

No. 13-895

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

**BRIEF OF ALABAMA LEGISLATIVE BLACK
CAUCUS *ET AL.* REPLYING TO THE JOINT
MOTION TO DISMISS OR AFFIRM**

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LIST OF PARTIES

The following are the appellants:

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.

The following are the appellees:

Defendants:
State of Alabama
Jim Bennett, Alabama Secretary of State

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

The following are the appellants in Docket No. 13-1158:

The Alabama Democratic Conference
Framon Weaver, Sr.
Stacey Stallworth
Rosa Toussaint
Lyne Pettway
Estate of Rep. Demetrius Newton

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**BRIEF OF ALABAMA LEGISLATIVE BLACK
CAUCUS ET AL. REPLYING TO THE JOINT
MOTION TO DISMISS OR AFFIRM**

This appeal requires the Court to decide what direction the constitutional jurisprudence of state legislative redistricting will take in the twenty-first century. Appellee State of Alabama contends that, so long as it adopts *de minimis* population deviation standards, the partisan legislative majority can ignore county boundaries and draw House and Senate districts that “further the interests of incumbents.” Appellees’ Joint Motion To Dismiss or Affirm the appeal of the Alabama Legislative Black Caucus *et al.* (“MDA”) at 6. Redistricting, the State appellees say, has been reduced to “the stuff of routine legislative compromise.” *Id.* at 7.

The Court should redirect the State of Alabama to constitutional first principles, which guarantee the rights of voters to fair and equal representation, not the prerogatives of legislators. *Reynolds v. Sims*, 377 U.S. 533 (1964). This case demonstrates how unrestrained gerrymandering practices are spiraling out of control. There is no way to exclude partisan and racial considerations entirely from legislative redistricting. Forcing state House and Senate districts back inside county boundaries, consistent with substantial population equality, can significantly restrain both partisan and racial gerrymandering and make legislators more responsive to their local constituents.

I. The Equal Protection Claim On Behalf of County Residents Is a Threshold Issue Warranting Summary Reversal.

A decision by this Court upholding the Fourteenth Amendment right of Alabama's county residents to House and Senate districts that do not split their county boundaries except when necessary to produce substantial population equality among districts statewide would render moot all remaining issues in this appeal and in Appeal No. 13-1138. The Legislature would be required to redraw completely the 2012 plans that split 50 of Alabama's 67 counties in the House and 33 counties in the Senate. Because of *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), the new redistricting plans would not be subject to preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and there would be no need for this Court to decide whether Section 5 justified the 2012 Legislature's attempt to preserve with 2010 census data the racial percentages in every majority-black district. And all of the claims advanced by the Alabama Democratic Conference appellants, which challenge specific districting choices in the 2012 plans, would be moot.

A. The ALBC Appellants Have Diligently Pursued a Timely Resolution of Their Whole-County Claim.

The State appellees misplace the equities of timeliness calling for summary action in this appeal, with primary elections scheduled for June 3 and the general election to be held November 4, 2014. Appellees' Joint Motion To Dismiss or Affirm the appeal of the Alabama Democratic Conference *et al.* ("MDA No. 13-1138") at 1-2. It was the

State who succeeded in getting this Court to dismiss for want of jurisdiction the ALBC parties' interlocutory appeal from the same August 2, 2013, divided decision of the district court rejecting the one-person, one-vote claim of county residents that now is back before the Court. *Alabama Legislative Black Caucus v. Alabama*, 134 S.Ct. 694 (2013). The ALBC appellants filed their jurisdictional statement appealing the December 20, 2013, final judgment of the district court on January 23, 2014. The State appellees requested and received not one but two extensions of time for filing their response to the ALBC jurisdictional statement. See Clerk's letters to Brasher dated February 4, 2014, and March 24, 2014.

It may be too late now for summary reversal of the whole-county judgment to allow time for drawing new plans before the June 3 primary. But there is still time for the Legislature – or the district court – to adopt new plans restoring county boundaries before the November 4 general election. If not, the district court could follow the precedent it set when it ordered mid-term elections in 1983 after the Legislature finally adopted House and Senate redistricting plans that satisfied all federal and state requirements. *Burton v. Hobbie*, 561 F.Supp. 1029 (M.D. Ala. 1983) (three judge court).

