1 and 2 were underpopulated, and CDs 3, 4, and 5 were overpopulated. *See* Doc. 85-7, pp. MCC00162–64.

	2020 Population Prior to Redistricting	Population variance	Population adjustments to achieve target population
CD 1	122,689	9.1% underpopulated	+ 12,255
CD 2	121,372	10.1% underpopulated	+ 13,572
CD 3	142,776	5.8% overpopulated	-7,832
CD 4	142,111	5.3% overpopulated	-7,167
CD 5	145,773	8.0% overpopulated	-10,829

See id.

At the Commission's October 5, 2021 work session, Board of Registrars Chair Barry Stephenson presented the Commission's three proposed plans, and on October 7, 2021, the Commission voted to conduct a public hearing on Nov. 4, 2021, and to make the proposed maps available for public inspection during the two week-period preceding the hearing. Doc. 85-13, pp. JCC0000136–38. On November 4, 2021, the Commission voted to adopt the Enacted Plan. Doc. 85-12, p. 2. Commissioners Ammons, Knight, Tyson, and Stephens voted in favor, while Commissioner Scales voted against the Enacted Plan. *Id.*

The Defendant admits the Commission did not conduct any analysis to determine whether the Enacted Plan complied with the VRA. Doc. 85-9, tp. 27:20–28:1 (Comm'n 30(b)(6) Dep.). Defendant admits the Commission did not conduct nor consider a RPV analysis of voting patterns before deciding to maintain supermajority Black populations in CDs 1 and 2 under the Enacted Plan. *Id*. at 27:20–28:9. The Commission did not consider voter registration nor turnout data in

any district in the County. *Id*. at 28:10–29:6. The Defendant admits the Commission did not attempt to determine if lower BVAPs in CDs 1 and 2 would comply with the VRA. *Id*. at 30:10-13. Defendant does not dispute that "[t]he Voting Rights Act did not come up" during the Commission's redistricting process. *Id*. at 29:15-18, 20-22.

The parties agree that the Enacted Plan maintains most of the population from each of the districts in the 2013 District map. Under the Enacted Plan, CDs 1 and 2 retained 90% and 90.1%, respectively, of their 2013 populations, and CDs 3, 4, and 5 maintained almost all their population from the 2013 plan. Doc. 85-14, pp. 5–6 (Barber Rep.). The parties agree the Commission has maintained the racial composition of the maps enacted by the Commission since the 1990 census in the Enacted Plan. Doc. 85-6, pp. MCC02552–58; *see* Doc. 85-14, pp. 9–10 (Barber Rep.). Similar to prior plans, the BVAPs of CDs 3, 4, and 5 were maintained at less than 30%. Doc. 85-8, Ex. C-2 (Cooper Rep. (Corrected)). In all three of the proposed plans, the racial demographics of CDs 3, 4, and 5 were unchanged. Doc. 85-11, tp. 16:17-18. The Parties agree the Enacted Plan splits the city of Birmingham five ways, with a portion of the city in each district. Doc. 85-14, p. 9 (Barber Rep.). Nearly 70% of Birmingham's population is comprised of Black persons. *Id*.

B. Plaintiffs

Plaintiff Metro-Birmingham NAACP is an organization with members residing and registered to vote in each commission district. *See* Doc. 93-1, p. 11–12,

tp. 44:17–45:3 (Metro-Birmingham NAACP 30(b)(6) Dep.); Doc. 93-2, pp. 8–9, 12–13. Members of the Metro-Birmingham NAACP are also members of the Alabama NAACP. Doc. 85-17, p. 8-9, tp. 32:22-33:9 (Ala. NAACP 30(b)(6) Dep.). The Metro-Birmingham NAACP aims to ensure the political, educational, social, and economic equality of all persons and to eliminate race-based discrimination. Doc. 93-1, pp. 6, 10, tp. 21:20-22:1, 39:2-8. Alabama NAACP's organizational mission is eliminating racial discrimination in the democratic process and ensuring the enforcement of federal laws securing voting rights so its members have an opportunity to elect people of their choice in each district. Doc. 85-17, pp. 11-12, 20, tp. 43:18–47:9, 76:7–77:6.

Plaintiff Greater Birmingham Ministries ("GBM") has members who reside and are registered to vote in C Ds 1, 2, 3, and 4. *See* Doc. 85-18, p. 11, tp. 42:3-10 (GBM 30(b)(6) Dep.); Doc. 93-2, pp. 8, 12. GBM's mission is to advance equal access to rights and freedoms through political participation in Jefferson County. Doc. 85-18, p. 13, tp. 49:20–50:6.

