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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

BOBBY SINGLETON, et al., *Plaintiffs*, v. Hon. WES ALLEN, in his official capacity as Secretary of State, *et al.*, *Defendants*.	)	Case No. 2:21-cv-1291-AMM **THREE-JUDGE COURT**

DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The *Singleton* Plaintiffs challenge the congressional map enacted by the Alabama Legislature in 2023. They claim the map segregates voters by race in violation of the Equal Protection Clause because the shape of District 7 has not changed enough since 1992. Not only that, Plaintiffs say the Legislature intentionally discriminated against black people when it didn't pick the map they liked best. And Plaintiffs purport to bring, for the first time, a vote dilution claim under Section 2 of the Voting Rights Act. But they don't back up their Section 2 claim with even one factual allegation; rather, they plead themselves out of a Section 2 claim by alleging that drawing even one majority-black congressional district would be unconstitutional. It takes far more before a plaintiff can submerge the State "in political trench warfare for years on end." *Cooper v. Harris*, 581 U.S. 285, 335 (2017) (Alito, J., concurring in part). All three claims should be dismissed.

First, Plaintiffs fail to appreciate the burden they bear to attack a facially neutral law as secretly discriminatory. To show that an entire legislative body acted with a discriminatory purpose is "a problematic and near-impossible challenge." *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1324 (11th Cir. 2021). Courts presume "the good faith" of the legislature, and in redistricting cases in particular, they "exercise extraordinary caution" before intruding "on the most vital of location functions." *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). To

lower this high burden will "invite the losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena." *Cooper*, 581 U.S. at 335 (Alito, J., concurring in part).

It appears that Plaintiffs, two of whom are Democratic members of the Alabama Senate, are doing just that—trying to "deny the majority its political victory by prevailing on a racial gerrymandering claim." *Id.* They decry the presumption of good faith owed to their colleagues and contend that the (purported) resemblance of District 7 to its original shape decades ago *automatically* gives rise to a constitutional violation today. But at most, they allege the 2023 Legislature was *aware* of District 7's racial demographics. That will not do, because legislatures "almost always [are] aware of racial demographics; but it does not follow that race predominates in the redistrict process." *Miller*, 515 U.S. at 916.

Second, Plaintiffs allege that the Legislature, as a whole, discriminated against black voters simply because it rejected an oddly-shaped map that allegedly would have produced a second reliably Democratic district. But in their attempt to demonstrate that their preferred map is so obviously meritorious that only a racist could reject it, Plaintiffs point to several "obvious alternative explanation[s]" other than race for why the 2023 Legislature chose another map. *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009). Plaintiffs admit their map is less compact than the 2023 Plan. And they admit that it would be far more likely to swing an additional congressional

district to Democrats—a strange goal for Republican legislators to pursue. Thus, Plaintiffs try to, but cannot avoid, the important principle that "the Constitution does not place an *affirmative* obligation upon the legislature to avoid creating districts that turn out to be heavily, even majority, minority. It simply imposes an obligation not to create such districts for predominantly racial, as opposed to political or traditional, districting motivations." *Easley v. Cromartie*, 532 U.S. 234, 249 (2001).

Finally, Plaintiffs tack on a Section 2 claim. But private parties have no statutory authority to enforce Section 2. *See Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1207 (8th Cir. 2023). And Plaintiffs plead zero facts in support of their claim, thereby failing the most basic pleading requirement. *See Iqbal*, 556 U.S. at 678. Even worse, they actually allege that no "permissible remedy" for their claim exists when they assert that even one majority-black district (much less two) would be unconstitutional. *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994) (en banc). Their Section 2 claim thus should be dismissed.

