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

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| ALABAMA STATE CONFERENCE OF THE NAACP, *et al.*,<br><br>Plaintiffs<br><br>v.<br><br>STATE OF ALABAMA, *et al.*,<br><br>Defendants. | Civil Action No.<br>2:16-cv-00731-WKW-CSC |

**POST-TRIAL STIPULATIONS**

Pursuant to the Court's August 9, 2019 Order (Dkt. No. 175, hereinafter, the "Order"), Plaintiffs and Defendants (collectively, the "Parties") submit this supplement.

## UNDISPUTED (STIPULATED) FACTS

The following is a list of Findings of Fact that are undisputed (stipulated) pursuant to paragraph 2(a) of the Court's Order:

**Parties**

1. Plaintiff Alabama State Conference of the National Association for the Advancement of Colored People ("Alabama NAACP") is a State subsidiary of the National Association for the Advancement of Colored People, Inc. Dkt. No. 117 ¶ 1. (DFOF ¶ 1.)

2. The Alabama NAACP currently has about 3,500 members, approximately 99 percent of whom are Black. Tr. I-158:8-9;158:12-15 (Simelton). (PFOF ¶ 1.)

3. The Alabama NAACP is the oldest and one of the most significant civil rights organizations in Alabama. Its purposes include ensuring the political, educational, social, and economic equality of African Americans in the State of Alabama. Two central goals of the Alabama NAACP are to eliminate racial discrimination in the democratic process, and to enforce federal laws and constitutional provisions securing voting rights. The Alabama NAACP has African American members who reside, and are registered to vote, in and throughout the State of Alabama. Doc. 117 ¶ 2. (DFOF ¶ 2.)

4. Members of the Alabama NAACP reside all across the State of Alabama. Tr. I-158:10-11 (Simelton). (PFOF ¶ 2.)

5. The Alabama NAACP encourages its members to vote in all Alabama elections, including judicial elections. Tr. I-160:5-7 (Simelton). (PFOF ¶ 3.)

6. One of the NAACP's core functions is strengthening and defending its members' voting rights. Tr. I-159:5-160:5 (Simelton). (PFOF ¶ 4.)

7. Plaintiff John Harris is an adult African American United States citizen. Mr. Harris is a resident of, and a registered voter in, Lee County, Alabama. Mr. Harris is also a member of the NAACP. Doc. 117 ¶ 3. (DFOF ¶ 3.)

8. Plaintiff Sherman Norfleet is an adult African American United States citizen. Mr. Norfleet is a resident of, and a registered voter in, Perry County, Alabama. Doc. 117 ¶ 4. (DFOF ¶ 4.)

9. Sherman Norfleet is African American. Tr. I-168:12-13 (Norfleet). (PFOF ¶ 5.)

10. Sherman Norfleet resides in Uniontown, Alabama. Tr. I-168:1-4 (Norfleet). (PFOF ¶ 6.)

11. Sherman Norfleet is registered to vote in Perry County, Alabama. Tr. I-177:23-178:2 (Norfleet). (PFOF ¶ 7.)

12. Sherman Norfleet resides within a proposed majority-minority district under Plaintiffs' remedial districting scheme. Tr. I-168:1-4 (Norfleet); Tr. II-173:25-174:3 (Cooper). (PFOF ¶ 8.)

13. Sherman Norfleet votes in Alabama's statewide elections for the Supreme Court of Alabama, the Alabama Court of Civil Appeals, and the Alabama Court of Criminal Appeals. Tr. I-178:21¬179:4 (Norfleet). (PFOF ¶ 9.)

14. Plaintiff Clarence Muhammad is an adult African American United States citizen. Mr. Muhammad is a resident of, and a registered voter in, Jefferson County, Alabama. Doc. 117 ¶ 5. (DFOF ¶ 5.)

15. Clarence Muhammad is African American. Tr. II-36:17-18 (Muhammad). (PFOF

¶ 15.)

16. Clarence Muhammad resides in and is registered to vote in Birmingham, Alabama. Tr. II-37:19-21 (Muhammad). (PFOF ¶ 16.)

17. Clarence Muhammad resides within a proposed majority-minority district under Plaintiffs' remedial districting scheme. Tr. II-36:4-5 (Muhammad); Tr. II-173:25-174:3 (Cooper). (PFOF ¶ 18.)

