No. _____

In The
Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS et al.,

Appellants,

v.

THE STATE OF ALABAMA et al.,

Appellees.

On Appeal From The United States District Court For The Middle District Of Alabama

JURISDICTIONAL STATEMENT

EDWARD STILL
130 Wildwood Parkway
Suite 108 PMB 304
Birmingham, AL 35209
E-mail: still@votelaw.com

U.W. CLEMON
WHITE ARNOLD & DOWD P.C.
2025 Third Avenue North,
Suite 500
Birmingham, AL 35203
E-mail:
uwclemon@waadlaw.com

JAMES U. BLACKSHER
Counsel of Record
P.O. Box 636
Birmingham, AL 35201
205-591-7238
Fax: 866-845-4395
E-mail:
jblacksher@ns.sympatico.ca

Counsel for Appellants Alabama Legislative Black Caucus et al.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether a state violates the requirement of one person, one vote by enacting a state legislative redistricting plan that results in large and unnecessary population deviations for local legislative delegations that exercise general governing authority over counties.

2. Whether Alabama's legislative redistricting plans unconstitutionally classify black voters by race by intentionally packing them in districts designed to maintain supermajority percentages produced when 2010 census data are applied to the 2001 majority-black districts.

PARTIES

The following were parties in the Court below:

Plaintiffs in Civil Action No. 2:12-CV-691:
Alabama Legislative Black Caucus
Bobby Singleton
Alabama Association of Black County Officials
Fred Armstead
George Bowman
Rhondel Rhone
Albert F. Turner, Jr.
Jiles Williams, Jr.

Plaintiffs in consolidated Civil Action No. 2:12-CV-1081:
Demetrius Newton (deceased)
Alabama Democratic Conference
Framon Weaver, Sr.
Stacey Stallworth
Rosa Toussaint
Lynn Pettway

Defendants in Civil Action No. 2:12-CV-691:
State of Alabama
Jim Bennett, Alabama Secretary of State

Defendants in consolidated Civil Action No. 2:12-CV-1081:
State of Alabama
Robert J. Bentley, Governor of Alabama
Jim Bennett, Alabama Secretary of State

Intervenor-defendants:
Gerald Dial, Alabama Senator
Jim McClendon, Alabama Representative

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	3
CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
A. Factual Background	4
1. Alabama's History of Redistricting	7
2. The 2012 Redistricting	10
a. The Disregard of County Boundaries	10
b. The Adoption of Racial Targets or Quotas	13
B. Procedural History	18
1. Proceedings Regarding Count III	19
2. The District Court's Disposition of Count III	20
3. Proceedings Regarding Count II	25
4. The District Court's Disposition of Count II	25

TABLE OF CONTENTS – Continued

Page

REASONS FOR NOTING PROBABLE JURISDICTION 29

I. The Unnecessary Division of Counties Among Legislative Districts Violates the One-Person, One-Vote Rights of County Residents 30

II. There Is No Compelling Interest That Can Justify the State's Purposeful Preservation of Arbitrary Black Supermajorities 39

CONCLUSION..... 41

APPENDIX

VOLUME 1

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2013 WL 6726625 (M.D. Ala., Dec. 20, 2013) (majority opinion).....App. 1

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2013 WL 6726625 (M.D. Ala., Dec. 20, 2013) (Thompson, J., dissenting).....App. 188

Alabama Legislative Black Caucus v. Alabama, Case Nos. 2:12-CV-691 and 2:12-CV-1081 (M.D. Ala., Dec. 20, 2013) (final judgment).....App. 276

TABLE OF CONTENTS – Continued

Page

VOLUME 2

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2013 WL 3976626 (M.D. Ala., Aug. 2, 2013) (majority opinion) .....App. 278

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2013 WL 4102154 (M.D. Ala., Aug. 2, 2013) (Thompson, J., concurring in part and dissenting in part) .....App. 340

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2013 WL 1397139 (M.D. Ala., Apr. 5, 2013).....App. 408

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2013 WL 1397139 (M.D. Ala., Apr. 5, 2013) (Thompson, J., concurring).App. 427

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2012 WL 6706665 (M.D. Ala., Dec. 26, 2012) .....App. 437

ALBC plaintiffs' Notice of Appeal, January 6, 2014 .....App. 454

Constitution of the United States, Amendment XIV, section 1.....App. 458

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.....App. 459

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c .....App. 460

TABLE OF AUTHORITIES

Page

CASES:

Abrams v. Johnson, 521 U.S. 74 (1997).....31

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2013 WL 6726625 (M.D. Ala., Dec. 20, 2013) 1

Alabama Legislative Black Caucus v. Alabama, ___ U.S. ___, 2013 WL 5410247 (Dec. 2, 2013) 1, 4

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2013 WL 3976626 (M.D. Ala., Aug. 2, 2013).....2

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2013 WL 4102154 (M.D. Ala., Aug. 2, 2013) (Thompson, J., concurring and dissenting).....2

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2013 WL 1397139 (M.D. Ala. Apr. 5, 2013), reconsideration denied, ____ F. Supp.3d. ___, 2013 WL 3976626 (M.D. Ala. Aug. 2, 2013).....2

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2012 WL 6706665 (M.D. Ala. Dec. 26, 2012) 2

Avery v. Midland County, 390 U.S. 474 (1968).....35, 36

Ball v. James, 451 U.S. 355 (1981) 35

Bartlett v. Strickland, 556 U.S. 1 (2009).....31, 32, 33, 38

Board of Estimate of City of New York v. Morris, 489 U.S. 688 (1989).....36

TABLE OF AUTHORITIES – Continued

Page

Bradley v. Richmond School Board, 416 U.S. 696 (1974) 40

Brown v. Thomson, 462 U.S. 835 (1983) 37, 38, 39

Burton v. Hobbie, 561 F. Supp. 1029 (M.D. Ala. 1983) (three-judge court) 8

Bush v. Vera, 517 U.S. 952 (1996) 28, 31

Connor v. Finch, 431 U.S. 407 (1977) 37

Cooper v. Aaron, 358 U.S. 1 (1958) 35

DeJulio v. Georgia, 127 F. Supp.2d 1274 (N.D. Ga. 2001), aff'd, 290 F.3d 1291 (11th Cir.), cert. denied, 537 U.S. 948 (2002) 34

DeJulio v. Georgia, 290 F.3d 1291 (11th Cir. 2002), cert. denied, 537 U.S. 948 (2002) 22, 36

Fullilove v. Klutznick, 448 U.S. 448 (1980) 40

Gaffney v. Cummings, 412 U.S. 735 (1973) 38

Hadley v. Junior College Dist., 397 U.S. 50 (1970) 35, 36

Holt Civic Assn. v. City of Tuscaloosa, 439 U.S. 60 (1978) 37

Kelley v. Bennett, 96 F. Supp.2d 1301 (M.D. Ala.) (three-judge court), rev'd on other grounds sub nom. *Sinkfield v. Kelley*, 531 U.S. 28 (2000) 9

Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991), aff'd in relevant part, 14 F.3d 1534 (11th Cir. 1994) 5