B. The Equal Protection Claim of County Residents Is Ripe for Adjudication, and Appellants Have Standing To Assert It.

The State appellees defend the ruling, which the district court majority raised *sua sponte*, that the whole-county claim is not ripe and appellants lack Article III standing, based on speculation that in 2015 the Alabama

House and Senate may abandon their century-old informal customs of local courtesy. MDA at 11-17. This stands the principles of ripeness and standing on their heads. There is no evidence that anyone in or out of the Legislature wants to end the local courtesy custom and county delegations' informal, exclusive power to control the introduction and passage of local laws concerning their counties. The district court majority relied entirely on its own invitation for the Legislature to consider disrupting one of its most cherished practices to hold that the 2012 redistricting plans cannot be challenged in light of today's circumstances and must await developments that are highly unlikely tomorrow.

The State appellees defend the majority's reliance on the testimony of the House and Senate clerks. MDA at 12-13. But like the district court majority they ignore the relevant part of the clerks' declarations. Both clerks emphasized that "[n]othing in the Rules of the Alabama House [or Senate] requires members to observe local courtesy, so, to the extent it is observed, that is done as a matter of custom." Affidavits of Jeff Woodard and Patrick Harris, Doc. 132-1 at 32, Doc. 132-2 at 30. No committee or rule of the Legislature can instruct its members how to vote, see Ala. Const., Art. IV, §§ 55 and 56, and there is no way for the leadership to adopt formal rules that end the local courtesy custom.

This case is not like *Texas v. United States*, 523 U.S. 296 (1998), where it was presently unknown whether any school district was subject to being sanctioned under yet to be defined state achievement rules. A more relevant precedent is *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), where clean air

regulations made it presently known what action states had to take to comply. The Court rejected the argument that the question of statutory interpretation was not ripe because it was unknown if the EPA might modify its rules in the future. In the instant appeal it is known both how the local courtesy customs operate presently and how the 2012 House and Senate districts will determine which voters can elect in 2014 the members of each county legislative delegation. Ripeness cannot be undermined by the tautology that it is unknown whether in the future what is known in the present may change.

The State appellees also defend the holding of the majority below that appellants lack standing to assert an equal protection claim for county voters because it fails on the constitutional merits. MDA at 16. That basis for denying standing falls with the majority's erroneous decision on the merits.

C. The County Integrity Claim Is Grounded in First Principles of One-Person, One-Vote Law.

Appellants' jurisdictional statement clearly states that their equal protection claim for county residents raises a question of first impression. ALBC J.S. at 30. But the State appellees are not entirely correct when they argue not a single precedent supports our contention that county legislative delegations are exercising the kind of governmental functions that invoke the constitutional rule of one person, one vote. Constitutionally significant principles of fair representation were implicit in *Reynolds'* acknowledgment of the importance of county delegations in Alabama.

A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions as political subdivisions. Several factors make *more than insubstantial* claims that a State can rationally consider according political subdivisions *some independent representation* in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. . . . In many States *much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions*. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering.

377 U.S. at 580-81 (emphases added). This is a clear reference to the important governmental function of “independent representation” county delegations exercise. So is the Court’s warning about “[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, [which] may . . . 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. 835, 842 (1983) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973)) (emphasis added).¹

1. At least one election law treatise notes the prevalence of local legislative delegation customs, “especially in the South,”

