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

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Plaintiffs' case rests upon at least three legal errors: (1) that a racial gerrymandering claim requires no showing of action taken because of race; (2) that an intentional vote dilution claim requires no showing of discriminatory effects; and (3) that a Section 2 claim against Alabama's 2023 Plan requires no showing at all. Plaintiffs' claims should be dismissed.

ARGUMENT

I. Plaintiffs Have Not Stated A Racial Gerrymandering Claim.

Plaintiffs' view of racial gerrymandering is a strange one: that certain district shapes and demographics inherently trigger strict scrutiny no matter why the Legislature adopted them. In Plaintiffs' view, the purportedly "race-driven lines" of 1992 continue to haunt the 2023 Plan and alone "are sufficient to carry the *Singleton* Plaintiffs' evidentiary burden," doc. 236 ("Response") at 11, no matter what drove the

Legislature in 2023. This flawed premise infects their entire theory of liability and every allegation propping it up.

Like all Equal Protection claims of racial segregation and "[r]ace-based assignments," to prevail on a racial gerrymandering claim, a plaintiff must show that the State treated voters differently "because of" their race, "not merely in spite of" it. *Miller v. Johnson*, 515 U.S. 900, 912, 916 (1995) (internal quotation marks omitted). While the shape and demographics of districts might be evidence of a racial gerrymander, no particular shape or demographic profile alone necessarily violates the Constitution because "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* (*"Cromartie II"*), 532 U.S. 234, 249 (2001). Thus, a racial gerrymandering claim requires proof that the Legislature discriminated against voters by classifying them *because* of race. *See Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (The "Equal Protection Clause forbids racial gerrymandering, that is, *intentionally* assigning citizens to a district on the basis of race without sufficient justification.") (emphasis added). Accordingly, when challenging "a facially neutral law" like Alabama's 2023 Plan, Plaintiffs' allegations must plausibly show that race was "the *predominant* factor motivating the legislature's districting decision"—in other

words, that the law "is unexplainable on grounds other than race." *Cromartie II*, 532 U.S. at 241-42.

This standard is "a demanding one." *Id.* at 241. But Plaintiffs think the bar is actually quite low. In their view, alleging that District 7 has the shape and demographics it does is sufficient. It is not because Plaintiffs have not alleged that the "statistical disparities" are so stark that they are "'tantamount for all practical purposes to a mathematical demonstration' that the State acted with a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 294 n.12 (1987) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)). Instead, Plaintiffs "plead[] facts that are 'merely consistent with'" race-predominant districting, but "stop[] short of the line between possibility and plausibility of 'entitlement to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Their claim thus fails as a matter of law.

A. "Shape and Demographics" Alone are Not Enough.

As clarified in their Response, Plaintiffs believe that allegations of District 7's "shape and demographics" alone "are sufficient" to state a racial gerrymandering claim. Response at 11 (quoting doc. 189 at 61). Not so. "Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative" of intentional race-based action, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252,

266 (1977), and Plaintiffs have not alleged that dividing Jefferson County between two districts is "unexplainable on grounds other than race." *Id.*

Moreover, because "racial identification is highly correlated with political affiliation in [Alabama]," these bare allegations are insufficient "as a matter of law." *Cromartie II*, 532 U.S. at 243 (citing *Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality opinion) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify.")); *see also Hunt v. Cromartie ("Cromartie I")*, 526 U.S. 541, 551 (1999) ("[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact."). Not only do Plaintiffs acknowledge that most black Alabamians prefer Democratic candidates and most white Alabamians prefer Republicans, they seem to think this fact helps their claim. Response at 15. It doesn't; in fact, it dooms it.

Of course, "race as a proxy for party is prohibited." *Id.* But where plaintiffs historically have shown that racial stereotyping was at work, they brought far more to the table than a district's mere shape and demographics. For example, in *Bush v. Vera*, the plurality agreed that race was being used as a proxy based on a plethora of damning evidence, including: (1) "The State's own VRA § 5 submission" detailing its "attempt to maximize the voting strength for this black community" by drawing

"a safe black district" with a "threshold 50% total black population"; and (2) the fact that "the districting software used by the State provided only racial data at the block-by-block level," which was where the splits occurred. 517 U.S. at 969-70.[1]

Here, unlike in *Vera* and other "race as proxy" cases, sufficient allegations of racial stereotyping are absent. To the contrary, Plaintiffs (including two Democratic Senators) appear to be the ones trying to use race as a proxy for party. They repeatedly allege that unless the Legislature intentionally creates districts containing "biracial political alliances," or "effective crossover districts," then it racially gerrymanders. Doc. 229 ("Compl.") ¶¶3, 10-12, 40, 64. But setting out to sort voters by race in order to create "biracial political alliances" would still involve the "assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Miller*, 515 U.S. at 911-12 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). The 2023 Legislature did not racially gerrymander by declining to adopt Plaintiffs' plan.

