No. 13-1138

In the
Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, *et al.*
Appellants,
v.
ALABAMA, *et al.*
Appellees.

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

APPELLEES' JOINT MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED (RESTATED)

The Alabama Democratic Conference (ADC) attempts to revive two claims on appeal. The questions relevant to these claims are as follows:

Racial Gerrymandering Claim:

1. Did the ADC establish its standing to challenge the redistricting plan in total or in part as violating the Equal Protection Clause, even though the ADC did not identify any districts in which the ADC's members purportedly reside?

2. Whether, after a four-day bench trial, the district court clearly erred by crediting the testimony of the redistricting plans' drafters and determining as a factual matter that race was not the predominant motivating factor behind the plans?

3. If the district court did clearly err in determining that race was not the predominant factor behind the State's redistricting plans, were the plans nonetheless a narrowly tailored means of complying with the Voting Rights Act?

Vote Dilution Claim:

4. Did the State dilute the black vote by failing to maintain aspects of a previous partisan gerrymander when: (a) a previous legislature had spread black population into majority-white districts in an admitted partisan gerrymander that resulted in disparities in population between districts, (b) there is no way to create an additional majority-black district on a state-wide basis within the standard of population deviation, and (c) the percentage of majority-black districts on a state-wide basis (23% Senate, 27% House) is proportional to the black voting population (25%)?

PARTIES TO THE PROCEEDING

All parties are listed in the jurisdictional statement.

There were two groups of plaintiffs below, and the other group has also appealed in Appeal No. 13-895. The plaintiffs in the two appeals incorporate each others' arguments and some of the arguments in this brief are relevant to the defendants' brief in the related appeal.

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MOTION TO DISMISS OR AFFIRM

The Appellees in this matter—Alabama, its Secretary of State, and the co-chairs of its Legislature's Reapportionment Committee—respectfully ask this Court to summarily affirm the judgment below.

The ADC plaintiffs seek to revive two claims in this appeal, neither of which has legal or factual merit. First, the plaintiffs claim that the State of Alabama's legislative redistricting plans are unconstitutional in their entirety because they were purportedly motivated by racial considerations. The district court gave three reasons to reject that claim, any of which should result in affirmance. Indeed, the district court held a four-day bench trial on this claim and found *as a matter of fact* that race was not the predominant factor behind these plans. Similarly, the U.S. Department of Justice investigated and rejected this claim, preclearing the State's plans under the Voting Rights Act. Second, the plaintiffs claim that the State diluted the black vote by failing to maintain districts that were created by a previous legislature in an admitted partisan gerrymander. This claim fails under the facts and the law.

Summary affirmance is also the right result for equitable reasons; months have passed between the district court's judgment and the plaintiffs' filing of their jurisdictional statement. In the meantime, and pursuant to a settlement entered in another case with the DOJ, the dissenting district judge in this case ordered all candidates to qualify for election in the new districts by Feb. 7, 2014. *See United States v. Alabama et al.*, 2:12-cv-00179-MHT-WC, 2014 WL 200668 (M.D. Ala. Jan. 17, 2014). The parties agreed

to this date so that the State could comply with the timing requirements of the Uniform and Overseas Citizens Absentee Voting Act. Accordingly, candidates have already qualified (or not) to run in the State's new districts, and the State has already begun organizing the ballots to mail overseas for the June primary. The Court should not disrupt this court-ordered and DOJ-approved election schedule because of this fact-bound and meritless appeal.

STATEMENT OF THE CASE

Like their co-plaintiffs in Appeal No. 13-895, the ADC plaintiffs overlook key facts that undermine their claims, including live testimony that the district court expressly credited. Most importantly, the plaintiffs are simply wrong, as a factual matter, when they say that the drafters of these plans were predominantly motivated by racial considerations.

I. The Legislature drew the new maps to strictly comply with federal law.

A few background facts about the Legislature's redistricting effort are important.

A. The Legislature strictly complied with one-person-one-vote, which limited opportunities for manipulation and gamesmanship.

The 2010 census revealed that Alabama's existing districts had become grossly mal-apportioned. Under this Court's precedents, the Legislature had an obli-

gation to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). The Alabama Legislature created a redistricting committee that held public hearings at 21 locations in the state, consulted lawmakers of both parties, and hired a redistricting expert to use modern computer modeling. ALBC J.S. App. 30-36.[1] The Committee ultimately developed proposals to redistrict the Legislature, which were enacted in substantial form on party-line votes. They were submitted for preclearance under Section Five of the Voting Rights Act and approved by the DOJ.

After listening to four days of live witness testimony about this process, the district court found as a matter of fact that "the main priority of the Legislature was to comply with the constitutional mandate of one person, one vote." ALBC J.S. App. 142. "[T]he consistent testimony of [the plans' drafters] established that the constitutional requirement of one person, one vote trumped every other districting principle." ALBC J.S. App. 151. *See also* App. 94 (recounting testimony); ALBC J.S. App. 105 (expressly crediting testimony). "Above all," the Legislature's goal was to "create more equality among districts throughout the State." ALBC J.S. App. 144.

To achieve its primary goal of population equality, the Legislature drew new electoral maps with population differences that do not exceed 2%. *See*

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[1] Like the ADC plaintiffs, the defendants cite to the appendix to the jurisdictional statement in Appeal No. 13-895 as "ABLC J.S. App. ___"

ALBC J.S. App. 6. The drafters adopted this 2% deviation figure—which allows for plus or minus 1 percent deviation from the "ideal" district—for essentially three reasons.

