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

ALABAMA LEGISLATIVE BLACK CAUCUS, et al.,	)	
Plaintiffs,	)	CASE NO. 2:12-CV-691
v.	)	(Three-Judge Court)
THE STATE OF ALABAMA, et al.,	)	
Defendants.	)	
ALABAMA DEMOCRATIC CONFERENCE, et al.,	)	
Plaintiffs,	)	CASE NO. 2:12-CV-1081
v.	)	(Three-Judge Court)
THE STATE OF ALABAMA, et al.,	)	
Defendants.	)	

DEFENDANTS' BRIEF IN RESPONSE TO PLAINTIFFS' POST-REMAND PLANS

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NOVEMBER 13, 2015

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Introduction

Although Plaintiffs have submitted new post-trial, post-remand, post-briefing, post-argument plans that comply with the Legislature's population deviation standard, they still have not shown that when the Legislature drew its plans, it had a real alternative that could meet the deviation standard, comply with the Voting Rights Act, and achieve significantly different racial balance in the challenged districts. What the new plans *do* show is that many of the Legislature's decisions were right all along, because Plaintiffs do many of the same things that they have criticized the Legislature for doing.

Plaintiffs' plans do not prove that any portion of the Legislature's plan is unconstitutional because Plaintiffs' plans do not comply with this Court's order (doc. 283), the Legislature's guidelines, or the Voting Rights Act. As discussed in Section II below, Plaintiffs subordinated traditional districting criteria to race by purposefully choosing areas to add to black-majority districts simply because fewer black people lived there; they did not comply with the Voting Rights Act, because Plaintiffs intentionally lowered the black population in black-majority districts to the point of being retrogressive; Plaintiffs ignored communities of interest other than county and precinct lines; and they failed to achieve the Legislature's race-neutral political goals of preserving district cores and providing true incumbent protection. All Plaintiffs have shown is that lowering the black percentages in the challenged districts to Plaintiffs' preferred size requires violating federal law,

ignoring Legislative political goals, and creating plans that would not have been supported by either party.

In Section III, we show how Plaintiffs' new plans confirm that the Legislature's plans are not racial gerrymanders. Some of the arguments Defendants made to defend the Legislature's plans are now echoed by the Plaintiffs in defense of their plans. Those arguments should now be accepted as indisputably true. Moreover, some districts were changed little, or have similar racial proportions across the plans. Where Plaintiffs endorse the Legislature's decisions by adopting them in their own plan, the Legislature's decisions should be affirmed without further analysis.

For all these reasons, the new plans do not show that the Legislature's plans are unconstitutional. If anything, they provide additional reasons to hold the opposite.

I. Summary of Plaintiffs' new plans.

The ALBC plan was drawn by William Cooper, a trial witness, who drafted earlier ALBC plans (which plans did not comply with the ±1% deviation standard). He modeled the newest plan after prior ALBC "whole-county" plans, with adjustments to bring the districts into ±1% deviation. Cooper depo. 78:19-25. Mr. Cooper's "overriding" goal was to minimize county and precinct splits. Cooper depo. 76:12-25. *See also id.*, 97:21-98:1. The ALBC plan makes no effort to preserve the core of districts, and it places incumbents in districts with drastically different electorates. Mr. Cooper used race to purposefully "unpack" SD 26, Cooper depo.

126:23-127:2, to draw black majority districts, Cooper depo. 123:24-124:20, and to draw at least one "influence district," Cooper depo. 126:11-14.

The ADC plan was drafted by Anthony Fairfax. Mr. Fairfax used the 2001 House and Senate plans as a starting point, but he admittedly made frequent references to the 2012 plans (and comparisons with the 2012 plans show that Fairfax adopted many of the 2012 plans' features). Fairfax depo. 58:7-16; 59:21-25; 119:2-3; 153:19-154:10. Mr. Fairfax used race to reach his own preferred percentage of black voters in challenged districts, purposefully seeking whiter population to add to districts if he felt the black percentage was getting too high. Fairfax depo. 73:21-75:8. And he purposefully added black population if the black percentage was getting too low, in his eyes. Fairfax depo. 190:18-24; 191:11-192:8.

Although Plaintiffs' approaches are sometimes different from each other's, they leave some districts virtually unchanged as compared to the 2012 plan. HD 32 looks remarkably similar across the board, for example, and there remains a consensus that certain districts will include protrusions into specific counties. In other instances, one plan or the other takes an approach similar to that of the Legislature, such as ADC's agreement that HD 53 should be moved to Madison County and HD 73 to Shelby County. Other similarities are discussed below.

Defendants' Supp. Ex. 64 is a chart that compares all districts in both the new ADC and ALBC plans to the 2012 plan. The same eight Senate districts are black-majority districts in all three plans. In the House, neither ALBC nor ADC kept HD 85 as a black-majority district. Instead, the ALBC plaintiffs made HD 6 a

black-majority district in Madison County, and the ADC plaintiffs made HD 45 a black-majority district in Jefferson County. But the Plaintiffs reduced the black voting age population in some districts so low that their plans are retrogressive, as discussed in Section II(B) and as shown on the charts attached as Def. Supp. Ex. 65.

In separately-filed evidentiary submissions, Defendants submit the following additional Defendants' Supplemental Exhibits:

Def. Supp. Ex. 64	Comparison of all districts to the 2012 plan
Def. Supp. Ex. 65	Voting-age percentages in the new ALBC and ADC plans
Def. Supp. Ex. 66	County splits in the ALBC plan
Def. Supp. Ex. 67	Precinct splits in the ALBC plan
Def. Supp. Ex. 68	County splits in the ADC plan
Def. Supp. Ex. 69	Precinct splits in the ADC plan
Def. Supp. Ex. 70	Anthony Fairfax deposition
Def. Supp. Ex. 71	William Cooper deposition
Def. Supp. Ex. 72	District Statistics Report, ADC Senate Plan
Def. Supp. Ex. 73	Population Summary Report, ADC Senate Plan
Def. Supp. Ex. 74	Assigned District Splits (County), ADC Senate Plan
Def. Supp. Ex. 75	Assigned District Splits (Precinct), ADC Senate Plan
Def. Supp. Ex. 76	District Statistics Report, ADC House Plan
Def. Supp. Ex. 77	Population Summary Report, ADC House Plan
Def. Supp. Ex. 78	Assigned District Splits (County), ADC House Plan
Def. Supp. Ex. 79	Assigned District Splits (Precinct), ADC House Plan
Def. Supp. Ex. 80	Assigned District Splits (County), ALBC House Plan
Def. Supp. Ex. 81	Assigned District splits (County), ALBC Senate Plan
Def. Supp. Ex. 82	Chart of counties included in ALBC districts

II. Plaintiffs' new plans are based on impractical, indefensible, and illegal districting decisions, do not comply with the Court's Order, and do not demonstrate that the challenged districts could have been drawn differently.

Plaintiffs produced plans with the right number of districts, and the population in those districts falls within ±1% deviation. They split fewer counties and precincts. However, in other ways, the plans do not comply with the Court's Order or the law generally. Plaintiffs therefore still have not shown that there

exists an alternative where the Legislature could have achieved its legal and political objectives while producing black-majority districts with any meaningfully different racial composition.

A. Plaintiffs' plans subordinate race-neutral districting criteria to racial considerations without a legally justifiable reason to do so.

The Plaintiffs' plans have lower black majorities than the State's plans in some of the challenged districts, but this result was not a happy accident of race-neutral line-drawing. Instead, the Plaintiffs intentionally subordinated traditional districting criteria to find white population to add to majority-black districts. By insisting that black-majority districts have a majority of 70% or lower, regardless of traditional districting criteria, the plaintiffs effectively imposed a quota on the majority-black districts of at least 30% white population. This case is not supposed to be "a fight over the 'best' racial quota," *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1281 (2015) (Thomas, J., dissenting), but that is the clear implication of Plaintiffs' plans.

Plaintiffs' race-based machinations violate this Court's order and federal law. This Court ordered that in Plaintiffs' new plans, "[n]o district may be drawn in a way that subordinates race-neutral districting criteria to racial considerations." Doc. 283 at 2. But the drafters of each plan testified that they purposefully sought out white and black population to add to districts solely because of race, in order to achieve their preferred ideal percentages.

