No. 13-___

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

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

This appeal in a legislative redistricting case presents issues of law in regard to how a State may rely on race in setting district boundaries. It is undisputed that the State had, among its chief goals, the idea that when possible it would redraw each majority-black district to have the same percentage of black population as the district would have had using 2010 census data as applied to the former district lines. This goal, particularly when combined with the new goal of significantly reducing population deviation among districts, led the State to stark racial intentionality in district-drawing, packing more supermajorities of black voters into already-majority-black districts, without regard to whether such efforts were actually necessary in each district to allow black voters to elect candidates of their choice. A divided three-judge District Court rejected the challenge to this map. This appeal presents issues summarized as follows:

1(a). Whether, as the dissenting Judge concluded, this effort amounted to an unconstitutional racial quota and racial gerrymandering that is subject to strict scrutiny and that was not justified by the putative interest of complying with the non-retrogression aspect of Section 5 of the Voting Rights Act?

1(b). Whether these plaintiffs have standing to bring such a constitutional claim?

2. Whether aspects of the State's map also violated both the purpose and results tests of Section 2 of the Voting Rights Act and the 14th Amendment, through the systematic dilution of minority voting strength and by the elimination of certain majority-minority districts?

PARTIES TO THE PROCEEDING BELOW

Appellants, plaintiffs below, are the Alabama Democratic Conference, Framon Weaver, Sr., Stacey Stallworth, Rosa Toussaint and Lynn Pettway. Rep. Demetrius Newton was also a plaintiff, but is deceased.

Plaintiffs in a consolidated action, who are appellants in No. 13-895 before this Court, are the Alabama Legislative Black Caucus, Bobby Singleton, the Alabama Association of Black County Officials, Fred Armstead, George Bowman, Rhondel Rhone, Albert F. Turner, Jr., and Jiles Williams, Jr.

Defendants-Appellees are the State of Alabama, its Governor Robert Bentley, and its Secretary of State Jim Bennett. Also present as appellees are intervenor-defendants Senator Gerald Dial and Representative Jim McClendon.

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JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANTS ALABAMA DEMOCRATIC CONFERENCE *ET AL.*

Appellants Alabama Democratic Conference, Framon Weaver, Sr., Stacey Stallworth, Rosa Toussaint and Lynn Pettway ("the ADC appellants"), have appealed from the final judgment of a divided three-judge District Court of the Middle District of Alabama, rejecting appellants' challenge to a state legislative redistricting scheme adopted by the State of Alabama. Also pending before the Court is an appeal by other plaintiffs ("the ALBC appellants") from the same judgment, *Alabama Legislative Black Caucus v. Alabama*, No. 13-895. The ADC appellants respectfully ask the Court to exercise jurisdiction, and to reverse either summarily or after briefing and argument.

OPINIONS BELOW

The majority and dissenting opinions of the three-judge District Court, accompanying that Court's final judgment, are reported at *Alabama Legislative Black Caucus v. Alabama*, ___ F.Supp.3d ___, 2013 WL 6726625 (M.D. Ala., Dec. 20, 2013), and are in the Appendix of No. 13-895 at ALBC Jurisdictional Statement Appendix (ALBC J.S. App.) 1-277.

STATEMENT OF JURISDICTION

This matter was properly before a three-judge District Court pursuant to 28 U.S.C. § 2284(a), as it involved a constitutional challenge to a statewide redistricting plan. This Court therefore has jurisdiction over the appeals from the final judgment pursuant to 28 U.S.C. § 1253. Final judgment was entered on December 20, 2013. The ADC appellants

timely filed their notice of appeal on January 14, 2014. ADC J.S. App. 1a-3a.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States of America and Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973 and 1973c, all reproduced in the Appendix of No. 13-895 at ALBC J.S. App. 458-62.

STATEMENT OF THE CASE

A. Facts

This case concerns a state legislative redistricting plan adopted by the Legislature of the State of Alabama in 2012, following the 2010 census. The following facts are demonstrated clearly by the evidence and, in most instances, even by the majority's findings.

Redistricting was necessary following the 2010 census because of malapportionment of various districts due to population changes. ALBC J.S. App. 17-25. The state experienced and is continuing to experience a relative decline in white population from 71.1 percent in 2000 to 68.5 percent in 2010 and to 66.7 percent in 2011; concomitant growth among minority groups is led by the increase in Hispanic population. ALBC J.S. App. 15; Newton Plaintiffs' Exhibit (NPX) 325; NPX 326; NPX 327. Core minority areas tended to lose total population as black and white residents moved to new areas and black-majority areas expanded into formerly white neighborhoods. Trial Tr. vol. 3, 39-40, Aug. 12, 2013; Defendants' Exhibit (DX) 400; DX 402; DX 406; DX 476; DX 477. Black-majority

districts were under-populated by 2010, but most such districts still had large enough black populations to remain predominantly black even if only white persons were added to meet the two percent deviation standard. Trial Tr. vol. 1, 129, Aug. 8, 2013; Trial Tr. vol. 3, 179, Aug. 12, 2013.

