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

ALABAMA LEGISLATIVE BLACK CAUCUS, et al.,	)	
Plaintiffs,	)	
v.	)	**2:12-CV-00691-WKW-MHT-WHP**
	)	**(Three Judge Court)**
THE STATE OF ALABAMA, et al.,	)	
Defendants.	)	
ALABAMA DEMOCRATIC CONFERENCE, et al.,	)	
Plaintiffs,	)	
v.	)	**2:12-CV-01081-WKW-MHT-WHP**
	)	**(Three Judge Court)**
STATE OF ALABAMA, et al.,	)	
Defendants.	)	

RESPONSE TO DEFENDANT'S NOTICE OF SUPPLEMENTAL AUTHORITY

The Supreme Court's recent decision in *Harris v. Independent Redistricting Commission*, 578 U.S. ___ (slip. op. April 20, 2016) addressed claims of unconstitutional partisan gerrymandering. This case, in contrast, rests on claims of unconstitutional racial gerrymandering. As a result, *Harris* has no direct legal bearing on the racial gerrymandering claims at issue here.

Harris does, however, provide a strong demonstration of one proper means through which States other than Alabama that were also subject to the pre-clearance requirement after the 2010 Census met their obligations under Section 5 of the Voting Rights Act. As the Court's brief opinion documents, the Arizona Independent Redistricting Commission consulted with a "Voting Rights Act expert, their mapping consultant, and their statisticians," id. at 6, to determine the level

of minority population in the VRA districts factually required to preserve the "ability-to-elect districts," id., and to therefore avoid retrogression. The Commission then followed the conclusion of their statistician's report, id. at 7, and designed the VRA districts to ensure that they preserved the ability to elect as determined by the conclusions of this statistical analysis.

The decision of the three-judge court that *Harris* affirmed fleshes out the details more fully about the process Arizona employed to comply with Section 5. As that court noted, "one of the most important factors the Department of Justice considered in determining the ability to elect in a district is *its* level of racial polarization. . ." 993 F. Supp. 2d 1042, 1054 (2014) (emphasis added). As a VRA consultant, the Commission hired a former Department of Justice voting-rights expert, who informed the Commission about DOJ pre-clearance practice. Id. at 1056. Based on the recommendation of the Commission's counsel, the Commission also retained an expert social scientist, experienced in racial-polarization analysis "to conduct a racial polarization analysis." Id. The Commission also carefully followed the advice of its counsel concerning how many ability-to-elect districts the VRA required. Id. at 1057.

The Arizona Commission, in other words, asked the legally correct question under Section 5: what level of minority population is actually necessary, in the specific circumstances of the Arizona VRA districts, to preserve the ability to elect. Having asked the correct legal question, the Arizona Commission then relied on an empirical racial-polarization analysis, advice of counsel, and advice of a VRA legal expert, to determine what level of minority population was required. The Commission carefully adhered to the conclusions the evidence dictated on what was actually necessary to preserve the ability to elect. Not surprisingly, given this responsible and thorough process, there were no allegations concerning the excessive use of race and

unconstitutional racial gerrymandering in the *Harris* case.

The process in Alabama could not have been further from that documented in *Harris.* Most importantly, as the Supreme Court has concluded already, Alabama simply asked the wrong legal question concerning Section 5. It did not ask what was necessary to preserve the ability to elect. Instead, Alabama simply aimed to re-create the prior black population percentages in all its VRA districts, to the extent possible – and made doing so a non-negotiable priority for each VRA district. In addition, because Alabama did not seek to determine what was actually necessary to preserve the ability to elect, it did not undertake any racial-polarization analysis at all. It ignored information from actual election results as to what was actually necessary to preserve the ability to elect. The redistricting committee did not follow the legal advice of its counsel, Dorman Walker, who testified publicly that the high black-population percentages in some of the districts was not necessary under the VRA and might itself create violations of the VRA. We do not take any position on whether Alabama was required to take all the steps that Arizona took to comply properly with Section 5. But Alabama took *none* of these steps because it simply did not understand correctly that its VRA obligation was to preserve the ability-to-elect.

Alabama's Notice of Supplemental Authority tries to obscure the fact that it did not design its districts to preserve the ability to elect but instead, to re-create the prior black-population percentages. Because Arizona did attempt to design its districts to preserve the ability to elect – rather than to populate them by race at excessively high levels that matched the prior black-population percentage – the first two points in Alabama's Notice are irrelevant to the issues in this case. The ADC does agree with Alabama that *Harris* rejects an argument ADC is no longer making concerning the relevance of *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) to this case.

But *Harris* provides no justification for the Alabama legislature having "relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression." *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273 (2015).

Respectfully submitted this 5th day of May, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 5, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

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