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

ALABAMA LEGISLATIVE BLACK CAUCUS; BOBBY SINGLETON; ALABAMA ASSOCIATION OF BLACK COUNTY OFFICIALS; FRED ARMSTEAD, GEORGE BOWMAN, RHONDEL RHONE, ALBERT F. TURNER, JR., and JILES WILLIAMS, JR., individually and on behalf of others similarly situated,	*	
Plaintiffs,	*	Civil Action No. 2:12-CV-691-WKW-MHT-WHP (3-judge court)
v.	*	
THE STATE OF ALABAMA; BETH CHAPMAN, in her official capacity as Alabama Secretary of State,	*	
Defendants.	*	
DEMETRIUS NEWTON et al.,	*	
Plaintiffs,	*	
v.	*	Civil Action No. 2:12-cv-1081-WKW-MHT-WHP (3-judge court)
THE STATE OF ALABAMA et al.,	*	
Defendants.	*	

ALBC PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO RACIAL DISCRIMINATION CLAIMS

Plaintiffs Alabama Legislative Black Caucus et al., through undersigned counsel, respond as follows to defendants' motion for summary judgment with respect to claim of ALBC plaintiffs of race-based vote dilution and isolation, Doc. 121, and supporting brief, Doc. 125. Plaintiffs rely on the arguments they advanced in earlier briefs, in particular, Docs. 32 and 35.

Defendants base their motion for summary judgment on the contention that their extraordinary efforts to pack the majority-black House and Senate districts in Acts 2012-602 and 2012-603 were a "reasonable" interpretation of what was necessary to obtain preclearance of these redistricting plans under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Defendants' brief, Doc. 125 at 64 et seq. The drafters started drawing both plans with the majority-black districts, and they attempted to maintain the high majority-black percentages produced by overlaying 2010 census data on the under-populated 2001 districts. This made them reach out to capture as many black people as possible and to avoid including white people.

Plaintiffs have previously shown that avoiding retrogression under § 5 did not require maintaining these high black percentages. Doc. 32 at 12-15. But the defendants' devil-made-me-do-it defense is now a moot question, because the State of Alabama has succeeded in getting the Supreme Court to strike down § 4 of the Voting Rights Act, 42 U.S.C. § 1973b, so it is no longer required to comply with §

5. Stripped of any alleged justification based on § 5, the drafters' repeated admissions that they subordinated good districting criteria to the explicit racial considerations needed to create black super-majorities now demonstrate clear violations of § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. According to the drafters' testimony, these racial considerations were a causal factor in splitting counties all over Alabama, even in areas not contiguous to majority-black districts. As alleged in Count II of the ALBC plaintiffs' amended complaint, Doc. 60, the statewide dilution of black voting strength outside the majority-black districts and the segregation of legislators elected by African Americans were aided by the arbitrary and unnecessary restriction of permissible population deviations to ± 1% and by systematic noncompliance with the whole-county provisions of the Alabama Constitution.

When these undeniable violations of federal statutory and constitutional prohibitions of racial discrimination are added to the widespread dilution of county residents' equal voting rights for members of their local delegations, there is little left in the Act 2012-602 and 2012-603 plans than can be defended. A do-over is needed, and it should be begun as soon as possible. Plaintiffs' pending motion for reconsideration of their facial Equal Protection challenge offers an immediate opportunity for this Court to enjoin the House and Senate plans in time for the

Legislature to revisit its redistricting responsibilities, this time following the correct legal and constitutional standards.

A. The Governing Statutory and Constitutional Standards.

Shelby County v. Holder, 2013 WL 3184629 (June 25, 2013), has held that the coverage formula in § 4 of the Voting Rights Act is unconstitutional, so that Alabama cannot be subjected to the preclearance requirements of § 5. Chief Justice Roberts' opinion for the Court's majority highlighted the concern that "considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 [of the Voting Rights Act] seem to be what save it under § 5." 2013 WL 3184629 at *13 (quoting *Georgia v. Ashcroft*, 501 U.S. 452, 491 (1991) (Kennedy, J., concurring)). Now §5 cannot save Acts 2012-602 and 2012-603, and they must be judged by the redistricting standards of § 2 and the Fourteenth and Fifteenth Amendments.