TABLE OF AUTHORITIES – Continued

Page

LULAC v. Perry, 548 U.S. 399 (2006) 31

Mahan v. Howell, 410 U.S. 315 (1973) 31, 39

Miller v. Johnson, 515 U.S. 900 (1995).....28

Montiel v. Davis, 215 F. Supp.2d 1279 (S.D. Ala. 2002) (three-judge court).....9

Reynolds v. Sims, 377 U.S. 533 (1964).....7, 18, 30, 31, 37

Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973).....35

Shaw v. Reno, 509 U.S. 630 (1993) 30, 40

Shelby County v. Holder, 133 S.Ct. 2612 (2013).....25, 29, 40

Sims v. Amos, 336 F. Supp. 924 (M.D. Ala.) (three-judge court), aff'd, 409 U.S. 942 (1972).....8

Sims v. Baggett, 247 F. Supp. 96 (1965) (three-judge court).....7, 18

Tennant v. Jefferson County Comm'n, 133 S.Ct. 3 (2012).....37

Texas v. United States, 523 U.S. 296 (1998) 32

Texas v. United States, 887 F. Supp.2d 133 (D. D.C. 2012) (three-judge court), vacated and remanded on other grounds, 133 S.Ct. 2885 (2013).....28

United Public Workers of America v. Mitchell, 330 U.S. 75 (1947).....32

TABLE OF AUTHORITIES – Continued

Page

Vander Linden v. Hodges, 193 F.3d 268 (4th Cir. 1999) 34

Vieth v. Jubelirer, 541 U.S. 267 (2004) 32

CONSTITUTIONAL PROVISIONS:

Constitution of the United States, Amendment I.....18

Constitution of the United States, Amendment XIV, § 1 .....3, 18, 19, 22, 35

Constitution of the United States, Amendment XV 18, 19

Constitution of the United States, Article III.....32, 33

1819 Constitution of Alabama, Art. III, § 9 5

1819 Constitution of Alabama, Art. III, §§ 10-11 5

1861 Constitution of Alabama, Art. III, § 9 5

1861 Constitution of Alabama, Art. III, §§ 10-11 5

1865 Constitution of Alabama, Art. IV, § 6.....5

1865 Constitution of Alabama, Art. IV, § 7.....5

1868 Constitution of Alabama, Art. VIII, § 1 5

1868 Constitution of Alabama, Art. VIII, § 3 5

1875 Constitution of Alabama, Art. IX, §§ 2-3 5

1875 Constitution of Alabama, Art. IX, §§ 4.....5

1901 Constitution of Alabama, Art. IX, § 200 5

1901 Constitution of Alabama, Art. IX, §§ 198, 199 5

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 ..... *passim*

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c ..... *passim*

OTHER AUTHORITIES:

Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105 (1992) 31

Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271 (2004) 6

Will Parker, *Still Afraid of "Negro Domination?": Why County Home Rule Limitations in the Alabama Constitution of 1901 Are Unconstitutional*, 57 ALA. L. REV. 545, 557 (2005) 5

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANTS ALABAMA LEGISLATIVE BLACK CAUCUS et al.

Appellants 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., for themselves and all residents of Alabama counties whose boundaries have been split unnecessarily in the State's 2012 redistricting plan and all African-American voters of Alabama, appeal to the Supreme Court of the United States from the final judgment, J.S. App. 276-77, entered by the three-judge United States District Court for the Middle District of Alabama on December 20, 2013, dismissing or granting judgment in favor of the State Defendants on all the claims made by appellants. The final judgment from which this appeal is taken includes the issues advanced in appellants' earlier appeal to this Court, which was dismissed for want of jurisdiction. *Alabama Legislative Black Caucus v. Alabama*, ___ U.S. ___, 2013 WL 5410247 (Dec. 2, 2013).

OPINIONS BELOW

The December 20, 2013, memorandum opinion and order of the three-judge District Court majority (J.S. App. 1-187) and dissenting opinion of Judge Myron Thompson (J.S. App. 188-275) are reported at *Alabama Legislative Black Caucus v. Alabama*, ___

F. Supp.3d ___, 2013 WL 6726625 (M.D. Ala., Dec. 20, 2013). The August 2, 2013, opinion and order of the three-judge District Court majority (J.S. App. 278-339) are reported at *Alabama Legislative Black Caucus v. Alabama*, ___ F. Supp.3d ___, 2013 WL 3976626 (M.D. Ala., Aug. 2, 2013), and the opinion of Judge Thompson concurring in part and dissenting in part (J.S. App. 340-407) is reported at ___ F. Supp.3d ___, 2013 WL 4102154 (M.D. Ala., Aug. 2, 2013).

Prior opinions in the consolidated actions are: the April 5, 2013, memorandum opinion and order of the three-judge District Court majority denying the ALBC plaintiffs' second motion for partial summary judgment (J.S. App. 408-36) and Judge Thompson's concurring opinion (J.S. App. 427-36), reported at *Alabama Legislative Black Caucus v. Alabama*, ___ F. Supp.3d ___, 2013 WL 1397139 (M.D. Ala., Apr. 5, 2013), reconsideration denied, ___ F. Supp.3d ___, 2013 WL 3976626 (M.D. Ala., Aug. 2, 2013); and the December 26, 2012, memorandum opinion and order denying the ALBC plaintiffs' motion for partial summary judgment regarding Count I of the original complaint and granting them leave to amend Count III (J.S. App. 437-53), reported at *Alabama Legislative Black Caucus v. Alabama*, ___ F. Supp.3d ___, 2012 WL 6706665 (M.D. Ala. Dec. 26, 2012).

JURISDICTION

The final judgment denying all claims in these consolidated actions[1] was entered on December 20, 2013, J.S. App. 276-77. The Alabama Legislative Black Caucus plaintiffs filed their notice of appeal on January 6, 2014. J.S. App. 454-57. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment and Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973 and 1973c, all reproduced at J.S. App. 458-62.

STATEMENT OF THE CASE

The drafters of Alabama's 2012 House and Senate redistricting plans violated the Equal Protection Clause of the Fourteenth Amendment in two fundamental ways: (1) they drew plans with the predominant purpose of maintaining the supermajority percentages yielded when 2010 census data were

[1] J.S. App. 6. Demetrius Newton, the lead plaintiff in the action consolidated with appellants' action, has died. This jurisdictional statement still refers to the "Newton plaintiffs," but the most recent District Court opinions call them the "Democratic Conference plaintiffs." *Id*. at 7.

overlaid on the 2001 majority-black districts, and (2) they completely ignored county boundaries in their pursuit of black population and in accommodating incumbents. In a split decision, the three-judge District Court rejected appellants' facial attack on both plans based on their indiscriminate splitting of county boundaries. J.S. App. 278-407. Because all House and Senate seats are up for election in the June 3, 2014, primary election, appellants filed an interlocutory appeal to assert the one-person, one-vote rights of county residents, but this Court dismissed that appeal for want of jurisdiction. *ALBC v. Alabama*, ___ U.S. ___, 2013 WL 5410247 (Dec. 2, 2013). Now that a final judgment on all issues has been entered, with another divided District Court decision, this time on the race issues, appellants are seeking to expedite this appeal so constitutional redistricting plans can be adopted in time for the June primary elections. The general election is November 3, 2014. The Alabama Legislature began its annual regular session on January 14, 2014.

