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

ALABAMA LEGISLATIVE BLACK CAUCUS, et al.	)	
Plaintiffs	)	
v.	)	**2:12-CV-00691-WKW-MHT-WHP (Three Judge Court)**
THE STATE OF ALABAMA, et al.	)	
Defendants	)	
DEMETRIUS NEWTON, et al.	)	
Plaintiffs	)	
vs.	)	**2:12-CV-01081-WKW-MHT-WHP (Three Judge Court)**
STATE OF ALABAMA, et al.	)	
Defendants	)	

MEMORANDUM IN SUPPORT OF THE NEWTON PLAINTIFFS' RESPONSE TO THE STATE OF ALABAMA'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO NEWTON PLAINTIFFS' CLAIMS

COME NOW, the Newton Plaintiffs, and hereby respectfully file this Memorandum in Support of the Newton Plaintiffs' Response to the State of Alabama's Motion for Summary Judgment on the Newton Plaintiff's Claims. The Newton Plaintiffs have alleged claims related to violations of Section 2 of the Voting Rights Act, unconstitutional gerrymandering, and violations of the 14th Amendment and the United States Constitution. The State of Alabama now seeks summary judgment on said claims. For the reasons set forth below, the State of Alabama's Motion for Summary Judgment should be DENIED as material issues of genuine fact exist that should be addressed at trial.

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INTRODUCTION

We note at the outset that defendants misperceive and conflate the Newton plaintiffs' claims. The Newton plaintiffs bring two distinct types of claims. First, we claim under the results prong of Section 2 of the Voting Rights Act that under the House and Senate plans minority voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" and that each plan "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 42 U.S. C. § 1973. Much of defendants' evidence, however, applies to the entirely separate effects prong of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The State, accordingly, confuses the "opportunity" district with "ability to elect" district, conflating Section 5 with Section 2 of the Voting Rights Act, which the Supreme Court has repeatedly advised against. "Section 2 concerns minority groups' *opportunity* to elect representatives of their choice, while the more stringent § 5 asks whether the change has the purpose or effect of denying or abridging the right to vote." *Bartlett v. Strickland*, 556 U.S. 1, 24-25 (2009) (citing *LULAC v. Perry*, 548 U.S. 399, 446 (2006)). [1]

The Newton plaintiffs' Section 2 results claim relates to the State's failure to create minority opportunity House districts in Jefferson and Montgomery counties; and the State's failure to create a minority opportunity Senate district in Madison County.

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[1] As the three-judge court held in *Major v. Treen*, 524 F. Supp. 325, 327 n. 1 (E.D. LA. 1983), "The Attorney General's preclearance determination does not pretermit a subsequent action….Private plaintiffs are free to mount a *de novo* attack upon a reapportionment plan notwithstanding preclearance.…. Since the statutory standards of review under § 5 differ from those established by amended § 2, a grant or denial of preclearance pursuant to § 5 is not dispositive of a § 2 claim. Hence we conclude that the Assistant Attorney General's preclearance determination has no probative value in the instant case." (internal citations omitted)

The Newton plaintiffs also challenge the House and Senate plans under the purpose prong of Section 2 and under the 14th and 15th Amendments. Here, the focus includes but is not limited to the State's failure to draw minority opportunity districts in the counties noted above, but also on the elimination of Senate districts 11 and 22 as crossover districts; and, indeed, the Newton plaintiffs aver that the entire House and Senate plans are pervaded by a racially discriminatory purpose.

STANDARD FOR SUMMARY JUDGMENT

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); accord *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In deciding whether there is a genuine issue of material fact, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Id.*

Moreover, courts have generally concluded that cases that involve questions of intent or motive are rarely appropriate for summary judgment as relevant evidence is often susceptible to different interpretations or inferences by the trier of fact. *Hunt v. Cromartie*, 526 U.S. 541, 552-553 (1999); accord, e.g., *Poller v. Columbia Brad. Sys., Inc.*, 368 U.S. 464, 473 (1962); *Att'y Gen. v. Irish People Inc.*, 796 F.2d 520, 524 (D.C. Cir. 1986). In the redistricting context, assessing whether a jurisdiction was racially or politically motivated is not a simple matter, but an inherently complex task requiring the court to perform a "sensitive inquiry into such circumstantial and direct evidence

of intent as may be available." *Hunt*, 526 U.S. at 546 (citing *Miller v. Johnson*, 515 U.S. 900, 905 (1995)); *accord Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488-90 (1997) (noting that in Section 5 cases involving discriminatory purpose questions, "courts should look to our decision in *Arlington Heights* for guidance").

FACTS

1. According to the 2010 Census, Alabama had 4,779,736 residents, including 3,274,402 white non-Hispanic persons (68.5%), 1,281,118 black persons (26.8%), 28,218 Native Americans (1.2%), and 186,602 persons of Spanish Heritage, or Latinos (3.9%). The remainder were of other races or mixed race. EX. A, 2010 Alabama Population Data. [2]

2. The 2010 white share of population declined from 71.1 percent in 2000 (including white Hispanics), EX. B, 2000 Alabama Population Data, and the white share continues to decline at an accelerating pace: the Census Bureaus' American Community Survey reports that in 2011, the white population had declined not only as a proportion of the total population, but in absolute terms as well. EX. C, 2011 ACS Report. The 2011 population of Alabama as a whole had grown to 4,802,740 persons while the white non-Hispanic population declined by over 63,000 persons to 3,202,563, or 66.7 percent of the state population. *Id.*

3. From 2000 to 2010, the black population of Jefferson County increased by 35,973 persons while the white population declined by 15,917 persons. EX. D, Jefferson County 2000 Race Population Data; EX. E, 2010 County Population Data; EX. F, Dr. Richard Arrrington Expert

[2] The white non-Hispanic population subtracts the white Hispanic population from the total white population. Consistent with Alabama historical practice, the black population includes persons who are black alone or in combination with another race.

Witness Report (hereinafter "Arrington Report"), ¶ 55. The Latino population of Jefferson County increased by 15,204 persons from 2000 to 2010. Ex. D; Ex. E.

4. From 2000 to 2010, the black population increased in Montgomery County by 16,894 persons while the white population declined by 18,524 persons. EX. E; EX. G, Montgomery County 2000 Race Population Data. The Latino population of Montgomery County increased by 5,649 persons from 2000-2010. *Id.* Much of this shift occurred in House District 73, which declined from 69.3 percent white in 2000 to 44.1 percent white in 2010. Doc. No. 30-3; EX. H, 2010 District Statistics Report. With minorities comprising a majority of the population in District 73, minority voters elected the candidate of their choice to the Alabama House from District 73. EX. I, Dr. Allan Lichtman Expert Witness Report (hereinafter "Lichtman Report"), at 14.

5. The Madison County population grew by 21.0 percent between 2000 and 2010, and the black population increased by 17,351, or 27.5% and the Latino population nearly doubled (+195.1%), with a gain of over 10,000 persons. EX. E; EX. J, Madison County 2000 Race Population Data.

Racially Polarized Voting

6. The Court can take judicial notice that in the past, elections in Alabama have been characterized by racially polarized voting.

7. Alabama admits that elections are racially polarized. Doc. 59, ¶18 ("The State Defendants admit that, when partisan campaigns are involved, African-American voters in Alabama generally vote for Democratic candidates and that many, but not all, white voters often vote for Republican candidates.").

8. In recent statewide elections involving black versus white candidates, support for black candidates among black voters was well over 90 percent (94%) while large majorities of white voters (81%) supported the black candidate's white opponent. Lichtman Report at 6, 11-12.

9. Polarized voting exists independent of political party in general elections in Alabama. That is, polarized voting is substantially stronger for elections with black Democrats than for elections with white Democrats. Black cohesion is only slightly lower for white versus white than black versus white elections (92 percent compared to 94 percent). However, white bloc voting against the African American candidate of choice is much more substantial in the black versus white elections than in the white versus white elections. As indicated in Table 1 of Dr. Lichtman's Report, only 19 percent of white voters backed black Democrats, whereas 29 percent of white voters backed white Democrats. The degree of polarization in black versus white elections is 75 percentage points (94% minus 19%), compared to 63 percentage points in white versus white elections (92% minus 29%). Lichtman Report at 5-6, 11-13.

10. Black voters are in coalition with Latino and Native American voters: the groups work together politically and jointly support minority candidates. This is evidence by the testimony of Plaintiffs Rosa Toussaint and Chief Framon Weaver. Plaintiff Rosa Toussaint is very involved in the Hispanic community in Madison County. She has served as an advocate for Hispanics through many different organizations: Huntsville International Help Center, Hispanic Latino Advisory Committee to the Mayor of Huntsville, the Alabama Hispanic Association, and the Alabama Coalition for Immigrant Justice. EX. K, Rosa Toussaint Deposition p. 32, l. 13-23; p. 33, l. 1-8. Ms. Toussaint is also a chaplain serving the Hispanic community in Madison County, and she is a member of the NAACP. *Id*.

11. Ms. Toussaint testified that the Hispanic community in Madison County is a politically cohesive group. EX. K. p. 31, l. 22-23, l. 1-2. She further testified that a large number of Hispanics live in southwest Huntsville, so much so that the area is frequently referred to as Little Mexico. EX. K, p. 8, l. 15-23, p. 9, l. 1-23, p. 10, l. 1-5, 18-23, p. 11, l. 1-23, p. 12, l. 1-5, p. 14, l. 1-12, and p. 23, l. 10-15. She stated that Hispanics developed a coalition with African American voters who lived in north Huntsville. EX. K, p. 8, l. 15, p. 9, l. 12, p. 10, l. 1-5, p. 11, l. 10-12, p. 12, l. 15-18, p. 16, l. 11-23, p. 19, l. 13-23, p. 24, 1-23. Ms. Toussaint worked with building this coalition. She worked in Laura Hall's campaign and believed there was a good relationship and coalition between the African American and Hispanic communities in Madison County. EX. K, p. 8, l. 15-23, p. 9, l. 1-12. Ms. Toussaint testified that the reapportionment plan of the Legislature severs that coalition and divides the Hispanic community. EX. K.

12. Likewise, Chief Framon Weaver is the tribal chief of the MOWA band of Choctaw Indians. EX. L, Framon Weaver Deposition, p. 5, l. 5-13. He testified that coalition existed between his tribe members and African Americans resided in the former Senate District 22. EX. L, p. 20, l. 5-10, pp. 37-38. He further testified that the plan adopted by the Legislature for reapportionment of District 22 hurt his tribe in two ways. First, it divided his tribe between three different senate districts. EX. L, p. 8 l. 7-12; p. 39, l. 14-23, p. 40, l. 1-2. Second, it divided the tribe from its normal coalition partners. EX. L, p. 20, l. 5-10, p. 28, l. 1-23, p. 30, l. 4-11, pp. 37, l. 1 -38, l. 23. Chief Weaver testified that his tribe's normal coalition partners, African American voters living next to his tribe, were moved into Senator Sanders district 23. With the loss of the tribe's coalition partners along with the division of the tribe into three districts, the tribe has now been rendered politically insignificant in Chief Weaver's opinion. EX. L.

13. While the Latino population in Alabama is still small, Republican legislators worry that Latino numbers will grow unless illegal immigration is curbed and this is important to them because Latino citizens vote for Democrats. Arrington Report ¶ 85.

14. The defendants admit (Doc. No. 59 ¶¶ 20 and 22) that Alabama has a history of racial discrimination in voting and other areas: "white officials in Alabama - who for the past 150 years have been almost exclusively Democrats - acted to deter participation by black citizens and to disrupt and hamper black political organizations." Defendants further admit that federal courts and the U.S. Justice Department have found state and local voting practices to be racially discriminatory. *Id.* at ¶23.

15. Defendants admit that minority citizens in Alabama suffer from disparities in income, education, health, etc. Doc. No. 59 ¶ 19 ("The State Defendants admit that, as a historical matter, black citizens in Alabama generally suffer from disparities in income, education, employment, and health."). Current data from the U.S. Census Bureau's American Community Survey confirms that these differences still exist. Arrington Report ¶ 83.

