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,	*	Civil Action No. 2:12-CV-691-WKW-MHT-WHP (3-judge court)
v.	*	
THE STATE OF ALABAMA; JIM BENNETT in his official capacity as Alabama Secretary of State,	*	
Defendants.	*	
DEMETRIUS NEWTON et al.,	*	
Plaintiffs,	*	Civil Action No. 2:12-cv-1081-WKW-MHT-WHP (3-judge court)
v.	*	
THE STATE OF ALABAMA et al.,	*	
Defendants.	*	

ALBC PLAINTIFFS' POST-TRIAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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OVERVIEW

Plaintiffs Alabama Legislative Black Caucus et al., through undersigned counsel submit the following post-trial proposed findings of fact and conclusions of law. ALBC plaintiffs also support the additional claims made by the Newton plaintiffs.

There is no serious dispute about the facts in this case. The drafters of the Act 2012-602 House redistricting plan and the Act 2012-603 Senate redistricting plan started with the majority-black districts, all of which were substantially underpopulated, and added to them as many predominately black precincts and census blocks as possible in an attempt to equal or exceed the the majority-black percentage obtained by laying 2010 census numbers over the 2001 districts. The quest to pack the majority-black districts, combined with an arbitrary $\pm$ 1% deviation restriction and a policy of allowing white Republican incumbents to agree on new district lines among themselves, subordinated the integrity of county boundaries. As a result, black voter influence in the majority-white districts was diluted statewide, and the votes of African Americans for many county legislative delegations was diluted. The legislative leadership aggressively attempted to turn all majority-white districts into Republican seats, leaving the legislators elected from majority-black districts isolated in the Democratic seats.

The statewide dilution of black voting strength in the majority-white districts, the destruction of a compact majority-black House district in Jefferson County, and the cracking of black and Latino precincts to thwart the emergence of a coalition Senate district in Madison County violate both the results prong and the intent prong of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments. The dilution of black voting strength in the Jefferson County local delegation is the most serious of Section 2 results violations among the counties, and its intentional discrimination violates Section 2 and the Fourteenth and Fifteenth Amendments. The intentional cracking of a potential black crossover or influence Senate district in Madison County violates the intent prong of Section 2 and the Fourteenth and Fifteenth Amendments.

Defendants attempted to justify the undisguised packing of the majority black House and Senate districts by misreading the requirements of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. But Alabama's victory in *Shelby County, Ala. v. Holder*, 133 S.Ct. 2612 (2013), which held Section 4 unconstitutional, removes any colorable compelling state interest that can save the predominant use of race in drawing the House and Senate district lines from violating the Fourteenth Amendment standards of *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny.

I. The Packing of Majority-Black Districts Dilutes Black Voting Strength Statewide.

A. *Findings of Fact.*

1. Defendants admit that "[i]n drawing the plans, Senator Dial and Representative McClendon started with the black-majority districts because the Voting Rights Act requires the State to, among other things, preserve those districts to the extent possible." Defendants' brief, Doc. 125 at ¶ 26 (citations omitted); id. at ¶ 109; testimony of Sen. Dial, 08-08-13 Tr. at 35; Rep. McClendon, APX 64 at 3, APX 67 at 20; Testimony of Mr. Hinaman 08-12-13 Tr. at 122 (collectively hereafter the "drafters").

2. The drafters thought "to the extent possible" meant going beyond preserving 27 House and 8 Senate districts with black voting-age majorities, which provides African Americans in those districts an equal opportunity to elect candidates of their choice. "In order to essentially **guarantee** that the black community could elect the candidate of its choice in those pre-existing black-majority districts, the population to be added to the black-majority districts had to be contiguous to the prior district lines and had to have about the same percentage of black population in it." Doc. 125 at ¶ 30 (emphasis added) (citations omitted). See also Doc. 125 at ¶¶ 49-50 and ¶ 125; testimony of Sen. Dial 08-08-13 Tr. at 55, 79; Testimony of Mr. Hinaman 08-12-13 Tr. at 118; Testimony of

Rep. McClendon 08-12-13 Tr. at 221.

3. "The result of loading the 2010 Census data into the 2001 Senate and House plans also demonstrates that the Legislature had to find substantial numbers of people to populate the black-majority districts in line with the applicable population deviation." Doc. 125 at 57. "They accomplished this by 'add[ing] population that was contiguous to the old district line and had about the same percentage of black population in it.'" Doc. 125 at 64 (citations omitted); Testimony of Mr. Hinaman 08-12-13 Tr. at 141-45.

4. This packing objective was paramount, subordinating the preservation of county boundaries. Doc. 125 at ¶¶ 42-43, 90; testimony of Sen. Dial 08-08-13 Tr. at 28. In fact, defendants admit, the drafters' misconceived notion that § 5 of the Voting Rights Act required preserving the size of all black majorities was the "major reason" they adopted the ± 1% population deviation restriction. Doc. 125 at ¶ 81; testimony of Sen. Dial 08-08-13 Tr. at 27. It was also why they rejected the SB 5 and HB 16 plans. Id. at ¶¶ 82, 114; testimony of Sen. Dial 08-08-13 Tr. at 75. Defendants admit that the ± 1% population deviation restriction "made it more difficult to avoid splitting counties." Id. at ¶¶ 88, 113; testimony of Sen. Dial 08-08-13 Tr. at 35, 55.

> Q. And you're aware that the Alabama Constitution Section 200 specifically prohibits splitting any county?

> A. When possible. And we adopted the guidelines to keep counties intact as much as possible, but when you apply the Voting Rights Act on top of all that, it makes it almost impossible to keep all counties -- and ten years from now what they do the next census, there will be more counties broken up than there were this year, simply demographics, the way people grow.

Testimony of Sen. Dial 08-08-13 Tr. at 91.

5. Rep. McClendon erroneously contended that controlling Alabama and federal constitutional law made county boundaries completely irrelevant in the redistricting process:

> . McClendon said, "Our Constitution creates House and Senate Districts independent of county lines." "There is no requirement to respect county boundaries." Federal court cases and guidelines are interested in population distribution not county lines. Redistricting considered county lines, but they are not paramount. Legislators those whose re-election is most affected by moving district lines will likely rate their political survival ahead of county lines. McClendon said that it is important to always remember that, "Redistricting is a political process."

APX 58 at 2; Testimony of Rep. McClendon 08-12-13 Tr. at 239.

6. Preserving county boundaries was even subordinated to incumbent interests.

> Q. Okay. And what made it impracticable to give county boundaries a lower priority than incumbent protection?
> A. Voting Rights Act and not regressing the minority districts.

Testimony of Sen. Dial 08-08-13 Tr. at 73.

7. Senator Dial repeatedly emphasized the priority given to maintaining the

black population percentages in the majority-black districts. "We wanted to make sure they stayed as they were and we did not do away with any and that the population, as they grew, that they grew into the same proportion of minorities that they originally had or as close to it as we could get it." APX 66 at 17:16-22; testimony of Sen. Dial 08-08-13 Tr. at 27-28, 36, 54. Dial never considered any black majority percentage to be too high. Id. at 99:12-15, 121:15-23, 122:1-19. He testified, "My concept of a safe harbor is drawing a district where a minority is assured of being elected." Id. at 120:18-20.

8. Randy Hinaman was "the primary drafter" of the plans. Dial, APX 66 at 17:4-6. Rep. McClendon instructed Randy Hinaman to begin the House plan by drawing the "minority districts." McClendon, APX 67 at 20:9-23, 21:1-9. And Sen. Dial instructed Hinaman to "begin with the minority districts to ensure they were not regressed, and each one of them had to grow. And as we did those, then I filled in the blanks around those with what was left of the districts." Dial, APX 66 at 19:19-23, 20:1-10; testimony of Sen. Dial 08-08-13 Tr. at 35, 113.

9. Maintaining the same high black percentages had a predominant impact on the entire plan. Dial testified: "Without the Voting Rights Act, I could have drawn perfect districts throughout the state." Id. at 50:6-7; testimony of Sen. Dial 08-08-13 Tr. at 35-36 ("And so that created a problem, realizing the whole plan is

like a domino. If you change one district, you effectively change the whole state. So I began by drawing the minority districts and worked from there out. And basically what we had left was basically filling in the blanks with what was left after we did the minority districts.").

