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

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

ADC REPLY TO DEFENDANTS' BRIEF IN RESPONSE

INTRODUCTION

Alabama cannot use legally unjustified racial-population floors to design districts without violating the Equal Protection clause. Yet with respect to each black-majority district, that is precisely what Alabama has done. Nothing in Alabama's brief refutes that basic fact. Alabama did not draw any of these districts based on a judgment about what was necessary to preserve "the ability to elect," which is what Section 5 of the VRA actually requires. Instead, Alabama intentionally designed each district to re-create, to the extent practical, its prior black-population percentage (BPP). Alabama purportedly believed that was what the VRA required, but the Supreme Court made clear that that is a fundamentally incorrect understanding of the Act. Thus,

Alabama lacks any legal justification for the way in which it intentionally designed each black-majority district – that is, in a way designed to re-create, to the extent practical, its prior BPP. Alabama's use of legally unjustified racial floors in each BMD makes each of those districts unconstitutional. Doing so perpetuates and entrenches the racial divisions that, as the Supreme Court has held many times, it is the very purpose of the Voting Rights Act and the Fourteenth Amendment to avoid.

Alabama has no compelling interest (indeed, not even a legitimate interest) in complying with an incorrect legal view about the meaning of Section 5. Race predominated in the drawing of each of these districts because the record establishes that meeting these unjustified racial targets in each district was the one non-negotiable factor in designing each districts. All other districting principles were necessarily subordinated to this factor, because Alabama, on its own account, believed the Supremacy Clause *required* it to meet these specific – though legally unjustified – racial floors. In addition, race also predominated because in meeting these racial floors, Alabama consistently subordinated traditional districting principles – as we demonstrate district by district by (1) consistently bypassing whiter areas to add blacker areas to the black-majority districts in the process of repopulating them; (2) moving underpopulated black-majority districts into other underpopulated black-majority districts rather than overpopulated white-majority districts; (3) using oddly-shaped borders and protuberances in ways designed to enable meeting the racial floors; (4) splitting county boundaries unnecessarily except to meet these racial targets; and (5) splitting precincts in race-based patterns to meet (legally unjustified) racial floors.

Once the State's flawed legal basis for the way it designed these districts was exposed and invalidated in the Supreme Court, the State has taken to arguing, in essence, that the BPPs in

these districts did not come about through intentional districting design decisions, but "naturally," given local demographics. This Court's Order was designed to test that claim. Both the ADC and ALBC plans demonstrate that there was nothing "natural" about the fact that Alabama met its pre-assigned racial floors so exactly and consistently. As common sense would dictate, Alabama met those racial floors so precisely, despite moving tens of thousands of people between districts, because its approach in each district was to do exactly that and to make the meeting of those floors the one non-negotiable factor that dominated over all others.

Alabama seeks to undermine ADC's plans with two main arguments. One involves ungrounded speculation that the BPPs in a few districts might be too low to preserve the ability to elect. First, Alabama is wrong factually; the record provides sufficient evidence to establish that all the districts in the ADC plan do provide a reasonable opportunity to elect candidates of choice, given today's turnout and registration rates by race. Second, Alabama is confused about where the legal obligation lies. It is Alabama that must show that *its* districts are necessary to preserve the ability to elect. Alabama's argument throughout has been that Section 5 required it to create black-majority districts at the population levels Alabama chose. It is therefore Alabama's burden to establish that the BPPs in its districts were in fact necessary to preserve the ability to elect. But Alabama never even asked that question, let alone provided evidence to support any conclusion. Instead, it simply recreated BPPs for their own sake – 70% in one place, 56% in another.

Second, Alabama mispresents how Mr. Fairfax drew the ADC plans. As his deposition explains, he did not go about systematically lowering BPPs; instead, he applied traditional districting principles and doing so typically had the *consequence* of lowering the BPPs from those in the State's plan – precisely because the State had avoided applying traditional districting

principles, given that *its* priority was to re-create the prior BPPs.

The ADC plans confirm what had already been demonstrated in our opening and reply briefs on remand: Race predominated in the design of each district through Alabama's application of unjustified racial floors in each district and the ways Alabama went about reaching those floors.

Defendants do not respond to the district-by-district evidence offered by the plaintiffs. See Doc. 258, 27-90 and Doc. 272 at 40-90. They do not, and cannot, use the example of the ADC plans to justify the hundreds of precinct splits affecting majority black districts in their own plans, or use the ADC plans to justify the county splits along racial lines in their own plans, the odd shapes reaching out to grab black population, or the disregard of communities of interest in favor of race. We respond to each of their claims below.

THE ADC PLANS RESPECT RACE-NEUTRAL REDISTRICTING CRITERIA.

"Influence Districts" Arose Naturally from Adherence to Traditional Redistricting Criteria

The State argues that the ADC plans subordinate race-neutral districting criteria to racial considerations without a legally justification in two ways. First, they argue that the ADC purposefully lowered the black population in majority-black districts, and second that the ADC used race to create "influence districts." Starting with the "influence districts" argument offers an illustration of the process and results of the ADC's adherence to traditional redistricting criteria.

The State first points to SD 7, which has a 43.17 percent black population in the ADC plan, Def. Supp. Ex. 75 at 15. SD 7 was 32.14 percent black in the 2001 plan, CE 29, and is 27.34 percent in the State's plan with the removal of 10, 994, 10,151 (92.23%)) of whom were

black. CE 40 at 21; Doc. 203 at 36. SD 7 is situated in Madison County, where the black population had increased by 17,351 since 2000. Doc. 23 at 15. The ADC plan shows how a much different result is obtained when the lines are guided by traditional, non-racial redistricting criteria.

In the northern area of the State, the ADC plan first kept intact the core of 2001 SD 1, which needed little change and which comprised the Muscle Shoals area, an acknowledged strong community of interest. Trans. Vol. I 46:16-20; .146:16-147:5; 160:8-161-5.

Limestone County, which had grown considerably in population, and the bulk of which was in SD 2 in the 2001 plan, sits immediately east of Lauderdale County and SD1. The ADC plan placed all of Limestone County in SD 2, correcting a county split, and filled out the remaining population with the area of Madison County immediately surrounding the home of the 2010 SD incumbent. Doc. 287-21, 287-31.

SD 2 had to give up population. The ADC plan transferred the northeastern portion of SD 2 in northwest Madison County to the adjacent district, SD 7, pulling that district westward,[1] and SD 7 shed some of its eastern border. *Id*. The impact of these choices was to maintain district cores while keeping not only Lauderdale and Limestone Counties intact, but also rippling out to respect the boundaries of DeKalb, Lawrence, Marion and Winston Counties, all of which the State's plan split one or more times. Doc. 287-31. These county integrity-based shifts also tended to unite most of the black-populated areas of Madison County in SD 7. The State's plan had divided those areas among SDs 1, 2 and 7, and split counties, precincts and communities of interest along the way.

[1] Placing the SD 2 excess population into adjacent SD 3, already over-populated would have required splitting of Morgan County.

