No. 13-1138

IN THE

Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, *et al.*,
Appellants,
v.
THE STATE OF ALABAMA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

BRIEF OPPOSING APPELLEES' JOINT MOTION TO DISMISS OR AFFIRM

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This case raises important issues of the role of race in legislative redistricting. Appellees (who will be referred to herein as "the State") have not shown that this Court clearly lacks jurisdiction as a matter of "standing," or that the merits questions presented are insubstantial. Accordingly, Appellants ask that this Court deny the motion, and postpone consideration of jurisdiction until a hearing of the case on the merits pursuant to Rule 18(12).

The State argues for affirmance as an "equitable" matter because, after the Judgment, qualifying for elections under the State's districting map closed in early February. Appellees' Joint Motion to Dismiss or Affirm (Joint Motion) pp. 1-2. This is no basis for affirmance. Even if Appellants had rushed the filing of their Jurisdictional Statement, the case would not have been ripe for this Court's consideration by early February; so we bear no "equitable" fault. In any event, "equitable" considerations would not justify affirmance, because the progress of the present election cycle by no means makes this case moot. The dispute about the present districting map will still matter for future elections, including any interim elections and the next cycle of legislative elections in 2018.

As shown in the Alabama Democratic Conference (ADC) Jurisdictional Statement, this appeal has two components: the "racial quota" or gerrymandering claim, and the dilution claim. The State has not shown that dismissal or affirmance is appropriate on either claim.

I. The "Racial Quota" or "Gerrymandering" Claim.

A. Substantial Questions Are Presented on the Merits.

Two factual points can be taken as common ground at this point. First, the State did decide to attain a stricter standard for population equalization among districts than had been utilized before. (The parties dispute whether that goal itself was adopted as part of the overall goal of reducing black voting strength, but as we have shown, Appellants can prevail even without prevailing on that issue.) Second, aside from that population-equalization standard, the State's foremost goal was to maintain or increase, as nearly as it could, the percentage of black population in each "black" district—no matter how high that percentage was, and no matter whether it was actually necessary in order to allow black voters to elect their candidate of choice. As the State does not dispute, the first stated qualification after meeting the guideline of an overall deviation of 2 percent was to maintain or increase the black total population in each district the State defined as majority black.

The State contends that the stricter population-equalization standard reduced the opportunity for race-based gerrymandering. Joint Motion, p. 18. But the facts show that—especially in this era where highly specific geographic and racial data are available and utilized—there was ample opportunity for race-based line drawing, and that the State actively took advantage of that opportunity. *See* ADC Jurisdictional Statement, pp. 7, 11-12 (reflecting multiple instances in which the State's district-drawers drilled down to a very deep "block" level, splitting precincts, in order to draw districts according

to race and to maintain or increase black population supermajorities).

The State contends that it wins, *ipso facto*, because it ranked the population-equalization standard just higher in priority than racial considerations. But there is (to say the least) a substantial question whether this is a legitimate defense to a racial gerrymandering claim. As shown in the ADC Jurisdictional Statement (pp. 16-18, citing, *e.g.*, *Shaw v. Reno*, 509 U.S. 630 (1993), *Miller v. Johnson*, 515 U.S. 900 (1995)), this Court's prior caselaw at least strongly suggests that a plaintiff does not have to prove that one-person-one-vote considerations were subordinated to race, in order to prevail on a racial gerrymandering claim. The State, rather than responding substantively to this discussion, whistles past it without addressing the caselaw that Appellants cited. Clearly there is a substantial question here, worthy of plenary consideration, even though the State would prefer to avoid it.

