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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

TIARA YOUNG HUDSON, in her individual capacity as a candidate for Jefferson County, Alabama's vacant Tenth Judicial Circuit, Place 14 judgeship,	)	
***Plaintiff*,**	)	
v.	)	
KAY IVEY, in her official capacity as Governor of Alabama; PATRICK TUTEN, in his official capacity as appointee to Madison County, Alabama's Twenty Third Judicial Circuit; and TOM PARKER, in his official capacity as Chair of the Judicial Resources Allocation Commission,	)	**Case No. 03-CV-2022-900892**
***Defendants*.**	)	

MOTION TO DISMISS

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INTRODUCTION

Plaintiff Tiara Young Hudson asks the Court to override the Legislature and a Commission composed of attorneys, judges, representatives of the Governor and Attorney General, and the Chief Justice of the Alabama Supreme Court and undo the reallocation of a vacant circuit judgeship from Jefferson County to Madison County. Plaintiff does not argue that she has a constitutional right to take office as a circuit judge because she won a primary for that office. Nor could she. *See King v. Campbell*, 988 So. 2d 969 (Ala. 2007) (holding that party nominee has no entitlement to judgeship even where general election would be uncontested).

Instead, Plaintiff advances the novel argument that the Legislature unlawfully delegated its lawmaking authority to the Judicial Resources Allocation Commission when it created the Commission for the purpose of reallocating judgeships. The argument is meritless. Longstanding precedent recognizes the Legislature's right to pass laws delegating significant powers if those powers are accompanied by adequate standards to channel and confine discretion during the law's implementation. As set out in detail below, when the Legislature created the Commission, it provided more than adequate standards to prevent the Commission from encroaching on the Legislature's lawmaking authority.

But in any event, the Court lacks subject-matter jurisdiction over this action because Plaintiff has improperly filed this action for declaratory judgment instead of

initiating a quo warranto action. A quo warranto action is the exclusive mechanism to do what Plaintiff seeks to do here: oust an official from his or her public office. Given the significance of cases that seek this type of relief, the Legislature created a specially structured, expedited process in which individuals can serve as relators to bring a claim on behalf of the State of Alabama. Plaintiff ignored the legal requirements associated with filing this type of action. And at any rate, she lacks standing to bring a claim on her own behalf as a potential candidate to be appointed to a circuit judgeship. Whether for lack of subject-matter jurisdiction or for failure to state a claim, the Complaint is due to be dismissed.

FACTS

In 2017, the Alabama Legislature enacted Act No. 2017-42, which is now codified at Ala. Code § 12-9A-1, *et seq.* In the Act, the Legislature created a "permanent study commission on the judicial resources in Alabama," the Judicial Resources Allocation Commission, and defined its composition and duties. Ala. Code § 12-9A-1(a). The Commission is tasked with "annually review[ing] the need for increasing or decreasing the number of judgeships in each district court and circuit court" and then ranking each district court and circuit court according to need. Ala. Code § 12-9A-1(d)-(e).

The Commission is required to consider several criteria when reviewing and ranking circuits and districts based on their need of judgeships. The Commission

must consider a "Judicial Weighted Caseload Study, as adopted by the Alabama Supreme Court," populations of the districts or circuits, and the judicial duties of the judges in the districts or circuits. *Id.*(d)(1)-(3). The Commission must also "us[e] [u]niformity in the calculation of how civil, criminal, and domestic cases are accounted for between circuits." *Id.*(d)(4). Finally, the Commission can consider "[a]ny other information deemed relevant by the Commission." *Id.*(d)(5). The Act also requires the Alabama Supreme Court to "revise" the factors considered in the "Judicial Weighted Caseload Study to uniformly, fairly, and accurately account for criminal cases by counts brought against a defendant." Ala. Code § 12-9A-5(a).

The Administrative Office of Courts contracted with the National Center for State Courts to conduct an empirical study to revise the formula used in the Judicial Weighted Caseload Study. (Commission Meeting Materials for June 14, 2018) (attached as **Exhibit A**)[1]; *see also* Ala. Code § 12-5-2(a) ("The Administrative Office of Courts may serve as an agency to apply for and receive grants or other

[1] Plaintiff incorporates the transcript from the June 2018 Commission meeting, the January 2020 Commission meeting, and letters sent after those meetings into the Complaint. Doc. 2 ¶ 24. The Court can therefore consider these documents at the motion to dismiss stage without converting the motion to one for summary judgment. *See Kennamer v. City of Guntersville*, 315 So. 3d 1090, 1092 n.3 (Ala. 2020); *Snider v. Morgan*, 113 So. 3d 643, 648 (Ala. 2012) (concluding that documents referenced in the complaint "were not matters outside the pleading"). Moreover, the content of those incorporated documents overrides any contrary allegations in the complaint. *See McCullough v. Ala. By-Products Corp.*, 343 So. 2d 508, 510 (Ala. 1977).