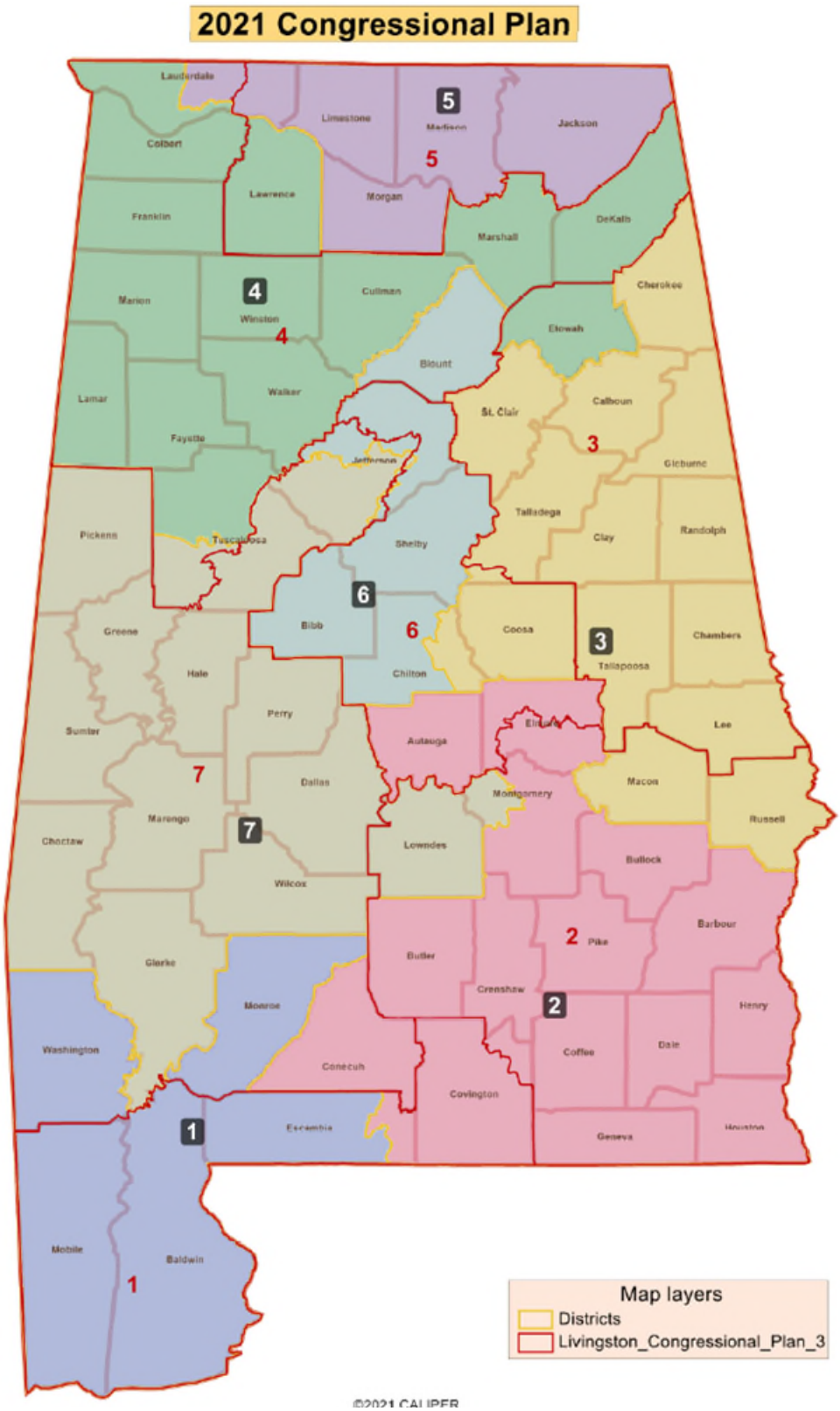
BACKGROUND

In 2021, Alabama enacted a congressional districting plan that largely retained existing district lines. *See Allen v. Milligan*, 143 S. Ct. 1487, 1501 (2023). This Court

determined that the plan likely violated Section 2, and the Supreme Court affirmed. *Id.* at 1498.