Cara McClure is a lawfully registered voter residing in CD 2. Doc. 93-3, p. 6, tp.18:17-19 (McClure Dep.).

C. Expert Evidence

Only after this litigation was filed did Defendant assert that core retention was one of the Commission's goals in redistricting. Doc. 85-9, tp. 26:19-22 (Comm'n

30(b)(6) Dep.); *accord*. Doc. 85-14, p. 42 (Barber Rep.). The parties agree that the Commission needed to enact a plan with "two majority-Black districts due to VRA considerations." Doc. 85-14, p. 46 (Barber Rep.). Defendant's sole expert, Dr. Michael Barber, does not dispute Plaintiffs' Expert, Dr. Baodong Liu's conclusions that elections in Jefferson County are highly racially polarized, and that white bloc voting usually prevents Black voters from electing candidates of choice in CDs 3, 4, and 5. *See* Doc. 85-20, p. 2 (Liu Rebuttal Rep.).

Dr. Barber does not dispute that in Jefferson County, Black voters vote with an "extremely high-level of cohesi[on] and unity." *See* Doc. 85-21, p. 5 (Liu Suppl.). Black voters' support for preferred candidates in each biracial election between 2008 and 2022 exceeded 90%. *See id.* at 4, Tbl.1 (column labeled "Black Support for BPC (95% CI)"). Dr. Barber does not dispute that in recent elections Black voters in Jefferson County "expressed a clear preference for…a Black candidate, and this preference was not shared by white voters who were the majority of the electorate." *Id*.; Doc. 85-21, pp. at 3–4, Tbl.1 (Liu Suppl.).

But the undisputed expert evidence also shows that the Commission does not need to maintain two supermajority-Black districts to comply with the VRA. Defendant does not dispute Dr. Liu's finding that CDs 1 and 2 could remain effective for Black voters by unpacking those districts and reducing the BVAPs to in the range of 54% to 55%, respectively. *Id*. at 6, Tbl.2. Defendant does not dispute Dr. Liu's

finding that the "distribution of Black voters in . . . Districts [3, 4 and 5] leads to a clear advantage of white voters [because] Black voters are concentrated in supermajorities in Commission Districts 1 and 2." Doc. 85-22, p. 7 (Liu Expert Rep. I); Doc. 85-21, p. 8 (Liu Suppl.).

It is undisputed that the proportion of the population retained from each of the 2013 districts in the challenged districts in the Enacted Plan is at least 90%. Doc. 85-14, pp. 5–7; Tbls.1 & 2 (Barber Rep.). CDs 1 and 2 are supermajority Black districts with BVAPs of 76.34% and 64.11% respectively. Doc. 85-8, ¶ 24, Fig. 4 (Cooper Rep. (Corrected)). CDs 3, 4, and 5 have BVAPs of 25.8%, 25.74%, and 13.99% respectively. *Id.*

Over the past three decades, the non-white population in Jefferson County increased from 48.33% in 2010 to 51.94% in 2020, while the white population fell from 51.67% in 2010 to 48.06%. Doc. 85-23, p. 6–7 (Cooper Decl.). It is undisputed that a comparison of the single race Black ("SR Black")[1] population distribution in Jefferson County under the 1990 Census, realigned to follow 2020 Census tracts, with the Black population distribution by census tract in Jefferson County under the 2020 Census reveals a clear geographic dispersion of the Black population between

[1] SR Black refers to only those Black people who identify as Black and no other race or ethnicity.

1990 and 2020, into areas north of Birmingham, in and around Center Point, and extending west of Birmingham around Forestdale and Adamsville. *Id*. at 15–16.

It is undisputed that despite these shifts in population demographics, the Enacted Plan maintains the racial compositions embodied in the 2014 and earlier plans. *Id*. at 19; Doc. 85-14, pp. 9–10 (Barber Rep.). Defendant's expert, Dr. Barber, agrees that the 2021 Jefferson County Commission map "largely resemble[s]" the districts from the previous decade. Doc. 85-14, p. 5 (Barber Rep.).

Illustrative Plans A, B, and C all unpack Black voters from CDs 1 and 2. Doc. 85-8, ¶¶ 33, 37, 42 (Cooper Rep. (Corrected)). Illustrative Plan A splits fewer municipalities and unincorporated places than the Enacted Plan and contains no populated VTD splits. Doc. 85-23, p. 33 (Cooper Decl.).