The State also contends that its highly race-conscious action would survive strict scrutiny review because it was thought necessary to comply with Section 5. But here again, the State ignores rather than confronts the caselaw cited in the ADC Jurisdictional Statement. For instance, the State contends that its race-based actions were necessary in order to obtain preclearance. Joint Motion, pp. 8, 23. Even if this were true, this Court has held that what matters is not what the Department of Justice would have demanded, but what the law actually demanded. *See Miller*, 515 U.S. at 922-23, discussed in ADC Jurisdictional Statement, p. 19. Did Section 5 actually require that the State maintain the same percentage of black population as much as possible, no matter

what percentage that was or whether it was necessary in fact to protect minority voting power, or whether (in fact) it actually reduced overall minority voting power through a "packing" effect? The advice of the State's own redistricting expert was that it would constitute packing. ADC Jurisdictional Statement, p. 5. As reflected in the split in the District Court, this is (to say the least) a substantial question.

In what can only be described as a bomb-throwing or *in terrorem* argument, the State suggests that if Appellants are correct, then by the same token all relief under Section 2 or Section 5 would be equally unconstitutional. Joint Motion, p. 24. That argument is absurd. In the first place, and unlike in other areas such as hiring and college admission decisions, redistricting simply cannot be race-blind. Legislators, familiar as they are with population and voting patterns, draw their own districts, and the racial composition of the district can determine their own chances of reelection. When considering whether it is constitutional to take account of race in redistricting, the law is—and always has been—sensible enough to recognize a distinction between what is reasonably necessary to make voting fair, and what is not. Here, the core of the problem is that the State did not make any inquiry into whether packing black voters into districts, at the block-by-block level, was necessary as a matter-of-fact to protect fair voting strength. The State truly was using quotas as quotas, not using percentages that were justified by facts and practical assessment.

B. Substantial Questions Are Presented as to Standing.

As expected, the State takes the simplistic view that these Appellants have no standing to raise this claim

under *United States v. Hays*, 515 U.S. 737 (1995). But as shown in the ADC Jurisdictional Statement (pp. 20-23), there are substantial questions about this on multiple grounds.

First, there is the fact that this is not merely a case like *Hays* that objects to classification *simpliciter*. Here, the classification harms ADC, its members (including individual plaintiff Pettway), and the individual plaintiffs by reducing overall black voting strength. This is the nature of packing: it causes harm in practical effect to all minority voters whether they are among those who are packed or are among the fewer who are left behind in fragments with less power to "pull, haul, and trade to find common political ground" with likeminded members of the majority. *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994). There is, to say the very least, a substantial question whether *Hays* rejected this type of practical-injury standing. This type of standing is especially important here, where Appellant ADC is undisputedly a statewide organization with members in every county and endorses candidates in virtually every legislative race. It is also key in a case like this one that contains a racial vote dilution claim.

Second, the State points to no case where this Court has decided whether individuals have standing on the basis of the sort of facts that affect individual Appellants Stallworth and Pettway. Their former majority-black district was abolished, in pursuit of the State's race-driven redistricting. ADC Jurisdictional Statement, pp. 22-23. This constitutes a specific and cognizable injury to them, directly traceable to the State's challenged use of race. *Hays* does not address this sort of situation.

Third, the ADC has standing because it suffers organizational harm from the redistricting beyond the harm to its legislative efforts, including the need to expend additional resources on voter education and turnout due to the willy nilly county and precinct splits. See, e.g., Trial Tr., vol. 2, 168-69, Aug. 9, 2013. Such a diversion of resources is sufficient for organizational standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). These arguments are sufficiently substantial, that this Court should postpone consideration of standing for full review along with the merits.

II. The Vote Dilution Claim.

A. Substantial Questions Are Presented on the Merits.

The racial classification issue is intertwined here with the claim under the purpose prong of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. This case presents a substantial issue as to the proper application of the standards for determining whether a redistricting plan was adopted with a racially discriminatory purpose.