1. Plaintiffs used race to purposefully lower the black population in majority-black districts.

The testimony of Plaintiffs' line-drawers establishes that they used race to artificially lower the size of the black majorities in challenged districts. There is no compelling interest for doing this. No case law holds that a district drawn consistently with traditional districting criteria is unconstitutional just because it has a high percentage of a particular race. No case law holds that a district drawn using traditional criteria that turns out to be 75 % black violates the Voting Rights Act. Yet Plaintiffs subordinated traditional districting criteria to avoid those situations and to achieve their preferred racial proportions.

Both the ADC and ALBC line-drawers admitted that they effectively imposed a racial quota on the percentage of white persons in a majority-black district. Mr. Fairfax kept an eye on race as he drew districts in the ADC plan. If he thought the black percentage was getting too high, he would purposefully seek out areas that were "less black" to add to the district:

> A. … There were certain circumstances where I felt that the districts [I was drawing] had an exceedingly high percentage. I don't know if this [SD 19] is one of the cases. I have to look at it. There were some that were 70 percent and higher, and so in that particular case, it bordered packing.
>
> Q. Okay. And so if you came to a district that was 70 percent, would you look at the racial composition of the district as you were drawing it?
>
> A. It was done probably on and off. Yeah, I would say at some times you would have to look at the racial composition. There's no other way to actually stop from packing if you don't look at the racial composition.

> Q. Would you tend to look at it as you go, as you were adding precincts, or would you draw a district and then look back to see what the composition was?
>
> A. Usually there was no racial indicators, but if I saw that we're getting to 75, 78, 80 percent or something thereabouts, then you have to look at the racial indicators for the voting districts.
>
> Q. Okay. And as you looked at it, you know, what would you do if you get a district that was getting into the high 70s?
>
> A. You would have to move into areas, neighborhoods, that were less black, less African-American, let's say.
>
> Q. Okay. So let's say hypothetically you were drawing a district, and you noticed that it was getting to 75 percent or above. You would then start looking for precincts that had a lower percentage of African-American voters?
>
> A. Areas, yes. You move into those areas, not necessarily specific precincts that you grab, but those areas that would actually offset that percentage. There really isn't any way other to do that.

Fairfax depo. 73:21-75:8.

The Birmingham House Districts show that Mr. Fairfax did exactly what he said he was doing and consciously lowered the black percentages. The city of Birmingham has over 200,000 people, as of the 2010 census, and is 73.4% black. Def. Supp. Ex. 7.[1] Thus, it is no surprise that in the Legislature's plan, the eight black-majority House Districts in Jefferson County range from 55 % black to two in the low 70s and one at 76 %. Yet in the new ADC plan, there is not a single district over 66 % black. Def. Supp. Ex. 64. The average size of the black-majority districts in the area, in the ADC plan, is only 60.2%. That is unlikely to happen naturally when there is such a large, concentrated black population in the area.

[1] Nearby and adjacent municipalities have similar large black majorities, *e.g.* Midfield (81.6%), Fairfield (94.6%), Bessemer (71.2%), Center Point (62.9%), and Lipscomb (61%). Def. Supp. Ex. 8.

Mr. Cooper likewise testified that he added specific areas to majority-black districts simply because more white people lived there. He testified that he purposefully moved SD 26 into Lowndes and Autauga Counties to "consciously lower the black population percentage" in the pre-existing SD 26. Cooper depo. 129:5-10. That is, he subordinated ALBC's goal of keeping whole counties – what ALBC calls the *very most important* traditional districting principle in the State – just so there would not be so many black people in SD 26. *See also id.* at 126:17-21 (speaking of "unpacking" SD 26); *id.* at 126:23-127:2 (referring to purposefully "distributing," *i.e.*, *sorting*, the black population of Montgomery County).

This racial sorting violates traditional districting principles in myriad ways. The Legislature's redistricting guidelines suggest that communities of interest—whether partisan, racial, or otherwise—should be kept together in the same district. But the Plaintiffs' line-drawers intentionally manipulated racial compositions to *split* communities of interest to achieve their ideal racial percentage. This race-focus is the only explanation for some of the strange features of the Plaintiffs' plans. For example, achieving the "right" racial quota is the only conceivable explanation for the ALBC's decision to combine Perry County with Shelby County in its Senate plan or for the ADC's decision to expand Dallas County's HD 67 into Chilton County instead of another County in the Black Belt. We discuss these oddities in more detail in Section C below.

These racial quotas would make sense if Plaintiffs were using race to comply with the Voting Rights Act. When the Legislature considered race in order to

comply with Section 5, for example, there was case law and a history of dealing with the Department of Justice that gave it a reason to do so. But Plaintiffs have no basis in law to seek out white people to add to a majority-black district, just to reach their desired "quota" of at least 30-35 % whites in a black-majority district. No justifiable reading of the Voting Rights Act prohibits the creation of districts that are above 70% black if those districts reflect the demographics of an area and have no dilutive effect. Neither Section 2 nor Section 5 requires the intentional reduction of black populations in existing majority-black districts. Plaintiffs' plans manipulate racial percentages for no justifiable reason at all.

2. Plaintiffs used race to create "influence districts."

Plaintiffs' plans also create so-called "influence districts" that are roughly 40% black. Although the ADC's Mr. Fairfax denied that he intentionally used race to create these kinds of districts,[2] the ALBC's Mr. Cooper expressly admitted that he did. Specifically, Mr. Cooper purposefully sought out black population to draw an "influence district," SD 9 in Madison County:

> Q. Why did you then make this district [SD 9] 44.63 percent black?
>
> A. Well, because there was an interest that was expressed during that time period in 2012 when I was doing HB – or SB-5 to create a district in – a Senate District in north Alabama, specifically in Madison County, that would at least have some influence.

Cooper depo. 93:5-12. *See also id.* at 126:11-14 ("[T]he only time that I created an influence district consciously would have been the aforementioned Senate District 9

[2] While Fairfax denied creating influence districts intentionally, it is difficult to believe that HD 74 (44% black), HD 85 (48% black), SD 25 (40.9% black), and SD 7 (43.1% black), were each created accidentally.

in Madison County."). That is, Mr. Cooper had a quota for SD 9, in the "influence district" range, and used race to get there. ALBC's HD 74, 65, 61, 38, and 75, as well as the 44% black SD 25, appear to be intentionally-created influence districts as well.

There is, of course, no legal justification for the Plaintiffs to use race to draw influence districts (although it may be politically advantageous to them to do so). The Supreme Court has expressly held that Section 2 of the Voting Rights Act does not justify the creation of an "influence" district, in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected. *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 412, 126 S. Ct. 2594, 165 L.Ed.2d 609 (2006). Similarly, the Court has expressly held that Section 2 of the Voting Rights Act does not justify the creation of a "cross-over" district or any other district that is not majority-minority. *See Barlett v. Strickland*, 556 U.S. 1 (2009). Plaintiffs' decision to use race to create these districts, without any arguable justification, undermines the evidentiary value of their alternative plans.

* * *

Plaintiffs point to the lower black majorities in the majority-black districts of their plans and say it is proof that the Legislature did something wrong. But the reason Plaintiffs' plans have lower black majorities is that they subordinated traditional districting criteria to find white population to achieve their own kind of racial quota. Nothing in federal law required this, the Plaintiffs had no legitimate

reason to do it, and this Court's order specifically prohibited it. For this reason, the Plaintiffs' plans do not help them prove a violation of the Voting Rights Act or the Constitution.

B. Plaintiffs' plans do not comply with the Voting Rights Act.

This Court ordered Plaintiffs to produce plans that comply with Sections 2 and 5 of the Voting Rights Act. Doc. 283. However, Plaintiffs' plans are retrogressive and do not preserve the ability of black voters to elect their candidate of choice in the challenged districts. Noncompliance with this requirement, even for a single district, means the new plans do not prove that the Legislature had a real alternative that would satisfy its legal obligations and political objectives.