The State's Redistricting Plans

16. Under the State's House redistricting plan, 78 of the 105 districts have clear white non-Hispanic majorities. Doc. No. 30-36. Each of these districts has a minority population well below the level that would accord minority voters to elect a candidate of their choice. Doc. No. 30-36; Lichtman Report at 1-2; Arrington Report ¶ 46. The districts with overwhelming white majorities comprise over 74 percent of the 105 total House districts as compared to the 68.5 percent white non-Hispanic share of the state's 2010 population and 66.7 percent of the state's 2011

population. The State's plan relegated the 31.5 percent (or 33.3 percent in 2011) minority population of the state to 25.7 percent of the House districts.[3]

17. Under the State's Senate redistricting plan, 27 districts have clear white non-Hispanic majorities. Doc. No. 30-39. Each of these districts has a minority population well below the level that would accord minority voters to elect a candidate of their choice. Doc. No. 30-39; Lichtman Report at 1-2; Arrington Report ¶ 46. These districts comprise over 77 percent of the 35 total Senate districts as compared to the 68.5 percent white non-Hispanic share of the state's 2010 population and 66.7 percent of the state's 2011 population. The State's plan relegated the 31.5 percent (or 33.3 percent) minority population of the state to 22.86 percent of the Senate districts.[4]

18. The black population of Jefferson County is sufficiently concentrated for the creation within Jefferson County of one additional compact, contiguous House district with a black voting age majority. Doc. 60-2; EX. M, Jefferson County Newton Illustrative. Likewise, the black population of Montgomery County is sufficiently concentrated for the creation within Montgomery County of one additional compact, contiguous House district with a black voting age majority. EX. N, Montgomery County Newton Illustrative. Furthermore, the black and Hispanic population of Madison County is sufficiently concentrated for the creation within Madison County of a compact, contiguous Senate district with a black and Hispanic voting age majority. EX. O, Madison County Newton Illustrative. The area of such a district includes areas in which the white population is declining as minorities move into neighborhoods and white residents leave. EX. K.

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[3] The black population would warrant 28.14 seats without inclusion of the Latino and Native American population with whom they are in coalition.

[4] The black population would warrant 9.38 seats without inclusion of the Latino and Native American population with whom they are in coalition.

19. Under the 2001 Senate plan, Senate district 11 had a 2010 population of 125,111 persons of whom 62.6 percent were white and 33.9 percent were black. Minority voters in Senate district 11 dependably were able to align with other minorities and with white persons dependably to elect a Senator of their choice from district 11. Lichtman Report at 13, 14.

The Process of Adoption of the Plans.

20. The Legislature established a Joint Reapportionment Committee which began meeting in March 2011. The Committee consisted of 22 members, which included two black senators and three black representatives. That is 23% of the membership in a state where minority residents are over 30% of the population. There were only two Democratic senators on the Committee, and four Democratic representatives (27% of the committee membership). The white Republicans held a comfortable 16 to 6 majority on the Committee. Arrington Report ¶ 98

21. Senator Gerald Dial and Representative Jim McClendon served as co-chairs of the Reapportionment Committee during the post-2010 redistricting cycle. Doc. No. 76-4 at 2, ¶ 3, l. 5-6; Doc. No. 76-5 at 2, ¶ 3, l. 3-4.

22. The Committee adopted official guidelines purportedly to guide the contours of districts to be produced during the redistricting process. In addition to compliance with the U.S. Constitution and the Voting Rights Act, these included as a mandatory requirement that:

> 6. The following redistricting policies contained in the Alabama Constitution shall be observed to the extent that they do not violate or conflict with requirements prescribed by the Constitution and laws of the United States:
> a. Each House and Senate district should be composed of as few counties as practicable.
> b. Every part of every district shall be contiguous with every other part of the district. Contiguity by water is allowed, but point-to-point contiguity and long-lasso contiguity is not.

> c. Every district should be compact…
> 7. … b. The integrity of communities of interest shall be respected.

Doc. 30-4.

23. The limitation to a two percent population deviation was new to Alabama; it had never been used before by the State. Arringto Report ¶ 69. The State gave the case of *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. GA. 2004) , as the rationale for requiring the two percent deviation. However, *Larios* in fact speaks not to the necessity for a population deviation, but to the abuse and manipulation of population deviations to transfer one or more districts from one region to another so as to deprive the disfavored region of the equal protection of the law. *Id. Larios*, 300 F.Supp.2d at 1347.

24. The minority members of the Committee argued against the two percent rule and voted to amend it repeatedly. Arrington Report ¶ 99.

25. Where States respect county boundaries to the extent possible, larger population deviations are entirely permissible. *Tennant v. Jefferson County Commission*, 133 S.Ct. 3 (2012); *Brown v. Thompson*, 462 US 835 (1983); *Reynolds v. Sims*, 377 U.S. 533, 578-79 ("Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering"); *Larios*, 300 F.Supp.2d at 1338.

26. In public hearings the Committee's legal counsel, Dorman Walker, often represented *Larios* as requiring this lower total deviation standard, but when pressed, he admitted that it was not so. Here is his exchange with Representative Chris England (black Democrat) in the public hearing in Tuscaloosa, 13 October 2011:

> Representative England: One thing I wanted to address specifically is what you said concerning deviation. Could you first reveal the case that you're referring to that talks about what the safe harbor is?

Mr. Walker: Sure. That's Larios v. Cox, which was a three-judge court in the, I think, Northern District of Georgia. And the meat of that decision is that - is in that three-judge court decision. It was appealed directly to the Supreme Court as to what happens with a three-judge court decision. They affirmed it, but really, if you want to get an understanding of what the law is, you have to read the District Court's decision. Representative England: All right. Would it be safe to say that the court decision doesn't necessarily suggest that the 2 percent deviation is required, other - and there's really no safe harbor and there's no really percentage recommended?

M. Walker: he only safe harbor is zero deviation.

. . .

Representative England: So 2 percent, something the legislature established, is not necessarily supported by the case law?

Mr. Walker: Well, what it says is that you should try to have zero deviation and - and that if - clearly 10 percent deviation is too much, as a - as a bright line, as I read the case, somewhere between 10 and 0 is the ideal. But the gist of the - the slant of the case law is that you should try to have as little deviation as possible because of one person, one vote in order to affect that principle. Some-some deviation is allowed, but what the decision says, at least as I read it, is that it - the more deviation you have, the stronger the explanation in terms of traditional redistricting criteria has to be. So I know that some jurisdictions have gone with 5 percent [he means 10% total deviation]. I'm not aware of any jurisdiction that has gone higher than that.

Mr. Walker: Well, what it says is that you should try to have zero deviation and - and that if - clearly 10 percent deviation is too much, as a - as a bright line, as I read the case, somewhere between 10 and 0 is the ideal. But the gist of the - the slant of the case law is that you should try to have as little deviation as possible because of one person, one vote in order to affect that principle. Some-some deviation is allowed, but what the decision says, at least as I read it, is that it - the more deviation you have, the stronger the explanation in terms of traditional redistricting criteria has to be. So I know that some jurisdictions have gone with 5 percent [he means 10% total deviation]. I'm not aware of any jurisdiction that has gone higher than

> that.
>
> In light of the - of the consequences - because there is no threshold established. It's just a gradation, if you will. In light of the consequences of getting that wrong, which would leave the state without a plan that could be pre-cleared, the legislature chose 2 percent, which is probably a little conservative, but it was - it was done in order to make sure that all of the work that goes into passing a plan didn't get wasted by choosing a standard that was higher than the courts in an area at the time when the law was very dynamic would not approve.
>
> Representative England: But it's safe to say, though, that you could - as long as you can justify it by the needs of the communities, maybe keeping communities together, packing - to avoid packing and so forth, that you could actually go beyond 2 percent deviation, if necessary?
>
> Mr. Walker: The case law would allow that.
>
> Representative England: OK. So when - so the 2 percent is not anything that's established in law; it's something that we've adopted as a - so far as a principle in order to, I guess, create our own safe harbor, but the court could actually say that 2 percent is too much or, if our plans aren't good enough, it could say that 2 percent is not enough, is that right?
>
> Mr. Walker: That is correct.

Arrington Report ¶ 70.

27. In drawing its redistricting plans, the State subordinated the traditional redistricting criteria, including the criteria that the Committee itself had adopted, to the two percent rule and to the interests of white Republican incumbents. EX. P, Randolph Hinaman Deposition (hereinafter "Hinaman"), at 63-64.

28. The actual operation of the computer system for drawing the House and Senate plans was assigned to Mr. Randolph Hinaman of Arlington, VA. Doc. 125-10; Hinaman at 6-7. Mr.

Hinaman began construction of the House and Senate plans on or about September 1, 2011. Hinaman at 14. Mr. Hinaman is not an attorney. Hinaman at 24.

29. Mr. Hinaman adjusted Maptitude computer software to match the Alabama voting precinct boundaries, and also loaded political data from the Republican National Committee showing how Republican candidates had performed in recent Alabama elections. Hinaman at 15.

30. Mr. Hinaman met with the Committee Co-Chairs, the House and Senate leadership, certain chiefs of staff, and counsel for the Committee, Mr. Dorman Walker, on September 22, 2011. Hinaman at 22. Mr. Hinaman was instructed to "interface" with the Republican Caucus through Co-Chairs Dial and McClendon in the development of the redistricting plans. Hinaman at 31.

31. According to Mr. Hinaman and, at least for white Republican legislators, as the maps evolved, the principle guidelines were to avoid placing two incumbents in the same district, and to maintain the core of each district and change each district as little as possible. Hinaman at 25-26, 125. While these two requirements stand out, Mr. Hinaman could recall no discussion of the requirement to avoid splitting counties. Hinaman at 29.

32. As interpreted by the Redistricting Co-Chairs and as implemented by Mr. Hinaman under their guidance, the adopted guideline of maintaining communities of interest was meaningless. Doc. 125, ¶¶ 102, 105; Hinaman at 121-123.

33. The Legislature knew from the outset that the redistricting plans would split more counties under the two percent deviation than under a 10 percent deviation. Hinaman at 34. Rep. McClendon stated that "I was obligated to do my best to stay within the guidelines adopted by the redistricting committee." Doc. 125-4 at 10, p. 36, l. 4-19. As the House and Senate plans were drawn, they split more counties than necessary to comply with the two percent deviation requirement

because "the current legislators for whatever reason liked it that way." Hinaman at 34.

34. The plan purports to have been drawn from the corners in: That is, districts in each corner of the state purportedly were drawn first, and subsequent districts were drawn from those corners and the borders of the state toward the center of the state. Hinaman at 39.

35. The plan fragments Lauderdale County in the northwestern corner of the state. Doc. 30-38. Lauderdale County was not split under the 2001 plan, where it was combined with part of Colbert County in Senate district 1. Doc. 30-44. The division of Lauderdale County was contrary to the Alabama Constitution and contrary to the interests of the State in respecting communities of interest, including Muscle Shoals and the minority community of Madison County. Hinaman at 121-123.

36. With the approval of Co-Chairs Dial and McClendon, Mr. Hinaman started by drawing in the majority black districts, but he did not consult with any black member of the legislature in drawing those districts. Hinaman at 23, 38, 67, 129; Doc. 125-4, at 6. p. 20, l. 5-20. Prior to the time the House and Senate proposals were made public, no black member of the Legislature was allowed to see the map. Hinaman at 91; Doc. 125-4, at 26, p. 98-99.

37. Mr. Hinaman sat at his computer terminal with white Republican legislators and adjusted the maps in response to their requests. Hinaman at 114, 136-139. As he sat with these white legislators, Mr. Hinaman had available political data showing the performance of various Republican candidates within the area of the district, and he would provide the data and discuss the data with the white Legislators. Hinaman at136-139.

38. Mr. Hinaman completed his draft House and Senate plans and provided them to the Committee Chairs. Sen. Dial and Rep. McClendon unveiled the House and Senate plans to minority

members of the Legislature only on May 7, 2012. Doc. 125, ¶¶ 47-48. The Special Legislative Session opened on May 17, 2012. Doc. 125-1. Mr. Hinaman ignored alternative plans presented by black Legislators during the special legislative session. Hinaman at 138-139.

39. Mr. Hinaman's only interaction with Ms. Bonnie Shanholtzer of the Alabama Reapportionment office was on technical issues relating to the transfer of his map into the Reapportionment Office's computers; he did not discuss the outline of any district. Hinaman at 92-93.

40. After Mr. Hinaman had begun drawing the legislative redistricting plans, the Committee conducted public hearings at 21 locations throughout the State of Alabama. Doc. 76-4 at 3, ¶ 7, l. 7-13; Doc. 76-5 at 3, ¶ 7, l. 1-6. The ostensible purpose of those hearings was to hear proposals from interested persons for drawing new districts and to receive other public comments. Senator Dial and Representative McClendon attended each of those public hearings. Doc. 76-4 at 3, ¶ 7, l. 7-13; Doc. 76-5 at 3, ¶ 7, l. 1-6.

41. At 21 public hearings, the Committee's legal counsel, Dorman Walker, often would mention that the hearings were in some way required by the Department of Justice as part of preclearance. This indicated that the hearings were a mere form and played no part in the construction of the plans. Arrington Report ¶ 100.

42. The public hearings were held prior to the presentation of any proposed maps so that the discussion could only involve abstract principles, and 49 different speakers complained about the lack of any meaningful participation in the process absent some maps to consider. Thirty-eight speakers mentioned the importance, in principle, of recognizing race in Alabama politics by appropriate districting. No one suggested that the current packing of minority districts was

appropriate, and many speakers suggested that the majority-minority districts should be "un-packed." The importance, in principle, of being fair to both political parties was mentioned thirteen (13) times. Arrington Report ¶ 102.