[1] *See also Cooper v. Harris*, 581 U.S. 285, 300-01 (2017) (record included direct evidence of "an announced racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites"); *Miller*, 515 U.S. at 907, 917-20 (substantial circumstantial and direct evidence that Georgia set out to hit the racial target of creating three majority-minority districts, using "the ACLU's 'max-black' plan as its benchmark").

Falling far short of showing racial stereotyping, Plaintiffs' allegations resemble the evidence submitted in *Cromartie II*, where the Court considered a racial gerrymandering claim challenging the boundaries of a black opportunity district in North Carolina's congressional map. 532 U.S. at 237. The district had originally been drawn in 1992 as majority black—indeed, that racial target was the "principal reason" for its configuration. *Id.* at 237. Plaintiffs challenged the 1992 Plan, and given the direct evidence of race-based districting, the Supreme Court held "that race was the predominant factor in drawing the challenged district." *Shaw v. Hunt*, 517 U.S. 899, 906 (1996).

Following *Shaw*, the General Assembly in 1997 altered the district's boundaries such that the BVAP decreased a bit and the shape changed from something resembling a skinny, long snake to a "wider and shorter" snake. *Cromartie I*, 526 U.S. at 544. The 1997 Plan also protected incumbents and preserved "the partisan core of the existing districts." *Cromartie II*, 532 U.S. at 240. All the same, Plaintiffs brought a new racial gerrymandering claim. *Id.* at 238. The district court found "as a matter of fact that the General Assembly … used criteria … that are facially race driven" and thus held "that the legislature had unconstitutionally drawn" the district's boundaries. *Id.* at 239-40. That conclusion was based "upon the district's snakelike shape, the way in which it split cities and towns, and its heavily African-American … voting population." *Id.* at 240. The district court also found "that the legislature had

drawn the boundaries in order 'to collect precincts with *high racial identification rather than political identification.*'" *Id.* The Supreme Court reversed for clear error. *Id.* at 243.

The Court first held that, where "racial identification is highly correlated with political affiliation," facts about a "district's shape, its splitting of towns and counties, and its high African-American voting population" "cannot, as *a matter of law*, support" a racial gerrymandering claim. *Id.* (emphasis added). That holding alone dooms the *Singleton* Plaintiffs' claim because, in their own words, it rests on the "shape and demographics of District 7." Response at 11.

The Court went on to discuss numerous subsidiary findings of "racial predominance" made by the district court. *Cromartie II*, 532 U.S. at 244-56. These included "two pieces of 'direct' evidence of discriminatory intent": (1) the legislative redistricting leader's statement "that the 1997 plan satisfies a 'need for racial and partisan balance"; and (2) an email from another legislator stating, "I have moved Greensboro Black community into the 12th, and now need to take about 60,000 out of the 12th." *Id.* at 253-54. All of that amounted to nothing more, in the Supreme Court's eyes, than "a modicum of evidence" in support of the district court's conclusion. *Id.* at 257. Here, the *Singleton* Plaintiffs' allegations fall far short even of that "modicum." They have no direct evidence allegations of discriminatory intent, and no circumstantial evidence allegations beyond District 7's shape and demographics.

With such "meager direct evidence of a racial gerrymander," plaintiffs must "rely on evidence of forgone alternatives," *Cooper v. Harris*, 581 U.S. 285, 322 (2017)—"politically practical alternative plan[s] that the legislature failed to adopt predominantly for racial reasons." *Cromartie II*, 532 U.S. at 259. These, if enacted, must "have better satisfied the legislature's other nonracial political goals as well as traditional nonracial districting principles." *Id.* In *Cromartie II*, the Court considered at least four such plans but found that none supported the plaintiffs' "race, not politics, thesis." *Id.* at 255. Among other things, they would have made incumbents more vulnerable and the shape of the challenged district less compact. *Id.* at 255-56.

