No. 13-395

In the
Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*
Appellants,
v.
ALABAMA, *et al.*
Appellees.

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

APPELLEES' JOINT MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

The District Court's decision does not implicate the question set forth in the jurisdictional statement for two reasons. First, Alabama's local delegations do not "exercise general governing authority over counties." J.S. i. Second, all three judges below agreed that the plaintiffs have offered no standard to distinguish necessary population differences relating to local delegations from "unnecessary" ones. *Id.*

In light of the record, this appeal actually presents the following four questions:

I. Whether this Court lacks appellate jurisdiction under *Goldstein v. Cox*, 396 U.S. 471 (1970), because the decision below was interlocutory and involved no request for a preliminary injunction.

II. If this Court has appellate jurisdiction under *Goldstein*, whether the District Court correctly concluded that the ripeness doctrine deprived it of subject-matter jurisdiction, given that the relevant Legislature will not be elected until November 2014 and will not adopt any relevant rules regarding local legislation until 2015.

III. Whether, in the alternative, the District Court correctly concluded that the standing doctrine deprived it of subject-matter jurisdiction, given that the plaintiffs offered no evidence that a cognizable claim was redressable through their requested relief.

IV. Whether, in the alternative, the District Court correctly determined, under the specific facts proffered by the plaintiffs, that these particular local delegations do not trigger the one-person, one-vote rule.

PARTIES TO THE PROCEEDING

The plaintiffs omitted intervenor-defendants Gerald Dial, Alabama Senator, and Jim McClendon, Alabama Representative, from their list of parties in this matter. *See* Doc. 90 (granting Dial and McClendon's motion to intervene).

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MOTION TO DISMISS OR AFFIRM

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

INTRODUCTION

Additional briefing and oral argument are neither necessary nor appropriate. This Court does not have jurisdiction over this appeal. If this Court does not dismiss the appeal on that basis, it should summarily affirm. The District Court offered three independent and equally valid reasons the plaintiffs cannot prevail. Each of these grounds is tied to this case's particular facts, and each is tied to jurisprudential problems created by litigation decisions these particular plaintiffs have made. These considerations make summary adjudication the proper outcome, whether by dismissal or affirmance.

STATEMENT OF THE CASE

The plaintiffs have overlooked several facts and procedural circumstances that render this case uniquely fit for dismissal or summary affirmance. The critical facts include the following:

(1) the relevant rules concerning local delegations will not be established until a new Legislature is elected in November 2014 and holds an organizational session in January 2015;
(2) local delegations do not "exercise general governing authority over counties," J.S. i; and

(3) it is undisputed that no legislative map for Alabama can be drawn that complies with the one-person, one-vote rule without splitting counties.

The discussion that follows describes these facts in more detail.

A. The relevant rules concerning local delegations will not be proposed or established until January 2015.

The plaintiffs have glossed over the District Court's undisputed findings—critical to the ripeness question—about the genesis of the rules governing Alabama's local delegations. The plaintiffs are challenging the effect that Alabama's redrawing of its electoral maps will have on local delegations after the first election conducted under those maps in November 2014. *See* J.S. App. 22. The plaintiffs have assumed that the courts can discern how the local delegations will operate when that Legislature convenes. But the facts do not bear out their assumption. The relevant rules regarding local delegations will not be crafted until after that election, and until then the courts cannot know what those rules will be.

A few facts about the Alabama Legislature provide important context. As the District Court explained, each member of the Legislature is elected to the same four-year term, so each stands for election, every four years, "on the same day." J.S. App. 3. The term of each current legislator is set to expire in November 2014, *see id.* at 22-23, and there is no guarantee that any particular legislator will be re-elected

to the new four-year term that will begin at that time.

Each new Legislature sets the procedural rules that will govern its four-year term during a constitutionally mandated "organizational session" that occurs during the January following the election. J.S. App. 3 (citing ALA. CONST. art IV, §48.01). Critically for present purposes, the District Court found that during this opening session, the separate houses adopt their respective "rules for local legislation, including the use of local delegations." *Id.* at 5. The separate houses also use this session to appoint "'standing committees of the senate and house of representatives for the ensuing four years.'" *Id.* at 3 (quoting ALA. CONST. art IV, §48.01). These include the committees that address local legislation. *Id.* at 5.

