No. 13-1138

IN THE

Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, ET AL.
Appellants,
v.
ALABAMA, ET AL.,
Appellees.

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

BRIEF FOR APPELLANTS

James H. Anderson
William F. Patty
Brannan W. Reaves
JACKSON, ANDERSON & PATTY, P.C.
P.O. Box 1988
Montgomery, AL 36102

Richard H. Pildes
Counsel of Record
Vanderbilt Hall
40 Washington Square South
New York, NY 10012
(212) 998-6377
pildesr@law.nyu.edu

Paul M. Smith
Jessica Ring Amunson
Mark P. Gaber
JENNER & BLOCK LLP
1099 New York Avenue NW
Suite 900
Washington, DC 20001

John K. Tanner
3743 Military Road NW
Washington, DC 20015

August 13, 2014 *Additional counsel on inside cover*

Walter S. Turner
P.O. Box 6124
Montgomery, AL 36106

Kevin Russell
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814

QUESTION PRESENTED

This appeal in a legislative redistricting case presents issues of law in regard to how a state may rely on race in setting district boundaries. It is undisputed that the State of Alabama had, among its chief goals, the idea that when possible it would redraw each majority-black district to have the same percentage of black population as the district would have had using 2010 Census data as applied to the former district lines. This goal, particularly when combined with the new goal of significantly reducing population deviation among districts, led the State to stark racial intentionality in district-drawing, packing more supermajorities of black voters into already-majority-black districts, without regard to whether such efforts were actually necessary in each district to allow black voters to elect candidates of their choice. A divided three-judge district court rejected the challenge to the State's legislative redistricting plans. The question presented is:

a. Whether, as the dissenting judge concluded, this effort amounted to an unconstitutional racial quota and racial gerrymandering that is subject to strict scrutiny and that was not justified by the putative interest of complying with the non-retrogression aspect of Section 5 of the Voting Rights Act?

b. Whether these plaintiffs have standing to bring such a constitutional claim?

PARTIES TO THE PROCEEDING

Appellants, plaintiffs below, are the Alabama Democratic Conference, Framon Weaver, Sr., Stacey Stallworth, Rosa Toussaint, and Lynn Pettway. Rep. Demetrius Newton was also a plaintiff, but is now deceased.

Plaintiffs in a consolidated action, who are appellants in No. 13-895 before this Court, are the Alabama Legislative Black Caucus, Bobby Singleton, the Alabama Association of Black County Officials, Fred Armstead, George Bowman, Rhondel Rhone, Albert F. Turner, Jr., and Jiles Williams, Jr.

Defendants-Appellees are the State of Alabama, its Governor Robert Bentley, and its Secretary of State Jim Bennett. Also present as appellees are intervenor-defendants Senator Gerald Dial and Representative Jim McClendon.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's rules, appellant states that it has no parent corporation and does not issue stock.

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Appellants the Alabama Democratic Conference, et al. (collectively, "ADC"), respectfully request that this Court reverse the judgment of the United States District Court for the Middle District of Alabama.

OPINION BELOW

The opinion of the district court is reported at 989 F. Supp. 2d 1227 and is reprinted in the appendix to the jurisdictional statement of No. 13-895 at Alabama Legislative Black Caucus's ("ALBC's") Jurisdictional Statement Appendix ("J.S. App.") 1-277.

JURISDICTION

The three-judge district court issued its judgment on December 20, 2013. Appellant timely filed its Statement as to Jurisdiction on March 14, 2014. This Court noted probable jurisdiction on June 2, 2014, and consolidated this case with No. 13-895. This Court extended the time for appellants to file their opening briefs to and including August 13, 2014. This Court has jurisdiction under 28 U.S.C. § 1253.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions, the Fourteenth Amendment and Section 5 of the Voting Rights Act, are set forth in the addendum to this brief.

INTRODUCTION

For its 2012 state legislative redistrictings, Alabama adopted throughout the State an express race-based targeting policy that resulted in districts with staggeringly high black populations, including many in the 70-77% range. That policy, which controlled the entire redistricting process, required the State to mechanically re-create the black-population percentages ("BPPs") in black-majority districts from one decade to the next. As a result of this "fixed BPPs" policy, 16–20% of the State's black residents were moved by race from white-majority districts into super-concentrated black districts. At the same time, inter-racial political coalitions in integrated districts were decimated, as 70% of the districts with black voting-age populations of 29–50% were eliminated.

Alabama asserts it had no choice but to adopt this policy in order to comply with Section 5 of the Voting Rights Act ("VRA") and to obtain preclearance of its redistricting plans from the Department of Justice ("DOJ"). That is the *only* justification the State has ever offered: federal law made us do it. But Section 5 did not require the State's policy, nor did Alabama have a reasonable, let alone a strong basis, in evidence to believe that it did. The result is election districts extraordinarily segregated by race, but for which *no* level of government claims decision-making responsibility.

Appellants challenge Alabama's race-based statewide redistricting policy, not the design of any one particular election district. Taking the State at its word that it believed federal law tied its hands, the

State dramatically misapprehended its federal obligations, and the Constitution does not permit states to stumble into such excessively-segregated election districts, whether through good faith or bad. Section 5 has never required mechanically re-creating BPPs from one decade to the next. This Court's decisions directly reject that view. DOJ's enforcement guidelines expressly reject that view. And actual DOJ Section 5 practice rejects that view.

Section 5 instead requires non-retrogression, which depends upon whether a state has unjustifiably eliminated districts in which a protected minority had the ability to elect its candidates of choice. Assessing non-retrogression requires a functional analysis of actual voting patterns and related factors. Yet Alabama, by its own admission, did no such analysis here. And the BPPs that Alabama re-created in numerous districts were far in excess of levels that any jurisdiction could reasonably believe functionally necessary to avoid retrogression.

Under any standard of equal protection review, Alabama's redistricting plans, based on a crude race-based policy in an area of exceptional constitutional sensitivity, are unconstitutional.

STATEMENT OF THE CASE

I. Factual Background

Alabama adopted two overarching policies to guide its 2012 statewide legislative redistricting process: (1) a strict interpretation of the "one person one vote" principle that abandoned Alabama's traditional practice of permitting inter-district total population deviations

of up to 10% in favor of a new, self-imposed 2% population-deviation rule, J.S. App. 27; and (2) an equally self-imposed (and legally incorrect) reading of the State's duties under Section 5 of the VRA that, according to Alabama, required the State to re-create from one decade to the next the identical or nearly identical BPPs of all black-majority districts (applying the 2010 Census data to the districts from the prior, 2001 plan). Adopted in advance of the actual map drawing, these two policies provided the constraints within which the redistricting authorities made specific decisions about the design of particular districts.

To illustrate, because Senate District 26 (SD 26) in the 2001 plan had a BPP of 72.75% (using the 2010 Census numbers), the redistricters intentionally designed the new SD 26 to ensure a BPP at least as high as 72.75% (in fact, the 2012 plan increased it to 75.22%). Although this "fixed BPPs" constraint was self-imposed, Alabama officials asserted that Section 5 denied the State any choice in the matter.

In insisting on creating districts with the same BPPs, the State took no factors into account other than raw racial population numbers. As described in detail below, the State did not consider whether its race-based policy of re-creating the identical or nearly identical BPPs from one decade to the next was necessary to ensure that minority voters would continue to have the ability to elect their candidates of choice. Nor, in the State's single-minded focus on meeting its racial-targeting priorities, did it consider whether it was linking communities of shared or divergent interests, socio-economic circumstances,

educational status, or other traits. Instead of exercising its judgment, Alabama asserted that Section 5 compliance required the State to re-create the same BPPs in all ability-to-elect districts.

It is this second policy—the State's claim that federal law imposed a racial straitjacket on the State, forcing its officials to re-create and lock in place BPPs in black-majority districts from one decade to the next—that is at issue here.

A. The State's Policy.

The 2010 Census revealed that in Alabama, the populations of white residents had decreased over the prior decade (from 70.3% to 67%), the black population had remained stable at 26%, and the Hispanic population had increased (from 1.7% to 3.9%). J.S. App. 15-16. The benchmark 2001 plans included eight majority-black population ("ability to elect") Senate districts and twenty-seven such House districts. J.S. App. 4.

The three key actors in the design of the 2012 plans gave uniform and consistent testimony regarding the State's "fixed BPPs" policy for these districts. Two of these figures were the political leaders of the process, the Senate and House co-chairs of the Joint House-Senate Permanent Legislative on Reapportionment Committee ("the Committee"), Senator Dial and Representative McClendon. The third figure, Randy Hinaman, was the political consultant they hired to "coordinate with the Republican leadership of the Legislature" to redraw the district lines for Committee approval. J.S. App. 32.

All three figures provided the same testimony regarding the State's racial-targeting policy. As the court below found, they all believed "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." J.S. App. 33. This policy was settled upon at the outset of the redistricting process; the State then carried out redistricting quite effectively to meet that overriding constraint. As the court below found, "[t]he final versions of the House and Senate bills preserved the majority-black districts with roughly the same percentages of black population as in the 1993 and 2001 plans." J.S. App. 46.

As the court below also found, the redistricters adopted this policy on the ground that Section 5 required it. J.S. App. 180. All three actors consistently testified that they understood non-retrogression to require that there not be "a significant reduction in the percentage of blacks in the new districts as compared to the 2001 districts with the 2010 [Census] data." J.S. App. 33. This was the sole justification the State offered for its policy: that doing so was necessary to comply with Section 5 and ensure DOJ preclearance.

The Committee co-chairs instructed Hinaman at the start of the process 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*." J.S. App. 33 (emphasis added); J.A. 70. Hinaman operated according to these instructions. As Hinaman explained, in direct response to a question from the court itself:

> JUDGE THOMPSON: Let me ask you this. How do you define retrogression?
>
> THE WITNESS: I define it, in terms of my work, in two ways: One, not lowering the overall total number of majority African American districts in either plan. . . . *And then looking at 2010 census as applied to 2001 lines, whatever that number was, I tried to be as close to that as possible.*

J.A. 88 (emphasis added).