Similarly, the *Singleton* Plaintiffs tout a politically *impossible* alternative plan, much less a "politically practical" one. *Id.* at 259. It is less compact, Compl. ¶59, pairs incumbents, *id.* ¶82, Response at 18, does not preserve district cores as well as the 2023 Plan, Compl. ¶68, and requires the Republican supermajority in the Alabama Legislature to favor Democrats, *id.* ¶40. On its face, it cannot support a "race, not politics, thesis." *Cromartie II*, 532 U.S. at 255; *see also* doc. 232 ("MTD") at 19-22.

In sum, no one disputes that District 7 is majority-black. But "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." *Cromartie II*, 532 U.S. at 249. "[A]s a matter of law," *id.* at 243, Plaintiffs' sole reliance on District 7's shape and demographics does not plausibly suggest that race predominated in the 2023 Plan, so their claim fails.

B. Plaintiffs Cannot Cut Corners by Pointing to the 1992 Plan.

Plaintiffs try to hitch their claim to the 1992 Plan's purported constitutional infirmities. Response at 12. In their view, this achieves the twin goals of shifting the burden of proof and ignoring the presumption of good faith owed the 2023 Legislature. *Id.* at 12-14. The 1992 Plan is irrelevant to Plaintiffs' claim that the 2023 Plan is the product of a racial gerrymander. *See* MTD at 16-19.

1. Plaintiffs repeat the repeatedly debunked assertion that "the Secretary's predecessor admitted" the 1992 Plan was a racial gerrymander. Response at 5, 12. Again, Secretary Merrill said no such thing, and it would not matter even if he did. *See* MTD at 18 n.1.

2. Plaintiffs also repeat the "fundamentally flawed" idea that the 2023 Legislature had an affirmative duty to remedy a purported racial gerrymander enacted by a previous Legislature (or federal court). *Abbott v. Perez*, 585 U.S. 579, 607 (2018); *see also* Response at 11, 14; Compl. ¶¶2, 16, 43, 51, 66, 68, 76. The cases Plaintiffs cite are inapposite because those arose following a racial gerrymandering finding by a court, which some courts have stated "impacts the nature of … review." *Covington v. North Carolina*, 283 F. Supp. 3d 410, 431 (M.D.N.C. 2018) (also recognizing that

in an "*original* racial gerrymandering challenge," like this one, the districting plan is "presumed valid and entitled to substantial judicial deference"); *see also North Carolina v. Covington*, 585 U.S. 969, 976 (2018) ("remedial posture"); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552 (E.D. Va. 2016) (same).

3. Plaintiffs allege "that Black and White Jefferson County voters remained separated by race in the 2023 Plan." Response at 12. They call this "perpetuat[ing] an unconstitutional racial gerrymander" and think this too is "sufficient" "to survive a motion to dismiss." *Id.* at 12, 14. The idea of "perpetuating a gerrymander" begs the question because different demographics on either side of a district line would be relevant only if black and white voters were separated *because of* race. The Complaint contains no plausible allegations of the latter "because of" intent. And disparate effects alone will not suffice outside of "those rare cases" like *Gomillion*, "in which a statistical pattern of discriminatory impact demonstrated a constitutional violation." *McCleskey*, 481 U.S. at 294 n.12. Plaintiffs have not alleged that the 2023 Plan's lines are "'tantamount for all practical purposes to a mathematical demonstration,' that the State acted with a discriminatory purpose." *Id.* (quoting *Gomillion*, 364 U.S. at 341).

4. Plaintiffs firmly believe "the Legislature's good faith or lack thereof is irrelevant." Doc. 165 at 18; *see also* Response at 13. They toss in two citations to district court decisions that seem to disparage the presumption of good faith, but

both decisions acknowledged that the presumption applies in a racial gerrymandering challenge. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 611 (M.D.N.C. 2016); *Page v. Va. State Bd. of Elections*, 2015 WL 3604029, at *7-8 (E.D. Va. June 5, 2015). If there were any doubt, the Supreme Court in *Miller* emphasized the importance of presuming the Legislature does not exalt race above all other criteria when drawing district lines. 515 U.S. at 915-16; *see also Chen v. City of Houston*, 206 F.3d 502, 507, 517, 520 (5th Cir. 2000) (repeatedly employing the presumption to give the legislature the benefit of the doubt in a racial gerrymandering case); *Ala. Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026, 1058, 1195, 1223 (M.D. Ala. 2017) (same).

Whatever a federal court did in 1992 says nothing about what the 2023 Legislature intended when it enacted the 2023 Plan. Even assuming the 1992 Plan was a racial gerrymander, that fact would not come close to showing that in 2023, race was the one factor that could not be compromised, the criterion that overshadowed all others, the predominant motivating force. Plaintiffs' racial gerrymandering claim should be dismissed.