The fact that these rules and committees are created at the beginning of each Legislature's term means they dissolve at the end. *See* J.S. App. 22 (citing Rules of Senate of Alabama, Alabama State Senate, *available at* http://www.legislature.state.al.us/senate/senaterules/senaterulesindex.html (last visited June 11, 2013)). As the District Court put it, these rules and committees "cease to exist" when the four years have run. J.S. App. 5. It is then up to the next Legislature to "adopt[] a system," in its own organizational session, to govern its own term. *Id.* Thus, although the "rules for local legislation that have been adopted by each Legislature have been fairly consistent over the last twenty years," they are not set in stone, and must be affirmatively adopted with each new Legislature. *Id.* at 5-6. "[N]ew local legislative committees have been created." *Id.* at 6. The

House has "created new local delegation committees," and the Senate "has increased the number of standing committees." *Id.*

The District Court explained that the plaintiffs "offered no evidence to support their assertions that the local delegations exist continuously without any action from the Legislature at the organizational session." *Id.* at 13. Thus, the plaintiffs were simply wrong when they repeatedly insisted to the District Court that "legislators are assigned to local legislative delegations *by statute*, not by internal rules of the Legislature." Doc. 67 at 4.

All this means that there is currently nothing for the plaintiffs to challenge. As the District Court explained, "we can neither know whether the Legislature elected in 2014 will adopt a system of local delegations, nor how that system, if adopted, will be structured." J.S. App. 23. Indeed, we do not even know who the members of that Legislature will be.

B. Alabama citizens do not elect local delegations, and local delegations do not exercise governmental authority over counties.

Two additional facts about the delegations are relevant to the question presented on the merits.

First, as a consequence of each Legislature's duty to implement its own rules during its organizational session, Alabama citizens do not vote for members of local delegations in any formal way. Citizens simply vote for the representatives assigned to their districts. *See* J.S. App. 60. Because the organizational session has not occurred at the time of the election, citizens do not know, when they cast their ballots, how the local delegations will work or even if the newly elected Legislature will choose to use local del-

egations. *See id.* Thus, as the District Court found below, "there can be no dispute that both members of committees and local delegations are selected through a process that occurs after the election of the legislators." *Id.*

Second, the plaintiffs are wrong when they assert that "local legislative delegations . . . exercise general governing authority over counties." J.S. i. As the District Court explained, it is certainly true that "the Constitution of Alabama limits the power of local governments." J.S. App. 3.[1] But it is "the Alabama Legislature," not the local delegations, that bears ultimate responsibility for local legislation. *Id.* Alt-

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[1] Alabama appears to be one of many States that employs the so-called "Dillon's Rule," which limits the power of local governments. *See* Adam Coester, *Dillon's Rule or Not*?, NAT'L ASS'N OF COUNTIES RESEARCH BRIEF, Jan. 2004, available at http://www.celdf.org/downloads/Home%20Rule%20State%20or%20Dillons%20Rule%20State.pdf. The plaintiffs misleadingly and unfairly imply that a district court has found that Alabama is currently using this system for racist reasons and to a racist end. *See* J.S. 4 ("Since adoption of the 1875 'Redeemer' Alabama Constitution, the state has denied home rule to its counties in order to 'guarantee[] the maintenance of white supremacy in majority-black counties.'" (quoting *Knight v. Alabama*, 458 F. Supp. 2d 1273, 1284-85 (N.D. Ala. 2004)). What that court held was that as an *original* matter, the "general hostility to home rule" in the 1875 and 1901 state constitutions was "motivated at least in part by race." *Knight*, 458 F. Supp. 2d at 1284. The plaintiffs presumably do not believe that state leaders' *current* use of local delegations still has either a racist purpose or effect, as they have disclaimed any intent to challenge the local delegations and indeed repeatedly argued below that local delegations should remain in place. *See* J.S. App. 34; *cf. Knight*, 458 F. Supp. 2d at 1312-13 (concluding that the once-discriminatory tax provisions challenged in that case "do not continue to have a segregative effect").

hough the Legislature traditionally has used local delegations and committees "to facilitate the passage of this legislation," *id.* at 4, the final power to promulgate these laws lies with the Legislature as a whole. Legislators are thus "free to oppose local legislation on the floor," and any member of the House can contest local legislation in a way that requires extraordinary steps before the bill gets a vote. *Id.* at 5. As the District Court found, "[l]ocal delegations exercise no general regulatory powers over counties; that is, local delegations cannot impose taxes; administer schools; or provide emergency services, housing, transportation, utilities, roads, sanitation services, health services, or welfare." *Id.* at 53. "And local delegations cannot enact laws for the counties." *Id.* To the contrary, no local legislation is "enacted until it receives a majority vote in both houses of the Alabama Legislature and is signed by the Governor." *Id.* at 5.

