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

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., **Plaintiffs,** **v.** **THE STATE OF ALABAMA, et al.,** **Defendants.**	**CIVIL ACTION NO. 2:12-cv-691-WKW-MHT-WHP (3-judge court)**
DEMETRIUS NEWTON, et al., **Plaintiffs,** **v.** **THE STATE OF ALABAMA, et al.,** **Defendants.**	**CIVIL ACTION NO. 2:12-cv-1081-WKW-MHT-WHP (3-judge court)**

DEFENDANTS' REPLY TO THE ALBC'S OBJECTION

This case is over. On remand from the Supreme Court, this Court recognized that the Plaintiffs' only remaining claims were against Alabama's 35 majority-black House and Senate districts. *See Doc. 316 at 2; see also Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1266 (2015) ("those are the districts that we believe the District Court must

reconsider"). It found that 12 of those districts were unconstitutional because they were predominantly based on race and insufficiently justified by the Voting Rights Act. *See Doc. 316 at 448*. In response to this Court's ruling, the Legislature redrew those districts and (for good measure) every other district the Plaintiffs had challenged. *See Doc. 335.*

The Plaintiffs agree that the Legislature's new districts remedy the constitutional problems identified by this Court. *See Doc. 345 & 349*. The ADC has "concluded that the State has complied with the Supreme Court's decision in this case, *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), with this court's decision on remand from the Supreme Court, and with the Supreme Court's applications of the *ALBC* decision this Term in *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788 (2017) and *Cooper v. Harris*, 137 S. Ct. 1455 (2017)." *Doc. 349.* Similarly, the ALBC concedes that the "majority-black districts are not objectionable," "[m]ost ALBC members . . . were satisfied – if not entirely happy – with the majority-black districts finally enacted," and the "ALBC plaintiffs have no objection to the majority-black districts." *Doc. 345, ¶ 11.* That's the end of the case.

But the ALBC is not done. It wants to raise factually and legally unsupported theories about three majority-white districts that have never

been challenged at any point in this half-decade-long litigation, based on the standing of new plaintiffs who want to intervene now that the case is over. Specifically, the ALBC has three theories for why we should continue to litigate about these majority-white districts in Jefferson County: (1) these three majority-white districts were not sufficiently affected by the "ripple effects" of redrawing the majority-black districts; (2) these districts are non-invidious racial gerrymanders; and (3) these majority-white districts invidiously discriminate against black people in other districts. These theories are a mishmash of the ALBC's county-splitting theory, which the Court rejected at summary judgment, *Doc. 174*, and its "grand Republican strategy" theory, which the Court rejected after trial, *Doc. 203 at 123*.

The Court should deny the ALBC's objection for the following reasons.

This Court's job is to decide whether the State fixed the problems it identified, not to evaluate unrelated claims.

There is only one "narrow" "task" remaining to this Court—ensuring that the twelve districts that it has held unconstitutional are now constitutional. *See League of United Latin American Citizens v. Perry*, 457 F. Supp. 2d 716 (E.D. Tex. 2006) (three-judge court) (describing its "narrow" "task" as to "do *no more than necessary* to correct the flaws the Supreme Court found in" a legislature-drawn redistricting plan that it had

previously found constitutional) (emphasis added); *see also King v. State Board of Elections*, 979 F. Supp. 582, 616 (N.D. Ill. 1996) (three-judge court) (reviewing a challenge to a remedial, court-drawn district and noting that "the remedial plan it adopted was properly proportioned to the nature of the violation."). And this Court has previously expressed its "expectation that the state legislature will adopt a remedy . . . [that] correct[s] the constitutional deficiencies in its legislative redistricting plans . . . ." *Doc. 327, p. 2.* It did not instruct the Legislature to reconsider districts that were never at issue in this case. This Court should reject the ALBC's belated effort to expand the scope of its constitutional challenge to these districts.

No standing and no right to intervene.

Even if the Court were to decide to look at claims about SD5, HD14 and HD16, it could not, because no person can bring those claims in this case. The Plaintiffs admit in the motion to intervene that none of them live in SD5 and HD14 or HD16, and that they do not have standing to bring claims about those districts: "If the Movants' motion to intervene is denied, [Plaintiffs] will be effectively foreclosed from relief because the Plaintiffs may be held to lack standing to challenge districts in which they do not live." *Doc. 350, ¶¶ 5 (e-f).*[1] *Accord, United States v. Hays,* 515 U.S. 737, 745

(1995) (voters who did not reside in a district that was the focus of a racial gerrymandering claims lacked standing); *Wittman v. Personhuballah*, __U.S. __, 136 S. Ct. 1732, 1736-37 (2016) (holding that members of Congress that neither lived in or represented a Congressional district had standing to defend it in a racial gerrymandering case). And as explained in the Defendants' objection to the motion to intervene, the Movants have no right to intervene in this action.