The existing judicial framework for assessing purpose was set forth in *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1997). Among the indicia of an invidious purpose is a "substantive departure[]. . . [from] considerations usually considered important by the decision-maker." 429 U.S. at 267. The State admitted that adherence to the Alabama Constitution—which forbids the splitting of any county boundary in the creation of a Senate district and restricts the splitting of counties by House districts—is an important governmental interest. Both plans routinely split

counties when doing so was unnecessary under either federal law or the legislatively imposed two percent deviation standard. ADC Jurisdictional Statement, p. 13; see generally ALBC Jurisdictional Statement. And the county splits disadvantaged minority voters through the State's block-by-block packing and fragmenting minority populations. *Id.* The District Court focused exclusively on the legal questions raised by the ALBC respecting county delegations and addressed by them in their Jurisdictional Statement. It ignored their functional interest—the traditional role which "strongly favored a decision contrary to the one reached" by the Legislature, 429 U.S. at 267, and failed to confront them under the *Arlington Heights* framework. The District Court's failure to recognize the legal significance of the departures from both the state constitutional interest and the long-standing functional interest in maintaining county boundaries is at odds with the decisions of this Court including, most recently, *Tennant v. Jefferson County Commission*, 133 S.Ct. 3 (2012), and merits full review.

The District Court further erred in its *Arlington Heights* analysis in failing to recognize the legal significance of the overt expressions of racial hostility during the legislative process, as in ignoring the significance of a white legislator objecting to having more black voters in his district, and the immediately preceding period as in the candid slurs, hostility and stereotypes captured in *United States v. McGregor*, 824 F. Supp.2d 1339, 1345-47 (M.D.Ala 2011) (which, perhaps understandably, the State fails to address). The District Court's approach to the issue of "contemporary statements by members of the decision-making body," 429 U.S. at 268, evincing discriminatory intent merits full review by this Court.

Just as vivid, if less crude, evidence of a racially discriminatory purpose was the manipulation of district boundaries within Montgomery County. Senate district 26 was 72 percent black and needed additional population. Appellees did not dispute that the existing black super-majority was not needed, that black voters could elect (or re-elect) the Senator of their choice with a lower percentage—even with the 64 percent majority that would have resulted by adding only white voters to the district. The incumbent, Sen. Ross, testified that he would welcome a lower black majority (50, 55 or 60 percent) in the district and criticized the corrosive effects of racial super-majorities, black or white. ALBC J.S. App. 201. The State's plan for district 26 went block by block, splitting numerous voting precincts, to add black persons to Senate district 26 and exclude white persons. The net effect was to add 15,785 persons to Senate district 26, but only 36, or 0.02 percent of whom were white. That racial imbalance is extraordinary, approximately 50 times as one-sided as the racial gerrymander in *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (evidence "irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation [was] solely concerned with segregating white and [black] voters."). The District Court dismissed these facts, noting that the Senate district 26 increase to over 75 percent black was "unremarkable," ALBC J.S. App. 152. The District Court's approach to these prongs of the *Arlington Heights* analysis presents a substantial question meriting this Court's full review.

B. There Is No Basis for Summary Dismissal Based On Standing.

The District Court did not question these Appellants' standing to raise the intentional dilution claim. This was clearly no oversight, but was instead surely based on the sense that standing was so clear that it required no discussion. This must be the case, because the District Court did address these Appellants' standing specifically as to the quota or gerrymandering claim (incorrectly finding a lack of standing). The District Court was attuned to standing issues. Its failure even to suggest that there was a potential problem on standing as to the dilution claim clearly manifests the understanding that there was no problem worth talking about.

The State attempts to import its simplistic understanding of *Hays* standing, not only from the pure-*Shaw* sort of case to the more practical-injury gerrymandering claim we have discussed above, but even to all vote dilution claims. This is not a step that this Court should consider taking without full deliberation. The very nature of dilution, we submit, mandates a sensitive inquiry into the practical effects on the individuals as well as an organization like ADC. A statewide scheme to dilute black voting power will, in practical terms, hurt all plaintiffs such as these—perhaps ADC most obviously, as an undisputedly statewide organization that is involved in House and Senate races across the State.

CONCLUSION

For the reasons explained herein and in the ADC Jurisdictional Statement, this Court should deny Appellees' Joint Motion to Dismiss or Affirm, and should postpone consideration of jurisdiction until a hearing of the case on the merits pursuant to Rule 18(12).

Respectfully submitted,

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