

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

ALABAMA LEGISLATIVE BLACK *
CAUCUS; BOBBY SINGLETON; *
ALABAMA ASSOCIATION OF BLACK *
COUNTY OFFICIALS; FRED *
ARMSTEAD, GEORGE BOWMAN, *
RHONDEL RHONE, ALBERT F. *
TURNER, JR., and JILES WILLIAMS, JR., *
individually and on behalf of others *
similarly situated, *

Plaintiffs,

v.

THE STATE OF ALABAMA; JOHN H. *
MERRILL in his official capacity as *
Alabama Secretary of State, *

Defendants. *

ALABAMA DEMOCRATIC *
CONFERENCE et al., *

Plaintiffs, *

v. *

THE STATE OF ALABAMA et al., *

Defendants. *

* Civil Action No.
* 2:12-CV-691-WKW-MHT-WHP
* (3-judge court)

* Civil Action No.
* 2:12-cv-1081-WKW-MHT-WHP
* (3-judge court)

ALBC PLAINTIFFS' REMAND REPLY BRIEF

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Reply To Defendants' Argument Regarding Racial Predominance:

The Supreme Court found that the drafters of the 2012 House and Senate plans drew the majority-black districts using an unlawful “mechanical” goal of reaching or exceeding, to the extent feasible, their existing black total population percentages. “That Alabama expressly adopted and applied a policy of **prioritizing** mechanical racial targets **above all other districting criteria** (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in **multiple districts** in the State.” 135 S.Ct. at 1267 (bold emphases added). “The legislators in charge of creating the redistricting plan believed, and told their technical adviser, that a **primary redistricting goal** was to maintain existing racial percentages **in each** majority-minority district, insofar as feasible.” 135 S.Ct. at 1271 (bold emphases added). The Supreme Court vacated the judgment for defendants and remanded with instructions that this Court examine each majority-black district individually to see if that racial targeting policy affected its boundaries.

The defendants declined to offer any new evidence that would contradict the testimony of Senator Dial, Representative McClendon, and Randy Hinaman that the drafters did their best to achieve the racial target in every one of the majority-

black districts. Instead, in their remand brief, defendants' counsel attempt to relitigate findings of fact already made by this Court and upheld by the Supreme Court, and they advance counsel-generated excuses, unsupported by any evidence in the record, that attempt to overcome the presumption that racial targeting impacted individual districts. This reply brief will briefly address defendants' "general" arguments that try unsuccessfully to evade the Supreme Court's decision, then will proceed to show how, in each individual House and Senate district, counsel's post hoc theories cannot overcome the overwhelming objective and testimonial evidence that the drafters did in fact reach or exceed their racial target or, in cases where there was insufficient black population, tried their best to do so. For the Court's convenience, this reply brief will attempt to follow the organization of defendants' remand brief.

1. The Supreme Court's Decision Establishes an Evidentiary Presumption That the Drafters' Racial Targeting Policy Affected At Least Some of the Boundaries of Each and Every Majority-Black District.

It is true that plaintiffs still bear the ultimate burden of proving *Shaw v. Reno*, 509 U.S. 630 (1993), violations. But defendants do not attempt to respond to plaintiffs' arguments that the Supreme's Court's finding that an unconstitutional racial targeting strategy was applied to "each majority-minority district," 135 S.Ct. at 1271, establishes a presumption defendants must overcome that each district is

tainted by this racial motive. ALBC Remand Brief, Doc. 256, at 24-26; ADC Remand Brief at 19. Instead of addressing the Court's opinion, defendants ask this Court to apply the reasoning of the amicus brief filed by the United States, which, of course, discusses the state of the record before the Supreme Court's ruling. Defendants' Remand Brief, Doc. 263, at 11-13. The Supreme Court adopted the position of the United States that the instant actions should be remanded for district-by-district analyses. But with respect to the substantive standards to be applied, the Court's opinion adopted the arguments on racial predominance in the ALBC appellants' brief, 2014 WL 4059779 at 18-54, and the arguments on strict scrutiny in both the ALBC and ADC appellants' briefs, *id.* at 54-61; 2014 WL 4059776 at 24-51. More importantly, the Court's majority opinion explicitly adopted Judge Thompson's dissenting view that plaintiffs had challenged all the majority-black districts and that each one of them should be examined to see if the drafters' "race-based criteria predominantly affected [it]." 135 S.Ct. at 1266 (citing *ALBC v. Alabama*, 989 F.Supp.2d 1227, 1329 (M.D. Ala. 2013) (three-judge court) (Thompson, J., dissenting)); 135 S.Ct. at 1268 (citing 989 F.Supp.2d at 1313).

2. Defendants' General Arguments On Racial Predominance Disregard or Misapply the Supreme Court's Opinion.

Defendants' Remand Brief disregards the Supreme Court's stated constitutional standards and its emphasis on "traditional race-neutral districting principles," 135 S.Ct. at 1270, and it tries to replace them with other "race-neutral criteria" that have no support in the evidence of this case. E.g., Defendants' Remand Brief at 17.

a. Defendants ask this Court to adopt criteria of predominance the Supreme Court said explicitly do not apply to this case.

Defendants begin their racial predominance defense by arguing that the evidentiary standards of *Easley v. Cromartie*, 532 U.S. 234 (2001), control this Court's investigation of individual majority-black districts on remand. Defendants' Remand Brief at 17-22. But that is exactly what the instant Supreme Court decision says should not happen. "Cf. *Easley v. Cromartie*, 532 U.S. 234, 258, (2001) (explaining the plaintiff's burden in cases, **unlike these**, in which the State argues that politics, not race, was its predominant motive)." 135 S.Ct. at 1267 (bold emphasis added). With no apologies, defendants' counsel create politics-not-race excuses that have no support in evidence. It would seem this Court could not even consider defendants' *Easley* arguments without violating the Supreme Court's mandate "for further proceedings consistent with this opinion." *Id.* at 1274. Nevertheless, we address them briefly.

Defendants contend it is impossible for plaintiffs to prove that race was the predominant purpose for drawing any one of the 28 majority-black House districts and 8 majority-black Senate districts, because none of plaintiffs' alternative plans complies with the $\pm 1\%$ maximum deviation rule adopted in the Reapportionment Committee's guidelines. Defendants' Remand Brief at 17-22. They base this argument on the following passage from *Easley v. Cromartie*, 532 U.S. 234, 258 (2001):

In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.

Defendants are grossly misinterpreting and misapplying the meaning of the foregoing passage, taking it out of the Court's intended context.

The question before the Court in *Easley* was whether the legislature's predominant motive in redrawing North Carolina's 12th Congressional District was race or politics. "The issue in this case is evidentiary." 532 U.S. at 241. The Court had previously held that the original 12th District boundaries violated *Shaw*, because it was "a deliberate effort to create a 'majority-black' district in which

race ‘**could not be compromised**,’ not simply a district designed to ‘protec[t] Democratic incumbents.’” Id. at 238 (quoting *Shaw v. Hunt*, 517 U.S. 899, 902-903 (1996)) (bold emphasis added). The *Easley* Court held that the challengers failed to prove “that the legislature’s motive was predominantly racial, not political,” 532 U.S. at 241, in the design of the redrawn district, because the drafters relied on “data showing how voters actually behave,” 532 U.S. at 239, and the plaintiffs had not produced an alternative plan with greater “racial balance” that still was likely, based on voters’ past performance, to elect a Democrat. Id. at 245, 249, 258.

In the instant case, the Supreme Court has already found that race was the predominant policy in drafting Alabama’s majority-black House and Senate districts.¹ This direct evidence, in the words of the *Easley* Court, is like “the kinds

¹ Here are some of the relevant passages from the Court’s opinion:

“That Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts in the State.” 135 S.Ct. at 1267.

“The legislators in charge of creating the redistricting plan believed, and told their technical adviser, that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible.” Id. at 1271.

of direct evidence we have found significant in other redistricting cases. See [*Bush v. Vera*, 517 U.S. 952, 959 [(1996)] (O'CONNOR, J., principal opinion) (State conceded that one of its goals was to create a majority-minority district); *Miller v. Johnson*, 515 U.S. 900,] 907 [(1995)] (State set out to create majority-minority district); [*Shaw v. Hunt*,] *Shaw II*, 517 U.S. [899,] 906 [(1996)] (recounting testimony by Cohen that creating a majority-minority district was the 'principal reason' for the 1992 version of District 12).” *Easley*, 532 U.S. at 254.

It is undisputed in the instant case that the goal of reaching or exceeding the 2010 black percentages of the 2001 plan where feasible could not be compromised, as an exasperated Senator Keahy found out.² As noted in the ALBC remand brief, Mr. Hinaman never referred to any political data when he

“The District Court found that ‘insofar as the State’s redistricting embodied racial considerations, it did so in order to meet this § 5 requirement.’” *Id.* at 1272 (citing 989 F.Supp.2d at 1306).

“Indeed, Alabama’s mechanical interpretation of § 5 can raise serious constitutional concerns.” *Id.* at 1273 (citing *Miller*).

“The record makes clear that both the District Court and the legislature relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression.” 135 S.Ct. at 1273.

² A summary of this Court’s findings of fact and the evidence upon which they were based, is set out in the ALBC appellants’ brief, 2014 WL 4059779 at 21-27.

was drawing the majority-black districts, and none was available to him when he was splitting precincts at the block level. Doc. 256 at 14-15.

b. Defendants attempt to resurrect their $\pm 1\%$ rule as an ironclad defense to racial gerrymandering claims.

Defendants' remand brief tries in several ways to do an end-run around the Supreme Court's reversal of this Court's holding that the drafters' rule prohibiting any House or Senate district from exceeding a maximum population deviation of $\pm 1\%$, not race, is the predominant reason traditional districting principles were subordinated in the majority-black districts. Defendants double-down on their misappropriation of *Easley* when they say it is "fatal" to any alternative plans that don't comply with the $\pm 1\%$ rule. Defendants' Remand Brief at 19.

First, *Easley* says alternative plans must be "comparably consistent with traditional districting principles" 532 U.S. at 258. The $\pm 1\%$ rule is not a traditional districting principle, as the *ALBC* Court made clear.

Now consider the nature of those offsetting "traditional race-neutral districting principles." We have listed several, including "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests," *ibid.*, incumbency protection, and political affiliation, *Vera*, 517 U.S., at 964, 968, 116 S.Ct. 1941 (principal opinion).

But **we have not listed equal population objectives**. And there is a reason for that omission. The reason that equal population objectives do not appear on this list of "traditional" criteria is that equal population objectives play a different role in a State's

redistricting process. That role is not a minor one. Indeed, in light of the Constitution’s demands, that role may often prove “predominant” in the ordinary sense of that word. But, as the United States points out, “predominance” in the context of a racial gerrymandering claim is special. It is not about whether a legislature believes that the need for equal population takes ultimate priority. Rather, it is, as we said, whether the legislature “placed” race “above traditional districting considerations in determining which persons were placed in **appropriately** apportioned districts.”

135 S.Ct. at 1271-72 (bold emphases added) (citation omitted). The alternative House and Senate plans the ALBC introduced (identified in Defendants’ Remand Brief at 21-22, as C46, APSX36, C48, and APSX27) do a much better job of complying with the objective traditional districting standards of compactness, contiguity, and respect for county and precinct boundaries than do the enacted House and Senate plans, while attempting to minimize incumbent conflicts. And they satisfy the Supreme Court’s standard of prima facie substantial equality within $\pm 5\%$ without systematically underpopulating the majority-black districts.³ Rather than seeking “racial balance,” the ALBC plans reduce black percentages

³ HB16, the Knight House plan, overpopulates 18 of its 27 majority-black districts and underpopulates 43 of the 78 majority-white districts. APX 21. SB5, the Sanders Senate plan, overpopulates 4 of the majority-black districts and underpopulates 12 of the 27 majority-white districts. APX 23.

The ALBC remand House plan overpopulates 16 of 28 majority-black districts and underpopulates 39 of 77 majority-white districts. APSX 36. The ALBC remand Senate plan overpopulates 3 of 8 majority-black districts and underpopulates 10 of 27 majority-white districts. APSX 27.

below most of those in the enacted majority-black districts. Defendants' Remand Brief at 21-22.⁴

Second, the Supreme Court said "an equal population goal is not one factor among others to be weighed against the use of race to determine whether race 'predominates.' Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to how equal population objectives will be met." 135 S.Ct. at 1270. Defendants claim this language means, as a matter of **federal** constitutional law, that the $\pm 1\%$ rule is "akin" to districting requirements in the Alabama Constitution. Defendants' Remand Brief at 18. That radical conclusion finds no support in the quoted passage,⁵ and it is contradicted by the Supreme Court's statement that the $\pm 1\%$ rule is "a more rigorous deviation standard than our precedents have found necessary under the Constitution." 135 S.Ct. at 1263. The

⁴ In the Knight Plan, C46, 17 majority-black districts have lower black percentages than do the enacted House plan, and in the ALBC remand House plan 22 majority-black districts have lower black percentages. Defendants' Remand Brief at 21.

In the Sanders Plan, C47, 7 of the 8 majority-black districts have lower black percentages than do those in the enacted Senate plan, and in the ALBC remand Plan 5 of the 8 majority-black districts have lower black percentages.

⁵ Defendants acknowledge this when they say "federal law supports a tighter population deviation or, at the very least, is agnostic." Defendants' Remand Brief at 23.

question is whether race predominates in “appropriately apportioned districts.” *Id.* at 1272.