C. The Legislature drew the new maps to strictly comply with the one-person, one-vote rule.

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

First, the plaintiffs' chief complaint is that the redrawn districts are, as the District Court put it, "too equal." J.S. App. 165. The 2010 census revealed that Alabama's existing districts had become "malapportion[ed]." *Id.* at 2. Under this Court's precedents, the Legislature had an obligation to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). To comply with that require-

ment, the Legislature drew new electoral maps with population differences that do not exceed 2%. *See* J.S. App. 6. That number represented stricter compliance with one-person, one-vote than the State's last two redistrictings, where the maps allowed deviations of up to 10%. *See* J.S. 8-9.

Second, it is undisputed that the one-person, one-vote rule makes it, as the plaintiffs put it, "impossible" to draw *any* legislative plan in Alabama that does not split a significant number of counties. J.S. 6. The maps used after the last two censuses, which used a more lenient 10% disparity between districts, prove the point. *See* Doc. 76 at 4-5. The 1993 maps split 32 counties in the Senate and 36 counties in the House, and the 2001 plans split 31 counties in the Senate and 39 counties in the House. *See id.* Meanwhile, the plans at issue here split 33 counties in the Senate and 50 in the House. *See id.*

Correspondingly, the plaintiffs have not claimed that the Legislature should have drawn a map that avoided county-splitting altogether. *See* J.S. App. 34. The plaintiffs' claim is instead that the Constitution requires the Legislature to split *fewer* counties by making the various districts less equal and by making what the plaintiffs ambiguously call only "necessary" splits. *See id.* at 35, 38-39.

D. The proceedings below.

Two aspects of this case's procedural history bear on its proper resolution in this Court.

First, when the plaintiffs claim that the lower court's order gave rise to "an immediate appeal to this Court," J.S. 14, they are ignoring the decision's interlocutory nature. As the plaintiffs acknowledge, the order they are challenging does not amount to a

final judgment resolving every claim in the case. This order instead granted the defendants summary judgment as to only one count of the complaint. *See* J.S. App. 62. Another count, alleging racial discrimination in the drawing of the maps, remained. Both counts sought an injunction prohibiting the enforcement of the redistricting acts. *See* Doc. 60 at 55-57. The three-judge court tried the plaintiffs' racial-discrimination claim in August. *See* J.S. 13 n.8. At the time this motion went to the printer, the court had not yet declared the outcome of the trial.

Second, the plaintiffs are misreading the interlocutory order when they claim that, as a result of the majority's ripeness holding, it "advised" them to challenge the local delegations in 2015. J.S. 16. The majority actually held that the plaintiffs' one-person, one-vote challenge to the local delegations would fail on the merits in any event. *See* J.S. App. 37-62.

ARGUMENT

Under *Goldstein v. Cox*, 396 U.S. 471 (1970), this Court lacks jurisdiction to review this order in this particular appeal. If this Court does not dismiss the appeal for that reason, it should summarily affirm on any one of the three alternative grounds the District Court gave for its decision. The District Court correctly concluded that the plaintiffs' claim will not be ripe until the new Legislature has set its rules regarding local legislation in 2015. *See* J.S. App. 20-26. The District Court also correctly concluded that the plaintiffs lacked standing because no cognizable claim was redressable through their requested relief. *See id.* at 26-37. And the District Court correctly held, in the alternative, that the plaintiffs cannot prevail on the merits. *See id.* at 37-62.

I. This Court lacks appellate jurisdiction.

As a threshold matter, this Court should dismiss this appeal for lack of jurisdiction. The order at issue granted the State only partial summary judgment. One count remained for trial, *see* J.S. 13 n.8, and the District Court has not yet rendered final judgment as of the time of this filing. The only jurisdictional statute the plaintiffs invoke here is 28 U.S.C. §1253. *See* J.S. 2. This statute provides that "[e]xcept as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. §1253. This Court has interpreted this language to bar immediate review over the sort of interlocutory order that is at issue in this appeal.