There was evidence at trial concerning the size of the black majority necessary to elect the candidate of choice of black voters. Senator Hank Sanders (a successful politician who knows what it takes to get elected) stated that in his view, the black majority should be 62% at a minimum. Ex. C21 at 6. Joe Reed ("the dean of Alabama redistricting") said that a black-majority district is usually safe when it is "[a]round 60 percent" of the total population, Tr. 2.157, although he agreed that it may need to be closer to 65% in some instances, Doc. 203 at 70.

One of the Plaintiffs' experts, Theodore Arrington, "testified that 51 percent voting age population is enough to give minority voters the opportunity to elect the candidate of their choice anywhere in the State." Doc. 203 at 83. This Court, however, did not credit that testimony. Doc. 203 at 84. This Court ultimately concluded 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." Doc. 203 at 99.

Certainly there is no "strong basis in evidence" for a conclusion, by the 2012 Legislature or this Court, that all it takes is a bare majority of 50% plus one. That, however, is exactly what the drafters of the new plans assumed to be true:

> A. … I think you're getting to some sort of a break point of where African-Americans can elect a candidate of choice, some sort of --
>
> Q. Well, let's go with that. Yeah. Is there a break point?
>
> A. Well, I was told that analysis had been done where 50 percent was shown to be that break point. Approximately 50 percent, let's say.
>
> Q. So you drew this plan with the assumption that a district that was 50 percent African-American would be able to elect the candidate of choice?
>
> A. Yes.
>
> Q. Do you have any opinion as to whether or not that analysis is correct?
>
> A. I don't know. I don't know. I was told that the experts in this case did analysis, and that's what they came up with.
>
> Q. Is it fair to say that you have no reason either to disbelieve or to believe that that analysis is correct?
>
> A. Right.

Fairfax depo. 55:25-57:11. *See also* Fairfax depo. 163:9-22 (assuming that a district required at least 50% black voting age population).

Mr. Cooper likewise assumed that he had done his job if he drew districts with a bare black majority. Cooper depo. 110:20-22. When asked if a district (ALBC HD 19) provided an opportunity for the black population to elect its candidate of

choice when the district has a black VAP of 50.82%, Mr. Cooper said, "Well, it's a majority-black district; and I think it would comply, but I understand if there are those who may think otherwise." Cooper depo. 111:10-12. *See also* Cooper depo. 124:13-16 ("Q. And how did you know when you created a black district? A. When I had more than 50 percent black voting age.").[3] When asked if he had any concern whether districts that barely exceed 50% would comply with Section 2 or Section 5, Mr. Cooper responded that "it's not my place to have that concern." Cooper depo. 114:16-20.

The districts in the new plans reflect those assumptions. As Def. Supp. Ex. 65 and the following excerpt shows, the plans contain many black-majority districts with a black VAP under 55% (and ALBC SD 28 lacks even the bare majority that Plaintiffs assert to be necessary):

House District	ALBC 1% Plan Black %	ALBC 1% Black 18+ %	ADC 1% Plan Black%	ADC1% Black 18+ %
6	55.12	53.47		
19	53.60	50.66	52.5	50.13
32	52.52	50.82	55.0	52.67
45			54.6	50.14
52	56.64	55.99	57.9	56.39
53	56.96	54.34	52.9	50.39
54	60.64	55.72	60.6	55.56
55	57.85	54.45	55.6	53.45
56	63.04	60.37	58.9	56.58
57	72.51	71.05	66.1	64.43
58	64.07	59.02	63.7	58.54
59	58.55	55.06	62.8	60.84
60	53.49	51.59	56.0	53.75
67	67.28	64.06	67.3	64.06
68	53.10	50.28	57.2	54.84

[3] In contrast, Mr. Cooper testified in an earlier case that a municipal district drawn in the "high fifties" "could well elect a white candidate." *Fairley v. Hattiesburg, miss.*, 584 F.3d 660, 671 (5th Cir. 2009).

House District	ALBC 1% Plan Black %	ALBC 1% Black 18+ %	ADC 1% Plan Black%	ADC1% Black 18+ %
69	54.54	52.75	58.9	56.65
70	57.52	52.73	61.9	56.79
71	59.54	57.33	59.8	57.25
72	60.88	58.27	54.0	51.58
76	63.99	63.18	59.3	56.47
77	65.43	62.43	63.5	60.35
78	66.76	64.67	77.5	75.67
82	60.57	60.27	57.9	57.04
83	37.79	35.63	55.0	53.39
84	54.32	52.81	52.3	51.07
85	49.03	46.32	48.3	45.57
97	55.91	53.07	56.2	53.37
98	60.40	57.51	60.4	57.51
99	58.24	54.69	58.2	54.63
103	62.61	57.24	62.3	56.87

Senate District	ALBC 1% Plan Black %	ALBC 1% Black 18+ %	ADC 1% Plan Black%	ADC1% Black 18+ %
18	55.96	53.59	59.5	57.00
19	64.94	62.44	62.1	59.81
20	63.32	59.53	62.2	58.25
23	53.80	51.06	58.9	55.98
24	57.31	54.50	59.3	56.34
26	57.59	55.94	60.7	57.70
28	50.98	49.71	51.7	50.43
33	62.28	58.88	58.3	55.15

Def. Supp. Ex. 65, 74, and 78; APSX 462, APSX 470.

There is no evidentiary basis for this Court to conclude that districts with a black VAP of 49.71% (ALBC SD 28), or 50.13% (ADC HD 19), or 50.82% (ALBC HD 32), or 50.39% (ADC HD 53), or 51.06% (ALBC SD 23) have sufficient black majorities to comply with the Voting Rights Act. When those districts, respectively, were drawn as 56.5%, 66%, 59.6%, 64.4%, and 62.3% black districts in 2001, doc. 203 at 20-21, how can they not be retrogressive? How could they have ever been

precleared? And why should this Court or anyone else believe that the Plaintiffs themselves would have *wanted* them precleared if they had been submitted in 2012?

ADC argues that "[t]o the extent the state would want to assert that the 50-55% black population districts in the ADC plan do not provide an equal opportunity to elect, the assertion would be irrelevant to the issue before the Court." Doc. 287 at 19. Defendants disagree. This Court ordered Plaintiffs to create plans that comply with the Voting Rights Act, and plans that do not provide an equal opportunity to elect do not comply with the Act. Non-compliant plans do not prove that the Legislature had a legal alternative. Whether the plans comply with the Court's order is relevant indeed.

ADC also says, "Even if small increases in black population were proven to be necessary, it would be a simple matter to increase those numbers slightly, consistent with traditional districting principles." Doc. 287 at 19. But there is no evidence of that. It cannot be known how changing one district to raise the black percentage will impact other districts. As Mr. Cooper acknowledged, "Once you start making changes to one county, it has a ripple effect all over the state, so the plan ends up changing." Cooper depo. 52:19-22. *See also, e.g.*, Fairfax depo. 164:18-23, 202:12-13 (discussing the "domino effect" that changes in one area have on others). And Mr. Fairfax acknowledged that a plan with a different assumption than 50% plus one would not be at all the same:

> Q. Do you think your plan would look different if you had been told that in Alabama you generally need 60-65 percent majority for blacks to be comfortably sure in electing their candidate of choice?

> A. Oh, yeah, yeah, yeah. If that threshold that I talked to you about of 50 percent was 65, yes, yes, it would.

Fairfax depo. 234:4-11.

This Court should have the same response to the new plans that the Department of Justice would have had if the State had submitted them for preclearance, and consider them non-starters.

C. Plaintiffs' plans fail in many cases to preserve communities of interest.

The Legislature's guidelines define a community of interest as "an area with recognized similarities of interests, including but not limited to racial, ethnic, geographic, governmental, regional, social, cultural, partisan, or historic interests; county, municipal, or voting precinct boundaries; and commonality of communications." Ex. 420 at 3-4. In addition, the Legislature conducted an unprecedented number of hearings around the State to learn more about which communities of interest were important to the electorate. The State's plans reflect this knowledge. In contrast, the Plaintiffs flew blind when they drew their districts.