The plan Hinaman drew, he testified, was designed to recreate the "identical numbers" "by total black percentage" as in the prior districts. J.A. 92.

Meeting these racial targets was the dominant consideration in drawing the black-majority districts. J.A. 88. Hinaman did not look at, or take into account, the actual rates of black political participation in these districts—even though he did take actual rates of political participation into account in the white-majority districts. J.A. 91. Hinaman did not look at, or take into account, actual election-return analysis in black-majority districts to see how they would be likely to perform or to determine what population levels were necessary to protect the minority community's ability to elect candidates of choice. *Id.* He did not look at, or take into account, the socio-economic status of the black people he moved into or out of those districts to see whether he was joining black communities of similar status. J.A. 89. He did not look at, or take into account, educational levels of the black residents he moved around. *Id.* He did not look at, or take into account,

anything that would indicate whether the populations he moved into or out of the black-majority districts had common interests. *Id.* As Hinaman testified:

> Q. Did you -- were you aware of any related studies, for example, about variations among the state's black communities in terms of voting or anything else?
>
> A. Well, "anything else" covers a lot of subjects, but I was --
>
> Q. I'll be more specific. How about socioeconomic characteristics such as income, type of employment, educational level achieved?
>
> A. I did not look at those factors.
>
> Q. Attitudes?
>
> A. No, sir.
>
> Q. Did you obtain or already have any information about the black population, variations in the black population in various areas such as Birmingham and Mobile, any differences?
>
> A. Differences in terms of?
>
> Q. Of any of the characteristics I've mentioned: Either voting or education, employment, types of employment.
>
> A. No, sir.

J.A. 89-90.

In focusing on bare numbers of black residents alone, Hinaman was equally explicit that he did not

engage in any functional analysis of how the black-majority districts actually performed, or would be likely to perform, in elections:

> Q. But [you] didn't even look how your black majority districts had performed in any election?
>
> A. I was more concerned in drawing minority districts as to whether I was retrogressing the overall population, black percentage, than voter results.

J.A. 91.

The co-chairs of the Committee gave exactly the same testimony. As the district court found, Senator Dial, the principal drafter of the Senate plan, J.A. 22, understood avoiding retrogression to mean that "we could not in any plan reduce the number of black voters in any district that had been determined to be a majority black district." *Id.* On direct examination, Senator Dial took pride in the fact that the Senate plan met its racial population targets nearly perfectly:

> Q: And that included bringing the African American populations of those districts up to approximately equal as best as you can with what it had been in 2001?
>
> A: Yes. And we were able to accomplish that almost 100 percent.

J.A. 24.

On cross-examination, Senator Dial explained that the policy of re-creating the same (or higher) BPPs took precedence:

> Q: So your testimony is that you really didn't look into the behavior of individual districts. Instead, you simply went by the black – the number of black people, the black percentage in the district, and what you did was try and *at least maintain that or increase it.* Is that your – fair statement of your testimony?
>
> A: That's fair, yes.

J.A. 36-37 (emphasis added). Senator Dial gave similar testimony numerous times. J.A. 22, 24, 29-30, 33-36. Representative McClendon, the Committee co-chair from the House, provided the exact same testimony. J.A. 97-98.

In adopting this statewide "fixed BPPs" policy, the redistricters rejected the public testimony of the Committee majority's own expert counsel, Dorman Walker. At a public redistricting hearing, he advised the Committee that Section 5 did *not* require locking into place fixed BPPs. To the contrary, he stated, Section 5 required the State to engage in a functional analysis of the population levels necessary for the minority community to elect its candidates of choice. Indeed, he testified that the State's mechanical racial targeting policy might well lead DOJ to *refuse* to preclear the plans because they would over-concentrate minority voters into supermajority districts without sufficient justification:

> In the past it used to be 65 or 65 - above 65 . . . I'm pretty sure that if you were to send a district that was 65 percent black to the Department of Justice now, they would wonder

> why you were packing it, and they'll be looking for, my understanding is, much lower levels. I mean a black majority would certainly be above 50, but 55 may be extreme in some cases.

J.A. 175-76.

Once these overall racial targets were in place, the first thing Hinaman did was to design the majority-black districts. J.S. App. 34. As Senator Dial similarly testified:

> [W]e had to increase [majority-minority districts] percentagewise on the same number of minority voters that we had [previously]. And so that created a problem, realizing the whole plan is like a domino. If you change one district, *you effectively change the whole state.* So I began drawing the minority districts and worked out from there. And basically what we had left was basically filling in the blanks with what was left after we did the minority districts.

J.A. 24 (emphasis added).

Before the Committee released its proposed plans to the public, it conducted twenty-one public hearings. J.S. App. 30. Without specific plans to examine, commentators complained that they lacked knowledge of how the design of any district might affect the design of others. Even so, many commentators, including incumbent black legislators, urged the Committee not to "pack" or "race pack[]" black-majority districts. J.A. 169-70, 174. After proposed plans were released, the Committee conducted a single, one-hour public hearing. Appellants, a major political organization mobilizing

minority voters for decades, and its chairman, Dr. Joe Reed, as well as all other witnesses, were permitted three minutes to address the entirety of both plans. J.A. 52. In their limited minutes, many criticized the plans as a "racial gerrymander" that involved "packing and stacking" black residents. J.A. 211-12.

When the final plans were enacted into law, every black member of the State House and Senate voted against them. J.S. App. 209. DOJ, which has no legal authority to deny preclearance based on the constitutional violations at issue in this appeal, precleared the plans and they went into effect. J.S. App. 8.

B. The Implementation and Effects of the State's Policy.

1. Implementation. As Section 5 required, the 2012 plans maintained the same number of black-majority districts as in the prior plans. But under the State's approach, that was not enough. In meeting its new 2% population-equality standard, the State insisted that it was further obligated to re-populate districts in ways that re-created the same BPPs in majority-black districts. That meant the State had to move voters in and out of districts based solely on race, and the State took extraordinary measures to do so.

SD 26, in Montgomery County, provides an example. Under the 2001 plan, this was a majority-black district represented by Senator Quinton Ross. Applying the 2010 Census data, SD 26 was 72.75% black at the time of redistricting. J.A. 107. Under the newly-adopted 2% population-deviation standard, it

was also underpopulated by approximately 16,000 people. *Id.* These additional 16,000 people could have been added to the district by many means.

The redistricters, however, chose an explicit racial means to do so. In searching out populations to fill out the district, the drafters explicitly used race to move black voters into, and white voters out of, the district to increase the district by 16,000 people. They succeeded, with great precision: the new plan added 15,785 people to the district—14,806 of whom were black and only 36 of whom (0.2%) were white (943 were other minorities).[1] In the new plan, SD 26 is now over 75% black—even higher than before. J.A. 107.

Senator Ross testified, without contradiction in the record, that white portions of precincts previously within SD 26 were moved into the adjoining white-majority SD 25, while the black portions of those precincts were retained in SD 26. J.S. App. 202. As the dissent noted, this meant that even though SD 26 needed to *add* a large new population, the redistricters nonetheless moved *out* of the district white residents already living in SD 26. J.S. App. 202.

Moreover, to achieve this level of racially-oriented precision, the redistricters had to go down to the census-block level and split existing election precincts along racial lines. J.A. 87-88. Census-block information (collected house by house) includes racial data for each block, but does not include political data on how voters

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[1] *ALBC v. Alabama*, No. 2:12-cv-00691-WKW-MHT-WHP (M.D. Ala. 2013) (ECF No. 30-39); *id.* (ECF No. 30-41).

register or vote. Thus, when using census-block data, the redistricters had only racial-demographic information to draw on and no information about how those blocks actually voted or performed in elections. J.S. App. 205; *see Bush v. Vera*, 517 U.S. 952, 961–62 (1996) (describing differences between ability to sort by race versus political behavior at the census block versus the precinct level). Senator Ross testified that, given the demographics of the area, to add 99.8% minority residents and only 0.2% white residents to SD 26, "You have to make sure you look hard to find them [the additional black residents]." J.A. 46. In ensuring that 99.8% of the people Alabama moved into SD 26 were minority residents—to create a 75% BPP district—Alabama achieved a level of racial line-drawing "perfection" even beyond that in *Gomillion v. Lightfoot*, where Tuskegeee managed to move only 97.5%-99% of its black residents outside of the city. 364 U.S. 339, 341 (1960). To achieve this result, the new SD 26 creatively curls around to exclude a majority-white portion of Montgomery County. J.S. App. 202; J.A. 197.

The redistricters did not attempt to determine the BPP necessary to enable SD 26 to function as an effective ability-to-elect district. As is undisputed and noted in the dissent, if every additional resident of SD 26 needed to fill out the new SD 26 with nearly 16,000 additional voters had been white, the new district would still have been 64.3% black. J.S. App. 201 n.12. That is a black ability-to-elect district everywhere, particularly in Alabama, where black registration and turnout now equals or exceeds that of whites. *See infra* Part I.A.3. At that level, and even at levels as low as

50% black, Senator Ross believed the district would enable the minority community to elect its candidate of choice. J.A. 46. Senator Dial similarly recognized that Senator Ross could no doubt win election in a 64% black district, but Senator Dial nonetheless refused to permit lowering that BPP because, he asserted, Section 5 and the DOJ would not permit it. J.A. 30-31, 36-37.

The court below noted, as SD 26 illustrates, how accurately the redistricters had achieved their purely numerical BPP goals across the State. J.S. App. 47-48. In nearly half of the House and Senate districts, the BPP of the new districts changed by less than 1% of the old.[2] The dissent further illustrated, with undisputed facts, the precise targeting of the State's policy:

> In some districts, the rigidity of these quotas is on full display. HD 52 needed an additional 1,145 black people to meet the quota; the drafters added an additional 1,143. In other words, the drafters came within two individuals of achieving the exact quota they set for the black population, out of a total population of 45,083; those two people represent .004 % of the district. In HD 55, the drafters added 6,994 additional black residents, just 13 individuals more than

[2] For accurate data comparing the 2001 and the 2012 districts, using 2010 Census data for both, which is the way the State applied its policy, see *ALBC v. Alabama*, No. 2:12-cv-00691-WKW-MHT-WHP (M.D. Ala. 2013) (ECF No. 196) at 12-13. The majority below apparently reproduced a different set of tables, at J.S. App.47-48, which list the population of the 2001 districts at the time of the 2000 Census, not the 2010 one.