The irony here is that defendants (conditionally) ask this Court to certify to the **state** Supreme Court the question whether **federal** constitutional law gives the Legislature “discretion to select an overall population deviation” that requires violating the “county-splitting restriction[s]” in the Alabama Constitution. Defendants’ Remand Brief at 26; Doc. 264 at 7. This Court has now refused again to address this question, reasoning that “[t]he Supreme Court did not hold that the Fourteenth Amendment requires state legislatures to obey their own constitutions, nor did it decide that we have subject matter jurisdiction to consider whether Alabama complied with its own state constitution in creating the redistricting plans.” Order, July 27, 2015, Doc. 265 at 3. But in their remand brief defendants are asking this Court to decide that the U.S. Supreme Court’s decision **in this case** makes its discretionary adoption of a narrow $\pm 1\%$ rule inviolable. It does not do so, of course.

The point is that the same discretion the Legislature claims it has to adopt a narrow deviation restriction gives it discretion to relax that goal for the sake of complying with other important fair districting criteria in its own Reapportionment Guidelines. In particular districts the drafters were willing to relax or ignore one

or more of every other districting standard in the Guidelines, and they have never explained why the $\pm 1\%$ rule was the only inviolable one. Defendants cannot invoke federal constitutional law to justify refusing to yield even a fraction on its arbitrary choice of $\pm 1\%$ to be the maximum allowable population deviation.

To be clear, plaintiffs contend that, even within the $\pm 1\%$ constraint, the boundaries of the majority-black districts were drawn intentionally to separate black from white residents to the extent practicable, as the discussion of individual districts below will show. The relevant question, as the Supreme Court says, is not whether counties and precincts were split to satisfy the $\pm 1\%$ rule, but whether they were split along racial lines in doing so.

c. Defendants cannot defend split county boundaries with alleged political and incumbent interests.

Defendants' remand brief does not stop with their argument that the $\pm 1\%$ rule trumps county integrity. In the face of explicit Supreme Court precedent to the contrary, they argue that "[c]ounty splitting, in general, is not evidence of racial gerrymandering." Defendants' Remand Brief at 27. They begin by chastising the ALBC plaintiffs for, "[f]rom its inception, [making] this case . . . more about county-splitting than race." *Id.* That assertion is correct, and plaintiffs do not apologize for doing so. Because the Supreme Court has said traditional

districting principles should not be subordinated to race. And the Legislature's own Redistricting Guidelines expressly make county integrity a priority traditional districting principle:

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.

SDX 420 at 3. Incumbent interests, communities of interest, and politics are traditional policies that “shall be observed to the extent that they do not violate or subordinate the foregoing policies prescribed by the Constitution and laws of the United States and of the State of Alabama.” *Id.*

Plaintiffs have tried to make clear they are not pursuing a partisan objective. They are representing voters, not themselves as office holders, and they are seeking districts that provide black, Latino, and white voters fair representation at the state and local levels, in compliance with state and federal constitutional requirements. Black voters in particular have been segregated and isolated at the state level, and we seek to protect at least their ability effectively to influence laws governing their particular counties.

The ALBC plaintiffs' proposed House and Senate plans approach

redistricting from the opposite direction than do the Legislature's plans. Instead of starting, as the legislator/drafters did, with existing majority-black districts, attempting to maintain their racial percentages, the ALBC plans begin with race-neutral, state constitutional and traditional districting principles, then look for opportunities to draw districts that provide black voters an equal opportunity to elect candidates of their choice. Defendants' arguments about naturally occurring majority-black districts in the state's demographics show why the number of majority-black districts would not be reduced substantially by maintaining county integrity and compactness, the traditional districting principles prioritized by the state constitution and the Legislature's own Guidelines.

Defendants contend that "[t]he increased number of [county] splits in the current plan is driven by the tighter population deviation, not race." In a few of the districts discussed below, that is true. But given the Supreme Court's finding that both the House and Senate plans were driven by an unconstitutional racial targeting strategy, it is the State who has the burden of proving, in each instance, that a split county boundary which helped separate voters by race was required by federally mandated population equality.

They go on to say "it is up to the Legislature—not the plaintiffs or this Court—to identify the 'most important' redistricting criterion." Defendants'

Remand Brief at 28. Well, the Legislature did identify which criteria are most important when they adopted their Guidelines. SDX 420. Those Guidelines place county integrity at the top of the list of “policies contained in the Alabama Constitution [which] 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.” Id. at 3. Protecting incumbent interests and communities of interest are among those “redistricting policies . . . embedded in the political values, traditions, customs, and usages of the State of Alabama and shall be observed to the extent that they do not violate or subordinate the foregoing policies prescribed by the Constitution and laws of the United States and of the State of Alabama....” Id.

Repudiating the Legislature’s own Guidelines, defendants’ remand brief now says “[t]he evidence shows that the drafters here clearly prized other race-neutral objectives in the House above keeping counties whole, such as preserving incumbents and the core of districts. For example, it is undisputed that counties were split in the challenged plan to comply with requests of incumbent legislators. Sometimes counties were split because they were split similarly in prior plans. And, as Hinaman noted, county lines do not necessarily constitute a ‘community of interest,’ which was a separate race-neutral principle that the Legislature adopted.” Defendants’ Remand Brief at 29 (citations omitted). This

remarkable turnabout appears to be an eleventh-hour attempt to substitute a tortured and misapplied *Easley* defense for the mechanical targeting, Section 5-made-me-do-it justification of the way majority-black districts were drawn, which got defendants in trouble in the Supreme Court. It won't work. Not just because it is a blatant reversal of the drafters' explanations at trial and calls the Legislature's Guidelines a lie, but because the integrity of political subdivisions is a primary traditional districting principle as a matter of both federal and state constitutional law.

- d. Defendants cannot relitigate the Supreme Court's finding that "Alabama adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote)." 135 S.Ct. at 1267.**

It is the Supreme Court, not plaintiffs, who "characterize this goal as having had a 'mechanical' application...." Defendants' Remand Brief at 30. Defendants may, of course, attempt to show that their mechanical goal did not affect every majority-black district, notwithstanding the drafters' unanimous testimony that they tried to reach those racial targets in every one of them.

The defendants' attempts to show that their racial targeting strategy did not subordinate traditional districting principles in any of the majority-black districts are primarily based on the hope that this Court will agree with their revisionist

theory “that the drafters’ race-related goal of keeping the majority-black districts the same is coextensive with their race-neutral goals of (1) consistency between old and new districts, (2) core preservation, (3) incumbency protection, and (4) preserving communities of interest.” Defendants’ Remand Brief at 33-34. As noted above, these are down-list traditional districting criteria that the Legislature’s own Guidelines expressly made subordinate to the state constitutional requirements of compactness and county integrity. In any event, defendants point to no testimony by the drafters that these incumbency-centered interests explain the boundaries of any majority-black districts, and they have offered no new evidence to support these new defenses.

e. Splitting precincts along racial lines is important evidence of racial gerrymandering, according to the evidentiary standards of the Supreme Court.

Defendants’ arguments aimed at discounting the visually obvious attempts to separate black and white residents in split precincts fall back on some of the very arguments the Supreme Court said have little relevance to an examination of individual majority-black districts: e.g., no “discernible pattern” of precinct splits in majority-black and majority-white districts throughout the state. Compare Defendants’ Remand Brief at 37-39 with 135 S.Ct. at 1265-66 (criticizing this Court’s reliance on comparisons that focus on “the State as an undifferentiated

whole. See, e.g., 989 F.Supp.2d, at 1294 (rejecting plaintiffs’ challenge because ‘[the legislature] followed no bright-line rule’ with respect to every majority-minority district); *id.*, at 1298–1299, 1301 (citing examples of majority-minority districts in which black population percentages were reduced and examples of majority-white districts in which precincts were split.’’). See also 135 S.Ct. at 1271 (“(core preservation) is not directly relevant to the origin of the new district inhabitants....”).

Defendants’ remand brief fails to address at all the evidentiary standards the Supreme Court’s opinion says **are** relevant for detecting racial predominance in a particular, individual majority-black district:

(1) First and foremost, the relevant *Shaw* inquiry is whether individual voters were located on the basis of their race at the margins of a particular district. “A racial gerrymandering claim, however, applies to the **boundaries** of individual districts.” 135 S.Ct. at 1265 (bold emphasis added).

(2) **Direct evidence** that the drafters were attempting to maintain every majority-black district at or above its 2010 black percentage “insofar as feasible.” 135 S.Ct. at 1267, 1271. The question in each district is whether there is “evidence that this goal had a direct and significant impact on the drawing of **at least some** of [its] boundaries.” *Id.* at 1271 (bold emphasis added).

(3) Rigid adherence to the $\pm 1\%$ rule meant the drafters often had to search farther away from existing district boundaries to find sufficient black population to reach their racial targets. *Id.* at 1266. Which poses these evidentiary questions:

(a) Whether the drafters “deliberately chose additional black voters to move into underpopulated majority-minority districts....” *Id.* at 1266.

(b) Whether the drafters “could have used, but did not use, white population . . . to repopulate the majority-black districts because doing so would have resulted in the retrogression of the majority-black districts....” *Id.*

(c) Whether the **net** number of persons added to the district were predominately black. *Id.* at 1271.

(4) Whether precincts were split and are “clearly divided on racial lines.” 135 S.Ct. at 1267, 1271.

(5) Whether “county lines” were split and the district’s boundaries “departed from county lines.” 135 S.Ct. at 1267, 1271.

(6) Whether the shape of the district is “irregular.” *Id.* at 1271.

(7) Whether “the use of race to draw the boundaries of the majority-minority districts affected the boundaries of other districts as well....” 135 S.Ct. at 1267. E.g., the Court cites pages in the ALBC post-trial brief

discussing how Hinaman crossed the Jefferson County boundaries in majority-white districts to avoid reducing the black percentage in majority-white Jefferson County districts. 135 S.Ct. at 1267 (citing the ALBC post-trial brief, Doc. 194, at pp. 30-35).

Defendants' "reverse engineering" of the precinct splits amounts to counsel deciding how the racial gerrymander could be corrected. Defendants' Remand Brief at 40-44. It is not admissible evidence of how the Legislature might have drawn challenged districts and neighboring districts, as counsel concedes. In any event, the hypothetical, reverse-engineered changes in the black percentage of the whole district are irrelevant to the question whether blacks and whites were separated by the way each precinct actually was split.

An apparent purpose of defendants' reverse-engineered precincts is to support their argument that the precinct splits don't affect a "significant number" of voters sufficient to prove racial predominance. Defendants' Remand Brief at 40-41. But a *Shaw* violation does not depend on whether the number or percentage of blacks and whites intentionally drawn into separate districts reaches some level that a court must determine to be "significant." When the Supreme Court says a plaintiff must show that "race was the predominant factor motivating the legislature's decision to place **a significant number** of voters within or

without a particular district,” 135 S.Ct. at 1265 (quoting *Miller*, supra, at 916) (emphasis added), it means the number must be significant enough to be convincing evidence that race was the basis for their placement. Once that racial basis for a precinct split is established, it does not matter how many black (or white) voters were affected. As an earlier three-judge court in this district said:

“Placing a **significant number** of voters in the district” refers to the drawing of lines, because it is ultimately boundaries that place voters in districts. If there were any doubt on that point, first principles would allay it: From the start, the “essence” of a *Shaw* claim has been that “the State has used race as a basis for separating voters into districts.” [*Miller v. Johnson*, 515 U.S. 900,] 911 [(1995)] (emphasis added). **The act of segregation, not racial composition alone**, inflicts the constitutional harm; when an **intent to racially segregate overrides a respect for political subdivisions and geographical communities**, it “convey[s] the message that political identity is, or should be, predominantly racial.” *Bush v. Vera*, 517 U.S. 952, 980-81 (1996).

Kelley v. Bennett, 96 F.Supp.2d 1301, 1307 (M.D.Ala.,2000), vacated and remanded on other grounds, *Sinkfield v. Kelley*, 531 U.S. 28 (2000) (bold emphases added). Thus the Supreme Court’s reference to a “significant number of voters” does not require this Court to decide, for example, whether, as defendants contend, “a difference of 4.9%, or 6,677 persons, . . . is not a significant number,” Defendants’ Remand Brief at 94, a judgment for which defendants can cite no principled evidentiary standards.

But aggregate split-precinct numbers can tell a story of massive racial sorting. Totaling the figures in SDX 405 shows there are 237 splits involving the 28 majority-black House districts -- affecting a total population of 995,183. Of the 596,288 persons in split precincts who are allocated to the majority-black House districts, 363,051 or 60.9% are black and 203,337 or 34.1%, are white. Of the 424,968 blacks in the split precincts, 363,051 or 85.4% are placed in the majority-black House districts. Of the 517,493 whites in the split precincts, 203,337 or 39.3% are placed in the majority-black House districts. The 28 majority-black House districts have a total population 1,269,931, so 78.4% of the population in the majority-black districts lives in the split precincts.

Totaling SDX 475 shows there are 91 precinct splits involving the 8 majority-black Senate districts -- affecting a total population of 385,955. Of the 168,272 persons in split precincts who are allocated to the majority-black Senate districts, 93,063 or 55.3% are black and 68,799 or 40.9% are white. Of the 125,961 blacks in the split precincts, 93,063 or 73.9% are placed in the majority-black Senate districts. Of the 241,551 whites in the split precincts, 68,799 or 28.5% are placed in the majority-black Senate districts. The 8 black-majority Senate districts have a total population of 1,089,323, so 35.4% of the population in the majority-black districts lives in the split precincts.