Neither Mr. Fairfax nor Mr. Cooper had input from Legislators, local politicians, or the public about what communities of interest matter. Fairfax depo. 58-59; Cooper depo. 53:10-19. Neither drafter is from Alabama. They therefore lacked knowledge about local communities of interest:

> Q. How did you get information about communities of interest that you used when you drew your plans?
>
> A. Well, I obviously paid attention to county boundaries, and when I began to split precincts, I often did almost invariably look at municipal boundaries to see if I could follow them if possible. Other communities

> of interest, you know, I'm not from Alabama, so I don't have that intrinsic knowledge necessarily, obviously.

Cooper depo. 53:10-19.

This lack of knowledge about communities of interest resulted in some oddities, particularly around the Black Belt. The ALBC plaintiffs have consistently put a bold black line around the boundaries of Black Belt counties in their maps. *See* APX 20, 22; APSX 29-30, 37-38. If they recognize this area of the State as such a community of interest, one would presume ALBC would try to preserve communities of interest by keeping those boundaries intact. ALBC did not even try to do that, though, because HD 65, HD 72, HD 72, HD 67, HD 88, HD 84, SD 14 SD 23, SD 24, SD 26, SD 31, and SD 28 each cross the bold line in the ALBC plans. SD 14 inexplicably connects north Shelby County with Black Belt Perry County, an admitted "mistake" in the ALBC plan. Cooper depo. 138:4-19.

In both the ADC and ALBC plans, HD 67 is mostly Dallas County (as it is universally across the various plans), plus a portion of Chilton County, instead of taking it into the fellow Black Belt Perry County, as the Legislature did.

ALBC split Washington County between HD 65 and HD 68 for no reason. ALBC could have kept Washington County whole by keeping HD 68 out, and then HD 65 could have taken more of Clarke County, which is already split. Unless, that is, ALBC was purposefully reaching out for the high concentration of black population in eastern Washington County. Def. Supp. Ex. 80.

ALBC's HD 88 is a strange, narrow district that runs from Crenshaw County and then takes narrow portions of Butler, Lowndes, and Autauga Counties. With

ALBC's devotion to county lines, nothing but race could explain taking the district through so many counties. (SD 15 links Chilton and Jefferson Counties in the same fashion.)

And speaking of Crenshaw County, ADC has argued that the "obvious solution" to the underpopulation of SD 26 was to add Crenshaw County, linking Crenshaw County to rural Montgomery County. Doc. 238 at 37-38. ADC, however, kept SD 26 in and around the city limits of Montgomery, and then linked *Pike* County to rural Montgomery County. Neither set of Plaintiffs used Crenshaw County in the way ADC said was "obvious."

Except for county boundaries, Plaintiffs paid little attention to communities of interest.

D. Plaintiffs' plans do not observe the Legislature's legitimate political objectives of preserving the core of existing districts, true incumbent protection, and ensuring that a majority of the Legislature would pass the plans.

Unlike Plaintiffs, the Legislature had to account for political realities when drafting the 2012 plans. Obviously, for a plan to be enacted, it had to be approved by a legislative majority: "And remember, this plan has to pass the Legislature, so I can't begin to cause dissension so that I don't have the 18 votes I need to pass this." Tr. 1.41–42 (Testimony of Sen. Dial). This required consulting with Legislators and accommodating their requests, including the requests of Democrats. *See* doc. 263 at 31 n.1.

This Court ordered Plaintiffs to avoid incumbent conflicts, and Plaintiffs did so. However, the Legislature's goal of "incumbent protection" meant more than just

avoiding conflicts. As Mr. Fairfax recognized, "incumbent protection" – the kind that will get a plan passed – also includes preserving the core of districts so that Legislators are not put into almost entirely new districts with an electorate who does not know them:

> Q. You mentioned incumbent protection as a redistricting principle; correct?
>
> A. Yes.
>
> Q. What did you mean by that?
>
> A. For the most part, it includes not removing incumbents from the existing districts that they already are in, so that's mostly the way. There are other alternatives that would shift different areas and put the incumbents in a different area, something like that. That's another aspect as well.
>
> Q. Okay. So for example, if you drafted a plan that avoided putting incumbents together in the same district where they would have to run against each other, that is one factor of incumbent protection?
>
> A. Yes, yes.
>
> Q. Is that the only factor of incumbent protection?
>
> A. No, no, no. Again, it doesn't have to be where they run against each other. Could be that the district is in a separate district where no one is running but that person is new to that area, that incumbent is new to that area.
>
> Q. So let's say you draft a plan, and you haven't pitted any incumbents together. But for this particular senator, you kept his home precinct, but other than his home precinct, his entire new district is completely different, a different set of voters who don't know him.
>
> A. Absolutely.
>
> Q. Would you say that satisfied incumbent protection?
>
> A. No, no.

Fairfax depo. 46:21-48:3.

Thus, Mr. Fairfax acknowledged that he had not observed incumbent protection when he mistakenly reversed HD 76 and 77 and gave the HD 76 incumbent a district that, other than his home precinct, included an entirely new area. Fairfax depo. 48:7-14, 170:10-17; doc. 287-16 at 4.

This problem occurs more often in the new ALBC plan, which is not based on any prior plan that has actually passed the Legislature. The changes ALBC made are illustrated in the chart submitted as Def. Supp. Ex. 82 (also attached as Ex. 5 to Cooper's deposition). For each district, the chart sets out the counties covered by that district in the Legislature's plan, and then the counties covered by that district in the new ALBC plan. The differences are many. Counties printed in red were "dropped" by ALBC, and counties printed in green were added to the district by ALBC. In the Legislature's plan, Senator Del Marsh (President Pro Tempore of the Senate) resides in SD 12, which has historically centered around Calhoun County (in the Legislature's plan, more than two-thirds of the electorate lives in Calhoun County). In the ALBC plan, Sen. Marsh resides in SD 8, where less than a third of the electorate resides in Calhoun County, and the remainder resides in three counties – Jackson, DeKalb, and Cherokee – that he has not previously represented. APSX 471.[4]

There are many other examples. Senator Slade Blackwell's current district (SD 15) is overwhelmingly in Jefferson County; ALBC gave him a district that is

[4] Defendants' Supplemental Exhibits 80 and 81 show how each district in the ALBC House and Senate plans is divided by counties, and the proportions of the district that lie in each county.

mostly in Shelby and Chilton Counties. Rep. Mickey Hammon's new district in the ALBC plan (HD 4) has less than half of his current electorate in it. And the list goes on.

By paying no attention whatsoever to preserving the core of districts or incumbent protection, ALBC changes the districts dramatically and disrupts the connections that incumbents have made and their relationship with the electorate. They have not shown that the Legislature could have achieved its political goals in a different way that would result in significantly greater racial balance, because they did not even try to achieve some of the Legislature's race-neutral political goals.

E. Plaintiffs' disavowal of their own plans eliminates any probative value of the plans.

Even assuming that the plans comply with the Court's order, the new plans still have little if any probative value because no one is suggesting that the new plans are something that the Legislature actually should have passed (or *could* have passed). Plaintiffs will not even say if their own Legislator clients would support the plans, or their own districts within the plans.

Plaintiffs point out that the new plans could not serve as "remedial" plans because the Court correctly required separation of 2010 incumbents, not current incumbents (that is, the task was to explore alternatives before the Legislature at the time the plans were drawn). But Plaintiffs go beyond that in distancing themselves from their new plans. The ALBC plan was presented with "no input from plaintiff ALBC members or from other members of the Legislature." Doc. 285

at 6. ADC says one reason the new plans would not be appropriate as remedial plans is because they still believe that the Legislature should relax its race-neutral ±1% deviation standard. Doc. 287 at 5; doc. 290 at 3. Plaintiffs will not tell us (and Defendants were not allowed to ask) if the Legislator members of ADC and ALBC themselves believe that the new plans produce districts that preserve the ability of African-Americans to elect their candidates of choice.

