**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF ALABAMA**

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| ALABAMA STATE CONFERENCE OF THE NAACP, *et al.*, | ) | |
| *Plaintiffs*, | ) | |
| | ) | CIVIL ACTION NO. |
| v. | ) | 2:16-cv-00731-WKW-CSC |
| STATE OF ALABAMA, *et al.*, | ) | |
| *Defendants*. | ) | |

# DEFENDANTS' MOTION TO DISMISS

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## DEFENDANTS' MOTION TO DISMISS

### Introduction

> *"Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. A State may assure its people that judges will apply the law without fear or favor."*
>
> *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1662 (2015)

* * * * *

Plaintiffs claim that African-American voters do not have the same opportunity as other voters to elect their "representatives of choice" to Alabama appellate courts. They claim this is because elections to the Court are state-wide and blacks are a minority. If only the State were divided into districts, Plaintiffs say, with at least one of those districts being drawn to be majority-black, then black voters (or, at least, the black voters in that particular district) could elect their preferred judges.

However, on three separate occasions, the Eleventh Circuit has rejected claims that the Voting Rights Act requires States to elect judges by districts. The Fifth, Sixth, and Seventh Circuits agree, and to the best of Defendants' knowledge, no federal court has read the Voting Rights Act to require the relief Plaintiffs seek in this action. Instead, courts recognize that there are good reasons for a State to decide that if a Supreme Court Justice has authority to rule on cases from

throughout the State, he or she should be a Justice for the entire state, not one-ninth of the State. And there are good reasons to allow voters to have a voice on all Supreme Court Justices and not just one.

In fact, the State has such a strong interest in maintaining the link between a judge's territorial jurisdiction and electorate, carving the State into "black" and "white" districts is not an available remedy. *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994); *Southern Christian Leadership Conference of Alabama v. Sessions*, 56 F.3d 1281 (11th Cir. 1995); *Davis v. Chiles*, 139 F.3d 1414 (11th Cir. 1998). Consequently, Plaintiffs have not stated a valid Section 2 claim.

On this authority, and pursuant to Fed. R. Civ. P. 12(b)(6), Defendants State of Alabama and Secretary of State John H. Merrill move this Court to dismiss this action for failure to state a claim on which relief can be granted.

**Facts**

For purposes of a motion to dismiss, the factual allegations of the Complaint are taken as true. However, there are additional facts of which this Court may take judicial notice that have bearing on the claims and provide helpful context.

1. Alabama has used at-large elections to select appellate judges for 148 years. At first, Alabama Supreme Court justices were elected by the Legislature, as

required by the Constitutions of 1819, 1861, and 1865.[1] ALA. CONST. of 1819, art. V, §12; ALA. CONST. of 1861, art. V, § 11; ALA. CONST. of 1865, art. VI, § 11.[2]

2. Beginning with the Reconstruction Constitution of 1868, and until the people adopted a 1973 amendment, Alabama's Constitutions provided that judges "shall be elected by the qualified electors of the respective counties, cities, towns or districts, for which said courts may be established." ALA. CONST. of 1868, art. VI, § 11; ALA. CONST. of 1875, art. VI, § 12; ALA. CONST. of 1901, art. VI, § 152 (original text).[3]

3. Pursuant to this language in effect from 1868-1973, Alabama used state-wide elections to select appellate judges. *See* results from elections for Chief

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[1] The text of Alabama's various constitutions is available at http://www.legislature.state.al.us/aliswww/history/constitutions/constitutions.html (last visited Oct. 11, 2016). The relevant provisions are collected in the attached Exhibit 1.

[2] At-large elections were first used to select Alabama *trial court* judges in 1850, pursuant to an amendment to the Constitution of 1819. *Southern Christian Leadership Conference of Alabama v. Sessions*, 56 F.3d at 1285.

[3] The 1868 Constitutional Convention, where state-wide popular elections were first proscribed for selecting appellate judges, was dominated by Republican and black delegates. Courtney Cooper, *The Burden of Fraud on Alabama's Legacy*, 65 Ala. L. Rev. 1107 (2014). When presented to the people for ratification, history has it that the Constitution did not receive approval from the Congressionally-required majority of registered voters; white voters boycotted the vote, and newly-enfranchised black voters overwhelmingly supported it. *See* 1868 Constitution: Ratification, available at http://www.legislature.state.al.us/aliswww/history/constitutions/1868/1868rat.html (last visited Oct. 11, 2016). Congress responded by repealing the majority-of-registered-voters requirement. *Id.* Republicans briefly gained control in Alabama in the late 1860's, and "Alabama's so-called 'redemption' by the white-supremacist Democratic party [occurred] around 1870." *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1358 (M.D. Ala. 1986). That is, the so-called "redemption" occurred *after* Alabama adopted at-large elections for appellate judges.

Justice and Associate Justice 1970 and 1972, attached as Exhibit 2 and available at https://www.alabamavotes.gov/ElectionsData.aspx (last visited Oct. 11, 2016).

4. In 1973, Alabama amended her Constitution to restructure the Judicial Article. Among other things, Amendment 328, championed by Chief Justice Howell Heflin, simplified language concerning judicial elections. The language in place today provides, "All judges shall be elected by vote of the electors within the territorial jurisdiction of their respective courts." ALA. CONST. of 1901, art. VI, § 152 (as amended by ALA. CONST. amend. 328).[4]

5. The Eleventh Circuit has noted the following findings concerning the history of Alabama appellate courts:

> Prior to 1969, Alabama's appellate courts consisted of a seven-justice Supreme Court and a three-judge intermediate appellate court called the Court of Appeals. The members of these courts were chosen for staggered six-year terms in at-large partisan elections. Vacancies occurring prior to the end of a term were filled by appointment by the Governor; these appointees then stood for election in Alabama's next general election held after the appointee had served one year in office.
>
> In 1969, the Alabama legislature added two seats to the Supreme Court. Act No. 602, § 1, 1969 Ala. Acts 1087 (codified at Ala. Code §

[4] Far from being tainted with allegations of racial intent, Amendment 328 has been lauded as an example of sound Constitutional reform:

> "Imagine that, Alabama being a model and held up as an example of the way to do something right," said Wayne Flynt, professor of history at Auburn University. "The Judicial Article is a good example of Alabama at its best."

Mike Goens, *Some see amendment 328 as proof that constitutional reform can happen here*, TUSCALOOSA NEWS (Nov. 19, 2001), available at http://www.tuscaloosanews.com/article/20011119/NEWS/111190333 (last visited Oct. 11, 2016).

> 12–2–1 (1995)). The legislature also divided the Court of Appeals into the Court of Criminal Appeals and the Court of Civil Appeals, each with three judges. Act No. 987, § 1, 1969 Ala. Acts 1744. In 1971, the legislature added two judges to the Court of Criminal Appeals, Act No. 75, § 1, 1971 Ala. Acts 4283, and in 1993, it added two seats to the Court of Civil Appeals, Act No. 93–346, §§ 1, 4, 1993 Ala. Acts 536, 537. *See* Ala. Code § 12–3–1 (1995). The elections for appellate judges have continued to be partisan and held at large, and the Governor has continued to fill mid-term vacancies.

*White v. Alabama*, 74 F.3d 1058, 1061 (11th Cir. 1996).

6. Alabama first required that candidates for appellate judgeships run for numbered positions in 1927. Ala. Act No. 1927-348. "At that time there were no black attorneys in Alabama and blacks were largely disenfranchised. The historical evidence is clear that the numbered place law was a measure promoted by the conservatives in the Democratic Party, which saw its dominance threatened in the 1926 election by Progressive--Prohibitionist--Ku Klux Klan factions which had won elections." *Southern Christian Leadership Conference of Alabama v. Evans*, 785 F. Supp. 1469, 1487–88 (M.D. Ala. 1992).

7. Alabama law has required that the winner of a primary election receive a majority of the votes cast, and a runoff election if no candidate receives a majority, since at least 1931. Ala. Act No. 1931-56.

**Standard of Review**

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court clarified the standard for evaluating

the sufficiency of a complaint. The Federal Rules of Civil Procedure require a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under prior doctrine, even a "'wholly conclusory'" claim would survive a motion to dismiss if the pleadings "'left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery.'" *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (quoting *Twombly*, 550 U.S. at 561). Now, a complaint must go beyond that mere possibility and "'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570).

Courts applying the facial-plausibility standard must adhere to "[t]wo working principles." *Iqbal*, 556 U.S. at 678. First, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Second, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679. "A claim has facial plausibility," the Court explained, only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678.

Courts should consider not just the complaint itself but also "other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in

particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

**Argument**

Plaintiffs seek to elect African-American judges to Alabama appellate courts. They say that at-large elections are standing in their way and that Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, requires Alabama to divide itself into districts for judicial elections.