assistance and to coordinate or conduct studies and projects in connection with the improvement of the administration of justice."); Ala. Code § 12-5-14. The NCSC worked with AOC and a committee of circuit and district judges from throughout the State. **Ex. A.** Based on the study conducted by NCSC in coordination with circuit judges and district judges, AOC submitted a revised formula for the Supreme Court's consideration. (June 21, 2017 Order of Ala. S. Ct.) (attached as **Exhibit B.**)

On June 21, 2017, a unanimous Alabama Supreme Court adopted the formula for use in its Judicial Weighted Caseload Study. *Id.* The Court determined that the new formula "accurately and uniformly calculates how civil, criminal and domestic cases are accounted for between circuits and uniformly, fairly, and accurately accounts for, by counts, criminal cases brought against defendants." *Id.* at 1. Based on this formula, the Supreme Court issued Judicial Weighted Caseload Studies for 2017 (**Exhibit C**), 2018 (**Exhibit D**), and 2019 (**Exhibit E**). For 2017, 2018, and 2019, the empirical analysis showed that Madison County was *most* in need of additional circuit judgeships and Jefferson County was *least* in need. *Id.*

The Commission met for the first time on January 11, 2018. It discussed the Judicial Weighted Caseload Study and the formula developed by the NCSC and adopted by the Supreme Court. Based on that data, the Commission voted unanimously to adopt the data and rankings that placed Madison County most in need of an additional circuit judgeship and Jefferson County least in need. (Comm.

Meet. Tr. Jan. 11, 2018 at 88-89) (attached as **Exhibit F**); (Comm. Let. Feb. 2, 2018 at 4) (attached as **Exhibit G**).

Since that time, the Commission has recommended that the Legislature create new judgeships on three separate occasions. On June 14, 2018, the Commission voted without opposition[2] to recommend the creation of five circuit judgeships, including one in Madison County and none in Jefferson County. (Comm. Let. July 23, 2018) (attached as **Exhibit H**). On January 9, 2020, the Commission voted without opposition[3] to recommend the creation of eleven circuit judgeships, including *three* circuit judgeships in Madison County and none in Jefferson County. (Comm. Let. Jan. 30, 2020) (attached as **Exhibit J**). And on January 5, 2022, the Commission voted to recommend the creation of twelve circuit judgeships, again recommending the addition of *three* circuit judgeships in Madison County and none in Jefferson County. (Comm. Let. Jan. 5, 2022) (attached as **Exhibit L**).

In the Act, the Legislature also empowers the Commission to reallocate a judgeship "in the event of a vacancy due to death, retirement, resignation, or removal from office of a district or circuit judge." Ala. Code § 12-9A-2(a). The Commission has 30 days to determine whether to reallocate a judgeship. *Id.* In making the

[2] One member of the Commission was absent and another member of the Commission abstained. (Comm. Meet. Tr. June 14, 2018 at 145) (attached as **Exhibit I**).

[3] One member of the Commission abstained. (Comm. Meet. Tr. Jan. 9, 2020 at 61) (attached as **Exhibit K)**.

determination of whether to reallocate a judgeship, the Commission is required to consider the rankings it created under § 12-9A-1. *Id*; *see* Ala Code § 12-9A-1(d).

On June 1, 2022, Jefferson County Circuit Judge Clyde Jones retired, effective immediately. Doc. 2 ¶ 5. On June 9, 2022, the Commission reallocated that circuit court judgeship from the Tenth Judicial Circuit (Jefferson County) to the Twenty-Third Judicial Circuit (Madison County). Doc. 2 ¶ 30, 34. "Governor Ivey has already appointed Judge Tuten to serve as a circuit judge in the reallocated Madison County judicial seat." Doc. 6 at 10. On July 19, 2022, Plaintiff filed the Complaint and a Motion for Preliminary Injunction. Doc. 2 & 6. In the Complaint, Plaintiff demands declaratory relief as well as injunctive relief barring Judge Tuten from exercising his authority as a circuit judge and requiring Governor Ivey to appoint someone to a circuit judgeship in Jefferson County. Doc. 2 at 11.