Race did not predominate in the ADC map, which is an entirely logical product of the criteria provided by the Court. Mr. Fairfax testified that race was not a factor at all in drawing any but the black majority districts. Fairfax Depo. at 126:10-12. This supposed influence district arose naturally from adherence to traditional redistricting criteria. ADC SD 7 arose from demography, maintenance of county boundaries and respect for an identifiable community of interest. Its emergence actually surprised Mr. Fairfax. 134:20-135-3.

The same principles shaped the other supposed influence districts identified by the State, including SD 25, where the growth of black population could hardly have been avoided with the elimination of the racial gerrymander in SD 26. The ADC version of SD 25 and SD 26 flowed from adherence to county boundaries in the southern part of the state (avoiding the State's plan's splits of Mobile, Washington, Clarke, Monroe, Conecuh, and Russell Counties), and actually respecting the State's *post hoc* preference for an urban City of Montgomery district on a non-racial basis. Doc. 287-31. The ADC version of HD 85 flowed from compact changes to the previous district without the gymnastics displayed in the State's bizarre HD 85.[2] Doc. 294-2. ADC Supp. Ex. 29A, 29C. The same can be said of the two crossover districts identified by the ADC, SD 11 and SD 22. SD 11 respects the core of the 2001 plan, in sharp contrast to the gerrymandering of the State's SD 11. The State eliminated the district core (the only part of 2001 SD 11 in 2012 SD 11 was a 41,100 person portion of Talladega County, CE 40 at 30), fragmented communities of interest (in Shelby and Talladega Counties), and drew a decidedly non-compact district.[3]

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[2] The parties have been treating HD 85 as one of the effective black districts based on its repeated election of black candidates favored by the black community. We are at a loss as to its reduction in rank by the State.

[3] A majority of the population in the majority-black Talladega portion shifted from SD 11 to SD 15 was in split precincts for which no political data are available. (CE 40 at 41).

The ADC version of SD 11 is substantially similar in population to the 2001 version – maintaining the core of that district - with a slight reduction in black population percentage (from 33.95% black in the 2001 plan (and 14.96% black in the State's plan) to 29.52% black ADC plan) due in part to trimming the Calhoun county population of a black majority area to meet the one percent deviation standard and to make that portion more compact. Attachment A. In SD 22, the ADC plan avoids splits to five counties (Mobile, Washington, Clarke, Monroe and Conecuh), the latter four along racial lines, and 39 precinct splits. Doc. 287-19, 287-36; Doc. 258-2; CE 40 at 68-75. Again, there is a decrease in the black percentage from 28.30 percent in the 2001 plan to 27.07 percent in the ADC plan (vs. 21.53 percent in the State's plan. CE 40 at 75).

The ADC Plans were Drawn to Comply with the Court's Criteria and had no Numerical Floor or Ceiling for Majority Black District

Jefferson County

The State conjures a 70 percent ceiling on black percentages in the ADC plans from Mr. Fairfax's straightforward acknowledgement that he was wary of "packing" where districts soared above 70 percent black to 75 or 80 percent. Doc. 295 at 6-7. The State turns to Jefferson County to demonstrate the supposed ceiling. *Id.* This is just as well because the only areas of Alabama in which there has been a House district over 70 percent black since at least the 1980s have been Jefferson and Montgomery Counties.[4] Doc. 203 at 43. The supposed ceiling has no application to any other area.

First, Mr. Fairfax did not set out with the objective of lowering the BP in any prior district. Instead, he applied traditional and standard districting practices of expanding under-populated districts out into nearby overpopulated areas. In doing so, the effect was occasionally

[4] The State plan included for the first time a 70 percent-plus black district in Mobile County through racial manipulation detailed in Doc. 258 at 27-29 and Doc. 272 at 57-59.

to diminish extremely high black populations in significantly under-populated black districts. But that is precisely the consequence of applying standard districting practices – rather than doing what the State did, which was to refuse to expand under-populated black districts naturally into surrounding overpopulated white districts.

Second, awareness of the danger of packing at a high black percentage level is, moreover, permissible and entirely appropriate consideration of race. Packing black population into one or more districts to avoid the creation of an additional minority district, as the State did in Jefferson County violates the Voting Rights Act. *Thornburgh v. Gingles*, 478 U.S. 30, 46 n. 11 (1986); *Ketchum v. Byrne*, 74 F.2d 398 (7th Cir. 1984).

Mr. Fairfax explained the process he employed. Mechanically, the form of the ADC districts followed as the consequence of the basic redistricting function: to balance population across underpopulated and overpopulated districts.

> Q. Okay, Mr. Fairfax. Let's look at Jefferson County first. And you know from the previous time we spent in the notebook that you have the -- just as we did for the Senate, you can find an exhibit that compares your Jefferson County plan with 2012 and the same thing that compares your Jefferson County plan with the 2001. So you take the time you need and review what you need to review but … start with any district you care to start with and tell me generally what you did in Jefferson County.
>
> A. In essence, I can't recall the specific first district, but essentially, the majority minority distributes (sic) were all underpopulated, and so they were a good standing or initial point to start from. So then the question is where to expand. And so the real logical way to expand is expand outward, outward where the population wasn't as low or under deviation as the other. So that's, in essence, what I did.

Fairfax Depo. at 151:8 - 52:4. In Jefferson County this pushing outward led organically to the creation of an additional majority black House district in Jefferson County, a prospect Mr. Hinaman acknowledged was present in the absence of the over-riding importance of the State's racial targets.

In Jefferson County Mr. Fairfax thus did indeed unpack the over-70 percent districts in the State's plan (HDs 55, 58 and 59, Doc 203 at 43) by the racially neutral mechanism described above – expanding the under-populated black majority districts outward. The result of abandoning the State's artificial racial floors and its willy-nilly precinct splitting was the maintenance of a ninth majority black district, HD 45, in Jefferson County. Doc. 287-7.

There was in fact, however, no ceiling, and Mr. Fairfax so testified:

> Q. Were you at any point told for either plan, hey, look out for this particular district over here; the black percentage is so high we need to find a way to reduce that?
>
> A. No, no.

Fairfax Depo 149:6-10.

Montgomery County

The absence of such a ceiling is demonstrated by the ADC plan in the other area in which there had been prior districts over 70 percent black, Montgomery County. There, ADC HD 78 has a black majority of 78.2 percent. *Id*. Traditional redistricting criteria determined the nature of ADC HD 78, with its large black majority and arching shape. There the press of population from the south pushed into southern Montgomery County, foiling the ADC hope of having House districts coterminous with Montgomery County. Fairfax Depo. at 169:14-21. The district could have been more compact (and had a lower black percentage) if Mr. Fairfax had extended it into Autauga or Elmore County, but that would have involved another county split. Fairfax Depo. 172:11-17. Mr. Fairfax kept the district within Montgomery County and allowed the above-70 black percentage.