More recently, in *Bartlett v. Strickland*, 556 U.S. 1 (2009), the Court did not examine the representational policy underlying the whole-county provision in the North Carolina Constitution that protected Pender County from being split among House districts unless failing to do so would violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. But there is little doubt North Carolina’s state constitutional policy implicates the same equal protection rights that the one-person, one-vote rule addresses. Alabama’s constitution has similar provisions that prohibit splitting counties between either House or Senate districts. Ala. Const. Art. IX, §§ 198-200. In this Court and in the district court on remand from *Reynolds*, Alabama argued these state constitutional requirements prevented compliance with a federal constitutional requirement of one person, one vote. *Reynolds*, 377 U.S. at 584; *Sims v. Baggett*, 247 F.Supp. 96, 103 (M.D. Ala. 1965) (three judge court). Remarkably, in the instant appeal, the State of Alabama makes no mention of the Alabama constitution. Adopting an ironic stance of reverse federalism, in the court below the State successfully argued this Court’s one-person, one-vote jurisprudence has liberated the Alabama Legislature from the redistricting constraints in its own constitution. The district court agreed and held it was barred from considering how the Legislature’s arbitrary decision to restrict allowable population deviations to a *de minimis* \pm 1% aggravated widespread violations of the whole-county state constitutional provisions. Memorandum Opinion and Order, Dec. 26, 2012, J.S. App. at 439-46.

and suggests county residents could “challenge the make-up of the county’s delegation” on one-person, one-vote grounds. D. Lowenstein, R. Hasen, and D. Tokaji (eds.), *ELECTION LAW: CASES AND MATERIALS*, Fifth Edition (Carolina Academic Press, 2012) (Kindle Location 2972).

The State appellees say the Legislature was justified in prohibiting larger deviations because it “eliminated the partisan gerrymander that existed in the former districts.” MDA at 4 (quoting J.S. App. 146). But the degree of meaningful gerrymandering that can be accomplished by such small variances in population pales in comparison with the gerrymandering *Reynolds* warned could result from ignoring county boundaries. The 2012 drafters’ disregard of county boundaries allowed Republican incumbents to wander across neighboring counties searching out voters they expect to support their re-elections. It is the voters who must pay the price.

The State appellees wrongly argue no court has articulated a manageable judicial standard for enforcing county residents’ equal voting rights, and “the requirement of one person, one vote is not the sort of injury that can be redressed by partial compliance.” MDA at 17 (quoting J.S. App. 312). This is a direct assault on the direction in *Reynolds* that the one-person, one-vote principle not be allowed to permit “[i]ndiscriminate districting, without any regard for political subdivisions,” which should be respected subject to “the overriding objective [of] substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.” 377 U.S. at 579.

The district court’s demand for a bright-line standard and its criticism of plaintiffs for failing “to define the word ‘necessary,’” MDA 18 (quoting J.S. App. 315) are directed at the entire body of this Court’s one-person, one-vote jurisprudence. See cases cited in ALBC Jurisdictional Statement at 37-38. The district court majority’s

claim of unmanageability squarely conflicts with the same court's decision after the Legislature's post-1980 census redistricting, which found the Legislature's plan "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." *Burton v. Hobbie*, 561 F.Supp. at 1035.

The State appellees seize on the district court majority's misapplication of *DeJulio v. Georgia*, 290 F.3d 1291 (11th Cir.2002), cert. denied, 537 U.S. 948 (2002), to contend the leadership of the Legislature may turn control over local laws to legislators who represent none of the affected county residents. MDA at 22 ("a future legislature could decide to appoint any member to any committee to function as a gatekeeper for local legislation"). This is an alarming contention, which, if implemented, would completely undermine county voters' control over their local laws, adding yet another chapter to Alabama's continuing history of manipulating the structure of state and local government to prevent local black majorities from being able to govern themselves. The State appellees wrongly discount the dissent's concern that ending the customs empowering local delegations could violate the Voting Rights Act. MDA at 13-14 n.2. See *Schuette v. Coalition To Defend Affirmative Action*, __ S.Ct. __, 2014 WL 1577512 (April 22, 2014) (the Fourteenth Amendment prohibits modifying the political process to disadvantage targeted minorities).