> the quota required, and in HD 56 they added 2,503 residents, just 12 individuals more than the quota required, both out of a total population of 45,071. In the Senate, SD 23 contains 116 more black individuals than were needed to achieve the drafters' quota of adding an additional 15,069 black people, out of a total population of 135,338; in other words, the difference between the quota and the additional black population in the ultimate plan represents .086 % of the district.

J.S. App. 208-09 (footnote omitted).

If the State slightly missed its racial targets in some areas, that was only because, as Hinaman testified, "[i]n some districts, it was obviously… unavoidable because there was just not the African-American population to enter those districts. The black percentage was going to go down no matter what. So there were certain areas where you couldn't help but lower the percentage."[3] Otherwise, the State met its targets.

2. Effects. Taken together, the State's two, overarching, self-imposed constraints produced legislative redistricting plans that took 16-20% of the State's black residents from white-majority districts and moved them into black-majority districts, many of which were above 65% in BPP. J.S. App. 196.

One effect of the "fixed BPPs" policy was that state officials rejected any plan out of hand that did not meet their racial targets. Senator Dial so testified. J.A. 34-

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[3] *ALBC v. Alabama*, No. 2:12-cv-00691-WKW-MHT-WHP (M.D. Ala. 2013) (ECF No. 134-4) at 102; Trial Tr. Vol. III, at 163.

35. The minority, for example, submitted a Senate plan, labeled SB 5, that maintained the same number of ability-to-elect districts with majority black voting age percentages as in the prior plan (eight). Senator Dial testified that the "only reason" he rejected this plan was that it did not maintain the high BPPs those districts previously had. J.A. 34. Even though SB 5 avoided measures like splitting Mobile County between districts, Senator Dial rejected this plan, in favor of one that did split counties like Mobile, solely because of the State's "fixed BPPs" policy. *Id.* Based on the view that Section 5 bound the State in this way, he would not consider any proposal that did not re-create the BPP in each majority-black district.

A second effect of the State's policy was that black residents were necessarily siphoned out of existing or potential inter-racial coalition districts and moved into black-majority districts that were already heavily racially concentrated. The ADC has always sought out and worked with white allies, and endorsed candidates in all races (whether a minority candidate runs or not), because, as its President Dr. Reed testified, "if you don't have white allies you can have – 30 percent of the senate can be black. But if you don't have some white allies, you're not going to pass anything."[4] Yet the number of more integrated Senate districts, with BVAPs between 29% and 50%, went down from four to zero; for the House, that number went down from nine to four. J.A. 103-08. Put in other terms, 70% of these racially integrated districts were eliminated in the

[4] Trial Tr., Vol. II. at 160-61.

service of the State's "non-retrogression" approach. Senator Dial specifically testified that this meant black voters would lose influence in white-majority districts, but that this was Section 5's fault, not his. J.A. 30.

HD 73 in Montgomery County, for example, was a black-plurality district that in 2010 had elected the candidate of choice of the black community.[5] Pursuant to the State's "fixed BPP" policy, the new plan eliminated that district, in part because its black residents were deemed "necessary" to meet the State's "fixed BPP" goals in black-majority districts. J.S. App. 36-37, 200 n.10.

Coalitions between minority groups were also affected. SDs 11 and 22 provide two examples.[6] SD 11, which had long elected the candidate of choice of minority voters through inter-racial coalitions, was re-shaped by the exchange of a large majority-black portion of Talladega County with a heavily white and growing suburban area of Shelby County. J.A. 90. As a result, the new plan lowered the minority voting age population in SD 11 from 34.2% to 15.3%.[7] In SD 22, a black-Native American coalition had long and dependably elected their candidate of choice from this

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[5] The majority below labeled HD 73 "majority white," J.S. App. 36, but as the dissent correctly noted, the 2010 Census numbers showed that blacks, at 48.44%, outnumbered whites in the district, at 44.07%. J.S. App. 200 n.10.

[6] J.A. 139-142.

[7] *ALBC v. Alabama*, No. 2:12-cv-00691-WKW-MHT-WHP (M.D. Ala. 2013) (ECF No. 30-39); *id.* (ECF No. 30-41).

rural area.[8] But the State's plan required dispersing a fifth of SD 22's black population to ensure that the surrounding black-majority districts SD 23 and SD 24 would meet the State's "fixed BPPs" targets.[9]

These are just some examples of the effects that followed from the statewide policy of requiring black-majority districts to be re-created with the same BPPs as in the prior plan, as nearly as practical. Other effects are documented in the ALBC merits brief in No. 13-895 and adopted herein by reference.

II. Proceedings Below.

The ADC was founded in 1960 by, among others, Dr. Gomillion, the lead plaintiff in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). The ADC was created for the purpose of advancing the political aspirations of Alabama's black residents. J.S. App. 76. Along with five named individuals, the ADC brought suit under Section 2 of the VRA and the Fourteenth and Fifteenth Amendments, alleging that the State's legislative redistricting plans constituted illegal racial gerrymanders.

Before the ADC complaint was filed, the ALBC plaintiffs (appellants in No. 13-895), had brought suit also challenging Alabama's 2012 plans on VRA and constitutional grounds. The ADC suit was assigned to

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[8] Trial Tr., Vol. IV at 38-50.

[9] *ALBC v. Alabama*, No. 2:12-cv-00691-WKW-MHT-WHP (M.D. Ala. 2013) (ECF No. 30-39); *id.* (ECF No. 30-41); Trial Transcript Vol. IV, at 44-46.

the same three-judge district court, which consolidated the cases. After a bench trial, the district court: (1) dismissed the ADC appellants' constitutional claims for lack of standing and (2) rejected those claims on the merits in any event and also rejected ADC's claims under the VRA.

The 2-1 majority in the district court found that the ADC did not have standing on a basis the State had never raised, but which the majority raised for the first time, *sua sponte*, in its final opinion on the merits.

This appeal followed. This Court noted probable jurisdiction over Question 1 in this appeal and Question 2 in No. 13-895, consolidated the cases, but did not summarily affirm with respect to the other questions presented.

SUMMARY OF ARGUMENT

This Court should invalidate Alabama's redistricting plans, and free Alabama from its misapprehension about what federal law requires, on either of two grounds.

First, under any standard of equal protection review, Alabama's racial-classification policy lacks a legitimate, non-arbitrary justification. No heavy constitutional lifting is required for that conclusion. Because Alabama's policy is based on the view that federal law required it to do something that federal law did not require (nor could be reasonably understood to require), the State's policy is left without any justification at all. Such a policy is, virtually by definition, unconstitutionally arbitrary. That Alabama's policy operates in an area of exceptional

constitutional sensitivity—the appropriate role of race in the design of democratic institutions—makes that policy's failure to rest on a legitimate, reasoned foundation all the more problematic.[10]

Second, even if Alabama's policy survives minimal constitutional scrutiny, it cannot survive strict scrutiny. Alabama employed an express racial classification that triggers strict-scrutiny review. Because Section 5 does not require mechanically re-creating BPPs from one decade to the next, untethered to any functional retrogression analysis, Alabama's policy is not narrowly tailored.

On either ground, Alabama's redistricting plans are unconstitutional. The ADC appellants have standing to make these claims. The district court *sua sponte* rejected the ADC appellants' standing based on grounds never briefed or argued below. Had the issue been raised at any time before final decision, the ADC could have simply filed an affidavit providing the information the majority below perceived necessary to establish standing. Regardless, the majority failed to recognize the undisputed fact that some named individual ADC plaintiffs, such as Stacey Stallworth, live in majority-black districts, drawn under the policy

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[10] Alabama's 2012 redistricting took place prior to this Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), and the Court need not address whether Section 5 compliance can continue to provide an adequate justification for that 2012 redistricting post-*Shelby County*. Even assuming it can, Alabama lacked an adequate basis in evidence for its position that Section 5 required the policy at issue here.

challenged here, and thus have standing on any view. The ADC appellants also established several other bases on which to raise their claims.

ARGUMENT

I. Alabama's Express "Fixed BPPs" Policy Cannot Survive Any Level of Equal Protection Scrutiny, Let Alone Strict Scrutiny.

Alabama's policy is virtually the definition of an unjustified governmental race-based classification. Alabama's purported need to comply with federal law cannot provide a legitimate or reasoned justification for Alabama's policy when federal law clearly does *not* require such a policy, nor was there any reasonable or strong basis in evidence to believe that it did.

Under any standard of review, the State's race-based policy is unconstitutional unless it at least serves an actual governmental interest. Compliance with the imagined requirements of federal law, when no reasonable or strong basis in evidence exists for that imagined view, cannot provide that justification.

The Court has already recognized this principle, even as a matter of statutory interpretation. In *Ricci v. DeStefano*, 557 U.S. 557, 583-84 (2009), this Court held that regulated entities must have a strong basis in evidence for race-based policies justified only by the claim that they are necessary to comply with federal anti-discrimination laws, such as Title VII. *See also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (under the Fourteenth Amendment). The bare minimum requirement of the Equal Protection Clause

must similarly be that a race-based policy have that same adequate and legitimate-justification.

That requirement is all the more important in the area of race and redistricting, for the Constitution explicitly vests States with the "primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993). This Court has recognized that "[e]lectoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Highly-charged judgments involving fair political representation must be made under the competing federal mandates to avoid retrogression while simultaneously avoiding the excessive use of race. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"). Yet here, by its own account, Alabama made no independent judgment at all. Ceding its constitutional power to design its democratic institutions, the State believed it had no discretion, nor any responsibility, for the results. The "rational, civic discourse" to forge political judgment on these difficult issues that this Court emphasized in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014), was silenced, and for no good reason. The Constitution's structural commitment to state judgment in this area is ill-served when states abandon their constitutional role based on misapprehensions about federal law constraints.