The minority population expansion was most noticeable in Jefferson County (Birmingham), where a black population increase was accompanied by a sharp decrease in white population, ALBC J.S. App. 16; Montgomery County (Montgomery), where organic population shifts had lifted district 73 (27 percent black in 2000) to a 48-44 percent black plurality, NPX 332; and Madison County (Huntsville), where a sizeable black-Hispanic concentration had expanded to dominate a potential Senate district. NPX 302; NPX 340; DX 406; DX 479; DX 480.

Amid the racially polarized voting that all parties agreed marks Alabama elections, black-supported candidates had been elected in 2010 in seven districts with black majorities below 60 percent, including two House districts, 73 and 85, with black population percentages of 48.4 and 47.9, respectively.[1] DX 406. In certain areas, black voters also had for years elected candidates of their choice in coalition districts, notably Senate districts 11 and 22. NPX 324 at ¶¶ 21-22; Trial Tr., vol. 1, 44, Aug. 8, 2013; Trial Tr. vol. 2, 202, Aug. 9, 2013.

The Legislature, pursuant to state law, established a Committee to guide the redistricting process. That Committee consisted of 22 members: 18 white

[1] The State counts district 85 as a black district, although it has a white plurality, but does not count district 73 as a black district despite the black plurality in that district.

Republicans, 1 white Democrat, and 3 black Democrats. ALBC J.S. App. 26. Senator Gerald Dial and Representative Jim McClendon were chairs of the Committee. ALBC J.S. App. 10.

The Committee adopted a set of guidelines for its work. Notably, the Committee decided that it would seek to dramatically reduce population deviation among districts, below the level that had been accepted in the past; the Committee would accept only a 2 percent variance between the most and least populous districts, whereas a 10 percent variance had previously been deemed acceptable. ALBC J.S. App. 27.

The Committee also described itself as seeking to comply with the Voting Rights Act, and described this (along with the near-equalization of population among districts) as having priority among the various goals (other less-prioritized goals including, for instance, compactness and incumbent protection). ALBC J.S. App. 27-28. The Committee guidelines also mentioned respect for county boundaries, a requirement of the Constitution of the State of Alabama, and other traditional redistricting criteria. Common Exhibit (C-) 1.

The approach to race taken by the Committee, especially through its chairs (Senator Dial and Representative McClendon) and its map-drawing consultant (Randy Hinaman), was in practice and in fact a very particular and striking one. They decided—as part of their putative understanding of the demands of the Voting Rights Act—that Section 5 required that each district should, if possible, be drawn to contain at least as high a percentage of black population, as was present within the "old" boundaries of the district under the 2010 census. ALBC J.S. App. 32-33, 94, 100, 148-51. In other words, because Senate district 26, for example, was 72.69 percent black as of

2010, they would—if possible—draw the new boundaries of Senate district 26 in a way that maintained or increased that black percentage. ALBC J.S. App. 32-33, 94, 100, 148-51; DX 400; DX 402. The Committee and Mr. Hinaman did not consider other minority populations of voting age populations within the majority-black districts, nor did they substantively consider compliance with Section 2 of the Act.

In adopting this remarkable approach, the drafters failed to heed what their own expert counsel had said at a redistricting hearing, about the level of black population that was needed to gain Section 5 preclearance, and about the related evil of over-packing minority voters into supermajority districts:

> In the past it used to be 65 or 65—above 65 . . . I'm pretty sure that if you were to send a district that was 65 percent black to the Department of Justice now, they would wonder why you were packing it, and they'll be looking for, my understanding is, much lower levels. I mean a black majority would certainly be above 50, but 55 may be extreme in some cases.

C-18 at 17.

The State (and the Committee's leadership and consultant) did *not* make any investigation, findings or conclusions about whether such action was actually necessary in order to allow black voters to elect representatives of their choosing in the particular context of Alabama as a whole, or of any district. ALBC Plaintiffs' Exhibit (APX) 75; Trial Tr., vol. 1, 55, 88, 133-34, Aug. 8, 2013; Trial Tr., vol. 3, 148-52, 180-82, Aug. 12, 2013. The drafters' approach—their professed belief that any reduction in the percentage of black population in a majority-black district would

reduce the ability of black voters to elect candidates of their choice—is also rejected by the majority's own finding that "the record evidence is insufficient to support any conclusion about the minimum level of the black voting-age population necessary to allow the black population to elect its candidate of choice." ALBC J.S. App. 107. Rather, the State's approach involved simply the intentional collection of black *qua* black population within the boundaries of majority-black districts on a strict numerical basis. APX 75; Trial Tr., vol. 1, 55, 88, 133-34, Aug. 8, 2013; Trial Tr., vol. 3, 148-52, 180-82, Aug. 12, 2013. As to non-majority districts, the plans fragmented minority concentrations and spread black, Hispanic and Native American population among districts with overwhelming white majorities. DX 400; DX 402; DX 403; DX 406; NPX 323; NPX 373; Trial Tr., vol. 1, 44, Aug. 8, 2013; Trial Tr., vol. 2, 202, Aug. 9, 2013; Trial Tr., vol. 4, 44-45, Aug. 13, 2013.

The plans adopted by the State maintained each of the eight existing majority-black Senate districts. The House plan eliminated one majority-black district and replaced it with a new majority-black district in the enlarged minority concentration of Madison County so as to maintain the number of black districts; however, the House plan also eliminated nascent minority district 73 in Montgomery. ALBC J.S. App. 36-38. That district was moved to suburban Shelby County. ALBC J.S. App. 36-37.