In *Goldstein v. Cox*, 396 U.S. 471 (1970), this Court held that although §1253's language could reasonably be subject to multiple constructions, it is best read as confining this Court's appellate "jurisdiction over interlocutory orders . . . to orders granting or denying a *preliminary* injunction," as opposed to a permanent injunction. *Goldstein*, 396 U.S. at 478 (emphasis added); *accord id.* at 475 ("[T]he *only* interlocutory orders that we have power to review under [§1253] are orders granting or denying *preliminary* injunctions." (emphasis added)). The interlocutory order in *Goldstein*, which denied a plaintiff's motion for summary judgment, involved a request for a permanent injunction rather than a preliminary one. *See id.* at 478. This Court therefore held that plaintiffs had to wait for the three-judge court's final

judgment before requesting appellate review. *See id.* at 477.

The rule in *Goldstein* precludes this Court's jurisdiction in this appeal. Like the order in *Goldstein*, the order the plaintiffs are trying to appeal is interlocutory because it did not resolve the whole case. *Cf. Mohawk Indus. v. Carpenter*, 558 U.S. 100, 106 (2009) (final orders disassociate the district court from the entire matter). And like the order in *Goldstein*, the order in question here "is not an order granting or denying a preliminary injunction." *Goldstein*, 396 U.S. at 479.

It makes no difference that the plaintiffs in this case, like the plaintiffs in *Goldstein*, included a request for a preliminary injunction in their complaint. *See* Doc. 60 at 56. As *Goldstein* explained, to invoke §1253, the plaintiff also must file a "separate application for a preliminary injunction," affirmatively "urge[] the appropriateness of temporary relief," and obtain a ruling from the three-judge court on that application. *Goldstein*, 396 U.S. at 479. The plaintiffs in this case did none of those things with respect to the count at issue. They limited their request to a permanent, rather than a preliminary, injunction. *See* Doc. 108. And as was true in *Goldstein*, "preliminary injunctive relief could never have been a practical possibility." *Goldstein*, 396 U.S. at 479. This case was set to be definitively adjudicated long before the new maps were to go into place.

Under the rule in *Goldstein*, "[s]ince the order here in question is an interlocutory one, and is not an order granting or denying a preliminary injunction, [this Court] must dismiss the appeal from that order for want of jurisdiction." *Id.* If the plaintiffs

wish to challenge this order, they must wait until the District Court has rendered a final judgment, and they must file a new appeal at that time.

This result will advance the policies underlying §1253. As *Goldstein* explained, "the purpose[] of Congress" in enacting §1253 was "to keep within narrow confines [this Court's] appellate docket." *Goldstein*, 396 U.S. at 478 (internal quotation marks omitted). Likewise, "piece-meal appellate review is not favored." *Id.* Yet piece-meal appellate review is what the plaintiffs are seeking here. The remaining count of their complaint seeks precisely the same injunction—one prohibiting enforcement of the new redistricting plans—as the count on which they are now seeking review. *See* Doc. 60 at 56. If the District Court rules against the plaintiffs after trial, then they can, at that time, file another appeal renewing the arguments they have raised here and incorporating whatever arguments they wish to make against the remainder of the judgment. This Court could thereby consider the entire case at that time instead of only part of it. On the other hand, if the plaintiffs prevail at trial, the arguments they have raised in this interlocutory appeal may become moot. Either way, it makes no sense for this Court to review these issues in piece-meal fashion, and *Goldstein* was right to foreclose that result.

II. If this Court has jurisdiction, it should summarily affirm on the rationale that the claim is not ripe.

If this Court does not dismiss the appeal under *Goldstein*, it should summarily affirm on any of the three independent grounds offered by the District Court majority—starting with its application of the

ripeness doctrine. This case involves no lower-court split or novel question about what standard governs the ripeness inquiry. Everyone agrees that "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" J.S. App. 22 (quoting *Texas v. United States,* 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568, 580-81 (1985))). The ripeness question here involves the District Court's fact-bound and correct application of this principle to the particular facts in this record. It is particularly suited for summary affirmance.