Indeed, a central purpose of this Court's federalism decisions is to ensure democratic accountability of both

national and state elected officials. *See*, *e.g.*, *New York v. United States*, 505 U.S. 144 (1992). That accountability is not just diminished, but destroyed, if Alabama claims, even in good faith, that "federal law made us do it"—when federal law did not—in an area as charged as racial redistricting. Federal law did not compel Alabama's race-based policy, yet Alabama disclaims any choice in the matter. A worse way to make policy in such a constitutionally sensitive area is difficult to imagine. Here *no* level of government claims to be responsible for Alabama's race-based districting policy. To preserve appropriate democratic accountability, it is essential for the Court to ensure—whether under minimal scrutiny or somewhat heightened scrutiny appropriate in this constitutionally sensitive context—that Alabama have at least a legitimate, actual justification for its policy. Alabama does not.

To the extent there is any doubt about that, Alabama's policy triggers strict scrutiny, as Part I.B demonstrates. The policy is not narrowly tailored to comply with Section 5 and, for that reason as well, is unconstitutional.

A. Alabama's Racial-Targeting Policy Lacks A Legitimate Justification.

Alabama fundamentally misapprehended its obligations under Section 5. The reasons why are immaterial. As this Court and DOJ enforcement practice have long made clear, Section 5 did not require the State's racial-targeting policy, nor did Alabama have a reasonable basis in evidence, let alone a strong one, for believing so.

1. Section 5 Has Never Required Mechanically Recreating BPPs.

For many decades, this Court's decision in *Beer v. United States*, 425 U.S. 130 (1976) has governed interpretation of Section 5's requirements. *Beer* concluded that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their *effective exercise* of the electoral franchise." *Id.* at 141 (emphasis added). This non-retrogression standard in the ability to elect candidates of choice has defined Section 5's requirements ever since. The "only 'effect'" that violates Section 5 is a retrogressive one; any change not retrogressive in fact does not violate Section 5. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 486-87 (1997) (citing *Beer*). Put in other terms, if a plan does "not increase the degree of discrimination against [protected minorities], it [is] entitled to § 5 preclearance." *City of Lockhart v. United States*, 460 U.S. 125, 134 (1983).

a. Section 5 Has Always Applied a Functional Definition of Retrogression.

To determine whether a change in voting practices is actually retrogressive, neither the courts nor DOJ look to any one demographic factor in isolation. Indeed, courts and DOJ expressly reject doing so. Instead, "a court or the Department of Justice should assess the totality of circumstances in determining retrogression under § 5." *Georgia v. Ashcroft*, 539 U.S. 461, 484-85

(2003) (citations omitted).[11] "No single statistic provides courts with a shortcut to determine whether" a redistricting plan violates the VRA. *Johnson* v. *De Grandy*, 512 U.S. 997, 1020-21 (1994). Consistent with this Court's decisions, DOJ also has long understood the non-retrogression standard to require a highly specific, functional analysis of how election districts are likely to perform in the new plan as compared to the benchmark plan—rather than any formulaic or mechanical "fixed demographic" approach. *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) ("DOJ Guidance"). In its guidance document for the most recent redistricting cycle, DOJ made clear that "the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment," but instead engages in a functional analysis. *Id.*

In assessing redistricting plans, DOJ looks at the number of ability-to-elect districts in the benchmark plan and ensures that number has not decreased without sufficient justification in the new plan. *See id.* Moreover, DOJ is explicit that the "ability to elect either exists or it does not in any particular circumstance." *Id.* Under DOJ's guidelines, Section 5 does not prohibit reducing a 75% black-majority district

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[11] In amending the VRA in 2006, Congress rejected this Court's view in *Georgia v. Ashcroft* that "influence" districts could substitute for ability-to-elect districts, but Congress did not reject the longstanding view that retrogression requires a totality-of-the-circumstances analysis.

to a 55% one as long as the minority's ability to elect its candidate of choice remains protected. *See id.*

Similarly, the specialized court in Washington, D.C. that Congress designated for judicial, rather than administrative, preclearance has also recognized the need for a "totality of circumstances" analysis to determine whether a proposed change has a prohibited retrogressive effect. *See Texas v. United States*, 887 F. Supp. 2d 133, 150 (D.D.C. 2012) (noting that "[t]here is no single, clearly defined metric to determine when a minority group has an ability to elect"), *vacated and remanded*, 133 S. Ct. 2885 (2013) (remanding for further consideration in light of *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013)). Other three-judge courts have consistently reached the same conclusion. *See, e.g.*, *Harris v. Ariz. Indep. Redistricting Comm'n*, No. CV-12-894, 2014 U.S. Dist. LEXIS 59227, at *8-9 (D. Ariz. Apr. 29, 2014); *Perez v. Perry*, 891 F. Supp. 2d 808, 815 (W.D. Tex. 2012).

b. Section 5 Specifically Permits Reductions in BPPs That Will Not Cause Retrogression in Ability to Elect.

Section 5 has never imposed a zero-tolerance policy for mere reduction of BPPs in ability-to-elect districts. The functional analysis employed specifically permits jurisdictions to reduce BPPs in ability-to-elect districts if doing so will not have an actual retrogressive effect. This Court and DOJ have been clear about that for years.

In *Georgia v. Ashcroft*, for example, every Justice of this Court recognized that mere reductions in BPPs are

not in themselves retrogressive. Indeed, every Justice thought this proposition so obvious as to be without dispute, though the Court divided on more complex questions. As Justice Souter's dissent noted: "The District Court began with the acknowledgement (to which we would all assent) that the simple fact of a decrease in black voting age population (BVAP) in some districts is not alone dispositive about whether a proposed plan is retrogressive." 539 U.S. at 498 (Souter, J., dissenting). To underscore how strongly the dissent agreed with the majority that reducing BPPs cannot be treated as retrogressive in itself, the dissent approvingly quoted the D.C. preclearance court on this point three separate times. *See, e.g.*, *id.* at 499 (Souter, J., dissenting) ("The mere fact that BVAP decreases in certain districts is not enough to deny preclearance." (quotation marks omitted)). Indeed, the district court in *Georgia v. Ashcroft* itself had approved *three* redistricting plans that all included decreases in BVAP in particular districts—and none of those approvals was at issue. *Id.* at 499 n.2 (Souter, J., dissenting).

DOJ practice also should have made clear to Alabama that non-retrogression did not require the State to mechanically preserve BPPs. Even back in the 2000 round of redistricting—well before Alabama's 2012 efforts—DOJ precleared several plans in which states had reduced BPPs, including when states changed majority-black districts into non-majority districts. Such changes are not retrogressive as long as the new districts will still function as effective ability-to-elect districts.

For South Carolina, DOJ precleared Senate maps in 2003 despite reductions in BVAP in nearly all districts with a majority or near-majority black population.[12] For North Carolina that same year, DOJ precleared plans that reduced BPPs in nearly *all* House and Senate districts.[13] Indeed, the benchmark Senate map had three districts with a majority BVAP, but the precleared map had none, with the highest BVAP in District 4, at 49.14%.[14] Similarly, the House had thirteen majority BVAP districts in the benchmark map, but only nine in the 2003 precleared map.[15] For

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[12] *See* Preclearance Submission for the 2003 South Carolina Senate Redistricting Plan by the Senate of South Carolina, June 27, 2003, at 6, *available at* http://www.scstatehouse.gov/redist/senate/Submission%20Letter%20dated%20June%2027,%2003.pdf.

[13] *See* DOJ, Status of Statewide Redistricting Plans, *available at*, http://web.archive.org/web/20100829034045/http://www.justice.gov/crt/voting/sec_5/statewides.php.

[14] *Compare* 2003 Senate Redistricting Plan, Voting Age Population by Race & Ethnicity, *available at* http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2003.asp?Plan=2003_Senate_Redistricting_Plan&Body=Senate, *with* 1992 Senate Base Plan 6, Voting Age Population, *available at* http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_1991.asp?Plan=1992_Senate_Base_Plan_6&Body=Senate.

[15] *Compare* 2003 House Redistricting Plan, Voting Age Population by Race & Ethnicity, *available at* http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2003.asp?Plan=House_Redistricting_Plan&Body=House, *with* 1992 House Base Plan 5, Voting Age Population, *available at*

Alaska, DOJ precleared plans in 2002 despite the reduction in Alaska Native VAP in both a Senate and a House district.[16]

When similarly faced with this issue in the current redistricting cycle following the 2010 Census, DOJ again precleared plans that reduced BPPs after a functional analysis determined these reductions did not compromise the ability to elect. In 2011, DOJ precleared Virginia's Senate plan, despite the fact that it reduced BVAP in all five ability-to-elect districts.[17] DOJ also precleared South Carolina's Senate plan despite BVAP reductions in several ability-to-elect districts.[18] For Alaska, in 2011 DOJ precleared a plan

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http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_1991.asp?Plan=1992_House_Base_Plan_5&Body=House.

[16] Senate District C fell from 47.23% Alaska Native VAP to 46.17% Alaska Native VAP, while House District 6 fell from 56.35% Alaska Native VAP to 54.53% Alaska Native VAP. *See* Submission Under Section 5 of the Voting Rights Act, State of Alaska, Amended Final Redistricting Plan, Request for Expedited Consideration, April 25, 2002, at 4, *available at* http://www.akredistricting.org/Files/Amended%20Final%20Plan/Pre-Clearance%20Letter.pdf.

[17] *See* DOJ, Status of Statewide Redistricting Plans, *available at* http://www.justice.gov/crt/about/vot/sec_5/statewides.php.