Dr. Cory McCartan analyzed the report offered by Defendant's expert, Dr. Michael Barber, including simulations run by him to determine whether the Enacted Plan was an outlier in its racial composition and whether any redistricting principle, including the Commission's stated goal of core retention, could explain the racial composition of the Enacted Plan. Doc. 85-2, p. 3 (McCartan Rep.). Dr. Barber does not dispute that the average BVAP share in the two districts with the highest Black populations, minus the BVAP share in the next-most-Black district for the Enacted Plan, the combined packing-cracking score, can measure the gap between the BVAP share in the two majority-Black districts, CD 1 and CD 2, which is 69.2%, and the

BVAP share in CD 3, which is 27.3%. *See* Doc. 85-25, p. 32–33, tp. 123:14–126:14 (Barber Dep.); Doc. 85-24, ¶ 21 (McCartan Rep.). The Enacted Plan has a combined packing-cracking score of 41.9 percentage points. Doc. 85-24, ¶ 22 (McCartan Rep.). Dr. Barber does not dispute that the Enacted Plan's combined packing-cracking score of 41.9 points is larger than 99.8% of Dr. Barber's simulated plans. *Id*. Dr. Barber does not dispute that statistical significance can be an important way of measuring whether race is the predominant factor using this approach. Doc. 85-25, p. 32, tp. 123:2-11 (Barber Dep.).

Dr. Barber does not dispute the validity of Dr. McCartan's methodology in calculating whether race is a significant predictor of inclusion in any of the districts under the Enacted Plan, whereby he compares, for each precinct, the average BVAP share of the district to which that precinct is assigned under the Enacted Plan with the same calculation for that precinct under each simulated plan, and then averages these BVAP shares across all of the simulated plans. Doc. 85-24, ¶ 24 (McCartan Rebuttal Rep.). Nor does Dr. Barber dispute the use of statistical significance to determine the role of race in this analysis. Doc. 85-14, p. 20 (Barber Rep.); Doc. 85-25, p. 32, tp. 123:2-11 (Barber Dep.). Nor does Dr. Barber dispute that the Enacted Plan concentrates Black voters in and around Birmingham, creating districts that are more than 20 percentage points more Black than would be expected under one of Dr. Barber's simulated plans. Doc. 85-24, ¶ 27 (McCartan Rebuttal Rep.). This

packing allows for the districts surrounding Birmingham to be much less Black than they would be otherwise. *Id.*

The parties agree that Dr. Barber's simulation set "only consider[s] simulations that produced at least two majority-Black districts due to VRA considerations." Doc. 85-14, p. 46 (Barber Rep.); Doc. 85-24, ¶ 28 (McCartan Rebuttal Rep.). The parties also agree that it is not appropriate to use simulations to "affirmatively suggest that drawing more majority-Black districts than resulted from the simulations [i]s not justified under Section 2 of the VRA." Doc. 85-14, p. 47 (Barber Rep.).

Dr. Barber does not dispute that even if you only analyze simulations with at least two Black-majority districts, as Dr. Barber does, the Enacted Plan remains an outlier with a combined packing-cracking score more extreme than 99.6% of the simulated plans. *See* Doc. 85-25, pp. 34–35, tp. 133:9–135:19 (Barber Dep.); Doc. 85-24, ¶ 33 (McCartan Rebuttal Rep.); *see also* Doc. 85-20, p. 6 (Liu Rebuttal Rep.). Dr. Barber also does not dispute that in the 120,000 plans that maintained the core of the prior plan as much as possible, retaining between 89% and 97% of the population from the 2013 plan, the combined packing-cracking score for the Enacted Plan is higher than 98.5% of the simulated plans. Doc. 85-26, p. 3 (Barber Rebuttal Rep.); Doc. 85-24, ¶ 39 (McCartan Rebuttal Rep.); Doc. 85-25, pp. 34–35, tp. 133:9–135:19 (Barber Dep.). This means that the gap between the average BVAP share in

CD 1 and CD 2, and the BVAP share in CD 3, is around 10 points higher in the Enacted Plan than in other plans that score just as highly on core retention and were drawn with no racial information. Doc. 85-24, ¶ 39 (McCartan Rebuttal Rep.). This degree of extremity is statistically significant, *id.*, and Dr. Barber agrees that statistical significance is relevant to this analysis, although he abandons consideration of statistical significance with respect to his simulations. Doc. 85-14, p. 50 (Barber Rep.); Doc. 85-25, p. 32, tp. 123:2-11 (Barber Dep.).