10. Mr. Hinaman testified he had two goals: first, to preserve the black-majority percentages, and, second, to avoid putting incumbents in the same district. Hinaman, APX 75 at 23:13 to 25:15; Testimony of Mr. Hinaman 08-12-13 Tr. at 118-19, 138. He testified that "I was concerned about anyplace where we lowered the black percentage significantly that there could be a preclearance issue." Id. at 101:23-25. The requirement in the Legislative Reapportionment Committee's guidelines that "Each House and Senate district should be composed of as few counties as practicable" was subordinated to these goals. Id. at 28:23 to 29:20, 57:4 to 58:22.

11. Mr. Hinaman's contract required that he work only for Republican legislators. APX 75 at 10:6 to 11:1. Even though he started the House and Senate plans with the majority-black districts, he met with no black legislators. Id. at 38:6-25; testimony of Sen. Dial 08-08-13 Tr. at 88. But he met with most of the Republican members of the House and Senate and attempted to follow their directions about how to draw the districts. Id. at 74:5-13, 114:8 to 116:14.

12. Defendants admit that Sen. Dial and Rep. McClendon let the incumbents decide how to draw their district lines, so long as they agreed among themselves. Doc. 125 at ¶¶ 21-26, 33-37, 55-57, 59-67, 83, 107, 116-21; testimony of Sen. Dial 08-08-13 Tr. at 68; Testimony of Mr. Hinaman 08-12-13 Tr. at 135. This policy explains why Dekalb County, whose population of 71,109 requires it to have no more than 2 House districts, ended up with 6 House districts.

> We had a group that involved Marshall County, Dekalb, Blount. I had about five legislators, and they -- and these were all Republican guys. And did they go round and round. About wore us out. But they finally came out with not everybody 100 percent happy, but came out -- and of course, what I told them, I said, look. You guys cut a deal here, and you got to be happy enough to vote for this plan when it comes on the House floor. That's the idea. And they finally did work it out. I bet they were in the office three or four times at least working on this.

Testimony of Rep. McClendon 08-12-13 Tr. 233.

13. According to Sen. Dial, maximizing the 3 majority-black Senate districts in Jefferson County required extending all 5 majority-white districts outside Jefferson County, causing additional splits in Jackson, Marshall, Talladega, St. Clair, Shelby, Clay, Coosa, and Blount Counties. APX 66 at ¶ 84; 125-3 at 47:13 to 51:1; testimony of Sen. Dial 08-08-13 Tr. at 69-70.

14. According to Mr. Hinaman, moving HD 53 from Jefferson County to Madison County had a further ripple effect. It combined with population growth to

cause "districts [to] radiat[e] out of Madison County," which, he said, helps explain why little Dekalb County ended up with 6 House districts. APX 75 at 53:15 to 55:8.

15. And Sen. Dial testified that maintaining the majority-black percentages in Senators Singleton's and Sanders' districts (SD 23 and SD 24) was one reason why he had to extend Democrat Senator Tammy Irons' SD 1 over into Madison County. APX 66 at ¶ 87; Doc. 125-3 at 51:2 to 52:15. Sen. Dial testified that Sen. Singleton's SD 24 had to grow north into Lamar County. Testimony of Sen. Dial 08-08-13 Tr. at 47-48. In fact, in the Act 603 plan, SD 24 does not extend into Lamar. SD 21, whose incumbent is white Republican Gerald Allen, does extend into Lamar County. Compare APX 4 with APX 17; Testimony of Mr. Hinaman 08-12-13 Tr. at 123-24. "It all rotated around because it's like dominos." Testimony of Sen. Dial 08-08-13 Tr. at 48.

16. Sen. Dial's self-imposed mandate to maintain the size of the black majorities in SD 23 (Sen. Hank Sanders) and SD 24 (Sen. Bobby Singleton), was the main reason SD 22, where the incumbent is white Democrat Sen. Marc Keahey, was "drastically" changed. Testimony of Sen. Dial 08-08-13 Tr. at 44-45. "[T]here was no way possible for me to appease him and keep him a, quote, as he said, democratic district, with what had happened in Baldwin County and what had

happened with Senator Sanders' district and also with Senator Singleton's district." Id. at 45.

17. Sen. Keahey presented about 10 proposals for drawing his SD 22 to Sen. Dial, but Sen. Dial rejected them all on the ground that they retrogressed the black majority percentages in SD 23 and SD 24, Sen. Sanders and Sen. Singleton. Testimony of Sen. Keahey 08-08-13 Tr. at 194-95. Sen. Keahey didn't realize until the last minute that Sen. Dial was defining retrogression by the black percentages of total population obtained by placing 2010 census data on the underpopulated 2001 SD 23 (64.76%) and SD 24 (62.78%). Id. at 195-96; CX 402. Sen. Keahey had been using the black percentages of total population that existed when the 2001 Senate plan was enacted based on 2000 census data, SD 23 (62.31%) and SD 24 (62.41%). Testimony of Sen. Keahey 08-08-13 Tr. at 195; APX 4. Sen. Keahey's proposals would have taken the fragments of Marengo and Washington Counties out of SD 22 without reducing the black percentages in SD 23 and 24 as they were measured in 2001. Testimony of Sen. Keahey 08-08-13 Tr. at 196-97. Even though Senators Singleton and Sanders agreed to Sen. Keahey's proposals, Sen. Dial rejected them, saying they retrogressed SD 23 and 24 by his definition. Id. at 196-97.

18. Asked why SD 11 was drawn in a semi-donut-shape that splits St. Clair,

Talladega, and Shelby Counties, Sen. Dial blamed that also on the need to preserve the black majorities in Jefferson County Senate districts. APX 66 at 111:2 to 114:15. The incumbent, Sen. Jerry Fielding, was a Democrat. He now has switched to the Republican Party.

19. At trial, Sen. Dial summarized the widespread impact of packing the majority-black districts:

> Q. So basically, the need to repopulate the African American districts down in the black belt, which had been systematically underpopulated in the 2001 plan and had lost population since then, pushed up along the Mississippi border into north Alabama and rolled around?
>
> A. That exactly what happened. Plus, it also had the same effect -- Senate District 2 also pushed up people in east Alabama and rolled it into Madison County as well. So it all had an impact into that area. And then when you factor in the fact that -- of what happened in Jefferson County in fixing those three districts that we've already talked about, it compressed the whole process and it forced out and it forced even to the fact that we had to divide my county that I live in, which I was not extremely happy with, too. But because of the numbers, that had to happen.

Testimony of Sen. Dial 08-08-13 Tr. at 48-49. "[To] keep the Voting Rights Act intact and grow the minority districts in Jefferson County along with the other minority districts, it was going to affect all the regions around it and all the way to the state border." Id. at 109.

20. Acts 2012-602 and 2012-603 were designed to concentrate black voters in House and Senate districts that have excessively large majorities, more than are

needed to satisfy § 2 of the Voting Rights Act. This necessarily increases the political segregation of African Americans and reduces their ability to influence the outcome of legislative elections in the rest of the state.

21. APX 72 and 73 compare the Act 2012-602 and 2012-603 plans with the HB 16 and SB 5 plans introduced by members of the Legislative Black Caucus. They show how heavily the majority-black House and Senate districts are packed by comparing the margins or differences between black and white voting-age percentages in the majority-black districts. The black-white margins in the Act 602 plan are greater than the margins in the HB 16 plan in 25 of the 27 majority-black districts. APX 72. The median and mean margins for the majority-black districts in the Act 602 House plan are 26.5% and 28.2%, compared with only 16.5% and 20.3% in the HB 16 plan. APX 72.

22. The black-white margins in the Act 603 Senate plan are greater than the margins in the SB 5 plan in 6 of the 8 majority-black districts. APX 73. The median and mean margins for the majority-black districts in the Act 603 Senate plan are 24.1% and 28.8%, compared with 21.0% and 22.6% in the SB 5 plan.