Reply To Defendants' Argument Regarding Strict Scrutiny:

The ALBC plaintiffs defer to the ADC plaintiffs' reply brief's detailed response to defendants' arguments regarding strict scrutiny. We reiterate that the only justification the drafters ever had for their race-conscious redistricting was an incorrect understanding of what Section 5 of the Voting Rights Act requires, and that understanding has been rejected by the Supreme Court as a basis for satisfying strict scrutiny. No attempt was made to develop "a strong basis in evidence" that the way any one of the majority-black districts was drawn was needed to preserve the ability of black voters to elect candidates of their choice. 135 S.Ct. at 1274.

Defendants' remand brief suggests new legal theories for satisfying strict scrutiny that counsel for defendants wish the State and the Legislature had used. The ADC plaintiffs' reply brief shows these new theories have no merit. But defense counsel cannot recreate history, nor can they retry this case, especially not the Supreme Court's decision. We think law of the case prevents this Court from even considering counsel's new strict scrutiny arguments. E.g., *Pepper v. United States*, 562 U.S. 476, 506-07 (2011) ("Although we have described the law of the case as an amorphous concept, as most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. *Arizona v. California*, 460

U.S. 605, 618 (1983). This doctrine directs a court's discretion, it does not limit the tribunal's power. *Ibid.* Accordingly, the doctrine does not apply if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice.") (internal quotations omitted). Defendants have not shown there would be manifest injustice in refusing to allow counsel to imagine on remand new legal justifications for racial predominance, disregarding the undisputed evidence of the erroneous Section 5 interpretation the drafters actually relied on and the State's own defense of that racial targeting construction of the statute in the Supreme Court. Accordingly, we will not respond to the new strict scrutiny justifications in the discussion below of individual districts.

Reply To Defendants' Argument Regarding Individual Districts:

The racial targeting tables at pages 20-21 of the ALBC plaintiffs' remand brief, Doc. 256, which duplicate the tables in APSX 01, present black percentage figures based on non-Hispanic black (single-race and mixed-race) numbers in the 2010 census. The black percentages in SDX 400, 402, 403, and 406, however, include Hispanic blacks in their black percentages. This makes insignificant differences in the numbers and percentages in plaintiffs' and defendants' briefs, but we should be using the same figures when dealing with racial targeting as

precise as that presented in this case. Therefore, our reply to defendants' discussion of individual House and Senate districts will use the same numbers they do, as they appear in the State exhibits. The following tables should replace the tables referred to above in the ALBC plaintiffs' remand brief and APSX 01.

Comparison of Majority-Black House Districts in 2001 and 2012 plans using 2010 census data and % Black total population⁶

House District	% Black 2001 plan	% Black 2012 plan	Difference
19	69.82	61.25	-8.57
32	59.34	60.05	0.71
52	60.11	60.13	0.02
53	55.7	55.83	0.13
54	56.73	56.83	0.10
55	73.55	73.55	0.00
56	62.13	62.14	0.01
57	68.42	68.47	0.05
58	77.86	72.76	-5.10
59	67.03	76.72	9.69
60	67.41	67.68	0.27
67	69.14	69.15	0.01
68	62.55	64.56	2.01
69	64.16	64.21	0.05

⁶ These tables are revised from the ALBC appellants' jurisdictional statement in Appeal No. 13-895, pages 15-17, with figures for HD 85 added. Their sources are SDX 403 and SDX 406.

70	61.83	62.03	0.20
71	64.28	66.90	2.62
72	60.2	64.60	4.40
76	69.54	73.79	4.25
77	73.52	67.04	-6.48
78	74.26	69.99	-4.27
82	57.13	62.14	5.01
83	56.92	57.52	0.60
84	50.61	52.35	1.74
85	47.94	50.08	2.14
97	60.66	60.66	0.00
98	65.22	60.02	-5.20
99	73.35	65.61	-7.74
103	69.64	65.06	-4.58

Comparison of Majority-Black Senate Districts in 2001 and 2012 plans using 2010 census data and % Black total population

Senate District	% Black 2001 plan	% Black 2012 plan	Difference
18	59.92	59.10	-0.82
19	71.59	65.31	-6.28
20	77.82	63.15	-14.67
23	64.76	64.84	0.08
24	62.78	63.22	0.44
26	72.69	75.13	2.44
28	50.98	59.83	8.85
33	64.85	71.64	6.79

I. Senate Districts:

A. Birmingham (SDs 18, 19, and 20):

Compare Defendants' Remand Brief, Doc. 263, at 63-69 with ALBC Remand Brief, Doc. 256, at 142-51 and ADC Remand Brief, Doc. 258, at 39-45.

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they nonetheless fell short of SD 18's target of 59.92% black by -0.82%, when they fell short of SD 19's target of 71.59% by -6.28% black, or when they fell short of SD 20's impossibly high target of 77.82% black by -14.67%.

Defendants argue that traditional districting principles were not subordinated to race in the Jefferson County majority-black Senate districts (1) because Mr. Hinaman attempted to follow a plan proposed by the black incumbents, (2) because heavily black municipalities and neighborhoods allegedly cause plaintiffs' alternative plans to have similar shapes and black percentages, and (3) because reuniting the split precincts (in a hypothetical manner imagined by defendants' counsel) would not cause much change in the black percentages. But defendants' arguments do not address and do not dispute the objective evidence that, in pursuit of their racial targets, the drafters sorted residents by race at the margins of these districts.

In the first place, even if the incumbent black senators had asked Hinaman to sort voters by race, that would not absolve the *Shaw* violation. But there is no specific evidence in the record about the districts the incumbents proposed, and defendants have not shown that the drafters abandoned their racial targeting strategy when drawing these three Senate districts. See also the ADC reply brief response on this point. The undisputed evidence is that they pursued the racial targets in every majority-black district. Mr. Hinaman testified he exchanged majority-white precincts at the request of a white Senator, but the record doesn't show whether these were among the 5 precincts he split along racial lines in SD 18, the 5 precincts he split along racial lines in SD 19, or among the 5 precincts he split along racial lines in SD 20.

Defendants' argument that these three Senate districts resembled the black percentages, general shapes and cores of the old districts and the alternative districts, because of "the area demographics," Defendants' Remand Brief at 65-68, is not relevant to the *Shaw* inquiry about whether there was racial sorting of "the new district inhabitants" at the margins of the districts. 135 S.Ct. at 1271-72. The fact that all three districts fell short of their racial targets, Defendants' Remand Brief at 66, and the fact that net white majorities of persons were added in two of the three Senate districts, *id.* at 68-69, are clearly explained by the fact that 90.5%

of Jefferson County's black population were placed in them, and there simply was not additional contiguous black population to capture. See ALBC Remand Brief at 142. The drafters came closest, within -0.83%, in SD18, the only one in which they found a net black majority of population to repopulate it with. *Id.* at 143, 146, 149. This is evidence that the drafters "deliberately chose additional black voters to move into underpopulated majority-minority districts...." 135 S.Ct. at 1266.

Defendants say incorrectly that "plaintiffs do not argue about county splits here...." Defendants' Remand Brief at 68. The ALBC remand brief recalls Senator Dial's testimony that the drafters' efforts to maximize the three majority-black districts forced all five majority-white Senate districts to split not only Jefferson County but eight other counties as well. ALBC Remand Brief at 143.

Finally, defendants contend the precinct splits did not move a significant number of voters based on race, because restoring and reshuffling those precincts in counsel's hypothetical redrafts would not make much difference in the black percentages in these three Senate districts. Defendants misunderstand how *Shaw* principles of equal protection, which prohibit **classifying** voters by race, differ from more familiar equal protection principles prohibiting **discrimination** on the basis of race. Positing hypothetical ways of changing the bottom-line black

percentages in a district is not the way you determine whether the number of residents moved from one district to another based on their race is “significant” in a *Shaw* analysis. See *Kelley v. Bennett*, *supra*; c.f., *United States v. Hays*, 515 U.S. 737, 746 (1995) (“Of course, it may be true that the racial composition of District 5 would have been different if the legislature had drawn District 4 in another way. But an allegation to that effect does not allege a cognizable injury under the Fourteenth Amendment. We have never held that the racial composition of a particular voting district, without more, can violate the Constitution.”).

The split precinct-by-split-precinct analyses in the ALBC remand brief show that sometimes hundreds and thousands of black and white residents were assigned to a district based on race in each split precinct. A total 11,799 persons, 8.7% of SD 19's population, reside in split precincts, including 3.0% of the district's black population. SDX 475 at 48-53. A total 10,136 persons, 7.5% of SD 18's population, reside in split precincts, including 5.8% of the district's black population. SDX 475 at 53-57. A total 19,526 persons, 14.4% of SD 20's population, reside in split precincts, including 10.3% of the district's black population. SDX 475 at 58-61. But even if only a handful of precinct residents had been sorted by race, because the constitutional harm is personal to each one of them, that number would be “significant.” See *Hays*, *supra*, 515 U.S. at 742 (“For

present purposes, the most significant difference between the two district maps is that in Act 42, part of Lincoln Parish was contained in District 4, while in Act 1, Lincoln Parish is entirely contained in District 5.”).

In some cases, most of the blacks in a majority-white precinct were assigned to the majority-black district, bringing many nearby whites with them, while most whites were assigned to the majority-white district. E.g., Homewood Pub Lib precinct, ALBC Remand Brief at 144; Johns Comm Ctr precinct, *id.* at 147. In other cases, most blacks in a majority-black precinct were assigned to the one Senate district that came within 1% of its racial target, at the expense of causing another majority-black district to fall farther behind its target. E.g., Robinson Elem precinct, *id.* at 145-46. In still other cases, white residents were stripped from a majority-black precinct and assigned to a majority-white district. E.g., Hillview Fire Station #1, *id.* at 148.

The split-precinct block maps, APSX 317-331, make it visually clear how in each case efforts were made to assign as many blacks as possible to the majority-black districts and as many whites as possible to the majority-white districts. For example, APSX 318 shows that the drafters amputated Fultondale First Baptist Church precinct at its waist to place 894 of its 988 black residents in majority-black SD 20. APSX 44 at 58a. The drafters fractured the edges of Hillview Fire

Station #1 precinct to place all but 14 of its 1,776 black residents in majority-black SD 19 and SD 20, while pulling 425 of its 906 white residents to majority-white SD 17. APSX 320, APSX 44 at 57a. They clipped the edges of Maurice L. West Community Center precinct to put all but 30 of its 493 black residents in majority-black SD 19, which required taking 1,049 of its 1,590 white residents with them. APSX 323, APSX 44 at 56a-57a.

The boundaries of SD 18, SD 19, and SD 20 are predominantly based on race.

B. West Black Belt (SD 23 and SD24):

Compare Defendants' Remand Brief at 70-77 with ALBC Remand Brief at 151-72 and ADC Remand Brief at 29-33.

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they reached and exceeded SD 23's target of 64.76% black by +0.08%, or when they reached and exceeded SD 24's target of 62.78% black by +0.44%. The drafters "deliberately chose additional black voters to move into underpopulated majority-minority districts," 135 S.Ct. at 1266, adding 15,265 blacks and 7,841 whites in SD 23 and 12,473 blacks and 5,702 whites in SD 24.

Defendants argue that traditional districting principles were not subordinated to race in SD 23 and SD 24, (1) because these districts needed to add a lot of population, and the drafters were limited in their choices by the black-majority counties to draw from, (2) because the alternative plans “also have high black percentages,” Defendants’ Remand Brief at 73, (3) because the 2001 Senate plan also split several counties and had the same “Tuscaloosa hook” that is in the alternative plans, and (4) because counsel’s efforts hypothetically to “unsplit” the precincts do not change much the black percentages. But defendants fail to address the criteria the Supreme Court opinion calls on to determine racial predominance: whether in adding population the drafters deliberately chose black voters and avoided adding white voters, and whether the splits in county boundaries, the Tuscaloosa hook, and precincts were along racial lines.

Defendants fail to show specifically how the addition of 15,265 blacks and only 7,841 whites to SD 23 and the addition of 12,473 blacks and only 5,702 whites to SD 24 is a function of the racial makeup of the counties involved. For example, the ALBC remand Senate plan demonstrates that SD 23 could have been drawn with a 54.19% black majority without splitting a single county, if the drafters had been willing to relax their $\pm 1\%$ rule slightly to accept a +1.47% deviation, ALBC Remand Brief at 153, and that SD 24 could have been drawn

with a 60.42% black majority splitting only one county if they had been willing to accept a +2.82% deviation. *Id.* at 164; APSX 26, 27, and 27A. The single county split is Tuscaloosa County, whose total population of 194,656, DSX 11, requires it to be split once. The ALBC remand plan does have the Tuscaloosa hook, but it does not split a single precinct. APSX 27A. The deviations of SD 23 and SD 24 in a plan drawn like that in the ALBC plan could have been brought within $\pm 1\%$ deviation by splitting just one more precinct in each district.⁷

See the ADC reply brief for more detailed discussion of the way the drafters split counties along racial lines, moved excessively large numbers of blacks and whites into and out of SD 23 and SD 24, and disregarded the wishes of incumbents.