III. LEGAL STANDARD

Federal Rule of Civil Procedure 56 provides that summary judgment shall be granted "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(b). An issue of fact is "material" if it is a legal element of the claim under the applicable substantive law, which might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). "It is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Id.* The basic issue before the court on a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52.

A. McClure Plaintiffs Have Standing to Challenge the Enacted Plan in all Five Districts.

It is undisputed that Plaintiffs have standing to challenge the Enacted Plan. *See* Doc. 19; Doc. 42, p. 12.

Plaintiffs Alabama NAACP, GBM, and Metro-Birmingham NAACP each have associational standing to challenge the Enacted Plan. An organization with members living in the challenged districts has standing to challenge those districts' composition if "the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual[] members' participation in the lawsuit." *ALBC*, 575 U.S. at 269–71 (internal citations omitted) (concluding organizational standing in a racial gerrymandering suit is established by identifying members who vote in the challenged districts); *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

Plaintiff Metro-Birmingham NAACP is an organization with members residing and registered to vote in each Commission District. *See* Doc. 93-1, pp. 11–12, tp. 44:17–45:3 (Metro-Birmingham NAACP 30(b)(6) Dep.); Doc. 93-2, pp. 8–9, 12–13 (Pls.' Resps. to Def.'s Interrogs. Nos. 2 and 4). Members of the Metro-Birmingham NAACP are also members of the Alabama NAACP. *See* Doc. 85-17, 32:22–33:9 (Ala. NAACP 30(b)(6) Dep.). Thus, the Alabama NAACP also has members residing and registered to vote in each District.

Members of Plaintiff GBM reside and are registered to vote in CDs 1, 2, 3, and 4. *See* Doc. 85-18, p. 11, tp. 42:7-10 (GBM 30(b)(6) Dep.); Doc. 93-2, pp. 8, 12. Plaintiffs, therefore, have adequately established "standing to challenge the [Commission]'s action" in each Commission District. *United States v. Hays*, 515 U.S. 737, 744–45 (1995).

Defendant does not dispute that the interests asserted in this lawsuit are germane to the purpose of each organizational Plaintiff. *See* Doc. 93-1, pp. 6, 10, tp. 21:20–22:1, 39:2-8 (stating the Metro-Birmingham NAACP aims to ensure the political, educational, social, and economic equality of all persons and to eliminate race-based discrimination); Doc. 85-17, pp. 11–12, 20, tp. 43:18–47:9, 76:7–77:6 (discussing Alabama NAACP's mission of eliminating racial discrimination in the democratic process and ensuring the enforcement of federal laws securing voting rights, such as ensuring a fair map for Jefferson County so its members have an opportunity to elect candidates of their choice in each district); Doc. 85-18, p. 13, tp. 49:20–50:6 (stating GBM's mission is to advance equal access to rights and freedoms through political participation in Jefferson County).

Finally, Defendant does not dispute that the injunctive and declaratory relief requested does not require the participation of individual members of Plaintiff organizations. *See Greater Birmingham Ministries v. Sec'y of State*, 992 F.3d 1299, 1316 (11th Cir. 2021) (holding GBM and the Alabama NAACP had standing to

challenge allegedly discriminatory voting laws). The Enacted Plan requires Plaintiffs' members to vote in districts drawn predominately on the basis of race without any compelling justification—this is sufficient to establish Plaintiffs' standing to challenge each district.

Plaintiff Cara McClure is an individual plaintiff who also has standing to challenge the injury caused by the racial gerrymandering of CD 2. "Where a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." *Hays*, 515 U.S. at 744–45 (citation omitted); *see also Gill v. Whitford*, 585 U.S. 48, 66 (2018) ("[A] plaintiff who alleges that he is the object of a racial gerrymander . . . has standing to assert only that his own district has been so gerrymandered."). Ms. McClure is a lawfully registered voter residing in CD 2. Doc. 93-3, p. 6, tp. 18:17-19 (McClure Dep.). Defendant does not dispute that a racial gerrymandering injury is traceable to the Commission. *See* Doc. 19, pp. 16–20. The injunctive and declaratory relief Ms. McClure requested for her racial gerrymandering injury is redressable by a favorable judicial decision.