Section 2 prohibits a political process that, based on the totality of the circumstances, results in some voters having less opportunity than others to elect their representative of choice, on account of the voters' race.[5] To establish their Section 2 claim, Plaintiffs must first show that they meet certain preconditions just to get the claim off the starting block. They must show that they can meet the three "*Gingles*" factors: (1) the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the

[5] Section 2(a) states that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." Section 2(b) provides that a violation of Section 2(a) is shown "if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State … are not equally open to participation by members of a class of citizens protected by [section 2(a)] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. … *Provided*, **That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population**." (Emphasis added)

minority group must be politically cohesive and vote as a bloc; and (3) the white majority must vote sufficiently as a bloc to enable it to defeat the minority's preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30, 49–51 (1986). Moreover, and importantly, "[a]s part of any *prima facie* case under Section Two, a plaintiff must demonstrate the existence of a proper remedy." *Davis*, 139 F.3d at 1419.

Plaintiffs' claim is due to be dismissed for two reasons. First, even assuming (without conceding) that Plaintiffs can establish the three *Gingles* requirements, Plaintiffs cannot demonstrate the existence of a proper remedy. The Eleventh Circuit has considered three cases where plaintiffs claimed that circuit judges should not be elected at large (and the analysis is no different for appellate judges). In each case, the court noted the strong State interest in maintaining a link between a judge's jurisdiction and her electorate. That is, if a judge hears cases from throughout the State, she should be accountable to voters from throughout the State. The most recent panel to look at the issue said that Circuit law is so clear on this point it could not "envision any remedy that a court might adopt in a Section Two vote dilution challenge to a multi-member judicial election district." *Davis*, 139 F.3d at 1424.

Second, even if this Court delves into the "totality of the circumstances," the circumstances Plaintiffs allege here are virtually identical to those rejected in prior cases. Allegations of bloc voting, few African-American judges, and historical

discrimination were part of earlier at-large challenges. Those allegations were not sufficient to outweigh the States' interests then, and they are not sufficient now.

## I. Plaintiffs' proposed remedy of dividing the State into districts is not an appropriate remedy under Section 2, and Plaintiffs therefore have not stated a claim under Section 2.

Because Plaintiffs cannot show that there is a proper remedy, they cannot make a *prima facie* case under Section 2. "As part of any *prima facie* case under Section Two, a plaintiff must demonstrate the existence of a proper remedy." *Davis*, 139 F.3d at 1419. But there is no proper remedy for the kind of claim Plaintiffs have made. There are so many good reasons for a State to choose at-large elections (as Alabama chose in 1868), and subdistricting would so disrupt the administration of justice, that numerous courts—most importantly, the Eleventh Circuit—have held that there is no remedy for the kind of claim that Plaintiffs are making in this case.

### A. Binding case law establishes that subdistricting is not an appropriate remedy in a challenge to at-large judicial elections.

The Supreme Court has held that Section 2 applies to judicial elections, but it has never addressed whether subdistricting is a legal remedy. In companion cases, the Supreme Court considered Section 2 claims by voters in Texas and Louisiana about the use of at-large systems to elect judges. *Houston Lawyers' Ass'n v. Attorney General of Tex.*, 501 U.S. 419 (1991); *Chisom v. Roemer*, 501 U.S. 380 (1991). The Court held that "state judicial elections are included within

the ambit of § 2 as amended."[6] *Id.* at 404. *See also Houston Lawyers' Ass'n*, 501 U.S. at 428. But the Court reserved other questions, including whether an appropriate remedy may be found. On the question of remedy, the Court recognized the State's strong interest in a particular method of election, but held that those concerns did not remove judicial elections entirely from Section 2's reach. For example, the Court noted, a State could not close the polls at noon in a judicial election if doing so resulted in an abridgment of voting rights. *Houston Lawyers' Ass'n*, 501 U.S. at 427.

On remand from the Supreme Court, the Fifth Circuit sitting *en banc* denied the Section 2 claim in part because of the lack of a proper remedy. *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831 (5th Cir. 1993) ("*LULAC*"). The Fifth Circuit concluded that the strong State interest in maintaining the link between jurisdiction and electorate eliminated subdistricting as a remedy. The Court held that "[l]inking electoral and jurisdictional bases is a key component of the effort to define the office of district judge. That Texas' interest in the linkage of electoral and jurisdictional bases is substantial cannot be gainsaid." *Id.* at 872. It was a system used for generations, was not adopted with a discriminatory purpose, and breaking that link would serve to *marginalize* minority

[6] Defendants contend that this question was wrongly decided and preserve that issue for purposes of future Supreme Court review. *See Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting). But Defendants recognize that this Court is bound by the Supreme Court's decision.

voters. *Id.* at 872–73. Ultimately, the Fifth Circuit held, this substantial interest outweighed any proof of alleged vote dilution in each Texas county at issue. *Id.* at 877–94.

This issue then came before the Eleventh Circuit in several different cases. The Eleventh Circuit consistently agreed with the Fifth Circuit that subdistricting is not an appropriate remedy to a Section 2 claim over at-large judicial elections.

**1. *Nipper v. Smith* (11th Cir. 1994)**

In *Nipper v. Smith*, African-American plaintiffs challenged Florida's system of electing trial judges (circuit and county), arguing that the use of at-large, nonpartisan elections diluted the voting strength of black voters. 39 F.3d 1494 (11th Cir. 1994). The court, sitting *en banc*, engaged in a lengthy discussion of what a plaintiff must prove to establish a Section 2 violation. Noting the requirements of *Thornburg v. Gingles*, 478 U.S. 30 (1986), that a plaintiff must establish a politically cohesive, geographically compact minority population, the court held that remedy is part of a plaintiffs' prima facie case: "A district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system." *Nipper*, 39 F.3d at 1531.

And when considering whether an appropriate remedy exists, a court must be mindful of the State's interests in its chosen form of government:

> Implicit in this first *Gingles* requirement is a limitation on the ability of a federal court to abolish a particular form of government and to use its imagination to fashion a new system. Nothing in the Voting Rights Act suggests an intent on the part of Congress to permit the federal judiciary to force on the states a new model of government; moreover, from a pragmatic standpoint, federal courts simply lack legal standards for choosing among alternatives. Accordingly, we read the first threshold factor of *Gingles* to require that there must be a remedy within the confines of the state's judicial model that does not undermine the administration of justice.

*Id.* That is, before Plaintiffs' claim may advance, Plaintiffs must show that there exists a remedy *within the confines of Alabama's judicial model* that does not undermine the administration of justice – that allows Alabama appellate courts to function as they were constitutionally designed to function.

The Eleventh Circuit found that racial bloc voting existed in Florida and that there was evidence creating a "strong inference" that the votes of African-American voters had indeed been diluted. *Id.* at 1537–41. For example, no black candidate had won a contested judicial election since 1972. *Id.* at 1503–04. Nonetheless, Florida's interest in linking the jurisdictional bases of its circuit and county court judges precluded entry of any of the three proposed remedies, because those remedies would break the link and undermine the administration of justice.

The first remedy the court considered is the one the Plaintiffs seek in this case: subdistricting to elect judges from districts, where they are elected by less than the full electorate in the judge's territorial jurisdiction. According to the Eleventh Circuit, the link between jurisdiction and electoral base serves five

interests that would be undermined by the proposed remedies. First, the link "serves to preserve judicial accountability." *Id.* at 1543. At-large elections ensure that all voters in a judge's jurisdiction have "the right to hold that judge accountable for his or her performance in office," whereas "[s]ubdistricting … would disenfranchise every voter residing beyond a judge's subdistrict, thus rendering the judge accountable only to the voters in his or her subdistrict." *Id.*

Second, at-large elections and the link they create ensure that all races have a voice in electing all judges. Agreeing with the Fifth Circuit's holding in *LULAC,* the Eleventh Circuit held that subdistricting to purposefully create one or more majority-black districts would disenfranchise certain voters: "In the white subdistrict, the voting power of blacks would be diluted to a degree greater than the dilution presently existing; in the black subdistrict, the voting power of whites would be diluted." *Id.* While subdistricting may make the system *appear* fairer to some, it in fact would be *less* fair:

> We believe that the effect of having black judges accountable primarily to the black section of their district, due to the creation of subdistricts, and white judges answerable primarily to the white section of their district, would be detrimental to this pattern of fair and impartial justice.

*Id.* at 1544.