A. Factual Background.

Local legislative delegations in Alabama, by longstanding custom, control the introduction and passage of local laws for their counties. Since Alabama was admitted to the Union in 1819, all six of its constitutions have treated counties as the central building blocks in creating state legislative districts. Those constitutions have required seats in the House of Representatives to be apportioned among the

counties in proportion to their populations, with each county entitled to at least one representative.[2] Senate districts, which are fewer than the number of counties, have also been apportioned among the counties, with the restriction that no county shall be divided among districts.[3]

Since adoption of the 1875 "Redeemer" Alabama Constitution,[4] the State has denied home rule to its counties in order to "guarantee[ ] the maintenance of white supremacy in majority-black counties." *Knight v. Alabama*, 458 F. Supp.2d 1273, 1284-85 (N.D. Ala. 2004), aff'd, 476 F.3d 1219 (11th Cir.), cert. denied, 127 S.Ct. 3014 (2007) (citation omitted).[5] It has done so by concentrating in the white-controlled state

---

[2] 1819 Constitution of Alabama, Art. III, § 9; 1861 Constitution of Alabama, Art. III, § 9; 1865 Constitution of Alabama, Art. IV, § 6; 1868 Constitution of Alabama, Art. VIII, § 1; 1875 Constitution of Alabama, Art. IX, §§ 2-3; 1901 Constitution of Alabama, Art. IX, §§ 198, 199. The text of all six constitutions can be accessed at http://www.legislature.state.al.us/misc/history/constitutions/constitutions.html.

[3] 1819 Constitution of Alabama, Art. III, §§ 10-11; 1861 Constitution of Alabama, Art. III, §§ 10-11; 1865 Constitution of Alabama, Art. IV, § 7; 1868 Constitution of Alabama, Art. VIII, § 3; 1875 Constitution of Alabama, Art. IX, §§ 4; 1901 Constitution of Alabama, Art. IX, § 200.

[4] The Redeemer Constitution "redeemed . . . white rule." *Knight v. Alabama*, 787 F. Supp. 1030, 1070 (N.D. Ala. 1991), aff'd in relevant part, 14 F.3d 1534 (11th Cir. 1994).

[5] *See generally*, Will Parker, *Still Afraid of "Negro Domination?": Why County Home Rule Limitations in the Alabama Constitution of 1901 Are Unconstitutional*, 57 ALA. L. REV. 545, 557 (2005).

legislature powers exercised by county governments in many other states. Local legislative delegations have ruled their counties since the nineteenth century.[6]

County commissions lack the power to enact their own laws. Instead, local legislation originates with members of a county's local state legislative delegation, which is composed of those House and Senate members whose districts include all or part of a county. August 2, 2013, majority op., J.S. App. 281; *id*. at 341-44 (Thompson, J., dissenting). The local legislative delegation must approve any bill before it can proceed in committee or to the floor of the House or Senate. *Id*. at 281-82. In some county delegations, local bills are approved by majority vote, while unanimity is required in other county delegations. *Id*. On the floor of the House and Senate, local bills approved by a county's delegation are often uncontested as a matter of local courtesy. *Id*. Local courtesy is a matter of informal custom, rather than a formal rule. *Id*.

---

[6] "In the words of a delegate to the Alabama Constitutional Convention of 1901, the lawmaker was a 'czar' who had 'dictatorial powers about every matter of legislation that affects his county. . . . He possessed 'absolute and undisputed power to control all legislation affecting his locality or county.'" Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271, 274 (2004) (footnote omitted).

1. Alabama's History of Redistricting.

From 1819 to 1974 no county was split between House or Senate districts.[7] But after this Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), required Alabama to create equipopulous state legislative districts, it became impossible to comply completely with the prohibition on splitting counties.

In the next several redistricting efforts, the state generally adhered as much as possible to its constitutional commitment to county integrity. In 1965, on remand from this Court's decision in *Reynolds*, a three-judge district court held that the longstanding whole-county provisos for House and Senate districts in the Alabama Constitution should remain operative "so far as practicable," giving way only where their application brings about "an unavoidable conflict" with the one-person, one-vote rule. *Sims v. Baggett*, 247 F. Supp. at 101-03. The district court approved plans which did not split a single county between districts, a result achieved by employing multi-member districts. *Id*. at 105-09. Two black House members were elected in 1970, the first African Americans to serve in the Alabama Legislature since

[7] *Sims v. Baggett*, 247 F. Supp. 96, 103 (1965) (three-judge court). Maps of the whole-county districts from which members of the Alabama House and Senate were elected from 1819 to 1962 can be viewed on the web site of the Alabama Archives. http://www.archives.alabama.gov/legislat/ala_maps/getstart.html (last visited Dec. 29, 2013).

Reconstruction. Dec. 20, 2013, majority op., J.S. App. 3.

After the 1970 census, a three-judge district court ordered the first single-member district plans for the House and Senate, but delayed their implementation until the 1974 regularly scheduled elections. *Sims v. Amos*, 336 F. Supp. 924 (M.D. Ala.) (three-judge court), aff'd, 409 U.S. 942 (1972). These first single-member district plans "cross[ed] county lines in as few instances as possible." 336 F. Supp. at 937. County boundary lines were "sacrificed only where absolutely necessary to satisfy the constitutional requirement of one man one vote," as it applied to court-ordered plans. *Id*. at 938-39. In the 1974 elections, 13 African Americans were elected to the House, and the first two African Americans were elected to the Senate. APX 81.

In 1982 the Alabama Legislature adopted a redistricting plan to which the Attorney General objected under Section 5 of the Voting Rights Act, because "the configuration of certain Black Belt districts caused retrogression of black voting strength . . . and . . . there was . . . insufficient adherence to county boundaries." *Burton v. Hobbie*, 561 F. Supp. 1029, 1035 (M.D. Ala. 1983) (three-judge court). The three-judge court observed the plan was "impermissible under Ala. Const. art. IX, §§ 198, 199 & 200 because of its disregard for the integrity of county lines. Boundaries of thirty counties were unnecessarily split by the plan." *Id.* The Legislature crafted a new plan in 1983, which the three-judge court accepted because

it "conform[ed] closely to county lines, splitting no more than thirteen of Alabama's 67 counties; the total population deviation among House districts [was] 10.86% and among Senate districts [was] 9.63%." *Id.* at 1035 and nn.13-14. Under these plans 17 African Americans were elected in the House, and 3 were elected in the Senate. J.S. App. 3.

Following the 1990 census, when the Legislature failed to enact a redistricting plan, a state court entered a consent decree approving a plan that split nearly twice as many counties as did its predecessor. *See Kelley v. Bennett*, 96 F. Supp.2d 1301, 1311 (M.D. Ala.) (three-judge court) (describing the plan), rev'd on other grounds sub nom. *Sinkfield v. Kelley*, 531 U.S. 28 (2000). These plans contained 27 majority-black House districts and 8 majority-black Senate districts. J.S. App. 3-4.

Following the 2000 census, the Alabama Legislature enacted House and Senate redistricting plans that received Section 5 preclearance, preserving the 27 majority-black House districts and 8 majority-black Senate districts. *Montiel v. Davis*, 215 F. Supp.2d 1279, 1282 (S.D. Ala. 2002) (three-judge court); J.S. App. 4.

2. The 2012 Redistricting.

a. The Disregard of County Boundaries.