B. Race was the Predominate Motive for the Design of Each District in the Enacted Plan in Violation of the Constitution.

Electoral districting violates the Equal Protection Clause of the U.S. Constitution when: (a) race is the "dominant and controlling" or "predominant" consideration in deciding "to place a significant number of voters within or without

a particular district," *Miller v. Johnson*, 515 U.S. 900, 913, 916 (1995); *Alexander v. S.C. State Conf. of NAACP*, 602 U.S. ___, 144 S. Ct. 1221, No. 22-807 [slip op at 2]; *Cooper v. Harris*, 581 U.S. 285, 291–92 (2017); and (b) the use of race is not "narrowly tailored to serve a compelling state interest," *Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899, 902 (1996), such as compliance with the Voting Rights Act, *see Cooper*, 581 U.S. at 292. Equal population is not a "traditional" districting goal that a court can weigh against the use of race to determine whether race predominates. *ALBC*, 575 U.S. at 272. Instead, it is taken as a given, and a court must determine "whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met." *Id*. (emphasis in original).

The court must proceed with "the starting presumption that the legislature acted in good faith," *id*. at 5, but that "presumption must yield . . . when the evidence shows that citizens have been assigned to legislative districts primarily based on their race." *Harris v. McCrory*, 159 F. Supp. 3d 600, 611 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 581 U.S. 285 (2017) (citing *Miller*, 515 U.S. at 915–16).

Plaintiffs may rely on "'direct evidence' of legislative intent, 'circumstantial evidence of a district's shape and demographics,' or a mix of both" to prove that race predominated. *Cooper*, 581 U.S. at 291; *see also Alexander*, [slip op. at 3]. If race did predominate, strict scrutiny applies, and Defendant bears the burden of proving that the use of race was "narrowly tailored" to satisfy a "compelling interest," such

as compliance with the VRA. *Cooper*, 581 U.S. at 292. "Race may predominate even when a reapportionment plan respects traditional principles." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189 (2017). Plaintiffs need only show the intent to "segregate voters on the basis of race." *See Shaw v. Reno*, 509 U.S. 630, 669 (1993) ("*Shaw I*"). "When a State invokes the VRA to justify race-based districting, it must show (to meet the 'narrow tailoring' requirement) that it had 'a strong basis in evidence' for concluding that the statute required its action." *Cooper*, 581 U.S. at 292. "To have a strong basis to conclude that § 2 demands race-based measures to augment a district's BVAP," the redistricting body is required "to evaluate whether a plaintiff could establish the *Gingles* preconditions...in a new district created without those measures." *Id.* at 304.

A government's decision to segregate voters based on race is subject to strict scrutiny even if it is motivated by a seemingly "benign" motive, *Shaw I,* 509 U.S. at 653, such as the desire to retain the cores of prior districts, *North Carolina v. Covington*, 585 U.S. 969, 972–75 (2018) (per curiam, an attempt to protect incumbents, *Clark v. Putnam Cnty.*, 293 F.3d 1261, 1271–72 (11th Cir. 2002), or a mistaken interpretation of the VRA, *Cooper*, 581 U.S. at 305–06 (holding a district drawn based on state's misinterpretation of the VRA as requiring it to make a successful crossover district into a majority-minority district did not satisfy strict scrutiny).

Courts have recognized that "where district lines track a path similar to their predecessor districts or where 'core retention' seems to predominate, courts should also examine the underlying justification for the original lines or original district" because even though "use of the core retention principle should certainly receive some degree of deference," the inquiry in a racial sorting claim examines the basis upon which voters were placed "within or without a particular district." *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 544 (E.D. Va. 2015) *aff'd in part, vacated in part*, 580 U.S. 178 (2017) (quoting *Miller*, 515 U.S. at 916); *cf. Robinson v. Ardoin*, 605 F. Supp. 3d 759, 831 (M.D. La. 2022) ("Core retention is not and cannot be central to [a Section 2 analysis], because making it so would . . . allow[] states to forever enshrine the status quo regardless of shifting demographics."), *cert. dismissed as improvidently granted*, 143 S. Ct. 2654 (2023), *and vacated and remanded*, 86 F.4th 574 (5th Cir. 2023).

1. Race Predominated in the Drawing of the Challenged Districts.

Here, the undisputed evidence, both direct and circumstantial, shows that race predominated in the Commission's decision to place a significant number of voters within and without the districts in the Enacted Plan.