[18] *See* South Carolina Senate Preclearance Submission, July 27, 2011, at 6-8, *available at* http://redistricting.scsenate.gov/Cover%20Letter/SC%20Senate%20%20Preclearance%20Cover%20Letter.pdf; Letter of Thomas E. Perez, Assistant Attorney General to Hon. Glenn F. McConnell, Nov. 14 2011, *available at* http://redistricting.scsenate.gov/SenatePlanDOJPreClearLtr2011.pdf.

that reduced the Alaska Native VAP from 58.32% to 46.85% because a functional analysis showed that districts greater than 41.8% Native population would afford the ability to elect.[19]

As these examples amply attest, Alabama had no reasonable basis—let alone a strong basis in evidence—for uncertainty about whether Section 5 or DOJ would permit reductions in BPPs in *any districts at all*, including significant reductions, as long as those changes did not function to eliminate an ability-to-elect district. That is all the more obvious given the extremely high BPPs involved in Alabama's 2012 districts, with BPPs in the House as high as 76.8%, 73.9%, 73.6%, 73.0%, 70.2%, 69.2% (HDs 59, 76, 55, 58, 78, 67, respectively) and in the Senate as high as 75.22% or 71.1% (SDs 26 and 33). J.S. App. 47-48. DOJ does, of course, object at times when jurisdictions reduce BPPs,

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[19] *See* Preclearance Submission of the 2011 Alaska State House and Senate Redistricting Plan by the Alaska Redistricting Board Under Section 5 of the Voting Rights Act, August 9, 2011, at 8, *available at* http://www.akredistricting.org/dojsubmission/August%2011,%202011%20Submission/Volume%2001/Folder%2002%20-%20Submission%20Statement/Submission%20Statement.pdf(Exh. A); Lisa Handley, A Voting Rights Analysis of the Alaska Amended Proclamation State Legislative Plan, May 25, 2015, at 6, 15 at 6, 15, *available at* http://www.akredistricting.org/dojsubmission/May%2025,%202012%20Submission/Volume%2010/Folder%2004%20-%20Report%20of%20Dr.%20Lisa%20Handley/Dr.%20Handley%27s%20Report.pdf. For DOJ's preclearance letter, *see* Letter of Thomas E. Perez, Assistant Attorney General to Michael D. White, Oct. 11, 2011, *available at* http://www.akredistricting.org/Files/PreclearanceLetter_10-11-2011.pdf.

but only when the totality of the circumstances indicates the change will actually be retrogressive.[20]

2. Had Alabama Performed Any Functional Analysis at All, It Would Have Recognized that Non-Retrogression Hardly Required Re-Creating Such Excessively High BPPs.

Alabama's policy was to re-create BPPs everywhere, in all districts, regardless of how high those BPPs were. Had Alabama performed any functional analysis, it quickly would have recognized that maintaining ability-to-elect districts did not require recreating BPPs at such extraordinarily high levels. Senator Dial acknowledged, for example, the 75.2% supermajority in SD 26 was not necessary to ensure ability to elect—yet he required it to have that level nonetheless. J.A. 36. Indeed, even without employing a statistical expert, all the State had to do was look at its own recent elections. All majority-black districts at all population levels were electing the

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[20] Alabama cites one such objection letter. *See* Motion to Dismiss or Affirm at 8. The State leaves out, however, that DOJ did not object to the mere reduction in BPPs, but because two critical factors made the reduction functionally retrogressive. One was that the county had to move some people out of the district to meet its population-equality standard, but had moved far more people out than required; as a result, the district went from the most overpopulated to the most underpopulated. Most importantly, the areas moved out were those from which the minority-preferred candidate in prior elections had received the most support. For that reason and another, DOJ found the change retrogressive. For DOJ's objection letter, *see* http://www.justice.gov/crt/records/vot/obj_letters/letters/VA/l_020709.php.

minority community's candidate of choice. Indeed, under the existing 2001 plan (with the 2010 Census data), three House districts with even *less* than 50% BVAP were electing candidates of choice. The BVAPs of HD 73, 84, and 85 were, respectively, 46.0%, 49.7%, and 46.1%. J.A. 147. Even in the most recent 2010 elections (a landslide for Republicans nationally and in Alabama), the latter two districts elected black office-holders and the first elected a white candidate of choice of the minority community. J.A. 140-41, 144.

Because the State did not perform any functional analysis at all, this is not a case that requires second-guessing the State's (non)judgment. Nor does the case require determining what the appropriate BPPs might be in Alabama generally or in specific areas. Alabama's policy is *different in kind* from one involving a reasonable, good-faith State effort to determine the BPPs necessary to ensure non-retrogression. Here, Alabama simply failed to take into account at all the one single factor—whether districts will function as ability-to-elect districts—most central to assessing retrogression. Instead, Alabama's BPP-targeting policy relied *at every point* on exactly the "predetermined or fixed demographic percentages" that DOJ has made clear are neither required nor appropriate. DOJ Guidance, 76 Fed. Reg. at 7471. In addition, the mechanical rule Alabama adopted does not happen, by accident, to correlate in any reasonable way with the BPPs functionally necessary in fact. No reasonable basis exists, let alone a strong basis in evidence, for the view that Section 5 or DOJ preclearance requires districts with BPPs of 76.8%,

73.9%, 73.6%, 73.0%, 70.2%, and 69.2% (in the House) and 75.22% or 71.1% (in the Senate). J.S. App. 47-48.

Though this evidence is not necessary to find the State's policy unconstitutional, plaintiffs at trial submitted an expert report from Dr. Allan Lichtman, a frequent social-science expert in voting-rights cases. Dr. Lichtman examined the kind of evidence, such as actual voting patterns, that the State had not and concluded that in Alabama, the "very high degree of black political cohesion combined with white crossover [voting] demonstrates that it is not necessary to draw supermajority African American districts to provide African Americans a reasonable opportunity to elect candidates of choice to the state legislature." J.A. 143.[21] The ADC also produced illustrative district maps with BPPs ranging from 48.4% to 55.7% in several counties and Dr. Lichtman found that these districts would provide an "excellent opportunity to elect candidates of [the black community's] choice." *Id.* This analysis was consistent with Dr. Lichtman's findings regarding opportunities for African-American communities to elect candidates of choice in districts with 50% BVAP or even lower in Alabama and other states. J.A. 144. The court below did not question Dr. Lichtman's testimony on any of these points.

Jurisdictions need not attain perfection, of course, in complying with Section 5. No one argues that there is

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[21] The mean level of black support for white and black Democratic candidates was in the low 90% range; the mean level of white support was 29% for white Democrats and 19% for black Democrats. J.A. 126.

some optimal BPP that Alabama was required to reach—anything below which would constitute retrogression and anything above which would be an unconstitutionally excessive use of race. As the Court has recognized, jurisdictions must have "a limited degree of leeway" in determining what is required to comply with Section 5. *Vera*, 517 U.S. at 977. But that leeway is "limited." A mechanical racial-population targeting policy that ignores actual election-district performance, particularly when it produces BPPs of the magnitudes involved here, is beyond any "limited leeway" the State possesses.

When a state takes *all* the considerations relevant under Section 5 into account, and generates a reasonable plan well-grounded in the actual evidence to ensure non-retrogression, the state properly has "limited leeway." Just as VRA districts have to be "reasonably compact," not optimally compact, *Shaw I*, 509 U.S. at 657, the same is true here: Alabama had some leeway to develop reasonable plans properly based in evidence to comply with Section 5. But Alabama did not have leeway to adopt a mechanical "fixed BPPs" policy not tied in any way to what federal law, reasonably understood, requires. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 793 (2007) (Kennedy, J., concurring) (condemning use of "mechanical formula" where racial classifications are employed).

"[C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws."

Miller, 515 U.S. at 921. Section 5 cannot, of course, justify a State's action "if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw I*, 509 U.S. at 655; *see also Vera*, 517 U.S. at 997 (Kennedy, J., concurring) (when a state invokes the VRA, "it still must tailor its districts narrowly to serve that interest"). Rigidly perpetuating BPPs at extremely high levels, with no determination that doing so was functionally required—indeed, where doing so was transparently *not* required—is far from "reasonably necessary."

3. The Majority Below Misinterpreted Section 5's Requirements.

In upholding the State's legislative redistricting plans, the majority below expressed a fundamentally incorrect understanding of Section 5 and the Constitution.

First, the court concluded that Alabama "chose the *only option available*" to the State to comply with Section 5. J.S. App. 181 (emphasis added). In the court's view, if Alabama had reduced BBPs, it would have "by definition" violated Section 5. *Id.*

As already demonstrated, that extreme position is inconsistent with this Court's precedents and DOJ's enforcement practices. Citing neither source, the majority relied for this rigid view only on its own interpretation of the 2006 amendments to the VRA. J.S. App. at 176-81. But no court or DOJ decision supports the majority's misunderstanding of those amendments.

Section 5, as amended in 2006, provides in relevant part that a voting change is prohibited if it "will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). The text further specifies that the purpose of this provision "is to protect the ability of such citizens to elect their preferred candidates of choice." 42 U.S.C. § 1973c(d).

For the thirty years prior to the 2006 amendments, *Beer* and its progeny defined the VRA's non-retrogression standard. But the district court apparently concluded that Congress in 2006 had made this standard far more rigid and mechanical than it had ever been under *Beer*. In other words, Section 5 would not have required or justified Alabama's racial-targeting policy before 2006, but after 2006, it did.

That remarkable view is wrong. Indeed, if the 2006 amendments to the VRA actually did require the kind of policy Alabama employed here, those amendments "would raise serious, if not fatal, constitutional concerns," as the dissent below rightly observed. J.S. App. 261. Such a policy would not just be racial balancing "for its own sake," *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2424 (2013), it would be racial ghettoization for its own sake, *see Gomillion*, 364 U.S. at 341, without any regard to whether the policy was actually necessary for realizing Section 5's legitimate goal of protecting ability-to-elect districts.

Instead, the 2006 amendments were designed to restore the *Beer* standard, in the wake of this Court's *Georgia v. Ashcroft* decision, not to expand Section 5

dramatically. In *Georgia v. Ashcroft*, the majority had concluded that Section 5 permitted states to reduce the number of ability-to-elect districts if doing so would enhance the political "influence" of minority voters overall. 539 U.S. at 483. The dissent argued that the Court should have stuck with *Beer's* ability-to-elect standard instead. 539 U.S. at 499 (Souter, J., dissenting). Agreeing with the dissenters, Congress amended Section 5 to restore the *Beer* "ability-to-elect" standard. Indeed, restoring *Beer* was the entire *raison d'etre* of that amendment. Both the House and Senate committee reports are clear about that.[22] That is why, consistent with *Beer*, the text of amended Section 5 states that its purpose "is to protect the ability of such citizens to elect their preferred candidates of choice." 42 U.S.C. § 1973c(d).

Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Had Congress intended Section 5 to become even *more* restrictive after 2006 than in the thirty years since *Beer*, someone in Congress would surely have said so—and any such proposed change would have sparked heated debate. But there is no inkling in the more than 15,000-page legislative record of that.

The palpable flaw in the majority's view of Section 5 is illustrated by the majority's celebration of the fact that the BPPs in Alabama's ability-to-elect districts in 2012 appeared to track closely the BPPs going back to

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[22] *See* H.R. Rep. No. 109-478, at 71 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618, 672; S. Rep. No. 109-295, at 19 (2006).

the 1990s districts. J.S. App. 47-48, 153. How, the majority asked, could the State have done anything wrong if it had merely reproduced what it had been doing since the early 1990s? The majority's view that Alabama's policy was legitimated by how closely the BPPs in the 2012 plan tracked those in the 1993 plan—without regard to changes in black political participation over those decades—exemplifies the majority's legal confusion.

The majority's view would turn both the VRA and the Constitution on their heads. As this Court emphasized in *Shelby County*, the VRA must be tied to "current conditions" to be constitutional and "cannot rely simply on the past." *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2629 (2013). Alabama's policy was not tied to "current conditions" in Alabama. Most strikingly, by the eve of the 2012 plan, black turnout had come to *exceed* white turnout in both presidential and mid-term elections—by 2.9 percentage points in 2010 and by 4 percentage points in 2012. On the eve of the 1990s redistricting, in stark contrast, white turnout exceeded black turnout—by 7.8 percentage points in 1992 and by 5 percentage points in 1990. Thus, these decades saw as much as an 11.8 percentage point swing in the relative rates of black and white participation in Alabama.[23] In the face of these changes—exactly the

[23] For data on registration and turnout from 1980-2006 in Alabama, *see* Charles S. Bullock III & Ronald Keith Gaddie, *The Triumph of Voting Rights in the South*, App. B, 379-85 (2009). For the subsequent elections in 2008-2012, data is available from the Census Bureau website at http://www.census.gov/hhes/www/socdemo/voting/publications/

sort *Shelby County* identified—the district court's view that Alabama was to be congratulated for keeping BPPs in 2012 at similar levels to those in the 1993 plans demonstrates how poorly the district court understood the principles of *Shelby County* and the requirements of the VRA. Mindless but intentional perpetuation of BPPs decade after decade, even when unnecessary to preserve ability to elect, is hardly what Section 5 requires.

4. The Mere Desire for DOJ Preclearance Cannot Provide an Adequate Basis in Evidence for Alabama's Policy.

At times, Alabama appears to justify its "fixed BPPs" policy by arguing that even if the policy was not required, it is enough that the State hoped the policy would help it garner DOJ preclearance. To the extent the State offers this belief as an independent argument, the desire to obtain DOJ preclearance cannot expand upon "the limited leeway" the State otherwise has in deciding what Section 5 compliance requires. The State cannot cavalierly deploy racial classifications to do anything that it hopes might help earn DOJ preclearance approval.

This Court has recognized that a state cannot adopt an otherwise unconstitutional redistricting policy based on the belief—even the *correct* belief—that doing so

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p20/2008/Table%2004b.xls (2008), http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/Table4b_2010.xls (2010), and http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/Table04b.xls (2012). The general website for these data is at http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html.

would enable DOJ preclearance. Alabama's incorrect belief about what DOJ required cannot have a higher stature. In the past, states have believed that using extremely non-compact majority-minority districts would enable them to obtain DOJ preclearance—and they were right about that. *See, e.g.*, *Shaw I*, 509 U.S. 630. But such districts nonetheless violate the Constitution. *See Shaw v. Hunt*, 517 U.S. 899 (1996) ("*Shaw II*"). Similarly, states have believed that maximizing the number of majority-minority districts would make DOJ's blessing more likely—and they were right about that, too. *See, e.g.*, *Shaw II*, 517 U.S. at 913 (noting that DOJ appeared to be pursuing such an approach); *Miller*, 515 U.S. at 924-25 (same). But as *Shaw II* and *Miller* establish, that DOJ would approve such plans does not provide a constitutionally adequate justification for them. Where, as here, the connection to Section 5 is even further attenuated—where a state invokes unreasonable fears about what DOJ *might* require—there is even less of a legitimate justification.

When public or private actors use race-based measures in anticipation of what they believe federal anti-discrimination law might require, this Court has already established that those measures must rest on a "strong basis in evidence" that federal law actually requires the policies. *Ricci*, 557 U.S. at 583-84. Federal anti-discrimination statutes and the Constitution converge to impose this same requirement. *See Wygant*, 476 U.S. at 277-78 (announcing strong-basis-in-evidence standard under the Fourteenth Amendment). Private employers cannot invoke compliance with Title VII of the Civil

Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended, to justify race-based policies unless a "strong basis in evidence" exists for the belief that the employer would otherwise be violating Title VII, *Ricci*, 557 U.S. at 583-84.

For the same reason, state actors cannot invoke Section 5 compliance without the same basis in evidence that Section 5 actually requires the state's policy. *Cf. Shaw I*, 509 U.S. at 656. Preclearance was never a license for states to use race excessively in ways otherwise unconstitutional. As the Court explained in *Miller*, to permit the DOJ preclearance process to immunize race-based districting would amount to surrendering to the executive branch the Court's independent obligation to ensure a state's explicit use of racial classifications is constitutional. 515 U.S. at 922-23. In addition, "avoiding meritless lawsuits" cannot constitute an "acceptable reason" for race-based districting not required by a reasonable interpretation of Section 5. *See Shaw II*, 517 U.S. at 908 n.4. Indeed, perpetuating BPPs, with no functional justification, can just as easily prompt litigation, as, of course, it has here.

5. The Fact that DOJ Precleared Alabama's Plans is Irrelevant to this Constitutional Challenge.

The fact that DOJ precleared the plans at issue does not matter for purposes of this constitutional challenge. DOJ preclearance was designed as a floor, not a ceiling, on the use of race in the redistricting process. By statute, DOJ's authority to object was limited in 2012 to ensuring that a plan did not have either a retrogressive

effect or "any discriminatory purpose." 42 U.S.C. § 1973c(b)-(d). Thus, DOJ lacked the legal authority to object to *any* use of race in redistricting (or other voting practices) that did not cause a retrogressive effect on minority voting power or involve any racially discriminatory purpose.

DOJ's own enforcement guidelines recognize that it cannot refuse to preclear a plan on the grounds that the plan constitutes an unconstitutional racial gerrymander (or a one-person, one-vote violation). As the DOJ Guidance states: "The Attorney General may not interpose an objection to a redistricting plan on the grounds that it violates the one-person one-vote principle, [or] on the grounds that it violates *Shaw v. Reno*, 509 U.S. 630 (1993). " 76 Fed. Reg. at 7470. Thus, DOJ could not have objected to Alabama's plans on the constitutional grounds raised here.

6. Alabama's Policy and the Plans Based on it Are Unconstitutional Under Any Standard of Equal Protection Review.

The sole justification for the State's policy—Section 5 compliance—evaporates under the slightest analytical pressure. As a result, nothing is left to prop up the State's policy.

Alabama's policy therefore does not serve any legitimate, non-arbitrary governmental purpose. Under any level of equal protection review, it is unconstitutional. *See Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam); *Romer v. Evans*, 517 U.S. 620 (1996); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty.*, 488 U.S. 336 (1989); *U.S.*

Dep't of Agric. v. Moreno, 413 U.S. 528 (1973); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920). Whether under minimal review or the somewhat more heightened scrutiny appropriate to this constitutionally sensitive context, Alabama's policy lacks adequate justification.

This is particularly true given the nature of Section 5, which was designed to be a temporary measure for "exceptional conditions." *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). For Section 5 to become a justification for permanently and intentionally recreating extraordinarily high BPPs, including in the 70% range, without any legitimate functional need, defies the overall purposes of the VRA itself and raises constitutional concerns. "[E]ntrench[ing] majority-minority districts by statutory command . . . could pose constitutional concerns," *Bartlett v. Strickland*, 556 U.S. 1, 23-24 (2009), and here, Section 5 does not even command Alabama's policy.

"The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Ashcroft*, 539 U.S. at 490. Properly interpreting Section 5 to serve both of these purposes is particularly imperative when it comes to racial redistricting. As Justice Souter wrote for a unanimous Court twenty years ago, "[i]t bears recalling, however, that for all the virtues of majority-minority districts as *remedial* devices, they rely on a quintessentially race-conscious calculus aptly described

as the 'politics of second best.'" *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994) (emphasis added). Before engaging in that politics of the second best, states must have adequate justification.

The effects of Alabama's unnecessary "fixed BPP" policy demonstrate the dangers of unduly expansive state appeals to the VRA. As Senator Dial testified, by requiring the re-creation of black supermajority districts, the policy necessarily diminished the influence of black voters and inter-racial political coalitions in white-majority districts. J.A. 30-31. Similarly, the State would not consider any plan that did not re-create these supermajorities—even plans that maintained the identical number of ability-to-elect districts as the benchmark plan, with all those districts having a black VAP majority. Under the State's policy, that was not good enough to comply with Section 5.

When the VRA actually requires it, a local jurisdiction's use of race reflects a considered national policy judgment that, on balance and despite the risks, such use is necessary to avoid discrimination. But Alabama's policy lacks any such congressional imprimatur. Many years ago, Justice Brennan warned about the risks of permitting racial redistricting beyond the contexts in which the VRA required it. *See United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 172-73 (1977) (Brennan, J., concurring) ("An effort to achieve proportional representation, for example, might be aimed at aiding a group's participation in the political processes by guaranteeing safe political offices, or, on the other hand, might be a 'contrivance to segregate' the group, thereby frustrating its potentially

successful efforts at coalition building across racial lines.") (internal citation omitted). The self-interested partisan and incumbent-protection aims that obviously infect redistricting performed by all political bodies, such as the Alabama Legislature, only further fuel those risks.