18. Clarence Muhammad votes in Alabama's statewide elections for the Supreme Court of Alabama, the Alabama Court of Civil Appeals, and the Alabama Court of Criminal Appeals. Tr. II 38:3-10 (Muhammad). (PFOF ¶ 17.)

19. Plaintiff Curtis Travis is an adult African American United States citizen. Mr. Travis is a resident of, and a registered voter in, Tuscaloosa County, Alabama. Doc. 117 ¶ 6. (DFOF ¶ 6.)

20. Curtis Travis is African American. Tr. II-14:15-16 (Travis). (PFOF ¶ 10.)

21. Curtis Travis resides in Tuscaloosa, Alabama. Tr. II-7:17-20 (Travis). (PFOF ¶ 11.)

22. Curtis Travis is registered to vote in Tuscaloosa County, Alabama. Tr. II-17:1012 (Travis). (PFOF ¶ 12.)

23. Curtis Travis votes in Alabama's statewide elections for the Supreme Court of Alabama, the Alabama Court of Civil Appeals, and the Alabama Court of Criminal Appeals. Tr. II-17:15-18:7;26:6-9 (Travis). (PFOF ¶ 13.)

24. John Harris is African American. Tr. II-50:2-3 (Harris). (PFOF ¶ 19.)

25. John Harris resides in Opelika, Alabama. Tr. II-49:23-24 (Harris). (PFOF ¶ 20.)

26. John Harris is registered to vote in Lee County, Alabama. Tr. II-50:4-11 (Harris).

(PFOF ¶ 21.)

27. John Harris votes in Alabama's statewide elections for the Supreme Court of Alabama, the Alabama Court of Civil Appeals, and the Alabama Court of Criminal Appeals. Tr. II 50:6-9 (Harris). (PFOF ¶ 22.)

28. Defendant John H. Merrill is the Secretary of State of Alabama. The Secretary of State is the State's chief election officer. Doc. 117 ¶ 7. He is sued in his official capacity only. Doc. 84 at ¶ 17. (DFOF ¶ 7.)

29. Defendant State of Alabama is a sovereign State of the United States. (DFOF ¶ 8 (in part).)

**History**

30. In the Federal system, the Founders chose Presidential appointment, with confirmation by the Senate, to select judges who serve for life during "good Behaviour." U.S. Const. art. II, § 2, cl. 2; art. III, § 1. (DFOF ¶ 14).

31. The "Radical Republicans" who controlled Alabama's 1867 Constitutional Conventions enfranchised African Americans in the late 1868 Constitution. Trial Tr. Vol. III: 174 (Norrell). That was a time when many northern States were refusing to enfranchise African Americans. Trial Tr. Vol. III: 175 (Norrell). (DFOF ¶ 30).

32. Article VI, Section 1 of Alabama's Constitution of 1868 provided: "The judicial power of the State shall be vested in the Senate sitting as a court of Impeachment, a Supreme Court, Circuit Courts, Chancery Courts, Courts of Probate, such inferior Courts of Law and Equity to consist of not more than five members, as the General Assembly may from time to time establish, and such persons as may be by law invested with powers of a judicial nature." (DFOF ¶ 42.)

33. Between 1874 and 1903, Democratic nominees for the Supreme Court of Alabama were nominated by the Democratic Party Convention. Nominees then appeared on the ballot in a General Election, competing with any independent candidates and nominees of other parties. Doc. 117 ¶ 9. (DFOF ¶ 43.)

34. Article VI, Section 139 of Alabama's 1901 Constitution provided: "The judicial power of the state shall be vested in the senate sitting as a court of impeachment, a supreme court, circuit courts, chancery courts, courts of probate, such courts of law and equity inferior to the supreme court, and to consist of not more than five members, as the legislature from time to time may establish, and such persons as may be by law invested with powers of a judicial nature; but no court of general jurisdiction, at law or in equity, or both, shall hereafter be established in and for any one county having a population of less than twenty thousand, according to the next preceding federal census, and property assessed for taxation at a less valuation than three million five hundred thousand dollars." (DFOF ¶ 44.)

35. In 1911, the Alabama Legislature created an intermediate Court of Appeals. Doc. 117 ¶ 12. (DFOF ¶ 45.)

36. In 1915, the Alabama Legislature passed a "double vote" primary rule (also known as a "second choice" primary rule) for primary elections. Doc. 117 ¶ 13. (DFOF ¶ 46.)