43. The bulk of the comments, and by far the largest amount of time in all twenty-one (21) of the hearings, concerned the importance of maintaining county lines intact and having districts contain as few counties as possible. Arrington Report ¶ 103.

44. After the Hinaman plans had been unveiled, the Committee held only one public hearing on the actual plans, in Montgomery on 17 May 2011, the same day the plans were adopted by the Committee, and a week before the plans were enacted by the legislature. Arrington Report ¶ 109.

45. The original "working plans" from Mr. Hinaman were changed very little in versions "2" and "3." These later versions of the House and Senate plans were the ones enacted. Arrington Report ¶ 110. But the changes all were minor: no changes were consequential or changed the overall pattern of the first draft. Arrington Report ¶ 111.

46. After the House and Senate plans were unveiled, the legislature restricted potential amendments to the plans so that each district had to fall within the two percent population deviation range. Doc. 76-4, ¶ 10; Doc. 76-5, ¶ 10. The only changes that would be accepted were those involving discrete exchanges of population between two or three districts within a week of final passage of the bills. Hinaman at 39, 40. Changes to cure the plans' violations of the prohibition against splitting counties and communities of interest could not be considered. Hinaman at 48. Rep. McClendon has testified that he insisted that, if changes were to be made, each member whose district would be affected concur on the proposed changes. Doc. 76-5 at 6, ¶ 16, l. 7-8.

47. In both the Committee and on the floor of the House and Senate, the minority legislators offered their plans as substitutes for the co-chair's plans. These efforts were all defeated essentially along party line votes in the various committees and on the floor of both houses. Arrington Report ¶ 112.

48. The black legislators had the illusion of participation in the process in the sense that they could offer amendments, vote, and speak freely, but the plan was basically a *fait accompli*: only minor, almost cosmetic, changes were made that had no bearing on the ability of minority voters to participate in the political process. Arrington Report ¶ 113.

49. The Alabama Constitution requires that the plan be adopted in the first regular session of the Legislature after the census data becomes available. Alabama Constitution § 199. The House and Senate plans were not adopted in the regular session but in a subsequent Special Session. Doc. 125-1.

50. The House and Senate plans placed an effective quota on minority districts. Before he eliminated majority-black district 53 in Jefferson County, Mr. Hinaman did not examine whether such elimination was in fact necessary, and whether it was possible to maintain all existing majority-black districts in Jefferson County. Hinaman at 60-61, 85.

The Section 5 Standard

51. The Legislature ignored the requirements of Section 2 of the Voting Rights Act in drawing district boundaries. Hinaman at 98-99. Mr. Hinaman was unaware of any studies or standard related to what black population in a district would be necessary for black voters to have a viable opportunity to elect a candidate of their choice and never discussed that issue with Sen. Dial or Rep. McClendon. Hinaman at 138-139.

52. In applying the non-retrogression standard of Section 5 of the Voting Rights Act, the State applied a standard by which (1) the number of black-majority districts could not decrease and (2) the black majority districts had to, where possible, maintain at least the black population percentage that existed in 2010 under the 2001 plan. Hinaman at 23-24, 101.

53. Mr. Hinaman understood that the black percentage in some districts could be reduced if necessary, but he had no idea how much the black majorities in "packed" districts such as those in Montgomery County could be reduced without threatening their viability, and made no inquiry into such a level of reduction. Hinaman at 146-147. He made no inquiry of any black legislator to ascertain their views. *Id.*

54. Using this metric, the State plans provided very large black majorities in a number of districts. Of the twenty-seven House and eight Senate majority-black districts, six House (22.2%) and two Senate (25%) districts are over 70 percent black in population; six additional House (22.2%) and one additional Senate (12.5%) districts are over 65 percent black in population; and 10 additional House (37%) and three additional Senate (37.5%) districts are over 60 percent black in population. Doc. 125, ¶¶ 49-50.

55. In Alabama, black voters have an excellent opportunity to elect candidates of their choice in any district in which they constitute 50 percent or even over 40 percent of the voting age population. Arrington Report ¶ 46; Lichtman Report at 2-3.

56. Section 5 has not been enforced so as to require that the black percentage cannot be reduced, and the Department of Justice earlier had interposed Section 5 objections to redistricting plans of the State of Alabama based, among other things, on "packing" or over-concentrating minorities in certain districts. EX. Q, 1982 Section 5 Objection Letter (House and Senate); EX. R,

1992 Section 5 Objection Letter (Congressional).

57. The Department of Justice has made available Procedures for the Administration of Section 5 of The Voting Rights Act Of 1965, as Amended, 28 C.F.R. §51, 52 Federal Register 490, Jan. 6, 1987, which specifically warn against over-concentration or "packing" of minorities into districts as well as fragmenting or "cracking" minority concentrations. *Id.* § 51.59

58. In gerrymandering, the voters of one's opponent are packed by putting more of them than are necessary for them to elect in a few districts. Arrington Report ¶ 32. They win in those packed districts, of course, but waste votes that would otherwise be used to form majorities in adjoining districts. Cracking means to divide their other voters into several districts where they are not a majority. Arrington Report ¶ 32.

59. In 2011 the Department of Justice had issued Guidance on its view of Section 5 compliance and noted that it would consider the following:

> In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district.

76 Fed.Reg. 7470-01, at 7472 (Feb. 9, 2011). And the Department reiterated that it would consider:

> whether minority concentrations are fragmented among different districts; whether minorities are overconcentrated in one or more districts; whether alternative plans satisfying the jurisdiction's legitimate governmental interests exist, and whether they were considered; whether the proposed plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and, whether the plan is inconsistent with the

jurisdiction's stated redistricting standards.

Id.

60. In addition to guidance from the Department of Justice, the District of Columbia Court made clear in 2011 that Sections 2 and 5 of the Voting Rights Act have separate standards, both of which the Legislature was required to comply. *Texas v. United States*, 831 F. Supp.2d 244, 260-262 (D.D.C. 2011).

61. The District of Columbia Court also held that:

> [d]etermining that minorities have an ability to elect based solely on their numbers in the voting population of a district cannot account for the most fundamental concern of Section 5: the effect past discrimination has on current electoral power.

Id. 262.

The District of Columbia Court further held that under Section 5:

> factors relevant to this complex [retrogression] inquiry may include the number of registered minority voters in redrawn districts; population shifts between or among redrawn districts that diminish or enhance the ability of a significant, organized group of minority voters to elect their candidate of choice; an assessment of voter turnout in a proposed district; to the extent discernible, consideration of future election patterns with respect to a minority preferred candidate; and new ability districts that would offset any lost ability district.

Id. at 254-265.

62. The creation of majority-minority districts with higher minority concentrations than are necessary for them to have a reasonable ability to elect candidates of their choice, even if their choice is a minority candidate, can serve to waste minority votes that could be used in adjoining districts where minority voters can work in coalition with white voters and elect candidates in "crossover" districts. Arrington Report ¶ 34.

63. Rep. McClendon and Seantor Dial were present at each public hearing held by the Redistricting Committee. Doc. 76-4 at 3, ¶ 7, l. 7-13; Doc. 76-5 at 3, ¶ 7, l. 1-6. Rep. McClendon testified that he first heard the term packing on the House floor. Doc. 125-4, at 28, p.105,l. 18-23,p.106, l. 1-2.

64. In fact, prior to the floor debate, during the Legislative Redistricting Committee's 9th hearing on October 6, 2011 in Birmingham Alabama, Rep. Rod Scott (African American) referred to "cracking" and "packing" of minorities and asked if the Reapportionment Committee had plan to deal with those issues; and Rep. Merika Coleman (African American) also spoke up that she was very concerned about "packing" and"cracking." Doc. 30-17 at 6, 9. During the 16th Hearing in Demopolis, Alabama on October 13, 2011, Perry County Commissioner Albert Turner (African American) voiced his hope that districts will not be "race packed", and that he wanted to make sure no "race packing" occurred. Doc. 30-24 at 7-9.

65. During the 17th Hearing in Tuscaloosa, Alabama on October 13, 2011, Rep. Chris England (African American) discussed the need to avoid "race-packing" of districts, and discussed with counsel for the Committee. Doc. 30-25 at 7-9. During the 19th Hearing in Auburn, Alabama on October 17, 2011, Barbara Pitts (Alabama New South Coalition; African American) told the Committee that it was important not to pack districts so that minority vote is not diluted and so that black voters do have an influence. Doc. 30-27 at 9.

66. During the 20th Hearing in Selma, Alabama on October 17, 2011, Senator Hank Sanders (African American) stated that he hoped packing would not occur, and Representative Dario Melton (African American) also stated his concerns about packing of districts. Doc. 30-28 at 6-7. And during the May 17, 2012 hearing in Montgomery, Alabama, African-American citizens,

including Rep Merika Coleman complained that the Legislature's map showed packing and that the plans were unconstitutional. Doc. 30-30, p. 27, l. 21-23; p. 28, l. 1-12.

67. In addition to the comments of black citizens, Counsel for the Committee, Mr. Dorman Walker, provided legal advice on the issue of packing:

> 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.

Arrington Report ¶ 40.

Mr. Walker also provided his legal advice with regard to packing to the Committee:

> Mr. Walker: That's a really good point. And let me - let me point out that I'm a lawyer who was hired by the Legislature to assist and advise with redistricting. I'm not partisan. I don't represent either party. I just tell them what the law is as far as I understand it.
> But you have made a very good point. And there are - there are protections particularly, as I suspect you know, in Section 2 and Section 5 against packing.
> And for those of you who are not familiar with this, packing is the - is the tactic of overloading a minority district with members of a racial or language minority and putting more in that district than is necessary for it to be a safe minority district, which might be required under Section 2 of the Voting Rights Act. And if you - if you put all of that inventory, if you will, of minority voters into that district, then they're not available to help populate minority districts in other places.

Arrington Report ¶ 41.

County Splits

68. With 105 House districts, the ideal population of a House district is 45,521 persons. With a maximum 10 percent population variance, the population of House districts would vary from

43,246 persons to 47,797 persons. With 35 Senate districts, the ideal population of a Senate district is 136,563 persons. With a maximum 10 percent population variance, the population of Senate districts would vary from 129,735 persons to 143,391 persons. EX. A.

69. Given a ten percent permissible population range, the following counties have sufficient population to include one or more whole House districts without any remainder: Baldwin (4 districts), Chilton, Dallas, Jefferson (14 or 15 districts), Lauderdale (2 districts), Marshall (2 districts), Mobile (9 districts), and Montgomery (5 districts). All minority districts within these counties are self-contained and do not rely on any part of any other county, and there is no need to split any of these counties to comply with the Voting Rights Act. Doc. 60-6; Doc. 60-7; Doc. 30-35; EX. M; EX. N; EX. W, House County and Precinct Splits.

70. Given a ten percent permissible population range, the following counties have sufficient population to include one or more whole Senate districts without any remainder: Lee, Mobile (3 districts), and Jefferson (5 districts). All minority districts within these counties are self-contained and do not rely on any part of any other county, and there is no need to split any of these counties to comply with the Voting Rights Act. EX. Doc. 30-38; Doc. 60-8.

71. Maintaining county boundaries intact is a traditional consideration normally considered important by decision-makers in redistricting. *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. GA. 2004). Sections 199 and 200 of the Alabama Constitution include "whole county" provisions, that would prevent, or at least discourage, adding many surrounding districts to a county and thus diluting the votes of those who live in the county. The Alabama Constitution requires that no county be split by Senate districting boundaries, Section 200, and that each county have at least one Representative. Section 198,199.

72. Following county lines is an important traditional districting principle in Alabama. In drawing the Congressional and State Board of Education plans, the legislature followed county lines to a large extent. Arrington Report ¶ 66.

73. County boundaries also have special significance in Alabama because the Legislature has exceptional power over and responsibility for local government functions. This legislative authority and lack of home rule was a contributing factor to Birmingham's fiscal woes. Arrington Report ¶ 61.

74. The legislature has a tradition of allowing the local delegation of each county to be the primary legislative committee to examine and approve legislation that applies to a specific local government within that county. Small delegations operate by unanimity, while larger delegations have majority vote rules. Legislative courtesy for local bills is common. Local bills account for two-thirds of the bills in the Alabama legislature and legislative courtesy "totally determines the fate of these bills". Arrington Report ¶ 62.

75. While a particular piece of local legislation must pass through the entire legislative process and be approved by the Governor or passed over his veto, the power of the county delegation is substantial. First, a lack of action by the county delegation is almost certainly a veto. Second, the large number of local bills and the normal traditions of reciprocity dictate that affirmative actions by the county delegation on most local bills will be honored with little controversy. Arrington Report ¶ 63.

76. Every member of the legislature whose district includes even a small part of a county is part of that county delegation. Arrington Report ¶ 64.