Third, the link between a judge's jurisdiction and electoral base preserves judicial independence. *Id.* Subdistricts, on the other hand, would "foster the idea

that judges should be responsive to constituents" and would undermine "the ideal of an independent-minded judiciary." *Id.*

Fourth, subdistricting would limit the pool of eligible candidates. If judges are required to reside in their districts, subdistricting obviously would limit the breadth of candidates to qualified lawyers residing in that district. And even if there were no requirement that judges live in the district that elects them, "black attorneys would be reluctant to stand for office in white subdistricts and white attorneys would be reluctant to stand for office in black subdistricts." *Id.*

Fifth, and finally, subdistricting would "increase the potential for 'home cooking' by creating a smaller electorate and thereby placing added pressure on elected judges to favor constituents." *Id.* In light of all these concerns, the court held that subdistricting was not a proper remedy.

The other proposed remedies fared no better. Creating new entire circuits would have required modifications to Florida's venue rules and jury selection. Cumulative voting and eliminating place numbers would require judges to run against each other, undermining collegiality and "dampen[ing] lawyer interest in a judicial career." *Id.* at 1545–46. In the end, even though there was evidence of vote dilution, the Florida plaintiffs' Section 2 claim failed because they could not show that the court could enter an appropriate remedy.

### 2. *Southern Christian Leadership Conference of Alabama v. Sessions* (11th Cir. 1995)

The holding in *Nipper* concerned Florida trial courts, but the Eleventh Circuit soon had to decide if the same principles apply to Alabama's Unified Judicial System. They do.

In *Southern Christian Leadership Conference of Alabama v. Sessions*, plaintiffs challenged at-large elections for circuit and district judges in certain of Alabama's 40 judicial circuits. 56 F.3d 1281 (11th Cir. 1995). In the District Court, after a careful examination of Alabama judicial elections, Judge Hobbs concluded that the plaintiffs had not shown that African-Americans "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. *SCLC v. Evans*, 785 F. Supp. 1469, 1473 (M.D. Ala. 1992). Party politics and candidate availability, not race, drove the outcome of judicial elections. 56 F.3d at 1293–94. There was no discriminatory purpose in the at-large system for electing Circuit Judges, in place since the 1850's, 785 F. Supp. at 1488 n.3, or in the requirement that judges run for numbered places, *id.* at 1477. And, Judge Hobbs found, Plaintiffs had not shown there was an appropriate remedy: (1) there is a legitimate State interest in linking jurisdiction and "constituency," (2) subdistricting would disfranchise voters residing outside a particular judge's district, (3) black voters outside the majority-black districts would have little influence in a subdistricting system, and (4) "a

worse system could not be imagined" than eliminating place numbers and requiring sitting judges to run against one another. *Id.* at 1479, 1487, 1490.

Sitting *en banc*, the Eleventh Circuit affirmed Judge Hobbs' decision in all respects. On remedy, the court agreed that there was none,[7] and lack of remedy doomed the plaintiffs' claims. Linking jurisdiction and electorate ensures that there will be a sufficient pool of judicial candidates, promotes judicial accountability and independence, and lessens the specter of "home cooking." *SCLC v. Sessions*, 56 F.3d at 1296–97. These interests were sufficiently weighty to decide the case:

> In sum, the many state policy interests we have discussed, including maintaining the link between a trial judge's electoral base and jurisdiction and ensuring a reasonable pool of qualified potential candidates, preclude the remedies appellants' propose; moreover these interests outweigh whatever possible vote dilution may have been shown in this case.

*Id.* at 1297.

### 3. *White v. Alabama* (11th Cir. 1996)

*White v. Alabama* involved a challenge to at-large elections to select Alabama appellate judges. 74 F.3d 1058 (11th Cir. 1996). The Eleventh Circuit did not address the merits of the claim; instead, it considered the propriety of a so-called consent decree that would have increased the size of appellate courts and

[7] "We agree with the court's conclusion that, assuming that appellants' opportunity to participate in the challenged elections was being abridged, no remedy is available in this case." *SCLC v. Sessions*, 56 F.3d at 1294.

created a commission to appoint judges (specifically, to appoint *black* judges), in contravention to the Alabama Constitution's requirements that judges be elected.

Soon after the case began, the Alabama Attorney General at the time (Jimmy Evans) entered into a settlement agreement with the plaintiffs. Under the terms of that settlement, various steps would be taken, including adding judges to the court, until there were two African-American judges on all three appellate courts. Those judges would be selected not by the voters, but by a commission made up of various segments of African-American leadership, overseen by the federal court.

Intervenors and a new Alabama Attorney General (Jeff Sessions) took issue with the settlement and objected, but the District Court entered an order implementing the agreement anyway. The intervenors appealed and the Eleventh Circuit reversed the District Court's orders. The remedy was not permitted under Section 2, the court held, for three reasons: First, one does not remedy alleged vote dilution by entirely removing an office from the reach of the voters. *Id.* at 1069–71. Second, the express goal of the so-called settlement was to achieve proportional representation, but Section 2 expressly provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.* at 1071–72, quoting 52 U.S.C. § 10301(b). And third, the district court lacked the authority to require Alabama to increase the size of its appellate courts. 74 F.3d at 1072.

The State's interests in at-large elections were never questioned in *White*, but the Court's decision bolsters the holdings in *Nipper* and *SCLC* in three respects. First, federal courts should show respect for a State's chosen judicial model. Second, the Eleventh Circuit again held that a remedy must comply with Section 2, and a court is not free to restructure a State's judicial system any way it chooses. The issue in *White* was the number of judges on a court, not at-large elections, but there is an undercurrent of the need to be respectful of a State's race-neutral choices. And third, disenfranchising voters is not the way to cure vote dilution. Admittedly in *White*, certain spots on the court would no longer have been filled by elections at all, but it is a principle that applies to the remedy urged by Plaintiffs in this case. Currently all Alabamians have a voice on all Supreme Court Justices, but Plaintiffs would strip any given voter of all say on 8 out of 9 Justices.

**4. *Davis v. Chiles* (11th Cir. 1998)**

In *Davis v. Chiles*, at-large elections for Florida trial-court judges were challenged a second time. 139 F.3d 1414 (11th Cir. 1998) (this challenge involved different circuits than the circuit at issue in *Nipper*). Following *Nipper* and *SCLC*, the district court rejected plaintiffs' claims and held that Florida's interests in maintaining the judicial model set out in its constitution, maintaining the link between a judge's jurisdiction and electorate, and preventing racial stigmatization

of its judiciary outweighed the plaintiffs' interests in a remedy. The Eleventh Circuit affirmed.

The court acknowledged the precedent that "a state has an interest in maintaining the judicial selection model established by its constitution." *Id.* at 1420, citing *Nipper*, 39 F.3d at 1531. As it had twice before, the court also agreed that Florida had a weighty interest maintaining the linkage between a judge's jurisdiction and electoral base, because this link "serves Florida's interest in judicial accountability." 139 F.3d at 1421. In addition, the court held, "Florida has an interest in avoiding even the appearance that its judges may harbor 'home cooking' biases." *Id.*

In light of this authority, the panel had to conclude that there was no remedy available to the plaintiff:

> Together with *Nipper*, *SCLC*, and the additional case of *White v. Alabama*, we will with this decision have disallowed redistricting, subdistricting, modified subdistricting, cumulative voting, limited voting, special nomination, and any conceivable variant thereof as remedies for racially polarized voting in at-large judicial elections. Given such rulings, neither we, nor Davis, nor Chiles have been able to envision any remedy that a court might adopt in a Section Two vote dilution challenge to a multi-member judicial election district. Thus, in this circuit, Section Two of the Voting Rights Act frankly cannot be said to apply, in any meaningful way, to at-large judicial elections.

*Id.* at 1423–24 (citations omitted).

The *Davis* court was entirely correct that all conceivable remedies have been foreclosed because of the strong state interest in allowing all voters in a judge's

jurisdiction to have a voice in his or her election. The panel went too far, of course, to suggest that this fact renders Section 2 inoperative. No doubt these cases would have come out a different way if a State used subdistricts to elect judges for decades and then, if African-Americans were being elected under that system, adopted an at-large system for the purpose of achieving an all-white judiciary. And, as Justice Stevens pointed out, Section 2 has a role to play in judicial elections if the State adopts procedures such as closing the polls early and those procedures have a prohibited discriminatory effect. *Houston Lawyers' Ass'n*, 501 U.S. at 427. But where, as here, a plaintiff challenges an at-large system that was adopted with no racial purpose, that promotes judicial accountability, and that allows voters to be heard on the election of all judges and not just some, the State's interests in keeping that system outweigh the plaintiff's interests in a remedy *as a matter of law*.