LEGAL STANDARD

Defendants move to dismiss under Rule 12(b)(1) and Rule 12(b)(6). On a motion to dismiss under Rule 12(b)(1), the plaintiff bears the burden of establishing the factual predicates of jurisdiction by a preponderance of the evidence. *Ex parte Safeway Ins. Co. of Alabama, Inc.*, 990 So. 2d 344, 349 (Ala. 2008). The Court has an affirmative obligation to ensure it is acting within the scope of its jurisdictional authority. *Id.*

A Rule 12(b)(6) motion "tests the sufficiency of the pleadings to determine if the plaintiff has stated a claim upon which relief can be granted, and in ruling on such a motion, the trial court's examination is limited to the pleadings." *Pub. Relations Counsel, Inc. v. City of Mobile*, 565 So. 2d 78, 81 (Ala. 1990). "In considering whether a complaint is sufficient to withstand a motion to dismiss under Rule 12(b)(6), a court "must accept the allegations of the complaint as true." *Crosslin v. Health Auth. of City of Huntsville*, 5 So.3d 1193, 1195 (Ala. 2008) (quoting *Creola Land Dev., Inc. v. Bentbrooke Hous., L.L.C.*, 828 So. 2d 285, 288 (Ala. 2002). "Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true." *Duran v. Buckner*, 157 So. 3d 956, 971 (Ala. Civ. App. 2014) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). But "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Ex parte Gilland*, 274 So. 3d 976, 985 n.3 (Ala. 2018) (quoting *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002)).

ARGUMENT

I. The Court lacks subject-matter jurisdiction because a quo warranto action is the exclusive manner of challenging a gubernatorial appointment.

The Complaint is due to be dismissed for lack of subject-matter jurisdiction because a declaratory judgment action cannot serve as the basis for challenging

someone's right to hold public office. In codifying the common-law writ of quo warranto, the Legislature enacted a carefully structured process that serves as the *exclusive* means of challenging a public official's legal right to hold office. *See Riley v. Hughes*, 17 So. 3d 643 (Ala. 2009). And for good reason: Without such a carefully structured and expedited process, public officials would be subject to a never-ending cloud of uncertainty about their right to hold office and conduct the public's business. To accomplish this objective, the Legislature imposed specific procedural requirements. The plaintiff's failure to comply with those requirements dooms the complaint as a jurisdictional matter.

The Alabama Supreme Court's decision in *Riley* controls here. In *Riley*, two taxpayers filed a declaratory judgment action arguing that the Governor's appointment of four trustees to the Board of Trustees of Alabama A&M University violated Alabama law. *Id.* at 644-45. The circuit court issued a declaratory judgment holding that the challenged appointments were "not effective." *Id.* at 645. The Supreme Court vacated the circuit court's judgment and dismissed the appeal, explaining that the circuit court lacked subject-matter jurisdiction to issue such a judgment:

> Both parties describe this action as governed by the Declaratory Judgment Act. However, the exclusive remedy to determine whether a party is usurping a public office is a quo warranto action pursuant to § 6–6–591, Ala.Code 1975, and not an action seeking a declaratory judgment. . . . A declaratory-judgment action cannot be employed

> where quo warranto is the appropriate remedy because the declaratory judgment would violate public policy.
>
> . . .
>
> Because of the unavailability of a remedy by declaratory judgment and the absence of security for costs if the action is treated as one for quo warranto, the trial court did not have subject-matter jurisdiction.

Id. at 646, 649.

Importantly, the Supreme Court explained that it could not construe the plaintiffs' complaint as initiating a quo warranto action even though the complaint was titled a "quo warranto complaint." *Id.* at 648. This was so because quo warranto actions carry specific procedural requirements, including the jurisdictional requirement of submitting security to the clerk of court to bring the claim in the name of the State. *Id.*; *see also Burkes v. Franklin*, No. 1210044, 2022 WL 2794356 (Ala. July 15, 2022) (vacating circuit court judgment in quo warranto action where petitioner failed to submit security). The lack of security prohibited the plaintiff from maintaining the quo warranto action in the name of the State.

In this action, it appears that Plaintiff purports to bring her claim under the Declaratory Judgment Act. *See* Doc. 2 ¶ 13. In any event, she certainly does not purport to bring her claim as a quo warranto action. And under binding precedent, it does not matter that Plaintiff here challenges the legality of the underlying office itself. "[A] quo warranto action" is the "exclusive remedy" that Plaintiff could seek in these circumstances. *Riley*, 17 So. 2d at 646; *see also Corprew v. Tallapoosa*

Cnty., 3 So. 2d 53, 54 (Ala. 1941) ("It is fully settled in this State that statutory quo warranto is the appropriate remedy to test the existence of a de jure office."); *Hale v. State ex rel. Algee*, 186 So. 163, 164 (Ala. 1939*)*.