The redistricting plans adopted after the 2010 census virtually ignored county boundaries throughout the state, thereby creating a set of local legislative delegations whose members represent vastly different numbers of constituents. The House plan enacted by the Legislature in 2012 splits 50 of Alabama's 67 counties, and the Senate plan splits 33 counties. J.S. App. 57. The division of counties in these plans was aggravated by the Legislature's decision to adopt an unprecedented requirement of $\pm$1% maximum population deviation among the districts. J.S. App. 57, 90. That decision required significantly more county splitting than would have been required by this Court's precedents. Measured by the guideline provided by this Court that total population deviations under ten percent constitute prima facie compliance with the one-person, one-vote rule, the Legislature's House plan splits 44 counties more than are necessary, including 22 counties small enough to be completely contained within one House district and 7 counties that could be divided into two or more complete House districts. Amended compl., Doc. 60 at 11. The Legislature's Senate plan splits 31 counties more than are necessary to satisfy the one-person, one-vote requirement, including 26 counties small enough to be completely contained within one Senate district and one county that could have been divided into three complete Senate districts. Doc. 60 at 11-12.

The House and Senate districts are littered with mere fragments of counties. House District 43, contains only 224 Jefferson County residents, or 0.49% of the total district population, with the rest residing in Shelby County. Aug. 2, 2013, dissenting op., J.S. App. 369; APX 25. Even more egregious is House District 61, which contains only 12 residents of Greene County (0.03%), at 9,045 the least populous county in the state. J.S. App. 57; APX 19, 25. Altogether there are 11 instances of House districts containing residents of a county who constitute less than 5% of the district population, and 27 instances where they constitute 10% or less of the district population. APX 25. In the Senate plan, there are 14 similar instances below 5% and 29 similar instances below 10%. APX 26.

The upshot of this apportionment, for example, is that the 12 residents of Greene County in House District 61 elect one member of the Greene County local legislative delegation, as do the 4,159 Greene County residents in House District 71 and the 4,874 Greene County residents in House District 72. APX 25. The following table shows the full impact of these splits on Greene County's House Delegation:

Counties Whose Residents Will Vote for Members of the Greene County House Delegation

See APX 15, 44. Ideal House district = 45,521. J.S. App. 17.

County	House Districts That Split Greene County	Population in These House Districts
Greene County	HD 61, 71, 72	9,045
Pickens County	HD 61, 71	19,746
Tuscaloosa County	HD 61, 71	49,228
Hale County	HD 72	15,760
Perry County	HD 72	9,333
Bibb County	HD 72	6,280
Marengo County	HD 71, 72	9,156
Choctaw County	HD 71	3,461
Sumter County	HD 71, 72	13,763
Total		135,772

Another example of violating county residents' equal voting rights for members of their local legislative delegation concerns Jefferson County, at 658,466 the most populous county in Alabama. APX 19. The plans introduced by ALBC members demonstrated that, within $\pm$ 5% deviation, 14 House districts could be drawn for Jefferson County, none of them crossing the county boundaries and nine of them majority-black. Doc. 60 at 44. Six Senate districts could be drawn for Jefferson County, three of

them majority-black, with only one majority-white Senate district crossing the county boundary. *Id*. Instead, the Legislature enacted plans that place Jefferson County in 18 House districts, only 8 of them majority-black. J.S. App. 64. All of the majority-black districts lie entirely inside Jefferson County, but six of the ten majority-white districts cross into six other counties. Doc. 60 at 42. The 2012 Senate plan puts Jefferson County in eight districts, three majority-black and five majority-white. All three of the majority-black Senate districts lie entirely inside Jefferson County, but all five of the majority-white districts cross the Jefferson County boundary to include parts of 11 other counties. *Id*. at 43. Altogether, 155,279 nonresidents vote for members of Jefferson County's House delegation, and 428,101 people residing in other counties vote for members of the Jefferson County Senate delegation. *Id*. at 42-43.

b. The Adoption of Racial Targets or Quotas.

The drafters[8] began mapping with the majority-black districts, J.S. App. 34, and the extraordinary lengths to which they went to maintain their inflated majority-black percentages had a "domino" impact on

[8] Sen. Gerald Dial and Rep. Jim McClendon, Chairpersons of the Permanent Legislative Committee on Reapportionment, J.S. App. 10, and Randy Hinaman, their consultant. *Id.* at 31.

the whole state.[9] Feeling unimpeded by county boundaries or any other traditional districting criteria,[10] they scoured the map to grab enough black precincts or census blocks to add over 100,000 more black residents needed to maintain the black percentages yielded by laying 2010 census data on the severely underpopulated 2001 majority-black districts. J.S. App. 57, 148-51. The arbitrary 2% maximum population deviation restriction made it even harder to find enough black population to meet these targets. *Id*. at 53. But the drafters were open and unapologetic about making this nakedly racial project their primary objective. They believed that attempting to "guarantee" the ability of blacks to elect their candidates of choice provided the drafters a "safe harbor" under Section 5 of the Voting Rights Act.[11]

The geographic dispersal of black population made it impossible to hit the racial target in every district, but the drafters tried to come "as close to it as we could get," Doc. 125-3 at 17, J.S. App. 33, and

---

[9] J.S. App. 62, 97-98; defendants' post-trial brief, Doc. 196 at ¶ 146; defendants' summary judgment brief, Doc. 125 at ¶ 26 (citations omitted).

[10] Defendants' summary judgment brief, Doc. 125 at ¶¶ 42-43, 90. Sen. Dial blamed the wholesale division of counties on the Voting Rights Act. Testimony of Sen. Dial, 08-08-13 Tr. at 91. Rep. McClendon believed that because of federal court cases and guidelines "[t]here is no requirement to respect county boundaries." McClendon quoted in press, APX 58 at 2.

[11] Doc. 125 at ¶ 30; Doc. 125-3 at 120; defendants' post-trial brief, Doc. 196 at ¶ 82.

they met or exceeded their goals in most districts, as the following tables show:

Comparison of Majority-Black House Districts in 2001 and 2012 plans using 2010 census data and% Black total population (from APX 6)

House District	% Black 2001 plan	% Black 2012 plan	Difference
19	70.04	61.5[12]	-8.54
32	59.62	60.3	0.68
52	60.09	60.1	0.01
53	55.71	56.2	0.49
54	56.77	56.9	0.13
55	73.54	73.6	0.06
56	62.26	62.3	0.04
57	68.49	68.5	0.01
58	78.08	73.0	-5.08
59	67.04	76.8	9.76
60	67.63	67.9	0.27
67	69.14	69.2	0.06
68	62.50	64.6	2.1
69	64.11	64.2	0.09

[12] House District 19 was the sole majority-black district in Madison County in the 2001 plan, and the size of its black majority necessarily decreased when majority-black HD 53 was moved from Jefferson County to Madison County.

70	61.89	62.2	0.31
71	64.28	66.9	2.62
72	60.12	64.5	4.38
76	69.56	73.9	4.34
77	73.58	67.0	-6.58
78	74.34	70.2	-4.14
82	57.18	62.2	5.02
83	57.03	57.7	0.67
84	50.67	52.4	1.73
97	60.73	60.8	0.07
98	65.23	60.0	-5.23
99	73.45	65.7	-7.75
103	69.90	65.3	-4.6

Comparison of Majority-Black Senate Districts in 2001 and 2012 plans using 2010 census data and% Black total population (from APX 7)

Senate District	% Black 2001 plan	% Black 2012 plan	Difference
18	59.93	59.12	-0.81
19	71.65	65.39	-6.26
20	77.96	63.38	-14.58
23	64.79	64.81	0.02
24	62.82	63.30	0.48

26	72.75	75.22	2.47
28	51.05	59.96	8.91
33	64.89	71.71	6.82

In HD 52 the drafters came within two persons of hitting their target, within 12 persons in HD 56, and within 13 persons in HD 55. Dec. 20, 2013, dissenting op., J.S. App. 208. The plans were enacted over the objections of every black legislator. *Id*. at 209.