Moreover, the drafters (Cooper and Fairfax) each said there were mistakes in their plans that they would like to go back and address, and they complained that they were rushed. *See* Cooper depo. 138:4-139:16 (discussing his "mistake" of linking north Shelby County and Perry County in SD 14 and how "hurriedly" he produced the ALBC plan); Fairfax depo. 47:19-48:14 (discussing how, due to "time constraints," he reversed HD 76 and HD 77 so that the HD 77 incumbent retained only a single precinct, but otherwise was given a completely unfamiliar district); Fairfax depo. 170:10-17 (same). Plaintiffs may argue that those mistakes could be fixed, but as every drafter has testified, "once you start making changes to one county, it has a ripple effect all over the state, so the plan ends up changing." Cooper depo. 52:19-22. *See also, e.g.*, Fairfax depo. 164:18-23, 202:12-13. Therefore, if Cooper and Fairfax went back and fixed the things they would like to fix, we do not know how that would change other parts of their plans.

In short, the new plans are not alternatives that were actually available to the Legislature. Plaintiffs do not even argue that they should have been. They

therefore do not prove that the Legislature could have done things in a different way.

* * *

Plaintiffs point to several districts in their new plans and argue that the percentage of black voters in their plans is "better" than the percentage of black voters in the Legislature's plans. In some cases they present a *lower* percentage of black voters in districts that meet the ±1% rule, but they were able to achieve these results only by drawing plans so bizarre that Plaintiffs themselves will not endorse them; by intentionally lowering the percentages to the point that the plans violate the Voting Rights Act; by subordinating traditional districting criteria to manipulate the percentages; by ignoring all communities of interest other than precinct and county boundaries (and ignoring even those when convenient to reaching their preferred percentages); and by failing to preserve the core of districts. Plaintiffs therefore have not proven that the Legislature had a viable and legal alternative.

III. To the extent they do anything, Plaintiffs' new plans confirm that the Legislature's plans are not racial gerrymanders.

To the extent Plaintiffs' plans prove anything, it is that the Legislature's plans are constitutional. This is so for three main reasons. First, in defending their plans as constitutional, the Plaintiffs have adopted and confirmed our primary arguments about the use of racial statistics and precinct splits to prove a racial gerrymander. Plaintiffs now apparently agree that the racial statistics of a district and the racial composition of county splits and precinct splits are not good evidence

of race-based districting. Second, Plaintiffs' plans undermine their chief criticisms about the overall changes that the State made to the old plans to bring districts to equal population, such as moving HD 53 and HD 73 and removing areas from already underpopulated districts. Third, because Plaintiffs hold out their plans to be constitutional, where one or both set of Plaintiffs' plans presents a district or a feature of the plan that is similar to the Legislature's, Plaintiffs' plans help establish that the Legislature's similar district or feature is constitutional. In other words, Plaintiffs cannot show that a district in the Legislature's plan is a racial gerrymander when their district is very similar.

A. Plaintiffs' plans confirm that population statistics in districts and precinct splits do not establish a racial gerrymander.

Plaintiffs have consistently argued that this Court should find that race predominated in the 2012 plan for two reasons. First, Plaintiffs have pointed to the racial composition of each district. Second, they have argued that the Legislature split precincts and counties on the basis of race because there are precincts split on the borders of black-majority districts and white-majority districts and the portion of the precinct going to the black-majority district is more heavily black than the portion going to the white-majority district. In page after page of brief after brief, Plaintiffs argued that these facts alone are clear evidence that the Legislature subordinated race-neutral criteria to race. Their own plans, however, contradict their arguments.[5]

[5] As Defendants have argued, the question is not simply whether race is a consideration, whether there is a high percentage of a particular race in a district, or whether precincts or counties were split. The question for the predominance analysis is whether the use of race *conflicted* with

1. Plaintiffs' plans confirm that the racial composition of a district reflects the area's population and is not good evidence of racial gerrymandering.

Plaintiffs intentionally sought to reduce the black population in majority-black districts. But as Mr. Fairfax acknowledged, that is not always possible in light of Alabama's racial demographics. Although Mr. Fairfax unjustifiably tried to reduce black population percentages below 70%, he acknowledged that in some cases "you just couldn't help it." Fairfax depo. 77:21. Similarly, Mr. Cooper explained that there are, after all, "places where you just literally cannot avoid a 90 percent district." Cooper depo. 30:14-21 (discussing Mississippi plans, but his acknowledgment of demographic realities applies to any State).[6] And in fact, Mr. Fairfax drew a district (HD 78) that is 77.5% black. Doc. 287-1. He could not figure out a way to reduce it, he said, without splitting counties; between the competing priorities, Mr. Fairfax chose county wholeness over an "unpacked" district. Fairfax depo. 177:11-15. Likewise, Mr. Cooper drew HD 57 in the ALBC plan as a 72.51% black district. APSX 462. In other words, just as Defendants have argued all along, Plaintiffs' plans show that the black population percentage of a district is controlled primarily by the demographics of the area; standing alone, a high black percentage is not evidence of race-consciousness.

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acknowledged race-neutral goals, such as the Legislature's goals of politics, incumbency protection, core preservation, and the preservation of communities of interest. *See* Def. Remand Brief, doc. 263 at 25-26. *See also Bethune-Hill v. Virginia Bd. of Elections*, ___ F.Supp.3d ___, 2015 WL 6440332 at *15 (E.D. Va. Oct. 22, 2015) (holding that proof of predominance requires "*actual* conflict between traditional redistricting criteria and race that leads to the subordination of the former, rather than a merely hypothetical conflict that *per force* results in the conclusion that the traditional criteria have been subordinated to race.").

[6] *See also* Cooper depo. 13:5-14:15, where Cooper discusses a 70% black district he drew in another State to preserve a community of interest.

Moreover, Plaintiffs' plans show that getting close to the "target" – the size of the black majority under the 2000 district lines using 2010 census data – is not evidence of race-conciousness. In HD 70, for example, the "target" was 61.83%. Doc. 263-2. The Legislature's plan has HD 70 at 62.03% (a difference of .20%), and ADC's new plan has HD 70 at 61.9% black (a difference of only .07%). In SD 18, the "target" was 59.92%, and ADC got closer (at 59.5%) than the Legislature. ALBC hit the bull's-eye on SD 28.[7] Mere proximity to a "target" is not evidence of anything.

2. Plaintiffs' plans confirm that racially-disparate precinct and county splits are not evidence of racial gerrymandering.

There are patterns of racially-disparate precinct splitting and county splitting in the new plans of the exact sort that Plaintiffs cite as evidence of racial gerrymandering on the part of the Legislature. As shown in Defendants' Supp. Exhibits 66, 67, 68, and 69, Plaintiffs split precincts and counties in an uneven fashion, with the portion going to a black-majority district having a significantly larger percentage of black voters than the portion going to a white-majority district.

For example, Pickens County is split in the new ALBC plan. The portion of Pickens County that Cooper put in majority-black HD 71 is 60.61% black, and the portion of the county going to majority-white HD 61 is only 24.95% black. Def. Supp. Ex. 66. Cooper split the Aliceville 5 National Guard precinct between HD 71 and HD 61, giving HD 71 a portion that is 55.6% black and HD 61 a portion that is 9.5% black. Def. Supp. Ex. 67. Similarly, Cooper split the Friendship Missionary Baptist

[7] ALBC also came with 1% of the "target" on HD 72, and ADC on HD 82, HD 85, SD 18, and SD 28.

Church precinct in Mobile County, giving majority-black HD 99 a portion that is 92.6% black, compared to the 36.1% black portion going to majority-white HD 100. *Id.*

ALBC also split precincts on the margins of HD 32 for the express purpose of making HD 32 a black-majority district. Cooper depo. at 124. ADC did the same, and in a way that demonstrates the hypocrisy of ADC's arguments. When addressing splits that the Legislature made in HD 32, ADC argued that in certain of those splits, "77% of the black persons in these splits were put into HD 32. 60% of the white persons were put into the white-majority districts." Doc. 258 at 56. That fact, ADC argued, was a reason to find that the Legislature's HD 32 is unconstitutional.