77. Under the 2001 plan, nine House districts (52-60) and three Senate districts (18-20) within Jefferson County allowed black voters to elect candidates of their choice, and alternative plans based on the 2010 census demonstrated that a fair plan would retain all of those districts with effective black majorities. Doc. 60-6; doc. 60-7. Legislators representing the interests of black voters under a plan that respected county boundaries under either population deviation standard would constitute a majority of the Jefferson County House delegation (9 of 14 or 15) and Senate delegation (3 of 5). *Id.*

78. Under the State's 2012 plan, the number of black House districts in Jefferson County is reduced to eight (8) of the eighteen (18) districts that will comprise the county's House delegation under the new plan. Doc. No. 66 at 23. Under that plan, therefore, the Jefferson County House delegation would include eighteen (18) members of whom eight (8) would be elected from districts with effective black majorities and ten (10) would be elected from white-controlled districts after elections under the 2012 plans. *Id.* The Senate delegation would include eight (8) members, three (3) elected from majority black districts and five (5) elected from heavily white districts. Arrington Report ¶¶ 73,74.

79. While a total of six (6) other counties vote to select members of the Jefferson County House delegation, the state's plan excludes the inner-city black voters of Jefferson County from voting on members of any of those six (6) counties' delegations. Doc. 60-26. These added districts are all white dominated. This makes the House delegation ten (10) white districts and eight (8) minority districts. Arrington Report ¶ 73.

80. The enacted Senate plan adds five (5) Senate districts that swoop into Jefferson County from the surrounding counties. Arrington Report, Table 4. Jefferson County population is

not a significant part of any of these five, and all of them are white districts. This makes the Senate delegation three (3) minority members and five white members. Arrington Report ¶ 74.

81. While a total of eleven (11) other counties vote to select members of the Jefferson County Senate delegation, the state's plan excludes the inner-city black voters of Jefferson County from voting on members of any of those eleven (11) counties' Senate delegations. Doc. 60-29.

82. Senator Dial testified that he did not reduce the number of white majority Senate districts in Jefferson County because that would have resulted in putting some incumbents in the same district, thereby violating "the promise I made to all 34 of the senators." Doc. 125-3, at 14, p. 50, l. 16-23, p. 51, l. 1. Two Senators whose white-majority districts included portions of Jefferson County reside outside the county so that their districts could be removed from Jefferson County without placing incumbents in the same district: Senator Reed (5) resides in Cordova in Walker County, EX. T, Senator Reed Information, and Senator Ward (14) resides in Alabaster in Shelby County, EX. U, Senator Ward Information. Senate district 14 contains only a single precinct of Jefferson County, and that area could easily have been swapped with a Shelby County portion of district 16 or by other changes among districts 14, 15 and 16. EX. V, Senate County and Precinct Splits, at 36.

83. The Legislature drew House district 43 so as to include a small portion of Jefferson County that included only 224 residents, or less than 0.04 percent of the district's population. EX. W, House County and Precinct Splits. Mr. Hinaman stated that the Jefferson County area was included in district 43 because the incumbent Representative for district 43 wanted to retain as much of her 2001 district as possible. Hinaman at 63-64.

84. The portion of Jefferson County included in district 43 was not in fact in district 43 under the 2001 plan. EX. X, District 43 Comparison.

85. Without those 224 Jefferson County residents, district 43 would be 1.18 percent under-populated. The "need" for an additional 224 people from Jefferson County was manufactured by the manner in which the plan divided voting precincts. In the case of House district 43, the line-drawers divided the Helena United Methodist Church between House districts 43 and 15 in such a manner as to create a slight under-population of districts 43 and an over-population of district 15 compared to the ideal district population. EX. W, at 32, 86. Placing all of the Helena United Methodist Church in district 43 rather than dividing it between districts 43 and 15 would place both districts within the two percent deviation range without using any Jefferson County population. *Id.*

86. The process of splitting voting precincts takes time and attention: it is an intentional process. The person drawing the district line must make considered decisions (1) that it is necessary to divide a given precinct and (2) precisely how to divide it. Hinaman at 110-112.

87. With 9,045 residents, Greene County has the smallest population of any county in Alabama. EX. E. Over 80 percent of the residents of Greene County are black. Id. Under the 2002 plan, Greene County was entirely contained within House district 71. Doc. 30-42. Under the State's 2012 plan, Greene County is split between House districts 71, 72 and 61. Doc. 30-35; EX. W, at 118-121, 146-153. House district 61 is a heavily white (18.9% black) district dominated by suburban and rural areas of Tuscaloosa County that have disparate interests from those of Greene County. EX. W, at 118-121. The placement of a portion of Greene County in House district 61 gives the white voters of district 61 a veto over local legislation affecting Greene County.

88. The split of Greene County and the community of interest it represented was made at the request of the white incumbent Representative from House district 61, Alan Harper, who owns property in that portion of Greene County and may retire to that property. Representative Harper is a resident of Northport, AL. EX. Y, Rep. Alan Harper Legislative Biography. Representative Harper will not reach the standard retirement age (65) until November 9, 2022. EX. Z, Rep. Alan Harper Information. Rep. Alan Harper changed his affiliation from the Democratic Party to the Republican Party in February 2012, during the redistricting process. EX. AA, Al.Com Article, Harper Switches Party.

89. Only 12 people live in the Greene County portion of House district 61. EX. W. The imbalance of population between the two districts could have been addressed by a different division of the Aliceville 4 Armory precinct or the Carrollton 2 Service Center precinct, both of which the state's plan divides between House districts 61 and 71. EX. W at 119, 148.

90. Under the State's plan, the Montgomery County delegation will include two members elected from rural House districts (69 and 90) and one (75) elected from a suburban district. Doc. 30-35. None of the three inner-city majority black House districts includes any part of a county other than Montgomery County although it would be possible to swap with adjacent areas of suburban Autauga and Elmore Counties. *Id.*

91. To meet the two percent deviation standard, Mobile County Senate districts needed to gain population and Baldwin County Senate district 32 needed to shed population. Mobile and Baldwin Counties comprise a census Combined Metropolitan Area and a community of interest. EX. BB, Alabama Census Map. The State's House plan fractures the boundaries of Mobile County so as to include a small portion of the county in House district 96, which includes parts of both

Mobile and Baldwin Counties. EX. W at 187-188. House district 96 is 10.2 percent black in population. Id.

District 22

92. According to the 2010 census, the three Senate districts (33, 34 and 35) contained entirely within Mobile County had a net deficit from the ideal population of 15,656 persons, while adjacent Senate district 32 in Baldwin County had a population surplus of 19,055. EX. CC, 2010 Population Data, 2001 Senate Districts. The population imbalance among the four districts could be resolved by a transfer of population from district 32 to the Mobile districts and appropriate adjustments among them. Id.

93. A proposal to transfer the excess Baldwin County population to the Mobile districts was made but rejected by Senator Pittman. Hinaman at 101-110. Senator Figues, who is black, was never consulted concerning the option. Hinaman at 129-130.

94. Senate district 22, which covered the northern portions of both Mobile and Baldwin Counties, was within one percent of the ideal district population and had a minority population of 34 percent, so it did not need to change. EX. CC. District 22 was a crossover district in which minority voters dependably had been able to, in coalition with an unusually number of white voters, elect candidates of their choice. Lichtman Report at 13, 14.

95. As adopted, the Senate plan adds a heavily white area of population in Baldwin County to Senate district 22 and removes substantial Baldwin County minority populations from District 22 so that the absolute number of black persons in the Baldwin County portion of district 22 actually declines while the overall Baldwin County contribution to district 22 increases substantially. EX. V; EX. DD, 2001 County Split, Senate District 22.

96. The new boundaries fragment the Native American concentration within district 22, moving a substantial part of it to district 34 so as to disrupt an active and successful minority coalition. EX. V at 110; EX. L. p. 8, l. 7-12; p. 20, l. 5-10; p. 28, l.1-23; p. 30, l. 4-11; p. 37, l. 1, p. 38, l. 23; p. 39, l. 14-23; p. 40, l. 1-2. The new boundaries fragmented Washington County and remove a heavily minority portion from Senate district 22 and place it in Senate district 23 in exchange for predominantly white area of Monroe County that had been in district 23. Doc. 30-38; EX. V at 75, 81. The division of Washington County was unnecessary for any legitimate purpose: the plan could have kept Washington County intact in Senate district 22 and left portions of Monroe County in district 23[5] while maintaining district 23 at over 62 percent black, consistent with Senator Sanders' wishes and all consistent with the Legislature's stated goals of avoiding county and precinct splits and maintaining communities of interest. EX. V; Doc. 125, at ¶ 16.

District 7

97. According to the 2010 Census, Senate district 7 was overpopulated. EX. CC. Representative Laura Hall, a black member of the Alabama House, was an unsuccessful candidate for Senate district 7 in a 2009 Special election. Doc. 125-3 at 117:5 to 119:2.

98. In redrawing Senate district 7, the Legislature lowered the total population by 10,994 persons; lowered the total black population by 10,151 persons; and increased the white population by 650 persons. EX. CC; Doc. 30-39. The Legislature fragmented the minority population of Madison County among Senate districts 1, 2 and 7 and in doing so avoided creation of a

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[5] E.g., make whole in 22 the split precincts of Chrysler/Eliska/McGill, Perdue Masonic Lodge, Perdue Hill, Monroe Beulah, Bethel Baptist House, Monroeville Housing Authority, and return the Mexia Fire Station precinct to 22. The districts drawn by the State split these precincts along racial lines. EX. V at 79-80.

majority-minority Senate district in Madison County. EX. V; EX. O. The State's Senate plan places majority minority precincts West Maslin, Johnson High School and Lewis Chapel CP Church in district 1. EX. V at 3-4. Senate splits The State plan places majority minority precincts Oakwood College, Ed White Middle School (part only), Highlands School, and University Place in district 2 along with a portion of precincts Ridgecrest School (49.5% minority) and the Sherwood Baptist and Blackburn Chapel CP Church, both over 40 percent minority in district 2. EX. V at 5-6.

District 11

99. Under the 2001 plan, Senate district 11 included all of Talladega and Coosa Counties and portions of Calhoun and Elmore Counties and was under-populated by 11,453 persons. EX. CC. District 22 was a crossover district in which minority voters dependably had been able, in coalition with an exceptional number of white voters, to elect candidates of their choice. Lichtman Report at 13. Senate district 11 included the cohesive minority population of majority-black House district 32 and other areas of substantial black population. Hinaman at 131-132; Arrington Report ¶ 28.

100. The enacted Senate plan reduces the non-white voting age population (VAP) in this district from 34.2% to 15.3%. The Legislature dramatically reconfigured district 11, dividing the bulk among districts 12, 15, 25 and 30, and removed the core of the district so that the new district contains only 22 percent from his old district. Arrington Report ¶ 28. Senator Fielding subsequently changed political parties. *Id.*

Split Precincts

101. While it is sometimes essential to split counties and precincts to comply with legal requirements, an excessive division of will create unnecessary problems for candidates and voters. EX. EE, Affidavit of Joe. L. Reed (hereinafter referred to as "Reed Affidavit"), ¶ 7-8. These

problems fall most heavily on minority voters. Reed Affidavit ¶ 7. There is a strong governmental interest in minimizing the number of counties and precincts split, especially from the perspective of minority voters and candidates. The division of existing voting precincts by district lines will necessitate the realignment of precinct boundaries and the reassignment of voters to new precincts. This process, in turn, will place a considerable burden on the Boards of Registrars, who will be tasked with reassigning the voters. Reed Affidavit ¶ 8.

102. Another problem that is created by the splitting of precincts is the need for additional polling places. Locating and securing accessible sites with appropriate space and parking unnecessarily burdens the time and resources on county governments who are already lacking adequate resources. Nevertheless, the problems for the counties are less serious compared to the problems for voters. Reassignment of voters undoubtedly results in mistakes. Voters who lack internet access or reading skills, disproportionately minority voters, are greatly disadvantaged when trying to correct voting precinct mistakes or when trying to navigate to new polling places. Reed Affidavit ¶ 9-10.

103. As a practical matter, many minority voters rely on political campaigns and organizations to get such election information, and also to obtain rides to the polls. The changes flowing from the precinct splits will divert time and resources from minority campaigns and organizations like Plaintiff Alabama Democratic Conference (ADC). The end result is that, since organizations like ADC will have to divert personnel and resources to the point that they will not be able to address the increased demands brought about by precinct splits, a disproportionate number of minority citizens will be able to vote. Reed Affidavit ¶ 11.

104. Because of the voter confusion that ensues from split precincts, most states consider splitting precincts to be unwise, and avoiding such splits is a kind of universal traditional districting principle. Arrington Report ¶ 76. The House and Senate plans increase the problems for minority voters, campaigns and organizations by the way the new district lines split many counties. Many of the county splits are unnecessary, and the House and Senate plans redraw a number of minority districts in a very irregular, contorted manner. Organizations that provide rides to the polls or engage in other "Get Out the Vote" activities will have to reorganize or form new alliances with shifts to new House, Senate, Congressional, County Commission, etc. type assignments. The irregularity of district lines is an impediment to such campaign activities, and will further stretch limited minority resources. As a result, a disproportionate number of minority citizens will not be able to vote. Reed Affidavit ¶ 11.