As the District Court explained, the plaintiffs' claim rests upon contingent events that may not occur as anticipated, or at all. The plaintiffs assert "that the redistricting Acts violate the Equal Protection Clause because of the way in which they interact with" a "system of local delegations" that "has not been adopted for the Legislature that would be elected in 2014 in accordance with the new district maps." J.S. App. 22. As the District Court found, "only the newly elected Legislature will be able to adopt that system." *Id.* at 22-23. "Because we can neither know whether the Legislature elected in 2014 will adopt a system of local delegations, nor how that system, if adopted, will be structured, the claim under the Equal Protection Clause in count three rests on contingent future events and is not sufficiently concrete and definite to be fit for judicial review." *Id.* at 23.

The District Court majority convincingly explained why the dissent, insofar as it reached a contrary conclusion, had misunderstood the facts. The plaintiffs had asserted that "the local delegation sys-

tem has existed continuously from time immemorial," *id.*, and the dissenting judge had agreed, *see id.* at 73-75. But the majority rightly found that "the undisputed record evidence forecloses that argument." *Id.* at 23. "[S]worn testimony from the clerks of both houses of the Alabama Legislature" had shown that the rules "governing local legislative delegations . . . are adopted each quadrennium at the organizational session" and "apply only to the sitting Legislature." *Id.* at 23-24 (discussing Docs. 76-1 and 76-2). "The next legislature," the majority noted, "will establish its own rules and committees in January 2015." *Id.* The District Court noted that the plaintiffs had "submitted no evidence to contradict" the testimony the State had submitted on these issues, *id.* at 24, and the plaintiffs offer no meaningful argument on this point now, *see* J.S. 22-23 (devoting a single paragraph to the question of their claim's fitness for adjudication). Moreover, undisputed evidence shows that the Legislature had, in previous organizational sessions, changed longstanding procedural rules. *See* J.S. App. at 14-15, 30.

The majority also rebutted the dissent's suggestion that the claim is ripe because it is "sufficiently likely" that the 2015 Legislature will enact a local-delegation system like the current one. *Id.* at 71-73. As the majority explained, that sort of speculation does not allow plaintiffs to challenge legislative action that may never "occur at all." *Id.* at 26. If the rule were otherwise, then a plaintiff could have challenged Congress's 2006 renewal of Section 5 of the Voting Rights Act *before* Congress actually renewed it—on the theory that it was "sufficiently likely," as a political matter, that the renewal was going to hap-

pen. *Cf. Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2635 (2013) (Ginsburg, J., dissenting) (noting that the 2006 reenactment "passed by a vote of 98 to 0" in the Senate). Just as Section 5's challengers had to wait until Congress actually went through the political process and enacted the statute, the same is true of the plaintiffs here.[2]

The majority also was right to say that the plaintiffs will suffer no hardship from having to wait for the new Legislature to decide how it wants to deal with local delegations. As the majority noted, "the use of the new districts" during the election "will not, by itself, cause any harm to the" plaintiffs. J.S. App. 23. Instead, the harm they are complaining about "is dependent upon the future decision of the Alabama Legislature to adopt a system of local delegations." *Id.* And the plaintiffs could address that purported harm in two ways at that time. First, they could try to persuade the new Legislature to adopt a local-delegation system that eliminates the plaintiffs'

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[2] The District Court also persuasively rejected the dissent's argument that the Legislature was substantially likely to continue with current practices, and that that the plaintiffs' claim was ripe, based on the dissenting judge's "own theory that it would be potentially illegal under the Voting Rights Act for the Alabama Legislature to not adopt a system of local delegation." J.S. App. 30. As the majority noted, this "speculation about the legality of the decision of a future Alabama Legislature not to adopt a system of local delegations" is "unwarranted" because "no federal court has ever considered – let alone decided – that issue." *Id.* The majority also took note of evidence showing that previous Legislatures, without consequence under the Voting Rights Act, had "altered longstanding rules in response to political changes in memberships." *Id.* The plaintiffs have wisely chosen not to assert the dissent's argument on this point. *See* J.S. 22-24.

equal-protection concerns. *Cf.* Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105, 188 n.461 (1992) (noting that legislatures could adopt "weighted voting" system that limits local delegates' power to the percentage of their constituents who reside in the county at issue). Second, if the plaintiffs cannot persuade the Legislature to choose an acceptable system, then they can file a lawsuit, if they can satisfy the requirements for justiciability, seeking to enjoin whatever system the Legislature does choose. This is what plaintiffs in similar cases have done. *See McMillan v. Love*, 842 A.2d 790, 793 (Md. 2004); *DeJulio v. Georgia*, 290 F.3d 1291, 1294 (11th Cir. 2002); *Vander Linden v. Hodges*, 193 F.3d 268, 272 (4th Cir. 1999).