* * *

In the end, every decision Defendants have found that addresses the issue concludes, like the Eleventh Circuit, that a Section 2 plaintiff cannot overcome a State's powerful interest in linking jurisdiction and electoral base. As discussed above, the Fifth Circuit recognized this result in *LULAC*, 999 F.2d 831. The Sixth Circuit likewise reached this result in *Cousin v. Sundquist*, 145 F.3d 818, 834 (6th Cir. 1998), and again in *Mallory v. Ohio*, 173 F.3d 377, 385 (6th Cir. 1999). In the

Seventh Circuit, Judge Easterbrook similarly held that the State's interest is "dispositive unless the plaintiffs show gross racial vote dilution." *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1200 (7th Cir. 1997). Like the Fifth and Eleventh Circuits, the Seventh Circuit held that "[a]t-large elections… are designed to balance accountability and independence." *Id.* at 1201.[8] *See also*, *France v. Pataki*, 71 F. Supp. 2d 317, 333–34 (S.D.N.Y. 1999) ("In all, the current system [of at-large elections for trial-court judges] insures that Justices are accountable to their entire constituency whose affairs they adjudicate."). All courts therefore agree that Section 2 does not require a State to divide itself into "black" and "white" districts to elect judges.

[8] Judge Easterbrook eloquently described the linkage interest and the policies it supports as follows:

> Wisconsin believes that election of judges from subdistricts would lead to a public perception (and perhaps the actuality) that judges serve the interests of constituencies defined by race or other socioeconomic conditions, rather than the interest of the whole populace. Larger jurisdictions liberate judges, to some degree, from the pressure created by the need to stand for reelection. A judge elected from a small district might fear that acquittal of a person charged with a crime against a member of that neighborhood, or a decision that harms an employer in that neighborhood, will lead to a defeat at the polls. To free the judge to follow the law dispassionately, Wisconsin prefers to elect judges from larger areas, diluting the reaction to individual decisions. Perhaps the belief that judges favor those who elect them is unwarranted – though the diversity jurisdiction of the federal courts rests in part on a belief that state judges highly value the interests of that state's citizens and thus are potentially biased against citizens of other states. So too, perhaps, for smaller jurisdictions within a state.

*Id.* (citations omitted).

**B. The recognized State interests that apply to trial-court judges apply with equal force to appellate judges.**

It is true that *Nipper*, *SCLC*, and *Davis*, all concerned the election of trial-court judges who decide cases on their own, not appellate judges who decide cases as a group. However, the court was no less concerned about a State's interests and the limitations of Section 2 in *White*, which *did* concern appellate judges.

It is also true that in *Nipper*, Judge Tjoflat wrote that there are hypothetical differences between one-judge trial courts and multiple-judge appellate courts:

> This case concerns the election of trial court judges, not the members of a multimember appellate court. Traditional legislative-style "logrolling" would not be appropriate even on a court that decides cases as a group, but there might be more to be said for some form of "representation" on a collegial court (like a state supreme court) than on a single-judge trial court. The ability to bring diverse perspectives to the court, not the prospect of outright dealmaking, would be relevant in such a context.

*Nipper*, 39 F.3d at 1535 n.78. But the nature of appellate courts was not before the court in *Nipper* and this dicta merely recognized potential differences between appellate courts and trial courts (there "*might be*" reasons . . .). Just as the court had not fully considered the potential differences, it had not considered all the many ways that trial judges and appellate judges are the same. In fact, all of the benefits of linking jurisdiction and electorate, and all the disadvantages of breaking that link, apply as obviously to appellate courts as they do to single-judge trial courts.

### 1. Respect for a State's constitutional model

When addressing trial courts, the Eleventh Circuit noted that a federal court is not authorized to fundamentally change a State's system of government: "Nothing in the Voting Rights Act suggests an intent on the part of Congress to permit the federal judiciary to force on the states a new model of government." *Nipper*, 39 F.3d at 1531.[9] Moreover, as the Fifth Circuit recognized, at-large elections and accountability to a judge's entire jurisdiction is part of the very definition of the judicial role:

> The decision to make jurisdiction and electoral bases coterminous is more than a decision about how to elect state judges. It is a decision of what *constitutes* a state court judge. Such a decision is as much a decision about the structure of the judicial office as the office's explicit qualifications such as bar membership or the age of judges.

*LULAC*, 999 F.2d at 872.

Appellate courts are no different. Alabama has decided that its appellate judges, who decide cases from all corners of the State, should "represent" the entire State and be accountable to all voters. To say that one Justice represents this district, and another Justice is accountable to a different district, changes "the structure of the judicial office" for both trial and appellate judges.[10]

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[9] *See also*, *Davis*, 139 F.3d at 1420–21 (noting that proposed remedies would contradict Florida's constitution).

[10] Nothing in the language of Section 2 suggests that Congress intended to require States to change their chosen court structure. As the Eleventh Circuit has noted, when federal legislation "alters the constitutionally mandated balance of power between the States and the

### 2. Allowing voters to have a voice on the entire court

When it comes to trial courts, the Eleventh Circuit recognized that voters should have a voice in all judges who serve on a court deciding cases from that jurisdiction:

> The maintenance of the linkage between a trial court judge's territorial jurisdiction and electoral base serves to preserve judicial accountability. Florida's current model of trial court elections embodies a state judgment that the voters in a judge's jurisdiction should have the right to hold that judge accountable for his or her performance in office. Subdistricting, however, would disenfranchise every voter residing beyond a judge's subdistrict, thus rendering the judge accountable only to the voters in his or her subdistrict.

*Nipper*, 39 F.3d at 1543.

The same principle applies to appellate courts. Presently, every voter in Alabama has a voice in the selection of every Justice on the Alabama Supreme Court. Plaintiffs would give voters a voice on only one out of nine Justices, and no say whatsoever on the others. Plaintiffs are correct that Alabama's appellate courts "render enormously consequential decisions that profoundly affect the lives of all Alabamians." Doc. 1 at ¶1. It would be wrong to strip Alabamians of any voice on 8/9 of its membership.

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Federal Government," congressional intent must be "unmistakably clear in the language of the statute." *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1232 n.35 (11th Cir. 2005), quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991).

### 3. Preventing the marginalization of minority voters

To give black voters more of an impact in appellate elections, Plaintiffs would draw districts and put most black voters in one of those districts. But what about the other African-Americans who would then make up only a tiny fraction of the "white" districts? For trial-court judicial elections, the Eleventh Circuit held that subdistricting disenfranchises black voters outside the majority-black district:

> Moreover, even in the judge's subdistrict, a group of voters would effectively be disenfranchised: In the white subdistrict, the voting power of blacks would be diluted to a degree greater than the dilution presently existing; in the black subdistrict, the voting power of whites would be diluted.

*Nipper*, 39 F.3d at 1543.[11]

The same concerns apply to the election of appellate judges. The answer to vote dilution, if such dilution exists, is not more vote dilution. Nor is the answer a system that would send the message that some judges represent one race, other judges another:

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[11] The Fifth Circuit agrees that subdistricting would only serve to marginalize voters:

> The inescapable truth is that the result sought by plaintiffs here would diminish minority influence. Minority voters would be marginalized, having virtually no impact on most district court elections. … After subdistricting, a handful of judges would be elected from subdistricts with a majority of minority voters. Creating "safe" districts would leave all but a few subdistricts stripped of nearly all minority members. The great majority of judges would be elected entirely by white voters. Minority litigants would not necessarily have their cases assigned to one of the few judges elected by minority voters. Rather, the overwhelming probability would be that the minority litigant would appear "before a judge who has little direct political interest in being responsive to minority concerns."

*LULAC*, 999 F.2d at 872–73 (citation omitted).

> [T]he effect of having black judges accountable primarily to the black section of their district, due to the creation of subdistricts, and white judges answerable primarily to the white section of their district, would be detrimental to this pattern of fair and impartial justice. Thus, in a districting scheme, the race of the constituents would become the deciding factor in determining over which judges the constituents would exercise their oversight function.

*Nipper*, 39 F.3d at 1544.

The purpose of the Voting Rights Act is "to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003). That purpose cannot possibly be served by Plaintiffs' requested remedy. We may tolerate some race-based districting for now, to elect representative legislators, but only because it is the "politics of second best." *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994). But for the election of judges, who do not have a constituency in the manner of a legislator, marginalizing black voters through subdistricting, and assigning some judges to consider the interests of black voters and others to consider the interests of white voters, countermands the very purpose of the Act.

Whatever the level of courts, trial or appellate, dividing the State into African-American and white districts would send the wrong message: "By altering the current electoral schemes for the express purpose of electing more black judges, the federal court in fashioning the alteration, and the state courts in

implementing it, would be proclaiming that race matters in the administration of justice." *Nipper*, 39 F.3d at 1546.