The race-driven nature of the plan drafters' decisions, and the negative impact, are seen starkly in various counties and districts including the following:

* In Montgomery County, Senate district 26 was, and still is, a majority-black district represented by Senator Quinton Ross. The "old" district, as of 2010

census data, was 72.75 percent black. ALBC J.S. App. 42. To meet the newly-adopted 2 percent deviation standard, the drafters added nearly 16,000 persons to that district. ALBC J.S. App. 201. As the dissent pointed out, and is undisputed, even if the drafters had added only whites to the district, it still would have been 64.3 percent black; and Senator Ross would have been comfortable with that percentage or even less. ALBC J.S. App. 201. Even the majority would apparently agree that this was sufficient to allow black voters to elect their candidate of choice. ALBC J.S. App. 185 (noting "the credible testimony of the Chairman of the Democratic Conference, Reed, that majority-black districts in Alabama ordinarily need to be 60 percent black and sometimes 65 percent black."). Senator Dial, a chair of the redistricting Committee, likewise recognized that Senator Ross could no doubt win reelection in a 64 percent black district. Trial Tr., vol. 1, 129, Aug. 8, 2013. Yet the drafters made the astounding decision to add to Senate district 26 only 36 white people—that being the number of people, not a percentage. ALBC J.S. App. 201. Consequently, more than 14,000 black people were newly packed into Senate district 26, raising its supermajority to 75.22 percent. ALBC J.S. App. 43, 202. The drafters even split precincts, going block by block to put the black residents into Senate district 26 while removing white residents who had previously been within the district. ALBC J.S. App. 202. This was the quintessence of race-driven packing.

The packing of Senate district 26 allowed the State to increase the white percentage of adjacent Senate district 25 from 66 percent to over 71 percent in the face of continuing rapid movement of black population into the Montgomery County portion of the district. DX 400. A Montgomery House member, Rep. Jay Love,

objected during redistricting to an alternative plan that would leave Love's district with a 69 percent white majority on the frankly stated grounds that the white majority would drop to 60 percent over the course of the decade. Trial Tr., vol. 3, 42-43, Aug. 12, 2013.

* At the House level, the race-driven line drawing within Montgomery County led to the abolishment of old House district 73, which had become a black-plurality district (blacks, at 48.44 percent at the 2010 census, outnumbered whites who made up only 44.07 percent), and which in 2010 had elected the choice of the black community. ALBC J.S. App. 199-200. As the dissent recounted, Rep. McClendon (a chair of the redistricting Committee) explained the reason why that district was deleted by the new plan: in order to maintain existing percentages of blacks in neighboring districts while increasing their population, the black voters from what had been House district 73 needed to be packed into the neighboring districts. ALBC J.S. App. 199-200 ("As McClendon put it, 'The minority districts in Montgomery were underpopulated' and so '[w]e needed to pick up minorities from somewhere.'").

Each of the majority-black districts in Montgomery County already had sufficient black total population to form a majority in equipopulous districts, as did over-populated House district 73. DX 406. The ADC appellants proposed a map for Montgomery County that would have avoided the elimination of House district 73 (and given that district a black voting age majority population), ALBC J.S. App. 87, NPX 300, but the majority faulted this map because it was not presented as part of an illustrative *state-wide* plan. ALBC J.S. App. 116-18. As explained in the

Argument, imposing this requirement on the ADC appellants was legal error.

* The story is similar with regard to House districts in Jefferson County. The drafters "moved" House district 53 from Jefferson County to Madison County; in other words, they abolished previously-existing majority-black House district 53 in Jefferson County. ALBC J.S. App. 36-38. Thus Jefferson County went from including all or parts of 9 of 18 black-majority House districts, to 8 of 18. ALBC J.S. App. 37-39. Again, the putative rationale was that this was necessary to meet the newly-chosen 2 percent population deviation standard, while maintaining (insofar as possible) the same percentage of black voters in each majority-black district. ALBC J.S. App. 38. Yet, as the dissent noted, citing the testimony of Mr. Hinaman (the State's map drawing consultant), Hinaman "never actually tried to draw nine majority-black districts in Jefferson County, and so could not say how much lower the black percentages would have been; in fact, he believed it *would* have been possible to draw nine such majority-black districts." ALBC J.S. App. 199 (emphasis in original). "Instead of doing so, he concluded that the prospect of lower black percentages in the majority-black House Districts left him no choice: he had to eliminate one of the districts, HD 53, from Jefferson County, relocate it elsewhere, and use its black population to maintain the black percentages in the remaining Jefferson County districts." ALBC J.S. App. 199. He even dug down to the census-block level and split precincts in order to meet the racial-percentage goal. ALBC J.S. App. 103-104.

* The ADC appellants proposed a map for Jefferson County that would have maintained the nine

existing majority-black districts. ALBC J.S. App. 87-88. Again, the majority faulted this map because it was not presented as part of an illustrative *state-wide* plan, ALBC J.S. App. 116-17, and because it did not meet the state's newly-adopted 2 percent population-deviation standard. ALBC J.S. App. 117. As explained in the Argument, imposing these requirements on the ADC appellants was legal error.