23. APX 128 and 129 extend the black-white margin comparisons to the 2001 House and Senate majority-black districts (with 2000 census data) and add the percent "other minority," which is almost entirely Latino. Testimony of

William Cooper 08-09-13 Tr. at 93-95; APX 134-37. All the margins in the 2001 plans are substantially smaller than are the black-white margins in the 2012 plans. The median and mean margins in the 2001 majority-black House districts are 20.5% and 22.5% BVAP, compared with 26.5% and 28.2% in the 2012 House plan. APX 129. The median and mean margins in the 2001 majority-black Senate districts are 20.3% and 22.0% BVAP, compared with 24.1% and 28.8% in the 2012 Senate plan. APX 129.

24. It is important to note that the "other minority" percentages in the majority-black districts in the 2012 majority-black districts – in both the Act 602 and 603 plans and in the HB 16 and SB 5 plans – have almost doubled, from about 2.5% to 4%, since the 2001 plans were drawn. APX 129. This increase is primarily a function of the tremendous growth in Hispanic population in Alabama. Testimony of William Cooper 08-09-13 Tr. at 94-95; APX 134-37. Since about 60% of the Latino population in Alabama is non-citizen, APX 135, they either don't vote or usually vote Democratic, which further enhances the voting power of the packed African-American majorities. Testimony of William Cooper 08-09-13 Tr. at 94-95.

25. One of the most egregious cases of packing is in Sen. Vivian Figures' SD 33 in Mobile County. SD 33 in the existing 2001 Senate plan with 2010 census

data is 64.89% black total population and 61.55% black voting-age population. APX 7. Act 2012-603 hikes the black total population in SD 33 to 71.71% and the black voting-age population to 68.10%. Id. SD 33 remains contained entirely inside Mobile County, but it no longer adjoins Sen. Keahey's SD 22, and most of the black precincts formerly in SD 22 were moved into SD 33, not into majority-white SD 34. Compare APX 4 with APX 17. Sen. Figures "absolutely" did not request that her black population be increased, and she had nothing to do with the design of the new SD 33, even though she was an active member of the Legislative Reapportionment Committee. Testimony of Sen. Figures 08-09-13 Tr. at 45-49.

> As we started debating, and I saw the percentages in my district, I asked for more white voters. I said I was very capable of representing white people. And they said that they couldn't go one way or the other way. So I said, well, why can't you go down in Baldwin County? Because my district does go to the state docks downtown. I said, why can't you go over the bay to Baldwin County? But one of the senators from that area didn't want me in their local delegation.

Testimony of Sen. Figures 08-09-13 Tr. at 46.

26. APX 74 shows how this packing substantially reduced the black percentages in the top five potential influence House and Senate districts under 50%. The average black percentage in the top five Act 603 Senate districts is 30.66%, compared with 36.34% in the top five SB 5 Senate districts. One SB 5 influence district, SD 7, is 40.10% black VAP and 5.46% Hispanic VAP, and

another is 31.76% black VAP and 2.56% Hispanic VAP. APX 23. All of the top five black plurality Senate districts in Act 603 are 26.12% black VAP or less. APX 74.

27. Only 2 of the top 5 black plurality House districts in the Act 602 plan are greater than 30% BVAP, while the top 5 potential influence districts in HB 16 range from 38.78% to 30.50% BVAP. APX 74. The average black percentage in the top five Act 602 House districts is 23.88%, compared with 31.01% in the top five HB 16 House districts. Id.

28. The voices and political influence of African-American Democrats in the Alabama Legislature have been marginalized and ignored by the filibuster-proof white Republican majorities in the House and Senate. Testimony of Sen. Figures 08-09-13 Tr. at 51-55. Even though she was minority leader in the Senate, Sen. Figures was not allowed even to speak when the surprise 28-page Accountability Act was introduced. Id. at 53-54.

29. The undisputed evidence of racially polarized voting throughout Alabama is supported, *inter alia*, by the testimony and expert report of Dr. Allan Lichtman. Testimony of Dr. Lichtman 08-12-13 Tr. at 87-97; NPX 324.

30. Polarized voting and turnout results demonstrate that African Americans in Alabama would find their opportunities to elect candidates of their choice and

participate fully in the political process impeded in state legislative districts dominated by whites. However, the very high degree of black cohesion combined with white crossover demonstrates that it is not necessary to draw super-majority African American districts to provide African Americans a reasonable opportunity to elect candidates of their choice to the state legislature. NPX 324 at 22.

31. African Americans have a demonstrated opportunity to elect the candidate of their choice in Alabama legislative districts that are less than 50% BVAP, ranging from 46% to 49.7%. NPX 324 at 25.

32. The facts that show intentional racial discrimination are detailed in the testimony and expert report of Dr. Ted Arrington. Testimony of Dr. Arrington 08-12-13 Tr. at 49-68; NPX 323.

B. *Conclusions of Law*.

33. *Shelby County v. Holder*, 133 S.Ct. 2612 (June 25, 2013), has held that the coverage formula in § 4 of the Voting Rights Act, 42 U.S.C. § 1973b, is unconstitutional, so that Alabama cannot be subjected to the preclearance requirements of § 5. Chief Justice Roberts' opinion for the Court's majority highlighted the concern that "considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 [of the Voting Rights Act] seem to be what save it under § 5." 133 S.Ct. at 2627 (quoting *Georgia v.*

Ashcroft, 501 U.S. 452, 491 (1991) (Kennedy, J., concurring)). Now §5 cannot save Acts 2012-602 and 2012-603, and they must be judged by the redistricting standards of § 2 and the Fourteenth and Fifteenth Amendments.

34. Defendants base their contention that it was necessary to preserve the high black percentages by crowding black residents into the majority-black districts entirely on their mistaken understanding of the § 5 preclearance standard. They rely on *Texas v. United States*, 831 F.Supp.2d 244, 263 (D. D.C. 2011) (3-judge court). Doc. 125 at 59. Plaintiffs previously showed that this decision interpreting § 5 post-2006 does not support defendants' policy of systematically packing all the majority-black districts. Doc. 32 at 12-14. Defendants do not dispute there is no such requirement in § 5, testimony of Sen. Dial 08-08-13 Tr. at 62-63 ("I did not say it required. I said it was the best way to get it precleared."), "but maintaining the size of the voting minority," they say, "is certainly one way to obtain preclearance." Doc. 125 at 64-65. So, defendants say, this purely discretionary [mis]understanding of § 5 by the co-chairs of the Legislative Reapportionment Committee was "not unreasonable." Id. at 66. "In the absence of anything in writing to the contrary, the ALBC Plaintiffs' suggestion that Senator Dial and Representative McClendon have an incorrect view of the Voting Rights Act should be disregarded." Id. Well, unfortunately, *Shelby County v. Holder* is

now "in writing," so defendants can no longer defend their black super-majorities by claiming compliance with § 5 of the Voting Rights Act.

35. The House and Senate redistricting plans will not be implemented until the June 2014 primary elections. This Court must apply the law in effect at the time of its decision, not at the time Acts 2012-602 and 2012-603 passed the Legislature. "[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Richmond School Board*, 1974, 416 U.S. 696, 711 (1974) (quoted in *United States v. Marengo County Com'n*, 731 F.2d 1546, 1553 (11th Cir. 1984)); accord, e.g., *United States v. Rojas*, 645 F.3d 1234, 1239-40 (11th Cir. 2011). The defendant State of Alabama cannot claim manifest injustice if it can no longer defend the packing of majority-black districts by claiming that the § 5 devil made it "reasonable" to do so, when the State's own advocacy was responsible for the Supreme Court's decision that it is unconstitutional to require Alabama to comply with § 5.

36. The State may no longer contend that it was "reasonable" for the Legislature to seek § 5 preclearance by maintaining super-majorities in the majority-black House and Senate districts that "guarantee" the election of black voters' preferred candidates. And it was not a "reasonable" way to comply with §

2, because "the ultimate right of § 2 is equality of opportunity, **not a guarantee** of electoral success for minority-preferred candidates of whatever race." *LULAC v. Perry*, 548 U.S. 399, 428 (2006) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 014, n. 11 (1994)) (emphasis added).