Either way, the District Court correctly held that there is no ripe controversy now. If this Court does not dismiss the appeal, it should summarily affirm on this ground.

III. Alternatively, this Court should summarily affirm on the rationale that the plaintiffs lack standing.

The District Court's alternative holding on standing is also suited for summary adjudication. As is true of ripeness, the standing question involves no lower-court split or novel issue about the appropriate legal standard. It is well established that "[t]o have standing under Article III, a plaintiff must establish three elements":

(1) that the plaintiff suffered "'injury in fact'";
(2) that the injury was caused by the "'challenged action of the defendant'"; and

> (3) that it is "'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'"

J.S. App. 27 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The District Court correctly held that the plaintiffs could not establish the first two of these elements for all the same reasons they could not establish ripeness. *See id.* at 28-33. And critically for present purposes, the court also held, for independent reasons, that the plaintiffs could not satisfy the third and essential requirement of redressability, either. *See id.* at 34.

As the District Court explained, the plaintiffs' requested injunction would not redress any arguable one-person, one-vote problem in this case. The plaintiffs' requested relief is an injunction against the current acts' enforcement. *See* Doc. 60 at 56. But the District Court observed that "no party has contended that it would be possible to create a [new] plan that is equitably apportioned at both the statewide and local delegation levels." J.S. App. 34. The plaintiffs' "proposed plans" did not "satisfy that requirement." *Id.* Nor did the plans the State implemented over the previous decade. *See id.* Accordingly, "an injunction to prevent the use of the redistricting Acts would not remedy" the equal-protection problem the plaintiffs claimed arose from the current redistricting maps. *Id.* at 33.

It bears emphasis that this redressability problem arises from limitations that the plaintiffs themselves intentionally placed on their request for relief. People who have brought similar cases in the past have sought redressable relief by actually challenging local-delegation practices. *See McMillan*, 842

A.2d at 793; *DeJulio*, 290 F.3d at 1294; *Vander Linden*, 193 F.3d at 272. But here, the plaintiffs "repeatedly asked [the court] not to enjoin the use of local delegations." J.S. App. 34. Future plaintiffs who wish to assert a redressable one-person, one-vote challenge might seek an injunction against local-delegation practices. The present plaintiffs affirmatively waived any such claim.

The dissent's response on this point had no grounding in the law. The dissent argued that the plaintiffs' claim was redressable because "a redistricting remedy by itself could remedy the one-person, one-vote violation in at least *some* Local Delegations." J.S. App. 86 (emphasis added). As the majority countered, that argument makes no sense. "[A] failure to comply with the requirement of one person, one vote is not the sort of injury that can be redressed by *partial* compliance." *Id.* at 35 (emphasis added). "[A] governmental body is either elected in accordance with the requirement of one person, one vote, or it is not." *Id.* The majority noted, without rebuttal from either the dissent or the plaintiffs, that "[n]o court has held that partial compliance can be sufficient to redress an injury caused by inequitable apportionment." *Id.* The plaintiffs have not even tried to defend the dissent's contrary reasoning in this Court.

The plaintiffs are instead advancing an unprecedented theory that the dissent prudently declined to adopt. The plaintiffs premise their claim on the theory that although they believe the one-person, one-vote rule generally applies to local delegations, a Legislature should be allowed to violate the rule as to a particular delegation if doing so is "necessary" to

satisfy the rule as to a particular district. J.S. 24. All three of the judges below recognized two fundamental problems with that argument. First, as the dissent noted and the majority agreed, the plaintiffs pointed to nothing "in the law, constitutional or statutory, that says that achieving one-person, one-vote for Local Delegations should be subordinated to achieving one-person, one-vote for both houses of the Legislature or vice versa." J.S. App. 127; *accord id.* at 38-39 (majority opinion). Second and just as important, both the majority and dissent agreed that the plaintiffs had failed "to define the word 'necessary'" for these purposes "or provide any other standard with which [the court] could adjudicate this claim." *Id.* at 38; *accord id.* at 127 (dissenting opinion). Even in their papers to this Court, the plaintiffs have refused to meet that obligation. *See* J.S. 30.