* The State's plans fragmented minority populations in Madison County and in Senate districts 11 and 22 so as to avoid and eliminate minority opportunity and coalition districts. In Madison County, the two adjacent majority-black House districts had sufficient minority population by themselves to comprise 44.7 percent of an ideal Senate district, and adjacent areas of that compact black and Hispanic concentration sufficed to comprise a majority-minority Senate district. DX 403. Sen. Dial testified that he was aware of the minority potential but rejected such a Senate district because he believed it would place two incumbent Senators in the same district. Trial Tr., vol. 1, 123, Aug. 8, 2013. Nevertheless, he also testified that he was unaware of, and made no inquiry as to, which two incumbents that might be, and, in fact, no alternative plan would have combined incumbents in such a district. Trial Tr., vol. 1, 123, 127, Aug. 8, 2013.

In the Senate plan adopted by the State, the Madison County minority concentration is fragmented among multiple districts, none as much as 28 percent black. DX 400. Senate district 7 was over 32 percent black and only 60.3 percent white before redistricting, and over-populated by 11,000 persons. DX 402. The new plan lowered the districts' black and Hispanic

population by 11,646 persons and added a net 650 white persons. DX 400.

Senate district 11, which had long elected the candidate of choice of minority voters, was dismantled by the fragmentation of the black concentration of House district 32, which had been part of the core of the district, and by an unnecessary exchange of a large majority black portion of Talladega County with a heavily white and growing suburban area of Shelby County. Trial Tr., vol. 3, 173, Aug. 12, 2013. The new plan lowered the minority voting age population from 34.2 percent to 15.3 percent. DX 400; DX 402. Rep. McClendon, a chair of the redistricting Committee, is now a candidate for the newly-configured district. Trial Tr., vol. 3, 258, Aug. 12, 2013.

Senate district 22, comprising a rural area just north of metropolitan Mobile, did not need to be changed at all. A black-Native American coalition had long and dependably elected their candidate of choice from the area. Trial Tr., vol. 1, 44, Aug. 8, 2013; Trial Tr., vol. 2, 202, Aug. 9, 2013. The district was within one percent of the ideal population and population imbalances within the Mobile area could be resolved by shifts of urban and suburban population among those districts. DX 402. Despite this, the State's plan fragmented the black-Native American coalition, lowered the minority percentage from 34.0 percent to 26.8, and changed the character of the district by replacing rural areas with growing white suburban areas. DX 400; DX 402; Trial Tr., vol. 4, 44-46, Aug. 13, 2013.

Senate district 22 also illustrates race-conscious line-drawing by the wholesale splitting of counties, and even precincts, along racial lines. The Senate district 22 lines split 46 small precincts along racial lines, often leaving tiny "orphan" areas, some with 20

or fewer residents, that the affected counties would have to treat as separate precincts. NPX 323 at ¶ 92. In addition to the financial and other costs associated with splitting precincts, by splitting precincts along racial lines, the State tended to create racially distinct voting places. NPX 323 at ¶ 94. The ADC demonstrated that avoiding such county and precinct splits would have raised the black percentage in Senate district 22 without adversely affecting any other district, and while remaining within the two percent deviation limit. NPX 304.

Other examples of quota-based line drawing abound, as demonstrated by the dissent with citation to indisputable facts and numbers:

> In some districts, the rigidity of these quotas is on full display. HD 52 needed an additional 1,145 black people to meet the quota; the drafters added an additional 1,143. In other words, the drafters came within two individuals of achieving the exact quota they set for the black population, out of a total population of 45,083; those two people represent .004 % of the district. In HD 55, the drafters added 6,994 additional black residents, just 13 individuals more than the quota required, and in HD 56 they added 2,503 residents, just 12 individuals more than the quota required, both out of a total population of 45,071. In the Senate, SD 23 contains 116 more black individuals than were needed to achieve the drafters' quota of adding an additional 15,069 black people, out of a total population of 135,338; in other words, the difference between the quota and the additional black population in the ultimate plan represents .086 % of the district.

ALBC J.S. App. 208-09 (footnote omitted).

The ADC appellants also contend that the plan drafters' rampant and unnecessary county-splitting in violation of a state constitutional command, when combined with Alabama's tradition of powerful "county delegations" in the Legislature, had both the purpose and effect of reducing black voters' power over the legislative fate of local acts affecting largely black counties. In this, for present purposes, we adopt the more extensive discussion in the ABLC appellants' jurisdictional statement in No. 13-895.

In addition to the race-based line drawing and packing discussed above, there are other elements of the plan and of the background facts which add to the strength of the argument that, overall, both the purpose and the effect of the State's redistricting plan was to reduce black voting strength both in terms of districts and in terms of local legislative delegations, to reduce the strength of black minority populations in majority-white counties, and to thwart the growth of coalitions among black voters, Hispanic voters, Native American voters, and reachable white voters. These additional indicia of dilutive purpose and effect are discussed in Section 2 of the Argument below, in order to avoid repetition.

B. Proceedings Below

The proceedings below can be described simply for present purposes. Suit was originally brought by the ALBC plaintiffs (appellants in No. 13-895). ALBC J.S. App. 8. The ADC appellants then brought suit under Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. ALBC J.S. App. 9. Our suit was assigned to the same three-judge court that was hearing the ALBC suit, and that court consolidated the cases. ALBC J.S. App. 9. A motion

for summary judgment by defendants was denied, ALBC J.S. App. 11, and the case proceeded to trial.