Yet, Mr. Fairfax split several precincts in this way, or saw fit to retain such splits from the 2001 plan:

	Placed in Maj. Black HD 32				**Placed in Maj. White Districts**			
Precinct	**Total**	**W**	**B**	**%Black**	**Total**	**W**	**B**	**%Black**
Talladega Nat. Gd Armory	2935	1083	1774	60.44	7243	5537	1462	20.19
Mabra-Kingston Bapt	7505	1766	5572	74.24	1334	626	540	40.48
Winterboro Vol Fire	2515	1137	1341	53.32	1106	932	158	14.29
Limbaugh Comm Ctr	292	59	222	76.03	10884	7317	3228	29.66
Renfroe Fire Hall	1281	755	496	38.72	3406	2624	680	19.96
Totals	29056	9600	18810	64.74	47946	34072	12136	25.31

Def. Supp. Ex. 69, drawn from data in Def. Supp. Ex. 79. Thus, in the ADC plan, over 60% of the 31,000 blacks in these precincts were placed in HD 32. Seventy-eight % of the approximately 43,000 whites in these precincts were put in the white-

majority districts. ADC thus sorted people on race through precinct splits in the same manner that they accuse the Legislature of doing.

The new ADC plan contains other examples of race-based precinct and county splits. Tuscaloosa County is split three ways, between one majority-black district and two majority-white districts. Fairfax gave the majority-black district a slice that is 60.98% black, and gave the other two districts slices that are 13.01 and 19.87% black. Def. Supp. Ex. 68. Defendants set out ADC's precinct splits, some of which have the same kind of racial discrepancies, in Def. Supp. Ex. 69.

When asked why these precinct splits are not evidence of racial gerrymandering, the Plaintiffs confirmed two things that Defendants have always argued. First, seeming racial divides in precinct splits merely reflect segregated housing patterns. Second, some of these splits existed in prior plans.

Mr. Fairfax testified that the different racial composition seen in some of his split precincts is the natural result of population patterns:

> A. … So those splits occurred on the outskirts, and so chances are, you're going to actually begin -- you're not going to grab a block here. You're going to grab a block here closer to the district. And close to the district is just natural, unfortunately, population patterns, demographical population patterns. You're going to have the inside having more black population percentage than the outside.
>
> Q. Okay. So District 7, let's say you draw District 7 using race-neutral, traditional districting principles, and it happens to be that the result of that is, let's say, a 40-45 percent black district. If it becomes necessary to split precincts on the edge, you're going -- you're necessarily going to get the portion of the precinct that's closest to District 7. That's going to go in District 7.
>
> A. Right.

> Q. And what's furthest away from District 7 is going to go in the other district.
>
> A. Right.
>
> Q. So it makes sense to you that the portion closest to your district very well could be more heavily black.
>
> A. Absolutely. As you move further and further away from the black population centers, you're going to get more and more white, less black, if you will.

Fairfax depo. 143:4-144:7.[8] *See also* Fairfax depo. 229:18-230:1 ("Well, I think we're running across the same problem that we talked about before where you have a concentrated African-American area, and you have a border. And so if you split the precinct, it's going to fall, many times, within that sort of white and black difference.").

It is true that Mr. Fairfax said that it might be different if there were a "dominant pattern" of precinct splits. Fairfax depo. 147:6-7. He did not explain what constitutes a "pattern," though, or why the large number of splits with significant

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[8] *Cf.* Doc. 263 at 50-51, where Defendants made the same argument that Mr. Fairfax now makes:

> The plaintiffs complain that when some precincts were split between majority-black districts and majority-white districts, the portion that went into the majority-black district had a greater percentage of black voters than the portion that went into the majority-white district. It is not surprising, though, considering the residential patterns in these areas, that a precinct on the border of majority-white and majority-black areas would reflect those patterns. If, for example, there is a majority-white district to the north of, and contiguous to, a majority-black district to the south, a precinct on the border of those districts may naturally have a greater concentration of white persons in the northern half of that precinct (which borders the majority-white district) and a greater concentration of black persons in the southern half (which borders the majority-black district). If that precinct is split in order for both districts to fall within 1% of the ideal population, the Legislature cannot skip Census blocks to put the northern half of the precinct in the majority black district. Each district will necessarily get the portion of the precinct contiguous to the district, and it will inherit the corresponding racial patterns. It is logical to expect a higher proportion of black voters to be placed in the majority-black district in many cases, based entirely on race-neutral criteria.

racial differentials in his plan does not amount to a pattern. The point remains that Mr. Fairfax agrees with Defendants that a seeming racial differential in a precinct split is not proof of race-consciousness, but may simply reflect local demographics.

Furthermore, Mr. Fairfax testified that sometimes he "inherited" precinct splits with racial patterns. When he chose to preserve the district core, he sometimes kept precinct splits (or county splits) that appeared in the 2000 plan, so, he said, any racial difference was due to the decision of the 2001 drafters. Fairfax depo. at 136:5-11; 181-82; 222:22-223:19. *Cf.* doc. 263 at 48 (Defendants noting that sometimes precincts are split in a plan because they were split in prior plans).

B. Plaintiffs' plans undermine their allegations about the process the State used to create its plans.

Throughout this litigation, Plaintiffs have argued that the state-wide decisions Randy Hinaman made to draw the State's plans were suspect. Plaintiffs have argued that the State should not have moved HD 53 and HD 73 to remedy population shifts. They have argued that the State should not have removed area from districts that were underpopulated. They have argued that the State should not have started its line-drawing with the underpopulated majority-black districts. Their new plans undercut these criticisms.

1. It made sense to move HD 53 and HD 73.

Plaintiffs complained that the Legislature should not have moved HD 53 from Jefferson County to Madison County, or HD 73 from Montgomery County to Shelby County. But ADC did exactly that in their new plan. Fairfax testified as follows:

> Q. What did you do with District 53?
>
> A. That district was removed to the northern end, Madison County, and the reason for that, I know that was done in the 2012 State Plan. And from my vantage point, it seemed logical because of the lack of population there. Once I add it up, it was something like 70,000, and lack of population amongst all the districts there and that's sort of where the city of Birmingham area –
>
> Q. So moving a district from Jefferson County [that] lacked population to Madison County that had lots of population, lots of growth, you could go along with that.
>
> A. That seemed logical to me.

Fairfax depo. 152:11-24.

Likewise, while Plaintiffs complained about HD 73 being moved from Montgomery County to Shelby County, that is a feature that appears in the ADC plan and that seemed like a logical choice to Mr. Fairfax: "It was logical. It was logical to do so." Fairfax depo. 167:20-24.

There should be no more complaints about moving HD 53 or HD 73.

2. Starting with the black-majority districts was a good idea.

Plaintiffs have implied that Mr. Hinaman did something wrong when he began with the black-majority districts when drafting the 2012 plans. Yet Mr. Fairfax, for purposes of the new ADC House plan, said that it makes sense to start with areas (like the challenged districts) that have lost population. When addressing the Jefferson County House districts, he said that "[t]he focal point was these districts that needed population to start and working on them because it doesn't make sense to work on the ones that have population. Work on the ones that

lack in population; then move to the other ones that are – that are less hamstrung, if you will, in population." Fairfax depo. 155:4-10.

3. Sometimes districts that are already underpopulated will lose more population as surrounding districts are drawn.

Plaintiffs implied that it is evidence of race-based line-drawing when a district expands into an area that is already underpopulated, as sometimes occurred in the course of drawing the 2012 plans.[9] But Mr. Fairfax often did the same thing. Discussing the Birmingham House districts, Mr. Fairfax said that this is sometimes unavoidable:

> A. … One of the things that -- one of the problems that I was confronted with is that you had an area where every district and every adjacent district had a lack of population. So somebody had to give up something, and you had to add to that other district that gave up something even more than what they gave up. I mean, you just -- you just had to do that.
>
> Q. You get stuck, don't you, where you have to take area from a district that's --
>
> A. Already --
>
> Q. -- that's already lacking in population?
>
> A. Absolutely.

---

[9] ADC argued as follows, for instance, in the course of discussing HD 67, which was expanded into an area previously part of underpopulated HD 72:

> The fundamental task of redistricting is to shift population from over-populated districts to under-populated ones. But taking population out of Perry County exacerbated the under-population there of HD 72, from which the population was taken: HD 72 was under-populated by 6,107 persons, or 13.42%. ADC Supp. Ex. 4. The more logical course would have been to take the population from racially mixed areas of adjacent HD 42 (Chilton County) or from rapidly growing Autauga County.