On July 21, 2023, the Legislature passed, and the Governor signed into law, new redistricting legislation. *See* Ala. Act No. 2023-563; *Singleton* doc. 139-1. The 2023 Act repeals the 2021 Plan and replaces it with the 2023 Plan. The Act's legislative findings outline the traditional principles given effect in the 2023 Plan, which prioritizes equal population, contiguity, reasonably compact geography, minimizing splits of county lines, maintaining communities of interest, and avoiding the pairing of incumbents. Ala. Code § 17-14-70.1(3)(a)-(f). The redistricting statute then states that the following secondary principles shall be given effect to the extent it can be done consistent with the primary principles above: "1. Preserve the cores of existing districts. 2. Minimize the number of counties in each district. 3. Minimize splits of neighborhoods and other political subdivisions in addition to minimizing the splits of counties and communities of interest." *Id.* § 17-14-70.1(3)(g).

The 2023 Plan flows from these traditional principles of compactness, county lines, and communities of interest. Because uniting the Black Belt took precedence over core retention, Districts 1, 2, and 7 saw substantial changes. The Legislature, however, did not completely reshuffle the deck, so the cores of each district were not entirely abandoned, and incumbents were not paired against each other. The changes from 2021 to 2023 are shown below, with the 2023 lines in red.


2021 Congressional Plan
Lauderdale
Limestone
Madison
Jackson
Colbert
Lawrence
Morgan
Franklin
Marshall
DeKalb
Marion
Winston
Cullman
Cherokee
Etowah
Blount
Lamar
Walker
St. Clair
Calhoun
Fayette
Jefferson
Talladega
Cleburne
Clay
Randolph
Pickens
Tuscaloosa
Shelby
Bibb
Coosa
Chambers
Greene
Hale
Chilton
Tallapoosa
Perry
Sumter
Autauga
Elmore
Lee
Dallas
Montgomery
Macon
Marengo
Russell
Choctaw
Lowndes
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Districts
Livingston_Congressional_Plan_3
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The *Singleton* Plaintiffs objected and sought a new preliminary injunction, "argu[ing] that the 2023 Plan is an impermissible racial gerrymander—indeed, just the latest in a string of racially gerrymandered plans the State has enacted, dating back to 1992." *Singleton v. Allen*, 2023 WL 5691156, at *2 (N.D. Ala. Sept. 5, 2023). Meanwhile, plaintiffs in *Milligan v. Allen*, Case No. 2:21-cv-1530, and *Caster v. Allen*, Case No. 2:21-cv-1536 (collectively, the "VRA Plaintiffs"), objected to the 2023 Plan on § 2 grounds. *Singleton*, 2023 WL 5691156, at *2. The Court granted the VRA Plaintiffs relief "on statutory grounds, and … RESERVE[D] RULING on the constitutional issues raised by the *Singleton* … Plaintiffs." *Id.* at *3. Remedial proceedings before a special master ensued, a remedial plan was chosen, and Alabama was ordered to administer its upcoming congressional election according to that plan. *See Singleton v. Allen*, 2023 WL 6567895, at *19 (N.D. Ala. Oct. 5, 2023). Like the 2023 Plan, the remedial plan splits Jefferson County between Districts 6 and 7. *Id.* The remedial plan adds splits to Mobile and Clarke Counties. *Id*.

The *Singleton* Plaintiffs amended their complaint to challenge the 2023 Plan.

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal,* 556 U.S. at 678**Error! Bookmark not defined.**. A plaintiff fails to state a plausible claim of discrimination when an "obvious alternative explanation" exists for the

defendant's conduct. *Id.* at 682. "Plaintiffs must plead all facts establishing an entitlement to relief with more than 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324 (11th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

ARGUMENT

I. Plaintiffs Have Not Stated A Claim Under The Equal Protection Clause.

Any "successful equal protection claim under the Fourteenth Amendment requires proof of *both* an intent to discriminate and actual discriminatory effect." *Greater Birmingham Ministries v. Sec'y of State for Ala. ("GBM")*, 992 F.3d 1299, 1321 (11th Cir. 2021). The facts alleged must show that "the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects on an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). In a gerrymandering case, "because of" intent is established with evidence 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. 285, 291 (2017).