The drafters "filled in the blanks around [the majority-black districts] with what was left of the districts." Sen. Dial dep., Doc. 125-3 at 19-20. They did so by "tr[ying] to accommodate the wishes of legislators where possible." J.S. App. 104. "Where the Republican legislators agreed upon boundaries and those particular boundaries did not pose a problem for either the requirement of one person, one vote or for the preservation of the majority-black districts, [the consultant] accommodated those requests." *Id*. at 100.

The Department of Justice precleared these plans. J.S. App. 8. But the target- or quota-driven packing of the majority black districts 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 black-white margins in the majority-white districts are substantially greater in the plans enacted by the Legislature than they are in the plans introduced by members of the Legislative Black Caucus,

APX 72 and 73, and in the 2001 plans, APX 129; J.S. App. 89-90.

B. Procedural History.

Appellants ALBC *et al.* commenced this action on August 13, 2012. They alleged Alabama's redistricting plans violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment, and Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. An amended ALBC complaint was filed January 15, 2013. Doc. 60; J.S. App. 8-10.

Count I alleged the 2012 plans violate the three-judge District Court's ruling on remand from *Reynolds v. Sims* that the Alabama constitutional provisions prohibiting the division of counties among House and Senate districts remain operative except where they conflict with the federal constitutional requirement of achieving equal population to the extent practicable. *Sims v. Baggett*, 247 F. Supp. 96, 101 (1965) (three-judge court). On cross-motions for partial summary judgment and for judgment on the pleadings, the District Court dismissed Count I, holding that splitting counties by narrowly restricting permissible population deviations does not violate federal constitutional law and that federal courts lack subject-matter jurisdiction to enforce the whole-county provisions of a state constitution. J.S. App. 9, 443.

Count II of the amended complaint alleged that the systematic packing of the majority-black House

and Senate districts diluted black voting strength statewide, racially classifying and segregating black voters and their elected representatives in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.

Count III of the amended complaint alleged that Alabama's plans constituted an impermissible political gerrymander: for partisan reasons, the state had unnecessarily split county boundaries and deviated from principles of one person, one vote in local legislative delegations.

1. Proceedings Regarding Count III.

Appellants moved for partial summary judgment and for entry of a preliminary and permanent injunction on Count III of the amended complaint, contending the wholesale disregard of county boundaries in the State's House and Senate plans violates the one-person, one-vote rights guaranteed county residents by the Equal Protection Clause. Doc. 68-1. On March 27, 2013, the District Court denied that motion without stating its reasons. Doc. 89. In response to appellants' motion for reconsideration, on April 5, 2013, the court vacated its March 27 order and substituted a memorandum opinion and order explaining its decision. J.S. App. 408-36. Judge Thompson filed a concurring opinion that found potential merit in plaintiffs' contention "that the local-delegations system results in inequalities of representation and power among county voters," J.S. App. 430, but he

suggested that appellants needed to clarify the basis for this claim. *Id*. at 434.

Subsequently, the state defendants moved for partial summary judgment on Count III of the amended complaint. Doc. 98. Appellants responded by opposing the State defendants' motion and by moving both for reconsideration of their motion for partial summary judgment, Doc. 107, and for entry of a permanent injunction. Doc. 108.

Following a hearing, the three-judge court *sua sponte* directed the parties to file supplemental briefs addressing the ripeness of the county one-person, one-vote claim and the standing of appellants to advance them. Doc. 130. Defendants' supplemental brief seized upon the District Court's suggestion that the Legislature might somehow change its internal operating procedures to do away with the local delegation system. Doc. 132. The ALBC plaintiffs' supplemental brief pointed out that the gatekeeping and local courtesy customs that empower local legislative delegations are not subject to change by House and Senate rules and, since they have been in use since the nineteenth century, are not likely to be abandoned. Doc. 133.

2. The District Court's Disposition of Count III.

A divided three-judge court on August 2, 2013, granted defendants' motion for summary judgment, dismissed the ALBC plaintiffs' one-person, one-vote

equal protection claim for county residents, and denied as moot appellants' motion for entry of a permanent injunction. J.S. App. 278-339, 2013 WL 3976626.

The majority acknowledged that a "significant" part of the business of the Alabama Legislature is passing local laws, that legislators are members of the local delegation for every county any portion of which is included in the House or Senate district they represent, that each local bill affecting a county must be approved by that county's local delegation before it can move to committee or to the floor, and that, even though no rules require it, a local bill approved by a county's local delegation usually is uncontested by the rest of the Legislature. J.S. App. 280-82, 323. But it held that the one-person, one-vote claim for county residents was not ripe for adjudication solely "[b]ecause 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. 300.

For the same reason, the majority held that the ALBC appellants had failed to establish injury-in-fact because they could not prove that the next Legislature would not disestablish the local delegation system. *Id*. at 305-06. Finally, the majority held that the ALBC appellants had not demonstrated redressability, because no redistricting plans could comply with their one-person, one-vote rights both as residents of the state and as residents of their counties. *Id*. at 310-13. Believing that "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 312, it advised appellants to wait until the 2015 Legislature has convened and then to sue the officers of the Legislature seeking to enjoin continued use of the local delegation system. *Id*. at 314.

The District Court majority then ruled in the alternative that the one-person, one-vote county resident claim should be rejected on the merits. It held itself bound by an earlier Eleventh Circuit decision, *DeJulio v. Georgia*, 290 F.3d 1291 (11th Cir. 2002), cert. denied, 537 U.S. 948 (2002), which had rejected a challenge to the Georgia Assembly's local delegation customs, similar to the claim the majority would have the ALBC appellants make in 2015. Unlike the ALBC appellants, the *DeJulio* plaintiffs did not challenge a state legislative apportionment. Instead, they asked the federal court to enjoin the legislature's internal practices. The Eleventh Circuit held that, because the Georgia Assembly had the ultimate discretion to adopt local laws or to overrule local bills approved by county delegations, the local delegations were not engaged in "governmental functions" that subject them to the one-person, one-vote requirement of the Equal Protection Clause. 290 F.3d at 1295. The District Court majority here considered itself bound to hold that the one-person, one-vote requirement does not apply to Alabama's local delegation system because, as with *DeJulio*, the local

legislative delegation system is not governed by formal rules of the Legislature. J.S. App. 323.

Judge Thompson dissented from the dismissal of the equal protection claim. J.S. App. 340-407, 2013 WL 4102154. He emphasized that local legislative delegations in Alabama "are generally creatures of custom" and "are the single most important legislating bodies for [the] counties." *Id*. at 344. He found the ALBC appellants' one-person, one-vote claim ripe for adjudication. *Id*. at 347-60. "The evidence overwhelmingly indicates that the Local Delegations system will almost certainly continue to exist with Alabama's next Legislature and the material aspects of the delegations will be the same as they are today, the same as they were last century, the century before that, and as far back as anybody involved in this litigation knows." *Id*. at 357-58. Particularly because the ALBC appellants wanted to preserve the local delegation system as a way of dampening the purposefully discriminatory centralization of power effected by the white supremacist 1875 and 1901 Alabama Constitutions, the majority's suggestion that the appellants should wait until the Legislature came back in session in 2015 and then attack the local delegation system misconceived the gravamen of appellants' claim. Properly understood, appellants had both suffered an injury caused by the new plan and had satisfied the redressability prong of Article III standing. *Id*. at 360-65.