The majority of the three-judge court (1) dismissed the ADC appellants' racial gerrymandering claim for lack of standing, ALBC J.S. App. 138-40, (2) rejected the racial gerrymandering claim on the merits (reaching that issue because the ALBC appellants did have standing, and also reaching the merits as an alternative to the no-standing holding as to the ADC appellants), ALBC J.S. App. 140, and (3) rejected the ADC appellants' vote dilution claim (which argued that there was dilution both in purpose and effect), ALBC J.S. App. 108-27.

ARGUMENT

I. THE "RACIAL GERRYMANDERING" OR "QUOTA" CLAIM.

As both the majority and the dissent in the District Court recognized, the claims of both the ADC appellants and the ALBC appellants included the argument that the State's redistricting scheme constituted an unconstitutional racial gerrymander, in the sense that those who drew the map did so based on race to an unconstitutional and unjustified degree.

This Court has addressed similar issues before, in *Shaw v. Reno*, 509 U.S. 630 (1993), and cases following *Shaw*. This case, however, is different from most *Shaw* cases, in that the gravamen of the claim here is not that the state went too far to create black-majority districts, enhancing black voting power more than is constitutionally permissible. Here, the claim by black voters and organizations is that the State's racial gerrymandering was to the detriment of minority voting strength, as (among other things) the State

intentionally "packed" large numbers of black voters into black-majority districts, more so than was warranted by the law, and thus not only created the intangible racial-balkanization harms that the *Shaw* line of caselaw decries, but also diluted black voting strength in other districts and in the State overall.

The majority held in favor of the State and other defendants on this point, on both "merits" and (as to the ADC appellants) "standing" grounds. ALBC J.S. App. 7. The "merits" holding raises important issues of law regarding the extent to which a State may intentionally rely on race in redistricting, issues that are of heightened importance as well as complexity after this Court's decision in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013). The "standing" issue raises difficult issues of law as well. (However, the court below recognized that the ALBC appellants do have standing to raise this claim. ALBC J.S. App. 34. They have raised it in No. 13-895. Therefore, the District Court's holding about standing, even if correct, would not save the judgment.)

A. On The Merits, This Issue Warrants Summary Reversal Or Plenary Review.

The majority's reasoning on the merits of this claim consisted, in summary, of two conclusions: *first*, that strict scrutiny was not required because reduction of population variance, rather than consideration of race, was the "predominant" motivating factor both for the redistricting scheme as a whole and for certain challenged districts, ALBC J.S. App. 140, 150, and *second*, that even if strict scrutiny was applied, the scheme was constitutional because the scheme (including its goal of trying to maintain the existing percentage of black population in each majority-black

district, whatever that percentage may be in each district) was narrowly tailored to comply with Section 5 of the Voting Rights Act. ALBC J.S. App. 183.

Each of those conclusions is both questionable as a matter of law, and highly important to the continued development of the law of redistricting.[2]

On the question of whether strict scrutiny applies, the majority of the District Court erred as a matter of law by treating the State's effort to achieve some specific standard of population-equalization as a motivation that predominated over race. That view, if accepted, would always defeat every *Shaw*-type claim. Whenever there is legislative redistricting, one thing that has always been accepted everywhere—since *Reynolds v. Sims*, 377 U.S. 533 (1964)—is that districts must meet a standard of near-equality. There is some flexibility about what standard the state may choose; ten percent deviation has often been thought of as the constitutional ceiling, but a state might choose to set itself a tighter standard. Still, whether the state chooses to use the ten percent standard or some other standard, that is always going to be, effectively, number one on the list of considerations.[3] Other considerations—whether (say) political advantage, respect for county boundaries, or

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[2] The legal standard for compliance with Section 5 remains a significant issue, even after *Shelby County v. Holder*, supra. The Court did not strike down Section 5 in *Shelby County*, but instead only struck down Section 4's coverage formula. The Section 5 standard remains in effect, when jurisdictions are covered through the "bail in" method of Section 3.

[3] Very occasionally, as in Hawaii, a chosen standard of acceptable population-deviation may give way to geographic concerns. That exceptional sort of case does not materially detract from the point made in the text above.

racial goals—are always second-in-line behind the state's chosen standard of population equalization (whether the state decides to test the boundaries of what the Constitution allows, or decides to achieve a closer standard of equality).

Indeed, even in *Shaw* itself, there was no allegation that the districts violated the one-person-one-vote doctrine regarding population equality. *Shaw*, 509 U.S. at 636. Thus even in *Shaw*, apparently, the goal of meeting a standard of population-equalization was not subjugated to racial considerations. In *Miller v. Johnson*, 515 U.S. 900 (1995), in listing the considerations to which the State of Georgia had obligated itself in redistricting, this Court listed first "single-member districts of equal population," *id.* at 906; and there was no suggestion that the state had ever jettisoned that goal in service of racial considerations.