**4. Judicial independence**

Another benefit of linking jurisdiction with electorate is that it promotes judicial independence. Judges do not have "constituents" in the same way that a legislator does:

> Trial court judges, on the other hand, are neither elected to be responsive to their constituents nor expected to pursue an agenda on behalf of a particular group. Engaging in legislative-style "logrolling" and negotiating would be reprehensible conduct in a judge and would violate the core principles governing the judicial role. The factor calling for an evaluation of whether the elected officials are addressing the "particularized needs of the members of the minority group" is, therefore, inappropriate in the judicial context.

*Nipper*, 39 F.3d at 1534–35. *See also*, *id.* at 1535 n. 77 ("The subdistricting remedy the appellants propose would reduce the size of the judge's electoral base (while maintaining the size of the judge's territorial jurisdiction) and thus increase the potential for responsiveness to special interest groups in the constituency.").

But if a court's jurisdiction were divided into districts, with each judge on the court elected by a different group of voters, it would send the wrong message that judges answer to that group, instead of to the jurisdiction as a whole or the rule of law:

> Breaking this link by creating smaller electoral districts along racial lines would override the State's judgment concerning the appropriate size of trial court electorates and would foster the idea that judges

> should be responsive to constituents, thereby reversing Florida's trend towards deemphasizing "representation" by judges and consequently undermining the ideal of an independent-minded judiciary.

*Nipper*, 39 F.3d at 1544. Moreover, subdistricting may encourage judges to promote the interests of people within their district over "non-voters" from without their district: "The implementation of subdistricts would increase the potential for 'home cooking' by creating a smaller electorate and thereby placing added pressure on elected judges to favor constituents—especially as election time approaches." *Id*.

What is true for trial judges is true for appellate judges. Assigning each appellate judge a district would encourage judges to give priority to that district, or would at least give the public appearance that all Alabamians would not be on an equal footing with each judge. It could raise difficult recusal questions for a judge if an appeal came before the court involving, for example, a large employer located in his or her district. In short, subdistricting promotes the idea that judges are responsive to constituents the way executive and legislative officials are, and that is not what we want from our courts.

The different expectations for judges was an issue in *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), which involved a prohibition against judicial candidates from personally soliciting campaign funds. The Court reasoned that while members of the executive and legislative branches "are expected to be

appropriately responsive to the preferences of their supporters," *id.* at 1667, judges are quite different:

> In deciding cases, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors. A judge instead must 'observe the utmost fairness,' striving to be 'perfectly and completely independent, with nothing to influence or control him but God and his conscience.'

*Id.*, quoting Address of John Marshall in Proceedings and Debates of the Virginia State Convention of 1829–1830, p. 616 (1830). *See also id.* at 1674 ("Favoritism, *i.e.*, partiality, if inevitable in the political arena, is disqualifying in the judiciary's domain.") (Ginsburg, J., concurring) (citations omitted).

Like the campaign solicitations in *Williams-Yulee*, the subdistricting requested in this case would politicize Alabama's appellate courts and threaten judicial independence. Presently each justice/judge is elected by all voters, is accountable to all voters, and is thus encouraged to look upon all Alabamians equally. But if each appellate judge becomes elected by, and accountable to, only a sliver of the electorate, the population is divided into "us" and "them." Defendants certainly do not contend that today's appellate judges in Alabama would rule with such bias, but the law is equally concerned with the *appearances* of bias. For appellate judges or trial judges, subdistricting creates the appearance that judges may favor their own voters over citizens who live in other districts.

**5. Ensuring a large pool of candidates**

In *Nipper*, the court noted that subdistricting may decrease the pool of trial court judges, limiting the candidates to those who lived in a particular district or, if there were no residency requirement, to those who wished to run in a particular district:

> Because Florida requires its trial court judges to reside in the jurisdiction from which they are elected, subdistricting would limit the breadth of applications to the circuit and county nominating commissions. Even if the requirement that judges live in their subdistrict were eliminated, given the racial composition of the subdistricts, black attorneys would be reluctant to stand for office in white subdistricts and white attorneys would be reluctant to stand for office in black subdistricts.

*Nipper*, 39 F.3d at 1544.

It is no different for an appellate judge. If judges are required to live in their districts, then the pool of candidates is limited to qualified lawyers within that district. Obviously, lawyers are not evenly spread throughout Alabama. The people might wish to have two court members from a particular district, but Plaintiffs would deny them that choice. If there is no residency requirement, then there could conceivably be two court members from Montgomery or Birmingham, for example, but only after they decided who was going to run from which district. That would violate "the core principle of republican government, namely, that the voters should choose their representatives, not the other way around." *Ariz. State*

*Legislature v. Ariz. Independent Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (internal quotation marks and citations omitted).

If districts are drawn, it seems quite unlikely that all sitting appellate judges would receive their own district (especially when replacing at least some of the present judges appears to be precisely Plaintiffs' point). Plaintiffs' remedy would pit judges against one another, and, as Judge Hobbs said, "a worse system could not be imagined" than requiring sitting judges to run against one another. *SCLC*, 785 F. Supp. at 1490.

The disadvantages of pitting judges against one another in elections, particularly the way it would limit the pool of candidates, was discussed in the context of a numbered seat requirement in *Nipper*:

> Requiring judges to run for unnumbered seats on the court, meaning that all of the judges seeking reelection would be forced to oppose each other, would have a detrimental effect on the collegiality of the court's judges in administrative matters. Furthermore, requiring judges to face such opposition would dampen lawyer interest in a judicial career, thereby decreasing the pool of candidates. A lawyer contemplating a run for judicial office currently relies on the fact that he or she will not have to compete against every judge up for reelection. Moreover, the lawyer expects that, if elected, the power of incumbency (a feature of the current system) will probably ensure his or her retention in office. In addition to dampening lawyer interest in a judicial career, requiring judges to face opposition every time their terms expire would adversely affect the independence of the judiciary: Judges would begin running for reelection from the moment they took office.

*Nipper*, 39 F.3d at 1546.

By allowing judges to run at-large, Alabama furthers its interest in encouraging capable candidates and allowing the best and brightest to run for her appellate courts, wherever they might live. Like all the State interests discussed in this section, this interest is furthered by Alabama's present system for all levels of courts, trial and appellate. Therefore, the Eleventh Circuit decisions dealing with trial courts apply with equal force to Alabama's appellate courts.

### C. To avoid conflict between the Voting Rights Act and the Constitution, the Court should not read the Act to require race-based districting for judges.

Plaintiffs ask this Court to read the Voting Rights Act to require Alabama to elect judges by voters who have been divided up by race. Such an approach, though, would raise serious constitutional questions, and "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Avoiding the constitutional concerns that Plaintiffs' requested remedy would bring is another reason not to require race-based districting for appellate judges.

There are at least four constitutional concerns raised by Plaintiffs' proposed remedy under the Equal Protection Clause, Due Process Clause, and Congressional enforcement authority under the Fourteenth Amendment. The first is the "sordid business" of divvying up voters by race. *League of United Latin American Citizens*

*v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., dissenting). The Court has raised constitutional avoidance in the legislative context where electing members from districts is commonplace and provided for by state law. *Bartlett v. Strickland*, 556 U.S. 1, 23–24 (2009) ("Entrench[ing] majority-minority districts by statutory command . . . could pose constitutional concerns."). Racially-based districting "encourages a racially based understanding of the representative function," under which "geographic districts are merely a device to be manipulated to establish 'black representatives' whose real constituencies are defined, not in terms of the voters who populate their districts, but in terms of race." *Holder v. Hall*, 512 U.S. 874, 907 (1994) (Thomas, J., dissenting). Racial division of voters is therefore suspect, even in the context of a truly representative body like a legislature, whose members are *expected* to promote the interests of their constituents and bargain with other members who promote different interests. How much more suspect would racial districting be for a court, where judges play a very different role.

The second constitutional problem involves the State's obligation to provide due process to litigants. "[I]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process,'" *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (citation omitted), and that "basic requirement" is called into question if judges are expected to interpret the language of statutes and constitutions, or select winners and losers in litigation, based upon the residency or

race of their voters. In *Caperton*, the Court held that a West Virginia Supreme Court Justice whose campaign had been largely funded by a litigant was obligated by the Due Process Clause to recuse himself from the donor's case. Justice Kennedy noted the lengths States had gone "to eliminate even the appearance of partiality." *Id.* at 888. Thus, while most recusal questions do not rise to the Constitutional level, there are circumstances, such as the campaign donations at issue in *Caperton*, where "experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* at 877.