37. In 1927, the Alabama Legislature passed a law requiring numbered-post elections for circuit court and appellate judgeships. 1927 Ala. Act 348. Numbered-post elections mean that candidates run for a particular post among several to be elected for the same office. Doc. 117 ¶ 14. (DFOF ¶ 47.)

38. In 1931, the Alabama Legislature passed a law ending the double vote primary and prohibiting single-shot voting in primary elections. 1931 Ala. Act 56. Doc. 117 ¶ 15. (DFOF ¶ 56.)

39. 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, and the appointee would thereafter need to stand for election to maintain the seat. Doc. 117 ¶ 37. (DFOF ¶ 57.)

40. In 1969, the Alabama Legislature added two seats to the Supreme Court. Act No. 602, § 1, 1969 Ala. Acts 1087 (codified at Ala. Code § 12–2–1 (1995)). The Alabama 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 Alabama 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 statewide, and the Governor has continued to fill mid-term vacancies. Doc. 117 ¶ 38. (DFOF ¶ 58.)

**Alabama's Appellate Courts**

41. Alabama's current Constitution provides that: "Except as otherwise provided by this Constitution, the judicial power of the state shall be vested exclusively in a unified judicial system which shall consist of a supreme court, a court of criminal appeals, a court of civil appeals, a trial court of general jurisdiction known as the circuit court, a trial court of limited

jurisdiction known as the district court, a probate court and such municipal courts as may be provided by law." Ala. Const. art., VI § 139. *See also* doc. 117 ¶ 24. (DFOF ¶ 59.)

42. "The supreme court shall be the highest court of the state and shall consist of one chief justice and such number of associate justices as may be prescribed by law." Ala. Const. art. VI, § 140(a). *See also* doc. 117 ¶ 25. (DFOF ¶ 60.)

43. "The supreme court shall have original jurisdiction (1) of cases and controversies as provided by this Constitution, (2) to issue such remedial writs or orders as may be necessary to give it general supervision and control of courts of inferior jurisdiction, and (3) to answer questions of state law certified by a court of the United States." Ala. Const. art. VI, § 140(b). *See also* doc. 117 ¶ 26. (DFOF ¶ 61.)

44. "The supreme court shall have such appellate jurisdiction as may be provided by law." Ala. Const. art. VI, § 140(c). *See also* doc. 117 ¶ 27. (DFOF ¶ 62.)

45. "The supreme court shall make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts; provided, however, that such rules shall not abridge, enlarge or modify the substantive right of any party nor affect the jurisdiction of circuit and district courts or venue of actions therein; and provided, further, that the right of trial by jury as at common law and declared by section 11 of the Constitution of Alabama 1901 shall be preserved to the parties inviolate. These rules may be changed by a general act of statewide application." Ala. Const. art. VI, § 150. *See also* doc. 117 ¶ 35. (DFOF ¶ 63.)

46. Today, the Chief Justice and eight Associate Justices of the Supreme Court of Alabama are elected at large to six-year, staggered terms. The Chief Justice is elected to a

designated position and the remaining Justices are elected to numbered places. Ala. Const. art. VI, § 154. *See also* doc. 117 ¶ 40. (DFOF ¶ 64.)

47. The Alabama Court of Criminal Appeals and the Alabama Court of Civil Appeals are the State's two intermediate appellate courts. Doc. 117 ¶ 39. (DFOF ¶ 65.)

48. "The court of criminal appeals shall consist of such number of judges as may be provided by law and shall exercise appellate jurisdiction under such terms and conditions as shall be provided by law and by rules of the supreme court." Ala. Const. art. VI, § 141(a). *See also* doc. 117 ¶ 28. (DFOF ¶ 66.)

49. "The court of civil appeals shall consist of such number of judges as may be provided by law and shall exercise appellate jurisdiction under such terms and conditions as shall be provided by law and by rules of the supreme court." Ala. Const. art. VI, § 141(b). *See also* doc. 117 ¶ 29. (DFOF ¶ 67.)

50. The Legislature created the Court of Appeals in 1911. It would replace the intermediate Court of Appeals with a Court of Criminal Appeals and a Court of Civil Appeals in 1969. Ex. P-85 at 14, 28. (PFOF ¶ 74, n. 5)

51. Today, the Alabama Court of Criminal Appeals and the Alabama Court of Civil Appeals have five judges each. The judges for these courts are also elected at large to six-year, staggered terms. Ala. Const. art. VI, § 154. Judges of the Court of Criminal Appeals elect the presiding judge, while the most senior judge on the Court of Civil Appeals serves as the presiding judge. The ten intermediate appellate judges are elected to numbered places. Doc. 117 ¶ 41. (DFOF ¶ 68.)