Crucially, "when a court assesses whether a duly enacted statute is tainted by discriminatory intent, 'the good faith of the state legislature must be presumed.'" *League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1373 (11th Cir. 2022) (per curiam) (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)). This

principle applies at every stage of litigation. *Miller*, 515 U.S. at 916-17. The presumption that a legislature acts for legitimate rather than discriminatory reasons serves important ends: it reminds courts to exercise caution before intruding "on the most vital of local functions"; it rightly recognizes that redistricting is a "complex" and "difficult subject for legislatures"; it is sensitive to the fact that legislators are "almost always … aware of racial demographics"; and it keeps the burden of proof where it should be—squarely on the plaintiff's shoulders. *Id.* at 915-16.

Even when dealing with a small number of decisionmakers, "[p]roving the motivation behind official action is often a problematic undertaking." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). In trying to prove the intent of a body the size of the Legislature, "the difficulties in determining the actual motivations of the various legislators that produced a given decision increase." *Id.* It is not enough to prove the motives of only a handful of the bill's backers, for "the legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021). Instead, a plaintiff must show "that the legislature as a whole was imbued with racial motives." *Id.* Making that showing is not merely difficult, it's "near-impossible." *GBM*, 992 F.3d at 1324.

Without this safeguard, federal courts are more easily "transformed into weapons of political warfare" by "the losers in the redistricting process"—an "often-unstated danger" that invites "illegitimate invasions" into "a traditional domain of state

authority." *Cooper*, 581 U.S. at 335 (Alito, J., concurring in part) (cleaned up). Because of the high stakes and potential for abuse, courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916.

Plaintiffs' theory of the case, however, requires ignoring the presumption of good faith due to legislative bodies. Their claim hinges on the idea that the 2023 Legislature intentionally discriminated against black Alabamians by declining to draw the 2023 Plan like Plaintiffs wanted. And earlier in this litigation, Plaintiffs insisted that "the Legislature's good faith or lack thereof is irrelevant." Doc. 165 at 18. The scant allegations in their current complaint show Plaintiffs cannot overcome the presumption. Thus, they try to invert the burden of proof and fault the Legislature for failing to "cure[] any" so-called "taint" purportedly infecting previous iterations of District 7, and then attribute this failure to "cure" to the Legislature's "bad faith and … intentional discrimination." *Abbott*, 138 S. Ct. at 2326-27. Plaintiffs' approach is "fundamentally flawed." *Id.* at 2326.

Plaintiffs attempt to show discrimination via two "independent" avenues: (1) with allegations that the 2023 Legislature "intentionally perpetuate[d] the unconstitutional racial gerrymandering of Jefferson County"; and (2) with allegations that the Legislature rejected Plaintiffs' preferred plan, which would have moved large numbers of voters around to create two Democratic districts. Doc. 229 ¶¶3, 4, 40-

41. These are two sides of the same coin. Their fundamental theory is that the Constitution imposes on the Legislature some "affirmative obligation" to hit racial targets rather than simply prohibiting the drawing of "districts for predominantly racial" reasons. *Easley v. Cromartie*, 532 U.S. 234, 249 (2001). According to Plaintiffs, the 2023 Legislature was obliged either "to expiate its predecessor's bad intent," *Abbott*, 138 S. Ct. at 2325, or "to avoid creating districts that turn out to be heavily, even majority, minority." *Cromartie*, 532 U.S. at 249. The Supreme Court has already rejected both arguments.

Moreover, Plaintiffs' complaint points to "obvious alternative explanations" other than race for why the Legislature adopted the 2023 Plan and not their own. *Iqbal*, 556 U.S. at 682. Each of these are sufficient grounds on which to dismiss.