First, that deviation represents stricter compliance with one-person, one-vote than the State's last two controversial redistrictings, where the maps allowed deviations of up to 10%. As the lower court explained, the Democrat-controlled legislature in 2001 had engaged in a "successful partisan gerrymander" by using the 10% deviation to "systematically underpopulate[] majority-black districts at the expense of majority-white districts that the Legislature, in turn, overpopulated." ALBC J.S. App. 145. *See* ALBC J.S. App. 17-24 (recounting history of the 2001 gerrymander). The partisan gerrymander meant that, with just 51% of the state-wide vote in 2002, the Democratic Party controlled 71% of the Senate seats and 60% of the House seats. ALBC J.S. App 24. The use of a 2% deviation necessarily "eliminated the partisan gerrymander that existed in the former districts." ALBC J.S. App. 146. It also "reduced, from the outset," the Legislature's "ability to pack voters for any discriminatory purpose, whether partisan or racial." ALBC J.S. App. 144.

Second, the chair of the legislative redistricting committee testified, and the district court expressly found, that "the Committee wanted to avoid future litigation about compliance with the requirement of one person, one vote." ALBC J.S. App. 94. The chair's concerns were well-founded. A three-judge district court in the Eleventh Circuit had previously cast doubt on the presumptive constitutionality of a 10% deviation. *See* J.S. App. 28-29 (discussing *Larios v.*

Cox, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004)). And the Democrats' partisan gerrymander in 2001 had been the subject of controversy and litigation because of population disparities between districts. *See* ALBC J.S. App. 4-5.

Third, the 2% deviation represents the best practices of other States. *See* ALBC J.S. App. 29-30. *See also* ALBC J.S. App. 106-107 (recounting expert testimony about other States' practices). California, Florida, Georgia, Illinois, Indiana, Iowa, Minnesota, Nevada, Oklahoma, Utah, Virginia, Washington, and Wisconsin all used a 2% deviation or less to redistrict one or both houses of their legislatures after the 2010 census. ALBC J.S. App. 30.

The plaintiffs have *never* proposed a competing state-wide redistricting plan with an overall deviation in population of 2 percent or less. *See* ALBC J.S. App. 146. Indeed, even the partial plans they proposed for certain areas failed to meet the 2 percent deviation standard.

B. The Legislature strictly complied with the Voting Rights Act.

The district court also expressly credited the testimony of the plan's drafters that, after one-person one-vote, their next highest goal was to comply with the Voting Rights Act. *See* ALBC J.S. App. 94 (recounting testimony); ALBC J.S. App. 105 (crediting testimony). The Alabama Legislature had to thread the needle between compliance with Sections Five and Two of the Voting Rights Act in order to ensure that the plans were precleared by DOJ and with-

stood any vote-dilution litigation. This was a challenging task for three reasons.

First, because the 2001 partisan gerrymander had systematically under-populated majority-black districts and those districts had also experienced population losses, the majority-black districts were the very districts that needed to change the most. They all needed to "grow" with additional population. *See* ALBC J.S. App. 148 (quoting state senator that "[e]very minority district in this state had lost population and had to grow"). The district court expressly credited "[t]he trial testimony" of the plan's drafters "that the primary reason they added population to majority-black districts was because those districts were severely underpopulated." ALBC J.S. App. 150.

Second, black legislators and other black leaders told the drafters that only districts with sizable black majorities, not bare majorities, would allow black voters to elect their candidates of choice. At least two black legislators, for example, suggested to the plan's drafters that majority-black districts needed to have a black population of at least 62 percent. *See* ALBC J.S. App. 31, 99. Other black legislators proposed changes to their own districts, which were incorporated by the plan's drafters and which created or maintained 60-plus percentages of black voters. *See* ALBC J.S. App. 96. Similarly, Dr. Joe Reed, who has led the ADC since 1970, testified that districts must be at least 60 percent black, and sometimes more than 65 percent black, to allow black voters to elect the candidate of their choice as required by the Voting Rights Act. ALBC J.S. App. 76. *See also* ALBC J.S. App. 165 (expressly crediting Reed's testimony).

In Alabama's previous DOJ-approved plans, the majority-black districts have always had black population percentages in these ranges. *See* ALBC J.S. App. 46-56 (charts comparing black population percentages). In the 2001 plan adopted by the Democrat-controlled legislature, for example, many of the majority-black districts had black-population percentages in the high 60s and low 70s. *See id.* Black leaders told the redistricting committee (and the district court) that these percentages remain necessary because the percentage of black persons in a district does not accurately indicate the percentage of black persons who vote:

> And I just want to say why 62 percent . . . Many times a population of a district is not reflective of the voters at all in the district. Sometimes a lot of people don't vote. Sometimes a lot of people can't vote. They might be in prison or other kinds of institutions. Sometimes a lot of folks are discouraged for one reason or another. So I would hope that 62 percent is a minim[um] for the majority African-American districts.

C-21 p.16 (comments of black legislator at committee hearing).