The ADC plans certainly involve consideration of race to the extent necessary for adherence to the Voting Rights Act, as the Court instructed. Here again, the development of the actual lines, however, was focused on the traditional redistricting criteria identified by the Court,

as evidenced by the marked superiority of the ADC plans to the State's plans in terms of those criteria.

The ADC Plans did not Artificially Manipulate District Boundaries to Lower Black Percentages

House District 67

The State rather breathlessly argues that "achieving the "right" racial quota is the only conceivable explanation for the … ADC's decision to expand Dallas County's HD 67 into Chilton County instead of another County in the Black Belt." Doc. 295 at 8. (The State does not identify the "right racial balance", *id*., and we have not been able to discern a pattern in the varying black percentages in the ADC Plans. Doc. 287-7, -8.) Other reasons -- the actual reasons, as Mr. Fairfax testified – were keeping Perry County intact (Chilton already had to be split) and because the Chilton VTD had the correct population. Fairfax Depo 184:21-185:7, 185:20-22. The ADC plan rippled to maintain not only Perry County intact, but avoided the splits to Sumter and Greene Counties the State's choice precipitated. Doc. 287-3.

The general principle of expansion outward to add population from overpopulated districts to the underpopulated districts – the essential function of redistricting – thus characterized the ADC redistricting plans. At times this meant adding white population to majority black districts: this is hardly surprising as all of the majority black districts were under-populated and perforce all but one of the over-populated districts had (usually very substantial) white majorities.[5] Doc. 203 at 16-18. At other times, as in SD 7, it meant adding black population to white majority districts. Demography thus largely answered the choice of what to add to the under-populated districts. The maps themselves demonstrate that the ADC plans

[5] HD 73, of course, had a black plurality in 2001. DX 411.

expanded the majority black districts so as to respect county boundaries and to avoid splitting precincts where possible. The ADC plans cured county splits in the State's 2001 plan and avoided the additional splits in the State's 2012 plan.

The Small Number of Precinct Splits in the ADC Plans do not Involve the Racial Sorting through Precinct Splits that Mark the State's Plan

The State argues that the fact that some precincts were split in the ADC plans and that some were split with a racial predominance on one side or the other of such splits excuses the pattern of precinct splits that marked the State's plans and that so concerned the Supreme Court in the case of SD 26. Doc. 295 at 23-24. The only evidence that the State offers to support their argument is a chart showing Senate and House precincts split by the ADC plan, with some 11 Senate and 18 House precincts shaded to demonstrate a racial imbalance in the split. Finding a pattern of racial sorting such as exists in the State's plans in such a small number of splits would be a stretch under any circumstance. The facts show an absence of any such pattern.

The first ADC Senate precinct split is the Whitesburg Boat Harbour precinct in SD 7 of Madison County. The SD 7 portion of the precinct had 1,946 residents of whom 404 (20.76%) were black, while only one of the 366 residents in the SD 9 portion of the precinct was black. There is some guesswork as to whether the State is concerned that the ADC is trying to raise or lower a black percentage, but we presume that in this instance the charge is that the split was to increase the black percentage in SD 7 rather than to lower the black percentage.

The first thing we note is that ADC SD 7 and ADC SD 9 are not contiguous. Doc. 287-33. Indeed, the Whitesburg precinct itself has non-contiguous parts. Attachment D. The populated portions of the precinct – those not shaded pink - are separated by miles. Attachment E. The VTD boundaries in southern and southwestern Madison County are a hot mess, with many non-contiguous portions of precincts. Attachment F. The ADC split of the Whitesburg precinct

closely follows the 2001 SD 7 boundary. Doc. 287-21. Clearly, the precinct boundaries largely determined the boundary between SD 2 and SD 7, and it is little short of a miracle that more precincts are not split. Compare doc. 287-33. Had the ADC wished to beef up SD 7, a number of areas were close at hand would have offered majority black populations rather tan the 21 percent Whitesburg area. See, e.g., Attachment G.

Next, the State points to the Anniston precinct in SD 11 in Calhoun County. Doc. 296-6. As noted above, here, the ADC plan largely follows the 2001 lines (in which the Anniston precinct already was split) but shaves off some 2001 excrescences that are majority black in population to make the district appear more compact. Attachment A. The ADC plan also adds a portion of Chilton County that is over 90 percent white rather than significantly more heavily black areas of Elmore County. Doc. 297-5 at 21, 73-76. [6] The ADC certainly did not subordinate its interest in traditional redistricting criteria to race, as by strengthening an influence or crossover district.

The state identifies suspect precincts in SD 24, but ADC SD 24 followed the 2001 lines (which were based on partisanship rather than race, Doc. 203 at 4, except to shed a small area at the eastern extremity of the district, Doc. 287-36 at 2; VTD 0112517 (Cottondale, Attachment H) for compactness and to meet the one percent deviation standard: SD 24 otherwise would have been overpopulated. Doc. 287-6. Similarly, in SD 22, the Riderwood Rock Springs VTD already was split under the 2001 plan. *Id*. (The precinct that the ADC Senate plan did split in Choctaw County was needed for population deviation and improved compactness. *Id*.) In SD 25 and SD 26, one precinct was split to (a) keep the incumbent in SD 26 and (b) maintain a compact district

[6] This is not, of course, to suggest a transfer of all of the Elmore County portion of SD 30 for the Chilton portion, only such part as to match the Chilton County portion.

(c) that respected the urban interest tardily identified by the State. The same precinct is split along identical lines in the House plan so that this precinct is, in effect, double counted. The split precincts in SD 33 reflect the nesting of House and Senate districts: like the SD25-SD 26 split, they are identical and in that sense, double-counted. One ADC split precinct tilts toward SD 33 in terms of black percentage, the other points away, and the third is in equipoise.

Five of the 16 remaining highlighted splits in the House plan are in HD 32 and were not split by the ADC at all. Doc. 287-30. There the ADC plan re-unites two VTDs that had been split in the 2001 plan. *Id*. The six shaded HD 85 splits do have a racial tilt and were necessary to avoid a reduction in black voting strength in the one majority district in which a black incumbent had faced a serious challenge. Doc. 287-37. Each of the splits was made to comply with Section 5. The ADC splits in HD 85 differ dramatically from the State's. Most of the ADC splits follow major highways – US 231 and the Ross Clark Circle, a major divided highway. *Id.* The other lines are regular and utterly without the bizarre contortions of the State's boundaries within Houston County. Doc. 294-2, ADC Supp. Ex. 29A and 29C.

Among the remaining five precincts, in HD 70, the McFaland (sic) Mall precinct in Tuscaloosa was split for compactness and not along racial lines. Doc. 287-37. Compare Doc. 287-18. The precinct was not split along racial lines: both relatively white and relatively black areas are directly inside and outside the district borders, depending on whether the State believes the ADC plan is artificially raising or lowering the black percentage in the district, so that the district easily could shift either up or down in black percentage. Attachment K. The same question arises as to the split in HD 71, which follows a straight line and was part of the delicate balancing of population among the Tuscaloosa House district, 61, 63, 70 and 71, all of which were near the one percent deviation limit. Doc. 287-5. Relatively white and relatively black

blocks lie at the boundary of the district, available to raise or lower the black percentage, but none fit. Attachment J. The highlighted precinct split in HD 83 also was based on compactness and helps account for the greater compactness of the ADC district than the States district. Doc. 287- 18 at 9.