A. Plaintiffs' Allegations of Past Discrimination Do Not Show Intentional Discrimination Today.

Plaintiffs state again and again that the 2023 Legislature's duty was "to remedy the racial gerrymander in Alabama's Congressional redistricting plan." Doc. 229 ¶15; *see also id.* at ¶¶2, 16, 43, 51, 66, 68, 76. In their view, the Legislature's purported failure to do so is proof the Legislature was motivated primarily by race when enacting the 2023 Plan. There are three huge problems with that position.

First, it's the same error that served as grounds for reversal in *Abbott v. Perez*, where the district court "referred repeatedly to the 2013 Legislature's duty to expiate its predecessor's bad intent." 138 S. Ct. at 2325. The district court reasoned that

discriminatory effects persisted "because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy." *Id.* at 2325-26. This "approach," declared the Supreme Court, "was fundamentally flawed and demands reversal." *Id.* at 2326. Why is it flawed? Because it "disregard[s] the presumption of legislative good faith and improperly reverse[s] the burden of proof." *Id.* at 2326-27. Neither of those "basic principles" are "changed by a finding of past discrimination" because "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott*, 138 S. Ct. at 2324-25. Here, Plaintiffs have already said the presumption of good faith doesn't matter, and they attempt to place the burden on the Legislature to "'cure' the earlier Legislature's 'taint.'" *Id.* Plaintiffs' failure to overcome the burden they actually bear is reason enough to dismiss their equal protection claims.

Second, even putting *Abbott* aside, the Complaint contains no allegations plausibly showing that a racial gerrymander "originate[d] in the 1992 consent judgment in *Wesch v. Hunt*" or was intentionally maintained on the basis of race following the 2000, 2010, and 2020 censuses. Doc. 229 ¶¶2, 27. The 1992 Map was approved by a federal court and has never been held to be the product of a racial gerrymander. *See Wesch v. Hunt*, 785 F. Supp. 1491 (S.D. Ala. 1992), *aff'd sub nom. Camp v. Wesch*, 504 U.S. 902 (1992), *Figures v. Hunt*, 507 U.S. 901 (1993).

Similarly, no court invalidated the 2002 and 2011 Plans. The 2021 Plan was enjoined solely on statutory grounds. *Singleton v. Allen*, 2023 WL 5691156, at *2 (N.D. Ala. Sept. 5, 2023). And the State has never conceded that the federal court racially gerrymandered the 1992 Plan. *Contra* Doc. 229 ¶¶15, 26, 71.[1] To declare as a settled fact that the 1992 Plan was a racial gerrymander and then to posit as a matter of law that the 2023 Legislature had an affirmative duty to fix it thus fails on multiple fronts.

Finally, setting aside *Abbott* and assuming *arguendo* that a federal court racially gerrymandered District 7 in 1992, Plaintiffs have still not sufficiently alleged the 2023 Legislature acted with a discriminatory purpose. "[I]ntent as volition or intent as awareness of consequences" does not rise to the level of discriminatory purpose. *Feeney*, 442 U.S. at 279. Nonetheless, the most Plaintiffs have alleged is that the Legislature chose to enact District 7 while "aware" of the district's "racial demographics." *Miller*, 515 U.S. at 916. That's not enough.

[1] Plaintiffs point to Secretary Merrill's pretrial brief in the *Chestnut* case as containing a concession that "the plan enacted in 2011 … was racially gerrymandered." Doc. 229 ¶15 n.1. That's not true. All the Secretary "conceded" was that Section 5's anti-retrogression requirement applied to those plans and limited the State's options with regard to District 7, and that in a post-Section 5 world, Alabama may not have been able to draw the same lines for the first time, *if done for a racial purpose*. *See Chestnut v. Merrill*, No. 2:18-CV-00907-KOB (N.D. Ala. Oct. 28, 2019), ECF No. 101 at 11-12. These "after-the-fact comments," *Simpson v. Hutchinson*, 636 F. Supp. 3d 951, 956 (E.D. Ark. 2022) (three-judge court), are not a concession that the Legislature adopted the 2001 or 2011 plans for a predominantly racial purpose.