This explains why the Court, in *Shaw* and cases following it, has asked not whether the district-drawers allowed race to trump one-person-one-vote considerations. An affirmative answer to that question has never been thought necessary. Instead, the Court has asked whether race trumped "traditional districting principles such as compactness, contiguity, and respect for political subdivisions," *Shaw*, 509 U.S. at 647; *see also Miller*, 515 U.S. at 916 (asking whether "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations"); *Bush v. Vera*, 517 U.S. 952, 962 (1996) (plurality) (noting "traditional districting criteria such as compactness" and stating that, "[f]or strict scrutiny

to apply, traditional districting criteria must be *subordinated to race*.") (emphasis in original).

In this case, it is clear that—other than meeting a chosen standard for population equalization—race was plainly the predominant factor for those who were drawing the lines. The drafters worked hard to try to make sure that each black-majority district, when growing in population due to the newly chosen population-equalization standard, maintained its prior percentage of black population—even when this meant crossing county boundaries,[4] splitting precincts, and placing incumbents in the same district. Even the majority so found, saying (with misplaced approval), "it makes sense that the 'first qualification' after meeting the guideline of an overall deviation of 2 percent was not to retrogress minority districts when repopulating them." ALBC J.S. App. 149. (Indeed, we submit that the choice of a population deviation standard, lower than required by the *Reynolds* doctrine, was itself part of the plan to reduce black voting power, by packing more black voters into majority-black districts; but the Court does not ultimately need to agree on that point, to agree with us on this gerrymandering issue.)

Thus, on a proper understanding of what it means for race to be the "predominant" factor, even on the majority's findings this plan was subject to strict scrutiny.

This leaves the question whether the plan's use of race was narrowly tailored to compliance with Section 5 of the Voting Rights Act, i.e., avoiding

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[4] The ADC appellants also adopt, agree with, and seek relief upon the county-based theory advanced by the ALBC appellants in No. 13-895.

"retrogression," as the majority concluded it was. As this Court has recognized, "[a] reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw*, 509 U.S. at 655.

The majority credited testimony that the drafters "believed that any significant reduction of the black population in the majority-black districts would also likely cause a problem with preclearance of the plans by the Department of Justice," ALBC J.S. App. 175, but that does not save the plan. A state cannot justify a race-based plan with the idea that it was thought to be, or even that it was (as a matter of historical fact) necessary in order to obtain Justice Department officials' preclearance under Section 5; the question is not what Justice Department officials would have said, but what was justified in fact. *Miller*, 515 U.S. at 922-23.

The majority and dissent disagreed about whether compliance with Section 5 will even count, now, as a compelling interest now that Alabama is no longer subject to Section 5 after *Shelby County*, supra. This in itself is an important question that deserves this Court's consideration. The majority took a backwards-looking view, deeming it dispositive that the plan was drawn before *Shelby County*; the dissent disagreed. ALBC J.S. App. 175-76, 267-69. The dissent, we believe, was correct. Districting plans have effect for a decade, between census-driven redistrictings. A plan that would be unconstitutional under current law should not be given ten years' effect into the future, simply because of the state of the caselaw when the plan was drafted.

But even if compliance with Section 5 in Alabama were still a compelling interest, the majority also erred in placing its imprimatur on the plan drafters' belief that Section 5 would *ipso facto*, as a blanket matter, prohibit reduction of the percentage of black population in all black-majority districts. The majority accepted the proposition that any such avoidable reduction—no matter whether it was (say) from 72 percent to 64 percent—would *ipso facto* reduce black voters' ability to elect candidates of their choice and thus violate Section 5. ALBC J.S. App. 180-81, 183. As the dissent explained at length, that reading of Section 5 is mistaken and would raise serious doubt about the constitutionality of the statute. The dissent explained that such locking-in of numbers—without regard to contextual factors that would actually prove what level of population is sufficient to allow minority voters to elect candidates of their choice—is (a) without foundation in the text of Section 5, (b) contrary to the legislative history of the 2006 amendments to Section 5, (c) contrary to the understanding of both the District Court for the District of Columbia and the Department of Justice, and (d) the sort of strict numerical racial quota that would raise very serious constitutional concerns. ALBC J.S. App. 189-90. This, too, is a matter that deserves this Court's consideration.

B. The ADC Appellants Have Standing To Pursue This Claim.

The majority below held that the ADC appellants lack standing to pursue the racial gerrymander (or "quota") claim. This was error.

First, it was error to think of this case as involving only the question whether the individual ADC

appellants, or members of ADC, reside in districts that were drawn to achieve certain racial percentages. That is the sort of "standing" inquiry which this Court has used, in cases involving the drawing of certain particular districts in ways that give rise to only the intangible *Shaw* harms of being racially classified. *Sinkfield v. Kelley*, 531 U.S. 28 (2000); *United States v. Hays*, 515 U.S. 737 (1995). But this Court has not rejected the possibility that there will be other sorts of harm that will support standing, in other sorts of cases based on race-based redistricting that reaches the point of violating the Constitution.