Bartlett v. Strickland, 556 U.S. 1 (2009), held that § 2 of the Voting Rights Act does not compel states to draw crossover districts, in which blacks who make up less than 50% of the voting-age population nevertheless can count on enough support from white voters to allow blacks to elect the candidate of their choice. But *Bartlett* reaffirmed the Court's earlier ruling that, where there is racially polarized voting, § 2 does prohibit "the concentration of blacks into districts where

they constitute an excessive majority, so as to eliminate their influence in neighboring districts." 556 U.S. at 28 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986)) (internal quotation marks omitted). "And," the *Bartlett* plurality reminded us, "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." 556 U.S. at 24 (citing *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 481–482 (1997)). As the *Bartlett* dissenters noted, the plurality disavowed the "aberrant implication" that "the only way to comply with § 2, is by drawing district lines in a way that packs minority voters into majority-minority districts, probably eradicating crossover districts in the process." 556 U.S. at 43 (Souter, J., dissenting). Indeed, the plurality opinion concludes by saying, "It would be an irony, however, if § 2 were interpreted to entrench racial differences by expanding a 'statute meant to hasten the waning of racism in American politics.'" Id. at 25 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)).

In *LULAC v. Perry*, 548 U.S. 399 (2006), the Court held that "proportionality" was no "safe harbor" for a legislative redistricting plan challenged under § 2 of the Voting Rights Act. Id. at 436. The state cannot defend the destruction of one majority-Latino or majority-black district solely by drawing

another one elsewhere. "If proportionality could act as a safe harbor, it would ratify 'an unexplored premise of highly suspect validity: that in any given voting jurisdiction ..., the rights of some minority voters under § 2 may be traded off against the rights of other members of the same minority class.'" Id. (quoting *De Grandy*, 512 U.S. at 1019).

"While no precise rule has emerged governing § 2 compactness, the 'inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries.'" *LULAC*, 548 U.S. at 433 (quoting *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) and *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion)) (internal quotation marks omitted). "A district that 'reaches out to grab small and apparently isolated minority communities' is not reasonably compact." *LULAC*, 548 U.S. at 433 (quoting *Bush v. Vera*, 517 U.S. at 979). Whether or not this Court has subject-matter jurisdiction to enforce the whole-county provisions of the Alabama Constitution, the defendants' total disregard of those state constitutional restrictions on the division of counties is highly relevant to plaintiffs' federal racial vote dilution and segregation claims, as defendants concede, Doc. 125 at 4-5. Neither political reasons nor incumbency protection can justify a § 2 violation. *LULAC*, 548 U.S. at 440-41. "If . . . incumbency protection means excluding some voters from the district simply

because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters." Id. at 441.

Defendants base their contention that it was necessary to preserve the high black percentages by crowding black residents into the majority-black districts entirely on their mistaken understanding of the ¶ 5 preclearance standard. They rely on *Texas v. United States*, 831 F.Supp.2d 244, 263 (D. D.C. 2011) (3-judge court). Doc. 125 at 59. Plaintiffs previously showed that this decision interpreting § 5 post-2006 does not support defendants' policy of systematically packing all the majority-black districts. Doc. 32 at 12-14. Defendants do not dispute there is no such requirement in § 5, "but maintaining the size of the voting minority," they say, "is certainly one way to obtain preclearance." Doc. 125 at 64-65. So, say defendants, this understanding of § 5 by the co-chairs of the Legislative Reapportionment Committee was "not unreasonable." Id. at 66. "In the absence of anything in writing to the contrary, the ALBC Plaintiffs' suggestion that Senator Dial and Representative McClendon have an incorrect view of the Voting Rights Act should be disregarded." Id. Well, unfortunately, *Shelby County v. Holder* is now "in writing," so defendants can no longer defend their black super-majorities by claiming compliance with § 5 of the Voting Rights Act.