In sum, actions by a federal court in 1992 or by the 2001 Legislature, the 2011 Legislature, or the 2021 Legislature do not taint the actions of the 2023 Legislature. Even if there were a finding of past discrimination, the "burden of proof" would not change. *Abbott*, 138 S. Ct. at 2324. The ultimate question remains whether a discriminatory intent has been proved in a given case," meaning that "what matters" in this case is the intent of the Legislature that enacted the 2023 Plan. *Id.* at 2324-25. That intent cannot be shown by the 2023 Legislature's "failure" to meet its non-existing obligation to "purge" improper racial taint, if it existed, from previous redistricting cycles. *Id.* at 2324, 2326. Giving credence to Plaintiffs' repudiated theory would impermissibly "reverse the presumption that a State's laws are constitutional and plunge federal courts into far-reaching expeditions regarding the sins of the past in order to question the laws of today." *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1226 (11th Cir. 2005) (en banc).

B. Plaintiffs' Allegations Provide "Obvious Alternative Explanations" for the Legislature's Actions.

Plaintiffs allege that the 2023 Legislature's refusal to enact their plan is evidence the Legislature intended to discriminate against black Alabamians. Doc. 229 ¶¶3, 58, 75-79. Yet, while comparing their plan to the enacted plan, Plaintiffs reveal several "obvious alternative explanations" other than race for the Legislature's choice. *Iqbal*, 556 U.S. 682. "The State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not

support an inference that the plan so discriminates on the basis of race or color as to violate the Constitution." *Miller*, 515 U.S. at 924. If even one of these legitimate "motives is predominant, then a racial motive cannot be." *Simpson v. Hutchinson*, 636 F. Supp. 3d 951, 957 (E.D. Ark. 2022) (three-judge court). The presumption of legislative good faith resolves any doubt. *See supra* at 7. Thus, this "independent" ground for enjoining the 2023 Plan fails to state a claim.

First, Plaintiffs admit that their "plan is only marginally less compact than the 2023 enacted plan." Doc. 229 ¶59; *see also* Ala. Code § 17-14-70.1(3)(c). In fewer words, it's less compact. The Legislature's rejection of a less compact map suggests that it "subordinated" "racial considerations" to "compactness," not the other way round. *Cooper*, 581 U.S. at 291.

Second, Plaintiffs admit that the 2023 Plan preserves the core of District 7 from preceding plans. Doc. 229 ¶68; *see also* Ala. Code § 17-14-70.1(3)(g)(1). Core retention is a common, valid, and race-neutral principle for a new redistricting map. *See, e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 99-100 (1997); *see also Cooper*, 581 U.S. at 338 (Alito, J., concurring in part) ("[I]t is a common practice to start with the plan used in the prior map and to change the boundaries of the prior districts only as needed to comply with the one-person, one-vote mandate and to achieve other

desired ends.").[2] The Legislature was not required to cast aside traditional redistricting criteria simply because District 7's core contained more black voters than Plaintiffs deem optimal.[3]

Third, Plaintiffs admit that a stated aim of the 2023 Plan, which was given effect, was "that no incumbents be placed in the same district." Doc. 229 ¶82; *see also* Ala. Code § 17-14-70.1(3)(f). This too is "a legitimate state goal." *Bush v. Vera*, 517 U.S. 952, 964 (1996) (collecting cases).