Once again, defendants' reliance on counsel's hypothetical unsplitting of many, many precincts is not an explanation of the relevant *Shaw* question: why were they split along racial lines in the first place? The precinct block maps and statistics show clearly Mr. Hinaman's click-by-click sorting of residents by race. For example, in Clarke County, APSX 296 shows how he clicked out of SD 23

⁷ The Court should keep in mind that Mr. Cooper had instructions to draw the ALBC plaintiffs' remand House and Senate plans splitting as few precincts as possible to get within $\pm 5\%$. It takes little imagination to see how one or two more precinct splits could have brought each of the districts within $\pm 1\%$.

majority-white blocks in Jackson City Hall precinct and placed them in majority-white SD 22. See APSX 44 at 58a. Only one or two blocks containing 184 blacks and 123 whites were snipped from the southern corner of Skipper Fire Station precinct to place in SD 23. APSX 44 at 58a; APSX 299. In Conecuh County the drafters cut apart little Paul Fire Dept. precinct to place 79 of its 81 black residents in SD 23, leaving 120 of the 178 whites in majority-white SD 22. APSX 305, 44 at 59a. In Monroe County, the small neighboring precincts of Perdue Hill Masonic Lodge and Purdue Hill are carved up to place most of their black residents in SD 23 while leaving most of their white residents in SD 22. In Mexia Fire Station a single block containing 12 blacks and no whites is moved into SD 23 from SD 22. APSX 346, APSX 44 at 61a. In Washington County's McIntosh Voting House precinct, 384 of its 442 black residents were placed in SD 23, leaving 400 of its 492 white residents in SD 22. APSX 376, APSX 44 at 62a. In Carson/Preswick precinct, 207 of its 263 black residents were carved out of non-contiguous parts of the precinct to place in SD 23, leaving 270 of its 295 whites in SD 22.

The foregoing are merely samples of racially split precincts in SD 23, and the same stark racial sorting is visually obvious in the others. We could cite as many or more examples in the 18 split precincts of SD 24, but we will not burden

this reply brief by doing so. Instead, this Court is invited to inspect the precinct block maps in APSX 289, 287, 292, 288, 291, 289A, 290, 293, 306, 307, 308, 360, 369, 368, 371, 370, 367, 366, and 44 at 63a-66a.

The boundaries of SD 23 and SD 24 are predominantly based on race.

C. Montgomery (SD 26):

Compare Defendants' Remand Brief at 78-89 with ALBC Remand Brief at 172-76 and ADC Remand Brief at 33-37.

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they reached and exceeded SD 26's target of 72.69% black by +2.44%. The drafters "deliberately chose additional black voters to move into underpopulated majority-minority districts," 135 S.Ct. at 1266, adding 14,806 blacks and just 36 whites to SD 26.

Defendants' attempt to evade the Supreme Court's finding that "there is strong, perhaps overwhelming, evidence that race did predominate as a factor when the legislature drew the boundaries of Senate District 26," 135 S.Ct. at 1271, only heightens their disregard of the evidentiary factors the Court says are probative of racial predominance: the direct evidence that racial targets were "a primary redistricting goal," and whether this overarching racial goal "had a direct and significant impact on the drawing of at least **some** [district] boundaries." *Id.*

(bold emphasis added). What the Court said is “considerable evidence” of “direct and significant impact” on SD 26 includes its irregular shape, the large **net** black majority added to repopulate it, and transgressions of the Reapportionment Committee’s Guidelines, especially splitting precincts along racial lines. *Id.*

So here, as is the case with every other majority-black district, defendants can point to no testimony that the drafters did **not** seek to reach or exceed the racial goal for SD 26. Instead, they try to discredit the Supreme Court’s conclusions and to defend SD 26 with excuses invented by their counsel.

First, they criticize the Supreme Court’s reliance on net racial change in the district’s population. Defendants’ Remand Brief at 79-80. We rely on the excellent response to this argument in the ADC reply brief.

Next they ask this Court to readopt its prior findings of fact that it thought explained SD 26’s irregular shape. Defendants’ Remand Brief at 80-81, 85. But the question is not whether those fact findings were reversed, but whether the Supreme Court found them insufficient to support a conclusion that race did not predominate. Obviously, it did.⁸

⁸ The ALBC appellants’ brief critiqued in detail the “land bridge” justification for the shape of SD 26. 2014 WL 4059779 at 50-53. We pointed out that this Court’s majority opinion failed to “mention[] Hinaman’s acknowledgment that he had connected Crenshaw County to SD 25 rather than to SD 26 in order to avoid reducing the black population percentage in SD 26.” *Id.* at 53.

Defendants also suggest that SD 26's ugly shape is driven by the need to avoid conflicts between the two incumbents in Montgomery County. Defendants' Remand Brief at 78, 87. But the ALBC remand Senate plan demonstrates how two compact Senate districts can be drawn in Montgomery County without creating a conflict between the incumbents, Ross and Brewbaker, and without splitting a single precinct. APSX 32, 27A. Of course, the ALBC remand SD 26 has a +1.75% population deviation, so the drafters would not have adopted it unless they relaxed their $\pm 1\%$ rule, as defendants' remind us. Defendants' Remand Brief at 85. There is little doubt this deviation could have been lowered under +1% by splitting just one precinct. This refutes defendants' contention that "[t]he plaintiffs do not present a realistic alternative to the existing lines." Defendants' Remand Brief at 81.

Remarkably, defendants' counsel advance "new" evidence they argue shows that SD 26's irregular shape can be explained "because it follows precinct lines." Id. at 86. But the precinct lines in DSX 9 are today's precinct lines, which had to be readjusted for use in the 2014 elections. And the Supreme Court said it was compelling that "the drafters split seven precincts between the majority-black District 26 and the majority-white District 25, with the population in those

precincts clearly divided on racial lines,” 135 S.Ct. at 1271, a fact defendants finally acknowledge. Defendants’ Remand Brief at 88.

Nevertheless, defendants’ counsel call into service their hypothetical redraft that unsplit these precincts to say that it makes only a 2% difference in SD 26’s black percentage. *Id.* This explains nothing about **how** those precincts were split, other than to concede implicitly that it was along racial lines. The precinct block maps leave no doubt. For example, APSX 354 shows how both 1B Vaughn Park Ch of Christ precinct and adjoining 1D Whitfield Memorial UMC precinct were split apart, placing 6,376 of their 7,687 black residents in SD 26 and 4,228 of their 7,846 white residents in SD 25. APSX 44 at 66a. A total 19,202 persons, 14.1% of SD 26’s population, reside in split precincts, including 12.1% of the district’s black population. SDX 475 at 93-98.

The boundaries of SD 26 are predominantly based on race.

D. East Black Belt (SD 28):

Compare Defendants’ Remand Brief at 90-95 with ALBC Remand Brief at 176-83 and ADC Remand Brief at 37-39.

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they reached and exceeded SD 28’s target of 50.98% black by +8.85%. The drafters “deliberately chose

additional black voters to move into underpopulated majority-minority districts,” 135 S.Ct. at 1266, adding 15,543 blacks and **removing** 8,812 whites.

Defendants concede there is no evidence why 18 precincts were split. Defendants’ Remand Brief at 94. So there is nothing to rebut the presumption that the direct evidence of a racial strategy had a direct and significant affect on SD 28. The asserted defenses that the Democratic incumbent cooperated in drawing his districts and that the resulting 59.96% black is in line with black percentages in past and present plans provide no evidence about why county and precinct boundaries were split along racial lines, why large populations were moved in and out of the district, why their net effect was to add 15,470 black people while removing 5,896 white people.

The splitting of 18 precincts is especially damning as evidence that race was driving the drafters’ pen (or mouse). Notwithstanding its irrelevance, it is difficult to understand how defendants try to draw comfort from the fact that counsel’s hypothetical unsplitting exercise dropped the black percentage 4.9% or 6,677 black persons. Defendants’ Remand Brief at 94. The racial sorting is starkly obvious in the precinct block maps and tables. APSX 309-316 (Houston County), 332-336 (Lee County), 361-365 (Russell County); APSX 44 at 67a-70a. For example, in the Houston County Library precinct 2,595 of its 3,151 black residents

were placed in SD 28, leaving 3,990 of its 4,541 white residents in majority-white SD 29. APSX 313, APSX 44 at 68a. A total 40,048 persons, 29.0% of SD 28's population, reside in split precincts, including 31.5% of the district's black population. SDX 475 at 101-04.

The boundaries of SD 28 are predominantly based on race.

E. Mobile (SD33):

Compare Defendants' Remand Brief at 96-102 with ALBC Remand Brief at 183-86 and ADC Remand Brief at 27-29.

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they reached and exceeded SD 33's target of 64.85% black by +6.79%. The drafters "deliberately chose additional black voters to move into underpopulated majority-minority districts," 135 S.Ct. at 1266, adding 25,015 blacks and **removing** 1,285 whites.

Defendants argue that politics, not race, explains the boundaries of SD 33. "Politics drove the lines: the need to get to 18 votes by satisfying incumbents." Defendants' Remand Brief at 99. They say because the drafters exceeded their black percentage target by 7 points "[t]here is no evidence that the Legislature set out to increase the black percentage in SD33, so whatever drove the end result was not a 'target.'" Id. But, as this Court found, in pursuit of their racial targeting goal

the drafters “did not consider any [black percentage] too high....” 989 F.Supp.2d at 1296 (quoting Senator Dial). The racial makeup of the net population change is strong evidence that no black percentage was too high for SD 33. Nothing else can explain why the drafters added 25,015 blacks and **removed** 1,285 whites. SDX 400, 402.

Counsel’s redrafting exercise that hypothetically unsplit five precincts cannot dispute the fact that those splits were along racial lines. The precinct block maps show how the drafters systematically tried to add as many black residents as possible to SD 33 while removing white residents. APSX 338-42, APSX 44 at 70a-71a. Defendants miss the point about the split of Satsuma City Hall precinct: it’s not the fact that it put 0 blacks and 0 whites in SD 33; it’s the fact that it took 3,536 whites and only 571 blacks out of this underpopulated district. APSX 338. Similarly, it’s clear that the protrusion of Chickasaw Auditorium precinct into majority-white SD 34 was designed to remove 1,906 whites and just 455 blacks from SD 33, APSX 341, APSX 44 at 70a; that the raggedy northern boundary of Riverside Church of the Nazarene precinct was designed to put 340 whites and just 92 blacks in majority-white SD 35, APSX 340; and that the raggedy western boundary of St. Andrews Episcopal Church precinct was designed to shift 378 whites and just 22 blacks from SD 33 to SD 35. APSX 347, APSX 44 at 70a.

Meanwhile SD 33 was extended into Morningside Elementary School precinct, which had been located entirely in SD 35 in the 2001 plan, SDX 409 at 43, to grab 3,647 blacks and only 922 whites. APSX 339, APSX 44 at 70a. The racial sorting is apparent. A total 12,719 persons, 9.3% of SD 33's population, reside in split precincts, including 7.6% of the district's black population. SDX 475 at 113-16.

Defendants wrongly assert that plaintiffs have offered “no alternative way to draw it in compliance with the Constitution and Alabama law, including the Legislature’s guidelines.” Defendants’ Remand Brief at 96. The whole point of the ALBC plaintiffs’ remand Senate plan is to demonstrate how the drafters could have drawn districts that comply with all federal and state constitutional standards and the traditional districting principles prioritized in the Legislature’s own Guidelines. Mobile County’s population of 412,992, NPX 328, divides by 3 into 137,664 persons, which is only 1100 persons or +0.8% over the ideal Senate district size of 136,564. In other words, three Senate districts could have been drawn without the Legislature relaxing its $\pm 1\%$ rule and without splitting any of Mobile County’s boundaries. The ALBC remand plan drew SD 33 at 62.83% black with -0.09% deviation, and with deviations in SD 35 and SD 35 of +1.93% and +0.58%. APSX 27, 31. The ALBC plan split no precincts at all in Mobile County, APSX 27A at 67-76, so if the Legislature still had been bound and

determined not to relax its $\pm 1\%$ rule, a single precinct split probably could have made all three Senate districts less than $+1\%$.

The boundaries of SD 33 are predominantly based on race.

II. House Districts:

A. Madison County (HDs 19 and 53):

Compare Defendants' Remand Brief at 103-09 with ALBC Remand Brief at 29-39 and ADC Remand Brief at 50-52.

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they fell short of HD 19's target of 69.82% black by -8.57% but reached and exceeded HD 53's target of 55.7% black by $+0.13\%$.

With apologies to the Huntsville Chamber of Commerce, this is not rocket science. To create two majority-black districts in Madison County, the drafters had to divide up the existing, compact majority-black district, HD 19, which at 70.04% black was only 440, or -0.97% short of ideal population. SDX 403. They decided to move HD 53 to Madison County, which had a 55.71% black target based on the demographics of Jefferson County. To hit their racial target in at least one of the new districts, they picked HD 53's target, which was 14 points lower than HD 19's target. Since most of the majority-black precincts were

already inside HD 19 (there were only 4 majority-black precincts outside HD 19 in the 2001 plan, SDX 413 at 3-4, 6, 11-14), the drafters had to repopulate the two new House districts with majority-white precincts.