37. *Bartlett v. Strickland*, 556 U.S. 1 (2009), held that § 2 of the Voting Rights Act does not compel states to draw crossover districts, in which blacks who make up less than 50% of the voting-age population nevertheless can count on enough support from white voters to allow blacks to elect the candidate of their choice. But *Bartlett* reaffirmed the Court's earlier ruling that, where there is racially polarized voting, § 2 does prohibit "the concentration of blacks into districts where they constitute an excessive majority, so as to eliminate their influence in neighboring districts." 556 U.S. at 28 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986)) (internal quotation marks omitted).

38. "And," the *Bartlett* plurality reminded us, "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." 556 U.S. at 24 (citing *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 481–482 (1997)).

39. As the *Bartlett* dissenters noted, the plurality disavowed the "aberrant

implication" that "the only way to comply with § 2, is by drawing district lines in a way that packs minority voters into majority-minority districts, probably eradicating crossover districts in the process." 556 U.S. at 43 (Souter, J., dissenting). Indeed, the plurality opinion concludes by saying, "It would be an irony, however, if § 2 were interpreted to entrench racial differences by expanding a 'statute meant to hasten the waning of racism in American politics.'" Id. at 25 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)).

40. The Court held in *De Grandy* that § 2 of the Voting Rights Act prohibits the "manipulation of district lines [that] dilute the voting strength of politically cohesive minority group members, whether by fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them, **or by packing** them into one or a small number of districts **to minimize their influence in the districts next door**. Section 2 prohibits **either** sort of line-drawing where its result, 'interact[ing] with social and historical conditions,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters.'" 512 U.S. at 1007 (quoting *Gingles*, 478 U.S., at 47) (emphasis added).

41. *De Grandy* rejected proportionality as a safe harbor against a § 2 challenge on the ground that it could become "an irresistable inducement" for a

state to create enough majority-black districts to mirror the black population percentage, allowing it to "rely on a quintessentially race-conscious calculus" that would "obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." 512 U.S. at 1020.

42. *Bartlett* does hold that a § 2 results violation cannot be based on a claim that a particular influence or crossover must be created. 556 U.S. at 23 ("as a statutory matter, § 2 does not mandate creating or preserving crossover districts"). But that kind of district-specific claim must be distinguished from a claim that **majority-black** districts have been packed in a manner that systematically eliminates African Americans' influence in neighboring districts. 556 U.S. at 28. It is one thing to contend that traditional districting standards may be violated for the sake of drawing a black-minority crossover district, especially where, in *Bartlett* as in the instant case, a whole-county requirement in the state constitution has been violated. It is altogether a different thing to contend that § 2 does not bar the state from stuffing as many black voters as it can into districts that are already majority-black. The dilution of black voting strength in the redistricting plan as a whole is evident in such systematic packing.

43. Alabama's position in the instant action that *Bartlett* and § 5 together provide it a safe harbor for packing the majority-black districts must fail for the same reason as did Florida's contention that statewide proportionality was a safe harbor. "The safety would be in derogation of the statutory text and its considered purpose, however, and of the ideal that the Voting Rights Act of 1965 attempts to foster. An inflexible rule would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.' 42 U.S.C. § 1973(b)." *De Grandy*, 512 U.S. at 1018. Section 2 was amended in 1982, the Court said, to counter "the demonstrated ingenuity of state and local governments [to] hobbl[e] minority voting power." Id. So this Court must assess the dilutive effects of the packed majority-black House and Senate districts by conducting "a searching practical evaluation of the 'past and present reality.'" Id.

44. Neither does *Bartlett* foreclose a §2 challenge to intentional packing of majority-black districts that systematically reduces African-American voters' influence in the remaining majority-white districts. "Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns." 556 U.S. at 23-24 (citing *Miller v. Johnson*, 515 U.S. 900 (1995), and *Shaw v. Reno*, 509 U.S. 630 (1993)).

45. To the contrary, *Bartlett* says that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments. There is no evidence of discriminatory intent in this case, however. Our holding recognizes only that there is no support for the claim that § 2 can require the creation of crossover districts in the first instance." 556 U.S. at 24 (citing *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 481–482 (1997)).

46. The overwhelming evidence in the instant case is that the Republicans who controlled legislative redistricting welcomed their bogus § 5 excuse to pack the majority-black districts in order to enhance Republican opportunities to capture all the majority-white seats. As Sen. Dial admitted, the drafters were fully aware that packing the majority-black districts would reduce black voter influence in the majority-white districts, a benefit to Republicans he blamed on § 5 of the Voting Rights Act. Testimony of Sen. Dial 08-08-13 Tr. at 61-62.

47. White Democrats were invited to join the Republican Party or had their districts targeted for Republican challengers. No black legislators were asked to become Republicans. All the Republican incumbents in predominantly white counties were allowed to negotiate their new district lines with their Republican colleagues. Testimony of Sen. Dial 08-08-13 Tr. at 68; Testimony of Mr. Hinaman

08-12-13 Tr. at 135. This scheme constituted intentional racial discrimination on its face, regardless of the denials of Sen. Dial and Rep. McClendon of any invidious intent on their part.

48. Rep. McClendon may claim ignorance of Alabama's history of white supremacy, *Hunter v. Underwood*, 471 U.S. 222, 229 (1985), and the Democrats' drawing of "the color line" in 1874 to redeem Alabama from "black rule" by forcing all whites into one party on one side of the Legislature "leaving the other side essentially black." *Knight v. Alabama*, 787 F. Supp. 1030, 1068 (N.D. Ala. 1991) aff'd in relevant part, 14 F.3d 1534 (11th Cir. 1994). Testimony of Rep. McClendon 08-12-13 Tr. at 243-45. But black Alabamians, like Sen. Smitherman, are aware of this history, Testimony of Sen. Smitherman 08-09-13 Tr. at 30. The defendant State of Alabama cannot disclaim institutional knowledge of its own history, and the reimposition of that racist policy by Acts 602 and 603, which is designed to segregate and exclude the representatives of black voters from effective influence in the Legislature, violates both the totality of circumstances standard of the results prong and the intent prong of § 2 of the Voting Rights Act, as well as the Fourteenth and Fifteenth Amendments.

49. Neither do the county-cutting majority-black districts in the Black Belt satisfy the § 2 compactness test. "While no precise rule has emerged governing § 2

compactness, the 'inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries.'" *LULAC*, 548 U.S. at 433 (quoting *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) and *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion)) (internal quotation marks omitted). "A district that 'reaches out to grab small and apparently isolated minority communities' is not reasonably compact." *LULAC*, 548 U.S. at 433 (quoting *Bush v. Vera*, 517 U.S. at 979).

50. Whether or not this Court has subject-matter jurisdiction to enforce the whole-county provisions of the Alabama Constitution, the defendants' total disregard of those state constitutional restrictions on the division of counties is highly relevant to plaintiffs' federal racial vote dilution and segregation claims, as defendants concede, Doc. 125 at 4-5.

51. Neither political reasons nor incumbency protection can justify a § 2 violation. *LULAC*, 548 U.S. at 440-41. "If . . . incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters." Id. at 441.

52. This Court concludes that the systematic packing or maximization of all the majority-black House and Senate districts in Acts 2012-602 and 2012-603

violates both the results and intent prongs of § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.

II. The Packing of Majority-Black Districts in Jefferson County, the Removal of HD 53, and the Inclusion of Non-resident Majority-White Constituencies in the Jefferson County Local Delegation Dilute Black Voting Strength in Jefferson County and Statewide.

A. *Findings of Fact.*

53. In Alabama, the dilution of black voting strength in counties' local legislative delegations matters a lot. They "are the single most important legislating bodies for th[e] counties." *Alabama Legislative Black Caucus v. Alabama*, 2013 WL 4102154 (M.D. Ala., Aug. 2, 2013) (Thompson, J., concurring in part and dissenting in part) at *2. Because the Constitution of Alabama limits the power of local governments, the Alabama Legislature is responsible for a significant amount of local legislation, and the current Legislature uses local delegations to facilitate the passage of this legislation. Each house has similar, but not identical, customs for local bills. *Alabama Legislative Black Caucus v. Alabama*, 2013 WL 3976626 (M.D. Ala., Aug. 2, 2013) at *2.