II. Plaintiffs Have Not Stated An Intentional Vote Dilution Claim.[2]

Plaintiffs' intentional vote dilution claim rests upon dictum from the plurality decision *Bartlett v. Strickland*, 556 U.S. 1 (2009), and Plaintiffs misapply the dictum. They quote the line: "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Id.* at 24. From this, Plaintiffs argue that the Legislature's refusal to adopt their map containing two "effective" crossover districts constitutes intentional, bad faith vote dilution. Response at 16 ("This is exactly what Count II alleges."). Right out of the gate, this allegation fails to plausibly state a claim because the Legislature never "*destroy[ed]* otherwise effective crossover districts"; it merely adopted a plan other than the one Plaintiffs' preferred. *Strickland*, 556 U.S. at 24 (emphasis added). So even construing *Strickland*'s dictum as articulating a fact pattern suggestive of intentional vote dilution, that scenario doesn't exist here. Aside from this error, Plaintiffs have pleaded neither discriminatory effects nor discriminatory intent.

[2] "[N]either the Supreme Court nor the Eleventh Circuit currently recognizes vote dilution as a cognizable claim under the Fifteenth Amendment." *Lowery v. Deal*, 850 F. Supp. 2d 1326, 1331 (N.D. Ga. 2012) (citing *Osburn v. Cox*, 369 F.3d 1283, 1288 (11th Cir. 2004)); *see also Ala. State Conf. of NAACP v. City of Pleasant Grove*, 372 F. Supp. 3d 1333, 1341 (N.D. Ala. 2019). Accordingly, the *Singleton* Plaintiffs' Fifteenth Amendment vote dilution claim must be dismissed as a matter of law.

A. Reading between the lines, Plaintiffs allege that the Legislature's refusal to enact a plan with two crossover districts has a discriminatory effect upon black Alabamians. To show the "discriminatory effects" of intentional vote dilution, plaintiffs in the Eleventh Circuit must "sufficiently alleg[e] the *Gingles* preconditions," *Thompson v. Kemp*, 309 F. Supp. 3d 1360, 1366 (N.D. Ga. 2018) (three-judge court), and "also establish a discriminatory effect under the totality of the circumstances." *Ga. State Conf. of NAACP v. State*, 269 F. Supp. 3d 1266, 1279 (N.D. Ga. 2017) (three-judge court). This rule finds its origins in *Johnson v. DeSoto County Board of Commissioners* (*"DeSoto"*), where the court, assuming discriminatory intent was present, rejected plaintiffs' intentional vote dilution claim for failing to "establish that an alternative system of districting could exist whereby the black-minority vote could elect its preferred candidates"—in other words, the plaintiffs couldn't satisfy *Gingles*. 204 F.3d 1335, 1346 (11th Cir. 2000); *see also Ga. State Conf. of NAACP*, 269 F. Supp. 3d at 1280-81 (dismissing intentional vote dilution claims on the pleadings where the allegations failed to meet the *Gingles* preconditions); *Lowery v. Deal*, 850 F. Supp. 2d 1326, 1336 (N.D. Ga. 2012) (same); *Broward Citizens for Fair Dists. v. Broward Cnty.*, 2012 WL 1110053, at *9 (S.D. Fla. April 3, 2012) (same); *Tyson v. Town of Homer*, 2021 WL 8893039, at *9 (N.D. Ga. July 2, 2021) (same); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1340-48 (S.D. Fla. 2002) (three-judge court) (same in pre-*Rucho* political gerrymandering case).

Here, Plaintiffs plead themselves out of satisfying the first and third *Gingles* preconditions by admitting of no "permissible remedy in the particular context of the challenged system." *Nipper v. Smith*, 39 F.4th 1494, 1531 (11th Cir. 1994) (en banc); *see also* MTD at 24-26. First, Plaintiffs insist the minority group could constitute an "effective minority," *Strickland*, 556 U.S. at 14, in two "crossover districts," Compl. ¶¶74, 79. But showing the availability of additional crossover districts does not establish the preconditions necessary for a claim of vote dilution. *Strickland*, 556 U.S. at 23. Accordingly, the Legislature's choice to forego a plan with more crossover districts has no legally cognizable discriminatory effect upon the minority group. *See Ga. State Conf. of NAACP*, 269 F. Supp. 3d at 1280-81 (dismissing the plaintiffs' intentional vote dilution claim after finding no allegations that "the relevant 'minority group' [was] sufficiently large to constitute a majority"). Second, and relatedly, Plaintiffs allege that white crossover voters plus minority voters will defeat any opposing white bloc—"more than enough," in their words, "to prevent meeting the third *Gingles* precondition." Compl. ¶74.