Third, in 2006, Congress amended Section Five of the Voting Rights Act, which required Alabama to obtain DOJ preclearance of its redistricting plans, to overturn this Court's redistricting decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). In *Georgia*, this Court said that Section Five allows covered States to choose between *either* creating "safe" districts for minorities *or* spreading out minority voters to give them influence in a greater number of districts. *Id.*

at 480. *See generally* Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 Election L.J. 21, 36 (2004). Congress added new language to reject this reasoning and, instead, to affirm the prior practices of DOJ. DOJ had previously held that a plan is illegal under Section Five if the candidate who minorities voted for under the benchmark plan is not *equally likely* to win under the new plan, and Congress adopted that interpretation. *See* 42 U.S.C. § 1973c(b)-(d).

Applying Section Five in the redistricting context before *Georgia v. Ashcroft*, the DOJ declined to preclear plans that reduced, even marginally, the black voting-age percentages in majority-black districts. *See* C-35 (objection letter to Virginia County when black majority reduced from 55.9% to 55.3%). Accordingly, it is undisputed that the drafters of Alabama's plans interpreted Section Five to require them to keep the percentages of minority voters roughly constant in the majority-minority districts so that the candidates supported by those voters were *equally likely* to win. *See* ALBC J.S. App. 175.

C. The plans accomplished the Legislature's objectives and the Department of Justice approved them.

Alabama's plans were successful in complying with the Voting Rights Act. The plans kept the same number of majority-minority districts in the Senate and added an additional majority-minority district in the House. ALBC J.S. App. 36, 46-48. The plans also kept the minority population in each majority-black district relatively stable. Although not identical, the

majority-black districts in the 2010 plan are comparable to the districts in the benchmark 2001 plan, which was drafted by black leaders and approved by the Democrat-controlled Legislature. *See* ALBC J.S. App. 46-56.

The DOJ investigated allegations that the plans were racially motivated and diluted minority voting strength. Numerous witnesses testified that they were interviewed by the DOJ during its investigation, including the principal drafters and opponents of the plans. Similarly, counsel for the plaintiffs sent multiple letters to the DOJ in which they made the same arguments about racial intent and effect that they made at trial. *See* S-DMcCX-454 &455 (letters). But the DOJ rejected these allegations and approved the plans. ALBC J.S. App. 61, 162-63, 183.

The drafters of Alabama's plans also had other traditional redistricting goals in mind, such as minimizing incumbent conflicts and preserving the hearts of existing districts. ALBC J.S. App. 33. They largely succeeded in meeting these goals as well. ALBC J.S. App. 57-58.

II. The 2001 plans' systematic under-population of majority-black districts necessitated state-wide changes.

As explained above, the Democrat-controlled legislature in 2001 adopted a plan that systematically under-populated majority-black districts. The plan allocated excess black population into majority-white districts to create "influence" or "cross-over" districts to help elect white Democrats. *See* ALBC J.S. App. 17-25. Over time, in light of organic population

changes, this intentional mal-apportionment grew worse until the majority-black districts were severely under-populated. The 2010 census revealed that nine of the majority-black House districts were under-populated by more than 20 percent as compared to the ideal district. ALBC J.S. App. 18. Similarly, seven of the eight majority-black Senate districts were under-populated by more than 10 percent, and two more than 20 percent. ALBC J.S. App. 19.

A. The plans moved House districts in Montgomery and Birmingham to maintain black voting power, not dilute it.

The under-population of majority-black districts was the worst in Montgomery County, which includes the City of Montgomery, and Jefferson County, which includes the City of Birmingham. *See* ALBC J.S. App. 36-39.

Under the benchmark 2001 plan, Montgomery County was divided into six House districts, three majority black (76, 77, 78) and three majority white (73, 74, 75). ALBC J.S. App. 37. Districts 78 and 77 were majority-black districts represented by black legislators, and they were respectively the most under-populated (-32.16%) and fourth most under-populated (-23.12%) in the State. ALBC J.S. App. 47. District 73 was a majority-white district with a sizable black population that was represented by a white Democrat named Joe Hubbard. ALBC J.S. App. 35.

Representative Thad McClammy, a black representative from Montgomery, proposed a new map for the area that solved the under-population problem. The map expanded the borders of the under-

populated districts to consume all of the population of District 73, eliminating that majority-white district. ALBC J.S. App. 35. This map was the consensus recommendation of the black legislators in the Montgomery area. ALBC J.S. App. 35. Understandably, Representative Hubbard did not like the McClammy map. But the chair of the redistricting committee rejected Hubbard's counterproposal because, with the McClammy map, "I could make several people happy. With Representative Hubbard's, I would just make him happy." Trial Trans. Vol. 3 at 233, lines 12-23. The drafters also testified that the McClammy map had the beneficial effect of allowing them to draw a new district in the suburbs of Birmingham, which had experienced substantial population growth. *See* ALBC J.S. App. 37.

With some modest changes, the Legislature adopted the McClammy map to redistrict Montgomery County. The approved plan used the population of House District 73 to populate the neighboring districts. The approved plan also extended two additional districts into Montgomery County because those districts needed additional population. App. 118. The plan thus divided Montgomery County into seven House districts—four majority black and three majority white. ALBC J.S. App. 37.