Using whole precincts would have made it harder to hit the 55.71% target, so they split 14 precincts in HD 19 and 13 precincts in HD 53, only 4 of which were split solely between HD 19 and HD 53.⁹ As defendants acknowledge, Defendants' Remand Brief at 106, "the balance favors HD53, which gets most of the population, including most of the black population in each split."¹⁰ This is "hard evidence," Defendants' Remand Brief at 103, that hitting HD 53's racial target explains why the drafters didn't shift these precincts whole.

Looking at the precincts split between the majority-black and majority-white districts, defendants observe that "most of the black and white population is assigned to majority white districts," and one precinct split "put nearly double the number of whites (2,093) in that majority-black district." Defendants' Remand

⁹ Defendants' brief counts 5 precincts split between HD 19 and HD 53, Defendants' Remand Brief at 105, because they include Blackburn Chapel CP Ch precinct, which also placed 23 blacks and 122 whites in majority-white HD 6. SDX 405 at 10, 40, 103.

¹⁰ In the precincts split solely between the two majority-black districts, HD 19 got 1,314 whites and 3,217 blacks, while HD 53 got 2,747 whites and 6,690 blacks. APSX 44 at 14-15.

Brief at 106. But that's what you would expect if the drafters had to find 45,521 persons, the ideal population of the new majority-black district, by dredging ten majority-white precincts. It is clear from the precinct block maps and statistics that the drafters did the best they could to put as many blacks as practicable in HD 19 and HD 53 while minimizing the number of whites who came with them. For example, the jigsaw destruction of Chase Valley United Meth precinct shows how, to move 949 of 1,036 black residents to HD 19, the drafters had to bring 1,528 whites with them, leaving 979 whites in majority-white HD 21. APSX 146, APSX 44 at 22a. The way this pattern of racial sorting is repeated in the other nine split precincts is revealed by the fact that in every case the part with the larger black percentage went to a majority-black district, while the part with the smaller black percentage stayed in the majority-white district. APSX 44 at 16a.

In HD 19, a total 22,949 persons, 50.9% of the district population, reside in a split precinct, including 36% of the 27,614 blacks. In HD 53, a total 29,438 persons, 65.3% of the district population, reside in a split precinct, including 62.3% of the 25,184 blacks. SDX 405 at 38-40. Even by defendants' mistaken evidentiary standard, this is a "significant number of people." Defendants' Remand Brief at 104.

The ALBC remand House plan demonstrates that two compact majority-black districts in Madison County (numbered HD 6 and HD 19) could have been drawn with 54.27% and 58.27% black majorities without splitting a single precinct. APSX 36, 36a, and 39. Both are underpopulated at -3.27% and -4.51% deviation, but if the drafters had been unwilling to relax their $\pm 1\%$ rule, the deviation in HD 6 could have been reduced to -1% by adding only 1,033 residents, a smaller number than the total population of most split precincts. If all 1,033 of those persons had been white, HD 6 still would have been 53.03% black. The deviation in HD 19 could have been reduced to -1% by adding only 2,052 residents, which is a smaller number than the total population of most of the precincts they split. If all 2,052 of those persons had been white, HD 19 still would have been 55.64% black.

The boundaries of HD 19 and HD 53 are predominantly based on race.

B. House District 32:

Compare Defendants' Remand Brief at 109-12 with ALBC Remand Brief at 39-45 and ADC Remand Brief at 52-53.

There was no evidence at trial that the drafters did not attempt to reach or exceed their 60.09% target for HD 32, and they succeeded at 60.3% black. The drafters "deliberately chose additional black voters to move into underpopulated

majority-minority districts,” 135 S.Ct. at 1266, adding 4,304 blacks and 1,810 whites.

It is true, as defendants point out, Defendants’ Remand Brief at 110-11, that HD 32 has always been a district that crosses the Calhoun-Talladega County border, and so has majority-white HD 35. HD 32 and HD 35 crossed the Calhoun-Talladega border in the 2001 plan, and they do also in the ALBC remand House plan. SDX 413 at 21-24; APSX 36A at 46, 50; APSX 38. But by splitting 13 precincts in HD 32, the drafters made it necessary to split that county border an additional time, in HD 36. SDX 405 at 63, 70, 72, 74-75.

The 13 precinct splits in HD 32 are along stark racial lines. Defendants’ remand brief doesn’t even bother with another counsel-imagined unsplitting project here. They argue only that the splits did not move a significant number of voters. Defendants’ Remand Brief at 112. But in HD 32, all 45,504 persons, 100% of the district population, reside in a split precinct. SDX 405 at 63-64. Even by defendants’ mistaken evidentiary standard, this is a “significant number of people.” Defendants’ Remand Brief at 104.

For example, small parts of the large Anniston precinct are snipped at its northern border to take 1,634 whites and only 223 blacks into majority-white HD 36, and an even smaller part is snipped at its southern border to remove 320 whites

and just 21 blacks to majority-white HD 40, leaving 11,672 blacks and 5,257 whites in HD 32.

The ALBC remand House plan also splits some precincts in HD 32, 7 of them, in order to preserve a black VAP majority at 50.65% and black total pop majority at 52.35%. APSX 36, APSX 36A at 46-47. These are objectives that seek to avoid a potential violation of Section 2 of the Voting Rights Act, not to pursue an elevated 59.62% black percentage target that Section 5 did not authorize.

The boundaries of HD 32 are predominantly based on race.

C. The Birmingham House Districts (HDs 52, 54-60):

Compare Defendants' Remand Brief at 113-26 with ALBC Remand Brief at 45-67 and ADC Remand Brief at 53-63.

Defendants' opening argument that plaintiffs "introduced very little evidence about why any particular district was drawn the way it was" in Jefferson County is simply an attempt to evade the presumption created by the Supreme Court's finding "that a **primary redistricting goal** was to maintain existing racial percentages **in each** majority-minority district insofar as feasible." 135 S.Ct. at 1271 (bold emphases added). All but two of these eight majority-black districts met and exceeded their racial goals by less than 1%.

House District	% black 2001 plan	% black 2012 plan	Difference
52	60.11	60.13	0.02
54	56.73	56.83	0.10
55	73.55	73.55	0.00
56	62.13	62.14	0.01
57	68.42	68.47	0.05
58	77.86	72.76	-5.10
59	67.03	76.72	9.69
60	67.41	67.68	0.27

SDX 403 and 406. The best evidence that the goal of maintaining racial percentages had a “direct and significant impact on the drawing of at least some of [a district’s] boundaries,” 135 S.Ct. at 1271, is that the goal was reached, especially when it came within a small fraction of the precise mechanical target. Defendants have no answer to this fundamental evidentiary principle.

Defendants point out that the nine majority-black Jefferson County House districts in the 2001 plan were underpopulated in 2010 by 76,427 persons, and that’s why the drafters cannibalized HD 53. Defendants’ Remand Brief at 113-14. But, as the ADC remand brief points out, Jefferson County’s black population increased by 35,973 persons, while the white population had declined by 15,917 persons. ADC Remand Brief at 53. So if restoring population equality in the Jefferson County House districts was the main concern, why didn’t they pick one

or more of the majority-white districts, most of which already extended into neighboring counties, to move somewhere else in the state, rather than one of the nine majority-black districts that were contained entirely inside Jefferson County? Mr. Hinaman supplied the answer in his trial testimony: “And looking at the map, I knew that most of the – if not all of the minority neighborhoods were already included in those [majority-black] districts. So trying to repopulate them to get them back to deviation was going to retrogress most if not all of them” *Id.* at 56 (quoting Tr. 3-132: 22-3-133:5).¹¹ The racial targets (“retrogression”), not population equality, explain why the drafters cannibalized HD 53, and that racial motive taints all the majority-black districts it left behind in Jefferson County, because they could not have reached their elevated black percentage targets otherwise.

To demonstrate what the drafters could have done had HD 53 not been cannibalized, the ALBC remand House plan draws the same eight majority-black districts in Jefferson County, HD 52, HD 54-60, and six majority-white districts,

¹¹ If the Legislature believed the drafters must comply with *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Ga.) (three-judge court), *aff'd sub nom Cox v. Larios*, 542 U.S. 947 (2004), as the Guidelines say, SDX 420, the majority-black House districts in Jefferson County may violate the one-person, one-vote rule, because all eight are systematically underpopulated, and seven are at the outer margin, ranging from -0.96% to 0.99%. SDX 403 at 4-5.

HD 15, HD 45-47, HD 51, and HD 53, all contained entirely inside Jefferson County. APSX 40, APSX 36, APSX 36A at 21-22, 60-64, 69-70, 71-73. HD 53 is kept where it was, centered around Malfunction Junction and including the Birmingham Southern College neighborhood, where our respected colleague Demetrius Newton resided before his untimely death. But HD 53, at +4.4% deviation, is 41.6% black, a sign of the increasing racial integration of downtown Birmingham that Rep. Newton was proud of.

All 14 Jefferson County districts in the ALBC remand House plan are overpopulated by deviations ranging from +0.84% in HD 46 to +4.95% in HD 55. If the drafters had been unwilling to relax their $\pm 1\%$ rule, they could have reduced all 14 districts to less than +1% without changing the racial majority in any of them. The population of Jefferson County is 658,466. The population of one House district at +1% is 45,977. So 14 House districts at +1% would total 643,678 persons, leaving a surplus of 14,788 persons to be assigned to another district. That would have required drawing a seventh majority-white district that extended outside Jefferson County, a clear example of how the drafters were willing to sacrifice the Legislature's highest priority traditional districting principle to their unprecedented rigid adherence to "uncritical, simplistic, and

heavy-handed application of sixth-grade arithmetic.” *Lucas v. Forty-Fourth Gen. Assembly of Colorado*, 377 U.S. 713, 750 (1964) (Clark, J., dissenting).

Defendants’ argument that this Court’s majority has already concluded that no other majority-black districts could have been drawn that complied with the \pm 1% rule, Defendants’ Remand Brief at 115, invites this Court to re-employ the same equal population evidentiary standard the Supreme Court reversed. And their contention that Jefferson County demographics require “a high percentage of blacks no matter what the drafter does,” *id.* at 115, does not help rebut the presumption that racial targeting explains the precise black percentages achieved there.

Especially unconvincing is their use of HD 55's 73.55% black majority to be an example of area demographics. That district may have the most tortured shape of any district in Alabama. See APX 41 (HD 55 is the green district with Scott as the incumbent; the boundaries are too irregular for the software to have printed the number 55). Compare that with the HD 55 in the ALBC remand House plan, which is much more compact and splits no precincts. APSX 40; APSX 36A at 75-76.

1. House District 52:

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they reached and exceeded HD 52's target of 60.11% black by +0.02%. The drafters “deliberately chose additional black voters to move into underpopulated majority-minority districts,” 135 S.Ct. at 1266, adding 1,165 blacks and 373 whites.

Defendants refrain the assertion “there is no real evidence that race predominated over other criteria.” Defendants’ Remand Brief at 117. There is no attempt to explain how the drafters managed to come “*within two individuals* of achieving the exact quota they set for the black population....” 989 F.Supp.2d at 1321 (Thompson, J., dissenting) (emphasis in original).¹² Their gesturing at unspecified area demographics is nonresponsive. *Id.*

So is counsel’s hypothetical precinct unsplitting exercise. It does not explain, for example, why in the two precincts split between HD 52 and majority-white HD 46 the net effect was to take 1,715 whites **out** of HD 52. ALBC Remand Brief at 47. It does not explain why the four precincts split between HD 52 and other majority-black districts fine-tuned each of them to within -1% of

¹² Using the SDX 403 black figures, 60.11% of the 45,083 population in HD 52 is 27,099 persons, so at 27,109 blacks the drafters exceeded their target by 20 persons.

their racial targets. *Id.* at 48-49. A total 7,428 persons, 16.5% of HD 52's population, reside in split precincts, including 10.1% of the district's black population. SDX 405 at 99-101.

Defendants' point that their unsplitting hypothetical would increase the black percentage of HD 52 four points simply confirms how most of the black population was needed by HD 55, which succeeded in reaching its supermajority 73.54% black target. For example, in the split of Ctr Street Mid Sch precinct, the drafters placed 656 blacks and 7 whites in majority-black HD 52, and they placed 2,432 blacks and 48 whites in majority-black HD 55. APSX 103; SDX 403 at 5-6. Neither HD 52 nor HD 55 likely would have reached their racial targets without the black population from the four precincts from cannibalized HD 53 used here. ALBC Remand Brief at 48.

The boundaries of HD 52 are based predominantly on race.

2. House District 54:

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they reached and exceeded HD 54's target of 56.73% black by +0.10%. The drafters "deliberately chose additional black voters to move into underpopulated majority-minority districts," 135 S.Ct. at 1266, adding 5,811 blacks and 4,036 whites.

Defendants' contention that HD 54 "was drawn to satisfy the incumbent, whose district was largely preserved," does not explain why the drafters hit their racial target. Defendants' Remand Brief at 118. The fact that "unsplitting the precincts increases the black population percentage of HD54," *id.*, actually confirms the racial targeting, because at 56.73% black HD 54 was the lowest of all the black percentages in Jefferson County.

There is no attempt to explain why it was necessary, but for racial targeting, to split 16 precincts in HD 54. A total 26,151 persons, 58.9% of HD 54's population, reside in split precincts, including 56.3% of the district's black population. SDX 405 at 103-05. In two of the three precincts split with majority-white districts, HD 54 was assigned more whites than blacks, and in the thirteen precincts split with majority-black districts, HD 54 was assigned the smaller number of blacks. APSX 44 at 27a-29a. These figures confirm the fine tuning the drafters were doing to reach their racial targets in each majority-black district.