52. "The court of criminal appeals and the court of civil appeals shall have no original jurisdiction except the power to issue all writs necessary or appropriate in aid of appellate

jurisdiction of the courts of appeals." Ala. Const. art. VI, § 141(c). *See also* Doc. 117 ¶ 30. (DFOF ¶ 69.)

53. "The court of criminal appeals shall have and exercise original jurisdiction in the issuance and determination of writs of *quo warranto* and mandamus in relation to matters in which said court has appellate jurisdiction. Said court shall have authority to issue writs of injunction, habeas corpus and such other remedial and original writs as are necessary to give it a general superintendence and control of jurisdiction inferior to it and in matters over which it has exclusive appellate jurisdiction; to punish for contempts by the infliction of a fine as high as one hundred dollars, and imprisonment not exceeding ten days, one or both, and to exercise such other powers as may be given to said court by law." Ala. Const. art. VI, § 141(d). *See also* Doc. 117 ¶ 31. (DFOF ¶ 70.)

54. Elections for the Supreme Court of Alabama, Court of Criminal Appeals, and Court of Civil Appeals are partisan contests. Primary Elections are held to determine which candidates advance to the General Election. Primary Elections must be won with a majority of the vote; if no candidate receives a majority, there is a runoff between the top two vote-getters. Doc. 117 ¶ 45. (DFOF ¶ 71.)

55. Appellate court elections in Alabama are statewide, numbered-place contests. Candidates run for staggered terms. Doc. 117 ¶ 46. (DFOF ¶ 72.)

56. Alabama voters elect judges to the Alabama Criminal Court of Appeals, the Alabama Civil Court of Appeals, and the Alabama Supreme Court on a statewide basis. (PFOF ¶ 80.)

57. "All judges shall be elected by vote of the electors within the territorial jurisdiction of their respective courts." Ala. Const. art. VI, § 152. *See also* doc. 117 ¶ 36. (DFOF ¶ 73.)

58. When vacancies arise on any of the three courts, the Governor appoints a replacement, who serves for a limited time before he or she must stand for election. Doc. 117 ¶ 47. (DFOF ¶ 74.)

59. "The office of a judge shall be vacant if he dies, resigns, retires, or is removed. Vacancies in any judicial office shall be filled by appointment by the governor . . . . A judge, other than a probate judge, appointed to fill a vacancy, shall serve an initial term lasting until the first Monday after the second Tuesday in January following the next general election held after he has completed one year in office. At such election such judicial office shall be filled for a full term of office beginning at the end of the appointed term." Ala. Const. art. VI § 153. *See also* doc. 117 ¶ 22. (DFOF ¶ 75.)

60. The Supreme Court of Alabama has held that an appointee may not serve beyond the term of his predecessor. *See also* Doc. 117 ¶ 122. So, for instance, when Glenn Murdock (who would have been up for election in 2018) vacated his seat in Place 1 in early 2018, his appointed successor (Brad Mendheim) was required to stand for election in 2018 (rather than 2020) to hold on to the seat. Doc. 117 ¶ 22. (DFOF ¶ 76.)

61. "Judges of the supreme court, courts of appeals, circuit court and district court shall be licensed to practice law in this state and have such other qualifications as the legislature may prescribe. Judges of the probate court shall have such qualifications as may be provided by law." Ala. Const. art. VI, § 146. *See also* Doc. 117 ¶ 32. (DFOF ¶ 77.)

62. "Persons elected to the Supreme Court, or appointed to fill a vacant term of office on the Supreme Court, after January 1, 2010, must have been licensed by the Alabama State Bar Association a combined total of 10 years or more, or by any other State bar association for a combined total of 10 years or more, prior to beginning a term of office or appointment to serve a vacant term of office." Ala. Code § 12-2-1(b). *See also* doc. 117 ¶ 33. (DFOF ¶ 78.)

63. After January 1, 2010, the judges of the Court of Civil Appeals and the Court of Criminal Appeals must have the same experience required of the Justices of the Supreme Court of Alabama. Ala. Code § 12-3-1. *See also* doc. 117 ¶ 34. (DFOF ¶ 79.)