Doc. 258 at 67. This argument has now been further discredited.

Fairfax depo. 158:17-159:4. *See also, e.g.,* Fairfax depo. 199, discussing his expansion of HD 72 into underpopulated HD 71.

C. Plaintiffs' plans affirmatively establish that certain districts are not racially gerrymandered.

Some of the districts in Plaintiffs' plans are nearly identical to the same districts in the State's plans. The point of Plaintiffs' plans was for them to show that other redistricting choices would result in "significantly greater racial balance" in the challenged districts. *Easley v. Cromartie*, 532 U.S. 234, 258 (2001). But, for some districts, Plaintiffs' plans make virtually no difference in the "racial balance." The fact that one of the two plaintiffs shows the district with an almost identical composition as the challenged plan undercuts any argument that the Legislature made race predominant in that district. Moreover, where Plaintiffs' plans present districts with very similar lines or features to those in the Legislature's plans, these districts should be affirmed for that reason alone.

1. HD 19 and HD 53.

One of ADC's complaints about HD 19 and HD 53 in Madison County is that "[t]hese two districts are physically interlocking, as in a jigsaw puzzle." Doc. 258 at 51. ADC argues that this suggests that the districts were drawn together, and that the Court should draw negative inferences as a result. Yet the two districts interlock, albeit at different points, in the new ADC plan. See doc. 287-15 at pp. 1, 4. When ADC draws it, jigsaw puzzles apparently are okay:

> Q. … Look at 53 and 19. What I've got now is a blow-up of -- this is just your plan. It doesn't compare it to anything else.

A. Right, right.

Q. Looks like 53 and 19 sort of -- kind of a jigsaw puzzle configuration.

A. Right, right.

Fairfax depo. 160:10-16. Mr. Fairfax testified that some of the odd shapes in Madison County are a result of the fact that some precincts are not even contiguous, a problem that any line-drawer would face in that area. Fairfax depo. 133:11-16. As is the case with other districts, Mr. Fairfax did not identify a traditional districting principle that made his choices better than the Legislature's choices.

2. HD 32.

HD 32 in the 2012 plan is long and narrow, running a north-easterly direction from Talladega County to Calhoun County. HD 32 in both sets of Plaintiffs' plans is likewise long and narrow, running a north-easterly direction from Talladega County to Calhoun County. Doc. 287-18 at p. 1.

While Plaintiffs argue that the Legislature used precinct splits to make HD 32 a black-majority district, they admittedly did the same thing. *See* Cooper depo. 123:24-124:20.

3. HD 52-60 (Birmingham House Districts).

As discussed above, Mr. Fairfax agrees with the decision to move HD 53 to Madison County. For the remaining districts, he expanded them outward to find the needed population to bring them within deviation. When asked if the decisions he made were an "improvement over what was done before" or a series of "equally valid

choices," Mr. Fairfax described his decisions as "mostly equally valid choices." Fairfax depo. 158:11-24.

4. HD 67-72 (Western Black Belt Districts).

Everyone agrees that HD 67 should be Dallas County, plus a precinct or two from another county to bring the population within deviation. The Legislature expanded into Perry County, another Black Belt County, preserving that community of interest. The Plaintiffs chose Chilton County, a non-Black Belt County. Doc. 287-18 at 2. There is no reason why Chilton County is a better choice (unless one believes that purposefully finding "whiter" areas is a better choice), and the Legislature was more observant of communities of interest. Nonetheless, the general configuration of the district is the same.

ADC's HD 68 and 69 are similar to the Legislature's. HD 68 is irregular in both the 2012 and ADC plan. Instead of moving into Conecuh and Baldwin County, as the Legislature did, Mr. Fairfax moved into Choctaw County. Doc. 287-18 at 3. For HD 69, instead of taking a row of precincts in Montgomery County, as the Legislature did, ADC takes an odd incursion into Butler County and then on into Conecuh County. Doc. 287-18 at 4. The majority of the District is the same in both plans.

HD 71 in the ADC plan contains a protrusion into Tuscaloosa County, just as in the 2012 plan. Doc. 287-18 at 5. Instead of going into Pickens County, ADC takes more of Marengo County. And for HD 72, ADC kept the core of what the Legislature did. Doc. 287-18 at 7. Instead of going west into Sumter County to get additional

population, ADC opted to go east to take more of Perry and Bibb Counties. The differences are not so stark that the Court should draw any conclusions from them.

5. HD 82-85 (Eastern Black Belt).

In the 2012 plan, HD 82 is comprised of Macon County, a portion of Lee County, and a portion of Tallapoosa County. In the ADC plan, HD 82 is much the same, except omitting a portion of Lee County and taking a larger portion of Tallapoosa County. Doc. 287-18 at 8. And the differences in the way the Legislature drew HD 82 and the way Mr. Fairfax drew 82 is typical of many differences in the plan. Macon County is the base of the district in both. The Legislature found the additional population with precincts to the south and a few to the north. Mr. Fairfax expanded only to the north, because he started drawing his plan in the southeast,[10] and another district needed the Lee County population. Fairfax depo. 206. But Mr. Fairfax concedes that there is nothing in the realm of traditional redistricting principles that makes one way "good" and the other way "bad." Fairfax depo. 206:20-207:2.

In the 2012 plan, HD 83 contains a section of Russell County and an extension into Lee County, with HD 80 straddling the border of the counties and scooping into HD 83. In the ADC Plan, HD 83 contains a section of Russell County and an extension into Lee County, with HD 80 straddling the border of the counties and scooping into HD 83. Doc. 287-18 at 9. Mr. Fairfax said that there was nothing about the nature of the precincts he "dropped" versus the precincts he grabbed that

[10] Mr. Fairfax acknowledged that two drafters who start in different areas of the map may end up with very different districts, because of the way changes ripple throughout the plan. Fairfax depo. 68:12-69:13. *See also* Fairfax depo. 202:9-203:2

led to the differences. Fairfax depo. 2092:10. That is, he did not say that redistricting principles required different decisions from those made by the Legislature.

HD 84 is so similar in the Legislature's plan and ADC's plan, it is difficult to find the slivers of difference in the overlay map. Doc. 287-18 at 10. The only change is an omission of two small portions of a single precinct. That makes it equally difficult to explain why ADC was critical of the Legislature's HD 84:

> [T]he redistricters [in the 2012 plan] unexceptionally added the rest of Bullock County, making that county whole and adding substantial black population. The redistricters went on to expand the district to the north, into Russell County where, they picked up overwhelmingly black areas from HD 83, contributing to that district's grotesque shape. In Russell County, the redistricters added 3,324 black and 1,667 white persons to HD 84, while removing 305 whites and 195 blacks.

Doc. 258 at 83. If ADC proposes the same HD 84, there must be nothing wrong with the Legislature's choices.

Although HD 85 is not a black-majority district in the ADC plan, it is worth noting that in both the ADC Plan and the 2012 Plan, HD 85 is made up of Henry County with a small extension into Houston County. Doc. 294-3. ADC just chose a slightly different extension and eliminated an easily-drawn black-majority district (a move that, had the Legislature done it, would have invited a Section 2 suit by the ADC plaintiffs).

6. Birmingham Senate Districts (SD 18-20).

The ADC plan contains three majority-black Senate districts in Jefferson County with roughly the same configuration as the Legislature's plan. The black

majorities in that district, compared to the Legislature's plans, are different by only .04%, -3.2%, and -.09%. Def. Supp. Ex. 64. In the ALBC plan, SD 18, 19, and 20 differ from the Legislature's plan by only 3.14, -.37, and .17%. *Id.* Plaintiffs have not shown that there is an alternative that would result in "significantly greater racial balance" in these districts. *Easley*, 532 U.S. at 258.

7. SD 23 and 24.

The differences between SD 23 and 24 in the ADC plan and the 2012 plans are marginal. ADC put more emphasis on whole counties, and worked south to north, driving the decision to bring SD 23 out of Marengo and Clarke Counties and taking it north into Autauga County. Doc. 287-24 at 1.