The boundaries of HD 54 are based predominantly on race.

3. House District 55:

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy with a vengeance when they reached and exceeded by only 13 black persons their 73.55% black target in HD 55. 989

F.Supp.2d at 1321 (Thompson, J., dissenting).¹³ The drafters “deliberately chose additional black voters to move into underpopulated majority-minority districts,” 135 S.Ct. at 1266, adding 6,988 blacks and 1,037 whites.

Contrary to defendants’ arguments that the fact all nine of the precinct splits are between majority-black districts “is not ‘evidence’ of anything,” Defendants’ Remand Brief at 120, it confirms that the drafters were madly searching for black population to reach HD 55's super-majority 73.55% black target. The net gain for HD 55 was 6,988 blacks and 1,037 whites. SDX 403 at 5; SDX 406 at 5.

Similarly, counsel’s inability to “unsplit” these precincts emphasizes how closely the drafters were fine-tuning the black percentages. Defendants’ Remand Brief at 121. For example, the precinct block maps show how they moved blocks as small as 9 persons between HD 55 and HD 57, and as small as 11 persons between HD 55 and HD 60. ALBC Remand Brief at 56-57 (citing APSX 92 and APSX 127). A total 19,416 persons, 43.1% of HD 55's population, reside in split precincts, including 27.1% of the district’s black population. SDX 405 at 106-07.

The boundaries of HD 55 are based predominantly on race.

4. House District 56:

¹³ Actually, using the figures in SDX 403, the drafters hit their target for HD 55 right on the nose, at 33,150 black persons.

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they reached and exceeded HD 56's target of 62.13% black by +0.01%. General, unspecific area demographics do not even address this level of fine tuning. The drafters “deliberately chose additional black voters to move into underpopulated majority-minority districts,” 135 S.Ct. at 1266, adding 2,495 blacks and 972 whites.

Counsel’s unsplitting exercise does not explain why the precincts were split along racial lines; why, for example, 337 of 1,090 blacks in Hunter Street Bapt Ch precinct, but only 1,142 of 7,624 whites were assigned to HD 56, SDX 405 at 31, 90, 108, or how the large concentrations of black population divided between HD 56 and HD 57 can be explained by anything other than the successful effort to hit the racial targets for both districts. SDX 405 at 109, 110-11. A total 5,220 persons, 11.6% of HD 56's population, reside in split precincts, including 5.8% of the district’s black population. SDX 405 at 108-09.

The boundaries of HD 56 are based predominantly on race.

5. House District 57:

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy with a vengeance when they reached and exceeded by only 21 black persons their 68.42% black target in HD 57. SDX

405 at 111. The drafters “deliberately chose additional black voters to move into underpopulated majority-minority districts,” 135 S.Ct. at 1266, adding 6,092 blacks and 2,752 whites. They contend the movements between majority-white HD 15 and majority-black HD 56 and HD 57 “resulted” in HD 57’s black population being “slightly higher” than its target. Defendants’ Remand Brief at 122 (citing SDX 459 at 125).

But McClendon’s notebook map does not appear to show any precinct boundaries, and the one precinct split between HD 57 and HD 15 is along clear racial lines. APSX 124 displays the irregular protuberance of HD 15 into Pleasant Grove First Baptist Church precinct, which leaves all but three of the many majority-black blocks in HD 57, placing 3,450 of 4,081 blacks in HD 57, and placing 2,223 of 5,461 whites in HD 15. SDX 405 at 110. The four precincts split between HD 57 and other majority-black districts show how they were fine-tuned to their racial targets. See ALBC Remand Brief at 60. A total 14,030 persons, 31.1% of HD 57’s population, reside in split precincts, including 26.4% of the district’s black population. SDX 405 at 110-11.

The boundaries of HD 52 are based predominantly on race.

6. House District 58:

Defendants contend “plaintiffs cannot cite the supposed “mechanical”

targets as evidence of a gerrymander for HD58.” Defendants’ Remand Brief at 122. That gets it backwards. Absent some testimony to the contrary, the presumption is that the drafters were trying to reach their racial targets in **each** majority-black district. In this case, HD 58's target was a huge 77.86% black, and the drafters missed it by just -5.10%. SDX 406 at 5. It would have been extremely difficult to hit this highest of all targets, even with the extra black population from cannibalized HD 53 added to the mix. The drafters “deliberately chose additional black voters to move into underpopulated majority-minority districts,” 135 S.Ct. at 1266, adding 3,653 blacks and 3,690 whites.

Defendants discuss two precinct splits cited by the ADC remand brief, but they do not address the ALBC remand brief for HD 58 at all. Their figures for Clearview Baptist Church precinct leave out the part assigned to majority-black HD 54. See APSX 44 at 31a. Altogether, 628 of 1,429 blacks were assigned to the two majority-black districts, leaving 3,496 of 4,138 whites in majority white HD 44. The precinct block map shows how noncontiguous pieces of this precinct containing majority-black blocks were snipped into the two majority-black districts. APSX 104.

Defendants’ figures for Pinson United Methodist Church precinct omit the parts assigned to majority-white HD 51 and majority-black HD 59. See APSX 44

at 32a. Altogether, 2,482 of 3,039 blacks were assigned to majority-black HD 58 and HD 59, while 2,622 of 3,338 whites were assigned to majority-white HD 44 and HD 51. The precinct block map shows how the drafters clicked one at a time to put all the majority-black blocks in the majority-black districts. APSX 123.

There were 12 precincts split altogether in HD 58. The other 10 were split between majority-black districts and demonstrate the fine-tuning needed to hit their racial targets. ALBC Remand Brief at 62-63. A total 31,418 persons, 69.7% of HD 58's population, reside in split precincts, including 71.6% of the district's black population. SDX 405 at 112-13.

The boundaries of HD 58 are based predominantly on race.

7. House District 59:

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they reached and exceeded their 67.03% black target by +9.69%. The drafters “deliberately chose additional black voters to move into underpopulated majority-minority districts,” 135 S.Ct. at 1266, adding 12,679 blacks and **removing** 780 whites.

Defendants admit that the drafters used portions of cannibalized HD 53 to repopulate HD 59. Defendants' Remand Brief at 124. HD 59 was not contiguous

to HD 53 in the 2001 plan; HD 54 and HD 60 were in the way. See APX 40. But by the time the drafters started drawing HD 59 they had created a pathway to the old HD 53 population by pushing majority-black HD 54 into areas around Irondale that had been in majority-white HD 44 and HD 45. Compare APX 40 with APX 41. The drafters could have repopulated HD 59 with mostly white populations to the north in east in HD 51 and HD 44, but, as Mr. Hinaman testified, the whole purpose of cannibalizing HD 53 was to use it to repopulate the remaining majority-black House districts in Jefferson County to avoid “retrogressing” them. Apparently, after all but one of the other majority-black districts had hit their targets by less than 1%, there was a surplus of black population left over that could moved to HD 59, causing it to exceed its racial target. If incumbent Rep. Moore was indeed complicit in this design, that only makes the excessive race-based line-drawing more problematic under *Shaw* standards.

It is not apparent which precincts formerly in HD 53 were placed in HD 59. Compare SDX 413 at 31 with SDX 405 at 113-16. It is clear, however, that the one precinct split with majority-white districts was drawn along racial lines. See the discussion of Pinson United Methodist Church precinct *supra* in the HD 58 section. The other 11 precinct splits were between HD 59 and other majority-black districts, all of which hit their racial targets except for HD 58. APSX 44 at

32a-33a. HD 58 got the lion's share of black population in 6 of the 8 precincts it split with HD 59, which shows that the drafters tried to reach HD 58's 78% black target. A total 20,711 persons, 45.8% of HD 59's population, reside in split precincts, including 47.7% of the district's black population. SDX 405 at 115-16.

The boundaries of HD 59 are based predominantly on race.

8. House District 60:

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they exceeded HD 60's target of 67.41% black by only +0.27%. The drafters "deliberately chose additional black voters to move into underpopulated majority-minority districts," 135 S.Ct. at 1266, adding 5,771 blacks and 2,127 whites.

Counsel's hypothetical unsplitting of the two precincts split between HD 60 and majority-white HD 51 misses the point that the drafters pulled 434 of 1,588 blacks into HD 60 from the heavily white Fultondale Sr Citizen's Ctr and Gardendale Civic Ctr precincts, leaving 15,640 of 16,600 whites behind in HD 51. APSX 44 at 34a. The precinct block maps show how the drafters snipped out a few hard-to-find majority-black blocks to place in HD 60. APSX 107 and 108.

Nor do defendants explain why 9 precincts needed to be split between HD 60 and other majority-black districts for any reason other than to fine-tune them to their racial targets. A total 11,391 persons, 25.3% of HD 60's population, reside in split precincts, including 24.9% of the district's black population. SDX 405 at 116-18.

The boundaries of HD 60 are based predominantly on race.

D. West Black Belt (HDs 67-72):

Defendants begin discussing this set of House districts by pointing to their large under-populations and similarities with plans from prior decades.

Defendants' Remand Brief at 127-29. But these generalities cannot explain why the drafters hit and exceeded their racial targets in these six districts by margins of 0.01, 2.01, 0.05, 0.20, 2.62, and 4.40, and they do not rebut the presumption that they are the result of the drafters' undisputed policy of trying to reach or exceed their racial targets in each district.

1. House District 67:

Compare Defendants' Remand Brief at 129-31 with ALBC Remand Brief at 67-69 and ADC Remand Brief at 63-64.

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they exceeded HD 67's target of 69.14% black by only +0.01%. The drafters “deliberately chose additional black voters to move into underpopulated majority-minority districts,” 135 S.Ct. at 1266, adding 4,984 blacks and 2,124 whites.

As defendants acknowledge, HD 67 was a one-county district in the 2001 plan, i.e., Dallas County, and they argue it is still “essentially” a one-county district. Defendants’ Remand Brief at 129-30. Not so, of course, and that makes a lot of difference to the 1,258 Perry County residents who are now submerged in a Dallas County district. SDX 405 at 136. This was done, as defendants say, because at -3.74% deviation, Dallas County alone would not comply with the \pm 1% rule. As throughout their brief, defendants do not say why this rule could not have been relaxed to prevent splitting Perry County.

But the \pm 1% rule does not explain why four precincts are split along racial lines in Perry County. All but the Pinetucky precinct had enough population to bring 1,258 Perry County residents into HD 67 with a single split precinct. Obviously, all four precincts had to be split to reach a district total of 31,172 blacks, 5 black persons more than needed to hit the 69.14% target -- or at least the drafter clicking on one block at a time must have thought so. SDX 405 at 136.

See the precinct block maps, APSX 245-248. This is precisely the kind of racial classifying *Shaw* prohibits. So it is small consolation to those folks in South Perry County that only 656 residents of HD 67 live in a split precinct.

The boundaries of HD 67 are based predominantly on race.

2. House District 68:

Compare Defendants' Remand Brief at 131-33 with ALBC Remand Brief at 69-84 and ADC Remand Brief at 64-66.

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they hit and exceeded HD 68's target of 62.55% black by 2.01%. The drafters "deliberately chose additional black voters to move into underpopulated majority-minority districts," 135 S.Ct. at 1266, adding 6,434 blacks and 2,109 whites.

Defendants' generalities about demographics and county populations are not responsive to the presumption. The only redistricting criteria they cite are maintaining the core of districts, compactness, and incumbent interests.

Defendants' Remand Brief at 132. They do not explain why the drafters violated the higher priority traditional districting principles in the Legislature's own

Guidelines by splitting the boundaries of six counties and 30 precincts along racial lines.

Defendants claim that “plaintiffs flatly reject the drafters’ race-neutral criteria,” Defendants’ Remand Brief at 133, and it is true that HD 68 in the ALBC remand House plan respects the Guidelines’ higher priorities of compactness and county integrity over its lower ones. However, the ALBC HD 68 does preserve the core of the 2001 version of HD 68 and avoids any incumbent conflicts, while splitting only two counties and two precincts. Compare APX 36 and 38 with APSX 36A and 37. Of course, HD 68 in the ALBC plan is only 53.30% black total pop and 50.48% black VAP. APSX 36. And its deviation is -4.78%.

Defendants don’t explain why they would not relax the $\pm 1\%$ rule to save any county or precinct boundaries. But a -4.78% deviation is only 1,720 persons short of -1.0% deviation, and adding that many persons to a House district as compliant with county and precinct boundaries as is the ALBC remand plan’s HD 68 would not require splitting four more counties and 28 more precincts, which is what the drafters did. Clearly, they did so because a HD 68 like the one in the ALBC remand plan could not easily be modified to reach and exceed a racial target of 62.50%.

Consider the drafters' split of Baldwin County. See APX 38. They placed 664 blacks and only 172 whites in HD 68, SDX 405 at 136, leaving 30,589 whites and 5,912 blacks in majority-white HD 64. *Id.* at 125. Splitting Washington County, the drafters placed 1,851 blacks and only 319 whites in HD 68, SDX 405 at 143, leaving 11,189 whites and 2,529 blacks in majority-white HD 65. *Id.* at 132. Splitting Marengo County, the drafters placed 4,432 blacks and 1,693 whites in HD 68, SDX 405 at 140, leaving 3,724 whites and 1,844 blacks in majority-white HD 65. *Id.* at 130. In Conecuh County (which is whole in the ALBC remand plan), the drafters placed 5,066 blacks and 3,041 whites in HD 68, SDX 405 at 139, leaving 3,747 whites and 1,083 blacks in majority-white HD 90. *Id.* at 181. These four counties obviously were split along racial lines.