The ALBC's objections are legally and factually unsupported.

Even if the ALBC had standing to raise them, none of its three grounds for objecting to these majority-white districts are legally or factually supported.

The ALBC's "ripple effects" theory makes no sense.

The ALBC's claim that the Legislature improperly minimized the "ripple effects" of fixing the majority-black districts makes no sense. This argument is based on a misreading of the Supreme Court's decision in *Abrams v. Johnson*, 521 U.S. 1925 (1997), and ignores the substantial ripple effects that the Legislature's remedy has in other, unchallenged/constitutional districts. *Abrams* permits, but does not require, a court-drawn remedial plan to make substantial changes in a map

as part of its remedy when a legislature refuses to act. *See id.*, 521 U.S. at 84 and 100 (describing and affirming the plan drawn by the district court).

Plaintiffs' reliance on *Abrams* is misplaced for four reasons.

First, *Abrams* addressed a question that is not at issue here. *Abrams* was about the extent to which a federal court could displace state policy choices as a judicial remedy for racial gerrymandering, not whether the Legislature must allow maximum "ripples" in adopting its own remedy. In that case, the Georgia Legislature had failed to enact a remedial redistricting plan, and the district court had to draw one. The *Abrams* appellants argued that "the District Court erred in disregarding the State's legislative policy choices and in making more changes than necessary to cure constitutional defects in the previous plan." *Abrams*, 521 U.S. at 78. The Supreme Court rejected that argument. But here, the Legislature did act. Thus, the only question for this Court is whether the Legislature's new plan remedies the constitutional problems that this Court identified—namely, the predominate consideration of race in the 2012 plan of Senate Districts 20, 26, and 28 and House Districts 32, 53, 54, 70, 71, 77, 82, 85, and 99. *Doc. 316 at 448*. As both groups of plaintiffs concede, the Legislature remedied those problems by drawing the majority-black districts without regard to race.

Second, the state policy that the district court declined to follow in the remedial phase of *Abrams* was itself a race-based policy. Specifically, the *Abrams* appellants argued that the district court erred in rejecting the purported state policy of having multiple majority-black districts, instead of just one. *Abrams*, 521 U.S. at 85. The Supreme Court's decision in *Abrams* says nothing about a district court's decision to reject a non-racial state policy, which is what the ALBC is urging here. Instead, as to that point, *Abrams* reaffirmed the general rule that a court may not willy-nilly reject state policy choices in the remedial phase of a redistricting case. The Court explained that "[w]hen faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act." *Id.*, 521 U.S. at 79 (citing *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam)).

Third, the ALBC's argument is inconsistent with the Supreme Court's decision in this very case. The Supreme Court emphasized that a plaintiff cannot make a state-wide racial gerrymandering claim; instead, the "geographical nature of the racial gerrymandering claim" is the "district." But the ALBC's counterintuitive argument is that the remedy to a district-specific claim must be a complete state-wide redraw, including of those

districts that need not be altered to remedy the district-specific violation. In light of the Court's holding that the substantive claim of racial gerrymandering is confined to a specific district, it would make no sense to say that a remedy for that claim must "ripple" far beyond the specific districts at issue.

Fourth, even if the ALBC were right that a redraw must have significant ripple effects, these redrawn plans did ripple. As the ALBC explains, "[e]ven under these restraints on ripple effects, the enacted 2017 remedial House and Senate plans make substantial changes in the 2012 plans." *Doc. 345, ¶ 13.* As Plaintiffs' admit, 29 Senate Districts and seventy-one House Districts were affected by this redraw. *Doc. 345, ¶ 13.* The clear majority of these districts are majority-white districts that were not racially gerrymandered under either this Court's majority opinion or dissenting opinion. *Id.* The ALBC's real complaint is not that the redraw did not have ripple effect; it is that the redraw did not have the *specific* ripple effects in Jefferson County that the ALBC wants.

The ALBC's "racial gerrymandering" theory makes no sense.

The ALBC's racial gerrymandering theory is no better than its ripple effects theory. The ALBC makes two allegations, neither of which makes out a racial gerrymandering claim. First, the ALBC alleges that "[r]ace is the

predominant reason why" these three districts were "kept in Jefferson County." *Doc. 345, ¶ 25(c).* Second, it alleges that "the drafters of the 2017 House and Senate plans relied on racial data, not partisan data, when deciding to keep SD 5, HD 14, and HD 16 in Jefferson County." *Id., ¶ 28(a).*

These allegations fail to make out a valid objection for three independent reasons.