Not every attempt to draw a majority-minority district invites strict scrutiny. *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality). However, statements from lawmakers who "expressly adopted and applied a policy of prioritizing mechanical

racial targets" can offer direct evidence that "race motivated the drawing of particular lines." *ALBC*, 575 U.S. at 267; *see also Alexander*, [slip op 3]; *Cooper*, 581 U.S. at 299.

As to the direct evidence, the Commission acknowledges that it deliberately sought to maintain the districts used during previous decades to the greatest extent possible. *See* Doc. 19, pp. 5, 25. It is undisputed that those previous district lines were based on racial targets. Doc. 85-4, p. MCC01023; Doc. 85-1, pp. MCC01163-67; Doc. 85-6, pp. MCC02553, MCC02558.

Since 1986, when the *Taylor* consent decree required the Commission to create single-member districts, two of which are majority Black, the Commission has expressly sought to maintain CDs 1 and 2 with Black populations over 65% each and every redistricting cycle. *See* Doc. 85-2; Doc. 26-2; Doc. 85-4, p. MCC01023; Doc. 85-1, pp. MCC01163–67. After the 1990 Census, the Commission's Section 5 submission to the Justice Department stated that its new districting plan would equalize population among the districts "without significantly changing the ratio of black and white population within the districts," which were over 65% Black. Doc. 85-4, p. MCC01023. After the 2000 Census, the Commission again redrew district lines to comply with the one-person, one-vote requirement, and again deliberately maintained "two districts containing African American majorities in excess of 65%." Doc. 85-1, pp. MCC01163–67. The Commission continued its use of racial targets

during the 2010 redistricting process, advising the Justice Department that "two of [the] districts contain[ ] African-American majorities in excess of 65%," Doc. 85-6, p. MCC02553, and that the Commission made changes to the districts to "bring each district close to the ideal district population without significantly changing the ratio of black and white population within the districts." *Id*. at MCC02558. The Commission did not undertake an analysis of the extent of RPV in Jefferson County before moving a significant number of Black residents, on the basis of race, into supermajority districts to maintain CDs 1 and 2 with Black populations above 65% in any of these redistricting cycles. *See id*.

The Commission's redistricting process after the 2020 Census was no different. In drawing the Enacted Plan, the Commission intentionally sought to maintain the existing district lines, stating that "core retention" was the Commission's primary goal. *See* Doc. 19, pp. 1, 4, 25 (all three proposals considered by the Commission "adhered to existing district lines"); Doc. 85-9, tp. 26:19-22 (Comm'n 30(b)(6) Dep.); Doc. 85-14, pp. 5–7, 42 (Barber Rep.). The Commission's decision to maintain the existing district lines perpetuated the explicit racial targets used in the previously enacted maps, creating supermajority Black CDs 1 and 2 with BVAPs of 76.34% and 64.11%, respectively. Doc. 85-8, ¶ 24, Fig. 4 (Cooper Rep. (Corrected)); *see* Doc. 85-14, pp. 5–7, Tbls.1 & 2 (Barber Rep.). Notably, the software used to draw the three proposed plans showed the Commission racial and

ethnic data of each voting district. Doc. 85-9, tp. 21:14–22:9, 24:9-12 (Comm'n 30(b)(6) Dep.). It did not show political party affiliation or elections data. *Id*. at 22:10-16.

Nothing in the 1985 Consent Decree, the VRA, nor state law required the Commission to maintain districts with these artificial BVAP supermajority targets. The mere passage of time does not sanitize the constitutional violation embodied in a prior plan such that the Commission can use core preservation to shield a prior racial gerrymander from strict scrutiny. *See, e.g.*, *Chen v. City of Houston*, 206 F.3d 502, 518 (5th Cir. 2000) ("[E]vidence that impermissible racial intent had tainted the plan upon which the challenged plan was based has been allowed, even when enough time has elapsed for a substantial degree of familiarity and political reliance to emerge.")(citation omitted); *Bethune-Hill*, 580 U.S. at 192 ("[S]tark splits in the racial composition of populations moved into and out of disparate parts of [a] district, or the use of an express racial target," are examples of significant and "relevant districtwide evidence" of racial predominance); *Polish Am. Cong. v. City of Chicago*, 226 F. Supp. 2d 930, 937 (N.D. Ill. 2002) ("Adherence to established boundary lines . . . may or may not be a legitimate redistricting objective, depending in part on how the lines were drawn originally.").