Because a quo warranto action is the exclusive method by which Plaintiff can pursue her claims, this Court lacks subject-matter jurisdiction to consider this case. And this defect cannot be cured by amending the Complaint. "Because the original complaint . . . failed to trigger the subject-matter jurisdiction of the circuit court[,] . . . it was a nullity." *Ala. Dep't of Corrs. v. Montgomery Cnty. Comm'n*, 11 So. 3d 189, 193 (Ala. 2008). And any "purported amendment of a nullity is also a nullity." *Id.* Accordingly, the Court lacks subject-matter jurisdiction and the Complaint must be dismissed.

II. Even if this case could properly be brought as a declaratory judgment action, Plaintiff does not establish standing to sue because she does not allege a justiciable injury-in-fact.

To the extent this suit could ever be brought as a declaratory judgment action, Plaintiff lacks standing to do so. The Alabama Supreme Court has adopted the test from *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), as "the means of determining standing in Alabama." *Ex parte Aull*, 149 So. 3d 582, 592 (Ala. 2014). Under *Lujan*, a plaintiff must establish three elements to prove standing: (1) injury in fact, (2) traceability, and (3) redressability. *Lujan*, 504 U.S. at 560-61 (1992). At the pleading stage, a plaintiff bears the burden of alleging facts that, if proved,

demonstrate that she has "been injured in fact" and that "the injury is to a legally protected right." *State v. Prop. at 2018 Rainbow Drive known as Oasis*, 740 So. 2d 1025, 1027 (Ala. 1999). It is not enough to allege a "mere speculative possibility" of an injury. *Ex parte Merrill*, 264 So. 3d 855, 864 (Ala. 2018). Rather, "[a] party's injury must be tangible." *Id.* (citation and quotation marks omitted).

Further, the injury-in-fact inquiry "is not as simple as whether a justiciable controversy exists"; rather, a plaintiff must "demonstrate that [she is] a proper party to invoke judicial resolution of the dispute" and establish "actual, concrete and particularized injury in fact." *Muhammad v. Ford*, 986 So. 2d 1158, 1162 (Ala. 2007) (quotation marks and citations omitted). "[A]n individual's belief that a law is invalid or unenforceable is not the kind of actual, concrete and particularized injury in fact that supports an individual's standing to sue." *Munza v. Ivey*, 334 So. 3d 211, 218 (Ala. 2021) (quotation marks and citations omitted); *Town of Cedar Bluff v. Citizens Caring for Children*, 904 So. 2d 1253 (Ala. 2004) (holding that a claimed injury of an "invalid election" was not a particularized injury and thus did not establish standing). Lack of standing is a "jurisdictional defect." *Prop. at 2018 Rainbow Drive*, 740 So. 2d at 1028 (citation omitted).

Plaintiff's Complaint comes up short of alleging a justiciable injury. She alleges that she won a primary election but that her predecessor's retirement "effectively canceled the planned general election for that position in November

2022." Doc. 2 ¶ 15.[4] The Jefferson County Judicial Commission is tasked with selecting three candidates to fill the vacancy, one of whom is then appointed by the Governor. *Id.* According to Plaintiff, the appointee would then serve in office until after the November 2024 election. *Id.* ¶ 6. In her separately filed Preliminary Injunction Motion, Plaintiff explains that she "does not argue that her injury stems from the initial vacancy that stripped her primary win." Doc. 6 at 9. "Rather, her injury arises from [the Commission's] interference with the constitutionally mandated process for filling judicial vacancies in the Birmingham Division of the Jefferson County Circuit Court." *Id.*

This broad, non-personalized allegation is not an injury that could establish an injury-in-fact for standing purposes. According to Plaintiff, her injury is the "loss of any *opportunity* to occupy the vacant judgeship in Jefferson County." Doc. 6 at 9 (emphasis added). This is the exact same "injury" suffered by any lawyer in Birmingham, which is to say that Plaintiff's alleged "injury" is insufficiently concrete and particularized to constitute an injury-in-fact for standing purposes. *See Town of Cedar Bluff*, 904 So. 2d at 1258-59 (holding that, even assuming entire town was injured by sale of alcohol, it still "does not establish 'an actual, concrete, and

[4] Plaintiff argues that the appointee would serve through the November 2024 elections, a result that would effectively *extend* the term held by the appointee's predecessor. Such a result would be inconsistent with how the Alabama Supreme Court has interpreted constitutional language parallel to Amendment 83. *See McDonnell v. State*, 74 So. 349, 350 (Ala. 1917).

particularized injury in fact'" on behalf of citizen and organization of citizens). Plaintiff's belief "that her home county cannot lose a judgeship," doc. 6 at 9, does not change this result. *See Munza*, 334 So. 3d at 218; *Muhammad*, 986 So. 2d at 1165 (rejecting argument that being "psychologically devastated" by a law constitutes justiciable injury).