105. No political data is available for census blocks, the basic units of redistricting (pieces of land surrounded on all sides by a physical feature such as a road, waterway), railroad line, or a political boundary such as a county or city limit. Election results are tabulated only at the precinct level. In Alabama one cannot know from available data how the voters in a given census block voted. Arrington Report ¶ 78.

106. Mr. Hinaman relied heavily on racial data in drawing the districts, as he split 164 precincts in his Senate plan and 423 in his House plan. Mr. Hinaman split 47 precincts into three in the house plan, six into four pieces, and one into an unbelievable five pieces. There are fewer splits in senate plans because the districts are so much larger, but here too many splits are along racial lines. For example, the Senate plan raised the black percentage from an already excessive 71 percent to over 75 percent under the State's plan by splitting precincts 1A, 1B, 1C, 1D, 3F, 3G and 5M along

racial lines and packing the black portions in Senate district 26. EX. V at 90-97. Similarly, the State's Senate plan splits 46 precincts around District 22 along racial lines and thereby contributed to the reduction the non-white population of the district. Arrington Report ¶ 80.

107. The precinct splits involved in Senate district 22 illustrate another feature of the precinct splits: the creation of difficulty in both election administration and minority political participation. The contours of Senate district 22 are very similar to the boundaries of House district 68 in terms of the lines on Washington, Monroe and Conecuh Counties. Doc. 30-35; Doc. 30-38. In Washington County, the Senate and House plans split the Mcintosh Community Center, McIntosh Voting House and Cortelyou precincts along slightly different lines (e.g., 26 person difference in the McIntosh Community Center) so that a new precinct, voting table and ballot style will be necessary for each split. EX. W at 142; EX. V at 73. In Monroe County, the State's House and Senate plans similarly split the Purdue Hill, Days Inn, Monroeville Armory, and Housing Authority precincts, the last with only a four-person difference. EX. W at 141,; EX. V at 79. In Conecuh County, on the other hand, the House and Senate lines split completely different precincts, so that10 precincts are split in a county with only 13,228 residents. EX. W at 138-139; EX. V at 79.

108. As detailed in *Vera v. Richards*, 861 F. Supp. 1304, 1325 (S.D. TX 1994), splitting precints can create "an electoral nightmare." There, in one county "the county clerk's office sent the wrong ballots to certain precincts and erroneously counted those votes within the wrong District... as a result of the complex new district lines." See also EX. Q. Given the voter confusion that ensues from split precincts, most states consider splitting precincts to be unwise, and avoiding such splits is a traditional districting principle. Arrington Report ¶ 76.

109. The ALBC alternative plans split no precincts in the Senate, and only eleven (11) in the House. Arrington Report ¶ 81.

110. Through the House and Senate redistricting plans, the Legislature has created a stark racial division. Almost all districts are either strongly non-white, or strongly white. The districts in the middle, that might be competitive for the parties or ability/non-packed districts for minority voters, are largely missing. Arrington Report ¶ 50.

111. In the current politics of Alabama, minority voters would have no influence over a Republican representative, who would almost certainly have been elected without minority support because of extreme polarized voting, and who would be part of a party coalition with decided racist elements. Arrington Report ¶ 55.

112. If the minority VAP in a district is increased from 10 percent to 20 percent in a district that a Republican usually wins, this would probably not increase minority influence at all. In the same way, when a district minority concentration is increased from 55 percent to 75 percent, it does not necessarily enhance minority ability to elect at all. Arrington Report ¶ 55.

113. The Legislature drew the House and Senate plans so as to perpetuate or create a kind of "political apartheid" such as the Supreme Court rejected in *Shaw v. Reno*,509 U.S. 630 (1993), and its progeny. Arrington Report ¶ 26. The all-white Republican super-majority in the legislature designed the districts to create a situation where the Democratic Party in the legislature would be all black. This has a number of partisan advantages for the Republicans. It cuts off an important route to higher office for politically ambitious whites forcing them to choose the Republican Party as the vehicle for their ambitions. And it creates the impression among white voters that the Democratic Party is a "Black Party," as opposed to a strongly integrated multi-racial/ethnic party. It also creates

the impression that the Republican Party is not just a white party, but is The White Party, the natural home for all white voters. Arrington Report ¶ 27.

114. White Democrats in the Legislature are frequently asked by their Republican colleagues to switch parties, black Democrats are not similarly recruited. Arrington Report ¶ 28. Rep. Joe Hubbard was told that he needed to switch from the Democratic Party to the Republican Party because, in the future, the Democratic Party would be virtually a black party. EX. FF, Declaration of Joe Hubbard; Arrington Report ¶ 28.

115. Sen. Jerry Fielding (Senate District 11) joined other Democrats in opposing the enacted plans because the senate plan made his district impossible for a Democratic candidate to win. He subsequently changed parties. The enacted plans reduced the non-white voting age population (VAP) in his district from 34.2% to 15.3%. Sen. Fielding's new district contains only 22% from his old district. This is a clear example of cracking white Democrats districts by manipulating minority concentrations to defeat them or force them to become Republicans. Arrington Report ¶ 28.

116. Speaker of the House Mike Hubbard, in his book Storming the State House, Montgomery: New South Books, 2012 at p. 116, writes: "I commissioned an in-depth study of voting patterns in various districts represented by **white** Democratic legislators across the state. We looked at past results in presidential elections, gubernatorial contests, and other statewide offices and pinpointed the areas that cast the most Republican ballots yet continued to send [white] Democratic lawmakers to Montgomery." (emphasis added). Arrington Report ¶ 29.

117. Senate President Pro Tem, Del Marsh, openly stated his intent to eliminate all of the white Democratic senators, which would have the effect of cementing white Republican control of

the legislature, institutionalizing the minimization of black influence, and leaving the Democratic Party as a black-only party. *Id.*

118. The Legislature enacted the House and Senate plans so as to place the Republican Party in the same position that the Democratic Party occupied in Alabama prior to the enfranchisement of minority voters: the Republicans would be both a white-only Party and, for all practical purposes, the only party in the state. Without the ability of some white Democrats to win office and work in coalition with minority Democrats, the racial minority legislators become isolated in a political ghetto, permanently locked out of participation in the political process. Arrington Report ¶ 30.

119. In prior Alabama redistricting, the Legislature used the traditional 10 percent deviation standard; and a 10 percent deviation allowance is the usual tradition for state legislative districts in most states and local jurisdictions. Arrington Report ¶ 69.

120. In *Central Alabama Fair Housing Center et al. v. Magee*,, 835 F.Supp.2d 1165 (M.D. Ala. 2011), the court found intentional discrimination by the Republican majority in the legislature against Hispanic persons including Hispanic citizens, and that the treatment of Latinos was driven by animus against Latinos in general.

121. In *United States v. McGregor*, 824 F.Supp.2d 1339 (M.D. Ala, 2011) the court found that powerful members of the Republican majority in the legislature acted specifically and intentionally to minimize or cancel out the ability of black voters to participate equally in the political process by reducing African-American voter turnout.

122. In addition to persons named in the McGregor decision as having expressing such racial intent, other powerful Republican legislators were engaged in the referenced conversations,

including Senator Larry Dixon of Montgomery, Chair of the Senate Energy and Natural Resources Committee; Judiciary Committee Co-Chair and Local Legislation 3 Chair Ben Brooks of Mobile; Senate Governmental Affairs Chair and Rules Committee Vice-Chair Jimmy Holley of the "Wiregrass" region of Alabama; Senate Finance and Taxation Education Chair Trip Pittman of Baldwin County; and Monica Cooper, a Republican Senate Caucus staff member. Representative Jay Love (a white Republican) told Representative Hubbard that he opposed a districting plan for his (Love's) district because it would fall below 60% white within the decade and that would hurt his chances to win reelection. Arrington Report ¶ 93; EX. FF.

123. None of the other white Republican leaders involved in these and other recorded calls made objections to the racial comments, and after the public release of the tape recordings, there was no response from the Republican leadership in the legislature. The State Republican Chair defended Senator Beason as late as June 2011. Senator Beason has never offered a public apology for his recorded racist comments. Senate President Pro Tem, Del Marsh, retained Senator Beason as the Chair of the powerful Rules Committee until 15 November 2011. The Republican Governor subsequently rewarded Lewis with a state court judgeship. Arrington Report ¶ 94.

DISCUSSION

A. The Alabama Democratic Conference has Organizational Standing to Pursue all its Claims.

1. The Alabama Democratic Conference has organizational standing to pursue its racial gerrymandering claims.

In order for an organization to have standing, it must show that "the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts." *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009)

(quoting *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008)). Standing requires "only a minimal showing of injury" and "[t]he fact that the added cost has not been estimated and may be slight does not effect standing." *Browning*, 522 F.3d at 1165 (quoting *Crawford v. Marion County Election Bd.,* 472 F.3d 949, 951 (7th Cir. 2006)). Such an injury is "sufficiently concrete to be more than the 'abstract social interests' not cognizable as injuries under Article III." *Id.*

In *Browning*, the Court was faced with a challenge by the NAACP and other groups to a Florida voter registration statute. In order to prove standing, the NAACP provided various examples of how its resources would be diverted from its regular use in order to address the new statute. The NAACP noted that it would have to allocate personnel and time to educating volunteers on compliance with the new statute and resolve problems with voters being left off rolls on election day, as opposed to using its resources for registration drives and general voter education. The NAACP also anticipated spending additional hours addressing voter matching failures. Likewise, the NAACP would likely have to divert resources away from language-translation assistance in order to compensate for other obstacles created by the statute. As a result, the 11th Circuit found that the NAACP showed a sufficient concrete injury because the "organization reasonably anticipate[d] that they [would] have to divert personnel and time" away from its regular activities as a result of the challenged statute. *Browning*, 522 F. 3d at 1165-66.

Likewise, in *Billups*, the 11th Circuit reached the same conclusion when the NAACP challenged a statute requiring government-issued photo identification as a condition for voting. The NAACP provided similar examples to those described in *Browning*. It noted that, because of the new voter identification law, the NAACP would have to divert funds away from mobilizing,

educating, and registering voters and shift them to assisting individuals in their efforts to obtain acceptable photo identification. Likewise, the NAACP would have to reduce the number of voter registration drives it typically conducted, as a product of allocating resources to areas addressing the new law. Finally, the NAACP also noted that it would need to increase the funds typically allocated for absentee voting, since that was a viable option to voters who did not have a proper form of identification. Consequently, the Court explained that since the statute forced the NAACP to divert resources from its regular activities that would cause its "noneconomic goals [to] suffer," the organization had standing as well. *Billups*, 554 F.3d at 1350.

In its Motion for Summary Judgment, the State fails to address any of the common factors when determining whether an organization has standing. Rather, the States simply tries to argue that because the ADC is not an individual and thus does not "live" anywhere, it therefore lacks standing. This argument lacks merit. As outlined above, in order to have standing, the ADC must show that the illegal acts (racial gerrymandering)[6] by the State forces the ADC to divert resources from its normal operations in order to combat those illegal acts.

According to Dr. Joe L. Reed, the President and Chairman of the ADC, the State's illegal acts will undoubtedly harm the ADC. In addition to the infringement of its members' right to vote, the ADC will also be harmed by forcing it to divert resources to address the challenges of the State's redistricting plans, which is permeated with racial gerrymandering. The ADC is an organization whose mission "is to 'organize' and to 'unify' the vote of the African American population and also to make the African American vote and opinion appreciated and respected." Reed Affidavit ¶ 3.

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[6] The Newton Plaintiffs would note that the State Defendants challenge to standing is only related to the ADC's claim of racial gerrymandering. If this Court were to conclude that the ADC does lack standing, it should not affect any of the ADC's other claims.

The ADC focuses on "voter registration drives, monitoring voting, employing African Americans, and helping African Americans to be able to run for office and to hold high positions." Reed Affidavit ¶ 4. Further, the "ADC uses its funds and resources to educate voters, for Get Out the Vote efforts, to endorse political candidates of all races for elected and appointed offices, to lobby for and against legislation, to sponsor reapportionment plans statewide, to support lawsuits dealing with political matters and elections, and to organize and educate voters regarding political issues relevant to the organization's purpose." Reed Affidavit ¶ 5.