On the merits, Judge Thompson's dissenting opinion identified at least four ways in which "Alabama's

Local Delegations system creates clear differences of voting power among the State's citizens." J.S. App. 367-68. First, among citizens of the same county, those who reside in a district only partially located in the county have numerically greater voting strength in the county delegation than do citizens whose district is contained entirely inside the county. *Id*. at 368-69. Second, among voters, those who reside in House or Senate districts that contain more than one county can "influence the local legislative affairs of their neighbors in other counties, although those cannot do the same for them." *Id*. at 371. Third, in districts that split counties, nonresidents are allowed "to influence a governmental body that they have no legitimate interest in (say, the Jefferson County Local Delegation), thereby diluting the votes of the legitimately interested voters." *Id*. at 372-73. "A quick look at the State's redistricting plans reveals that, across the State, residents of numerous counties are authorized, through their representatives, to legislate for other, neighboring, and, in many cases, even distant, counties." *Id*. at 374. Finally, among legislators, those whose districts include residents of multiple counties become "gatekeepers" for several counties, giving them more power than can be exercised by House or Senate members whose districts include fewer counties. *Id*. at 369-70. Judge Thompson concluded that "Alabama's Local Delegations scheme, which irrationally empowers certain of the State's citizens to the disadvantage of others, violates the equal protection clause." *Id*. at 378.

3. Proceedings Regarding Count II.

Trial was held August 8, 9, 12, and 13, 2013, before the three-judge District Court on the ALBC and Newton plaintiffs' race claims. J.S. App. 11-12. Before trial began, on June 25, 2013, this Court held that Alabama did not have to comply with Section 5 of the Voting Rights Act. *Shelby County v. Holder*, 133 S.Ct. 2612 (2013). The defendants in these consolidated actions stood by their position that Section 5 provided a compelling state interest that justified maintaining supermajority targets in the majority-black districts as a controlling factor in drawing the 2012 House and Senate plans. Defendants' post-trial brief, Doc. 196 at 83; J.S. App. 12-13. The State persisted in its mistaken view that, to comply with Section 5, "trying to make sure that the minority voting strength in those black-majority districts remained at or about the same level as it was when the 2010 Census data were loaded into the 2001 legislative district lines and in the 2001 districts was not unreasonable or demonstrably incorrect." Doc. 196 at 85. The State made no attempt to show that the inflated black population percentages in its targets or quotas were necessary to provide black voters the ability to elect candidates of their choice.

4. The District Court's Disposition of Count II.

The District Court majority accepted the State's arguments and expanded on them to uphold the 2012

House and Senate plans. It agreed that the drafters began by drawing the majority-black districts, J.S. App. 34, and that they tried to maintain "as closely as possible" the black percentages in the 2001 districts with 2010 census data, *id*. at 33. It found that the tighter 2% maximum deviation restriction made the black percentages higher than they had been in the 2001 plans. *Id*. at 52. The search for additional black population "drove the development of the Acts," *id*. at 103, and had a "domino" effect on majority-white districts throughout the state. *Id*. at 62, 97-98; accord, *id*. at 232 (Thompson, J., dissenting) ("seeking to achieve the racial quotas drove everything"). But, held the majority, "[a]though race was a factor in the creation of the districts, we find that the Legislature did not subordinate traditional, race-neutral districting principles to race-based considerations." *Id*. at 143. It said the consultant "ably balanced" all objectives, *id*. at 147, and "the constitutional requirement of one person, one vote trumped every other districting principle." *Id*. at 151. The majority conceded, however, "that the 'first qualification' after meeting the guideline of an overall deviation of 2 percent was not to retrogress minority districts when repopulating them." *Id*. at 149 (quoting Rep. McClendon). The integrity of county boundaries was conspicuously missing from the objectives listed in the majority opinion. *Id*. at 146-47.

In the alternative, and notwithstanding the drafters' repeated denials of partisan motives, J.S. App. 216-17 (Thompson, J., dissenting) (citations

omitted), the District Court majority found "that partisanship explains what happened here," not race. J.S. App. 161. If the sizes of black majorities were inflated, the majority said, that was the fault of the Democratic-controlled legislatures that had drawn the previous plans. *Id*. at 161-62. "We refuse to apply a double standard that requires the Legislature to follow one set of rules for redistricting when Democrats control the Legislature and another set of rules when Republicans control it." *Id*. at 163.

Even if race was the predominant factor, the majority held, the State's compliance with Section 5 of the Voting Rights Act was a compelling state interest, J.S. App. 173, and the plans were narrowly tailored to meet this interest, because any significant reduction of the percentages in the majority-black districts would have violated Section 5. *Id*. at 183. This was Congress' intent, the majority thought, when it amended Section 5 in 2006 to prohibit any diminishment in a minority's ability to elect its preferred candidates. *Id*. at 181. And, it concluded, this was the legal standard by which the 2012 House and Senate plans should be judged, because Alabama was subject to Section 5 when those plans were enacted. *Id*. at 175-76.

The District Court majority also rejected the ALBC and Newton plaintiffs' claims of racial discrimination. For example, it dismissed as nonjusticiable, for the reasons set out in its August 2, 2013, opinion and order, the claim that the plans diluted the votes

of black residents of Jefferson County for members of their local delegation. J.S. App. 115-16.

Dissenting, Judge Thompson said the drafters' policy of maintaining the 2010 census percentages in the 2001 majority-black districts, on which they focused "[f]rom start to finish," J.S. App. 214, "sifted residents by race" to achieve "naked 'racial quotas.'" *Id*. at 189 (quoting *Bush v. Vera*, 517 U.S. 952, 976 (1996)). He cited legislative history, controlling case law, and Department of Justice regulations to show that the State's reliance on the 2006 amendments to Section 5 of the Voting Rights Act to justify these racial quotas was wrong. *Id*. at 243-67. Congress did not intend to create a "one-way ratchet" that froze black percentages in place. *Id*. at 253. Determining whether a new redistricting plan diminishes a protected minority's ability to elect its favored candidates cannot depend solely on population statistics. It requires a "functional analysis" of all relevant factors, including "minority voter registration, minority voter turnout, election history, and minority/majority voting behaviors." *Id*. at 259-60 (quoting *Texas v. United States*, 887 F. Supp.2d 133, 263 (D. D.C. 2012) (three-judge court), vacated and remanded on other grounds, 133 S.Ct. 2885 (2013)).

Judge Thompson pointed out that the State's exclusively census-based interpretation of Section 5 "by definition raises a serious constitutional question," as this Court warned in *Miller v. Johnson*, 515 U.S. 900, 923 (1995). J.S. App. 261-62. It creates racial classifications that require strict scrutiny. *Id*.

at 189, 231. And here, Judge Thompson said, the State has not met its burden to establish a "strong basis in evidence" that it needed to draw districts that preserved these racial quotas. *Id*. at 265. "The conclusion is as clear as day: the drafters' action was not required under any correct reading of the statute, and so cannot survive as narrowly tailored." *Id*. at 267.