As *Caperton* shows, a system that makes a court appear more political and that encourages judges to favor some litigants over another (or that even *appears* to provide that incentive) should be strongly disfavored. The subdistricting that Plaintiffs urge upon the court – assigning judges to different parts of the State – would encourage appellate judges to consider whether the parties before the appellate courts were one of his or her voters. The judge may fear that voting in favor of one of his own would be automatically suspect, and voting against one of his own would be political suicide. *Caperton* teaches that such incentives raise serious concerns that implicate the Due Process Clause.

A third constitutional problem presented by Plaintiffs' proposed remedy is that it would disenfranchise voters. Plaintiffs' basic premise is that the Voting

Rights Act prevents at-large judicial elections because black voters are "submerged" in the larger population. Subdistricting would not solve this problem, but would simply change who is "submerged." Yes, in a district with a large-enough majority of black voters (and how large is large enough?), assuming African-American voters vote as a block,[12] African-American voters can likely select the judge from that district. But in all the majority-white districts, blacks would probably make up an even smaller minority in their district than they do today in the State at large. They will be more submerged than ever, and white voters in the majority-black district will be submerged. Not to mention that if Plaintiffs receive their remedy, Alabama voters would be completely disenfranchised from the election of 16 of the 19 Alabama appellate judges.

Finally, Plaintiffs' reading would raise questions about whether Section 2 is a congruent and proportional response to documented constitutional violations. *Johnson*, 405 F.3d at 1232.

Reading the Voting Rights Act to require Alabama to jettison its 150-year-old system of at-large judicial elections, and replace it with racial subdistricting, would raise constitutional concerns that should be avoided. It would cause friction between Section 2 and the States' "constitutionally protected" right to regulate the franchise. *Id.* at 1230. It would infuse express racial considerations into judicial

[12] Defendants do not concede that there is polarized voting in judicial elections, or the underlying premise that black voters and white voters value different judicial characteristics.

elections (and, perhaps, judicial decision-making), bringing Section 2 into tension with the Equal Protection Clause. *See Miller v. Johnson*, 515 U.S. 900, 927 (1995). Far better to hold, as the Eleventh Circuit already requires, that Plaintiffs' remedy is inappropriate and unavailable.

## II. Under a "totality of the circumstances" analysis, the State's interest in its current electoral system is so strong, it outweighs any alleged vote dilution.

As discussed above, because Plaintiffs cannot show that they have a valid remedy in the context of Alabama's judicial model, there is no need to go further. The claim is due to be dismissed on that basis alone. But should the Court weigh the "totality of the circumstances," it is plain that the allegations of the complaint, taken as true, do not add up to vote dilution that outweighs Alabama's interests in maintaining its system of at-large election.

Consider the circumstances in Florida that failed to make the cut. In *Nipper*, no black candidate had won a contested judicial election since 1979. 39 F.3d at 1504. "All of the black candidates for judicial office in [the applicable] jurisdictions have been defeated by their white opponents." *Id.* at 1508. Florida had majority-vote and numbered post requirements. *Id.* at 1499. There was evidence of bloc voting, a "history of discrimination," a "legacy of disfranchisement," and "segregation in most areas of life." *Id.* at 1506–07. Yet even with these facts, the Court held that subdistricting would undermine the administration of justice and

was not an available remedy. *Id.* at 1546–47. Likewise, in *Davis*, even though there was "persuasive evidence of racially polarized voting" in Florida judicial elections, there was no permissible remedy. 139 F.3d at 1426.

The court in *SCLC* considered the totality of the circumstances in Alabama, including the fact that "[o]nly one black candidate for the trial bench who was not an incumbent has prevailed in a judicial election contest in a majority white jurisdiction." 56 F.3d at 1287. The court affirmed findings that the judicial election losses in Alabama were explained by factors other than race, such as party politics and candidate availability. *Id.* at 1293–94. In the end, the circumstances were not sufficient to require Alabama to abandon at-large elections. Similarly, in *White*, the court would have had before it all of Alabama's racial history, through the mid-1990s. 74 F.3d 1058. Yet the circumstances were not sufficient to overlook the inappropriateness of the remedy.

Nearly all of the alleged circumstances in this case have already been tried. Plaintiffs allege that voting in Alabama is racially polarized (Doc. 1 ¶ 3), but that did not tip the scales in *Davis*. They allege that blacks have had little success in judicial elections (Doc. 1 ¶¶ 2, 4, 31–37), but that was the case in all the earlier Eleventh Circuit cases. Moreover, as Plaintiffs concede, African-American Justices Adams and Cook won state-wide elections in the 1990s, doc. 1 ¶¶ 31–32, before the collapse of the Alabama Democratic Party. While it is true that no African-

American who has run for state-wide office in Alabama since 2000 has been elected, doc. 1 at 54–56, it is also true that few *Democrats* have been elected to state-wide office in recent years, none since 2010, and in 2012 the Democratic Party did not even field candidates for all but two state-wide offices. [13]

Plaintiffs allege a history of discrimination in the 1950s and 1960s, doc. 1 ¶¶ 47–48, but that same history was before the court in *SCLC*, and Plaintiffs do not (and cannot) allege that racial discrimination is worse now than then. Yes, the Department of Justice objected to voting changes under the unconstitutional preclearance system, doc. 1 ¶ 49, but this is not news. The Department of Justice was objecting to voting changes in Alabama at the time of *SCLC*. And while the Plaintiffs allege that African-American Alabamians lag behind white residents in certain socioeconomic facts such as poverty and employment, doc. 1 ¶¶ 52–53, they do not allege that this is something that has developed since *Nipper*. That is, whatever gap exists now existed in a similar fashion when the Eleventh Circuit rejected this claim.

Plaintiffs do not appear to allege that Alabama chose to elect appellate judges on an at-large basis for racial reasons, and such allegations would not be plausible in any event. At-large elections were chosen in 1868, as part of the

[13] *See* Sample 2012 General Election ballot, available at http://www.alabamavotes.gov/downloads/election/2012/general/sampleBallots/montgomery-2012-sample.pdf (last visited Oct. 12, 2016).

Reconstruction Constitution, not in the maligned constitutions that followed. Numbered places and majority-vote requirements (*see* doc. 1 ¶ 51) were adopted in the early 20th Century, not in the Jim Crow era, and do not have the racial taint of certain long-past voting systems used in the South. *See SCLC*, 56 F.3d at 1286.

Plaintiffs allege that a federal court in the 1980s struck at-large elections for certain county commissions, but as they note, that was after a finding that the State, "in the century following Reconstruction," switched from subdistricting to at-large elections for these bodies *for the purpose* of diluting African-American votes. Doc. 1 at ¶ 48. At-large elections for County Commissions were therefore adopted under very different circumstances than at-large elections for judges. And besides, *SCLC* came 10 years after the *Dillard* decision, and the facts of *Dillard* were not enough to persuade the Eleventh Circuit to restructure Alabama courts.

There are a couple of allegations of circumstances in Alabama that were apparently not considered in earlier cases, but those allegations do not change the analysis. First, Plaintiffs allege that blacks are disproportionately represented on death row. Doc. 1 ¶ 57. If Plaintiffs are suggesting that Alabama appellate courts are discriminating in death penalty cases, that makes little sense, because appellate judges do not sentence anyone to death. That is done by trial judges, with an advisory verdict from a jury. *See* Ala. Code § 13A-5-47. Second, Plaintiffs criticize the Alabama appellate courts' rulings on the mandatory life-without-parole

sentencing scheme at issue in *Miller v. Alabama*, 132 S. Ct. 2455 (2012). Doc. 1 ¶ 58. But the Alabama Court of Criminal Appeals and Alabama Supreme Court were not racist in ruling that the law was constitutional, any more than the dissenters in *Miller* – Chief Justices Roberts and Justice Thomas, Scalia, and Alito – who also thought the law was constitutional.

Plaintiffs' allegations, even if true, are not enough. Plaintiffs do not allege circumstances worth any greater weight than those already found to be outweighed by the State's interests. Again, Defendants do not believe the Court need weigh the circumstances when there is not an appropriate remedy. But even if the Court takes that step, then on the face of the Complaint, and as a matter of law, Plaintiffs have not stated a plausible claim for relief.

## III. Plaintiffs' claims are barred by standing and sovereign immunity.

As discussed above, Circuit precedent dealing with the lack of remedy provides a clear path to dismissal. There are, however, standing and sovereign immunity issues that also require dismissal.

**Standing:** The party seeking to invoke the Court's subject matter jurisdiction has the burden of establishing that jurisdiction exists. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Plaintiffs must therefore demonstrate that they have standing to assert their claims by showing (1) an injury in fact, (2) that is traceable to the defendant's actions, and (3) that will be redressed by a

favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Plaintiffs' alleged injury must be "concrete and particularized," not "conjectural or hypothetical." *Id.* And it must be one that "affect[s] the plaintiff in a personal and individual way." *Id.* at n.1.