Our case is different from a simple *Shaw* case, as our case involves the contention—and demonstration—that the "packing" of black supermajorities into majority-black districts, to a degree that is unwarranted and unconstitutional, has particular negative effects *not* only on those within the packed districts, but also on black voters outside the packed districts. Let us imagine that, even though the drafters of this redistricting plan were doggedly looking for concentrations of black voters to pack into majority-black districts, the majority were right that it *might conceivably be true* that it just so happened that every member of ADC (a large statewide organization of black voters) was left behind and not swept up in that hunt for black voters. Conceivable, though we respectfully submit it is highly unlikely. Yet it would still have a specific detrimental effect on ADC and its members, who were among the leftover people left behind in districts that were more majority-white than they constitutionally should have been. ADC and its members would then find themselves, fragmented into tinier black populations in super-majority white districts, much less able 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). To deny standing here, to an organization such as ADC, is to deny that "packing" has harms that go beyond the mere dignitary into the reality and practicalities of politics. The majority failed to inquire whether the unconstitutional race-based plan would affect ADC's (and its members') ability to secure the gains, through the political process, that ADC in particular exists to pursue. Had the majority asked that question, the answer undoubtedly would have been "yes."

Second, as the dissent recognized, ALBC J.S. App. 209-210, n.21, individual ADC appellants Stallworth and Pettway have standing individually, as they resided and voted in former House district 73, which was in Montgomery County. The plan challenged in this case abolished that district, "moving" it (i.e., transferring that district number) to another part of the state. As the dissent explained—citing testimony from Committee chair McClendon—that district was abolished *because of* the plan drafters' racial percentage goal. They were determined to bring more black people into surrounding districts, because, as they increased the overall population levels of those surrounding districts, they (in their view) needed more black people to keep the percentages constant. They found those black people by abolishing House district 73. ALBC J.S. App. 199-200. Thus Stallworth and Pettway have been directly affected by the utilization of unconstitutional quotas; the district in which they used to vote has been abolished because of race. (The majority apparently felt it dispositive that it is unclear whether they are now in a packed super-majority black neighboring district. If they are, then their standing would be clear. If they are not, then they are relegated to being among a smaller minority

of black voters in a majority-white neighboring district, where their ability to influence elections along with black neighbors has been reduced by the overall racial balkanization. Thus they would have standing either way, even if it were necessary to focus only on where they vote now, as opposed to focusing also on the abolishment of their former district.)

At the very least the case presents issues about the law of standing that warrant full review, such that the Court should (as to this claim) carry the "standing" question of jurisdiction with the case for briefing and argument. As the court below recognized, the ALBC appellants do have standing with regard to this claim. They have raised the claim in No. 13-895. The claim is therefore before the Court; and it would be most fair to allow the ADC appellants to participate in regard to that claim as well, and to obtain full review on the question of their standing.

II. THE STATE'S REDISTRICTING PLAN HAD THE PURPOSE AND EFFECT OF DILUTING BLACK VOTING STRENGTH.

As to the vote-dilution claims, the District Court recognized that the ADC appellants do have standing. The rejection of those claims was error on both legal and factual grounds.

The District Court addressed only part of the ADC vote-dilution claim, namely that part concerning the elimination of majority-black House districts in Jefferson County and Montgomery County. ALBC J.S. App. 116-17. It failed to address the broader claim, that by its combination of packing black voters into super-majority districts and also fragmenting the remaining minority population among districts where their votes would be ineffective, the State

intentionally diluted minority voters' opportunity to participate equally in the political process.

As to the latter claim, the District Court erroneously concluded that Section 2 only reached the potential retention of additional majority-minority districts, and not the broader claim of intentional minimization of minority voting strength. The District Court saw, correctly, that the Voting Rights Act does require creation of coalition or other non-majority districts, *Bartlett v. Strickland*, 556 U.S. 1 (2009), and it does not require maximization of minority opportunities. *Johnson v. DeGrandy*, 512 U.S. 997 (1994). It erred, however, in failing to consider whether the intentional elimination of such districts, where adherence to racially neutral redistricting criteria would lead to their creation and retention, violated the Voting Rights Act and the Constitution. Even while deciding that there was no Section 2 obligation to create such districts in *Bartlett*, this Court has recognized that their intentional elimination of districts "would raise serious questions under both the Fourteenth and Fifteenth Amendments", especially amid the intensely race-conscious redistricting by the State. *Bartlett*, 556 U.S. at 24. This is not a case, like *Georgia v. Ashcroft*, 539 U.S. 461 (2003), where minority districts were trimmed to increase black influence in adjacent districts; rather, the State packed and fragmented the minority population in order to eliminate or avoid majority districts and coalition districts alike.

As to the Section 2 results claim, the majority of the District Court rejected these contentions, first, because the ADC appellants did not propose a *state-wide* map that included additional majority-black districts in those counties. ALBC J.S. App. 117-18. That is, we proposed maps for those counties in

particular, demonstrating that their black populations were large enough, in each county, for one more black-majority House district than the State had created. However, because the ADC appellants did not propose a state-wide map, the majority indicated that this was fatal at the first step under *Thornburg v. Gingles*, 478 U.S. 30 (1986).

The majority's thinking, apparently, was that we did not show that there could be a map that included more majority-black districts *in total* than the State created. This would be a valid concern, *if* there was reason to think that our proposed districts would have a domino effect that would destroy other majority-black districts that existed in the State map. While this sort of effect could theoretically happen in some situations, the majority erred because there was no reason whatsoever to suspect that it was a likelihood in this case. There is no suggestion that our proposed maps for Jefferson and Montgomery counties necessitated withdrawing black voters from majority-black districts in other counties, or that the alternative districts would not have had effective black majorities.