These standing problems thus arise from case-specific procedural moves the plaintiffs have made. Future plaintiffs can avoid these problems by taking a different approach. In this case, summary affirmance on the standing ground is the correct disposition.

IV. Alternatively, this Court should summarily affirm on the rationale that the plaintiffs' claim fails on the merits.

The District Court's alternative holding on the merits is yet another independent reason to summarily affirm. As with the ripeness and standing questions, this issue concerns only the application of an established legal standard to the facts at hand. The applicable rule, set forth by *Hadley v. Junior College District,* 397 U.S. 50 (1970), requires "'each qualified voter'" to "'be given an equal opportunity to partici-

pate'" when a government selects persons "'by popular election'" who are to "'perform governmental functions.'" J.S. App. 43 (quoting *Hadley,* 397 U.S. at 56). If this Court does not dismiss the appeal or affirm on jurisdictional grounds, the District Court's fact-bound application of the *Hadley* rule will be worthy of summary affirmance for at least two reasons.

A. The District Court's merits ruling was correct and consistent with the decisions of other courts.

As an initial matter, the District Court's application of *Hadley*'s "governmental functions" requirement was correct. The court determined that even if it could assume that the 2015 Legislature will use a local-delegation system like the current one, the plaintiffs had not shown that those delegations exercise "governmental functions." J.S. App. 37-62. The plaintiffs' principal argument before the District Court on this issue was the same one it is making here—namely, that the delegations exercise governmental functions because they engage in "[l]awmaking." J.S. 25. The District Court explained why the plaintiffs' argument is factually and legally wrong.

As a factual matter, the District Court observed, "the legislature, not the local delegations, is engaged in the governmental function of lawmaking." J.S. App. 44 (citing *DeJulio*, 290 F.3d at 1296). The local delegations' approval of proposed legislation does not give it the force of law. Instead, "local legislation, like all other legislation, is not officially enacted until it is approved by majorities of both houses and signed by the Governor or approved by majorities of both houses over the veto of the Governor." *Id.* at 46. Alt-

hough non-local representatives often defer to the delegations as a matter of courtesy, the record contains uncontested evidence "about Alabama legislators who disregarded local courtesy to prevent the enactment of certain pieces of local legislation." *Id.* at 47. Accordingly, the "gatekeeping" function performed by these delegations is no different from the function performed by "other legislative committees" such as finance or ways and means. *Id.* at 59. If the one-person, one-vote requirement applies to legislative delegations because they perform this function, then it must apply to all legislative committees. As the District Court observed, that cannot be the law. *Id.* (citing *DeJulio v. Georgia,* 127 F. Supp. 2d 1274, 1298 (N.D. Ga. 2001), *affirmed, DeJulio,* 290 F.3d at 1291).

In light of that logic, it should come as no surprise that the plaintiffs have not cited a single lower-court decision supporting their view on the governmental-functions point. To the contrary, other courts appear to have uniformly concluded that gatekeeping functions do not implicate one-person, one-vote. *See DeJulio*, 290 F.3d at 1295-97 (local delegation); *Driskell v. Edwards*, 413 F. Supp. 974, 976-78 (E.D. La. 1976) (constitutional convention), *aff'd mem.,* 425 U.S. 956 (1976); *McMillan*, 842 A.2d at 800-01 (local delegation); *Polk Cnty. Bd. of Sup'rs v. Polk Commonwealth Charter Comm'n,* 522 N.W.2d 783, 788-90 (Iowa 1994) (advisory commission). The dissent below had no choice but to argue that *each* of these decisions, including one this Court had summarily affirmed, was "erroneous." J.S. App. 124-26. In what appears to be the only precedent finding a one-person, one-vote problem with a local delegation,

South Carolina "conceded" that its particular delegations "perform[ed] numerous and various general county governmental functions." *Vander Linden*, 193 F.3d at 275. Those included "fiscal and regulatory powers" that far exceeded the gatekeeping functions to which the plaintiffs pointed the District Court in this case. *Id.* The District Court's application of *Hadley* was consistent with this body of law.