Even if the districts had been narrowly tailored to satisfy Section 5, Judge Thompson wrote, the *Shelby County* decision removed Alabama's obligation to comply with Section 5, so that statutory provision no longer provides the State a purported compelling interest for its racial classification of voters. J.S. App. 267-69. "In the absence of an actual compelling interest at the time of judgment, the court cannot approve a racial gerrymander." *Id*. at 269.

Because race was the "overriding consideration" for the entire plans, *id*. at 271, so that the Legislature should be required to draw completely new plans that respect county boundaries and other good districting criteria "based *far less on race*," J.S. App. 274 (emphasis in original), Judge Thompson did not reach the claims of racial discrimination. *Id*. at 271.

REASONS FOR NOTING PROBABLE JURISDICTION

Alabama's 2012 House and Senate redistricting plans epitomize the worst evils this Court has tried to

guard against since it entered the "political thicket" of legislative redistricting. *Reynolds v. Sims*, 377 U.S. at 566. Instead of starting the process with county boundaries that should be the basic building blocks of every redistricting plan, boundaries Alabama's own constitution forbids its Legislature to fragment, and that protect the one-person, one-vote rights of residents electing their county legislatures, the drafters began and ended their work trying to maintain arbitrary black supermajorities, an explicit and unapologetic classification of voters by race that violates the core principles of *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny. This Court should note probable jurisdiction and expedite this appeal to restore rationality and basic fairness to the House and Senate districts before Alabama's voters go to the polls in June.

I. The Unnecessary Division of Counties Among Legislative Districts Violates the One-Person, One-Vote Rights of County Residents.

This appeal raises a question of first impression before this Court: how are the bedrock principles of one-person, one-vote to be applied when a state chooses a system of government where local delegations in the state legislature also exercise general governmental power at the county level? This Court has long recognized an inherent tension between the requirement of equal population among state legislative districts and respect for county boundaries.

Reynolds v. Sims, 377 U.S. 533, 580-84 (1964). The tension is most acute in states like Alabama, where local legislative delegations, operating under long-standing customs of local courtesy, are "the single most important legislating bodies for [their] counties." J.S. App. 344. Local legislative delegations are especially prevalent in the South, where, as in Alabama, they grew out of efforts to deny African Americans the power to control or influence their county governments.[13]

This Court has long emphasized the preservation of county boundaries as one of the "traditional districting principles" that constrain what might otherwise be the unbridled power of plan drawers to choose districts that undercut fair representation for all citizens. *See*, *e.g.*, *LULAC v. Perry*, 548 U.S. 399, 433 (2006) (quoting *Abrams v. Johnson*, 521 U.S. 74, 92 (1997), and *Bush v. Vera*, 517 U.S. 952, 977 (1996)); *Mahan v. Howell*, 410 U.S. 315, 325 (1973). Most recently, in *Bartlett v. Strickland*, 556 U.S. 1 (2009), this Court held that states cannot use federal law as a smokescreen for violating state constitutional "whole county" requirements. North Carolina could not justify violating its whole-county requirement by pointing to Section 2 of the Voting Rights Act of 1965,

---

[13] Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105, 121 (1992). Local legislative delegations remain active in Alabama, Florida, Georgia, Mississippi, North Carolina, and South Carolina. *Id*. at 109 n.23.

unless Section 2 required the creation of a district with a majority-black voting-age population. But *Bartlett* did not involve – and this Court had no need to consider – whether splitting Pender County violated the federal one-person, one-vote rights of county residents as well as the state constitution. Particularly in light of this Court's difficulties identifying standards to constrain rampant partisanship in the redistricting process, *see*, *e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267 (2004), this appeal presents an opportunity for this Court to clarify that states cannot arbitrarily violate traditional districting principles, at least when those violations also produce massive inequalities in voting power for local legislative delegations possessing general governmental powers over their respective counties.

1. The court below erred in holding that the ALBC appellants' challenge was not ripe and that they lacked Article III standing. Because the House and Senate rules do not affect the local delegations' customary gatekeeping function or the informal courtesy other legislators usually extend to the local bills approved by county delegations, the impact the local delegation system will have on the one-person, one-vote rights of county residents is not "[a] hypothetical threat." *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89-90 (1947). The equal protection claim does not rest on contingent events that may never occur. *Texas v. United States*, 523 U.S. 296, 300 (1998). To the contrary, the District Court majority's suggestion that the rules of the Legislature

could somehow do away with the informal local delegation system rests on events not just hypothetical and contingent but counter-factual and unrealistic. Not a single legislator testified the majority's revolutionary proposal is even possible. J.S. App. 353 (Thompson, J., dissenting). Nor did the majority suggest how the operation of county delegations could be rooted out of the statute laws in which they are embedded. *Id*. at 344-46, 357.

If the June 2014 primary elections are allowed to proceed under the challenged plans, the hardship suffered by residents of counties unnecessarily divided among House and Senate districts will be the denial of "one of the most fundamental rights of our citizens: the right to vote," *Bartlett v. Strickland*, 556 U.S. at 10, in this case the constitutional right to an equal and undiluted vote for the members of their county delegations. There is no more serious hardship than that. The ALBC appellants' equal protection claim is not only ripe for review, it requires this Court's urgent attention.

The District Court majority's denial of Article III standing turns on two misconceptions: (1) that the ALBC appellants' real beef is with the informal system of local delegations, and (2) that anything done in the next organizational session of the Legislature can prohibit members of the House and Senate from continuing their customs of deference to local delegations. When the one-person, one-vote claim is viewed correctly, the appellants' Article III standing is evident. Their injury-in-fact – the dilution of county

residents' votes for their local legislative delegation – is fully materialized in the 2012 redistricting statutes. Appellants' injury is directly traceable to the county-blasting districts that unnecessarily allow nonresidents to elect members of county delegations. The one-person, one-vote violations would be redressed by the requested injunction, which would prohibit enforcement of the challenged statutes and require the District Court to order its own House and Senate plans in effect if the Legislature failed timely to enact new plans that split counties between districts only where necessary to satisfy substantial statewide equality of district populations.

2. On the merits, the court below erred in rejecting the ALBC appellants' one-person, one-vote claims. By analogizing them with the claims advanced in *DeJulio v. Georgia*, 127 F. Supp.2d 1274 (N.D. Ga. 2001), aff'd, 290 F.3d 1291 (11th Cir.), cert. denied, 537 U.S. 948 (2002), and *Vander Linden v. Hodges*, 193 F.3d 268 (4th Cir. 1999), the majority misconceived appellants' constitutional claim. It is *not* that the system of local legislative delegations violates appellants' rights. To the contrary, as the majority acknowledged, J.S. App. 311, appellants have argued that, absent local delegations, the State's system of government would be *less* fair and representative, particularly in counties with heavily African-American populations. Rather, appellants' claim is that the decision to create local legislative delegations whose members represent vastly different numbers of constituents, and to give voters in different counties across the state vastly different voting

power selecting and influencing the members of local legislative delegations, violates fundamental principles of one person, one vote that cannot be excused by a state's decision to adopt redistricting principles not required by federal law.