The Supreme Court has made clear that a districting plan violates the Equal Protection Clause anew where it '"retain[s] the core shape of districts' . . . found to

be unconstitutional." *Covington* 585 U.S. at 972–73 (citing *Covington v. North Carolina*, 283 F. Supp. 3d 410, 436 (M.D.N.C.)). Thus, the undisputed evidence demonstrates that race unlawfully predominated in drawing the Enacted Plan.

Thus, although a redistricting body is entitled to the presumption of good faith, the undisputed direct evidence of racial targeting in the Enacted Plan overcomes that presumption here.

2. The Challenged Districts Are Not Narrowly Tailored to Serve Any Compelling Interest.

Because Plaintiffs have shown that race predominated in the drawing of the challenged districts, strict scrutiny applies, and the Defendant bears the burden of proving that its use of race to sort voters was narrowly tailored to serve a compelling interest. *See Cooper v. Harris*, 581 U.S. 285, 292 (2017).

Though compliance with the VRA is a compelling interest, *see Cooper*, 581 U.S. at 292, the Supreme Court made clear that the VRA does not require "maintaining the same population percentages in majority-minority districts as in the prior plan ... [it] is satisfied if minority voters retain the ability to elect their preferred candidates." *ALBC*, 575 U.S. at 276.

In earlier decades, a threshold of 65% Black VAP was thought necessary to enable Black voters to elect candidates of their choice. *See* Doc. 85-3, ¶ 8 (Cooper Rebuttal). *See, e.g., Smith v. Clinton*, 687 F. Supp. 1361, 1362–63 (E.D. Ark.) (three-

judge court), *aff'd*, 488 U.S. 988 (1988); *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 164 (1977).

The *Taylor* Consent Decree that first established the majority Black districts for the Commission in 1985, Doc. 26-2, was presumably based on this assumption. But the Commission could not simply assume that a 65%t BVAP threshold was still necessary today without actually analyzing what was necessary for Black voters to have an equal opportunity to elect candidates of their choice, as required by Section 2. *See Cooper*, 581 U.S. at 292; *ALBC*, 575 U.S. 254 at 275–76 (explaining that Section 5 of the VRA did not require legislatures to maintain the percentage of Black voters in majority-Black districts from previous cycles); *Miller*, 515 U.S. at 921 ("[C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws."). And the undisputed RPV analysis by Plaintiffs' expert, Dr. Liu, establishes that the packing in CDs 1 and 2 is far in excess of the BVAP needed to allow Black voters to elect candidates of their choice. Doc. 85-21, p. 6, Tbl.2 (Liu Suppl.).

Indeed, even when the Commission was required to comply with the anti-retrogression mandate of Section 5 of the VRA, Section 5 did not require "maintaining the same population percentages in majority-minority districts as in the prior plan," *ALBC*, 575 U.S. 254 at 276. A new Commission plan that reduced the

Black population percentages in CDs 1 and 2 would have satisfied Section 5 "if minority voters retain[ed] the ability to elect their preferred candidates" under the new plan. *See id*.

Defendant lacks a "strong basis in evidence" that the VRA required the race-based design of the Enacted Plan. *See Cooper*, 581 U.S. at 292–93 (citing *ALBC*, 575 U.S. at 278). The Commission failed to undertake any "functional analysis of the electoral behavior within the particular election district," to justify packing Black voters into supermajority districts, *see Bethune-Hill*, 580 U.S. at 194 (cleaned up), or any "pre-enactment analysis with justifiable conclusions" to show that the districts in the Enacted Plan satisfy the VRA, *see Abbott v. Perez*, 585 U.S. 579, 621 (2018). To meet the narrow-tailoring requirement, rather than maintaining a particular or existing numerical minority percentage, the Commission was required to determine: "[t]o what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" *ALBC*, 575 U.S. at 279.

Although the parties agree the Commission was required to draw two majority-Black districts to comply with the VRA, it lacked "good reasons" and a "strong basis in evidence" for drawing the super-packed versions of CDs 1 and 2 in the 2021 Enacted Plan. *See id*. at 278. The Commission also used a +/-1% population variance as its target for population equality, even though that is stricter than the one-

person, one-vote requirements of the U.S. Constitution. *See id*. at 259; Doc. 85-6, pp. MCC00166–67; Doc. 85-9, tp. 76:6–77:2 (Comm'n 30(b)(6) Dep.); *see* Doc. 85-10.