Fourth, the Democratic Senators explain that their preferred map would have created two reliably Democratic congressional districts instead of one, an outcome their Republican colleagues across the aisle understandably would disfavor for partisan reasons. *See, e.g.*, Doc. 229 ¶¶40-41, 46, 65. Plaintiffs needed then to allege "at the least that the legislature could have achieved its legitimate political objectives

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[2] *See also* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649, 671 (2002); *Vieth v. Jubelirer*, 541 U.S. 267, 357-58 (2004) (Breyer, J., dissenting) (collecting sources); *Stenger v. Kellett*, No. 4:11-cv-2230, 2012 WL 601017, at *3 (E.D. Mo. Feb. 23, 2012) ("A frequently used model in reapportioning districts is to begin with the current boundaries and change them as little as possible while making equal the population of the districts.").

[3] Though the *Allen* Court held that "core retention" is not a defense to a § 2 claim, which does not require a showing of discriminatory intent, 599 U.S. at 22, the Court did not upend its past recognition "that preserving the cores of prior districts" is a "legitimate objective[]" that can be given effect in a plan, *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). Thus, even if that "traditional … districting motivation[]" leads to "districts that turn out to be heavily, even majority, minority," that is no constitutional problem. *Cromartie*, 532 U.S. at 249.

in alternative ways that are comparably consistent with traditional districting principles" and bring "about significantly greater racial balance." *Cromartie*, 532 U.S. at 258. They alleged the opposite. *See, e.g.*, Doc. 229 ¶40 (touting their plan's better results for Democrats); ¶59 (admitting their plan is less compact); ¶68 (faulting 2023 Plan for preserving core of District 7); ¶82 (faulting 2023 Plan for not pairing incumbents). Thus, their claim fails.

The bottom line is that the allegations come nowhere close to showing that race predominated over traditional factors when enacting the 2023 Plan. Obvious alternate explanations abound, and there is no "smoking gun" like an express racial target, *Cooper*, 581 U.S. at 299-300, 318, nor "strangely-irregular" boundaries, *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)—nothing from which the requisite "because of" intent could plausibly be inferred. *Feeney*, 442 U.S. at 279.

Most troubling of all is the subtext of Plaintiffs' position, which is essentially that when Republicans in the Legislature don't support a bill backed by Democrats who are black, it must be on account of racial discrimination. That belief is what "threatens to carry us further from the goal of a political system in which race no longer matters." *Shaw v. Reno*, 509 U.S. 630, 657 (1993). That mindset will "balkanize us into competing racial factions" and do "lasting harm to our society." *Id.* And that tactic, if allowed to persist, threatens to "transform[]" "the federal courts … into" especially divisive "weapons of political warfare," *Cooper*, 581 U.S. at 335

(Alito, J., concurring in part), waged with baseless accusations of racism. Fortunately, the presumption of legislative good faith protects our politics and our courts from such cynical maneuvers by requiring far more to state an intentional discrimination claim. Plaintiffs' constitutional claims should be dismissed.

II. Plaintiffs Have Not Stated A Claim Under Section 2 of the VRA.

Plaintiffs' Section 2 claim is more assumed than stated. It barely constitutes a single page of their 48-page complaint. It is supported by zero factual allegations. And Plaintiffs shoot themselves in the foot by alleging in paragraph 83 that no "permissible remedy" exists for their claim. *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994) (en banc). This claim too should be dismissed.

A. Section 2 does not contain an implied right of action. *See Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1207 (8th Cir. 2023). No provision of the VRA contains "clear evidence that Congress intended to authorize" private citizens to seek judicial enforcement of Section 2. *In re Wild*, 994 F.3d 1244, 1256 (11th Cir. 2021) (en banc). To the contrary, "[i]f the text and structure of [the VRA] show anything, it is that Congress intended to place enforcement in the hands of the Attorney General, rather than private parties." *Arkansas NAACP*, 86 F.4th at 1211 (quotation omitted). Also, Plaintiffs do not seek to enforce Section 2 under the remedial vehicle of 42 U.S.C. § 1983. Doc. 229 ¶5. And attempting to do so would

be futile, because Section 2 created new remedies, not new federal rights. *See City of Boerne*, 521 U.S. 507, 527 (1997).