B. Packing the Majority-Black Districts Was the Predominant Objective of the House and Senate Plans, Impacting How Every Other District Was Drawn.

Defendants admit that "[i]n drawing the plans, Senator Dial and Representative McClendon started with the black-majority districts because the Voting Rights Act requires the State to, among other things, preserve those districts to the extent possible." Defendants' brief, Doc. 125 at ¶ 26 (citations omitted); id. at ¶ 109. They thought "to the extent possible" meant going beyond preserving 27 House and 8 Senate districts with black voting-age populations, which provides African Americans in those districts an equal opportunity to elect candidates of their choice. "In order to essentially **guarantee** that the black community could elect the candidate of its choice in those pre-existing black-majority districts, the population to be added to the black-majority districts had to be contiguous to the prior district lines and had to have about the same percentage of black population in it." Doc. 125 at ¶ 30 (emphasis added) (citations omitted). See also Doc. 125 at ¶¶ 49-50 and ¶ 125. "The result of loading the 2010 Census data into the 2001 Senate and House plans also demonstrates that the Legislature had to find substantial numbers of people to populate the black-majority districts in line with the applicable population deviation." Doc. 125 at 57. "They accomplished this by 'add[ing] population that was contiguous to the

old district line and had about the same percentage of black population in it.'" Doc. 125 at 64 (citations omitted).

This packing objective was paramount, subordinating the preservation of county boundaries. Doc. 125 at ¶¶ 42-43, 90. In fact, defendants admit, the drafters' misconceived notion that § 5 of the Voting Rights Act required preserving the size of all black majorities was the "major reason" they adopted the ± 1% population deviation restriction. Doc. 125 at ¶ 81. It was also why they rejected the SB 5 and HB 16 plans. Id. at ¶¶ 82, 114. Defendants admit that the ± 1% population deviation restriction "made it more difficult to avoid splitting counties." Id. at ¶¶ 88, 113.

Senator Dial repeatedly emphasized the priority given to maintaining the black population percentages in the majority-black districts. "We wanted to make sure they stayed as they were and we did not do away with any and that the population, as they grew, that they grew into the same proportion of minorities that they originally had or as close to it as we could get it." Dial, Doc. 125-3 at 17:16-22. Dial never considered any black majority percentage to be too high. Id. at 99:12-15, 121:15-23, 122:1-19. He testified, "My concept of a safe harbor is drawing a district where a minority is assured of being elected." Id. at 120:18-20.

Randy Hinaman was "the primary drafter" of the plans. Dial, Doc. 125-3 at

17:4-6. Rep. McClendon instructed Randy Hinaman to begin the House plan by drawing the "minority districts." McClendon, Doc. 125-4 at 20:9-23, 21:1-9. And Sen. Dial instructed Hinaman to "begin with the minority districts to ensure they were not regressed, and each one of them had to grow. And as we did those, then I filled in the blanks around those with what was left of the districts." Dial, Doc. 125-3 at 19:19-23, 20:1-10. Maintaining the same high black percentages had a predominant impact on the entire plan. Dial testified: "Without the Voting Rights Act, I could have drawn perfect districts throughout the state." Id. at 50:6-7.

Mr. Hinaman testified he had two goals: first, to preserve the black-majority percentages, and, second, to avoid putting incumbents in the same district. Exhibit D, Hinaman deposition at 23:13 to 25:15 (hereafter "Hinaman"). He testified that "I was concerned about anyplace where we lowered the black percentage significantly that there could be a preclearance issue." Id. at 101:23-25. The requirement in the Legislative Reapportionment Committee's guidelines that "Each House and Senate district should be composed of as few counties as practicable" was subordinated to these goals. Id. at 28:23 to 29:20, 57:4 to 58:22.