A similar scenario played out in Jefferson County. As in Montgomery County, the majority-black House districts were all grossly under-populated. ALBC J.S. App. 37. In 2001, Jefferson County was divided into nine majority-black districts (52 through 60) and nine majority-white districts. App. 38. Six of the nine majority-black districts were under-populated by roughly 20% or more. ALBC J.S. App. 47. These

nine majority-black districts were collectively under-populated by 76,427 people, which is the population of approximately 1.5 "ideal" House districts. Accordingly, as they did in Montgomery, the drafters used the population of one of the under-populated districts (District 53) to bring the population of the surrounding districts up to the ideal population level. ALBC J.S. App. 38. This plan had the beneficial effect of allowing the drafters to create an additional majority-black House district in the suburbs of the City of Huntsville, where the black population was growing. *See id.*

But, unlike in Montgomery County, certain districts adjoining Jefferson County were grossly *over*-populated. The suburbs of the City of Birmingham extend into Shelby County, which is one of the fastest growing counties in the State. ALBC J.S. App. 37. In the 2001 House plan, all or part of six districts (41, 42, 43, 48, 49, and 50) lay in Shelby County. *See* D-412. These districts were *over*-populated by +60.76%, +6.19% +23.14% +18.73%, +14.26%, and +21.65% respectively. *Id.* Inversely proportional to Jefferson County, these districts had an excess of 63,000 people, enough for more than one additional House district. Accordingly, the drafters used this excess population (and the extra majority-white district that was dissolved in Montgomery) to create an additional majority-white district in Shelby County. *See* ALBC J.S. App. 37.

B. The plans modified various Senate Districts to equalize population.

The ADC's jurisdictional statement mentions Senate districts in Montgomery County, Madison County, Talladega County, and Washington/Mobile Counties. The allegations about these districts come in two types.

First, the ADC alleges that Senate 26 in Montgomery County is a majority-black district that has been "packed" with black voters. J.S. 6-7. Like so many other majority-black districts, Senate District 26 had to grow in population because it was underpopulated by 11 percent. ALBC J.S. App. 152. Although the black-voting-age percentage of the new district is more than 70 percent, District 26 has always had a high percentage of black voters. ALBC J.S. App. 153. In 1993, it was 70 percent black. In 2001, it was 71 percent black. As the district court expressly found, these percentages "evidence[] consistent concentrations of black population in the City of Montgomery," not racial gerrymandering. ALBC J.S. App. 153.

And, far from being an arbitrary gerrymander, District 26's new lines make sense under traditional redistricting criteria. *See* ALBC J.S. App. 152-253. The 2001 plan had split the largely black population of the City of Montgomery between Senate Districts 25 and 26, combining each of those urban populations with sparsely-populated rural areas. The new District 26 follows the old district's lines except that it is more compact; it is now "concentrated in the urban northeast corner of Montgomery County where the City of Montgomery lies instead of stretching

across the entire county to envelop sparsely populated rural precincts." ALBC J.S. App. 153.

Second, the ADC complains that the plans altered "minority opportunity or coalition districts" in Madison County, Talladega County, and elsewhere. J.S. 10. These districts had been gerrymandered in the Democrats' 2001 partisan redistricting to have a large enough black population to increase the electoral chances of a white Democrat, but not enough to establish a black majority. The district court expressly found that the need to equalize population and maintain the population of adjacent majority-black districts necessarily changed these "opportunity" districts. *See* ALBC J.S. App. 39-40, 61-62, 70-74, 79-81, 166-173.

ARGUMENT

I. The Court should summarily affirm the district court's rejection of the racial gerrymandering claim.

The ADC plaintiffs argue that the plans violate the Equal Protection Clause *in their entirety* because they purportedly categorize voters on the basis of race "to an unconstitutional and unjustified degree." J.S. 14. Not even the dissenting district judge below endorsed that argument. *See* ALBC J.S. App. 227 ("With this dissent, I am not saying that the plaintiffs should prevail as to all the districts."). The plaintiffs' state-wide racial gerrymandering claim fails for three reasons that are unique to the facts of this case.

A. The ADC plaintiffs do not have standing, and the ALBC plaintiffs have effectively forfeited this claim.

As a threshold matter, the district court correctly held that the ADC plaintiffs do not have standing to make their state-wide racial gerrymandering claim.[2] To meet the "'irreducible constitutional minimum of standing,'" a plaintiff must show (1) "'an injury in fact,'" (2) "'a causal connection between the injury and the conduct complained of,'" and (3) that a "'favorable decision'" would be "'likely'" to redress the injury. *United States v. Hays*, 515 U.S. 737, 742-43 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). When considering another racial gerrymandering claim, this Court explained that a plaintiff who lives in an allegedly racially gerrymandered district has standing to challenge the denial of equal treatment, but "where a plaintiff does not live in such a district, he or she does not suffer those special harms" and, therefore, lacks standing. *Hays*, 515 U.S. at 745. Unless the record contains evidence that a plaintiff lives within an allegedly racially gerrymandered district, "that plaintiff would be asserting only a generalized grievance," *id.*, which this Court has "repeatedly refused to recognize," *id.* at 743. And when a district court has entered a final judgment after trial, as in this case, these facts "must be supported adequately by the evidence ad-

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[2] The district court also held that the ADC plaintiffs lack standing to make a gerrymandering claim as to any specific district. ALBC J.S. App. 139. The ADC's jurisdictional statement does not attempt to appeal any district-specific claims.

duced at trial." *Id.* (internal quotation marks omitted).