54. All members of the Senate are members of local delegations for the counties that they represent. The local delegation of a particular county must approve local legislation before it can move forward to a local legislation committee and again before it can be sent to the floor. The local delegations of

Jefferson County, Mobile County, and Madison County each have a standing local legislative committee made up of the same members as the local delegation, and the rest of the local delegations use another local legislative committee whose members are appointed. The latter committee does not vote on the local legislation; instead, the local delegations of the counties sign the legislation out of that committee. Although local legislation is often uncontested on the Senate floor as a matter of local courtesy, there is no Senate rule that requires deference to delegations. Any senator may oppose local legislation on the floor of the Senate. And on tax and alcohol related matters, Senate members routinely contest legislation for other localities. 2013 WL 3976626 at *2.

55. All members of the House of Representatives too are members of local delegations for the counties that they represent. Each local delegation with more than five members has a corresponding standing committee in the House of Representatives to consider its local legislation, and a separate standing committee considers local legislation from all other delegations. A local delegation with more than five members must approve local legislation by a majority vote before it is sent to the House floor, but a local delegation with fewer than five members must unanimously approve the bill before it is sent to the House floor. House members are free to oppose local legislation on the floor, but local legislation is often

uncontested as a matter of courtesy. Although local legislation is often uncontested in the House of Representatives, legislators can and do deviate from this practice. House Rule 23 allows any member of the House of Representatives to file a contest on a local bill as long as he or she does so in written form with the Clerk. See Ala. H. Rule 23. If the member of the House of Representatives wishes to contest a bill for more than one day, that member can submit one letter and inform the Clerk each day that the contest is still active. While the bill is under contest, it cannot be presented to the full House, unless four/fifths of those present and voting suspend the rules to bring the bill to the floor or the rules committee places the bill on a special order calendar. Local legislation is not enacted until it receives a majority vote in both houses of the Alabama Legislature and is signed by the Governor. Id.

56. Jefferson County has the largest local legislative delegation in the state. In the Jefferson County delegation, local bills are voted out of committee by majority vote within the delegation. Id.

57. The importance of county delegations is reflected in the way the drafters of the House and Senate plans tried to avoid having district lines cross county boundaries when members of the county's local delegation objected to having non-resident legislators join them. E.g., Testimony of Sen. Dial 08-08-13 Tr. at 41-42 121-22; Testimony of Sen. Figures 08-09-13 Tr. at 46.

58. Acts 2012-602 and 2012-603 contain 18 House districts and 8 Senate districts that include some part of Jefferson County. APX 15, 17, 41, 43. The HB 16 and SB 5 plans demonstrated that, using a ± 5% population deviation, only 14 House districts and 6 Senate districts need be drawn in Jefferson County, with none of the House districts and only two Senate districts crossing the Jefferson County boundary. APX 20-23.

59. By packing the Jefferson County Local Delegation with 6 more members than are required by the county's population, all of whom represent majority-white constituencies outside Jefferson County, white legislators will continue being able to block local revenue bills, whose defeat has helped drive Jefferson County into bankruptcy and has closed Cooper Green Mercy Hospital for the poor. Testimony of Sen. Smitherman 08-09-13 Tr. at 11-21.

60. In Acts 2012-602 and 2012-603 Jefferson County has 6 more members of its local legislative delegation than are warranted by its population, 4 in the House and 2 in the Senate. All six of the extra districts are majority white. Thus the total membership of the Jefferson County Legislative Delegation remains at 26, but one of the current majority-black House districts, HD 53, has been taken out of Jefferson County and moved to Madison County. So, where currently the 18 Jefferson County House districts are evenly divided, 9 majority-white and 9

majority-black, under Act 2012-602 there will be 10 majority-white House districts and only 8 majority-black House districts. The Act 2012-603 plan retains 3 majority-black and 5 majority-white Senate districts.

61. The lack of home rule for counties in Alabama is rooted in racial discrimination. "[G]eneral hostility to home rule in the 1901 Constitution, as well as the 1875 Constitution, was motivated at least in part by race: 'white control of the state government ... is an important fall-back provision for guaranteeing the maintenance of white supremacy in majority black counties. And so it's important not to have too much power in the hands of the counties, or to make sure that the power ... that is at the local level is in safe, that is, Democratic [now Republican] and white hands.'" *Knight v. Alabama*, 458 F.Supp.2d 1273, 184-85 (N.D. Ala. 2004), aff'd 476 F.3d 1219 (11th Cir.), cert. denied, 127 S.Ct. 3014 (2007) (citation omitted).

62. Under Act 2012-602, the eight majority-black House districts will be HD 52 and 54-60, all but one of which (HD 58) have been packed to the same or higher % BVAP as in the current plan. APX 6. All eight majority-black House districts lie entirely within Jefferson County. APX 41. The ten majority-white House districts will be HD 14, 15, 16, 43, 44, 45, 46, 47, 48, and 51. APX 6, 41.

63. As one example of how the Reapportionment Committee's ± 1%

deviation rule facilitated gerrymandering, the part of HD 43 that lies in Jefferson County contains only 224 people, 213 white and 8 black, and is so small it is not visible on maps of the scale in these exhibits. APX 25.

64. As another example of how the Legislature's disregard of Alabama's whole-county constitutional restriction facilitated gerrymandering, only 4 of the 10 majority-white House districts lie entirely within Jefferson County, HD 44, 46, 47, and 51. APX 41.

65. Under Act 2012-603, the 3 majority-black Senate districts will be 18, 19, and 20, all lying entirely within Jefferson County. APX 43. All 5 majority-white Senate districts cross the Jefferson County boundaries into adjoining counties. Id.

66. Had the Legislature complied with the whole-county provisions of the Alabama Constitution, 14 House districts could have been drawn entirely within Jefferson County, with no district extending beyond the Jefferson County boundaries, as demonstrated by the HB 16 plan. APX 20, 21. All 9 of the current majority-black House districts could have been maintained. APX 21. Similarly, as demonstrated by the SB 5 plan, APX 23, 24, 6 Senate districts could be drawn, 4 of which could be contained entirely within Jefferson County, while maintaining the current 3 majority-black Senate districts.

67. Thus, under Acts 2012-602 and 2012-603, the Jefferson County Local Legislative Delegation will have 26 members elected from 11 majority-black and 15 majority-white House and Senate districts. In the Jefferson County Local Legislation Committee, each member of the delegation has an equal vote. All 11 members from majority-black districts will represent only residents of Jefferson County. But 11 of the 15 members elected from majority-white districts will also represent residents in 11 other counties, Walker, Blount, St. Clair, Shelby, Bibb, Tuscaloosa, Lamar, Fayette, Chilton, Winston, and Talladega. Testimony of Sen. Smitherman 08-09-13 Tr. at 8-9. This allows residents of those other counties to block action in the Jefferson County delegation. It "strangles" the ability of Jefferson County residents, particularly those in the majority-black districts, to have their interests addressed. Testimony of Sen. Smitherman 08-09-13 Tr. at 11.

68. As one white Republican explained in the press:

> Rep. Mary Sue McClurkin, R-Indian Springs Village, who represents parts of Shelby County, said legislators who represents counties near Jefferson will not support an occupational tax. "When you add up those people that represent counties surrounding Jefferson, that's a lot of folks," McClurkin said. "They don't want their constituents to have to pay an occupational tax for Jefferson County. . . . People just don't want to have another income tax and that's what an occupational tax is."

APX 8 at 3; Testimony of Sen. Smitherman 08-09-13 Tr. at 15-18.