The individual plaintiffs allege only that they are registered voters and are African-American residents of particular Alabama counties. Doc. 1 at ¶¶ 12–15. They do not, however, identify particular judicial candidates of their *personal* choice whom they were unable to elect on account of race, or that they personally have suffered vote dilution because the challenged courts' members are elected statewide. *See United States v. Hays*, 515 U.S. 737, 745–46 (1995). The individual plaintiffs offer no basis to conclude that *their* right to vote has been "deni[ed] or abridge[d] … on account of race or color." 52 U.S.C. § 10301(a).

Plaintiffs also fail to allege facts demonstrating that subdistricting will enable them to elect candidates of choice. There are no district lines yet, of course, and no basis of any sort for this Court to determine that it is plausible that the four individual Plaintiffs will reside in majority-black districts (if such relief were permissible).

Nor has the Alabama Chapter of the NAACP alleged sufficient facts to find standing. To the extent the NAACP is suing on its own behalf, it too must allege a personal, concrete injury under *Lujan*. The Complaint includes no such allegations,

*see* Doc. 1 at ¶ 11, and a "setback to the organization's abstract social interests" does not qualify as an injury under Article III, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

To the extent the NAACP seeks to assert vote-dilution claims on behalf of its members, it is required to show that (1) its members each independently meet the Article III standing requirements; (2) the interests that the group seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires that NAACP's members participate in this lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). The Complaint makes no attempt to identify such members or applicable interests, nor does it seek to demonstrate that it can proceed in this suit without its members' participation. The Complaint is simply silent on these issues.

For all these reasons, Plaintiffs have not alleged sufficient facts to support Article III standing.

**Sovereign immunity:** Plaintiffs' Section 2 claims against the State of Alabama are barred by sovereign immunity. *See, e.g.*, U.S. CONST. amend XI. "The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). The Alabama Constitution makes clear that Alabama has not consented to this suit. *See* ALA. CONST. art. I, § 14. The key

question is thus whether Congress has validly "abrogate[d]" Alabama's immunity "by appropriate legislation." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253–54 (2011). It has not.

The standard for finding a valid abrogation is "stringent." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 56 (1996). Even where Congress has the power to abrogate state immunity, it may do so "only by making its intention *unmistakably clear* in the language of the statute." *Id.* (emphasis added; internal quotation marks omitted).

The Voting Rights Act does not meet this stringent "clear statement" test with respect to Section 2. When private plaintiffs sue under that section, they do so only through an "*implied* private right of action." *See, e.g., Ford v. Strange*, 580 Fed. App'x 701, 705 n.6 (11th Cir. 2014) (emphasis added) (citing *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996)). And implied private rights of action, as that label suggests, by definition do not amount to an "unmistakably clear" waiver of sovereign immunity: Indeed, even an express, "*general* authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985) (emphasis added).[14] For this reason, it does

[14] *See also, e.g., Beneficial Consumer Disc. Co. v. Poltonowicz*, 47 F.3d 91, 95 (3d Cir. 1995) (explaining, in an analogous context, that "[a] waiver of sovereign immunity" cannot be implied); *Dorsey v. U.S. Dep't of Labor*, 41 F.3d 1551, 1555 (D.C. Cir. 1994) (explaining, in an

not matter that the Voting Rights Act authorizes the United States Attorney General to "institute for the United States, or in the name of the United States" an action against a State to prevent a Section 2 violation. 52 U.S.C. § 10308(d). The very language of that clause confirms that the Voting Rights Act does not authorize *private* litigants to sue a State under Section 2.[15]

**Conclusion**

This case might be different if Alabama had first adopted an at-large system for electing judges at the height of resistance to the civil rights movement. But the origin is quite different: Alabama switched from election by the Legislature to at-large election by the people in the 1868 Reconstruction Constitution when African-Americans were full participants.

And it made *sense*. The at-large model allows Alabamians to vote on all judges, promotes judicial independence and accountability, and avoids disenfranchisement and marginalization. That is why the Eleventh Circuit holds

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analogous context, that "[w]hile private rights of action may be implied, waivers of sovereign immunity may not").

[15] Although a few nonbinding precedents suggest that States lack sovereign immunity from a Section 2 claim, those decisions were wrongly decided and are not persuasive. *See Mixon v. Ohio*, 193 F.3d 389, 398 (6th Cir. 1999); *Hall v. Louisiana*, 983 F. Supp. 2d 820, 829–30 (M.D. La. 2013); *Terrebonne Parish NAACP v. Jindal*, 154 F. Supp. 3d 354, 359 (M.D. La. 2015). The Sixth Circuit's discussion of whether Congress had employed language abrogating States' immunity to these actions consisted of a single paragraph that did not mention that the plaintiffs were proceeding under an implied right of action. *See Mixon*, 193 F.3d at 398. Even less persuasive, the Middle District of Louisiana simply adopted the Sixth Circuit's rule with little elaboration. *See Hall*, 983 F. Supp. 2d at 829–30; *Terrebonne Parish NAACP*, 154 F. Supp. 3d at 359.

that the subdistricting, race-injecting remedy these Plaintiffs seek is simply not available. In fact, no remedy dreamed up by any of the judges or lawyers involved in the earlier cases is available. Because no remedy is available, this Court should dismiss the claims before weighing the totality of the circumstances. In the alternative, because the circumstances alleged here are so similar to circumstances found insufficient in earlier cases, the Court may rule as a matter of law that the State's interest in maintaining its current judicial model outweighs Plaintiffs' interest in a subdistricting remedy.

WHEREFORE, Defendants move this Court to dismiss Plaintiffs' claims.

Respectfully submitted,

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**Certificate of Service**

I certify that on October 12th, 2016, I filed the foregoing document electronically via the Court's CM/ECF system, which will send a copy to all counsel of record.

s/James W. Davis
Counsel for the State of Alabama
and Secretary of State John H. Merrill

# Exhibit 1

# History of Alabama Constitutional Provisions Concerning Appellate Judge Selection[1]

**1819**

Chancellors, Judges of the Supreme Court, Judges of the Circuit Courts, and Judges of the Inferior Courts, shall be elected by **joint vote of both Houses of the General Assembly**.

ALA. CONST. of 1819, art. V, § 12

**1861**

Chancellors and Judges of the Supreme Court shall be elected by **joint vote of both houses of the General Assembly**; but at and after the session of the General Assembly, to be held in the winter of the year eighteen hundred and forty-nine-fifty, the General Assembly shall provide by law for the election of judges of the circuit Courts, by the qualified electors of their circuits respectively, and for the election of Judges of the Courts of Probate, and other inferior courts, (not including Chancellors) by the qualified electors of the counties, cities, or districts, for which such courts may be respectively established; the first Monday in November in any year shall be the day for any election of such judges by the people, or such other day not to be within a less period than two months of the general election for Governor, members of the General Assembly, or members of Congress, as the General Assembly may by law prescribe; ….

ALA. CONST. of 1861, art. V, § 11

**1865**

Judges of the supreme court, and chancellors, shall be elected by a **joint vote of both houses of the General Assembly**; judges of the circuit and probate courts, and of such other inferior courts as may be by law established, shall be elected by the qualified electors of the respective counties, cities, or districts, for which such courts may be established. Elections of judges by the people shall be held on the first Monday in May, or such other day as may be by law prescribed, not within a less period than two months of the day fixed by law for the election of Governor, members of the General Assembly, or members of Congress….

ALA. CONST. of 1865, art. VI, § 11

[1] The text of Alabama's various constitutions is available at http://www.legislature.state.al.us/aliswww/history/constitutions/constitutions.html.

**1868**

Judges of the Supreme Court, and Chancellors, Judges of the Circuit and Probate Courts, and of such other inferior courts as may be by law established, shall be **elected by the qualified electors of the respective counties, cities, towns or districts, for which said courts may be established**, on the Tuesday after the first Monday in November of each year, or such other day as may be by law prescribed. …

ALA. CONST. of 1868, art. VI, § 11

**1875**

The chief justice and associate justices of the supreme court, judges of the circuit courts, and chancellors shall be **elected by the qualified electors of the state, circuits, counties, and chancery divisions, for which such courts may be established**, at such times as may be prescribed by law.

ALA. CONST. of 1875, art. VI, § 12

**1901**

The chief justice and associate justices of the supreme court, judges of the circuit courts, judges of probate courts, and chancellors shall be **elected by the qualified electors of the state, circuits, counties, and chancery divisions, for which such courts may be established**, at such times as may be prescribed by law, except as herein otherwise provided.