Defendants have absolutely no response to the 30 precinct splits in HD 68; they didn't even attempt hypothetically to unsplit them, for obvious reasons. The precinct block maps and statistics in the ALBC remand brief reveal stark racial divisions, and there is no point in reviewing them again in this reply brief. A total 22,761 persons, 50.5% of HD 68's population, reside in split precincts, including 49.7% of the district's black population. SDX 405 at 136-43.

The boundaries of HD 68 are based predominantly on race.

3. House District 69:

Compare Defendants' Remand Brief at 133-35 with ALBC Remand Brief at 84-88 and ADC Remand Brief at 66-67.

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they hit and exceeded HD 69's target of 64.16% black by 0.05%. The drafters "deliberately chose additional black voters to move into underpopulated majority-minority districts," 135 S.Ct. at 1266, adding 5,096 blacks and 2,048 whites.

The core of HD 69 is Lowndes County, and in a rare bow to the Legislature's Guidelines defendants argue the racial target was hit in a manner consistent with "follow[ing] county lines...." Defendants' Remand Brief at 133. Still, the drafters split two county boundaries, in Autauga and Montgomery County. A comparison with HD 69 in the ALBC remand House plan, APSX 37, shows that the only reason for splitting Montgomery County (which can be drawn whole with five House districts all within $\pm 1\%$) was to reach the drafters' racial target. The ALBC remand plan HD 69 keeps Lowndes and Butler Counties whole and splits Autauga County, taking more white population than does the drafters' HD 69. As a result HD 69 in the ALBC plan is only 50.61% total black pop and 48.61% black VAP. APSX 36. This is a particularly clear demonstration of how

rigid racial targeting necessarily demanded extra county boundary splits. Here Montgomery County had to pay that price.

At -4.35% deviation, HD 69 in the ALBC remand plan would need only 1,524 more people to reach -1%, which would mean adding more Autauga County population (and likely lowering the black percentage). Restoring the split in Camelia Baptist Church precinct would have accomplished that. APSX 36A at 95, 115. As it is, the drafters had to split two precincts in Autauga County and nine precincts in Montgomery County along racial lines to reach their 64.11% black target. See ALBC Remand Brief at 84-88 and accompanying precinct block maps, APSX 50-51, 223, 225, 226-27, 229, 239-41, 244. A total 10,177 persons, 22.4% of HD 69's population, reside in split precincts, including 26.3% of the district's black population. SDX 405 at 143-45.

The boundaries of HD 69 are based predominantly on race.

4. House District 70:

Compare Defendants' Remand Brief at 136-38 with ALBC Remand Brief at 88-92 and ADC Remand Brief at 67-68.

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they hit and exceeded HD 70's

target of 61.83% black by 0.20%. The drafters “deliberately chose additional black voters to move into underpopulated majority-minority districts,” 135 S.Ct. at 1266, adding 4,245 blacks and 1,935 whites.

Defendants’ attempt to discount the stark racial splitting of 12 precincts in Tuscaloosa County by invoking counsel’s hypothetical unsplitting exercise does not explain why the splits were made along racial lines. Defendants’ Remand Brief at 137. See the precinct block maps and statistics in ALBC Remand Brief at 89-92. A total 39,586 persons, 86.1% of HD 70's population, reside in split precincts, including 86.9% of the district’s black population. SDX 405 at 145-46.

Defendants inexplicably argue “[t]here is zero proof that an alternative exists that would protect the area incumbents and keep HD70 and surrounding districts within deviation. Defendants’ Remand Brief at 137. The ALBC remand plan demonstrates that HD 70 could have been drawn with a +0.71% deviation and 57.21% black majority without splitting a single precinct or creating any incumbent conflicts. APSX 36; APSX 36A at 95-96.

The boundaries of HD 70 are based predominantly on race.

5. House District 71:

Compare Defendants' Remand Brief at 138-40 with ALBC Remand Brief at 92-100 and ADC Remand Brief at 68-70.

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they reached and exceeded HD 71's target of 64.28% black by 2.62%. Their contention this presumption is overcome if the drafters did not "hit the bullseye squarely" ignores that, as this Court found, in pursuit of their racial targeting goal the drafters "did not consider any [black percentage] too high...." 989 F.Supp.2d at 1296 (quoting Senator Dial). The drafters "deliberately chose additional black voters to move into underpopulated majority-minority districts," 135 S.Ct. at 1266, adding 5,582 blacks and 1,157 whites.

Defendants contend that HD 71 is "reasonably compact," maintained the core of the old district, and "protected the incumbent," even if "its overall shape changed...." Defendants' Remand Brief at 138. But these generalities about lower priority redistricting guidelines offer no evidence that something other than pursuit of the drafters' racial target can explain the splitting of 6 county and 24 precinct boundaries. The ALBC remand House plan demonstrates that the Sumter-Marengo core of HD 71, see APX 36, could have been maintained in an almost perfectly compact district that splits no county or precinct boundaries, with a

deviation of +2.06% and a 63.82% black majority. APSX 35 and 36; APSX 36A at 96. Defendants offer no reason why the drafters could not have relaxed the \pm 1% rule for the sake of preserving the boundaries of these three Black Belt counties, Sumter, Marengo, and Wilcox. Even if they had been unwilling to do so, reducing the size of HD 71's population by 483 persons to reach +1% deviation would have required cutting the boundary of only one county to send one precinct to another district. (Merely stating these facts show there is no principled basis for requiring rigid compliance with a \pm 1% rule when the drafters were willing to compromise literally every other redistricting principle in the Legislature's Guidelines.)

Defendants' hypothetical unsplitting exercise does not explain why the 24 precincts were split along racial lines. See ALBC Remand Brief at 92-100. A total 20,190 persons, 44.5% of HD 71's population, reside in split precincts, including 46.0% of the district's black population. SDX 405 at 146-50.

The boundaries of HD 71 are based predominantly on race.

6. House District 72:

Compare Defendants' Remand Brief at 140-44 with ALBC Remand Brief at 100-03 and ADC Remand Brief at 70.

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they reached and exceeded HD 72's target of 60.2% black by 4.40%. Defendants' contention that this missed the target "by quite a bit," Defendants' Remand Brief at 141, ignores that, as this Court found, in pursuit of their racial targeting goal the drafters "did not consider any [black percentage] too high...." 989 F.Supp.2d at 1296 (quoting Senator Dial). The drafters "deliberately chose additional black voters to move into underpopulated majority-minority districts," 135 S.Ct. at 1266, adding 5,566 blacks and only 197 whites.

Defendants say "the new HD 72 generally followed county lines...." Defendants' Remand Brief at 142. In fact, it split the boundaries of five small Black Belt counties, Sumter, Greene, Marengo, Perry, and Bibb, and it split 14 precincts along racial lines. ALBC Remand Brief at 101-03. Defendants offer no explanation of why these extensive county and precinct splits were made for any reason other than the drafters' pursuit of their racial target. Counsel present a difficult to read map they say "shows that the boundaries of HD 72 were driven by the need to include the populations of various small towns at its edges." Defendants' Remand Brief at 143. There is absolutely no evidence in the Guidelines or the drafters' testimony that preserving small town boundaries was

“driving” their mouse, however worthy that goal is. And that doesn’t explain why 14 precincts were split along racial lines, including splits in the municipalities of Brent, Eutaw, Demopolis, and Livingston. APSX 54, 55, 79, 80, 166, 258. A total 16,859 persons, 37.2% of HD 72's population, reside in split precincts, including 36.4% of the district’s black population. SDX 405 at 151-53.

The ALBC remand House plan demonstrates that HD 72 could have drawn keeping Greene, Hale, and Perry Counties whole, splitting only the Bibb County line and no precincts, with a deviation of -4.32% and a 62.65% black majority. APSX 35, 36, and 36A at 97. If the drafters had been unwilling to relax the $\pm 1\%$ rule, they could have added at least 1,520 more persons in one or more Bibb County precincts to reach -1% deviation. For example, adding Eoline Fire Dept. 12 precinct (total pop. 943, 142 black) --- contiguous to HD 72 -- and Alternative School 2 precinct (total pop. 1022, 139 black) -- adjacent to Eoline Fire Dept. 12, would leave ALBC remand HD 72 with a 60.56% black majority and a near-perfect deviation of -0.02%. See SDX 405 at 95, 151, and 94.

The boundaries of HD 72 are based predominantly on race.

E. Montgomery County (Hds 76-78):

Compare Defendants’ Remand Brief at 145-48 with ALBC Remand Brief at 103-13 and ADC Remand Brief at 70-76.

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they reached and exceeded HD 76's target of 69.54% black by +4.25%, came within -6.48% of reaching HD 77's target of 73.52%, and came with -4.27% to reach HD 78's target of 74.26%. The drafters "deliberately chose additional black voters to move into underpopulated majority-minority districts," 135 S.Ct. at 1266, adding 2,706 blacks and removing 2,912 whites in HD 76, adding 5,077 blacks and 5,351 whites in HD 77, and adding 9,237 blacks and 4,214 whites in HD 78.

Defendants are incorrect when they say the three majority-black House districts in Montgomery County were designed by Rep. McClammy. Defendants' Remand Brief at 145. McClammy's plan kept Montgomery County whole, with five districts all within $\pm 1\%$. The drafters drew seven House districts, with three of them, HD 69, HD 75, and HD 90 crossing into neighboring counties. The ADC remand reply brief discusses the McClammy plan in more detail.

But defendants' misplaced argument about the McClammy plan underscores their erroneous contention that "plaintiffs' arguments about county-splitting have no role to play with these districts." Defendants' Remand Brief at 148. As noted above, the drafters brought HD 69 from Lowndes County into Montgomery County in order to reach their racial target for HD 69. This split of the

Montgomery County boundary took 9,183 black residents out of Montgomery County, SDX 405 at 145, and that helps to explain why the drafters were able to reach their racial target in only one of the three majority-black districts contained entirely within Montgomery County.

The table at page 147 of the defendants' remand brief has the numbers for the 2001 and 2012 plans reversed. Here is the corrected table:

House District	SDX 406 Black % in 2001 plan using 2010 Census Data	SDX 403 Act 2012-602 Plan as Passed Black %	Difference
76	69.54	73.79	+4.25
77	73.52	67.04	-6.48
78	74.26	69.99	-4.27

As explained in the ALBC remand brief at page 105, using Montgomery County to draw four majority-black districts used 106,083 black Montgomery County residents, and the majority-white districts needed the remaining 24,537 black residents of the county to reach population equality. There was no testimony that the drafters abandoned their pursuit of the racial targets for HD 77 and HD 78.

Counsel's hypothetical unsplitting exercise does not explain why the drafters split along racial lines 9 precincts in HD 76, 10 precincts in HD 77, and 12 precincts in HD 78. See ALBC Remand Brief at 106-13. A total 37,159

persons, 80.8% of HD 76's population, reside in split precincts, including 84.3% of the district's black population. SDX 405 at 159-60. A total 25,359 persons, 55.2% of HD 77's population, reside in split precincts, including 48.7% of the district's black population. SDX 405 at 160-62. A total 21,830 persons, 47.5% of HD 78's population, reside in split precincts, including 48.2% of the district's black population. SDX 405 at 163-65.

Defendants say the fact that the majority-black Montgomery County House districts in the alternative plans “have high minority percentages [is] because of where people live, not because of a ‘quota.’” Defendants’ Remand Brief at 147. (In fact, all three percentages in the ALBC remand plan are lower. *Id.* at 148.) But, of course, that is exactly what should happen if, to comply with *Shaw* standards, the districts begin with traditional districting principles instead of beginning with racial targets. For example, the ALBC remand House plan draws five House districts, HD 74 through HD 78, keeping Montgomery County whole, while splitting just two precincts to avoid incumbent conflicts. APSX 36A at 98-106; APSX 37; APSX 43. The deviations range from -1.20% in HD 75 to +4.00% in HD 77, with black majorities of 63.79%, 65.61%, and 66.92%. APSX 36. If the drafters insisted on a rigid $\pm 1\%$ deviation requirement, one or two additional precincts could be split to bring each of the five districts within 1%.

The boundaries of HD 76, HD 77, and HD 78 are based predominantly on race.

F. East Black Belt (HDs 82-85):

Compare Defendants' Remand Brief at 149-58 with ALBC Remand Brief at 113-26 and ADC Remand Brief at 77-81.

Defendants begin their defense of this set of House districts by pointing to the relatively small number of county splits in the 2012 plan, which splits only Lee, Tallapoosa, Russell, and Houston Counties. SDX 404 at 19-20. This is the starting point plaintiffs wish the Legislature had taken throughout. The total populations of Russell County (52,947) and Houston County (101,547) require they be split for population equality. NPX 328. But Tallapoosa County (41,616) is small enough to be contained in one House district, and Lee County (140,247) can be self-contained with three districts averaging only 1,228 persons (+2.70%) over the ideal size of 45,521. Lee County presents a good example of how unwillingness to compromise one – and only one -- of the Legislature's Guidelines, i.e., the $\pm 1\%$ rule, will sacrifice county integrity, the highest priority constitutional traditional districting principle in the Guidelines.