When a plaintiff shows that additional black-majority districts could be retained or created, it is generally up to the State (or other jurisdiction), not the plaintiffs, to then propose how other districts will work around that. *Perry v. Perez*, 132 S.Ct. 934 (2012); *Wise v. Lipscomb*, 435 U.S. 535, 540 (1978). Thus, for the ADC appellants to have proposed a state-wide map would have been presumptuous and pointless, in the absence of any case-specific fact-based reason to suspect that retaining other majority-black districts would have been impossible. The State, in working up a map that included the ADC appellants' additional

proposed majority-black districts in Montgomery and Jefferson counties, would presumably have done what the State actually did in its own redistricting efforts: start with the majority-black districts, and then work in other districts around them. ALBC J.S. App. 34.

The majority rejected our proposal for Jefferson County, second, because it did not comply with the State's newly-chosen two percent population deviation standard; again the majority deemed this fatal at the first *Gingles* step. ALBC J.S. App. 118. But this was not a legitimate *per se* bar to our proposal, and the majority cited no case supporting the view that there is such a *per se* bar under *Gingles*. The two percent standard is certainly not required by the Constitution. (This Court's recent summary affirmance in *Kostick v. Nago*, No. 13-456, on January 21, 2014, demonstrates that there certainly is no such Constitutional requirement.). A State's choice to create such an unnecessarily stringent standard might be deserving of some weight in the consideration of the totality of circumstances; or, on the contrary, the choice might itself be recognized as having been part of an overall *unlawful* set of choices that dilute minority strength by standing in the way of some constitutionally-permissible majority-black districts. The question would require a degree of nuanced factual assessment that the majority did not give in this case. In any event, each of the illustrative districts was over 60 percent black and had a sufficient black population to retain a substantial black population majority within a two percent or zero deviation standard.

The majority also indicated that, even if the ADC appellants' proposals for Jefferson and Montgomery counties passed the first *Gingles* step, they failed at the "totality of the circumstances" step. This

conclusion—like the conclusion that we failed to prove that the State's *purpose* was to reduce black voting—was tainted by the incorrect conclusion (as discussed earlier herein) that the State was required by Section 5 to pack black voters into certain districts, and that such action was legitimate. In addition, the majority failed to adequately consider or, indeed, even address: (a) the unnecessary and rampant county-splitting, with its impact on black voting strength as discussed by the ALBC appellants in No. 13-895, which raises a suspicion of discriminatory purpose under *Arlington Heights v. Metropolitan Housing Development Corp*., 429 U. S. 252 (1977), as it is a marked departure from the redistricting criterion normally given great weight; (b) the evidence of discriminatory animus against black voters in the majority party of the State Legislature, as reflected in a tape-recorded conversation among legislators that was discussed in *Shelby County*, 133 S.Ct. at 2646-47 (Ginsburg, J., dissenting); and (c) the evidence of anti-Hispanic animus in the State Legislature, as reflected in the decision in *Central Alabama Fair Housing Center, et al. v. Magee*, 835 F.Supp.2d 1165 (M.D. Ala. 2011), which is also relevant insofar as the case involved the possibility of a Senate district that would allow a cross-racial coalition of black and Hispanic voters. Ultimately, this Court should at least vacate the judgment below on the dilution issue (both effect and purpose) and remand for further factual consideration.

Although factual findings are viewed deferentially, we respectfully submit that the majority's factual findings on dilution are fatally flawed. To the extent they address the ADC claims, they are rooted in the premise that the race-driven districting discussed in the prior section of this filing was not only lawful but required. Once that faulty premise is removed—i.e.

once one recognizes the race-driven redistricting as highly suspect and indeed unlawful—the rest of the picture (including the parts which the District Court majority did not reckon with) comes into a different focus. We ask the Court to recognize that, upon reversal on the gerrymandering issue discussed earlier in this filing, the appropriate course is a remand for further consideration on the dilution issue as well.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and reverse the judgment of the District Court for the Middle District of Alabama.

Respectfully submitted,

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March 14, 2014

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Filed 01/14/14]

2:12-CV-00691-WKW-MHT-WHP
(Three Judge Court)

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*,

Plaintiffs,

v.

THE STATE OF ALABAMA, *et al.*,

Defendants.

2:12-CV-01081-WKW-MHT-WHP
(Three Judge Court)

ALABAMA DEMOCRATIC CONFERENCE, *et al.*,

Plaintiffs,

v.

STATE OF ALABAMA, *et al.,*

Defendants.

THE ALABAMA DEMOCRATIC CONFERENCE
PLAINTIFFS' NOTICE OF APPEAL
FROM FINAL JUDGMENT

The Alabama Democratic Conference Plaintiffs,[1] Alabama Democratic Conference, Framon Weaver, Sr., Stacey Stallworth, Rosa Toussaint and Lynn Pettway, hereby notice their appeal to the Supreme Court of the United States, from the December 20, 2013 Final Judgment (Doc. 205) and accompanying Opinion (Doc. 203).

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: January 14, 2014.

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[1] Throughout the litigation, these Plaintiffs were referred to as the Newton Plaintiffs. Representative Newton, lead Plaintiff, passed away after the trial and the Court re-captioned the case as styled above. See Doc. 203; Doc. 205; see Doc. 204, n. 1.

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