Mr. Hinaman's contract required that he work only for Republican legislators. Hinaman at 10:6 to 11:1. Even though he started the House and Senate plans with the majority-black districts, he met with no black legislators. Id. at

38:6-25. But he met with most of the Republican members of the House and Senate and attempted to follow their directions about how to draw the districts. Id. at 74:5-13, 114:8 to 116:14. Defendants admit that Sen. Dial and Rep. McClendon let the incumbents decide how to draw their district lines, so long as they agreed among themselves. Doc. 125 at ¶¶ 21-26, 33-37, 55-57, 59-67, 83, 107, 116-21.

Mr. Hinaman made no effort to preserve the 9 majority-black House districts in Jefferson County, even though that would have been possible within the ± 1% deviation restriction he was given. Hinaman at 85:23 to 86:8. His reason for not trying to preserve all 9 House districts was that "adding white voters from the rest of Jefferson County posed a serious problem with retrogression." Doc. 125-10 at 5; Hinaman at 84:14-19. By a retrogression problem he meant reducing the size of the black majorities, and he "thought that would potentially create preclearance issues." Hinaman at 61:4-11. The result was that two black incumbents, Representatives Newton and Givhan, were put in the same HD 60. Doc. 60-27. Defendants openly admit that the only reason a new majority-black district was created in Madison County was to replace Rep. Newton's HD 53. The clear inference is that a second majority-black House district would not have been drawn in Madison County if the majority-black House districts in Jefferson County had not been "sufficiently underpopulated **to allow for** the creation of a new black-

majority House district in Huntsville, where the black population was growing." Doc. 125 at ¶ 38 (emphasis added) (citations omitted).

But, in order to draw 10 majority-white House districts in Jefferson County, Hinaman had to extend 6 of them far into other counties. He crossed the county boundaries for two reasons: (1) to avoid pulling black population away from the majority-black districts, and (2) to avoid putting white incumbents in the same districts. Hinaman at 62:16-19, 66:2-7. That included honoring Mary Sue McClurkin's request to keep 224 Jefferson County residents in her Shelby County district, id. at 63:17 to 64:12, a fragment that was not needed to keep HD 43 within ± 1%. Id. at 64:2-12. Mr. Hinaman's explanation for extending HD 16 all the way from Lamar County to Jefferson County was that keeping the high majority-black percentages in the districts south of Lamar County forced HD 16 eastward. Id. at 65:2-17.

With respect to the Jefferson County Senate districts, defendants make these race-specific admissions:

> 85. Senator Dial testified that he "couldn't move Senator Smitherman over the hill into Mountain Brook and Vestavia. It would have regressed his district." Exhibit O-3 at page 50, lines 6-8.
>
> 86. Senator Dial testified that he did not reduce the number of white-majority districts in Jefferson County because that would have resulted in putting some incumbents in the same district, thereby violating "the promise I made to all 34 of the senators."

Doc. 125 at 24. According to Sen. Dial, maximizing the 3 majority-black Senate districts in Jefferson County required extending all 5 majority-white districts outside Jefferson County, causing additional splits in Jackson, Marshall, and Blount Counties. Doc. 125 at ¶ 84; 125-3 at 47:13 to 51:1.

According to Mr. Hinaman, moving HD 53 from Jefferson County to Madison County had a further ripple effect. It combined with population growth to cause "districts [to] radiat[e] out of Madison County," which, he said, helps explain why little Dekalb County ended up with 6 House districts. Hinaman at 53:15 to 55:8. And Sen. Dial testified that maintaining the majority-black percentages in Senators Singleton's and Sanders' districts (SD 23 and SD 24) was one reason why he had to extend Democrat Senator Tammy Irons' SD 1 over into Madison County. Doc. 125 at ¶ 87; Doc. 125-3 at 51:2 to 52:15. Sen. Dial denied that extending Sen. Irons' district all the way from Lauderdale to Madison County to take black precincts out of SD 7 was a consideration on his part. Doc. 125-3 at 118:13 to 119:2. Rep. Laura Hall, an African American, had recently lost a special election for SD 7. Doc. 125-3 at 117:5 to 119:2. But Mr. Hinaman testified that those black precincts were put in Sen. Irons' district because she is a Democrat and should prefer them to "X thousand more Limestone Republicans." Hinaman at 120:24 to 121:16.