Plaintiffs cannot avoid the consequences of these admissions by casting them as features "in a proposed remedial plan." Response at 22. Plaintiffs misunderstand the "permissible remedy" rule. *See id* at 24. "Unless [the *Gingles* preconditions] are established, there neither has been a wrong nor can be a remedy." *Growe v. Emison*, 507 U.S. 25, 40-41 (1993). Thus, "the issue of remedy is part of the plaintiff's prima

facie case," and the "inquiries into remedy and liability … cannot be separated." *Nipper*, 39 F.3d at 1530. Here, Plaintiffs have failed to allege "the existence of a permissible remedy" by virtue of their reliance upon crossover districts and the correlative lack of white bloc voting. *Id.* at 1524. Thus, they have not shown discriminatory effects, *i.e.* that any alleged "inequality of opportunity results from the … current electoral system." *DeSoto*, 204 F.3d at 1345.

B. Neither do Plaintiffs sufficiently allege discriminatory intent. Defendants identified "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." MTD at 22. Plaintiffs do not defend against this assertion but apparently embrace it. Response at 16. To Plaintiffs, the idea that Republicans would disfavor a districting plan that gives more political power to Democrats is a "direct admission" of intentional vote dilution on the basis of race. *Id.* Unwittingly, they home in on an "obvious alternative explanation," *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009), other than race for the Legislature's decision to enact the 2023 Plan—"securing partisan advantage." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019); *see also Simpson v. Hutchinson*, 636 F. Supp. 3d 951, 957 (E.D. Ark. 2022) (three-judge court) (noting the "possibility" of "a purely partisan motive" and dismissing an intentional vote dilution claim on the pleadings).

And by lamenting that their preferred plan fails to protect incumbents, they highlight another legitimate alternative explanation for the Legislature's decision. *See Cromartie II*, 532 U.S. at 246-47 ("incumbents might have urged legislatures … to make their seats … as safe as possible"); *id.* at 248 ("the proposed alternative plan would have pitted two incumbents against each other"); *id.* ("But the legislature, for political, not racial, reasons … drew its plan to protect incumbents—a legitimate political goal.").

Plaintiffs include a few allegations going to the *Arlington Heights* factors, but these do not lift the inference of intentional discrimination out of the realm of "possibility of misconduct" or even "consistent with" liability and into the realm of "plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678-79; *see also Tyson*, 2021 WL 8893039, at *9 (speculative allegations "are plainly insufficient to allege" intentional vote dilution); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1194 (11th Cir. 1999) (no intentional vote dilution because of nondiscriminatory reasons for city's decision not to annex a majority-black public chousing development coupled with the city's reasonable interpretation of an "anything but clear" Florida law). Plaintiffs intentional vote dilution claim should be dismissed.

III. Plaintiffs Have Not Stated A Section 2 Claim.

As discussed in Defendants' motion to dismiss, Plaintiffs' Section 2 claim collapses under the slight weight of its own allegations. *See* MTD at 23-36. Unphased, Plaintiffs argue that their claim is "based on the evidence cited by this Court in support of its preliminary injunction and the Supreme Court's affirmance."[3] Response at 20. But merely saying that courts have found a likely violation is not the same as setting out the factual basis for a violation. Plaintiffs thus turn to the "incorporation by reference doctrine" to fill in the gaps.

That doctrine has no place here. Usually, when hearing a motion to dismiss, a court limits its "review to the four corners of the complaint." *Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010). Incorporation by reference is an exception to the "four corners" rule and permits "a court [to] consider evidence *attached to a motion to dismiss* without converting it into a motion for summary judgment if (1) 'the plaintiff refers to certain documents in the complaint,' (2) those documents are 'central to the plaintiff's claim,' and (3) the documents' contents are undisputed." *Baker v. City of Madison*, 67 F.4th 1268, 1276 (11th Cir. 2023) (emphasis added). The doctrine is a tool for *defendants* "to prevent artful pleading by plaintiffs," not

[3] One problem with this strategy is that it targets the wrong law. The 2023 Plan—the one Plaintiffs allege violates Section 2—is a different law that the 2021 Plan—the subject of this Court's "preliminary injunction and the Supreme Court's affirmance." Response at 20.

for *plaintiffs* to avoid the requirements of a "well-pleaded complaint." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1003 (9th Cir. 2018).