Dr. Reed contends that the State's redistricting efforts, which implement "an excessive division of counties and voting precincts," will ultimately create a myriad of problems that "fall most heavily on minority voters" which in turn will excessively burden the ADC and its resources. Furthermore, Dr. Reed has provided great detail on how the State's redistricting efforts will ultimately damage minority citizens and the ADC:

> 8. It is sometimes essential to split counties and precincts to comply with legal requirements, but there is a strong governmental interest in minimizing the number of counties and precincts split, especially from the perspective of minority voters and candidates. The division of existing voting precincts by district lines will, of course, necessitate the realignment of precinct boundaries and the reassignment of voters to new precincts. The process of reassigning voters will require considerable effort by the Boards of Registrars. Many of the Boards of Registrars, in my experience, lack technical skills.
>
> 9. The precinct splits also are likely to require a number of additional polling places. Locating and securing accessible sites with appropriate space and parking will involve time and resources on the part of county government, and we can no longer count on Section 5 to make sure the new polling places are not discriminatory.
>
> 10. The problems for the counties are less serious compared to the problems for voters who will need to be notified. Reassignment of voters to new precincts can, in the nature of things, result in mistakes: voters may be assigned to the precinct. That has been the case in the

past. Voters also must learn of their new polling place assignments. That in turn requires knowledge that the polling place assignments have been changed or may have been changed, and the ability to ascertain the correct new assignment. Voters who lack internet access or lack reading skills – disproportionately minority voters – are at a severe disadvantage. Voters must actually get to the new polling places as well, which may be in an unfamiliar neighborhood. A disproportionate number of minority voters will not be able to navigate this process and will be discouraged from voting, or will go to the wrong polling location and lack the time, energy and resources to get to the correct site to cast a ballot.

11. As a practical matter, many minority voters rely on political campaigns and organizations to get such election information, and also to obtain rides to the polls. The changes flowing from the precinct splits will divert time and resources from minority campaigns and organizations like the ADC, which is already at a severe financial disadvantage. To make things worse, the Legislature has taken steps to de-fund black political organizations like the ADC by cutting off funds from sources like the Democratic Party, unions, and advocacy groups through the ban on transfers to the ADC via political action committees (PACs), and by its attacks on the AEA. Consequently, the ADC's resources and personnel will be undoubtedly be stretched thin to the point that they will not be able to meet increased demands, resulting in a disproportionate number of minority citizens being able to vote.

12. The House and Senate plans increase the problems for minority voters, campaigns and organizations by the way the new district lines split many counties. Many of the county splits are unnecessary, and the House and Senate plans redraw a number of minority districts in a very irregular, contorted manner. Organizations that provide rides to the polls or engage in other "Get Out the Vote" activities will have to reorganize or form new alliances with shifts to new House, Senate, Congressional, County Commission, etc. type assignments. The irregularity of district lines is an impediment to such campaign activities, and will further stretch limited minority resources. As a result, a disproportionate number of minority citizens will not be able to vote.

13. The need for voter education and organization activities will be extraordinary as well. The party primary elections will be held on Tuesday, March 4, 2014. In addition to the need to inform voters of changes in district and polling places, the State of Alabama has enacted a new voter identification law. Alabama has not finalized its procedures for implementing this plan and for notifying voters of the

> requirement. A new voter ID requirement will generate confusion, and an effective campaign will have to spend time and resources educating voters in a very short time. In Georgia it took two years and a major publicity campaign.
>
> 14. The ADC is particularly concerned with the special difficulty of assisting voters who cannot read or who rely on Spanish translations. The state has no procedures for publicizing election information in Spanish or in any Asian languages. These citizens face unremitting hostility from state and local officials and regularly require assistance in voting.
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> 15. Ultimately, some boundary changes are necessary. Some counties and precincts have to be split to comply with federal requirements. However, there is no federal law requirement that to split other counties that the House and Senate plans fracture. The State's plans go far beyond what is necessary and they split counties and precincts in ways that are unnecessary and illogical.
>
> 16. The State's House and Senate plans will disrupt existing minority political channels and systems, and add to the financial costs of minority candidates and others supporting minority participation in the new districts. Aside from the problems that the plan creates in terms of the opportunity of minority voters to elect candidates of their choice to the Legislature, the plans place new burdens on minority voters and make it harder for them to vote. As a result of these plans, many minority citizens will be unable to cast ballots in the 2014 elections.

Reed Affidavit ¶¶ 8-16. As is described above, the problems and issues that the ADC will undoubtedly face if the State's redistricting plans are allowed mirror the examples noted in *Browning* and *Billups*, which the 11th Circuit has previously found sufficient to establish organizational standing. Consequently, despite the State's contentions, the ADC possesses proper standing to assert a racial gerrymandering claim.

2. The Alabama Democratic Conference has Organizational Standing to Pursue a Challenge to SD 11.

As set forth above, the ADC has organizational standing to assert racial gerrymandering claims. The fact that none of the individual Newton Plaintiffs reside in the counties that make up

SD 11 is of no consequence, since the ADC is a proper organizational plaintiff in this matter. In any event, the ADC also has individual members that reside in Calhoun County, Coosa County, Elmore County, and Talladega County, all of which are a part of SD 11. Reed Affidavit ¶ 6. As such, the State Defendants challenge to standing lacks merit.

B. The Proposed House and Senate Plans would Result in a Denial to Minority Voters of an Equal Opportunity to Participate in the Political Process and Elect Representatives of Their Choice

Oddly, although the State moves for summary judgment under Section 2 of the Voting Rights Act, the State never addresses the familiar standards for determining whether an electoral scheme violates the results prong of Section 2 of the Voting Rights; nor does the State directly address the legal standards related to the purpose prong of Section 2. By examining the facts of this case under the relevant legal framework, it becomes abundantly clear that the State's motion for summary judgment is utterly baseless.

A violation of the discriminatory results prong of Section 2 in the instant electoral system context exists where "a bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Thornburg v. Gingles*, 478 U.S. 30, 49 (1986). That is, a violation of Section 2 occurs where (1) the minority community votes cohesively; (2) "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate"; and (3) the minority population is "sufficiently large and geographically compact to constitute a majority in a single-member district". Id. at 50; See also *Bartlett v. Strickland*, 556 U.S. 1, 12-14 (2009). Once these threshold elements are present, the Court moves to determine whether under of the totality of the circumstances to determine whether "as a result of the challenged practice or structure, plaintiffs do not have an equal opportunity to

participate in the political processes and to elect candidates of their choice." *Gingles*, 478 U.S. at 44.

1. Voting in Alabama is Racially Polarized

Defendants admit that elections in Alabama remain racially polarized in general elections, and the expert report of Dr. Lichtman provides the all-too-familiar details.

2. The Alabama Minority Population is Concentrated so that Additional Compact Majority-Minority Districts Can be Drawn

The illustrative plans accompanying for Jefferson and Montgomery Counties show that an additional compact district with a black majority of voting age population can be drawn in each of those counties entirely consistent with traditional redistricting criteria. The illustrative plans noted above demonstrate that compact and contiguous Senate districts also can be drawn in which minorities constitute a majority of the voting age population. The illustrative plans, unlike those of the State, also avoid any unnecessary division of any county boundary and thus comply with the Alabama Constitution Articles 199 and 200 and the strong community of interests held by counties. The State plans avoid these additional districts by packing minority population into black majority districts in Jefferson and Montgomery Counties and by fragmenting or "cracking" the minority population in Madison County.

The illustrative Senate district in Madison County has a black plurality of voting age population and the black-Hispanic coalition comprises over 50 percent of the voting age population: there is a black plurality and black voters and Latino voters have a commonality of interest and are politically cohesive. This district provides an opportunity for minority voters to elect a candidate of their choice.

The Supreme Court has not had the occasion to address directly the issue of whether a district in which a coalition of minorities forms a majority of voting age population. *Bartlett v. Strickland*, 556 U.S. at 13-14.[7] A large majority of lower courts, however, including the Eleventh, Fifth, and Second Circuits, have allowed minority group coalitions to satisfy the first *Gingle*s prerequisite. See, e.g., *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (Fifth Circuit allowed African-Americans and Latinos to be combined for purposes of satisfying the first Gingles prerequisite so long as the groups could show that they were politically cohesive); *Concerned Citizens v. Hardee County Bd.*, 906 F.2d 524, 526-27 (1990) (in which the Eleventh Circuit stated: "Two minority groups … may be a single section 2 minority if they can establish that they behave in a politically cohesive manner"); and *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271,276 (2d Cir. 1994), vacated and remanded on other grounds, 512 U.S. 1283, 115 S. Ct. 35, 129 L. Ed. 2d 931 (1994) (Second Circuit combined African-Americans and Latinos for purposes of satisfying the first *Gingles* prerequisite).[8] These cases all are consistent with

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[7] We have very different facts here: "minorities make up more than 50 percent of the voting-age population in the relevant geographic area," *Bartlett v. Stickland* ,556 U.S. at 18, as compared to the 39 percent minority in Bartlett: and as demonstrated by Dr. Lichtman, here a single minority has a clear plurality sufficient to meet the "opportunity to elect" standard of Section 2.

[8] These cases are hardly alone. See, e.g., *LULAC Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (rehearing en banc), cert. denied 114 S Ct 878 (1994)("[i]f blacks and Hispanics vote cohesively, they are legally a single minority group"); *Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs,* 906 F.2d 524 (11th Cir. 1990); *Overton v. City of Austin*, 871 F.2d 529, 538 (5th Cir. 1989); *Brewer v Ham*, 876 F.2d 448, 453 (5th Cir 1989)("minority groups may be aggregated for purposes of asserting a Section 2 violation"); *Campos v. City of Baytown*, 840 F.2d 1240, 1244-45 (5th Cir. 1988) ("a minority group [in this case a coalition] is politically cohesive if it votes together"), reh'g denied, 849 F.2d 943, cert denied, 492 U.S. 905 (1989); *LULAC Council No. 4386 v. Midland ISD*, 812 F.2d 1494, 1501-2 (5th Cir. 1987), vacated on other grounds, 829 F.2d 546 (5th Cir. 1987) (en banc); *France v. Pataki*, 71F.Supp. 2d 317, 327 (S.D.N.Y .1999)*; Latino Political Action Committee v. City of*

Congress' finding that the Voting Rights Act protects minorities' ability to elect candidates of choice either "directly or coalesced with other voters," (H.R. REP. No. 109-478, at 71), and with Supreme Court's holding that the Voting Rights Act should be "interpreted ... in a manner which affords it 'the broadest possible scope' in combating racial discrimination." *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969).

3. The House and Senate Plans Result in Over-Representation of the White Population and Under-Representation of the Minority Population of Alabama to the Disadvantage of Minority Voters.

The plans substantially over-represent the declining share that white voters now comprise of the Alabama population. The most recent census data shows that the white non-Hispanic population comprises only two thirds of the Alabama population, but the Legislature has locked in 74 percent of House and 77 percent of Senate districts for white voters. Minority voters are substantially and unnecessarily under-represented.

The House and Senate plans, moreover, lock in that disparity for the foreseeable future, even as their share of the population declines. As Dr. Arrington discusses, the plans are startlingly devoid of "swing" districts - those with a sufficient racial mix in population that they might change hands as political winds shift and demographic changes occur. Representative Love's district, for example, was openly configured to protect against demographic changes he expected. The plans thus lock in a white super-majority that can utterly exclude and ignore the black legislators and their remaining white allies, as indeed they did during the redistricting process itself.

4. The Totality of the Circumstance Establishes a Violation of Section 2 by both the House and Senate Plans

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Boston, 609 F.Supp. 739, 746 .C.Mass.1985) aff'd, 784 F.2d 409 (1st Cir.1986).

It is undisputed that elections in Alabama are polarized along racial lines, and the facts available to the Court demonstrate, even without the benefit of the inferences to which plaintiffs are entitled in the summary judgment setting, that the minority population is situated so that additional majority-minority districts can be drawn. The facts also demonstrate the other elements of a Section 2 claim. It is undisputed that black citizens of Alabama have been subject to a long history of racial discrimination in voting and other areas, and it is all too clear that the same racial-ethnic animus has greeted the more recent Latino population of Alabama.[9] In addition, it is undisputed that minority citizens of Alabama suffer from the effects of discrimination in areas such as education, employment and health with their concomitant effects on the ability to finance campaigns. And by not only freezing the under-representation of minorities in the Alabama House and Senate for the foreseeable future, but also by leaving the white majority free to ignore them, the House and Senate plans deprive minority voters not only of equal representation but of any realistic opportunity to "pull, haul and trade" either within the legislative districts or within the Legislature itself. *Johnson v. DeGrandy*, 512 U.S. 997,1020 (1994).

C. The State Relies on the Inapplicable Section 5 Standard and Misinterprets the Section 5 Standard

In all, the State's request for summary judgment under the effects prong of section 2 is singularly divorced from the legal elements of a Section 2 claim. Indeed, the facts set forth above

[9] Rather than set forth facts that establish the absence of the elements of a Section 2 results claim, the State of Alabama has taken the position that the State of Alabama is not responsible for conditions fostered by actions of the State of Alabama in its long support of racial segregation and White Supremacy. See Doc. No. 59 at 4, 5, 6, and 7. The State seems to confuse itself with the Republican Party; and the Republican Party is not responsible for the actions the State took when many of its members were Democrats. *Id.* at 6. In the same vein, the packing of minority districts is not their fault because the Democrats did the same sort of thing in a different time and under different circumstances. *Id.* at 6, 7-8,12.

indicate that the State did not even consider compliance with Section 2. The State instead, focuses on a claim that their plans satisfy the requirements of Section 5 of the Voting Rights Act.