As the district court noted, the ADC plaintiffs did not "clearly identify the districts" where their "individual members" live "under the Acts." ALBC J.S. App. 138. The absence of such evidence in the record is fatal to their assertion of standing. Nor do the ADC plaintiffs attempt to show that they meet the requirements of *Hays*; instead, they argue that "the 'packing' of black supermajorities into majority-black districts" affects black voters everywhere. J.S. 21. This Court has already rejected such an argument:

> The fact that Act 1 *affects* all Louisiana voters by classifying each of them as a member of a particular congressional district does not mean—even if Act 1 inflicts race-based injury on *some* Louisiana voters—that *every* Louisiana voter has standing to challenge Act 1 as a racial classification. Only those citizens able to allege injury as a direct result of having *personally* been denied equal treatment may bring such a challenge, and citizens who do so carry the burden of proving their standing, as well as their case on the merits.

Hays, 515 U.S. at 746 (internal quotation marks and citations omitted).

The ADC plaintiffs make a last-ditch effort to argue that two individual appellants have some limited degree of standing because they "resided and voted in former House district 73," which "was abolished" to populate adjacent majority-black districts. J.S. 22. But as the district court concluded, the plaintiffs failed to show where those individuals live "under the Acts." ALBC J.S. App. 138. Therefore, they have

not shown whether they "were personally subjected to any racial classification *when they were assigned to their districts*." *Id.* (emphasis added).

Finally, the ADC plaintiffs argue that their own standing is irrelevant because the ALBC plaintiffs in Appeal No. 13-895 have standing to bring a racial gerrymandering claim. But the ALBC plaintiffs have effectively forfeited that claim. Unlike the ADC plaintiffs, the ALBC plaintiffs devote only two pages of their brief to their racial gerrymandering claim. *See* ALBC J.S. at 39-40. Most importantly, the ALBC plaintiffs did not challenge as clearly erroneous the district court's express fact-finding that race was not the predominant motive behind these plans. *See* Mot. to Affirm, No. 13-895, at 23-25. The ADC plaintiffs cannot piggyback on the ALBC plaintiffs' standing.

B. The district court's fact-findings are not clearly erroneous.

On the merits, the ADC plaintiffs' racial gerrymandering claim runs headlong into the district court's express fact-findings. District lines are facially race-neutral, and strict scrutiny applies only if race is the "predominant factor motivating the legislature's redistricting decision." *Bush v. Vera*, 517 U.S. 952, 959 (1996) (internal quotations omitted). "In a case such as this one," a plaintiff "must show *at the least* that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and "that those districting alternatives would have brought about significantly

greater racial balance." *Easley v. Cromartie*, 532 U.S. 234, 258 (2001) (emphasis added). Here, the district court found as a factual matter—based on four days of live witness testimony—that the predominant purpose of these plans had nothing to do with race, and the plaintiffs have not shown otherwise.

The plaintiffs have not meaningfully argued that the district court's express fact-finding on this front is clearly erroneous. It is amply supported by the drafters' testimony, which the district court expressly found to be credible. It is also supported by the manner in which the Legislature redistricted. As the district court explained, if the drafters had wanted to engage in a race-based gerrymander, they would have used a 10 percent deviation to "pack" black voters into districts by overpopulating those districts. *See* ALBC J.S. App. 145. Instead, they used a tight 2 percent deviation, which "reduced the potential for . . . discrimination, whether in favor of or against a racial minority." ALBC J.S. App. 145. They also slightly *under*-populated the "vast majority" of majority-black districts, which gave the voters in those districts proportionally *greater* representation. The plans also kept incumbent conflicts to a minimum, ALBC J.S. App. 57, kept the districts relatively compact, and preserved the hearts of most existing districts. ALBC J.S. App. 142. This is not the stuff of a state-wide racial gerrymander.

Other aspects of the plans also support the district court's fact-findings. The purported "packing" that the plaintiffs complain about was proposed by black political leaders. Black leaders testified that majority-black districts should generally be more than 60% black to ensure that black voters can elect

their candidates of choice as required by the Voting Rights Act. ALBC J.S. App. 76-77. And black legislators themselves proposed some of the changes that the plaintiffs cite as evidence of packing. ALBC J.S. App. 57-58. Finally, simple arithmetic refutes plaintiffs' claim that these districts "diluted black voting strength . . . in the State overall." J.S. 15. The percentage of majority-black districts on a state-wide basis (23% Senate, 27% House) is proportional to the black voting population as a whole (25%). Accordingly, the plans guarantee that black voters have representation in the Legislature commensurate with their share of the population.

The plaintiffs' only response to the district court is to set up a straw man. Specifically, the plaintiffs argue that "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." J.S. 16. The district court's reasoning makes no sense, the plaintiffs argue, because population equalization "is always going to be, effectively, number one on the list of considerations." J.S. 16. There are at least two problems with the plaintiffs' argument.

First, it mischaracterizes the district court's fact-findings. The district court's point was not just that the Legislature's first priority was population equalization as a general matter. Instead, the district court expressly found that the need to equalize population drove the drafters to make the specific changes that the plaintiffs cite as evidence of racial gerrymandering. The drafters "had to repopulate severely underpopulated majority-black districts and depopulate severely overpopulated majority-white districts."

ALBC J.S. App. 152. According to the district court, the evidence established that "the State followed the guideline of an overall deviation of 2 percent, without exception, and then applied the following neutral redistricting principles when feasible: to preserve the core of existing districts; to avoid incumbent conflicts; to draw compact and contiguous districts; and to appease incumbents by accommodating their preferences whenever possible." ALBC J.S. App. 142.