Relatedly, the Federal Rules permit incorporation by reference to pleadings and exhibits in the *same case*. *See* FED. R. CIV. P. 10(c). But under the Rules, a party may not incorporate by reference evidence from an earlier action, *see Muhammad v. Bethel-Muhammad*, 2012 WL 1854315, at *3 n.5 (S.D. Ala. May 21, 2012), or allegations in another party's complaint, *see Halbert v. Credit Suisse AG*, 402 F. Supp. 3d 1288, 1302 n.1 (N.D. Ala. 2019) ("[C]ourts in this circuit appear to follow the rule that allegations in pleadings in another action, even if between the same parties, cannot be incorporated by reference."); *see also Shelter Mut. Ins. Co. v. Pub. Water Supply Dist. No. 7 of Jefferson Cnty.*, 747 F.2d 1195, 1198 (8th Cir. 1984) (incorporating another party's "thirty-six pages of allegations" against the defendant was prohibited). And under the doctrine of judicial notice, a "court may take notice of another court's order only for the limited purpose of recognizing the 'judicial act' that the order represents or the subject matter of the litigation." *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994).

The one case Plaintiffs cite as authorizing their conduct does nothing of the sort. In *Luke v. Gulley*, Officer Gulley, whom Luke had sued in state court for malicious prosecution, "removed the suit to federal court" and "attached a copy of the

order dismissing the charges against Luke" when moving "to dismiss Luke's complaint." 975 F.3d 1140, 1143 (11th Cir. 2020). The district court "correctly incorporated the dismissal order" and granted Officer Gulley's motion to dismiss. *Id.* at 1144. *Luke* is an example of how incorporation by reference operates. Plaintiffs' use of the rule, in contrast, would create an end run around Rule 8.

If they wanted to challenge the use of the 2023 Plan, the *Singleton* Plaintiffs had an obligation to draft a complaint with "a short and plain statement of the[ir] claim showing that [they are] entitled to relief" under Section 2. Fed. R. Civ. P. 8(a)(2). Vaguely alluding to thousands of pages of evidence simply will not do.

CONCLUSION

The Court should dismiss the Second Amended Complaint.

Steve Marshall
Attorney General

s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr. (ASB-9182-U81L)
Solicitor General

James W. Davis (ASB-4063-I58J)
Deputy Attorney General

A. Barrett Bowdre (ASB-2087-K29V)
Principal Deputy Solicitor General

Soren Geiger (ASB-0336-T31L)
Assistant Solicitor General

Misty S. Fairbanks Messick (ASB-1813-T71F)
Brenton M. Smith (ASB-1656-X27Q)
Benjamin M. Seiss (ASB-2110-O00W)
Charles A. McKay (ASB-7256-K18K)
Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
501 Washington Avenue
P.O. Box 300152
Montgomery, Alabama 36130-0152
Telephone: (334) 242-7300
Fax: (334) 353-8400
Edmund.LaCour@AlabamaAG.gov
Jim.Davis@AlabamaAG.gov
Barrett.Bowdre@AlabamaAG.gov
Soren.Geiger@AlabamaAG.gov
Jim.Davis@AlabamaAG.gov
Misty.Messick@AlabamaAG.gov
Brenton.Smith@AlabamaAG.gov
Ben.Seiss@AlabamaAG.gov
Charles.McKay@AlabamaAG.gov

Counsel for Secretary of State Allen

s/ Dorman Walker
Dorman Walker (ASB-9154-R81J)
BALCH & BINGHAM LLP
Post Office Box 78 (36101)
105 Tallapoosa Street, Suite 200
Montgomery, AL 36104
Telephone: (334) 269-3138
Email: dwalker@balch.com

Michael P. Taunton (ASB-6853-H00S)
BALCH & BINGHAM LLP
1901 Sixth Avenue North, Suite 1500
Birmingham, AL 35203
Telephone: (205) 226-3451
Email: mtaunton@balch.com

Counsel for Sen. Livingston and Rep. Pringle

CERTIFICATE OF SERVICE

I certify that on March 21, 2024, I electronically filed the foregoing notice with the Clerk of the Court using the CM/ECF system, which will send notice to all counsel of record.

s/ Edmund G. LaCour Jr.
Counsel for Secretary Allen