B. Plaintiffs actually allege that they cannot satisfy the third *Gingles* precondition, which requires establishing white bloc voting. Doc. 229 ¶74 ("Districts 6 and 7 in the Singleton and Smitherman plans have more than enough White crossover voting to prevent meeting the third *Gingles* precondition."). That is a fatal admission. Satisfaction of the preconditions is "necessary," *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), but "not sufficient" to establish liability under Section 2, *Chisom v. Roemer*, 501 U.S. 380, 397 (1991).

C. Plaintiffs make no attempt to allege that black Alabamians "have less opportunity to participate in the political process." *Chisom*, 501 U.S. at 397; 52 U.S.C. § 10301(b). "Equal opportunity to participate in the political process" means—the ability to register and vote, choose the party one desires to support, participate in its affairs, and have an equal vote when the party's candidates are chosen. *Whitcomb v. Chavis*, 403 U.S. 124, 149-50 (1971). There are no allegations that black Alabamians have been "denied access to the political system." *Id.* at 155.

D. Plaintiffs conclude Count III with this remarkable paragraph: "The 2023 enacted plan violates the Constitution and Section 2 of the Voting Rights Act by creating only one opportunity district, and that one opportunity district is unconstitutionally racially gerrymandered." Doc. 229 ¶83. This is another death knell.

Plaintiffs must establish "the existence of a permissible remedy" as part of their "prima facie case in section 2 vote dilution cases." *Nipper*, 39 F.3d at 1524, 1530. Plaintiffs have not alleged any facts showing that a new map can be drawn in which the alleged constitutional infirmities of District 7 are addressed and two majority-black districts are created, all while complying with the Voting Rights Act *and* the Constitution. At least eight members of the Supreme Court agree that a plaintiff cannot satisfy *Gingles* I if race is predominant in a plaintiff's alternative map. *See Allen*, 599 U.S. at 31-33; *id.* at 59 (Thomas, J., dissenting). And, again, Plaintiffs allege that race unconstitutionally predominated when just *one* majority-black district was created. Understandably then, they never allege that a second constitutionally constructed majority-black district can be drawn.

It is well-established that Section 2 plaintiffs in a vote dilution case must allege "that the minority group is 'sufficiently large and geographically compact to constitute a *majority* in a single-member district.'" *Nipper*, 39 F.3d at 1510 (quoting *Gingles*, 478 U.S. at 50 (emphasis added)). This "precondition" "asks whether the court can fashion a remedy for a demonstrated abridgement." *Id.* at 1511. Thus, the "inquiries into remedy and liability … cannot be separated: A district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system." *Id.* at 1530-31.

Plaintiffs appear to argue that nearly any split of Jefferson County is unconstitutional and that failing to draw a map with two opportunity districts violates the VRA. Doc. 229 ¶¶55, 59, 66, 68, 77. The map they want, therefore, must have two opportunity districts and not split Jefferson County. They say their map achieves this because it does not split Jefferson County and creates two "effective crossover districts." *Id.* ¶¶74, 79. But nowhere do they allege that that "the minority group" is "sufficiently large and geographically compact" "to constitute a *majority*" in not one but two single-member districts in a map that does not split Jefferson County (or splits Jefferson County in a way Plaintiffs would deem constitutional). *Nipper*, 39 F.3d at 1510 (emphasis added). Quite the opposite, they suggest that the minority group is large and compact enough to constitute an "effective minority" in two crossover districts. *Bartlett v. Strickland*, 556 U.S. 1, 14 (2009) (plurality op.). But "§ 2 does not require crossover districts." *Id.* at 23. Thus, "crossover-district claims," like Plaintiffs', are not allowed. *Id.* at 16.

For any one of these reasons, Plaintiffs' Section 2 claim should be dismissed.

CONCLUSION

The Court should dismiss the Second Amended Complaint in full.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2024, I filed the foregoing using the Court's CM/ECF system, which will serve all counsel of record.

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