Second, the district court addressed the overall goals of the Legislature because the plaintiffs were challenging those goals. The plaintiffs have always argued that the *entire* redistricting plan is unconstitutional because *one* of the Legislature's overall goals was to "make sure that each black-majority district . . . maintained its prior percentage of black population." J.S. 18. They argued below and on appeal that *this* goal predominated over all other redistricting criteria. The district court's fact-findings merely reflect and reject the plaintiffs' argument.

The district court did not clearly err when it rejected the plaintiffs' contention that the Legislature was predominantly motivated by race. *Cf.* ALBC J.S. App. 163 ("Let us not forget too that the Attorney General of the United States precleared these new districts."). Summarizing the relevant state-wide evidence, the district court explained:

> The Democratic leaders complain about maintaining the relative percentages of black population in districts they designed even after the voters of these districts elected these very Democratic leaders. The Democratic leaders complain of racial unfairness even though black legislators—Senator Rodger Smitherman and Rep-

> resentative Thad McClammy—helped draw the new lines for the majority-black districts. They complain of racial unfairness after they told [the redistricting committee] in public hearings that the majority-black districts need to be at least 60 percent black [under the Voting Rights Act]. . . . To suggest that race is the only dynamic at play here is absurd.

ALBC J.S. App. 162. In light of the evidence presented at trial, it was not clearly erroneous for the district court to find that race was not the predominant motivation for these redistricting plans.

C. The plans pass strict scrutiny.

The district court's effectively unchallenged fact-finding about the Legislature's predominant purpose is enough, by itself, to reject the plaintiffs' claim. But the record also establishes that, to the extent the drafters considered race, they considered race because they needed to consider race to comply with the Voting Rights Act.

First, Section Two of the Voting Rights Act requires the State to create and maintain districts that allow compact racial minorities to elect candidates of their choice. *See Thornburg v. Gingles*, 478 U.S. 30 (1986). Black legislators and political leaders suggested to the drafters and testified at trial that, to comply with Section Two, the black population of a majority-black district must usually be more than 60 percent and sometimes more than 65 percent. The district court expressly credited this testimony. ALBC J.S. App. 76-78. It is also consistent with the case law. *See Texas v. United States*, 831 F. Supp. 2d

244, 263 & n.22 (D.D.C. 2011) (65% "essentially guarantees" compliance with Voting Rights Act).

The dissenting district judge "disagree[d] with those factual determinations" and suggested that some unidentified lower percentage of black voters could comply with Section Two. ALBC J.S. App. 264. But that is contrary to what black political leaders told the redistricting committee and the district court, and it is also contrary to the history of successful Voting-Rights-Act-compliant redistricting in Alabama. As the district court explained, the drafters ensured that their plans would be consistent with the Voting Rights Act by following the example of the 2001 redistricting. The percentage of black voters in each current district "closely resemble[s] the percentages that the Black Caucus endorsed and helped to enact into law only a decennial census ago." ALBC J.S. App. 160. "[T]he plaintiffs offered no credible evidence" that the percentages "adopted only ten years earlier were no longer warranted" to comply with Section Two. ALBC J.S. App. 164.

Second, the drafters attempted to comply with Section Five by keeping the majority-black districts roughly the same as they had been. As explained above, Section Five was amended in 2006 to require covered states like Alabama to ensure that minorities in majority-minority districts have *an equal chance* to elect their favored representative as under the previous districting plan. *See supra* 7-8. Notwithstanding this goal, the State did not keep the percentages exactly the same. "13 House districts and 3 Senate districts have lower percentages of black populations than before," and "there are 5 majority-black House districts below 60 percent under

the new plan in contrast with only 2 majority-black House districts below 60 percent under the 2001 plan." ALBC J.S. App. 159-60.

The plaintiffs assert without any analysis that the district court's "reading of Section Five is mistaken" and that, in fact, Section Five did not require the State to keep black voting power relatively constant in majority-black districts. *See* J.S. 20. As the district court explained, however, the plaintiffs' view is contrary to the amended text, other court cases, and scholarly commentary. *See, e.g,* ALBC J.S. App. 180-81. And it is telling that the plaintiffs would fault the drafters of these plans for attempting in good faith to comply with Section Five of the Voting Rights Act. Section Five applied to Alabama at the time of this redistricting, and the plans secured preclearance from DOJ.[3] It would have been "irresponsible" for the Legislature not to comply with Section 5 because, without preclearance, the redistricting plans would have been unenforceable. *See Vera*, 517 U.S. at 991 (O'Connor, J., concurring). And the plaintiffs cannot seriously maintain that black voters would be better off if the Legislature had ignored the DOJ and intentionally enacted plans that would not have been precleared.

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[3] In any event, the proper interpretation of Section Five is not a legal question worth exploring through briefing and oral argument. In light of the district court's fact-finding that race did not predominate, there is no need for the State to assert compliance with Section Five as a compelling interest to survive strict scrutiny. And the right resolution of this issue is likely irrelevant going forward because no State is currently covered by the 2006 amendments to Section Five.