64. Two "court history" documents, Defendant's Exhibits 1 and 65, obtained from the Alabama Supreme Court, are true and correct copies of government records and may be admitted without an identifying witness. The parties stipulate that the historical information contained therein is accurate. The correct full list of past and present justices can be found at http://judicial.alabama.gov/library/judges. Doc. 117 ¶ 85. (DFOF ¶ 83.)

65. There are no African-American judges sitting on Alabama's appellate courts today. Joint Stip. ¶ 48; Ex. P-122 at ¶ 59. (PFOF ¶ 116)

66. There has never been an African-American judge on Alabama's Court of Criminal Appeals or Court of Civil Appeals. Joint Stip. ¶ 49. (PFOF ¶ 120)

**Appellate Courts of Other States**

67. Thirty-eight states use elections to select appellate judges; 7 of these states use partisan direct elections,[1] 15 use non-partisan direct elections,[2] and 16 use retention elections

[1] Alabama, Illinois, Louisiana, New Mexico, North Carolina, Pennsylvania, and Texas use partisan direct elections to select appellate judges.

[2] Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, West Virginia, and Wisconsin use non-partisan direct elections to select appellate judges.

after an initial appointment.[3] Four of these states (Illinois, Kentucky, Louisiana and Mississippi) employ districts, and the remaining (34) use state-wide elections. Alabama, North Carolina, and Texas are the only three states that elect appellate judges using partisan (both initial and subsequent) elections that are statewide. Doc. 117 ¶ 64. (DFOF ¶ 86.)

68. In Kentucky and Louisiana, the State is divided into seven Supreme Court districts, with each district electing one member of the Supreme Court. Doc. 117 ¶ 65. (DFOF ¶ 90.)

69. Kentucky has seven appellate court districts. Fourteen judges, two elected from each of the seven appellate court districts, serve on the Court of Appeals. Doc. 117 ¶ 66. (DFOF ¶ 91.)

70. Louisiana has five courts of appeal circuits, with one court of appeals in each. Each circuit is divided into at least three districts, and at least one judge is elected from each. The current Louisiana Constitution of 1974, as amended in 1980, provides for a Supreme Court composed of a justice elected from each of the seven Supreme Court districts, serving terms of ten years. The Chief Justice is not elected separately from the other justices; under Article V, Section 6, the "judge oldest in point of service on the supreme court" serves as the Chief Justice. Doc. 117 ¶ 67. (DFOF ¶ 92.)

71. The Louisiana Supreme Court, which is elected by district, always sits *en banc*. Trial Tr. vol. IV: 27 (Thibodeaux). (DFOF ¶ 94.)

72. The longest-tenured justice on the Louisiana Supreme Court sits as Chief Justice. Trial Tr. vol. IV: 30 (Thibodeaux). (DFOF ¶ 95.)

[3] The 16 states that use retention elections after an initial appointment are Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming.

73. In Illinois, Cook County elects three judges to the Supreme Court and the other four districts in the State elect one judge each. Doc. 117 ¶ 68. (DFOF ¶ 96.)

74. The Illinois Appeals Court is organized into five districts. Judges are elected by voters in each district. The number of appellate court judgeships, currently fifty-four, is determined by the Legislature. Doc. 117 ¶ 69. (DFOF ¶ 97.)

75. In Mississippi, the State is divided into three geographical districts, with each district electing three justices of the Supreme Court. Doc. 117 ¶ 70. (DFOF ¶ 98.)

76. The ten judges on the Mississippi Court of Appeals are elected from five districts, two judges from each district. Doc. 117 ¶ 71. (DFOF ¶ 99.)

**Illinois**

77. The Illinois Supreme Court was established in 1818 under the new State's Constitution. Art. IV. The Supreme Court consisted of four judges appointed without districts by the General Assembly. 1818 Ill. Const. Art. IV, § 4.

78. The Illinois Constitution of 1848, Art. V decreased the number of Supreme Court judges to three; elected from separate districts: "The state shall be divided into three grand divisions, as nearly equal as may be, and the qualified electors of each division shall elect one of the said judges for the term of nine years; Provided, that after the first election of such judges, the general assembly may have the power to provide by law for their election by the whole state, or by divisions, as they may deem most expedient." 1848 Ill. Const. Art. V.