Section 5 and Section 2 have entirely different standards. The congressionally designated Section 5 forum underlined the difference between Section 5 and Section 2 early in the State's redistricting process.

An "opportunity" to elect is meaningful under Section 2 of the VRA, but not necessarily under Section 5:

> Section 2 is violated upon a showing that minorities "have less opportunity than other members of the electorate to ... elect representatives of their choice.….
> A Section 5 claim requires a determination of how and where minority citizens' ability to elect is currently present in a covered jurisdiction and how it will manifest itself in a proposed plan. This requires identifying districts in which minority citizens enjoy an existing ability to elect and comparing the number of such districts in the benchmark to the number of such districts in a proposed plan to measure the proposed plan's effect on minority citizens' voting ability.

Texas v. United States, 831 F.Supp.2d 244, 261-262 (2011). This case presents this Court with a fundamentally different question than was before the Attorney General during Section 5 review.[10]

To give one example, while the Attorney General simply counts the effective minority

[10] And at times the Attorney General got the answer wrong. See, e.g., *Blanding v. Dubose,* 454 U.S. 393 (1982) (minority citizens appealed successfully where Attorney General failed to appeal an adverse section 5 ruling); *Young v. Fordyce*, 520 U.S. 273, 281 (1997); *LULAC v. Perry*, 548 U.S. 399 (2006) (voting change precleared by the Attorney General found to be racially discriminatory); *Buskey v Oliver*, 565 F. Supp 1473 (M.D. Ala. 1983) (voting change precleared by the Attorney General found to be racially discriminatory); and *Major v Treen*, 574 F. Supp. 325 (E.D. La 1983) (three judge court) (voting change precleared by the Attorney General found to be racially discriminatory), to name a handful of cases. Most recently, the Attorney General did not oppose preclearance of the Texas Senate redistricting plan and aspects of the Texas congressional plan that were found to have been adopted with a racially discriminatory purpose. *Texas v. United States*, 887 F.Supp.2d 133 (2012).

districts under the old plan and sees if there are more or fewer in the new plan, a Section 2 violation also flows where an emerging minority coalition in a district in one area (Laredo or Birmingham or Montgomery) is broken up and the district is moved to another area (Austin or Huntsville or Shelby County), even if the minority voters in the new district can elect a representative of their choice. *LULAC v. Perry*, 548 U.S. 399, 429 (2006) ("these conflicting concerns are resolved by allowing the State to use one majority-minority district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be accommodated.")[11]

The State gets it wrong, moreover, even within the context of its misidentified statute. Section 5 courts have flatly rejected the concept of a bright line for minority effectiveness. There is no need to maintain the existing minority percentage in a district and no validity in a bright line "effective majority" such as the antiquated 65 percent figure the State offers. Indeed, while the issue of redistricting was being considered by the Legislature, hot on the heels of the public hearings, the District of Columbia Court expressly rejected an effort of Texas to persuade

> this Court to rely solely on voter demographic data to identify majority-minority districts and to count only such districts as minority ability districts. This Court cannot oblige. We find that a simple voting-age population analysis cannot accurately measure minorities' ability to elect and, therefore, that Texas misjudged which districts offer its minority citizens the ability to elect their preferred candidates in both its benchmark and proposed Plans. Since Texas used the wrong standard, there are material facts in dispute about which districts are minority ability districts in the benchmark and proposed Plans.

Texas v. United States, 831 F. Supp.2d at 261. Similarly, the Attorney General has issued guidance

[11] The State eliminated an extant black majority House district in Jefferson and an emerging majority House district Montgomery Counties even though the Section 2 right was present and could be accommodated

on Section 5 and has rejected the standards used by the Legislature:

> In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district.

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Federal Register, 27, 7470, at 7471. The Guidance also specifically rejects packing: "[t]he Department also will consider whether minorities are overconcentrated in one or more districts." *Id*. at 7472. And indeed, Assistant Attorney General Reynolds had interposed a Section 5 objection to Alabama redistricting involving packing in 1982.

If the District of Columbia Court and the Attorney General were insufficient, the Legislature had guidance from their own counsel, Mr. Walker, in describing the appropriate minority population level for majority-minority districts to satisfy Section 5:

> 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.

Arrington Report ¶ 40. Despite this chorus of advice and a record of electoral success by black legislative candidates at the simple majority level, the State not only continued excessive black super-majorities but increased them by as much as 14 percentage points in the House (district 60, Jefferson County) and as much as nine percentage points in the Senate plan (district 30, Mobile County).

D. The Legislature Enacted the House and Senate Plans with a Racially Discriminatory Purpose to Minimize and Cancel Out Black Political Strength

Section 2 of the Voting Rights Act, like the 14th and 15th Amendments, proscribes actions taken with a racially discriminatory purpose. *Mobile v. Bolden*, 446 U.S. 55 (1980). The State's motion does not directly address the purpose prong of Section 2 or the Fourteenth Amendment (while seeking to dismiss both claims) through the applicable legal standards, but focuses on two arguments: that there was no "packing" of minority districts and that the State's understanding of the requirements of the Voting Rights act was reasonable. There is, however, much more to the issue of racially discriminatory issue.

1. The State's Approach to Racial Considerations Requires Strict Scrutiny of the House and Senate Plans

Some consideration of race in redistricting is inevitable: racially segregated housing patterns and, in Alabama, voting patterns that correlate tightly with race make an awareness of race unavoidable, and the need to comply with the Voting Rights Act necessitates some awareness of and caution regarding the racial makeup of districts. But there are limits. "[S]o long as they do not subordinate traditional redistricting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny….Only if traditional criteria are neglected *and* that neglect is predominantly due to the misuses of race does strict scrutiny apply." *Bush v. Vera*, 517 U.S. 952, 993 (1996). "[A] district drawn in order to satisfy § 2 must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid § 2 liability." *Id.* at 979.

The Alabama Legislature exceeded those limits. The Legislature began redistricting by drawing in the black majority districts without the consultation of black members and without regard

to traditional redistricting criteria. The Legislature in essence established a quota for black majority districts and insisted that the number of minority districts not change despite demographic changes. Although the black populations in both Jefferson and Montgomery counties were rising and the white population was falling in both counties, the State transferred majority-minority districts out of both counties, and Senator Marsh set aside eight minority Senate districts. The Legislature insisted that the black percentage in each majority black district not change downward, regardless of the need for such a majority. The map-drawer, Mr. Hinaman, considered only the black percentage and ignored other racial groups and the black-white ratio of the districts as he drew them. Mr. Hinaman unnecessarily split many precincts, and did so along racial lines in the course of packing districts, such as Senate districts 23 and 25. The Legislature considered the minority voters in Birmingham and Huntsville, two very different cities with very different histories, economies, and "disparate needs and interests", *LULAC v. Perry*, 548 U.S. 399, 435 (2006), as interchangeable. The Legislature focused on the race of the legislators themselves in defining House district 85 and not House district 73 as a minority district. House district 73 has a black plurality and a higher black percentage than white-plurality House 85 (48.44% black, 44.07% white in 73; 47.94% black, 48.50% white in 85). But what the State saw was that the incumbent in district 85 is black while the incumbent in district 73 is white.

As set forth below, the State set aside traditional redistricting criteria, including the procedural and substantive commands of the State Constitution, all with a distinct and discriminatory racial impact. Accordingly, the plans are subject to strict scrutiny. *Bush v. Vera, supra*.

2. The Arlington Heights Analysis Demonstrates that the Legislature Drew New Districts with a Racially Discriminatory Purpose

As the Supreme Court reminds us in *Arlington Heights v. Metropolitan Housing Development Corp*., 429 U. S. 252, 265-266 (1977), "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Under the *Arlington Heights* rubric, the "important starting point" for assessing whether the State can establish that the proposed plan was adopted free of a discriminatory purpose is "the impact of the official action whether it bears more heavily on one race than another." Id. Other factors besides impact relevant to a purpose inquiry under *Arlington Heights* include: the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; the sequence of events leading up to the decision; whether the challenged decision departs, either procedurally or substantively, from the normal practice; and contemporaneous statements and viewpoints held by the decision-makers. *Id*. at 266-68.

Such an intensely fact-driven inquiry is typically difficult to resolve at the summary judgment stage. In this case, defendants have not come close to meeting their burden. Indeed, defendants have failed even to address the Arlington Heights factors. Instead, rather than presenting undisputed facts demonstrating the absence of intentional discrimination, the State's claims reveal a laser-like focus on race in the construction of their plans that offends the Constitution.

The constitutional and statutory protection against intentional racial discrimination extends to minorities outside majority-minority areas and to crossover districts - districts "large enough to elect the candidate of its choice with help from voters who are members of the majority and who

cross over to support the minority's preferred candidate." *Bartlett*, 556 U.S. at 13. Senate districts 11 and 22 and House district 73 are examples. While denying such districts the protection of the results prong of Section 2, the Supreme Court in *Bartlett v. Strickland* expressly recognizes that a state's intentional elimination of an existing crossover district "would raise serious questions under both the Fourteenth and Fifteenth Amendments." 556 U.S. at 24. The *Arlington Heights* framework shows, moreover, that racial discrimination motivated the elimination of crossover these districts as well as the elimination of House district 53 and the failure to create majority minority districts in Montgomery and Madison Counties that would have flowed from a non-discriminatory application of traditional redistricting criteria.

In arguing the absence of such purpose in the State's passage of the State House and Senate plans, the State points only to conclusory statements of State legislative officials that the State was motivated by its peculiar view of the requirements of Section 5 and its peculiar view of *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. GA. 2004) and, therefore, not by any invidious unconstitutional purpose.

The State thus addresses the racial purpose prong of Section 2 only obliquely, primarily by pointing at its actions when Democrats were in the majority. However, what is noticeably absent from the State's discussion of discriminatory purpose under Section 2 is any discussion of what the Supreme Court itself has set down as guidance for assessing discriminatory purpose in the context of redistricting. As the Court has stated, "assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a 'sensitive inquiry into such circumstantial and direct evidence as may be available." *Arlington Heights*, 429 U.S. at 266.

In addition, intentional discrimination encompasses actions that purposefully discriminate to achieve an otherwise permissible aim. See *Garza v. County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski J., concurring in part and dissenting in part) (describing purposeful housing discrimination motivated by a desire to maintain property values). Utilizing the *Arlington Heights* analysis in this case a racially discriminatory purpose pervaded the construction of the State's House and Senate districts, as is amply demonstrated both by the reports of the Newton plaintiffs' expert, Dr. Arrington, as well as by the declarations and other exhibits appended to this Response.

a. The Impact of the Decision Points to a Racially Discriminatory Purpose in the Enactment of the Plans

The impact of the redistricting plans fall more heavily on minority voters. As noted above, the plans under-represent the growing minority share of the State's population and over-represent the non-Hispanic whites' eroding majority. The plans go a long additional step in freezing the white over-representation. The House plan eliminates a district in which minorities have achieved a majority of the population and have elected a candidate of their choice who happens to be white. The plan also artificially reduces and avoids districts, such as that of Representative Love, where minorities could make their weight felt in the future with predictable, predicted growth and expansion. Perhaps most insidiously, the plan eliminates crossover districts in which white and minority citizens cooperate and work together, all to give the two political parties racial "faces" - a white party in complete control and a black party that might as well stay home.

b. The Historical Background of the Decision Points to a Racially Discriminatory Purpose in the Enactment of the Plans

The action of the State in devising the proposed House and Senate plan is all too consistent with the state's long history of intentional discrimination in voting. Here, a dramatic "wave" election

in 2010 elections had given the Legislature a veto-proof white Republican majority in both Houses after decades of Democratic control. As the 2010 census revealed, the non-Hispanic white population share was declining, particularly due to an increase in the Hispanic population of the state. Legislators had a well-founded belief that the new Latinos who were citizens and the children of non-citizen immigrants (who themselves would be citizens) would vote against them The new Legislature moved immediately to cement its control including through, among other things, passing a race-based anti-immigration bill aimed at driving Hispanic population from the state.

The 2010 census also revealed that the black population and Hispanic population was growing in Jefferson and Montgomery Counties and that white non-Hispanic citizens were leaving both counties; and that the shift in Montgomery had transformed a 37 percent black district (73) into a black-plurality, majority-minority district. At the same time, rapid increases n the minority population in Madison County revealed a "threat" of a minority Senate district in that county.

This background puts in context the Legislatures action to cement its super-majority status in the Legislature by adopting a redistricting plan that would under-represent minority voters and over-represent their own faction.

c. The Sequence of Events and Procedural Departures Point to a Racially Discriminatory Purpose in the Enactment of the Plans

The Legislature began the redistricting process on September 1, 2011. For months thereafter, selected white members of the Legislature sat with a consultant hired by an outside group, Mr. Hinaman, and worked out how the districts would be drawn. No black legislator had similar access to Mr. Hinaman. The redistricting plan devised by Mr. Hinaman and white legislators was revealed to the public and to black members of the Legislature on May 9, 2012, or one day before the May

10, 2012 deadline the white legislators had given Mr. Hinaman. The decision to hold the plan until well into May prevented the Legislature from considering the plans in its first post-census legislative session as required by Section 199 of the Alabama Constitution. A special session was convened on May 17, 2012, the plans sped through the committee and the floor, and were finally adopted on May 24, 2012 without substantive change.