Finally, although the plaintiffs and dissenting judge call the drafters' target percentages "quotas," they are no more quotas than any other figure that might reasonably be necessary to ensure that a district complies with Section Two or Section Five of the Voting Rights Act. *See* ALBC J.S. App. 215 (defining a "racial quota" as any attempt to "achieve a set percentage of black population"). Indeed, the plaintiffs' theory that all such redistricting targets are constitutionally suspect "quotas" would call into question the constitutionality of the Voting Rights Act and this Court's longstanding interpretation of it. Under this Court's case law, "creating majority-black districts is the core remedy in voting rights cases." Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1428 (1991). Because of the institutional interests of the parties, this case would be an especially bad vehicle in which to explore legal theories that call into question the constitutionality of the Voting Rights Act or would require the Court to reconsider established case law interpreting the Act.

II. The Court should summarily affirm on the vote dilution claim.

The ADC plaintiffs allege two species of vote dilution under Section Two of the Voting Rights Act. Neither raises important legal issues, and no judge in the district court would have ruled in their favor on these claims. *See* ALBC J.S. App. 190 (dissenting judge expressly declining to reach these claims). The first is clearly barred by this Court's precedent and both claims were resolved by the district court based

on the specific facts of this case. The plaintiffs also failed to establish their standing to bring vote dilution claims. As with the racial gerrymandering claim, these vote dilution claims are uniquely suited to summary affirmance.

A. The ADC plaintiffs lack standing to bring a vote dilution claim.

The ADC plaintiffs lack standing to bring a vote dilution claim because they did not show that any of the ADC's members live in the affected districts. *See Hall v. Virginia*, 276 F. Supp. 2d 528, 531-32 (E.D. Va. 2003) (must live in district to bring VRA vote dilution claim); *Old Person v. Brown*, 182 F. Supp. 2d 1002, 1006 (D. Mont. 2002) (same). The district court did not separately address the ADC plaintiffs' standing to bring a vote dilution claim. But its reasoning about their lack of standing to bring an equal protection claim applies *a fortiori* to their standing to bring a vote-dilution claim under Section Two. *See supra* 15-17.

B. The Voting Rights Act does not require the State to maintain "influence" districts created in a partisan gerrymander.

On the merits of their first vote dilution theory, the ADC plaintiffs argue that, by failing to maintain certain aspects of the 2001 partisan gerrymander that favored Democrats, the newly constituted Republican-controlled Legislature diluted the black vote. The former Democrat-controlled Legislature intentionally under-populated majority-black districts

and spread the excess black population to adjacent majority-white districts. The gerrymandered plans created "influence" or "opportunity" districts where the black voting population was large enough to help a white Democrat be elected, but not so large that the black population could elect a black representative. The district court explained that, by equalizing the population between districts, the Legislature necessarily "eliminated the partisan gerrymander that existed in the former districts," which is "why both the Black Caucus plaintiffs and Democratic Conference plaintiffs have challenged the use of an overall deviation in population of 2 percent throughout this litigation and have refused to offer into evidence an alternative statewide plan for redistricting that conforms to this guideline." ALBC J.S. App. 146.

This dilution claim is fundamentally at odds with this Court's precedents. The Court has expressly held that the Voting Rights Act does not require the creation of coalition, influence, or other non-majority districts, *Bartlett v. Strickland*, 556 U.S. 1, 14-20 (2009), and it does not require the State to maximize minority political influence, *Johnson v. De Grandy*, 512 U.S. 997, 1016-17 (1994). But that is precisely the relief that the plaintiffs seek. They would read the Voting Rights Act to *compel* what this Court has held that it *allows*—"spreading out minority voters over a greater number of districts" to increase the number of elections that they influence. *Georgia*, 539 U.S. at 481. This Court rejected that claim just a few years ago when it held that Section Two "does not mandate creating or preserving crossover districts." *Bartlett*, 556 U.S. at 23.

The district court also rejected this claim based on the facts of this case. The plaintiffs assert that the district court "failed to address" their argument that the "combination of packing black voters into super-majority districts and also fragmenting the remaining minority population among districts" diluted the black vote. ALBC J.S. App. 23. But the district court expressly discusses this claim over three pages of the appendix. *See* ALBC J.S. App. 119-22. Even assuming that the law supported this kind of dilution claim, the district court rejected it because the ADC did not support it with evidence. The ADC's leader testified that majority-black districts must be at least 60 percent black under Section Two, but the ADC "failed to present any evidence of how the Legislature could have drawn, in a statewide plan, the same number of majority-black districts with 60 or more percent black voters in those districts with an overall deviation in population of 2 percent while still increasing the number of influence or crossover districts." ALBC J.S. App. 122.

Finally, the district court explained in granular detail that these contested influence districts were altered for population equalization and to preserve communities of interest. *See* ALBC J.S. App. 166-173. The plaintiffs do not argue that these findings are clearly erroneous; they simply ignore them. For example, the plaintiffs state that Senate District 22 "did not need to be changed at all." J.S. 11. But the district court found that Senate District 22 "bordered several severely malapportioned districts" and "the need to bring the neighboring districts into compliance with the requirement of one person, one vote served as the primary motivating factor for the

changes to District 22." ALBC J.S. App. 170. The drafters had to change District 22 because there was nowhere else to find population. A "practical, geographical feature . . . materially restricts redistricting options in Mobile County;" it borders the Gulf of Mexico to the south and east and the State of Mississippi to the west. ALBC J.S. App. 171.

Ultimately, the plaintiffs are arguing that the State must, as a matter of federal law, manipulate the populations of districts to preserve specific features of a previous partisan gerrymander. *Cf.* ALBC J.S. 161 (noting that "three white Democrats" who represent influence districts "testified in support of the plaintiffs' complaints"). That result would be contrary to the law and the facts. As the district court put it, "[n]othing in Section 2 of the Voting Rights Act would require the State to adopt a higher population deviation and a less equal system for the election of its representatives to give minorities a *better* opportunity than other members of the electorate to participate in the electoral process." ALBC J.S. App. 114 (emphasis added).