ALA. CONST. of 1901, art. VI, § 152 (original text)

**1973**

All judges shall be **elected by vote of the electors within the territorial jurisdiction of their respective courts**.

ALA. CONST. art. VI, § 152 (as amended by ALA. CONST. Amen. 328)

# Exhibit 2

Democratic Primary - Chief Justice (1970)

| County | Howell Heflin | John Patterson |
|---|---|---|
| Autauga | 3855 | 2397 |
| Baldwin | 10447 | 3957 |
| Barbour | 3607 | 2554 |
| Bibb | 1926 | 3274 |
| Blount | 3739 | 2757 |
| Bullock | 1886 | 1090 |
| Butler | 3437 | 3381 |
| Calhoun | 15432 | 7314 |
| Chambers | 4840 | 4595 |
| Cherokee | 1959 | 2535 |
| Chilton | 3407 | 3261 |
| Choctaw | 2624 | 2229 |
| Clarke | 5252 | 2469 |
| Clay | 2236 | 2760 |
| Cleburne | 2424 | 2006 |
| Coffee | 6304 | 3086 |
| Colbert | 14561 | 696 |
| Conecuh | 2407 | 1616 |
| Coosa | 2294 | 1684 |
| Covington | 7104 | 5551 |
| Crenshaw | 2511 | 2303 |
| Cullman | 10159 | 5853 |
| Dale | 5608 | 2773 |
| Dallas | 9784 | 4390 |
| De Kalb | 5493 | 5234 |
| Elmore | 5823 | 4036 |
| Escambia | 6328 | 3227 |
| Etowah | 17273 | 8474 |
| Fayette | 3527 | 2697 |
| Franklin | 6244 | 2502 |
| Geneva | 3741 | 2563 |
| Greene | 897 | 840 |
| Hale | 2234 | 1163 |
| Henry | 2718 | 1818 |
| Houston | 9481 | 3903 |
| Jackson | 3837 | 4756 |
| Jefferson | 100328 | 46363 |
| Lamar | 2132 | 3145 |
| Lauderdale | 15098 | 1298 |
| Lawrence | 5445 | 3233 |
| Lee | 8479 | 2706 |
| Limestone | 5566 | 3030 |
| Lowndes | 1239 | 775 |
| Macon | 4269 | 793 |
| Madison | 26387 | 9913 |
| Marengo | 4934 | 2557 |
| Marion | 4315 | 4594 |
| Marshall | 8086 | 5489 |
| Mobile | 43319 | 15848 |
| Monroe | 4202 | 2420 |
| Montgomery | 27256 | 11410 |

| | | |
|---|---|---|
| Morgan | 12493 | 5141 |
| Perry | 2581 | 1948 |
| Pickens | 3628 | 2627 |
| Pike | 4640 | 2343 |
| Randolph | 2135 | 2194 |
| Russell | 3251 | 2841 |
| Shelby | 5084 | 3789 |
| St. Clair | 4875 | 2814 |
| Sumter | 2213 | 1279 |
| Talladega | 12229 | 6413 |
| Tallapoosa | 5333 | 5678 |
| Tuscaloosa | 17309 | 7884 |
| Walker | 11357 | 8360 |
| Washington | 3333 | 2547 |
| Wilcox | 2909 | 1451 |
| Winston | 1173 | 967 |
| **Total** | **550997** | **287594** |
| **Reported** | **550997** | **287594** |

General - Chief Justice (1970)

| County | Howell Heflin (D) |
|---|---|
| Autauga | 4658 |
| Baldwin | 11245 |
| Barbour | 4306 |
| Bibb | 3744 |
| Blount | 5010 |
| Bullock | 1478 |
| Butler | 4101 |
| Calhoun | 15531 |
| Chambers | 6060 |
| Cherokee | 3111 |
| Chilton | 4774 |
| Choctaw | 2313 |
| Clarke | 5288 |
| Clay | 2948 |
| Cleburne | 2633 |
| Coffee | 5830 |
| Colbert | 9733 |
| Conecuh | 2763 |
| Coosa | 1896 |
| Covington | 7841 |
| Crenshaw | 3007 |
| Cullman | 10667 |
| Dale | 6937 |
| Dallas | 9346 |
| De Kalb | 7350 |
| Elmore | 6758 |
| Escambia | 5276 |
| Etowah | 15941 |
| Fayette | 3340 |
| Franklin | 5270 |
| Geneva | 6326 |
| Greene | 1468 |
| Hale | 3589 |
| Henry | 3728 |
| Houston | 12405 |
| Jackson | 5574 |
| Jefferson | 33062 |
| Lamar | 4088 |
| Lauderdale | 11270 |
| Lawrence | 5110 |
| Lee | 6641 |
| Limestone | 6362 |
| Lowndes | 1393 |
| Macon | 3072 |
| Madison | 28363 |
| Marengo | 5603 |
| Marion | 4764 |
| Marshall | 7783 |
| Mobile | 33456 |
| Monroe | 4204 |
| Montgomery | 26725 |

| | |
|---|---|
| Morgan | 11419 |
| Perry | 3186 |
| Pickens | 4169 |
| Pike | 4708 |
| Randolph | 2850 |
| Russell | 4072 |
| Shelby | 6463 |
| St. Clair | 5960 |
| Sumter | 3251 |
| Talladega | 12016 |
| Tallapoosa | 6184 |
| Tuscaloosa | 18246 |
| Walker | 12586 |
| Washington | 2973 |
| Wilcox | 2450 |
| Winston | 2275 |
| **Total** | **496949** |
| **Reported** | **507749** |

General - Associate Justice (1972)

| County | Richard L. Jones (D) Pl. 1 | James H. Faulkner (D) Pl. 2 |
|---|---|---|
| Autauga | 4045 | 3738 |
| Baldwin | 5610 | 6042 |
| Barbour | 2861 | 3543 |
| Bibb | 2521 | 2593 |
| Blount | 3581 | 3584 |
| Bullock | 927 | 958 |
| Butler | 2701 | 2808 |
| Calhoun | 11353 | 11223 |
| Chambers | 5352 | 5481 |
| Cherokee | 2191 | 2198 |
| Chilton | 3871 | 3953 |
| Choctaw | 1765 | 1683 |
| Clarke | 3418 | 3422 |
| Clay | 1654 | 1679 |
| Cleburne | 1760 | 1753 |
| Coffee | 5501 | 5482 |
| Colbert | 9243 | 9014 |
| Conecuh | 1572 | 1511 |
| Coosa | 1674 | 1690 |
| Covington | 4065 | 4138 |
| Crenshaw | 1460 | 1439 |
| Cullman | 10216 | 10120 |
| Dale | 3546 | 3551 |
| Dallas | 9645 | 9893 |
| De Kalb | 6521 | 6485 |
| Elmore | 5541 | 5550 |
| Escambia | 3909 | 3988 |
| Etowah | 14642 | 14559 |
| Fayette | 2502 | 2487 |
| Franklin | 3647 | 3620 |
| Geneva | 3925 | 3952 |
| Greene | 814 | 809 |
| Hale | 2708 | 2704 |
| Henry | 2214 | 2238 |
| Houston | 5199 | 5178 |
| Jackson | 5337 | 5320 |
| Jefferson | 106709 | 107128 |
| Lamar | 2179 | 2200 |
| Lauderdale | 12318 | 12164 |
| Lawrence | 3401 | 3289 |
| Lee | 7906 | 7929 |
| Limestone | 5455 | 5394 |
| Lowndes | 1751 | 1766 |
| Macon | 4194 | 4253 |
| Madison | 22120 | 22350 |
| Marengo | 4487 | 4507 |
| Marion | 2822 | 2885 |
| Marshall | 8159 | 7956 |
| Mobile | 29577 | 30339 |
| Monroe | 2189 | 2240 |
| Montgomery | 21541 | 21765 |

| | | |
|---|---|---|
| Morgan | 13976 | 13800 |
| Perry | 3014 | 3024 |
| Pickens | 3012 | 2892 |
| Pike | 2742 | 2813 |
| Randolph | 2366 | 2363 |
| Russell | 4797 | 4825 |
| Shelby | 6357 | 6446 |
| St. Clair | 4488 | 4482 |
| Sumter | 1669 | 1559 |
| Talladega | 8049 | 8378 |
| Tallapoosa | 4435 | 4450 |
| Tuscaloosa | 18500 | 18403 |
| Walker | 10091 | 10039 |
| Washington | 1774 | 1755 |
| Wilcox | 2461 | 2474 |
| Winston | 1324 | 1283 |
| **Total** | 481354 | 483537 |
| **Reported** | 481354 | 483517 |