The process by which the plans were adopted marked a sharp departure from the norm. The public hearings on the plan were held in a vacuum, with no maps or other information that would allow discussion beyond generalities. Only one hearing was held after the plan finally was made public, and at that point the plan was locked in. The plans had been drawn in a uniquely closed setting: white Republican legislators were allowed to sit with Mr. Hinaman as he drew and adjusted districts, but the State denied black legislators such an opportunity. Mr. Hinaman drew the majority black districts without consulting the black members. When, for example, the "Mobile delegation" decided against a simple transfer of excess population from Baldwin County to Mobile County, Senator Dial's explanation that the delegation would not agree to such a transfer completely excluded the black member of the Mobile County Senate delegation, Senator Figures.

After drawing up plans in this closed process, the all-white majority in the Legislature would allow only mutually agreeable swaps between legislators. The Legislature gave no consideration to alternative plans that would better meet its stated redistricting criteria. Changes to improve compliance with the Alabama Constitution could not be considered because of the ripple effect. Among many other departures, the State ignored the requirement of Section 199 of the Alabama Constitution that the reapportionment take place in the first session of the Legislature after the decennial census. The State did not redistrict until after the close of the first regular session, and

instead drew lines in a called special legislative session. The fencing out of black legislators from any effective participation in the redistricting indicates a racially discriminatory purpose. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

d. Substantive Departures Point to a Racially Discriminatory Purpose in the Enactment of the Plans

The State also ignored the substantive commands of the Alabama Constitution which stress the importance of maintaining counties intact. Section 200 of the Alabama Constitution has an express command that counties not be split between Senate districts. Section 198 provides that "[t]he members of the house of representatives shall be apportioned by the legislature among the several counties of the state" and that if new counties are created, "each new county shall be entitled to one representative." Section 199 repeats those commands.

While federal law requires that some counties be split, this does not give the Legislature carte blanche to ignore them. *See Burton v. Hobbie*, 561 F.Supp. 1029, 1035 (M.D. Ala. 1983). ("Furthermore, we find that Act No. 82-629 is impermissible under Ala. Const. art. IX, §§ 198, 199 & 200 because of its disregard for the integrity of county lines. Boundaries of thirty counties were unnecessarily split by the plan. Implementation of such a plan for an entire legislative term is unacceptable.").

Many of the splits in the plans flowed from the Legislature's adoption of a two percent deviation rule. Nothing in the law requires a deviation below 10 percent so long as the Legislature does not abuse the population variances among districts to shift one or more districts from one region of the state to another, thus diluting the votes of the residents of the disfavored region. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) aff'd sub nom *Cox v. Larios*, 542 U.S. 947, (2004). The

Larios court found that retention of the core of districts was not actually a concern of the Georgia Legislature in the redistricting process." *Id.* at 1334. The *Larios* court also found that the State's rationale of incumbency protection was "a permissible cause of population deviations only when it is limited to the avoidance of contests between incumbents and is applied in a consistent and nondiscriminatory manner" that it had been applied unevenly. Id. at 1338. Most particularly, the *Larios* court repeatedly cited the Georgia Legislature's splitting of county boundaries and splitting counties among multiple districts was part of the compelling evidence of the invidious, unconstitutional nature of the plan. *Id.* at 1325, 1326, 1332, 1333, 1335, 1342, 1346-7, 1349, 1354, and 1356. Where such systematic departures from traditional redistricting criteria are absent, a 10 percent population variation is perfectly acceptable. *Rodriguez v. Pataki*, 308 F.Supp.2d 346 (S.D. N.Y. 2004). In essence, the Alabama Legislature took what the *Larios* court found was a bug in the Georgia plans and made it a feature of its own House and Senate redistricting plans.

In Alabama, the standard of maintaining the core of existing districts was ignored to the disadvantage of opportunities for black voters and candidates they support, as in Senate districts 1, 11 and 22 and House districts 53 and 73; and abused as a rationale as in the numerous "packed" districts, or fabricated as a rationale, as in House district 43. The separation of incumbents similarly was fabricated as a rational for the splitting of Jefferson County and Montgomery County, again to the disadvantage of black voters and their representatives in terms of local legislation. The division of Montgomery County in the House was unnecessary even to comply with the State's two percent rule, as were the division of other counties. such as Washington and Greene. Jefferson and Mobile Counties could have been kept intact in both the House and Senate within a 10 percent deviation framework without raising any issue under the Voting Rights Act: all minority districts in the

counties are self-contained. As the alternative plans presented to and rejected by the Legislature demonstrate, it would have been possible to maintain many other counties intact. No law placed any barrier to the Legislature maintaining many more counties intact. The Supreme Court stated the reason for splitting counties at the outset of its consideration of redistricting: "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964).

The control that the Alabama Legislature exercises over various counties and municipalities creates a strong governmental interest in matching legislative district lines to county boundaries, even beyond compliance with the state constitution. [12] In Alabama, the Legislature determines many issues that usually are controlled by the localities themselves. These include such matters as local government salaries, creation of and appointments to local boards and commissions, taxing powers, annexations and de-annexations, and the like. See. e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)

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[12] Significantly every state supreme court that has considered the issue has held that such state constitutional commands retain their full vitality where they do not conflict with federal law. *Craddick v. Smith*, 471 S.W.2d 375 (1971). See *Stephenson v. Bartlett*, 562 S. E. 2d 377, 392, stay denied, 535 U. S. 1301 (2002) (Rehnquist, C. J., in chambers); *Stephenson v. Bartlett*, 582 S. E. 2d 247, 254 (2003); *In re Reapportionment of Colo. Gen. Assembly*, 45 P. 3d 1237, 1247-8 (2002); *Hellar v. Cenarrusa*, 682 P.2d 524, 527-28 (1984) (Idaho Supreme Court upholding a plan with a high deviation in circumstances similar to those of *Brown v. Thompson,* 462 U.S. 835 (1983)); *Legislative Research Commission v. Fischer*, 366 SW 3d. 905(2012) (Kentucky).

In Alaska, which does not have counties but has other state constitutional redistricting requirements, the state supreme court struck down a state redistricting plan because the Redistricting Board had started the redistricting process by drawing districts to comply with the Voting Rights Act, as did Mr. Hinaman, rather than starting by drawing districts that complied fully with the state constitution and adjusting those districts as necessary to comply with federal law. *In re 2011 Redistricting Cases*, 274 P.3d 466 (2012) See also *Hickel v.Southeast Conference*, 846 P.2d 38 (Alaska 1992).

(annexation); *Hale County v. United States*, 496 F. Supp. 1206 (D.D.C. 1980) (at-large elections for county commission); *City of Pleasant Grove v. United States*, 623 F. Supp. 782 (D.D.C. 1985), aff'd, 479 U.S. 462 (1987); (annexations); and *Hardy v. Wallace,* 603 F. Supp. 174 (N.D. Ala. 1985) (method of appointing members to local racing commission). The state constitutional provisions on county boundaries are integral to the legislative power over local legislation. Each county thus constitutes a strong community of interest. In addition to the many social and economic ties that bind residents of particular governmental units, in Alabama a given county's residents uniquely bear common effects, good and bad, of much state legislation.

As it ignored the community of interest within each county, the State ignored other significant communities of interest. The State unnecessarily divided Muscle Shoals, a well-recognized community of interest that long had been intact in Senate district 1. The State intruded numerous predominantly white suburban-dominated districts into urban Jefferson and Montgomery Counties - but never allowed a majority-minority district to have any portion of a suburban county.

e. Contemporaneous Statements by Legislators Point to a Racially Discriminatory Purpose in the Enactment of the Plans

Racial animus is not a precondition for a determination that a particular action was taken with a racially discriminatory purpose. As Judge Kozinski's explaining in opinion concurring in part and dissenting in part in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir.1990):

> Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your

> house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.

918 F.2d at 778 n. 1.

While racial animus is not essential and while the existence of contemporaneous statements of direct racial intent related to current redistricting efforts may be rare, both are present in this case. The candid contemporaneous statements of Senator Beason and others are plain on their face, and the silent acquiescence of other powerful Legislators speak eloquently. Judicial findings in *United States v. McGregor*, 824 F.Supp.2d 1339 (M.D. Ala, 2011) and *Central Alabama Fair Housing Center et al. v. Magee* 835 F.Supp.2d 1165 (M.D. Ala. 2011) establish the too-familiar bias against black citizens is attended by animus against Native American and Latino citizens. Representative Love's concern with the rising black population within his district and action to minimize the black percentage in his district illuminates the Legislature's fear of black voters effectively exercising their franchise.

Analysis of the *Arlington Heights* factors provides compelling evidence that the State acted with a racially discriminatory purpose in devising the House and Senate plans.

CONCLUSION

The Section 2 results standard requires a multi-factored, functional approach to gauge whether a redistricting plan will have the result of denying minority citizens' an equal opportunity to participate in the political process and elect candidates of their choice. The statute requires a complex inquiry into the totality of circumstances of minority political access, and an equally complex inquiry into the motivations of the State in adopting the plans. As set forth above, there are

numerous disputed issues of material fact with regard to the discriminatory results and the discriminatory purpose of the State's redistricting plans for its House of Representatives and Senate, and the State is not entitled to judgment as a matter of law.

Substantial evidence also creates a genuine dispute of material facts concerning the possible presence of a discriminatory purpose. The plan has a racially discriminatory impact. Deviations from procedural and substantive standards, as well as racially-charged contemporaneous statements provide significant evidence of a discriminatory purpose. The State has presented little evidence concerning the intent of the proposed plan beyond self-serving and conclusory statements by the House and Senate Chairs. Assessing the credibility of these witnesses and resolving other disputed factual issues cannot be performed until trial.

The State's motion for summary judgment should be DENIED.

RESPECTFULLY SUBMITTED, this 10th day of July, 2013.

/s/James H. Anderson
JAMES H. ANDERSON [ANDE4440]
WILLIAM F. PATTY [PATTW4197]
JESSE K. ANDERSON [ANDEJ8821]
BRANNAN W. REAVES [ASB-7602-B41R]
JACKSON, ANDERSON & PATTY, P.C.
P.O. Box 1988
Montgomery, AL 36102
(334) 834-5311 (334) 834-5362 (fax)
janderson@jaandp.com; bpatty@jaandp.com
Jkanderson@jaandp.com;breaves@jaandp.com

WALTER S. TURNER [ABA 6307R49W]
PO Box 6142
Montgomery, AL 36106
334-264-1616; wsthayer@juno.com

JOHN K. TANNER [DC BAR # 318873]
3743 Military Road, NW
Washington, DC 20015
202-503-7696; john.k.tanner@gmail.com
Appearing Pro Hac Vice

JOE M. REED [ABA 7499-D59J]
Joe M. Reed & Associates, LLC
524 S Union St.
Montgomery, AL 36104-4626
T(334) 834-2000; F (334) 834-2088
joe@joereedlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2013, I electronically filed the foregoing document using the Court's CM/ECF system which will send electronic notification of such filing to all registered parties:

Luther Strange, Attorney General of Alabama
By: John J. Park, Jr.
Deputy Attorney General
Strickland, Brockington Lewis LLP
Midtown Proscenium Suite 2200
1170 Peachtree Street NE
Atlanta, GA 30309
Telephone: 678.347.2200 / Facsimile: 678.347.2210
E-mail: jjp@sbllaw.net

James W. Davis
Misty S. Fairbanks Messick
Office of the Attorney General
State of Alabama
P.O. Box 300152
Montgomery, Alabama 36130-0152
Telephone: 334-242-7300/ Facsimile: 334-353-8440
jimdavis@ago.state.al.us / mmessick@ago.state.al.us

Edward Still
130 Wildwood Parkway
STE 108 PMB 304
Birmingham, AL 35209

205-320-2882; fax 205-320-2882
still@votelaw.com

James U. Blacksher
P.O. Box 636
Birmingham AL 35201
205-591-7238; Fax: 866-845-4395
E-mail: jblacksher@ns.sympatico.ca

U.W. Clemon
WHITE ARNOLD & DOWD P.C.
2025 Third Avenue North, Suite 500
Birmingham, AL 35203
Phone: (205)-323-1888; Fax: (205)-323-8907
uwclemon@waadlaw.com

Jordan Dorman Walker, Jr.
Balch & Bingham, LLP
P.O. Box 78
Montgomery, AL. 36101-0078
Phone: (334) 834-6500; Fax: (334) 269-3115
Email: dwalker@balch.com

/s/James H. Anderson
JAMES H. ANDERSON