69. Together Acts 2012-602 and 603 demonstrate a racially discriminatory

purpose to dilute severely black voting strength within the Jefferson County delegation. By arbitrarily imposing a ± 1% maximum deviation rule, and by totally ignoring the whole-county provisions in the Alabama Constitution, the Legislature purposefully created a majority-white Jefferson County House Delegation by eliminating the current black-white balance of 9-9 House members. "McClendon said the 18-member Jefferson County House delegation, which in the past has been split evenly along party-lines, is expected to become majority Republican in the next legislative election. 'Jefferson County is less likely to have a 9-9 tie vote on important issues in the future,' McClendon said." Testimony of Rep. McClendon 08-12-13 Tr. at 236; APX 14.

70. Mr. Hinaman made no effort to preserve the 9 majority-black House districts in Jefferson County, even though that would have been possible within the ± 1% deviation restriction he was given. APX 75 at 85:23 to 86:8. His reason for not trying to preserve all 9 House districts was that "adding white voters from the rest of Jefferson County posed a serious problem with retrogression." APX 68 at 5; APX 75 at 84:14-19. By a retrogression problem he meant reducing the size of the black majorities, and he "thought that would potentially create preclearance issues." APX 75 at 61:4-11. The result was that two black incumbents, Representatives Newton and Givan, were put in the same HD 60. APX 41.

71. But, in order to draw 10 majority-white House districts in Jefferson County, Hinaman had to extend 6 of them far into other counties. He crossed the county boundaries for two reasons: (1) to avoid pulling black population away from the majority-black districts, and (2) to avoid putting white incumbents in the same districts. APX 75 at 62:16-19, 66:2-7. That included honoring Mary Sue McClurkin's request to keep 224 Jefferson County residents in her Shelby County district, id. at 63:17 to 64:12, a fragment that was not needed to keep HD 43 within ± 1%. Id. at 64:2-12. Mr. Hinaman's explanation for extending HD 16 all the way from Lamar County to Jefferson County was that keeping the high majority-black percentages in the districts south of Lamar County forced HD 16 eastward. Id. at 65:2-17.

72. With respect to the Jefferson County Senate districts, defendants make these race-specific admissions:

> 85. Senator Dial testified that he "couldn't move Senator Smitherman over the hill into Mountain Brook and Vestavia. It would have regressed his district." Exhibit O-3 at page 50, lines 6-8.
>
> 86. Senator Dial testified that he did not reduce the number of white-majority districts in Jefferson County because that would have resulted in putting some incumbents in the same district, thereby violating "the promise I made to all 34 of the senators."

Doc. 125 at 24; testimony of Sen. Dial, 08-08-13 Tr. at 28; testimony of Sen. Dial 08-08-13 Tr. at 70-71, 114-15.

B. *Conclusions of Law*.

73. The elimination of HD 53 as the ninth majority-black House district in Jefferson County diluted the voting strength of black voters in the Legislature statewide and diluted the voting strength of black voters in Jefferson County for members of their local legislative delegation. In both instances, this vote dilution violated both the results prong and the intent prong of § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.

74. The creation of a second majority-black House district in Madison County by moving HD 53 from Jefferson to Madison County, which maintains 27 House districts in Alabama with black voting-age majorities, does not cure the statewide vote dilution violation. In *LULAC v. Perry*, 548 U.S. 399 (2006), the Court held that "proportionality" was no "safe harbor" for a legislative redistricting plan challenged under § 2 of the Voting Rights Act. Id. at 436. The state cannot defend the destruction of one majority-Latino or majority-black district solely by drawing another one elsewhere. "If proportionality could act as a safe harbor, it would ratify 'an unexplored premise of highly suspect validity: that in any given voting jurisdiction ..., the rights of some minority voters under § 2 may be traded off against the rights of other members of the same minority class.'" Id. (quoting *De Grandy*, 512 U.S. at 1019).

75. The 27 majority-black VAP House districts in Act 602 constitute 25.7% of the 105 House districts. According to the 2010 census, 26.43% of the total population of Alabama are non-Hispanic black, and 24.5% of the voting-age Alabama population are non-Hispanic black. APX 6. Those persons who are any part black constitute 26.8% of the total population of Alabama, APX 24, and 25.16% of the voting-age population. APX 16. If the number of majority-black VAP House districts were increased to 28, at 26.7% of the 105 House districts they would not exceed proportional representation according to total population and would exceed proportional representation by voting-age population (using any party black) by only 1.5%. Moreover, according to statistics compiled by the Alabama Secretary of State, African Americans now comprise some 26.9 percent of active registered voters in the state. NPX 324 at 20.

76. In the 2010 census, Jefferson County's total population is 42.5% any part black. APX 24. But in the November 2012 Jefferson County general election, due primarily to black voters, Democrat candidates "trounce[d]" their Republican opponents, sweeping all fifteen county offices on the ballot and "easily" carrying the county for President Obama. Testimony of Sen. Smitherman 08-09-13 Tr. at 11-12, 33; APX 118.

> Q. So given the fact that the last election demonstrates that African American candidates can sweep Jefferson County, in your

> opinion, do acts -- the Dial plan and the McClendon plan dilute the black vote in Jefferson County?
>
> A. In [sic: it] dilutes the black vote in Jefferson County, and it basically eliminates any opportunity for the elected officials who represent them to be able to have a significant impact on day-to-day lives and the legislation that affect them directly. In other words, we're at the mercy of the suburbs and the surrounding other counties....

Testimony of Sen. Smitherman 08-09-13 Tr. at 13.

77. As demonstrated by HB 16 and SB 5, if the Jefferson County boundaries are respected to the extent possible to avoid population inequality statewide, 9 of 14 compact House districts and 3 of 6 compact Senate districts would be majority-black. Instead, under Acts 2012-602 and 2012-603, only 8 of 18 House districts and 3 of 8 Senate districts are majority-black.

78. It is undisputed that voting is racially polarized in Jefferson County and that white majorities usually vote against the choices of black voters. According to the three-part standard of *Thornburg v. Gingles*, 478 U.S. 30, 48-49 (1986), and under the totality of circumstances, the House and Senate districts drawn by the Legislature dilute black voting strength in the election of members of the Jefferson County local delegation and violate the results standard of § 2 of the Voting Rights Act.

79. There is both direct and circumstantial evidence that the dilution of black voting strength for the Jefferson County local delegation is intentional. The

direct evidence includes the admission by the drafters that they maintained all the majority-white districts in Jefferson County at the request of the white incumbents, including Rep. McClurkin's request to add 224 Jefferson County residents to her House district, whose Shelby County residents did not want the Jefferson County delegation to re-enact an occupational tax. Rep. McClendon admitted that he extended HD 16 all the way from Lamar County into Jefferson County to increase the number of (white) Republicans in the Jefferson County local delegation. APX 14; Testimony of Rep. McClendon 08-12-13 Tr. at 236-37. Sen. Dial admitted that, at the request of the white Republican incumbents, he preserved the five majority-white Senate districts in Jefferson County by extending them far out into majority-white counties. Testimony of Sen. Dial 08-08-13 Tr. at 114.

80. The circumstantial evidence of intentional discrimination satisfies all five of the objective factors set out in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977): (1) the racial impact of the districts, (2) the historical background of the House and Senate plans, "particularly if it reveals a series of official actions taken for invidious purposes," (3) the sequence or chain of events leading up to their enactment, (4) procedural or substantive departures from the norm, and (5) contemporary statements by members of the decisionmaking body.

81. The racial impact of the Jefferson County House and Senate districts is apparent from the numbers, which dilute black voting strength in the Jefferson County delegation. That vote dilution has caused serious injury to the tax base, hospital and other public services, and jobs on which African-American residents of Jefferson County are so dependent.

82. The historical background of racial discrimination in Alabama and Jefferson County is all too familiar and too extensive to recite here. E.g., see *Hunter v. Underwood*, 471 U.S. 222, 229 (1985), and *Knight v. Alabama*, 787 F. Supp. 1030, 1068 (N.D. Ala. 1991) aff'd in relevant part, 14 F.3d 1534 (11th Cir. 1994), cited above; *Giles v. Harris*, 189 U.S. 475 (1903) (no federal court remedy for difranchisement of blacks by 1901 Alabama Constitution); *Dillard v. Crenshaw County*, 640 F.Supp. 1347, 649 F.Supp. 289 (M.D. Ala. 1986) (at-large provisions in Alabama law governing local elections violate Voting Rights Act); *United States v. Alabama*, 252 F.Supp. 95 (M.D. Ala. 1966) (cumulative poll tax requirement for voter eligibility unconstitutional); *Taylor v. Jefferson County Com'n*, CA No. 84-C-1730-S (N.D. Ala., August 1985) (consent decree requiring single-member district elections and the expansion of seats on the Jefferson County Commission from 3 to 5).