The Commission did not hire an expert to conduct a RPV analysis. Doc. 85-9, tp. 28:7-9 (Comm'n 30(b)(6) Dep.). Nor did the Commission consider voter registration or turnout data in any district in the County. *Id.* at 28:10–29:6. Defendant admits the Commission did not attempt to determine if lower BVAPs in CDs 1 and 2 would comply with the VRA. In fact, compliance with the Voting Rights Act did not come up at all when the Commissioners were drawing the Enacted Plan. *Id*. at 29:20-22.

The Commission has also sought to maintain the racial ratios of the districts since the 1990 census in the Enacted Plan. Doc. 85-6, pp. MCC02552–58; Doc. 85-14, pp. 5–6, 9–10 (Barber Rep.). In so doing, the Commission has disregarded over three decades of demographic shifts whereby the non-white population, particularly the Black and Latinx populations in Jefferson County, increased to 51.94% while the white population fell to 48.06% as of 2020. Doc. 85-23, p. 6–7 (Cooper Decl.). As established in its submission of the 2013 plan to the Justice Department, the 2013, 2001, and 1993 plans all had two Black majority districts and Black majority populations in excess of 65%. Doc. 85-6, p. MCC02558. In each round of redistricting, the Commission made changes to the districts to "bring each district

close to the ideal district population without significantly changing the ratio of black and white population within the districts." *Id*. at MCC02557. Similar to prior plans, the BVAPs of CDs 1 and 2 were maintained as super majorities, and the BVAPs of CDs 3, 4, and 5 were maintained at less than 30%. Doc. 85-8, Ex. C-2 (Cooper Rep. (Corrected)). In all three of the proposed plans in 2021, the racial demographics of CDs 3, 4, and 5 were unchanged. Doc. 85-11, tp. 16:17-18. Under the Enacted Plan, CDs 1 and 2 retained 90% and 90.1%, respectively, of their 2013 populations, and CDs 3, 4, and 5 maintained almost all their population from the 2013 plan. Doc. 85-14, p. 5–6 (Barber Rep.).

Due to the high degree of RPV in Jefferson County, the Enacted Plan is highly ineffective for Black voters. Expert analysis shows RPV continues to exist across the County. Doc. 85-21, p. 6, Tbl.2 (Liu Suppl.). In the Enacted Plan, the Commission kept the BVAP of CDs 1 and 2 at approximately 75% and 63%, respectively, yet Dr. Liu determined that they would remain effective for Black candidates with BVAPs around 54% to 55%. *Id.* Because of the extreme RPV in Jefferson County, the concentration of Black voters in supermajority CDs 1 and 2 leads to a "clear advantage of white voters" in CDs 3, 4, and 5. *Id.* at 8. Had the Commission undertaken any analysis, it would have been clear that the BVAPs in CDs 1 and 2 of the Enacted Plan were unnecessary to maintain Black voters' ability to elect the candidate of their choice. *See ALBC*, 575 U.S. at 279.

Defendant has not cited any other compelling government interest that could justify their predominant use of race to pack and crack Black voters within and without the challenged districts. An interest in preserving the cores of prior districts, particularly where those districts were designed using a racial threshold that may have been based on an incorrect legal interpretation of non-retrogression under Section 5 of the VRA, is not a compelling state interest. *See, e.g.*, *Clark v. Putnam Cnty.*, 293 F.3d 1261, 1274–77 (11th Cir. 2002) (finding district court erred when it determined the redistricting plan satisfied strict scrutiny because county's interest in complying with Justice Department's "max Black" policy not a sufficient justification for use of race to pack two majority Black districts); *cf. Allen v. Milligan*, 599 U.S. 1, 22 (2023) ("[T]his 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. That is not the law."); *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1016 (N.D. Ala. 2022), *order aff'd sub nom. Milligan*, 599 U.S. at 1 (upholding that core retention is not an established priority among competing traditional redistricting principles and there is room for other principles to be assigned greater weight); *GRACE, Inc. v. City of Miami*, 85 F. Supp. 3d 1365, 1373 (S.D. Fla. 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."); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (indicating that redistricting criteria, including preserving the cores of prior districts, may be legitimate only if they are non-discriminatory).

As a result, there is no genuine issue of material fact that the Commission's use of race serves any compelling interest nor that the drawing of the districts in the Enacted Plan was narrowly tailored.

IV. CONCLUSION

For the foregoing reasons, this Court should grant summary judgment to Plaintiffs.

Dated: June 7, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Kathryn Sadasivan
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