79. The Illinois Constitution of 1870 established a Supreme Court of seven judges, each elected from a separate district and serving nine-year terms. Art. VI. The districts were composed of whole counties specified in the Constitution, which further provided: "The boundaries of the districts may be changed at the session of the general assembly next preceding

the election for judges herein, and at no other time; but whenever such alterations shall be made, the same shall be upon the rule of equality of population, as nearly as county boundaries will allow, and the districts shall be composed of contiguous counties, in as nearly compact form as circumstances will permit. The alteration of the districts shall not affect the tenure of office of any judge." Art. VI, § 5. Staggered terms were specified, and "The chief justice shall continue to act as such until the expiration of the term for which he was elected, after which the judges shall choose one of their number chief justice." Art. VI, § 6.

80. The Illinois Appellate Court was established by the Illinois General Assembly with the Act to Establish Appellate Courts, June 2, 1877, pursuant to Article VI, § 11 of the Illinois Constitution of 1870.

81. In 1877, the Illinois Legislature provided for four appellate courts, one court "in and for" each of four districts created by the same statute. Act of June 2, 1877, § 5. "There are hereby created four Appellate Courts in this State to be called the Appellate Courts in and for the districts hereby created; the first district to consist of the county of Cook, the second district to include all the counties now embraced within the Northern Grand Division of the Supreme Court, except the county of Cook; the third district to include all the counties now embraced within the Central Grand Division of the Supreme Court; and the fourth district to include all the counties now embraced within the Southern Grand Division of the Supreme Court. Said Appellate Courts shall be Courts of Record, with seals and clerks for each respectively; and each shall be held by three of the Judges of the Circuit Court, to be assigned in the manner hereinafter provided. Act of June 2, 1877, § 1. "At the first terms of said Appellate Courts the judges thereof in every one of said districts shall choose one of their number, who shall be presiding justice of the Appellate Court in the district to which he shall have been assigned, for such time

as the judges of said court may determine among themselves and at the expiration of such time his successor shall be chosen in like manner. Act of June 2, 1877, § 6.

82. Under the Judicial Article of 1964, Article VI was amended to create five districts for both the Supreme Court and the Appellate Court. "The State is divided into five Judicial Districts for the selection of judges of the Supreme and Appellate Courts. The First Judicial District consists of the county of Cook. The remainder of the State shall be divided by law into four Judicial Districts of substantially equal population, each of which shall be compact and composed of contiguous counties." Art. VI, § 3 (Judicial Amendment 1964).

83. Three Supreme Court judges were elected from the First Judicial District. The remaining districts elected one Supreme Court judge each. The Supreme Court judges were elected for ten-year terms. "The Supreme Court shall consist of seven judges, three of whom shall be selected from the First Judicial District and one each from the Second, Third, Fourth and Fifth Judicial Districts. Four judges shall constitute a quorum and the concurrence of four shall be necessary to a decision. The judges of the Supreme Court shall select one of their number to serve as Chief Justice for a term of three years." Art. VI, § 4 (Judicial Amendment 1964).

84. The Appellate Court was organized in the same five judicial districts as the Supreme Court. It consisted of twenty-four judges, twelve in the First District (Cook County), and three in each of the other four districts. Appellate Court Judges were elected for ten-year terms. Art. VI, § 4 (Judicial Amendment 1964).

85. Under the Judicial Article of 1964, once elected, Illinois Supreme and Appellate Court judges ran for re-election in non-partisan, non-adversarial retention elections. Art. VI, §§ 10, 11 (Judicial Amendment 1964).

86. The Illinois Constitution of 1970 reorganized the five districts for the Supreme and Appellate Courts, with three judges elected from a multimember district and four judges elected from separate single-member districts:

> The State is divided into five Judicial Districts for the selection of Supreme and Appellate Court judges. The First Judicial District consists of Cook County. The remainder of the State shall be divided by law into four Judicial Districts of substantially equal population, each of which shall be compact and composed of contiguous counties. Art. VI, § 2.
>
> The Supreme Court shall consist of seven judges. Three shall be selected from the First Judicial District and one from each of the other Judicial Districts. Four Judges constitute a quorum and the concurrence of four is necessary for a decision. Supreme Court Judges shall select a Chief Justice from their number to serve for a term of three years. Art. VI, §3.

**Kentucky**

87. Kentucky was admitted as State of the Union in 1792. The Kentucky Supreme Court was established in the Kentucky Constitution of 1792 and styled the Kentucky Court of Appeals. Ky. Const. of 1792, art. V, § 1. Its members were appointed by the Governor with the advice and consent of the Senate. Art. II, § 8. The same provisions were included in the 1799 Kentucky Constitution. Art. IV, § 1; Art. III, § 9.