83. The sequence of events, procedural and substantive departures leading

to enactment of Acts 2012-602 and 2012-603 are described in detail in the expert report of Dr. Ted Arrington. NPX 323.

84. The contemporary statements of legislators are set out in ¶¶ 68 and 79 above.

85. The Court concludes that the Act 602 and 603 House and Senate plans result in the dilution of black voting strength statewide and in the Jefferson County local delegation in violation of § 2 of the Voting Rights Act.

86. The Court concludes that the Act 602 and 603 House and Senate plans intentionally dilute black voting strength statewide and in the Jefferson County local delegation, in violation of § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.

III. Dilution of Black Voting Strength in Other County Local Delegations.

A. *Findings of Fact*.

87. The unnecessary splitting of county boundaries in Acts 2012-602 and 2012-603 also adds legislators elected by white majorities and dilutes black voting strength for the local delegations in the following counties: Greene (HD 61), Marengo (HD 65 and 72, SD 23 and 24), Montgomery (HD 90), Mobile (HD 96, SD 22), and Madison (HD 6, 22, and 25, SD 1 and 2). APX 25, 26, 33, 35, 38, 39, 47, 49.

88. Mr. Hinaman included 12 persons in majority-black Greene County in majority-white HD 61, APX 25, 38, to accommodate the white incumbent, Rep. Alan Harper, who told Hinaman that he owned property in those Greene County census blocks and planned to retire there. Harper told Hinaman that the black incumbent in HD 71, A.J. McCampbell, had no objection. APX 68 at 6; APX 75 at 67. HD 61 could have been brought within ± 1% population deviation without going into Greene County. APX 75 at 68.

B. *Conclusions of Law*.

89. The unnecessary inclusion of legislators representing other majority-white counties in the local legislative delegations of Greene, Marengo, Montgomery, Mobile, and Madison Counties violates the results prong of § 2 of the Voting Rights Act by diluting the voting strength of black voters in those counties.

IV. Destruction of an Emerging African-American-Latino Coalition Senate District in Madison County.

A. *Findings of Fact*.

90. When the 2010 census is laid on the 2001 Senate plan, SD 7 in Madison County is overpopulated and has a 31.6% black voting-age population and a 5.1% Hispanic voting-age population. APX 31.

91. The Hispanic community in Madison County is growing rapidly, is

politically active and eligible to vote, and has formed a strong political coalition with the black community. Testimony of Bernard Simelton, Isabel Rubio, Laura Hall, and Rosa Toussaint. (ALBC plaintiffs expect the Newton plaintiffs to provide further details about the African-American-Hispanic coalition in Madison County.)

92. In a 2009 special election for the vacant SD 7 seat, Rep. Laura Hall, who is black, won the Democratic primary. But she lost the general election to the white Republican candidate, Paul Sanford, by a 57% to 43% margin. Testimony of Sen. Tammy Irons 08-08-13 Tr. at 153.

93. There was a voter suppression issue in the 2009 general election for SD 7. A popular conservative talk-show radio host sent out a flier announcing that, due to the expected high voter turnout, persons voting for Sanford could vote on Tuesday, the actual election date, while persons voting for Rep. Hall should vote on Wednesday. The Alabama Secretary of State had to issue a press release saying the flier was a hoax. Testimony of Sen. Irons 08-08-13 Tr. at 153-54. There is no evidence about the extent to which this hoax may have suppressed the vote for Rep. Hall.

94. Sen. Irons' SD 1 was underpopulated by only 1,507 persons (-1.1%). APX 31. It contained all of Lauderdale County and the eastern, most populous

third of Colbert County. APX 34.

95. Sen. Irons spoke with and wrote to Sen. Dial asking him to preserve the longstanding, inter-governmental Shoals community of interest within Lauderdale and Colbert Counties. Testimony of Sen. Irons 08-08-13 Tr. at 146-47, NPX 313, 351. Sen. Dial told her he would work on keeping the cities in Colbert County, Sheffield, Tuscumbia, and Muscle Shoals, in SD 1. Testimony of Sen. Irons 08-08-13 Tr. at 170.

96. Sen. Irons was shocked when she saw the Act 603 plan, which removes all of Colbert County and much of Lauderdale County from SD1 and extends it 70 miles through Limestone County and Madison County into the heart of Huntsville. Testimony of Sen. Irons 08-08-13 Tr. at 147-48; APX 35. A Huntsville Times editorial said the new SD 1 looked like it was drawn by "someone giddy after a couple of glasses of bourbon." Testimony of Sen. Irons 08-08-13 Tr. at 148; APX 94.

97. Sen. Irons' quick, "primative" analysis of the new SD 1 convinced her that it was designed to "shed" the minority population of Sen. Sanford's SD 7 to SD 1. Testimony of Sen. Irons 08-08-13 Tr. at 150-51. It crossed both Rep. Hall's new HD 19 and the vacant majority-black HD 53 that had been removed from Jefferson County. Id. "I finally realized what they had done to the Madison

County area was crack a minority influence district. And that's the only explanation I can see." Id. at 151.

98. This potential black-Hispanic influence district is suggested in the SD 7 contained in the SB 5 Senate plan. APX 22. Without splitting any existing precincts, it is 40.1% non-Hispanic black VAP and 5.46% Hispanic VAP. APX 23. According to Dr. Lichtman, this 45.5% VAP coalition district might be an opportunity district, not just an influence district. NPX 324 at 21-25.

99. A closer examination of the population data for the Senate districts in Madison, Limestone, and Lauderdale Counties shows that the largest percentage of the emerging black and Hispanic populations in Madison County was given to Sen. Irons' SD 1 (34.24% black VAP and 2.24% Hispanic VAP), while dividing the remaining percentages between Republican incumbents Holtzclaw in SD 2 (26.45% black VAP and 4.47% Hispanic VAP) and Sanford in SD 7 (26.12% black VAP and 4.55% Hispanic VAP). APX 139. Mr. Hinaman admitted that the idea of reaching Sen. Irons' SD 1 over the top of Limestone County down into the black Huntsville precincts "was a function of meeting with Senator Holtzclaw and what he wanted in his district, and then that determined where one had to go." Testimony of Mr. Hinaman 08-12-13 Tr. at 154.

100. In Limestone County, under Act 603, only 9.99% black VAP and

2.24% Hispanic VAP are in SD 1, compared with 14.53% BVAP and 4.47% HVAP in SD 2, and 23.38% BVAP and 3.90% HVAP in SD 3, where the incumbent is white Republican Sen. Orr. APX 140.

101. Sen. Irons pointed out that minority populations in Lauderdale County had been removed from SD 1. So, overall, SD 1 was designed to remove much of the black and Hispanic population from SD 7, without giving Sen. Irons enough minority voters to ensure her re-election. Further to put Sen. Irons' re-election at risk, SD 1 was given the smallest percentage of black and Hispanic populations in Limestone County. Thus the white incumbents in SD 2 and SD 3 also had to share with SD 7 – in relataively safe percentages – some of black and Hispanic population in Madison and Limestone Counties. Testimony of Sen. Irons 08-08-13 Tr. at 155-59.

102. If the 22,036 persons Act 603 gave SD 1 in Madison County had been swapped with the 23,952 persons SD 2 was given in Limestone County, SD 1 would have been contained entirely in Lauderdale and Limestone Counties, while SD 2 would have been located entirely inside Madison County. APX 139-40. But this swap would have required the white incumbent in SD 2, Holtzclaw, to take a higher percentage of black and Hispanic populations. Testimony of Sen. Irons 08-08-13 Tr. at 163-64; Testimony of Mr. Hinaman 08-12-13 Tr. at 140-41.