On the other hand, keeping Lee County whole would seem to make it impossible to make HD 83 majority-black. The ALBC remand House plan

demonstrates how an effort to maintain just a 38.58% compact black HD 83 in Lee County led Mr. Cooper to make one unnecessary split of Lee County, sending 6,885 persons to HD 14 in Russell County. APSX 36; APSX 36A at 20.

Similarly, in an effort to keep HD 85 at just 49.21% black, APSX 36, he split six precincts in Houston County. APSX 36A at 112-13. Mr. Hinaman managed to get HD 85 up to 50.08% black to produce the 28th majority-black House district in the 2012 plan (although it is only 47.22% black VAP), but to do so he split all nine precincts in Houston County. SDX 405 at 174-75. This is clear evidence of the drafters' racial targeting efforts. But, candidly, it also points to the difficult issues any remedial plan must confront, in particular whether county boundary splits can be justified if they cannot create compact, majority-black VAP districts.

1. House District 82:

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they reached and exceeded HD 82's target of 57.13% black by 5.01%. The drafters "deliberately chose additional black voters to move into underpopulated majority-minority districts," 135 S.Ct. at 1266, adding 3,707 blacks and **removing** 988 whites.

The drafters split both Lee and Tallapoosa Counties in a visually irregular fashion that is apparent even on the mini-maps in defendants' remand brief at 151.

Defendants wonder how the ALBC plaintiffs can complain about this district when the ALBC remand plan would raise the size of the black majority in HD 82 even higher. *Id.* This illustrates the misunderstanding of *Shaw* jurisprudence that bedevils defendants' remand brief throughout. On remand from the Supreme Court this is not a **discrimination** case, it is a **racial classification** case. HD 82 in the ALBC plan turns out to be 66.46% black with a +4.84% deviation only because it keeps together whole Macon and Bullock Counties, which have been joined since the 1970s to enable the election of the first two black legislators in 1970, see APX 79, and it splits Pike County to gain 15,358 persons without splitting any precincts. The size of the black majority in the ALBC plan's HD 82 is "driven by the demographics of the Black Belt itself," in defendants' own words, Defendants' Remand Brief at 151, not by the racial classifications produced by the drafters' racial targeting policy.

Defendants also illustrate their misunderstanding of the controlling *Shaw* standards when they profess not to understand what problem the ALBC plaintiffs have with the six precincts the drafters split in HD 82 when three splits place more whites than blacks in HD 82. Defendants' Remand Brief at 152. This is an attempt to divert attention from the drafters' efforts to separate white and black voters, even when it was necessary to move more whites to reach their narrow

population deviation, which is apparent on the face of the precinct block maps and statistics. See ALBC Remand Brief at 114-17. For example, APSX 140 displays how the drafters clicked on majority-black blocks in the large Opelika B Voting District precinct to take them out of majority-white HD 38 and put them in majority-black HD 82 and HD 83. A total 16,754 persons, 36.5% of HD 82's population, reside in split precincts, including 24.8% of the district's black population. SDX 405 at 171.

The boundaries of HD 82 are based predominantly on race.

2. House District 83:

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they reached and exceeded HD 83's target of 56.92% black by 0.60%. The drafters “deliberately chose additional black voters to move into underpopulated majority-minority districts,” 135 S.Ct. at 1266, adding 3,086 blacks and 1,595 whites.

Defendants' contention that HD 83 is compact is risible on the face of their own mini-maps. Defendants' Remand Brief at 153. And the jigsaw shapes the drafters produced to connect the south part of Opelika in Lee County with the south end of Phenix City in Russell County make plain the racial separations displayed in the eleven precinct splits. *Id.* at 154.

Their misunderstanding of *Shaw* principles is displayed again when defendants say “[t]he ALBC’s argument makes no sense at all; if some precinct splits drive the black population percentage down and others drive it up, the right inference is that precincts were split for reasons that have nothing to do with race.” *Id.* at 155. The relevant question in these remand proceedings is whether the drafters were trying to separate black voters from white voters, regardless of whether the census blocks they picked had more blacks than whites or more whites than blacks. The precinct block maps and statistics leave no doubt that they were separating residents by race. For example, the split of Old Salem School precinct that pulled 143 blacks and 188 whites into HD 83 shows how the drafters amputated the feet of this precinct with a raggedy slash through its lower half to capture just a few majority-black blocks. APSX 139. A total 34,823 persons, 75.7% of HD 83's population, reside in split precincts, including 68.9% of the district’s black population. SDX 405 at 172-3.

The boundaries of HD 83 are based predominantly on race.

3. House District 84:

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they reached and exceeded HD 84's target of 50.61% black by 1.74%. There is no question the drafters were

pursuing their racial targeting policy in HD 84. The drafters “deliberately chose additional black voters to move into underpopulated majority-minority districts,” 135 S.Ct. at 1266, adding 3,155 blacks and 1,370 whites.

HD 84 presents a close question. If the drafters had been pursuing a legitimate racial objective, such as creating a compact district that provided black voters an equal opportunity to elect a candidate of their choice, or if the district boundaries were the product of negotiations between the drafters and representatives of black voters (the incumbent, Rep. Forte, voted against Act 2012-602), plaintiffs would not be able to prove that in achieving their race-conscious objectives the drafters subordinated traditional districting principles in HD 84. The drafters kept Bullock and Barbour Counties whole, splitting only Russell County, which must be split because it’s too populous to be contained in a single House district. (We leave aside the additional unnecessary splits of Russell County in HD 83 and HD 80.) See APX 38. And they split a single small precinct, Seale Courthouse Voting District, apparently for the purpose of getting HD 84 under 1% deviation. APX 16; SDX 405 at 173-74.

But, as the Supreme Court found, the drafters were not pursuing a lawful racial objective when they decided which whole counties to put together and which Russell County precincts to place in HD 84. That extraordinary

circumstance requires defendants to back up with more complete evidence their assertion that “[t]here is no way to draw HD84 with a meaningfully different black population percentage,” Defendants’ Remand Brief at 156. For example, as the ALBC remand House plan demonstrates, had the drafters kept Macon and Bullock Counties together, HD 84 could have been drawn as a majority-black district by joining all of Barbour County with more precincts in Russell County. (If the drafters had been unwilling to relax the $\pm 1\%$ rule, the ALBC plan’s HD 84 could have been brought within 1% deviation by splitting one precinct.)

The boundaries of HD 84 are based predominantly on race.

4. House District 85:

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they reached and exceeded HD 85's target of 47.94% black by 2.14%, making it majority-black in total population at 50.08%. APX 16. The drafters “deliberately chose additional black voters to move into underpopulated majority-minority districts,” 135 S.Ct. at 1266, adding 2,311 blacks and 308 whites.

Defendants concede, as they must, that all nine precincts in Houston County were split in order to exceed HD 85's target of 47.94% black and reach a bare black total population majority. Defendants’ Remand Brief at 158. But there is

only a 47.22% black VAP plurality. APX 16. We referred to this problem above and in the ALBC remand brief at 122-26. A total 27,927 persons, 61.7% of HD 85's population, reside in split precincts, including 78.2% of the district's black population. SDX 405 at 174-75.

So there is no doubt that the boundaries of HD 85 are based predominantly on race.

G. Mobile County (HD 97-99, and HD103):

Compare Defendants' Remand Brief at 159-63 with ALBC Remand Brief at 126-42 and ADC Remand Brief at 81-88.

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they fell short of HD 97's target of 60.66% black by only one person at 27,339 blacks. SDX 405 at 191. The drafters "deliberately chose additional black voters to move into underpopulated majority-minority districts," 135 S.Ct. at 1266, adding 5,863 blacks and 3,532 whites in HD 97, adding 2,376 blacks and 4,492 whites in HD 98, adding 386 blacks and 4,587 whites in HD 99, and adding 1,043 blacks and 2,554 whites in HD 103.

Defendants base their defense of the Mobile County majority-black House districts on the drafters' ability to hit their racial target in only HD 97, falling short by 5% to 7% in the other three districts, and on a claim that alleged similarities of black percentages in the alternative plans "suggest that the districts merely match the demographics of the area." Id. at 159-60. On the first point, they ignore the simple arithmetic which shows that 113,286 of the 147,695 black residents of Mobile County were placed in one of the majority-black districts, leaving only 34,409 blacks to be shared by five majority-white districts. SDX 405 at 189, 191, 193, 195, 196, 197, 199, 200, 201, 202. On the second point, they fail entirely to explain away the overwhelming evidence that scores of precincts were split along racial lines. The fact that HD 97, HD 98, and HD 99 all have population deviations of -0.99% and that HD 103's deviation is -0.98% is additional evidence that the drafters came as close as they could to hitting their racial targets. APX 16.

1. House District 97:

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they hit on the nose HD 97's target of 60.66%. Actually 27,339 black residents in HD 97 is one person shy of 27,340, which is 60.66% of 45,071. SDX 405 at 191. Close enough for government work. The drafters were able to reach their HD 97 target, the lowest

racial target of the four majority-black Mobile County House districts, by making HD 97 the only one of the four to add more blacks than whites to repopulate it, 5,863 blacks and 3,532 whites. Compare SDX 403 and 406.

Defendants say the drafters actually could have exceeded HD 97's racial target if they had let counsel unsplit the nine precincts. Defendants' Remand Brief at 160. Of course, that does not refute the evidence that those splits were along racial lines. To do that, defendants reprise their argument that there can be no racial motive if more whites than blacks are moved to the majority-black district when a particular precinct is split. *Id.* at 160-61. They pick the two precincts split with majority-white HD 96, Chickasaw Auditorium and Saraland Civic Center. But, as the ALBC remand brief shows, close inspection of how the drafters split these heavily white precincts when majority-white HD 96 had almost +1% deviation and had to give up population, the drafters picked blocks with the higher black percentages to move to underpopulated HD 97 and HD 98. ALBC Remand Brief at 128-30; APSX 179, 197; SDX 189, 190, 192.

The other seven precincts were split between three underpopulated majority-black districts in a clear effort to raise each of them as close as possible to their racial targets without dropping below -1% deviation. Defendants' Remand Brief at 128-31. Some of these precincts had white majorities, and some had black

majorities, but, as noted, there simply was not enough black population in all of Mobile County to reach three of the four racial targets. A total 23,876 persons, 53.0% of HD 97's population, reside in split precincts, including 55.9% of the district's black population. SDX 405 at 190-91.

The boundaries of HD 97 are based predominantly on race.

2. House District 98:

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they nonetheless fell short of HD 98's target of 65.22% black by -5.20%%. To repopulate HD 98, the drafters had to add more whites than blacks, 2,376 blacks and 4,492 whites. Compare SDX 403 and 406.

Counsel once again isolates one House district to redraw by hypothetically unsplitting its precincts. Defendants' Remand Brief at 162. In HD 98's case that's 13 split precincts, and it is all the more both irrelevant and unrealistic, because, as counsel concedes, the unsplitting exercise does not account for its effect on neighboring districts. In Mobile County, where the drafters didn't have enough black population to begin with, increasing the black percentage in one district necessarily would have lowered it in another district. Counsel's hypothetical does

nothing to rebut the presumption that the drafters were trying to come as close to all their racial targets as they could.

Defendants have no response to the specific 13 precinct splits along racial lines in HD 98. See ALBC Remand Brief at 131-35. A total 25,088 persons, 55.7% of HD 98's population, reside in split precincts, including 54.6% of the district's black population. SDX 405 at 191-93.

The boundaries of HD 98 are based predominantly on race.

3. House District 99:

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they nonetheless fell short of HD 99's impossibly high target of 73.35% black by -7.74%. To repopulate HD 99, the drafters had to add more whites than blacks, 386 blacks and 4,587 whites.

Compare SDX 403 and 406.

Counsel's hypothetical unsplitting exercise for HD 99 again makes the unsurprising point that its black percentage could have been increased had the drafters done so, without taking account of the obvious problems it would have created for their racial targeting objectives in the other majority-black districts. Defendants' Remand Brief at 162-63. Again, defendants have no response to

plaintiffs' analysis of 13 precincts split along racial lines in HD 99, which clearly shows both the separation of white and black voters where possible and the division of black populations between majority-black districts. ALBC Remand Brief at 135-38. A total 26,286 persons, 58.3% of HD 99's population, reside in split precincts, including 53.7% of the district's black population. SDX 405 at 193-95.

The boundaries of HD 99 are based predominantly on race.

4. House District 103:

Defendants offer no evidence to overcome the presumption that the drafters were pursuing their racial targeting policy when they nonetheless fell short of HD 103's high target of 69.64% black by -4.58%. To repopulate HD 103, the drafters had to add more whites than blacks, 1,043 blacks and 2,554 whites. Compare SDX 403 and 406.

Counsel's hypothetical unsplitting exercise for HD 103 again makes the unsurprising point that its black percentage could have been increased had the drafters done so, without taking account of the obvious problems it would have created for their racial targeting objectives in the other majority-black districts. Defendants' Remand Brief at 163. Again, defendants have no response to plaintiffs' analysis of 10 precincts split along racial lines in HD 103, which clearly

shows the separation of white and black voters where possible. ALBC Remand Brief at 139-42. A total 13,273 persons, 29.4% of HD 103's population, reside in split precincts, including 22.2% of the district's black population. SDX 405 at 199-200.

The boundaries of HD 103 are based predominantly on race.

Conclusion

All 8 majority-black Senate districts and all 28 of the majority-black House districts are unconstitutional.

Respectfully submitted this 7th day of August, 2015.

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