C. The plaintiffs never established that an additional majority-minority district could be created, and the district court did not clearly err in weighing the totality of the circumstances.

The plaintiffs also made a traditional Section Two claim that the purpose or effect of the plan was to dilute the black vote. That claim required the plaintiffs to identify additional majority-minority districts that the State could have created, and the plaintiffs

failed to do so. But, even had they done so, the district court found as a factual matter that the plans do not dilute the black vote.

First, as the district court held, the plaintiffs did not meet the first *Gingles* factor to establish a *prima facie* case of vote dilution. *See Gingles*, 478 U.S. at 50-51. "A plaintiff claiming vote dilution under § 2 must initially establish that: (i) the racial group is sufficiently large and geographically compact to constitute a majority in a single-member district . . ." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479 (1997) (internal quotation marks omitted). "When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *De Grandy*, 512 U.S. at 1008. No one has ever proposed a state-wide redistricting plan that would create an additional majority-minority House or Senate district. Instead, the ALBC plaintiffs' proposed a state-wide plan that "actually create[s] fewer opportunities for black voters to elect the candidates of their choice." ALBC J.S. App. 112.

For their part, the ADC plaintiffs have never proposed a state-wide plan of any kind. Instead, the ADC plaintiffs erroneously argue that they met their burden by proposing county-specific maps that create one additional majority-minority House district in Jefferson County and one additional district in Montgomery County. J.S. 25.

The district court properly rejected those county-specific maps. Obviously, anyone with the right software can draw districts in a single county; the chal-

lenge is to include them in a plan to redistrict the entire state. *See* ALBC J.S. App. 117. The plaintiffs concede that "[t]his would be a valid concern, if there was reason to think that our proposed districts would have a domino effect" and undermine other districts. J.S. 25. But the plaintiffs ignore the district court's express fact-finding that there would be such a domino effect. The district court found that the State's plans "include[] several House districts that cross into Jefferson County" such that "a new plan for Jefferson County cannot be simply inserted into the state plan" without affecting those districts.[4] ALBC J.S. App. 117. Similarly, the district court expressly found that the plaintiffs' proposal for Montgomery County was insufficient because the State's plan "brought an additional majority-black House district, District 69, into Montgomery County" and the plaintiffs could "not account for the domino effect that [their] plan could have on District 69 or the other neighboring majority-black districts." J.S. 118.

Second, even if plaintiffs had met all the steps of *Gingles*, the district court did not clearly err in evaluating the totality of the circumstances. If a plaintiff establishes the *Gingles* factors, it must then prove that "the totality of facts, including those pointing to proportionality, showed that the new scheme would deny minority voters equal political opportunity." *De Grandy*, 512 U.S. at 1013-14. Here, the 2012 Senate and House plans provide minority voters with roughly proportional representation, which is "a relevant

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[4] The district court also rejected the ADC's proposed map for Jefferson County because it continued to systematically underpopulate the proposed majority-black districts by up to 5%. *See* ALBC J.S. App. 117.

fact in the totality of circumstances." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 436 (2006) (internal quotation marks omitted). According to the 2010 Census, the voting-age African-American population of Alabama is about 25% of the total voting-age population. The Senate plan creates 8 majority-black districts, or 22.9% of the total of 35, and the House plan creates 28 majority-black districts, or 26.7% of the total of 105.

The plaintiffs do not discuss proportionality at all, and they muster almost no other evidence in support of their claim. They incorporate the arguments of the ALBC plaintiffs about county-splitting, although county-splitting is a race-neutral feature of all redistricting plans. *See* J.S. 27. And they cite to unrelated judicial decisions. For example, they say the "anti-Hispanic animus in the State Legislature" is reflected in *Central Alabama Fair Housing Center, et al. v Magee*, 835 F. Supp. 2d 1165 (M.D. Ala.), *vacated* by 2013 WL 2372302 (11th Cir. 2013). But the district judge in that vacated decision found a likelihood of anti-Hispanic animus based largely on "derogatory comments about Hispanics" made by *black legislators*. *Id.* at 1193-94 (quoting statements by Reps. Rogers and Jackson). That decision does not support the plaintiffs' notion of a "cross-racial coalition of black and Hispanic voters" that warrants a Section Two remedy. J.S. 27.

The district court, on the other hand, cited "overwhelming evidence in the record" that establishes "that black voters have an equal opportunity to participate in the political process the same as everyone else." ALBC J.S. App. 127. Black voters are politically active in Alabama and "have successfully elect-

ed the candidates of their choice in the majority-black districts." ALBC J.S. App. 125. Although the district court recognized Alabama's shameful history of racial discrimination, "the record contains no evidence of racial appeals in recent political campaigns in Alabama or of a significant lack of responsiveness to the needs of blacks." ALBC J.S. App. 125. On the contrary, the very Montgomery County redistricting plan that the plaintiffs challenge as diluting the black vote was proposed and supported by the area's black legislators. The district court's ruling on the plaintiffs' vote dilution claims should be summarily affirmed.

CONCLUSION

The Court should summarily affirm the judgment of the district court.

Respectfully submitted,

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