Appellees completely misconceive the significance of *Knight v. Alabama*, 458 F. Supp. 2d 1273 (N.D. Ala. 2004), *aff'd*, 476 F.3d 1219 (11th Cir.), cert. denied, 127 S.Ct. 3014 (2007). MDA at 10 n.1. The *Knight* court found that

restrictions were placed in the Alabama Constitution to prevent county officials from raising taxes on land owned by whites to pay for the education of black children. 458 F.Supp.2d at 1295-97. The *Knight* court denied relief because it concluded property tax discrimination was beyond the purview of the higher education desegregation issues before it. A new lawsuit challenging those same property tax restrictions, filed primarily for K-12 students in the majority-black counties in Alabama's Black Belt, is pending certiorari before this Court. *Lynch v. Alabama*, No. 13-1232 (U.S.) (petition filed April 10, 2014)

The most important governmental function county delegations exercise in the Alabama Legislature is control over county taxes. Amendments to the Alabama Constitution Governor George Wallace pushed through the Legislature in the 1970s require county officials to get the Legislature's approval of any increases in millage rates. *Knight*, 458 F.Supp.2d at 1286-97. Obviously, there is no governmental function more important than the power of taxation.

II. The Racial Gerrymandering Claim, Should the Court Address It, Also Warrants Summary Reversal.

Reversal of the judgment below on the one-person, one-vote claim of county residents would moot the racial gerrymander issues, as the State appellees seem to concede. MDA No. 13-1138 at 23 n.3. If the Court addresses it, the district court's ruling on the racial gerrymandering claims should be reversed summarily, because, based on the undisputed facts, the drafters' strategy for assigning racial populations to House and Senate districts, in its

very design, violated the core principles of the *Shaw v. Reno*, 509 U.S. 630 (1993), line of cases.²

The district court majority found “that the effort to preserve the majority-black districts and bring them into compliance with the requirement of one person, one vote drove the development of the Acts.” J.S. App. 103. It acknowledged the drafters thought that to comply with the Voting Rights Act “the new districts could not reduce the total number of majority-black districts for each house and that the new majority-black districts should reflect as closely as possible the percentage of black voters in the existing majority-black districts as of the 2010 Census.” *Id.* at 32-33. And it conceded the arbitrary $\pm 1\%$ deviation restriction sharpened the focus on racial populations: “Because the Legislature used a tighter deviation in population compared to the Democrat-controlled Legislature in 2001, the number of black people and the percentage of the black population moved into majority-black districts were higher under the Acts than compared to those same numbers in 2001.” *Id.* at 53.

The State appellees argue these undisputed facts do not violate *Shaw v. Reno* because the district court majority found “that the constitutional requirement of one person, one vote trumped every other districting principle.” MDA at 3 (quoting J.S. App. 151). But the majority misconceived the *Shaw* standard when it held the redistricting plans were not subject to strict scrutiny

2. The State appellees wrongly argue that “the ALBC plaintiffs have effectively forfeited [the racial gerrymandering] claim,” saying we “devote only two pages” of our jurisdictional statement to it. The jurisdictional statement actually devotes pages 13-18, 25-29, and 39-40 to the racial gerrymandering issues.

because the drafters had a “paramount commitment to population equality. . . .” J.S. App. 152. Population equality is “the paramount objective” in every redistricting plan, especially when Congressional districts are being redrawn. *Abrams v. Johnson*, 521 U.S. 74, 98 (1997) (quoting *Karcher v. Daggett*, 462 U.S. 725 (1983)). The relevant question is whether race was the predominant factor in determining which of the many possible arrays that satisfy population equality were selected. *Shaw* itself involved Congressional redistricting and its requirement of *de minimis* population deviations, as did *Miller v. Johnson*, 515 U.S. 900 (1995). The *Miller* Court relied on direct evidence that the Georgia Assembly attempted to draw a “max black” plan containing three majority-black Congressional districts that would satisfy the Department of Justice, *id.* at 907-08, a mapping objective not unlike the one presented in the instant appeal, where the Alabama drafters announced their intention to head off DOJ objections by preserving the sizes of black majorities to the extent possible. Viewing the 2012 House and Senate plans on their face, it is apparent “that the legislature subordinated traditional race-neutral districting principles, including . . . compactness . . . and respect for political subdivisions . . . to racial considerations.” *Miller*, 515 U.S. at 916.

CONCLUSION

The judgment below should be reversed summarily.
Alternatively, the Court should note probable jurisdiction.

Respectfully submitted,

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