88. As modified in the Kentucky Constitution of 1850, the Court of Appeals would consist of four judges. The Kentucky General Assembly was tasked with dividing the State, by counties, into four districts, as nearly equal in voting population as possible. From each district, voters would elect one judge to the Court of Appeals. Should a change in the number of judges to sit on the Court of Appeals be made, the term of office and number of districts were to be changed to preserve the principle of electing one judge every two years. Ky. Const. of 1850, art. IV, § 4. The judges were to be elected to staggered terms. "The judge having the shortest time to serve shall be styled the Chief Justice of Kentucky." Art. IV, § 6.

89. Should a vacancy occur, the district from which the vacancy occurred would elect a replacement, unless the unexpired term was less than one year, in which case the Governor would appoint a replacement to fill the vacancy. Ky. Const. of 1850, art. IV, § 7.

90. In 1882, under the powers granted in the Kentucky Constitution of 1850 to create inferior courts, the Kentucky General Assembly created an intermediate court of appeals given jurisdiction over all appeals except those involving felonies, the validity of statutes, the title to land, the right to a franchise, or judgments greater than $3,000. Its decisions could be appealed to the Court of Appeals, unless they involved less than $1,000 or were unanimous decisions upholding a circuit court ruling. *See* Kurt X. Metzmeier, *History of the Courts of Kentucky* 9 (Univ. of La. 2006), available at https://works.bepress.com/kurt_metzmeier/5/. It is not clear how the judges of the intermediate court of appeals were to be selected. The 1891 Kentucky Constitution "abolished the Superior Court and established one supreme court. Advocates of the single court arrangement clinched their victory over the proponents of the intermediate court by inserting a provision that prohibits the creation of any courts not established by the constitution." William E. Bivin, *The Historical Development of the Kentucky Courts*, 47 Ky. L.J. 465, 488 (1959).

91. The Kentucky Constitution of 1891 provided: "The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the Senate when sitting as a court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution." § 109. It set a term of eight years for each judge on the Court of Appeals and, after 1894, calling for the Court of Appeals to consist of at least five, but no more than seven judges. Ky. Const., §§ 112-113. The number of districts from which the judges were to be elected would be adjusted to correspond with the number of judges set by the

Legislature, with redistricting to occur as necessary every ten years. Ky. Const., §§ 115-116. "The Judges of the Court of Appeals shall be elected by districts. The General Assembly shall, before the regular election in eighteen hundred and ninety-four, divide the State, by counties, into as many districts, as nearly equal in population and as compact in form as possible, as it may provide shall he the number of Judges of the Court of Appeals; and it may, every ten years thereafter, or when the number of Judges requires it, redistrict the State in like manner." Ky. Const. § 116.

92. The Kentucky Constitution of 1891 abolished the intermediate court of appeals, transferring all cases to the Court of Appeals upon the expirations of the terms of the judges on the court. Ky. Const., § 119.

93. In the Judicial Article Amendment of 1975, the judicial power of the Court of Appeals was divided into a Supreme Court, a Court of Appeals, and trial court of general jurisdiction known as the Circuit Court and a trial court of limited jurisdiction known as the District Court. Ky. Const., § 109.

94. The Supreme Court consisted of a Chief Justice of the Commonwealth and six associate Justices, with the Justices electing one of their number to serve as the Chief Justice for a term of four years. Ky. Const., § 110(1). The seven members of the Kentucky Supreme Court are elected from single-member districts.

95. The Court of Appeals consisted of 14 judges, an equal number selected from each Supreme Court district. The Court of Appeals would be divided into panels of not less than three judges, with each panel deciding a cause by a concurring vote of the majority of the judges on that panel. Ky. Const., § 111.

96. Justices of the Supreme Court and judges of the Court of Appeals, Circuit and District Courts were to be elected from their respective districts or circuits on a nonpartisan basis. Ky. Const., § 117.

97. Vacancies were to be filled by the Governor from a list provided by a judicial nominating commission, which consisted of seven members, one of whom being the chief justice of the Supreme Court, two from the Bar, and four others appointed by the Governor from among persons not members of the Bar, with two of those four being members of each of the two political parties that represented the largest number of voters. Ky. Const., § 118. Those appointed generally stand for election at the succeeding annual election. Ky. Const. § 152.