The State also highlights the split of the Pinson United Methodist Church by ADC HDs 44 and 8. The division of the Pinson precinct is a regular line and was necessary for compactness and population balance. Attachment K. Shifting the 347 persons in the shaded precinct to HD 44 in exchange for the 400 persons (343 and 57) in the adjacent non-shaded blocks, if that is what the State contends should have been done, would have been possible, but would have created a marked irregularity in the district boundary, and achieved little. *Id*.

The State only identifies one county split in the ADC plan that they suggest shows racial imbalance, that in Tuscaloosa County in SD 24. Doc. 295 at 28. That split of Tuscaloosa County dates back at least to 1983 and the numerical nesting of House district to form Senate districts. The area is a long-standing part of the SD 24 core and was adopted almost entirely from the 2001 plan. Doc. 287-24.

The small number of of county and precinct splits in the ADC in and of itself is strong evidence as to the lack of a racial pattern in those splits (one county, 11 Senate precinct and 18 House precincts. The State's plans have vastly more splits in a number of individual counties, and literally hundreds in the majority black districts statewide. Rather than disproving the predominance of race in the State's departure from traditional redistricting criteria through their precinct and county splits, the ADC plans prove it.

THE ADC PLANS COMPLY WITH THE VOTING RIGHTS ACT AND OFFER MINORITY VOTERS AN OPPORTUNITY TO ELECT LEGISLATORS OF THEIR CHOICE

Most ADC Districts Meet the State's New 55 Percent Black VAP Threshold

The State next argues that the ADC plans do not comply with the Voting Rights Act because, in essence, certain of the districts fall below a 55 percent black in voting age population, Doc. 295 at 13.

First, the State's argument has no application to the ADC Senate illustrative districts, all of which, with the exception of SD 28, are over 55 percent in black in voting age population, or in 18 of the 29 majority black House Districts (52, 54, 56-59, 67-71, 76-78, 82, 98, 99 and 103). As to the remaining Senate district, ADC SD 28 actually has a larger black percentage than the pre-existing plan, so there is no indication that it may be retrogressive. Similarly, HD 85 (which the State curiously drops to "influence district" status in Doc. 295, p. 9 n. 2) also has a black percentage marginally higher than the 2001 district, a percentage at which black candidates have survived repeated challenges. Doc. 287-37. None of these districts is retrogressive. The new threshold also invites explanation, which is not forthcoming, of the non-racial basis for going so far above 55 percent in crafting their own districts. Their claim is incoherent.

The State's New 55 Percent Threshold is Invalid, as Election Returns and their Own Districts Prove

We note further that the State's own 2012 plan provides for districts with black VAPs under 55 percent (HDs. 53, 54 and 84). Each of these districts (HDs 53, 54, and 84) was, like HD 85 and SD 28, under 55 percent black in VAP in 2010. Again, the State's claim is incoherent. Each had elected black legislators under the previously lines and three of the five, HDs 84 and 85 and SD 28, had done so despite white VAP majorities or pluralities (according to the 2010 census). APX 6 and 7, Docs. 35-2 and 35-3.

The State specifically argues that "there is no evidentiary basis for this Court to conclude that specific districts with a black VAP … 50.13% (ADC HD 19), … or 50.39% (ADC HD 53 … have sufficient black majorities to comply with the Voting Rights Act." Doc 295 at 14. In fact, both districts are in Madison County where the Court credited Dr. Lichtman's testimony that an ADC illustrative Senate district, NPX 301, that was 48.36 percent black in total population and 46.45 percent black in voting age population, offered an opportunity for minority voters to elect a candidate of their choice. Doc. 203 at 80-81. The State's claim simply is inaccurate.

The black percentage alone, of course, tells only part of the story. As discussed in the ADC Response to the Court's August 28, 2013 Order, Doc. 287 and as the State has not contested, the bare black percentages understate the actual black voting strength of the districts given the wide gap between the electorally relevant populations, Non-Hispanic White persons and Any Part Black individuals. *Id*. at 24-25. Attachments B and C show the Non-Hispanic white and Any Part Black voting age percentages in each House and Senate district, respectively. The ADC HD 19 white non-Hispanic in VAP, for example, is only 44.6 percent, not the 49.87 percent that the State's figure suggests. Attachment B. The HD 53 population has only a 35.7 percent white non-Hispanic VAP. *Id*. The State offers no reason why the illustrative Senate district but not the House districts would offer a viable opportunity for black voters.

At bottom, the State's argument clings to its misinterpretation of Section 5, rejected by the Supreme Court, that a reduction in black percentage equaled retrogression. They write:

> When those districts, respectively, were drawn as 56.5%, 66%, 59.6%, 64.4%, and 62.3% black districts in 2001, doc. 203 at 20-21, how can they not be retrogressive?[7] How could they have ever been precleared? And why should this

[7] Note the State's sudden switch from the 2010 black percentages to the 2001 percentages in the benchmark districts, which are irrelevant to the Section 5 inquiry.

> Court or anyone else believe that the Plaintiffs themselves would have *wanted* them precleared if they had been submitted in 2012?

Doc. 295 at 14-15. The short answer is that with the increases in black participation to a level at or above that of white voters, see, e.g., Doc. 203 at 115, black majorities that may have been appropriate when black participation was lower are no longer necessary.

Attachments B and C demonstrate that even the smallest black majorities provide a substantial advantage for black voters. The gaps for all ADC districts under 55 percent black in voting age population still show a black predominance of thousands of persons of voting age. Given that, as the Court found, black registration and turnout "is at least comparable and likely above white participation," that black voters are mobilized" and working in coalition with other minority groups, Doc. 203 at 115, that black political cohesion exceeds white political cohesion, *Id*. at 78, there is no reason to believe that a black VAP majority of several thousands (or more) will not give black voters an opportunity to election candidates of their choice. The electoral history in Alabama points to consistent success for black voters in such districts, and the State has failed to present a grain of evidence or a logical construct to the contrary.

The clear basis in fact available to the Legislature at the time of redistricting shows that large black voting age majorities were not necessary for black voters to have a viable opportunity to elect candidates of their choice. Even districts with the lowest black majorities rarely produce seriously contested elections, and black-supported candidates regularly outperform their districts' black percentages by substantial margins. Doc. 287-3. Black candidate also have out-performed the black percentages in every county in the state in statewide elections. In the scattergrams accompanying Dr. Lichtman's testimony, each dot (each county) on the graph sits is above the diagonal: that is, the percentage of the vote for the black candidate exceeded the black percentage in each county. Doc. 168-1 at 9, 28, 29, 31. And in terms of Section 5 preclearance,

the analysis of Dr. Lichtman, who has been an expert witness for the Justice Department in more than a dozen cases, *Id*. at 3, carries special weight. The ADC has provided evidence regarding other supposedly marginal districts, Doc. 287 at 24-27, and the State has failed to respond; indeed, the State has failed to produce any statistical evidence of any infirmity in the ability of black voters to elect candidates of their choice in any of the districts in the ADC plans.