Ensuring that Alabama's race-based policy genuinely has a legitimate, non-arbitrary basis also serves as a prophylactic against cynical, but difficult to prove, manipulations of race. Because the policy lacks the minimal justification required under the Equal Protection Clause, the plans based on it are unconstitutional.

B. Alabama's Policy Also Cannot Survive Strict Scrutiny.

1. Strict Scrutiny Is Appropriate.

If the Court finds it necessary to reach the question, Alabama's policy also triggers strict scrutiny. Under the *Shaw/Miller* analysis, there should be little doubt here "that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 515 U.S. at 913. Indeed, as in *Miller*, the evidence of Alabama's "intent to racially gerrymander" is "'overwhelming, and practically stipulated by the parties involved.'" *Id.* at 910 (quoting *Johnson v. Miller*, 864 F. Supp. 1354, 1374 (S.D. Ga. 1994)). The State established its "fixed BPPs" policy at the outset and designed all black-majority districts pursuant to this policy. The redistricters acknowledged their policy's absolute priority: they immediately rejected

any proposed plan that did not adhere to the "fixed BPPs" policy. The plans also had to meet the relevant population-equality standards, but that is true of every plan. The majority below committed legal error and/or clear factual error in concluding that race was not the redistricters' predominant motive, for reasons elaborated further in the ALBC merits brief in No. 13-895 and adopted herein by reference.

But the majority also committed legal error in unreflectively assuming as a starting point that *Shaw's* "predominant motive" test provides the correct legal framework for this case. Instead, the analysis here can be governed by this Court's more general equal protection cases. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Parents Involved*, 551 U.S. at 744; *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant*, 476 U.S. at 273.

Shaw was designed for the context of challenges to the *design* of particular election districts, in which determining the reasons for a district's shape are inherently complex. This Court itself has said *Shaw* simply "applied these same principles [of traditional equal protection law] to redistricting," *Miller*, 515 U.S. at 914, but that a unique application was required *in that context* because, on its face, "[a] reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses." *Shaw I*, 509 U.S. at 646; *see also Vera*, 517 U.S. at 958 ("Electoral district lines are 'facially race neutral,' so a more searching inquiry is necessary before strict scrutiny can be found

applicable in redistricting cases than in cases of 'classifications based explicitly on race.'" (quoting *Adarand*, 515 U.S. at 213)).

Here, there is no mystery about Alabama's statewide policy. No need exists for "a more searching inquiry," *Vera*, 517 U.S. at 958, to plumb beneath the lines on a map and dredge up actual purposes. Redistricters will always have general knowledge of racial demographics, *Miller*, 515 U.S. at 916, and mere awareness of race does not trigger strict scrutiny, *Shaw I*, 509 U.S. at 646. But Alabama's policy here goes well beyond that. The excessive use of race is transparent on the face of Alabama's policy: no jurisdiction needs to create BPPs in the 70% plus range to ensure an equal opportunity to elect. In this circumstance, strict scrutiny is appropriate.

Indeed, Alabama's "fixed BPPs" policy is a particularly egregious form of governmental treatment of black persons as little more than numbers. The Constitution requires that redistricters "acknowledge voters as more than mere racial statistics." *Vera*, 517 U.S. at 985. Yet in insisting on its fixed BPP targets, the State paid no attention to evidence of the actual ability to elect, to changes in black turnout and registration over time, and to differences in socio-economic status, educational levels, policy attitudes, and other factors this Court described as relevant in *League of United Latin American Citizens v. Perry*, 584 U.S. 399 (2006). Alabama's policy focused on bare numbers of black people and numbers alone.

The policy Alabama employed here is markedly different from redistricting legitimately done pursuant

to the VRA. Going forward, such redistricting will now take place pursuant only to Section 2 (absent congressional enactment of a new coverage formula for a preclearance regime). When racial redistricting is done under Section 2, numerous procedural and substantive safeguards surround that process. Such districting is by definition remedial, for the first predicate is the existence of significant and sustained patterns of racially polarized voting, that, combined with the design of existing electoral structures, causes minorities to have "less opportunity than other members of the electorate to . . . elect representatives of their choice." *Thornburgh v. Gingles*, 478 U.S. 30, 63 (1986). The need for that remedy is not assumed, but must be proven in particular jurisdictions, one by one.

Moreover, Section 2 remedies are necessarily "limited in time and limited to the wrong." *Parents Involved*, 551 U.S. at 796 (Kennedy, J., concurring). When districts are next redrawn, if the elements of potential Section 2 liability are no longer present, there is no further Section 2 obligation. In addition, the mere presence of even sustained polarized voting is not enough. As this Court made clear in *Johnson v. De Grandy*, Section 2 requires analysis of numerous other factors in a full, totality-of-the-circumstances assessment. 512 U.S. at 1000. Section 2 also requires only districts that are reasonably compact, not more, while Section 5 required preservation of ability-to-elect districts. In Section 2 litigation, plaintiffs also bear the burden of proof on these issues; judicial oversight and fact-finding is present throughout; and courts will resolve any interpretive uncertainties regarding what

Section 2 actually requires. *Bartlett*, 556 U.S. at 15. And under Section 2, "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *De Grandy*, 512 U.S. at 1020. If a jurisdiction defensively asserts Section 2 as its only justification for racial redistricting, there must be an adequate basis in evidence for that position.

Where sustained polarized voting exists, carefully circumscribed racial redistricting is not only remedial, it is also integrative. If, in the context of public education, the "legitimate interest government has in ensuring all people have equal opportunity regardless of their race" can justify race-conscious policies, *Parents Involved,* 551 U.S. at 787-88 (Kennedy, J., concurring), the integrative interest government has in ensuring the equal opportunity of citizens to participate fully in the most basic right of citizenship—choosing and holding accountable their political representatives—must be at least as forceful. Properly applied, Section 2 serves that integrative interest, too. Other race-conscious measures that do not involve excessively racialized means might also be legitimate to serve that integrative interest. *See id.*

It should be immediately apparent, however, that Alabama's crude "fixed BPPs" policy—particularly when BPPs are fixed at such exceptionally high levels—serves none of these remedial or integrative purposes and triggers strict scrutiny even without a need for *Shaw's* inquiry into "predominant motives."

2. Alabama's Policy Is Not Narrowly Tailored.

Under strict scrutiny, this Court has assumed many times that complying with the VRA constitutes a compelling interest. *See, e.g.*, *Vera*, 517 U.S. at 977; *Shaw II*, 517 U.S. at 915; *Miller*, 515 U.S. at 920-21. There is no reason to change that assumption here. But for the same reasons that Alabama's policy lacks a legitimate, adequate justification under any standard of review, as demonstrated above, that policy cannot be narrowly tailored to Section 5 compliance and thus must fall under strict scrutiny.

II. The District Court Erred in Holding Appellants Lack Standing.

Sua sponte, the district court raised a new standing issue in its final opinion on the merits. The majority concluded that the ADC lacked standing to bring its claims based on the majority's view that the ADC was required (and had failed) to present evidence that its members lived in specific, relevant districts. J.S. App. 136-38.[24] That was the first time any party or the court raised this particular requirement.

At that point, of course, appellants had no opportunity to respond. Because this issue was never briefed or argued, the majority below committed several significant errors. The Court should reverse

[24] The majority likewise held that there was insufficient proof that any of the individual named plaintiffs "will reside in any of [the challenged] districts under the Acts." J.S. App. 139.

the standing ruling, or vacate and remand for appropriate consideration.

A. ADC Plaintiff Stallworth Has Standing Even Under the Narrowest Standing Rule Potentially Applicable.

In a racial gerrymandering challenge to the design of a particular district, standing under *United States v. Hays*, 515 U.S. 737 (1995) requires either that: (1) the plaintiff live in the particular district being challenged; or (2) "otherwise demonstrate[]" that he or she has "personally…been subjected to a racial classification." *Id.* at 739. As explained below, *Hays* is not the proper framework to analyze standing in this case. Nonetheless, even under *Hays*, individual plaintiff Stallworth, for example, indisputably has standing. The parties stipulated, and the State's proposed findings acknowledged a second time, that Stallworth resides in proposed HD 77, J.A. 181, designed to have a 67% BPP in the 2012 redistricting, and shaped under the statewide policy challenged here. The majority's failure to recognize that this case challenges a statewide policy applied in every black-majority district precluded it from recognizing Stallworth's standing.

Given Stallworth's standing to challenge application of the State's policy to her district at least, the Court need not address further standing issues. Where at least one party has standing, the Court regularly proceeds to the merits. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) (plurality); *id.* at 209 n.2 (Souter, J., dissenting); *McConnell v. FEC*, 540 U.S. 93, 233 (2003), *overruled*

on other grounds, *Citizens United v. FEC*, 558 U.S. 310 (2010); *Clinton v. City of N.Y.*, 524 U.S. 417, 431-32 n.19 (1998); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

B. The ADC Also Has Standing Both in Its Own Right and in Its Capacity to Represent its Members.

Should the Court decide to reach additional issues concerning the ADC's standing, the Court must assess both ADC's organizational and representational standing.

Under representational standing, an organization may have standing as the representative of its members, if, among other things, the "members would otherwise have standing to sue in their own right." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

But in addition to representational standing, there "is no question that an association may have standing *in its own right* to seek judicial relief from injury to itself." *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (emphasis added); *see also, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 260-63 (1977); *NAACP v. Button*, 371 U.S. 415, 428 (1963). To establish such standing, an organization, like any other plaintiff, must prove that the challenged conduct has caused the organization the requisite injury-in-fact. *See, e.g.*, *Havens Realty*, 429 U.S. at 378-79; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Int'l Union, United Auto., Aerospace &*

Agric. Implement Workers of Am. v. Brock, 477 U.S. 274, 281-82 (1986).

The majority below (1) failed to address the ADC's claim to organizational standing in its own right and (2) erred in its analysis of the ADC's right to sue in its representative capacity.