By contrast, Sen. Dial had no qualms about taking black precincts out of the Senate district of another white Democrat, Sen. Marc Keahey's SD 22. He justified it on the ground that Sen. Sanders in SD 23 needed those black precincts to prevent a drop in Sanders' majority-black district, even from 65% to 62%, which Sen. Dial (erroneously) thought would be retrogression prohibited by ¶ 5. Doc. 125 at ¶¶ 96, 101; Doc. 125-3 at 80:4 to 81:22.

Asked why SD 11 was drawn in a semi-donut-shape that splits St. Clair, Talladega, and Shelby Counties, Sen. Dial blamed that also on the need to preserve the black majorities in Jefferson County Senate districts. Doc. 125-3 at 111:2 to 114:15. The incumbent, Sen. Jerry Fielding, was a Democrat. He now has switched to the Republican Party.

C. The Dilution and Segregation of Black Voting Strength Statewide.

Acts 2012-602 and 2012-603 were designed to concentrate black voters in House and Senate districts that have excessively large majorities, more than are needed to satisfy § 2 of the Voting Rights Act. This necessarily increases the political segregation of African Americans and reduces their ability to influence the outcome of legislative elections in the rest of the state. The dramatic statewide negative impact on black voting strength outside the majority-black districts can be seen in Exhibits A, B, and C to this response. Exhibits A and B compare the Act

2012-602 and 2012-603 plans with the HB 16 and SB 5 plans introduced by members of the Legislative Black Caucus. They show how heavily the majority-black House and Senate districts are packed. Exhibit C shows how this packing substantially reduced the black percentages in the top five House and Senate districts under 50%. The average black percentage in the top five Act 603 Senate districts is 30.66%, compared with 36.34% in the top five SB 5 Senate districts. The average black percentage in the top five Act 602 House districts is 23.88%, compared with 31.01% in the top five HB 16 House districts.

Both of the State's plans ignore traditional districting criteria, the preservation of county boundaries in particular, which are subordinated to incumbent interests. This violates the results standard of § 2. *Bartlett v. Strickland*, 556 U.S. at 28; *LULAC*, 548 U.S. at 433. The undisputed evidence of racially polarized voting throughout Alabama is supported, *inter alia*, by the expert report of Dr. Allan Lichtman.

The drafters' avowed purpose of packing African Americans in the majority-black districts also constitutes a *per se* admission of intentional discrimination that violates both § 2 of the Voting Rights Act, *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009); accord, *Broward Citizens for Fair Districts v. Broward County*, 2012 WL 1110053 (S.D. Fla., April 3, 2012) at *4-*6, and the Fourteenth and Fifteenth

Amendments. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). See cases cited in Doc. 35 at 13-15. A finding of intentional discrimination is abundantly supported by the direct and circumstantial evidence plaintiffs referred to in Doc. 35 and elsewhere, and by the expert report of Dr. Ted Arrington.

The first priority given to maintaining the excessively high majority-black population percentages was, of course, an intentional classification of residents predominantly on the basis of race, subordinating all other good districting standards, thus violating the Fourteenth and Fifteenth Amendments in the absence of a compelling state interest. *Easley v. Cromartie*, 532 U.S. 234, 241-42 (2001). Defendants' purported compelling state interest, the need to comply with § 5 of the Voting Rights Act, has been declared unconstitutional by the Supreme Court in *Shelby County v. Holder*.

D. The Dilution of Black Voting Strength For Local Legislative Delegations.

Plaintiffs previously briefed at length the dilution of black voting strength for the Jefferson County local delegation. Doc. 35 at 8-13. The unnecessary splitting of county boundaries in Acts 2012-602 and 2012-603 also adds legislators elected by white majorities and dilutes black voting strength for the local delegations in the following counties: Greene, Marengo, Montgomery, Mobile, and

Madison. Each of these instances of vote dilution in county legislative delegations violates both the results and intent prongs of § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.