It is clear, moreover, that the Legislature itself did not actually believe that the 2010 percentages actually were necessary in order for black voters to elect candidates of their choice. Sen. Dial testified that Sen. Ross could win election in a 64 percent black Senate District 26, a district with a black percentage *eleven percentage points below the district adopted by the State*. Sen. Dial also rejected proposals by Sen. Keahey for adjustments to SD 22 because they narrowly failed to meet the 2010 black percentages in SD 23 and SD 24: Sen. Keahey had used the 2001 black percentages for those districts, percentages which had proved effective for the black voters' and both Sen. Sanders (SD 23) and Sen. Singleton (SD 24) had signed off on the changes. 8-8-13 Trans.Vol. I, 194:19-196:3; 196:21-197:6. Doc. 203 at 56-57.

In terms of the Legislature's purported understanding at the time at which the districts were drawn, the State relies entirely on testimony from Sen. Sanders and Rep. Jackson at the public hearings that black districts in their areas should be at least 62 percent as a minimum for the majority-black districts.[8] Doc. 203 at 28. At that time, however, such testimony was in the

[8] Dr. Reed, of course, also testified at trial that he *preferred* 60 percent black population majorities for a "safe" district (as distinguished from an equal opportunity district: "You have to take what you can get, take the hand that's dealt you and go with it. Sometimes you don't have the people. So if you have 55 percent, okay. If you got 53 percent, okay. Take what you can get and go with it. But my overall goal would be a safe district now would be about 60 percent." The plan drawn by Dr. Reed, CE 42, included numerous House districts under 60 percent black in (HDs, 32, 53, 56, 68, 69, 71, 72, 82, 83, 84, and 85). Dr. Reed is no authority for the floors imposed by the State.

abstract: no maps of proposed districts were available for analysis. Doc. 168-2 at 50. When maps became available and the legislators could look at the actual lines, both Sen. Sanders and Rep. Jackson voted for plans with much lower black population percentages for their districts. The Sanders Senate plan provided for an SD 23 with a 57.75 percent black total population majority and the Knight House plan offered Rep. Jackson a 56.92 percent black total population majority, both well below 60 percent. CE 45-48. The Reed Buskey plan, CE 42, provided a 55.19 percent black total population majority in HD 68. These districts, the districts in which Sen. Sanders and Rep. Jackson would have to run if they got their way, are the strongest evidence of the level at which they believed a black candidate could win. All of the legislators from the majority black districts supported all of these plans and opposed the supposedly more friendly districts in the State's plans. Doc. 168-2 at 57; NPX 314-315, 320-322. The evidence before the Legislature at the time it adopted the 2012 plans establishes that there was no real need for the floors suggested by the two speculative comments in the hearings as to any district. And in any event, as discussed below, the State studiously ignored testimony at the public hearings. The argument from the hearing testimony does not establish a basis in evidence that the black super-majorities they adopted were necessary, and the Supreme Court has made clear that they had no legal basis.

THE ADC PLANS ADHERE TO THE REDISTRICTING CRITERIA AND DEMONSTRATE THAT THE STATE'S DEPARTURES TO MEET RACIAL TARGETS WERE NOT NECESSARY OR APPROPRIATE

The State does not dispute the plain fact that the ADC plans are superior in terms of the traditional redistricting criteria adopted by the State and set forth in the Court's August 28 Order. As previously noted, the ADC plans adhere to every quantifiable guideline much more closely than do the State's plans. Doc. 287 at 2. The State claims, however, that "many districts" in the

ADC plans fail to preserve communities of interest, Doc. 295 at 16, the most nebulous of its "traditional redistricting criteria".

"Many districts" actually turn into one district, HD 67, and one supposed community of interest. The ADC HD 67 combines all of Dallas County with an adjacent precinct from Chilton County. There the State added to Dallas a portion of Perry County from under-populated HD 71. These areas from a community of interest, the State posits because both fall within the heavy black lines that demarcate the Black Belt in the ALBC exhibits. See, e.g, Doc. 60-2. In this, HD 67 stands alone in the State's own plans: every other "Black Belt" House and Senate district in the State's plans (other than the urban majority black districts in Montgomery County) includes some or all of one or more counties outside that black line: the State's HD 68 reaches all the way into Baldwin County. *Id*. By the State's argument, all of these districts also violate communities of interest. The State has identified nothing to single out HD 67 from the general pattern, and offers nothing to show that the rural area of Chilton County lacks a community of interest with the adjacent rural precincts of Dallas County: indeed, members form both counties work together in the Alabama Rural Caucus. http://ruralalabama.org/1profile/martin/; http://ruralalabama.org/1profile/melton/.

The ADC House plan for HD 67 follows the standard redistricting practice by moving a rural precinct of overpopulated HD 42 to the adjacent rural areas of under-populated HD 67 to bring both within the one percent deviation standard. The State's choice of taking population from Perry County created a cascade among under-populated districts that led to the fragmentation of Perry, Greene, Sumter, and Pickens Counties, all of which are intact under the ADC plan. Doc. 287-18 at 2, 5, 6.

Beyond HD 67, the State's community of interest rationale is founded solely on the

statements that "the Legislature conducted an unprecedented number of hearings around the State to learn more about which communities of interest were important to the electorate", which is true, and that "[t]he State's plans reflect this knowledge", which is barking nonsense. The State ignored comments at the hearings. Dr. Arrington performed a content analysis of the State's hearing and found that most of the comments were in favor of keeping counties intact. NPX 323 at ¶ 117; Doc. 168-2 at 72-73. The hearings contained 122 references to county boundaries during which no one suggested that a county should be divided or divided more; 12 mentions of population deviation (2% vs. 10%), 13 mentions of partisanship, with most advocating of being fair to both parties; 38 mentions of the Voting Rights Act and race; and 49 mentions of the fact that the hearing was not as useful as a hearing with map proposals available. *Id*. The Legislators paid so little attention that Sen. Dial could not remember his legal counsel's explanation of the potential danger of packing black population into districts with majorities of *over* 55 percent. DX 441 at 9, 17; Trans. 8-8-13 at 129:18-130-8.

Against the tenuousness of the State's sole example, State violations of identifiable communities of interest are numerous: the fragmenting of Muscle Shoals by SD 1, the combination of diverse parts of Shelby and Talladega Counties in SD 11, the addition of urban precincts to rural HD 69, and so on. All that the State is left with is the claim that "[e]xcept for county boundaries, Plaintiffs paid little attention to communities of interest." Doc. 295 at 18. Keeping county boundaries intact, of course, addresses the clearest community of interest in Alabama in terms of legislative elections.