First, they are a species of the kind of improper "undifferentiated" racial gerrymandering claim that the Supreme Court rejected in *ALBC.* There, the Court explained that the "geographical nature of the racial gerrymandering claim" is the "district." "[T]he essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." *Miller*, 515 U.S. at 911. In the words of the Supreme Court, a "racial gerrymandering claim . . . applies to the boundaries of individual districts." *ALBC*, 135 S.Ct. at 1265.

The ALBC's county-wide gerrymandering theory runs into the same problem as its defunct state-wide gerrymandering theory. Previously, the ALBC attempted to make a gerrymandering claim as to the state as an "undifferentiated" whole. Now it is trying to make a gerrymandering claim as to Jefferson County (and its surrounding counties) as an "undifferentiated" whole. Because the ALBC does not allege that the lines of

these three majority-white districts were drawn to put black people on one side and white people on the other, they have not stated a racial gerrymandering claim under the *Shaw* line of cases. *ALBC*, 135 S. Ct. at 1265.

Second, the ALBC does not even try to identify the race-neutral districting criteria that would compel the Legislature to single out Jefferson County for special treatment. The drafters did not need any reason to "keep" these districts in Jefferson County. They were already in Jefferson County. Instead, the drafters needed a reason to *change* them, which they did not have. *See id.*, 135 S. Ct. at 1263 ("minimizing change[s]" to existing districts is a "traditional districting objective[]"). The remedial redistricting was focused on unrelated districts. And the Legislature was under no obligation to eliminate non-resident legislators from Jefferson County. After all, legislators who reside in Jefferson County represent residents of other counties (*e.g.*, HD 15, HD 45, HD 48, SD 15, SD 16, and SD 17), which is true in other areas of Alabama as well. There is no race-neutral districting principle that says Jefferson County residents should only be represented by other residents of Jefferson County.

Moreover, intentionally changing majority-white districts would have ripple effects throughout the plan. The ALBC's proposed alternative plans

underscore the point. The ALBC proposed two plans to remove SD 5 from Jefferson County. The first reduced the number of districts in Jefferson County by increasing the number of districts in Blount and St. Clair Counties; the second plan reduced the districts by splitting counties that are whole in the Legislature's plan (Jackson, Morgan, Calhoun). *See Doc. 345 ¶25*. The ALBC also proposed several plans for reducing the number of House Districts. One proposal increased the number of districts in St. Clair County; another involved a population swap between two majority-white districts completely unrelated to the plan's remedial purpose. *Doc. 345 ¶26*. No race-neutral districting criteria required the Legislature to manipulate the district lines of unchallenged majority-white districts to satisfy the ALBC (who does not even represent the districts at issue) and potentially anger other legislators. *See ALBC*, 989 F.Supp.2d 1277 (M.D. Ala. 2013) (acknowledging the practical reality that a plan has to please enough Legislators to be passed in both houses).

Third, the drafters of these districts did not rely on racial data. As we said in our initial remedial filing, racial data was not a consideration. *Declaration of Randolf Hinaman; Declaration of Donna Shanholtzer.*

This Court has already rejected the ALBC's invidious discrimination theory.

Finally, the ALBC objects based on unsupported generalized allegations of invidious racial discrimination. But the ALBC's claim requires proof "both that the redistricting plan was created with an invidious discriminatory purpose and that it results in the dilution of a minority's voting strength." *Doc. 203 at 119*. "Discriminatory purpose," in this context, "implies more than intent as volition or intent as awareness of consequences." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). "It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' . . . its adverse effects upon an identifiable group." *Id.* The ALBC has provided no evidence of such intent.

The ALBC makes two allegations relevant to its invidious discrimination claim. It says that the point of declining to remove these districts from Jefferson County was to "maintain more majority-white than majority-black districts in the Jefferson County House delegation." And it says that the Jefferson County districts are related to a purported scheme "to isolate or segregate black Alabamians in the Democratic Party" and make the Republican Party into the "party of whites."

The Court has addressed, and rejected, both allegations before. The Court rejected the claim that the mix of majority-white and majority-black districts in Jefferson County dilutes the voting strength of black voters. The Court heard testimony from Senator Smitherman that the "districts were unfair to the voters of Jefferson County because of the structure of the local delegation, which is composed of every legislator who represents voters in Jefferson County." *Doc. 203 at 57.* And the Court considered a claim that "the Acts dilute the voting strength of blacks in Jefferson County because they shift the balance between majority-white and majority-black House districts." *Doc. 203 at 106*. But the Court denied that claim—and similar challenges to the plans—in part because "the majority-black districts under the Acts are roughly proportional to the black voting-age population." *Doc. 203 at 111*. The Court also expressly rejected the claim that the plans "were the product of a grand Republican strategy to make the Democratic Party the 'black party' and the Republican Party the 'white party.'" *Doc. 203 at 123*.