Although Plaintiff participated in a primary election for a circuit judgeship in Jefferson County, she straightforwardly argues that her participation in the primary election has nothing to do with her alleged injury. Doc. 6 at 9. The Complaint does not allege that she suffered an injury based on the election. *See* Doc. 2. Instead, Plaintiff asserts that she is injured by missing out on the opportunity to be appointed to fill a judicial vacancy. *Id.* ¶¶ 15-16. That is, she alleges that she has been denied the opportunity to be *considered* by the Jefferson County Judicial Commission to become a candidate to be *considered* by Governor Ivey to be appointed to a judgeship. This sort of attenuated theory of injury is not an actual, concrete, and particularized injury under Alabama law. And because she does not establish such an injury, her Complaint is due to be dismissed for lack of subject-matter jurisdiction.[5]

[5] Plaintiff's failure to establish a cognizable *injury* is not her only problem on the standing front. She also cannot establish causation and redressability because neither Governor Ivey, nor Judge Tuten, nor Chief Justice Tom Parker (in his capacity as a single member, albeit the chairman, of the Judicial Resources Allocation

III. Plaintiff fails to state a claim because the Legislature lawfully empowered the Commission to reallocate judgeships.

Even if the Court had subject-matter jurisdiction, the Complaint is nevertheless due to be dismissed because it fails to state a claim. In this context, it must be emphasized that "acts of the legislature are presumed constitutional," *State ex rel. King v. Morton*, 955 So. 2d 1012, 1017 (Ala. 2006), and that "Courts will strive to uphold acts of the legislature," *City of Birmingham v. Smith*, 507 So. 2d 1312, 1315 (Ala. 1987). *See also Kirby v. State*, 899 So. 2d 968, 973 (Ala. 2004) ("We must afford the Legislature the highest degree of deference, and construe its acts as constitutional if their language so permits.") (internal quotation marks and citations omitted). Courts "approach the question of the constitutionality of a legislative act with every presumption and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of the government." *Morton*, 955 So. 2d at 1017 (citations omitted). To overcome the presumption of constitutionality, the party asserting the unconstitutionality of the law bears the burden to show that the law is unconstitutional "beyond a reasonable doubt." *Id.* (citation omitted).

Commission) can be said to have "caused" the judicial reallocation at issue here, and none of them could restore Plaintiff's lost opportunity to be appointed to a vacant Jefferson County circuit judgeship.

With this heavy presumption in mind, Plaintiff cannot establish that the Legislature violated the Alabama Constitution when it established the Commission and entrusted it with the authority to reallocate judgeships. First, the Legislature provided reasonably clear standards in the Act governing the execution and administration of the reallocation process. These standards foreclose a violation of the separation of powers. Second, contrary to Plaintiff's contention, the reallocation of judgeships is not a non-delegable lawmaking function such that delegation is foreclosed under any circumstances.

A. In the Act, the Legislature provided reasonably clear standards for administering the law.

The Legislature acted within its constitutional authority when it established the Commission and authorized its reallocations of judgeships. True, "[e]ach branch within our tripartite governmental structure has distinct powers and responsibilities, and our Constitution demands that these powers and responsibilities never be shared." *Monroe v. Harco, Inc*., 762 So. 2d 828, 831 (Ala. 2000). "But 'the doctrine of separation of powers does not prohibit the Legislature's delegating the power to execute and administer the laws, so long as the delegation carries reasonably clear standards governing the execution and administration.'" *Id.* (quoting *Folsom v. Wynn*, 631 So. 2d 890, 894 (Ala. 1993)). The Legislature can lawfully "make a law to delegate a power to determine some fact or state of things upon which the law

makes or intends to make its own action depend. To deny this would be to stop the wheels of government." *Bailey v. Shelby Cnty.*, 507 So. 2d 438, 442 (Ala. 1987).

The statutory scheme at issue carries significant standards that limit the Commission's discretion and foreclose Plaintiff's argument that the Legislature unlawfully delegated its authority. First, the Commission is statutorily required to rank judicial circuits and districts in order of their relative need of judgeships according to five statutorily provided criteria. Ala. Code § 12-9A-1(d)(1)-(5). These criteria include the use of circuit/district population and the Judicial Weighted Caseload Study, which empirically accounts for differences in case types and differences between circuits. *Id.*; *see also* Ala. Code § 12-9A-5. The Commission is required to consider these rankings when deciding whether to reallocate a vacant judgeship. Ala. Code § 12-9A-2(a).