The State Misinterprets the Incumbency Interest and the Responsibility of Legislators to Follow the Constitution

The State curiously argues that "Plaintiffs' plans do not observe the Legislature's legitimate political objectives of preserving the core of existing districts, true incumbent protection, and

ensuring that a majority of the Legislature would pass the plans." Doc. 295 at 18.[9] Virtually all of the State's discussion addresses the ALBC plan. In essence, the State argues that "true" incumbent protection involves not only the separation of incumbents, but also making them happy: drawing of safe districts for at least a majority. There is no authority for this argument. The traditional interest in protecting incumbents involves placing them in separate districts – protecting them from election contests with each other. In *Bush v. Vera*, 517 U.S. 940, 964-965 (2006) the Court recognized "incumbency protection, at least in the limited form of 'avoiding contests between incumbent[s],' as a legitimate state goal.") But promoting the self-interest of incumbents and protecting the rights of the individual voter are two different things. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440–41(2006) ("If ... incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters.") Ultimately, the Constitution does not bow to the wishes of a majority of the Alabama Legislature. Alabama has lost this argument again and again. See, *Reynolds v. Sims*, 377 U.S. 533 (1964). The obligation of the Alabama Legislature is to adopt a redistricting plan that complies with the United States Constitution and the Voting Rights Act. That obligation remains unmet.

THE ADC PLANS ESTABLISH THAT RACE PREDOMINATED IN THE STATE'S PLANS

The State lightly touches on its own districts and attempts to identify similarities between its districts and the ADC districts. Such attempts are strained and unsuccessful. The

[9] The State also argues that the ADC's disavowal of their own plans eliminates any probative value of the plans. We are nonplussed. The ADC was given an exercise by the Court, in essence a challenge for the ADC to put up or shut up. The ADC was not invited to propose a remedial plan, and in any event such proposed plans would be entirely premature.

State avoids explaining or justifying the many counties and precincts spit by its plan along racial lines and glosses over the contorted shapes of so many of its districts as they reach and stretch to bring in black population to meet their predetermined percentages. At bottom, the State evades the question of why they added particular populations to particular districts, the key to negating "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without *a particular district*." *ALBC v. Alabama*, 135 S.Ct. at 1265 (emphasis in original.)

The Predominance of Race in the State's Plan is not Excused by the Similarity in Black Percentages in Some Districts in THE ADC Plan

The State cites the language in *Easley v. Cromartie*, 532 U.S. 234, 258 (2001), upholding the challenged district (district 12) in that plan where the black percentage in the adopted district was not significantly different than an alternative. Fairly considered, however, *Easley* offers no comfort to the State.

The plan in *Easley* was drawn based on political data with the goal of maintaining the then-current partisan balance in the North Carolina congressional delegation. 532 U.S. at 240-241. The State had election returns loaded into its redistricting computers, *Id*. at 249, and the State used those data to draw the districts, the State relied on those election returns to produce dependable partisan majorities in each district with a predicted 60 percent partisan advantage for each party in their respective districts: district 12, which was 47 percent black, *Id*. at 240, had a 63 percent Democratic advantage while some other districts had a 61 percent Republican advantage. *Id*. at 246. The State plan split one VTD in creating district 12, *Id*. at 256-57, which, in the context of hundreds of thousands of people in a congressional district, did not materially affect the whole precinct political analysis.

The circumstances of the creation of the State's district are entirely different. The State

had partisan data available but did not use it. Trans. 8-12-13, Vol. III, 15 181:18-182:12. Mr. Hinaman looked only at the total black population percentage in each district so as not to "retrogress." *Id*, 190:5-9. The North Carolina was drawn based on whole precinct election returns. The State's districts were drawn based on race without regard to election returns. Even if the State had claimed to look at election returns, that claim would not have been credible given the large number of voting precincts that the State split, and for which only racial data were available.

The *Easley* Court, was not concerned that there may be something problematical in achieving a district with a 47 percent black population. *Shaw v. Reno*, 509 U.S. 630 (1993), and the following cases are not concerned with the specific minority population percentage but how the State selected which population to include in those districts, how the State selected populations to add to or remove from specific districts, and the intersection of those choices with traditional redistricting criteria.

In the few districts in which the black percentage in the ADC district ends up being close to the percentage in the State's district, the Equal Protection clause thus is still violated by the very different means the State used to get to that end point. Respect for traditional districting principles, such as keeping counties and political subdivisions intact to the extent possible – as in the ADC plan – serves many important values, as Supreme Court doctrine has recognized. These are means of keeping communities with shared political interests together, of enabling voters to have easier access to information about who their representatives are, and to give these subunits greater integrity and weight in the state legislature.

By contrast, in those instances when the State's districts produced similar population percentages, the State did not respect these principles but instead manipulated boundary lines in

numerous ways, to split counties, subdivisions, and precincts and move thousands of people between the districts – many times the number of people needed to be moved to meet the ideal-total population levels

For the State, meeting the racial targets was still the one non-negotiable goal. The ADC plans demonstrate that the State did not care about respecting traditional districting principles in doing that. Nor did the State meet these racial targets as an indirect effect of applying traditional districting principles, as in the ADC plan. Instead, the State contorted the boundaries of these districts, bringing in parts of some precincts, removing parts of others, splitting counties when doing so was unnecessary to non-retrogression. The Supreme Court has made clear that race predominates when significant numbers of voters are moved by race at the boundaries of districts – and this is precisely what the State did – even as the ADC plans demonstrate that it is not necessary to do so to end up with districts that have the black-population percentages that these districts do. In the few districts where the ADC and State black population percentages end up the same, the ADC plans show precisely that it was not necessary for race to predominate over traditional districting principles to get to that result. . Compare, for example, the very different districts drawn by the State and the ADC for HD 70. Compare eth respect for county and precinct boundaries in SD 24. And so on.

The State pursues the *Easley* argument and occasionally makes other points in relation to some, but not all, of the ADC districts. As set forth below, however, it consistently fails to address its departures from traditional redistricting criteria, to explain its repeated subordination of compactness, communities of interest, and county and precinct boundaries to predetermined racial percentages.

The House Plan

HDs 19, 53 (Madison)

Here, as elsewhere, the State misrepresents the testimony of Mr. Fairfax. The State suggests that when Mr. Fairfax testified about the odd shapes of Madison County precincts discussed *supra* that it has some relationship to the State's districts. Doc. 295 at Fairfax depo. 133:11-16. Attachment E shows that the problematic Madison precincts are in the south and southwest, away from the State's HDs 19 and 53: their splits were to meet the misguided HD53 quota and maintain HD 19 above 60 percent black (unnecessarily).