B. The District Court's merits adjudication was supported by multiple additional grounds.

The holes in the plaintiffs' case on the merits are not confined to the governmental-functions issue. At least three additional problems stand firmly in the way of the plaintiffs' ultimate success here.

First, the majority and dissenting judges agreed that the plaintiffs also "failed to identify the constitutional standard that [the court] should" ultimately employ to adjudicate their equal-protection claim. J.S. App. at 38. The plaintiffs believe that the one-person, one-vote rule applies to local delegations unless deviation is necessary to comply with that rule for the legislature as a whole. But the plaintiffs failed "to define" when it would be "necessary" to deviate from the rule "or provide any other standard with which [the court] could adjudicate this claim." *Id.* at 38; *accord id.* at 127 (dissenting opinion). When a court "ha[s] no standard by which to measure the burden [the plaintiffs] claim has been imposed on their representational rights, [the plaintiffs] cannot establish that the alleged political classifications burden those same rights." *Vieth v. Jubelirer*, 541 U.S. 267, 313 (2004) (Kennedy, J., concurring in the judgment).

Second, the local delegations do not trigger the one-person, one-vote rule for a separate reason under *Hadley*: they are not selected "by popular election." *Hadley,* 397 U.S. at 56. The plaintiffs are mistaken when they assert that delegation members become members "'*as a matter of law* upon their various elections.'" J.S. 26 (emphasis added) (quoting *Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688, 694 (1989)). Instead, the District Court found that members of local delegations "are selected through a process that occurs *after* the election of the legislators." J.S. App. 60 (emphasis added). "[T]he legislative committees and local delegations are all appointed in the same organizational session that occurs each quadrennium." *Id.* "Because "[u]ntil that meeting, no such internal organization exists," the local delegations are no more "elected" by operation of law than are the members of a legislative judiciary committee. *Id.*

Third, on a more fundamental level, the plaintiffs' one-person, one-vote theory is incoherent. As to each individual legislator, the new electoral maps ensure tight conformity with the one-person, one-vote rule. So if the 2015 Legislature adopts a local-delegation system like the current one, then within each delegation, each member will be elected by roughly the same number of people. The crux of the plaintiffs' claim is thus not really one-person, one-vote. It is that some people who live outside a particular county will get to vote for a representative who will sit on that county's delegation. *See* J.S. 27.

Yet the plaintiffs have not come close to showing that the Constitution prohibits that sort of arrangement. People cross county lines all the time, for all

sorts of business, governmental, and personal reasons. Somebody who commutes from her home in St. Clair County to her office in Jefferson County has a considerable interest in whether Jefferson County can charge her an occupational tax. So the plaintiffs are simply wrong when they assert that people living in neighboring counties have "no substantial interest" in what happens across their borders. J.S. 28 (internal quotation marks omitted). To this end, the single precedent from this Court the plaintiffs cite on this front, *Holt Civic Association v. City of Tuscaloosa*, 439 U.S. 60 (1978), does not hold that the Constitution precludes States from giving people who are affected by another jurisdiction's laws a say in how that jurisdiction will be governed. *See* J.S. 27 (citing *Holt Civic Ass'n*, 439 U.S. at 68-69)). It holds only that the Constitution does not always *require* the State to take that step. And it affirmatively recognizes the "logical appeal" of occasionally extending the franchise to affected persons beyond a jurisdiction's borders. *Holt Civic Ass'n*, 439 U.S. at 70. The very cornerstone of the plaintiffs' equal-protection claim is on exceedingly shaky ground.

* * *

Each step of the analysis underscores this appeal's unsuitability for plenary review. The plaintiffs do explain how their appeal is consistent with *Goldstein*. The District Court rightly found that the case is unripe and that the plaintiffs' admissions and strategic decisions had deprived them of standing. And the plaintiffs' claim fails on the merits for multiple reasons. This Court does not need further briefing and oral argument in this case.

CONCLUSION

The Court should dismiss the appeal or, in the alternative, summarily affirm the judgment of the District Court.

Respectfully submitted,

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