Second, the Legislature specifically prohibits the Commission from reallocating a judgeship if doing so would cause a circuit to become one of the ten circuits most in need of judgeships. *Id.* Third, the Legislature prohibits the Commission from reallocating more than one judgeship from any judicial circuit over a two-year period. Ala. Code § 12-9A-5(b). Fourth, the Commission must provide its rankings of need to the Governor and Legislature no later than 30 days after completing those rankings. Ala. Code § 12-9A-1(e). Fifth, the Legislature ensured that the Commission was subject to public scrutiny by providing that it is

subject to the Alabama Open Meetings Act and Alabama Open Records Act. Ala. Code § 12-9A-6. Sixth, the Commission has only thirty days following a judicial vacancy to decide whether to reallocate that judgeship. Ala. Code § 12-9A-2(a). Finally, the Legislature provided for the appointment process, compensation, and powers of judges appointed to a newly allocated judgeship, preventing any possibility that the Commission itself would attempt to fill any perceived gap in the judicial reallocation process. Ala. Code §§ 12-9A-2(a), -3 & -4.

The Alabama Supreme Court has found statutes with much less guidance to present no issue under the separation of powers provision of the Alabama Constitution. *Monroe*, 762 So. 2d at 833; *Folsom*, 631 So. 2d at 894. In *Monroe*, the Supreme Court considered a challenge to a statute in which the Legislature delegated authority to the Governor to determine the amount of sales-tax discounts to be allowed to licensed retailers. *Monroe*, 762 So. 2d at 830. The Court noted just two legislative restrictions on the Governor's discretion: (1) the Governor could not exceed a maximum allowable discount, and (2) the Governor could not allow a discount to retailers that were delinquent in their tax payments. *Id.* at 833. The Court held that this modest guidance constituted sufficient standards to prevent a separation of powers violation, explaining that the statute "d[id] not vest the Governor with unlimited discretion to decide what amount retailers can claim as a sales-tax discount." *Id.*

In this case, it cannot be said that the Legislature "vest[ed] the [Commission] with unlimited discretion to decide" how to allocate judicial vacancies. *Id.* Instead, the Legislature provides detailed guidance and strict limits about the circumstances in which the Commission can and should reallocate vacancies. For example, the Legislature restricts the Commission from reallocating more than one vacancy in a circuit within two years and from making an allocation if it would result in a circuit becoming one of the ten circuits most in need of an additional judgeship. Ala. Code §§ 12-9A-2(a) & -5(b). Because the details and structure provided in the Act constitute reasonably clear standards governing the execution and administration of the law, there is no violation of the Alabama Constitution.

B. The Act does not delegate a non-delegable lawmaking power.

Plaintiff attempts to sidestep a traditional separation-of-powers analysis by arguing that the statutory scheme at issue is *per se* unconstitutional because it delegates a non-delegable lawmaking function.[6] Doc. 6 at 6-7. Under Plaintiff's theory, the reallocation of judgeships is a purely lawmaking function that the Constitution *expressly* prohibits the Legislature from delegating to any entity under any circumstances. Plaintiff's argument necessarily fails because there is no

[6] The Alabama Supreme Court rejected a similar argument in *Monroe*. *See Monroe*, 762 So. 2d at 832 (rejecting argument that Legislature's delegation of power to Governor to set sales-tax discount was "in and of itself[] an unconstitutional encroachment on the Legislature's power to levy taxes").

authority to support her assertion that the reallocation of judgeships between judicial circuits is a non-delegable lawmaking function.

For a legislative power to be a non-delegable lawmaking function, it is not enough that the power simply be a *legislative* power. A "delegation of power that [the Legislature] could rightfully have exercised itself in an administrative capacity . . . does not come within the prohibition or rule referred to." *Yeilding v. State ex rel. Wilkinson*, 167 So. 580, 584 (Ala. 1936). In fact, the Legislature may even delegate what is "*in effect* . . . the legislative power of the state." *Bailey v. Shelby Cnty.*, 507 So. 2d 438, 442 (Ala. 1987) (emphasis added). To be non-delegable, the legislative function at issue must be *lawmaking*—that is, the "power to repeal, amend, or otherwise supplant an act of the Legislature." *Freeman v. City of Mobile*, 761 So. 2d 235, 236-37 (Ala. 1999) (reasoning, in dicta, that Legislature could not delegate to Mobile County Personnel Board power to repeal acts passed by the Legislature).