The State attempts to justify the interlocking nature of their oddly shaped HDs 19 and 53 by noting that at one point there is a notable aberration in the otherwise smooth line between ADC HD 19 and ADC 53. Doc. 295 at 33-34. In fact, the ADC districts split only two precincts in these districts. Doc. 297-9, a fraction of the 28 split segments involved in the State's HDs 19 and 53. The ADC line follows, in that regard, the 2001 line, Doc. 287-27 at 1, 4, and provides for population equality with minimal precinct splits. Doc. 297-9 at 26-28. The ADC lines thus follow the State's own redistricting criteria. The State's lines, however, show exponentially great interlocking districts, ADC Supp. EX. 6A and 9A, and truly odd shapes. The State's lines are marked by split precincts: Six of the State's HF 53 precincts are split along racial lines between black and white majority districts as are 10 of the State's HD 19. Doc. 258-1, ADC Supp. Ex. 6B-6E.

HD 32 (Anniston-Talladega)

The State avers in defense of its own grotesque HD 32 that ADC HD 32 "is likewise long and narrow, running a north-easterly direction from Talladega County to Calhoun County", Doc. 295 at 34, and incorrectly suggests that the ADC plan splits precincts to make HD 32 a black

majority district. *Id*. As discussed above, the ADC plan did not split any voting precincts but rather adhered to the 2001 lines except in re-uniting two VTDs which had been split under that plan. In contrast, the State's split 11precincts in drawing HD 32, reaching to grab black population and cutting into the 2001 lines to remove white population. Doc. 287-1, 18. The net population removed from HD 82 by the State was over 88 percent white. ADC Supp. Ex. 4. The State has presented no non-racial reason for these departures from traditional redistricting criteria. The ADC district demonstrates the predominance of race in the State's plan.

HDs 52, 54-60 (Jefferson)

The State barely touches the Jefferson County districts, but in doing so again misrepresents the testimony of Mr. Fairfax. When Mr. Fairfax was asked whether the decisions he made were an "improvement over what was done before" it was in the context of the 2001 districts, which were the districts from which he invariably worked, rather than from the State's districts. Fairfax Depo. 157:20-158-24. The ambiguous exchange avoids the real issue: why the State needed to fragment voting precinct wholesale in redrawing districts – with 84 separate precinct segments involved in their eight Jefferson black-majority districts alone, CE 41 at 99-101, 103-115 – when the ADC plan created nine viable districts with only four split precinct segments. Doc. 297-9 at 75-77, 78-90. Nor does the State explain their districts' irregular district boundaries or the violation of communities of interest such as the racial split of the City of Pleasant Grove. *Id*. at 80, and ADC Supp. EX. 8a-8B, 10A-16C.

The State also cites the ADC transfer of HD 53 to Madison County as justifying their own actions. The ADC plan certainly does place the HD 53 district number in Madison County, thereby taking advantage of the flexibility with respect to incumbent residences the August 28 Order allowed, but the ADC maintained the ninth black district in Jefferson County (ADC HD

45), the removal of which all along had been the point of the ADC complaint. The numbers assigned to the districts are irrelevant to the substantive issues of this case.

HDs 67-69, 71-72 (Western Black Belt)

The State rushes through the Western Black Belt, grasping at each point of similarity among the alternative plans. The State never, however, explains why it added the population it did to the various districts, or why it removed so much population from under-populated districts in the way it did: it never refuted the evidence that race predominated in its choices or offered a non-racial explanation.

The only mention of HD 70 (Tuscaloosa) is at Doc. 295 at 31, where the State notes the similarities in the black percentage in the various districts. What the State avoids is why it drew HD 70 the way it did, on the shape of a raging tiger upon which an elephant has sat. ADC Supp. Ex. 20A, Doc 287-18. The district includes six precincts split along racial lines, doc. 25801, and is marked by boundary extensions and cul de sacs that follow racial lines. ADC Supp. Ex. 20-B-D. The ADC version of HD 70 splits one precinct, Doc. 297-9 at 106, an oversized VTD that had been split among three districts in 2001. Attachment H. Referring to that VTD split, Mr. Fairfax testified, "That was sort of an easy fix, if you will. Make it a little more compact and then expand over to that voting district over there and, pretty much, it was finished." Fairfax Depo. at 203:6-16. The State's gymnastics bear no explanation other than the need to meet the State's specific racial floors.

The remaining districts similarly beg explanation. In drawing HD 68, Mr. Hinaman split an heroic 33 voting precincts along racial lines, compared to one precinct split (which was necessary for population equality) in the ADC plan, and stretching into Baldwin County. Doc.

287-18 at 4. In the majority black House districts in the Western Black Belt, the State's plans contain 99 split precinct segments. The ADC plan contains four.

HDs 76-78 (Montgomery)

The State skips a separate discussion of the House districts in Montgomery County and jumps instead to the Eastern Black Belt. Doc. 295 at 14-15. The State does early on note that the ADC plan places HD 73 in Shelby County, as does the State plan. As it did with HD 53, the State mistakes the district number with the treatment of population. Again, the issue never has been the district number. The ADC plan provides for an HD 74 in Montgomery with a population similar to that of the 2001 HD 73. Doc. 287-7. Again, the State does not explain why the three majority black districts involve 32 separate split precinct segments (vs. 4 in the ADC plan) or justify the diversion of urban precincts to rural HD 69 other than to meet the racial quota for that district. The State does say that the ADC HD 69 "instead of taking a row of precincts in Montgomery County, as the Legislature did, ADC takes an odd incursion into Butler County and then on into Conecuh County", Doc. 287-18 at 4, but never suggests why adding rural areas to a rural district – the reason of the ADC's choice based on the rural community of interest -- is at all odd. The States point that the "majority of the District is the same in both plans." *Id*. As always, the State avoids the key question of why it added the particular population it did.

HDs 82-85 (Eastern Black Belt)

Again, to the State the ADC and State plans are "much the same" with both versions of HD 82, for example, based on Macon County and expanding from there. Doc. 295 at 36. Both take portions of Lee and Tallapoosa Counties, but the approaches they take are very different. In Lee County, the State HD 82 has an oddly shaped excrescence into the City of Auburn to grab

black population, APSX 136, and a similar finger into Dadeville in Tallapoosa County to split a precinct along racial lines. ADC Supp. Ex. 26C, 26E. The State plan also splits the Wall Street precinct in Tallapoosa County along racial lines. ADC Supp. Ex. 26D. The ADC plan splits no precincts in Tallapoosa County, and the choice of precincts to include was not racial: the ADC plan does not include any part of the Dadeville Armory or Wall street precincts. Doc. 297-9 at 123-24. The ADC plan uses whole precincts that fit the one percent population deviation standard. And the ADC plan makes the unavoidable split of the Auburn VTD (which has more population than a full House district, must be split, see CE 41 at 166,171) along a smooth, non-racial line. See, Doc. 287-18 at 8., APSX 136. And see Doc. 287-18 at 9 and ADC Supp. Ex. 28A-F for the sharp distinction between the ADC and state plans for HD 83.