Lawmaking is the original, quintessential "governmental function" that requires that the election of a public body comply with the Equal Protection Clause, *Hadley v. Junior College Dist.*, 397 U.S. 50, 56 (1970). In Alabama local legislative delegations are the *de facto* lawmakers for their respective counties. When it comes to the equal protection rights of voters, this Court has repeatedly held that "the Equal Protection Clause reaches the exercise of state power *however manifested*, whether exercised directly or through subdivisions of the State." *Avery v. Midland County*, 390 U.S. 474, 479-80 (1968) (quoting *Cooper v. Aaron*, 358 U.S. 1, 17 (1958)) (emphasis added). The Constitution imposes "one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population." *Avery*, 390 U.S. at 485-86. The exceptions to this rule – in cases like *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), and *Ball v. James*, 451 U.S. 355 (1981) – involve governmental bodies with limited powers far removed from the core functions exercised by local legislative delegations in Alabama. That Alabama has chosen to use local legislative delegations as the

county lawmaking body cannot relieve it of its constitutional duties. While the Eleventh Circuit may have reached the right result in *DeJulio* when it held that the one-person, one-vote rule does not authorize federal courts to interfere with a legislature's internal allocation of powers among its members, it was wrong to base its holding on the patently erroneous conclusion that Georgia's local legislative delegations were not exercising governmental functions.

This Court has held that when officials become members of a body exercising local governmental powers "as a matter of law upon their various elections" to other offices "ultimately . . . selected by popular vote," the principle of one person, one vote applies. *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 694 (1989). The requirements of one person, one vote apply to the equal power exercised by *voters* in the affected local political subdivisions. "No distinction between authority exercised by state assemblies, and the general governmental powers delegated by these assemblies to local, elected officials, suffices to insulate the latter from the standard of substantial voter equality." 489 U.S. at 692-93 (citing *Avery*, 390 U.S. at 481, and *Hadley*).

Ordinary citizens have no difficulty understanding why it is unfair to allow voters in other counties to influence and even to control their local laws, as speakers at the Legislature's public hearings, including the co-chair of the Legislative Reapportionment Committee, repeatedly complained. J.S. App. 95, 374-75. Related decisions of this Court support

the common-sense conclusion that, at least where it can be avoided, allowing strangers to elect county lawmakers violates equal protection. "No decision of this Court has extended the 'one man, one vote' principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions." *Holt Civic Assn. v. City of Tuscaloosa*, 439 U.S. 60, 68-69 (1978). The extraterritorial impact of one county's local laws, for example, a sales tax, which must be paid by residents and nonresidents alike, is not a constitutionally sufficient justification for allowing nonresidents to vote for that county's local delegation. *Id*. at 69.

The court below further erred in rejecting appellants' claim because it thought they had failed to define with sufficient precision exactly when population deviations affecting local legislative delegations might be excused by the need to comply with federal constitutional or statutory requirements for the legislature as a whole. J.S. App. 315-16. This Court has repeatedly emphasized since *Reynolds* that it is impossible to provide a bright-line definition of exactly when population deviations are "necessary to achieve some legitimate state objective," *Tennant v. Jefferson County Comm'n*, 133 S.Ct. 3, 5 (2012), or when their conflict with other state or federal districting standards is "unavoidable," *Brown v. Thomson*, 462 U.S. 835, 843 (1983), or when population equality has been achieved as nearly as "practicable," *Connor v. Finch*, 431 U.S. 407, 419 (1977). This Court has held that a total population deviation of less than ten

percent constitutes prima facie compliance with one person, one vote and need not be justified by the state absent evidence of arbitrariness or discrimination. *Brown v. Thomson*, 462 U.S. at 842 (citations omitted). The Alabama Legislature's imposition of an arbitrary ±1% restriction on all House and Senate districts systematically increased the instances in which county residents' votes are diluted, and it cannot be justified by this Court's precedents any more than North Carolina's decision to ignore its whole-county provision in *Bartlett* could be justified by invoking the Voting Rights Act. As this Court long ago noted, "An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement." *Brown v. Thomson*, 462 U.S. at 842 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973)). The plans introduced by members of the ALBC demonstrated that the number of county splits could be more than halved without running afoul of either one person, one vote or the Voting Rights Act. There is no need for a bright-line definition to show that Alabama's 2012 redistricting plans "unnecessarily" violate the one-person, one-vote rights of many county residents.

The refinement of appellants' suggested equal protection rule can and should await the next case with a different set of facts. This Court has upheld Wyoming's legislative decision to keep counties whole

even though it produced an average deviation of 16% and a maximum deviation of 89%. *Brown v. Thomson*, 462 U.S. at 839. *Mahan v. Howell* held that the statute redrawing the districts for the Virginia House of Delegates did not violate the Equal Protection Clause notwithstanding a maximum deviation of 16.4% among districts. 410 U.S. at 319. But it is an altogether different question to ask what maximum population deviations among state legislative districts are *required* to prevent diluting the votes of residents of political subdivisions whose local delegations exercise substantial control over local laws. The most that can be said now, as the dissent below observed, is that a state "cannot . . . fail to recognize at all its one-person, one-vote obligations to the voters residing in the Local Delegations across the state." J.S. App. 405.

II. There Is No Compelling Interest That Can Justify the State's Purposeful Preservation of Arbitrary Black Supermajorities.

1. It is unnecessary to scrutinize district shapes and census statistics to see that Alabama's 2012 House and Senate plans classify voters by race. There is direct evidence they do so. The redistricting committee chairs and their mapping consultant all openly admitted they tried to maintain the target percentages yielded by overlaying 2010 census data on the 2001 districts. The drafters repeatedly insisted their search for black precincts and/or census blocks to add to the uniformly underpopulated majority-black districts was the primary reason for the helter-skelter

fragmentation even of counties in the majority-white districts. These racial classifications of voters are subject to strict scrutiny. *Shaw v. Reno*.

2. The District Court majority erred when it held that Section 5 of the Voting Rights Act provided a narrowly tailored, compelling state interest for the State's attempt to maintain the size of every black majority. The Section 5 retrogression standard only prohibits diminishing the ability of protected minorities to elect candidates of their choice. It does not require maintaining particular black percentages regardless of whether they are necessary to construct ability-to-elect districts.

3. In any case, Section 5 is no longer binding on the State of Alabama. *Shelby County v. Holder*. The State offered no evidence to show that the sizes of its majority-black districts are needed to comply with Section 2 of the Voting Rights Act. The court below erred when it failed "to apply the law in effect at the time it renders its decision. . . ." *Bradley v. Richmond School Bd*., 416 U.S. 696, 711 (1974), particularly where that failure causes a racial classification to "last longer than the [problem] it is designed to [address]." J.S. App. 269 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring)).

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and reverse the judgment of the District Court for the Middle District of Alabama.

Respectfully submitted,

EDWARD STILL
130 Wildwood Parkway
Suite 108 PMB 304
Birmingham, AL 35209
E-mail: still@votelaw.com

U.W. CLEMON
WHITE ARNOLD & DOWD P.C.
2025 Third Avenue North,
Suite 500
Birmingham, AL 35203
E-mail:
uwclemon@waadlaw.com

JAMES U. BLACKSHER
Counsel of Record
P.O. Box 636
Birmingham, AL 35201
205-591-7238
Fax: 866-845-4395
E-mail:
jblacksher@ns.sympatico.ca

Counsel for Appellants
Alabama Legislative
Black Caucus et al.