103. When the objective redistricting criteria are considered, there is no alternative explanation for the design of SD 1 in Madison County for the purpose of cracking the black and Hispanic communities. Testimony of Sen. Irons 08-08-13 Tr. at 151, 166. SD 1 clearly violates the Alabama constitutional prohibition of splitting counties and cities, and it splits the Shoals community of interest, id. at 160-61, 163-64; it ignores natural boundaries like the Tennessee River, isolating the little Town of Waterloo in western Lauderdale County, id. at 161-63; and it destroys the core of the existing SD 1, id. at 166.

104. Clearly, race was used as a proxy for political party in the design of the Senate districts in Lauderdale, Limestone, and Madison Counties. Sen. Irons was told "they could draw me a good Republican district" if she switched parties. Testimony of Sen. Irons 08-08-13 Tr. at 159. Mr. Hinaman testified that the black precincts were put in Sen. Irons' district because she is a Democrat and should prefer them to "X thousand more Limestone Republicans." APX 75 at 120:24 to 121:16; Testimony of Mr. Hinaman 08-12-13 Tr. at 141.

B. *Conclusions of Law*.

105. The design of SD 1, SD 7, and the other Senate districts in Madison County was intentional discrimination against both African Americans and Hispanics for reasons that closely track the Supreme Court's analysis in *LULAC v.*

Perry, 548 U.S. 399 (2006). *LULAC* held that the elimination of a majority-Latino Congressional district in Texas violated the results prong of § 2 of the Voting Rights Act. As shown by the Newton plaintiffs' illustrative plans, it may be possible to draw SD 7 with a black-Hispanic voting-age majority, as was the case in *LULAC*. Here, however, we claim only that the Madison County Senate districts violate the intent prong of § 2 and the Fourteenth and Fifteenth Amendments.

106. The Court said in *LULAC* that the evidence showing that Congressional District 23 in Laredo had been designed to prevent the defeat of the Republican incumbent who was threatened by an emergent Latino voting block "bears the mark of intentional discrimination that could give rise to an equal protection violation." 548 U.S. at 440. As the drafters did in Madison County, Texas, "[i]n response to the growing participation that threatened Bonilla's incumbency . . . divided the cohesive Latino community in Webb County.. . ." Id. at 439.

107. Just as there was a "political, social, and econimic legacy of past discrimination for Latinos in Texas," 548 U.S. at 440 (internal quotation marks omitted), there is an even longer legacy of past discrimination against African Americans in Alabama, a legacy that was aggressively supported by the Constitution and laws of Alabama. And, as the Newton plaintiffs' evidence shows,

there is a more recent official legacy of discrimination against Latinos in Alabama.

108. The fact that race was used as a proxy for party in drawing the Act 2012-602 and 2012-603 plans does not mitigate the unlawful and unconstitutional racial discrimination. Even if the lines were drawn "for political, not racial reasons," neither partisan nor incumbency-protection motives can justify the damage done to black and Latino voters. 548 U.S. at 440. "This policy, whatever its validity in the realm of politics, cannot justify the effect on Latino voters." Id. at 441 (citing *Gingles*, 478 U.S. at 45).

109. The Court concludes that the Act 603 Senate districts in Madison, Limestone, and Lauderdale County are intended to dilute black and Latino voting strength in Madison County, in violation of the § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.

V. The State's Use of Race as the Predominant Factor in the House and Senate Plans Is Not Justified By Any Compelling State Interest and Violates the Fourteeth Amendment Standard of *Shaw v. Reno*.

A. *Findings of Fact*.

110. The findings of fact set out above show that the drafters of the House and Senate plans in Acts 2012-602 and 2012-603 started their line drawing with the majority-black districts, reaching out to include in them predominantly black precincts and census blocks that would maximize the size of their black majorities.

This explicitly racial factor impacted the drawing of majority-white districts in nearly every part of the state.

111. By defendants' own admission, race was the predominant factor in drafting both plans enacted by the Legislature in 2012.

B. *Conclusions of law*.

112. Under the *Shaw v. Reno*, 509 U.S. 630 (1993), line of cases, where the "legislature [has] subordinated traditional race-neutral districting principles ... to racial considerations," *Miller v. Johnson*, 515 U.S. 900, 916 (1995), so that race was "the '*predominant* factor' motivating the legislature's districting decision[s]," *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999) (quoting *Miller*, *supra*, at 916) (emphasis in original), the plans are deemed to be "classifying citizens on the basis of race [and] cannot be upheld unless they are narrowly tailored to achieving a compelling state interest." *Miller v. Johnson*, 509 U.S. at 904.

113. However, "[c]aution is especially appropriate . . . where the State has articulated a **legitimate** political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citation omitted) (bold emphasis added).

114. The House and Senate plans the Alabama Legislature drew after the

2000 census survived a *Shaw* challenge by demonstrating that partisan politics, not race, was the predominant purpose for their majority-black districts.

> Plaintiffs have proffered no evidence to refute the abundant evidence submitted by the defendants and defendant-intervenors which establishes that black voters and Democratic voters in Alabama are highly correlated; that the Legislature utilized recent election returns to ascertain actual voter behavior; and that Acts 2001-727 and 2001-729 were the product of the Democratic Legislators' partisan political objective to design Senate and House plans that would preserve their respective Democratic majorities.

Montiel v. Davis, 215 F.Supp.2d 1279, 1283 (S.D. Ala. 2002) (3-judge court) (footnote omitted).

115. But the defendants in the instant case do not contend – indeed, they deny – that the majority-black districts in Acts 2012-602 and 2012-603 were packed for the partisan political purpose of preserving their Republican majorities. E.g, testimony of Sen. Dial 08-08-13 Tr. at 55-57, 89. They have argued consistently and at great length that it was the need to maximize the size of black majorities that drove nearly every districting decision, blaming the need for this explicitly race-conscious effort, which dilutes the influence of black voters in the majority-white districts, on their mistaken interpretation of the preclearance requirements of § 5 of the Voting Rights Act. Testimony of Sen. Dial 08-08-13 Tr. at 61-62.

116. Now, as shown in ¶ 33 supra, *Shelby County v. Holder*, 133 S.Ct. 2612

(June 25, 2013), has eliminated the State's alleged compelling state interest in using race as the predominant factor in the construction of the House and Senate plans. The plans' widespread violation of the Equal Protection Clause under *Shaw v. Reno* cannot be avoided.

VI. Proposed Remedial Decree.

117. A declaratory judgment is HEREBY ENTERED that the redistricting plans set out in Acts 2012-602 and 2012-603 violate the rights of plaintiffs and the subclass of African-American citizens of Alabama they have been certified to represent guaranteed by Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, and the Fourteenth, and Fifteenth Amendments to the Constitution of the United States.

118. Defendants, their political subdivisions, departments, officers, agents, attorneys, employees and those acting in concert with them or at their direction are HEREBY PROHIBITED AND PERMANENTLY ENJOINED from enforcing Acts 2012-602 and 2012-603.

119. The Alabama Legislature shall have until January 31, 2014, to adopt new redistricting plans for the House and Senate that comply with Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, and the Fourteenth, and Fifteenth Amendments to the Constitution of the United States.

120. Should the Alabama Legislature fail in timely manner to enact lawful, constitutional, and enforceable redistricting plans for the Alabama House and Senate, the parties shall by February 15, 2014, submit redistricting proposals that this Court should adopt in time for the orderly conduct of the June primary and November general elections for members of the Alabama House and Senate in 2014.

121. Plaintiffs are prevailing parties in this action and are entitled to payment by the defendants of their costs incurred in prosecuting this action, including an award of attorneys' fees and expenses, pursuant to 42 U.S.C. §§ 1973l and 1988. The parties are encouraged to negotiate the amount of this award, but if no agreement has been reached after 30 days from the date of this decree, plaintiffs may petition the Court to determine the amount of their attorneys' fees and expenses.

Respectfully submitted this 21st day of August, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2013, I served the foregoing on the following electronically by means of the Court's CM/ECF system:

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