Plaintiff argues that Section 151(b) of the Alabama Constitution establishes that the reallocation of existing judgeships is a non-delegable, purely lawmaking function of the Alabama Legislature. Section 151 provides:

> (a) The supreme court shall establish criteria for determining the number and boundaries of judicial circuits and districts, and the number of judges needed in each circuit and district. If the supreme court finds that a need exists for increasing or decreasing the number of circuit or district judges, or for changing the boundaries of judicial circuits or districts, it shall, at the beginning of any session

> of the legislature, certify its findings and recommendations to the legislature.
>
> (b) If a bill is introduced at any session of the legislature to increase or decrease the number of circuit or district judges, or to change the boundaries of any judicial circuit or district, the supreme court must, within three weeks, report to the legislature its recommendations on the proposed change. No change shall be made in the number of circuit or district judges, or the boundaries of any judicial circuit or district unless authorized by an act adopted after the recommendation of the supreme court on such proposal has been filed with the legislature.
>
> (c) An act decreasing the number of circuit or district judges shall not affect the right of any judge to hold his office for his full term.

Plaintiff repeatedly argues that under Section 151(b), "an increase or a decrease in the *size of a judicial circuit* can occur only by an act of the Legislature." *E.g.*, Doc. 6 at 7 (emphasis added). But Section 151(b) contains no such restriction. Although Section 151(a) tasks the Supreme Court with "establish[ing] criteria for determining . . . the number of judges needed *in each circuit and district*," Section 151(b) says nothing at all about the number of judges "in each circuit and district." Instead, Section 151(b) concerns only "increase[ing] or decreas[ing] the number of circuit or district judges"—that is, the *total*, *aggregate* number of circuit or district judges statewide, not in any one circuit or district. Thus, *reallocating* existing circuit and district judgeships between circuits and districts, which does not change the total number statewide, does not implicate Section 151(b). That Section 151(a) tasks the Supreme Court with the responsibility of "determining the number of judges needed

in each circuit and district," (emphasis added), underscores that Section 151(b) concerns only the "number of circuit or district judges" statewide. If the Legislature (and ratifying voters) meant to include "the number of judges needed *in each circuit and district*" in Section 151(b), they would have done so.

This distinction between Section 151(a) and Section 151(b) makes even more sense considering that changing the number of judges statewide would necessitate an increase in State funding, and appropriating additional funds is a quintessential legislative function. In contrast, merely reallocating judgeships has no similar effect on the State treasury and carries no implication that "lawmaking" is taking place. Indeed, the Legislature has preemptively provided that "the state resources allocated to fund the [reallocated] judgeship shall continue to fund the judgeship in the district or circuit to which it was reallocated." Ala. Code § 12-9A-2(d). No new appropriation is required.

Further, Section 151(b)—even if it did concern reallocating judicial vacancies—does not establish or imply that reallocating judicial vacancies is a non-delegable lawmaking function vested purely in the Legislature. Quite the opposite. Section 151(b) is a *restriction* on what the Legislature can do. It provides that the Legislature cannot act to increase or decrease the total number of judgeships until "*after* the recommendation of the supreme court on such proposal has been filed with the legislature." Ala. Const. § 151(b) (emphasis added). No part of Section 151(b)

indicates that any power—much less the power to reallocate judicial vacancies—is vested exclusively in the Legislature. Instead, it describes legislative procedures for increasing and decreasing judgeships in the State. Simply put, this provision is not implicated in this case.

Plaintiff cites *King v. Campbell*, but it does not support her case. 988 So. 2d 969 (Ala. 2007). In *King*, the Legislature created a circuit court judgeship and later attempted to change the method by which someone would be selected to serve as its first judge. *Id.* at 971. An individual—Chad Woodruff—won the Democratic Primary for the new seat, and there was no Republican opposition. *Id.* at 973. However, the day after Woodruff was officially certified as the Democratic Party's candidate, another act was signed into law that provided that the judgeship would be filled not by election but by appointment of the Governor. *Id.* A registered voter in Talladega County and Woodruff challenged the new law. Woodruff argued that the Legislature was constitutionally forbidden from preventing him from taking office because he had already won the Democratic Party primary and had no Republican opposition in the general election. *Id.* at 980. The Supreme Court rejected Woodruff's argument. *Id.*

However, the Court held that the new act violated Section 152 (*not* Section 151) of the Alabama Constitution, which provides: "All judges shall be elected by vote of the electors within the territorial jurisdiction of their respective courts." *Id.*

at 981. The constitutional infirmity had nothing to do with the timing of the law's enactment or that fact that a candidate had already won a primary election. Instead, the Court simply held that a newly created judgeship was not a "vacancy" under Alabama's Constitution, so the Governor could not appoint someone to fill the seat—the judge was required to elected. *Id.*