1. The ADC Has Organizational Standing.

The ADC argued that it had standing in its own organizational right, even apart from whether its members individually had standing to challenge any particular district.[25] Because the court below neglected even to address this issue, this Court should vacate and remand to the district court with instructions to consider the ADC's organizational standing claims, particularly if the Court is going to remand in any event.

Should the Court reach the issue, however, the ADC demonstrated that it has adequate organizational standing. Importantly, this case involves a constitutional challenge not to the design of any one specific district, but to a statewide policy applied directly in every black-majority district. The ADC is a particularly appropriate plaintiff to challenge this statewide policy.

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[25] ADC Memorandum in Response Defendant's Motion for Summary Judgment, at 43-44.

a. The ADC Has Organizational Standing in Its Own Right.

The ADC presented uncontested evidence that the policy challenged here will cause it organizational injury-in-fact. An organization can make out the requisite injury-in-fact by showing that the effects of the challenged action will "perceptibly impair[]" the organization's ability to perform its mission, or "drain . . . the organization's resources" by forcing it to redirect its activities to combating the ill effects of the action challenged. *Havens Realty Corp.*, 455 U.S. at 379. "[T]here can be no question" that such organizational injuries constitute the requisite Article III injury in fact: "Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *Havens Realty*, 455 U.S. at 379; *see also Crawford*, 553 U.S. at 189 n.7 (plurality) (agreeing "with the unanimous view" of the court below "that the Democrats have standing to challenge the validity of" Indiana's voter identification law); *id.* at 189 n.7 (2008) (plurality); *id.* at 209 n.2 (Souter, J., dissenting) (same); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (Pryor, J.).

The ADC made such a showing of organizational injury-in-fact here. As the district court found, the ADC was created in 1960 for the very purpose of advancing the political influence of black residents of Alabama, through education, registration, turnout drives, formation of political coalitions, and the like.

J.S. App. 76; J.A. 46, 183. Dr. Reed's affidavit explained how that mission would be affected, and how those limited resources would be diverted, in response to the policy challenged here. J.A. 184-87.

He explained, for example, that the State's policy would affect the ADC's political-participation mission because it would result in new, confusing precinct reassignments that often require citizens in a single county to cast ballots in different precincts for State House and Senate races, as well as county positions. J.A. 184-85. To ensure minority participation under the new regime, the ADC would be required to divert its limited resources to voter education and transportation to scattered precincts. J.A. 185-86. In addition, because these difficulties would directly affect minority voters, among others, the challenged redistricting plans would also have concrete effects on the ADC's mission of "helping African Americans to be able to run for office and to hold high positions." J.A. 183. There "can be no question" that these kind of direct injuries to the ADC's long-standing organizational mission, constitute injury-in-fact. *Havens Realty*, 455 U.S. at 379.

The State has never contested any of these facts. Instead, the State has argued that, as a legal matter, *Hays* precludes *any* organization from bringing racial gerrymandering claims. But *Hays* does not do so and the ADC has standing in its own organizational right.

b. Hays Does Not Preclude an Organizational Challenge to a Statewide Policy.

Hays said nothing about organizational standing for a simple reason: that case involved no organizational plaintiffs. *See* 515 U.S. at 741. Indeed, a statewide organization that suffers direct injury-in-fact from a statewide policy that affects districts throughout the state is a particularly appropriate plaintiff.

The court below apparently believed that *Hays* provides the only framework in which to analyze standing to bring a racial gerrymandering claim. But *Hays* is not an all-purpose standing rule for any complaint in which the words "race" and "redistricting" appear. The nature of the substantive constitutional claim being advanced determines the appropriate standing requirements. *See, e.g.*, *Lujan*, 504 U.S. at 560 (requiring "causal connection between the injury and the *conduct complained of*" (emphasis added)). The *Shaw* claims of the 1990s were challenges to the design of particular districts. For *those* kinds of claims, *Hays* provides the corresponding standing rule. But that is not this case. Here, plaintiffs challenge not one district in isolation, but a statewide policy, applied directly in every black-majority district and necessarily affecting other districts. As Senator Dial's testimony demonstrates, *supra* p. 10-12, the State's singular focus on racial data from the starting gate tumbled "like a domino" through each district's boundaries. Any person or organization that suffers injury-in-fact from

that policy necessarily has standing to seek declaratory and injunctive relief against the plans as a whole.[26]

2. The ADC Also Has Representational Standing.

a. The record also establishes that the ADC has standing in its representative capacity, even under *Hays*. The ADC has shown that it has at least one member who lives in a majority-black district designed under the statewide policy challenged here and that is sufficient to establish representational standing. *See Lujan*, 504 U.S. at 563 (organizations need only prove that "one or more of [its] members" face an injury-in-fact); *Warth*, 422 U.S. at 511 ("The association must allege that its members, or any one of them, are suffering immediate or threatened injury").

The issue of the ADC's representational standing was never joined below. The State argued that *Hays* precluded organizational standing altogether, but never argued that the ADC was required to show that it had members in any, some, or all of the challenged black-majority districts.[27] Nor did the State contest whether

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[26] This case is therefore more akin to a statewide one-person, one-vote challenge to a districting plan. Such cases hardly require that there be one named plaintiff residing in each allegedly overpopulated district. *See, e.g.*, *Karcher v. Daggett*, 462 U.S. 725, 729 (1983) (simply describing plaintiffs as "a group of individuals with varying interests, including all incumbent Republican Members of Congress from New Jersey").

[27] The State's standing arguments, made only at summary judgment and in proposed post-trial findings and conclusions, are at J.A. 204, 205, 208.

ADC had made that showing in fact. The district court did *not* reject ADC's standing on the basis of the State's arguments. Instead, this purported requirement to identify the district residence of the ADC's individual members arose for the first time in the district court's final opinion. In its brief analysis, the district court committed several errors.

First, the district court failed to recognize, as noted above, that individual plaintiff Stacey Stallworth has standing.

Second, the district court failed to recognize the import of Dr. Reed's uncontested testimony that the ADC "has members in nearly every county in the State of Alabama." J.A. 183. While the district court found this insufficient for standing because some counties contain multiple districts and it is thus theoretically possible that all of the ADC's members in that county might be condensed into one or more non-majority-black districts, the court failed to recognize that its concern was misguided with respect to at least some counties and districts. All of Butler, Dallas, Lowndes, Perry, and Wilcox counties are in SD 23, a 64.8% BPP district under the 2012 plans; all of Sumter and Greene counties are in SD 24, a 63.3% BPP district; and all of Barbour, Bullock, Henry and Macon counties are in SD 28, a 59.96% black district. J.A. 200. Because the record sufficiently establishes that the ADC has members in these districts, the ADC has representational standing to challenge the statewide policy as it was applied in these districts.

Third, Dr. Reed, the ADC's Chairman/President, provided his own address in his testimony, from which

the Court can take judicial notice that he is assigned to SD 26, at 75.2% BPP, another one of the majority-black districts. J.A. 46.[28]

Fourth, the record shows that ADC individual plaintiffs Pettway and Stallworth were previously in HD 73, which was abolished in part to meet the State's racial targets in other districts. J.S. App. 209-10 n.21. As *Shaw II* recognized could be the case, these plaintiffs have therefore "provided specific evidence that they personally were assigned to their voting districts on the basis of race," 517 U.S. at 904, and, as the dissent concluded below, they, too, have standing for this reason. J.S. App. 209-10 n.21.

Finally, the most reasonable inference from the trial testimony was that the ADC had at least one member in many, if not all, of the black-majority districts. The State never asserted otherwise. The district court's representational standing analysis was therefore erroneous. As with organizational standing, this Court need not decide the issue of the ADS's standing to

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[28] The Alabama Legislature's webpage (www.legislature.state.al.us) contains a tool that provides voting district information for any given voter address (one enters the relevant zip code in the "Find Your Legislature" box on the left-hand portion of the page; if the zip code contains more than one district, additional address information is requested). This Court can take judicial notice of this information because it is available through official, public records and not subject to reasonable dispute. *See* Fed. R. Evid. 201(b); *see also* Fed. R. Evid. 201(d) (judicial notice may be taken at any stage of the proceedings); *Mass. v. Westcott*, 431 U.S. 322, 323 n.2 (1977) (taking judicial notice by reference to Coast Guard records).

proceed with the merits given the standing ADC plaintiff Stallworth, but in no event should the Court affirm the district court's erroneous holding on the ADC's representational standing. At the very least, remand is required on this issue.

b. To eliminate any question about specific district residences of the ADC's members, appellants have requested permission to lodge with the Court an affidavit from Dr. Reed confirming the obvious import of his prior testimony—that at all relevant times the ADC has had members in numerous black-majority, and other, districts. *See* S. Ct. R. 32.3. This Court recently permitted, and relied upon, a similar lodging to confirm standing in comparable circumstances in *Parents Involved in Community Schools v. Seattle School District Number 1*, 551 U.S. 701 (2007); *see id.* at 718; App. A (reproducing lodging).

* * *

No level of government claims responsibility for Alabama's crude race-based policy in an area of exceptional constitutional sensitivity. Alabama disavows any basis of its own for the policy, but federal law does not require it. That policy lacks a legitimate, rational justification and, if that is not enough, also cannot survive strict scrutiny.

CONCLUSION

Appellants respectfully request that the Court reverse the judgment below.

Respectfully submitted,

James H. Anderson
William F. Patty
Brannan W. Reaves
JACKSON, ANDERSON & PATTY, P.C.
P.O. Box 1988
Montgomery, AL 36102

Paul M. Smith
Jessica Ring Amunson
Mark P. Gaber
JENNER & BLOCK LLP
1099 New York Avenue NW
Suite 900
Washington, DC 20001

Kevin Russell
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814

Richard H. Pildes
Counsel of Record
Vanderbilt Hall
40 Washington Square South
New York, NY 10012
(212) 998-6377
pildesr@law.nyu.edu

John K. Tanner
3743 Military Road NW
Washington, DC 20015

Walter S. Turner
P.O. Box 6124
Montgomery, AL 36106

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ADDENDUM

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other

crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C.A. § 1973c (effective: July 27, 2006)

§ 1973c. Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any

voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that

no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

42 U.S.C.A. § 1973c (2005)

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting

qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer

or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.