E. The ALBC Plaintiffs Have Article III Standing.

Defendants' attempt to apply the "district-specific" Article III standing rule of *United States v. Hays*, 515 U.S. 737 (1995), to plaintiffs' claims of racial discrimination in this case is misplaced. Doc. 125 at 53. *Hays* addressed the standing requirements for asserting the unique cause of action established by *Shaw v. Reno*, 509 U.S. 630 (1993). A *Shaw* claim seeks redress for injuries that "threaten to stigmatize individuals" or create "representational harms" that the Court held could be caused by drawing a district so bizarre that it is "unexplicable on grounds other than race." *Hays*, 515 U.S. at 744 (quoting *Shaw*, 509 U.S. at 644). To have standing, a plaintiff must live in the district he or she contends violates the special kind of racial gerrymander that *Shaw* prohibits. Hays, 515 U.S. at 745.

Justice O'Connor's majority opinion in *Hays* took pains to distinguish the *Shaw* standing requirement from the "quite different grounds" needed to provide standing to a plaintiff asserting dilution of his or her vote in a legislative redistricting plan based on population inequality or race or political party. 515

U.S. at 747. She was referring to Justice Stevens' dissent, which argued that the *Hays* plaintiffs lacked standing because they alleged no cognizable injury. "Appellees have not alleged or proved that the State's districting has substantially disadvantaged any group of voters in their opportunity to influence the political process. They therefore lack standing to argue that Louisiana has adopted an unconstitutional gerrymander." 515 U.S. at 751 (Stevens, J., dissenting) (citing *Davis v. Bandemer*, 478 U.S. 109, 125, 132-33 (1986)).

Davis held that to assert a justiciable claim against a statewide legislative redistricting plan the plaintiff must allege that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." 478 U.S. at 132. The Court distinguished this from a claim of "unconstitutional vote dilution in an individual district...." Id. "Statewide, however, the inquiry centers on the voters' direct or indirect influence on the elections of the state legislature **as a whole**. And, as in individual district cases, an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively." Id. at 133 (emphasis added).

Common sense tells us why the district-specific *Shaw* standing rule could not apply to statewide vote dilution challenges to state legislative redistricting

plans, like the instant case. For example, it would limit a one-person, one-vote action to the single over-populated district in which the plaintiff resided, and it would bar claims that majority-black districts should be created where none now exists. In the instant action plaintiffs allege – and the evidence proves – that the systematic packing of the majority-black districts segregates legislators elected from those districts and denies all black Alabamians equal access to the political process as a whole. Plaintiffs also allege that the unnecessary splitting of county boundaries dilutes their voting strength both statewide and in particular counties. These are justiciable claims under the Voting Rights Act and the Constitution, and the ALBC plaintiffs have standing to assert them.

In any event, under Acts 2012-602 and 2012-603, plaintiff Singleton resides in Hale County, HD 72, and SD 24; plaintiff Armstead resides in Marengo County, HD 65, and SD 24; plaintiff Bowman resides in Jefferson County, HD 58, and SD 20; plaintiff Rhone resides in Clarke County, HD 65, and SD 22; plaintiff Turner resides in Perry County, HD 67, and SD 23; and plaintiff Williams resides in Montgomery County, HD 78, and SD 26. The Alabama Legislative Black Caucus is composed of every African-American member of the House and Senate. The Alabama Association of Black County Officials has members in most counties in Alabama. By whatever standard, including the *Shaw* standard, they have standing

to challenge more than enough of the packed, predominantly race-based House and Senate districts to require a complete redrawing of both redistricting plans.

Conclusion.

Defendants' motion for summary judgment with respect to claim of ALBC plaintiffs of race-based vote dilution and isolation, Doc. 121, should be denied.

Respectfully submitted this 10th day of July, 2013.

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