As its facts make plain, *King* has nothing to do with Plaintiff's claim that the Commission violates the separation of powers provision of the Alabama Constitution. Instead, *King* forecloses a claim that Plaintiff has chosen not to bring: In the same way that Woodruff had no entitlement to office by winning a party primary, Plaintiff likewise has no entitlement to office by winning a party primary. Plaintiff argues that, under *King*, the Commission "cannot be given the power to undermine § 151(b)." Doc. 6 at 8. But as set forth above, *King* turned on the application of an entirely different section of the Constitution. Moreover, the Commission does not undermine Section 151(b), which says *nothing* about judicial reallocation. And *King* certainly does not establish that such a process is a non-delegable lawmaking function under Alabama law.

Lastly, Plaintiff cites *State v. Vaughn* in support of her claim. 4 So. 2d 5 (Ala. Ct. App. 1941). There, the Legislature passed two relevant acts. First, the Legislature prohibited the sale of "game fish named in this Act, caught or taken from the public waters of this State." *Id.* at 7. Relevant here, bream and crappie were both included

as game fish in the text of the act.[7] *Id.*; *see* Ala. Acts 1933-72, § 2. Importantly, the Act restricted the sale of game fish only if those fish were "caught or taken from the public waters of this State." *Vaughn*, 4 So. 2d at 7. Second, the Legislature passed another Act that prohibited the sale of bass "regardless of where taken." *Id.* Therefore, under Alabama law, it was illegal to sell any game fish (including bream and crappie) caught in public waters in Alabama or to sell bass no matter where they were caught, but *legal* to sell non-bass game fish caught out of state or in private waters. Against this backdrop, the Commissioner of the Department of Conservation—who only had the general authority to implement regulations "he may deem for the best interest of the conservation, protection and propagation of wild game, birds, animals, fish and seafoods," *id.* at 6—promulgated "Rule 7," declaring that the sale of *all* game fish was illegal, even if they were caught out of state or in private waters. *Id.* at 6-7.

John Vaughn was arrested for the sale of bream and crappie caught *outside* the State in violation of Rule 7, even though the sale of those fish was not prohibited in the Alabama Code. *Id.* at 6. Vaughn argued that the Commissioner's promulgation of Rule 7 violated the Alabama Constitution because the Legislature had prohibited the sale of only bass caught outside the State and all game fish caught inside the

[7] Plaintiff wrongly asserts that "bream and crappie were not named in the act." Doc. 6 at 8.

state, but not the sale of all fish caught outside the State. *Id.* The Court of Appeals agreed, reasoning that it was "significant . . . that the legislature itself prohibited the sale of bass taken without the State." *Id.* at 8. Importantly, the Court of Appeals explained that "the legislature itself has regarded[] the prohibition of the sale of fish, foreign or domestic, a subject of law and not a subject of a regulation to carry some previously enacted law into effect." *Id.* The Legislature had not delegated to the Department of Conservation the ability to criminalize the sale of foreign fish. *Id.* The laws it *had* passed showed the Legislature's "intent not to authorize [prohibiting the sale of fish] to be done by an administrative agency." *Id.*[8]

Unlike in *Vaughn*, which involved a broad and generalized delegation of authority, the Legislature here plainly and specifically manifested its intent to give the Commission the authority to do exactly what it did—reallocate vacant judgeships. Further, the Commission has not created any new law or prohibited any conduct in a manner inconsistent with existing law. Instead, the Commission did exactly what the Legislature tasked it to do: determine which judicial circuits are most in need of judgeships and, under limited circumstances, reallocate judgeships

[8] The problem in *Vaughn* was not that the Legislature *could not* delegate the authority to criminalize conduct, but that it had not done so. In some circumstances, the Legislature *can* delegate such authority. *See, e.g.*, *Sanders v. State*, 302 So. 2d 117, 122 (Ala. Crim. App. 1974) (rejecting argument that Legislature unlawfully delegated legislative power to Department of Conservation by authorizing it to criminalize certain conduct related to commercial fishing).

accordingly. Unlike in *Vaughn*, Plaintiff does not argue that the Commission has exceeded the authority the Legislature granted to it.

The Legislature lawfully delegated its authority to reallocate judgeships and the Commission acted within the bounds of the power the Legislature conferred on it. Plaintiff cites no authority that would lead to a different result. Accordingly, even should the Court reach the merits of Plaintiff's claims, the Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2022, I electronically filed the foregoing with the Clerk of the Court using AlaFile, which will send notification of such filing to all counsel of record.

s/ A. Reid Harris
Counsel for Defendants