The State characterizes the difference between the lines within Houston County and those of ADC HD 85 as "slight." Doc. 295 at 37. But see Doc. 294-2 at 2 and ADC Supp. Ex. 29A, 29C. The State suggests that if they had not so contorted the district lines so as to obtain a cosmetic black total population majority, they would have risked a Section 2 lawsuit. The State's HD 85, however lacks a black voting age majority, Doc. 203 at 47, so that a Section 2 suit would fail under *Bartlett v. Strickland*, 556 US. 1 (2009).

HDs 96-99, 103 (Mobile)

As it did with Montgomery, the State skips over the Mobile House districts. The only mention of Mobile County in the text of the State's Response is a reference to one the ALBC precinct splits in the county. Doc. 295 at 27. The State split 26 Mobile County precincts between majority black and adjacent white districts, all but two along racial lines so as to draw black population into the majority black districts and fence white population out. Doc. 258-1.

The State offers no explanation of their choice as to what to include and what to exclude from the districts.

The Senate Plan

As it did with the House districts, the State argues repeatedly that the State's Senate districts are similar to the ADC Senate districts, so that the ADC districts prove little or nothing. Doc. 295 at 37-42. Again, the State fails to come to grips with the specific choices they made as to which population to add and which to remove.

SDs 18-20 (Jefferson County)

The State argues that its districts are "roughly" the same as the ADC districts and, indeed, the differences are on the outer boundaries of the districts. The State split 13 precincts along racial lines with adjacent white districts, Doc. 258-2, and six more internally for racial balancing. CE 40 at48-61. The ADC plan splits no precincts at all. Doc. 297-9 at 39-51. The ADC plan also provides more regular boundaries and avoids the elongation of SDs 18 and 19 and the race-based hooks of SD 20. Doc. 287-20 ADC Supp. Ex. 36A and 36H.

SD 23 and 24 (Western Black Belt)

The State characterizes the differences between SD 23 and 24 in the ADC plan and the 2012 plans as "marginal" while acknowledging that "ADC put more emphasis on whole counties." Doc. 295 at 38. Precisely. Maintaining counties whole is a traditional redistricting criterion, a standard in the State's redistricting guidelines, and a command of Section 2 of the Alabama Constitution. The ADC plan maintains counties intact and the State plan splits them. Doc. 287-24. Similarly, the state's plan splits voting precincts, and splits them along racial lines. Id. In SD 23, the State's plan splits 26 precincts along racial lines. Doc. 258-2; Doc. 37G-H. Doc. 38 K-M. The ADC plan for SD 23 has no voting precinct splits at all. Doc. 297-5 at 57. In

HD 24, the ADC plan splits one new precinct (that was not split by the 2001 plan), while the State's HD 24 splits 18 precincts.

SD 26 (Montgomery)

The State attempts to defend the irregular shape of SD 26 by noting that both the ADC plan and the State's plan provide an urban SD 26, and by comparing it with the configuration of ADC HD 78. As noted above, the shape of HD 78 was determined by the need to avoid going into Autauga and/or Elmore Counties. Doc. 295 at 38-41. The State does not defend its decision, stressed by the Supreme Court, to split seven precincts along racial lines so as to add a net of 15,785 persons of whom only 36 were black. That decision is the essence of the action. The State pointed to the urban nature of SD 26 only on remand as an after-the-fact rationalization. The State's SD 26 includes predominantly black urban precincts and excludes predominantly white urban precincts: the Montgomery County portion of SD 25 does not include a single majority black precinct or precinct portion. CE 40 at 90-97. ADC SD 26 demonstrates an urban Montgomery district based on the common urban interest in the City of Montgomery rather than on race. It is compact with readily identifiable boundaries and much more nearly matches the overall racial composition of the City. Doc. 287 at 18.

The State attempts to make much of the fact that ADC SD 26 splits one precinct along urban-rural lines, as if that were a justification for the State's division of seven precincts along racial lines, because there can be a conflict between maintaining precincts intact and compactness. Doc. 295 at 39-40. But the State's precinct splits in SD 26 have nothing to do with compactness: indeed, they undermine it, leaving a SD 25 white "island" of the City of Montgomery virtually cut off from the remainder of the district by the pincers of SD 26. ADC Supp. Ex. 39A-F. The State attempts to equate the overhanging shape of ADC HD 78 with SD

26, doc. 295 at 40-41, but the comparison does not hold: HD 78 does no isolate the white island of SD 25 but rather opens the pincers, *Id.*, and the shape of HD 78 is a product of the constraints of county boundaries rather than race. The State has failed to answer the Supreme Court's strong concerns with SD 26.

SD 28 (Eastern Black Belt)

The State justifies the large increase in black percentage in SD 28 at the sacrifice of two county splits on the grounds the State "was listening to Joe Reed and Senator Hank Sanders, who thought a greater majority was required". Doc 295 at 42. But there is no evidence in the record that Sen. Sanders or Dr. Reed ever mentioned SD 28 or, indeed, that DR. Reed said anything about any percentage until his trial testimony. Sen. Sanders proposed a plan with a 51.55 percent black majority in SD 28; and given the past electoral history of SD 28 and its constituent House districts, HDs 82-85; and given the lower black percentages the State adopted for those House districts, the State's claim that black voters in SD 28 needed a 59 percent majority in SD 28 is incredible.

The State plan splits18 precincts between SD 28 and adjacent white majority districts. Doc 258-2; ADC Supp. Ex. 41G-I. The ADC plan splits two precincts, both in Houston County as discussed above. The larger number of precinct splits was not necessary other than to meet the State's newly-minted 59 percent target. Clearly, race predominated in the State's choice as to what population to include in SD 28 and what population to exclude.

SD 33 (Mobile)

The State notes that the "Legislature moved SD 33 south to find the population it needed; Mr. Fairfax opted instead to move west and north." Doc. 295 at 42. The State has yet to explain the reason for its choice.

> The redistricters moved a total of 42,767 persons into and out of SD 33. ADC Supp. Ex. 5. Of the ones added, 80% were black. *Id*. Of the ones removed, 84% were white. Indeed, although the district was under-populated, the State actually *removed* 8,065 whites from the district, in total, and 1,304 whites, in net. ADC Supp. Ex. 5. As a result, the redistricters added a net of 24,999 persons. ADC Supp. Ex. 5. Remarkably, 24,897, of those net persons (99.59%) were black.

Doc 258 at 28-29. *See also* Doc. 272 at 57-59. The State has yet to offer a reason to believe that race did not predominate in the choice of a net 99.59 percent change in the district

CONCLUSION

The drawing of alternative plans has confirmed that race predominated in the drawing of the districts, which re-created the prior black population percentages not as a matter of the sheer happenstance of "natural demographic factors" but as a matter of a determined and intentional State policy to re-create those prior percentages. The State purportedly did so based on the view that Section 5 required that, but Section 5 clearly did not. Because race predominated in the drawing of each of these districts without compelling justification or narrow tailoring, the districts are unconstitutional. The State used unjustified racial targets to draw these districts, and the State's Brief in Response to Plaintiffs' Post-Remand Plans has done nothing to explain away the predominance of race in their redistricting choices.

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