The "hook" into Tuscaloosa County in SD 24 has been much maligned by the Plaintiffs, even though it appears in virtually every Senate plan ever drawn. It appears in the ADC plan, too. Doc. 287-24 at 2. It made sense to Mr. Fairfax, because that is the way SD 24 had been drawn before:

> Q. Now, you got several whole counties and then the extension into Tuscaloosa. If you hadn't looked at any other plans, is that what you would have chosen to do to make up the needed population?
>
> A. I guess it all depends.
>
> Q. On what?
>
> A. Well, you could consider that potentially since it existed, I guess, and it looks like it's an urban area, looks like a city area, that it's a district core, so you may want to retain that district core.
>
> Q. You mean because it existed before is a reason for it to exist again?
>
> A. That's, yes, one of the reasons, exactly.

> * * *
>
> Q. But the extending it into Tuscaloosa doesn't offend your understanding of redistricting principles?
>
> A. No, no. And not in this particular case because, again, I view that as a core of the district, and so it makes sense.

Fairfax depo. 115:1-14, 115:24-116:4.

8. SD 26.

Both the 2012 Senate Plan and the new ADC Senate Plan include a small Senate District 26 centered around the city of Montgomery, with SD 25 taking up the rural parts of the County:

> Q. Okay. So you've got no problem with the small, compact Senate District 26 focusing around the city limits and having Senate District 25 take the rural areas of Montgomery County and going into other counties to make up whatever -- to grab the population it needs?
>
> A. Correct. Whole counties, yes.
>
> Q. That concept makes sense to you.
>
> A. It is. It's logical. Not necessarily in every case, but in this case, it made sense.

Fairfax depo. 97:14-23.

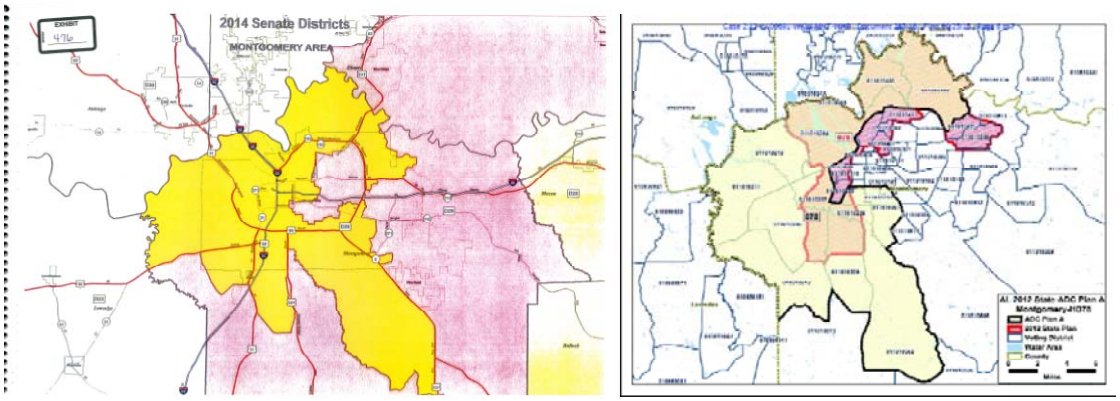
One of the main differences in the two versions of SD 26 is that the Legislature left the incumbent's home precinct whole, resulting in the "crab claw" shape, as it has been described in this litigation. In the ADC Plan, however, Senator Ross's home precinct is split in order to "chop off the claw" and make the district more compact. Fairfax depo. 98:24-99:23, 100:8-11. This is a case of competing goals

– compactness and whole precincts – and Fairfax admits that his choice is not necessarily "better" than another:

> Q. Well, now, over here you have a desire to keep precincts whole; correct? …
>
> A. Yes.
>
> Q. Okay. Over here you've got a desire for compact districts.
>
> A. Yes.
>
> Q. Here's a case where you can't have both; correct?
>
> A. Right.
>
> Q. So what makes you a better decider of which one you do than the Legislature?
>
> A. I don't necessarily believe that I'm a better judgment for that. I made the judgment at that time that I thought was best.
>
> Q. Okay. If someone made a different judgment that says I would rather have a whole precinct even if it's slightly irregular, that's not always a wrong choice; correct?
>
> A. That could be done, definitely.
>
> Q. Sometimes you're not dealing with right and wrong; you're dealing with different judgment calls.
>
> A. Absolutely. Somebody might not split that precinct.

Fairfax depo. 100:24-101:23.

And interestingly, the much-maligned shape of the Legislature's SD 26 (the first map below) looks a lot like ADC's HD 78 (the second map, doc. 287-16 at p.6):



According to ADC, SD 26 is "irregular" and a "strangely-shaped configuration." Doc. 258 at 39. Yet somehow, ADC's similar HD 78 is just fine. Fairfax depo. 172:4-6 ("*Q*. You're saying this District 78 in the House isn't that bad looking a district to you. *A*. Correct, right."). At the least, this means that SD 26 is not constitutionally suspect because of its shape.

Mr. Fairfax may differ on a few race-neutral choices that the Legislature made, but he agrees with the Legislature that it makes sense to have a "city" district and a "rural" district in Montgomery County. And the slight difference in SD 26's "claw" shape is a result of Mr. Fairfax's preference (in that instance) for compactness over whole precincts, not anything race-related.

Finally, it is worth noting that the only way the ALBC could get a meaningfully different black population in SD 26 was to racially gerrymander it. The ALBC's line-drawer expressly testified that he split counties for the express purpose of reducing the black population of SD 26. Cooper depo. 129:5-10.

9. SD 28.

In the ADC plan, Mr. Fairfax had no problem with adding specific, heavily-black precincts in Houston County for the express purpose of making SD 28 a black-

majority district, Fairfax depo. 124:8-14, and to "not do any type of retrogression or have any retrogression effect," Fairfax depo. 126:6-9. Of course, he was acting under the assumption that 50% black was sufficient for black voters to elect their candidate of choice, Fairfax depo. 113:12-17, and he drew it as a 51.7 % black district. The Legislature, on the other hand, was listening to Joe Reed and Senator Hank Sanders, who thought a greater majority was required, and drew it as a 59% black district.[11] They had different "targets," but used generally the same procedures and drew very similar districts, both featuring a peninsula into Houston County.

10. SD 33.

As in Montgomery County, Mr. Fairfax and the Legislature agreed in principle that the County should be divided into urban and rural Senate Districts. The Legislature moved SD 33 south to find the population it needed; Mr. Fairfax opted instead to move west and north (and ALBC made similar decisions). Fairfax could point to no general districting principle that made one direction an obviously better choice than another. *See generally* Fairfax depo. 102-111.[12] He even admitted that on the "eyeball test," the Legislature's version of SD 33 is more compact than ADC's. Fairfax depo. 110:12-17.

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[11] As the court in *Bethune-Hill* held, the issue is whether the Legislature "had good reasons for believing the BVAP percentage employed in the district … was necessary to avoid retrogression." *Bethune-Hill*, ___ F.Supp.3d at ___, 2015 WL 6440332 at *40.

[12] Mr. Fairfax said that he did not want go south because SD 35 to the south was already lacking in population, but that was no impediment when he was drawing other districts and gave up part of the population of an underpopulated district. *See* Fairfax depo. 111, 158:17-159:4, 199.

Conclusion

The only purpose of drafting new plans at this stage is to belatedly attempt to show that the Legislature could have achieved significantly greater racial balance through a plan that still achieved its political goals. Plaintiffs have shown no such thing. While Plaintiffs' plans fall within ±1%, and while some of the black-majority districts in their plans have lower black majorities, they could not reach that result without bizarre districts and retrogression to reach that point. Plaintiffs' plans do not even comply with the Court's order and, therefore, do not prove that the Legislature had a legal alternative.

Plaintiffs' plans do nothing to help their case. But, in making many of the same decisions that the Legislature made, and many of the same arguments to defend those decisions, the new plans help Defendants' case quite a bit and provide an additional reason for the Court to rule for the Defendants.

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