In any event, the ALBC offers no evidence, or even allegations, that suggest that racial discrimination was the reason for any of the Legislature's decisions in 2017. Sufficiently alleging discriminatory purpose is hard enough where the decisionmaker is a single government official. *See Iqbal*,

556 U.S. 662, 680–83 (2009). But as the Supreme Court has explained, plaintiffs face even more "difficulties" where the decisionmaker is a legislative body as large as the Alabama Legislature. *Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *see also Mason v. Village of El Portal*, 240 F.3d 1337, 1339 (11th Cir. 2001) (evidence of racial motivation of "one member of a three-member majority" does not give rise to liability). And it is even more difficult to state a plausible claim of discriminatory intent where there are obvious legitimate reasons supporting the government's decision. *McCleskey v. Kemp*, 481 U.S. 279, 298–99 (1987) *Personnel Adm'r of Mass.*, 442 U.S. 256, 275 (1979. As explained above, there was no reason for the Legislature to consider changing these districts at all. But it also had good, non-racial reasons, for declining to use the remedial districting process to remove legislators from the local delegation.

First, the Legislature had no reason to elevate the preferences of Jefferson County over the preferences of other counties or the preferences of Jefferson County Legislators over other Legislators. Senator Sanford objected to the ALBC plans because they "consider Jefferson County more important than Madison County." *Doc. 339-6, p. 32* (transcript of the May 17, 2017 Tourism Committee meeting; pointing out that only two Senators in the Madison County delegation live in the county). In his view, the

ALBC's proposed maps would "respect Jefferson County lines" but "compromis[e] two other counties." *Doc. 339-4, p. 10-11* (transcript of Reapportionment Committee meeting; "your argument is you trying to respect Jefferson County lines but in order to do that, you've compromised two other counties and ... counties that had two Senators [Blount and St. Clair]... now they would have three in order to try to honor [Jefferson County]."). Similarly, Senator Dial rejected these plans because, to "fix Jefferson," he would need to "distribute and disrupt five other counties." *Doc. 339-5, p. 29* (transcript of May 9, 2017 CCE Committee; "I can just fix Jefferson ... the problem [is] that I distribute and disrupt five other counties. And those counties have the same argument that you do."). As Representative Randy Davis put it, "[m]ost of our members like their district" and "our direction from the court was . . . to only deal with the districts" that were constitutionally problematic. *Doc. 339-6* (transcript of the May 30, 2017 Tourism Committee meeting, pp. 14-15). As Representative Davis explained, "[t]his is not the reappointment year to do this"; "2021" will the time to "redraw" all the districts in Jefferson County. *Id., p. 10*.

Second, the Republicans in the Legislature had no reason to cede control over Jefferson County's delegation to Democrats. As ALBC plaintiff

Senator Smitherman testified at trial, these districts were originally drawn, not for racial reasons, but so "the county would be controlled by the people in [the Republican] party." *ALBC,* Joint Appendix, at 43. Similarly, the debate in the Legislature in 2017 was about the mix of existing Republican and Democratic legislators who would sit on the local delegation for Jefferson County. *See Doc. 339-5 at 15-16; 339-6 at 15.* As Senator Smitherman again described the supposed problem, the Legislature "[s]natch out a democratic district and stick in two republican districts." *Ex. 58 at Transcript Page 36-37.* He alleged that the plans "impose [R]epublican control over both Jefferson County delegations." *Ex. 58 at Transcript Page 41.*

The ALBC erroneously asserts that the Court must engage in "a sensitive inquiry into all circumstantial and direct evidence of intent to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines." *Doc. 345 at 24.* But, even on the ALBC's theory, this is not a situation where a line-drawer relies on a perspective voter's race as a proxy for that voter's party preference. This claim has nothing to do with the placement of voters in the majority-black districts at all, given that the ALBC has waived any objection to those districts. Instead, this claim is about why the Legislature declined

to swap population between majority-white districts such that one or more of them would move out of Jefferson County. Whatever motivated the Legislature to decline to transfer portions of majority-white districts into other majority-white districts, it was not the race of any voter involved in this case.

For these reasons, the Court should deny the objections of the ALBC and approve the Remedial Plans.

Respectfully submitted this the 27th day of June, 2017.

s/Andrew Brasher
One of counsel for the defendants the State of Alabama, the Governor of Alabama, and the Secretary of State

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CERTIFICATE OF SERVICE

I certify that June 27, 2017 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and service will be perfected upon the following by email and/or US mail:

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