**Louisiana – Supreme Court**

98. The Louisiana Supreme Court is the court of last resort for both civil and criminal matters in Louisiana. It currently consists of seven justices elected from seven single-member districts. Districts were first implemented under the Louisiana Constitution of 1852, reinstated under the Louisiana Constitution of 1913, and the districts were modified in 1992 as a result of litigation under Section 2 of the Voting Rights Act.

99. The Louisiana Constitutions of 1812 and 1845 established the Supreme Court with 3 to 5 justices appointed by the Governor. La. Const. art. III § 9, IV § 3 (1812); La. Const. art. IV (1845).

100. The Louisiana Constitution of 1852 provided for the Chief Justice to be elected statewide and four associate justices to be elected from four Supreme Court districts composed of whole parishes. La. Const. art. IV § 64 (1852).

101. Supreme Court elections were eliminated in the Constitution of 1864, when Louisiana returned to gubernatorial appointments for all Supreme Court justices. La. Const. art. V § 79 (1864); La. Const. art. IV § 75 (1868).

102. The Louisiana Constitution of 1879 retained gubernatorial appointments, but required that all five justices be appointed from districts composed of whole parishes. La. Const. art. 83 (1879).

103. The Louisiana Constitution of 1898 retained the same districted appointment scheme of all Supreme Court justices. La. Const. art. 87 (1898).

104. The Louisiana Constitution of 1913 established a Supreme Court composed of five justices elected from four districts. La. Const. art. 86, 87 (1913). Two justices were elected from the First District, which included Orleans Parish, and three justices were elected from single-member districts composed of whole parishes. Vacancies in the office of Chief Justices were to be filled by the "the Associate Justice who has served the longest time." *Id.*

105. The Louisiana Constitution of 1921 established a Supreme Court composed of seven justices elected from six districts composed of whole parishes. La. Const. art. VII §§ 7, 9 (1921). Two justices were elected from the First District, which included Orleans Parish as well as surrounding parishes, and five justices were elected from single-member districts. *Id.* It also provided that "[w]henever a vacancy shall occur in the office of Chief Justice, the justice oldest in point of service shall succeed thereto, and when sitting in divisions the justice longest m service shall preside." *Id.*, art. VII, § 7.

106. The Louisiana Constitution of 1974 authorized the State Legislature to change the Supreme Court district boundaries and the number of Supreme Court justices. La. Const. art. V § 4 (1974).

107. Orleans Parish was majority African-American but the First District as a whole was majority white, and minority plaintiffs challenged the at-large multi-member First District under Section 2 of the Voting Rights Act. *Chisom v. Edwards*, 659 F. Supp. 183 (E.D. La. 1987), *rev'd*, 839 F.2d 1056 (5th Cir.), *cert. denied sub nom. Roemer v. Chisom*, 488 U.S. 955 (1988); No. CIV. A. 86-4057, 1989 WL 106485 (E.D. La. Sept. 19, 1989), *remanded*, 917 F.2d 187 (5th Cir. 1990), *rev'd and remanded*, *Chisom v. Roemer*, 501 U.S. 380 (1991).

108. The Louisiana Legislature passed Act 512 in 1992, creating a temporary eighth Supreme Court seat from the majority-Black sub-district consisting of nearly all of Orleans Parish. 1992 La. Acts No. 512. A federal consent judgement was entered on August 21, 1992, as amended effective January 3, 2000, memorializing Act 512 and stipulating that Louisiana would in its next Supreme Court district reapportionment split the multi-member First District into two single-member districts, one of such districts being majority-Black and consisting of most of Orleans Parish and a portion of Jefferson Parish. Consent Judgement, *Chisom v. Edwards*, Case No. 86-4075 (E.D. La. Aug. 21, 1992).

**Louisiana – Court of Appeal**

109. The Louisiana Courts of Appeal currently consist of 53 judges and five Circuits. Districts were first implemented under the Louisiana Constitution of 1894, reinstated under the 1906 amendment to the Louisiana Constitution of 1898, and have been modified numerous times since, including sub-districts implemented in 1992 and 2007.

110. The Louisiana Constitution of 1879, as amended in 1882, established the Court of Appeal composed of judges elected by the Louisiana General Assembly. La. Const. art. 96, 97 (1879); 1882 La. Act No. 125 § 4.

111. The Louisiana Constitution was amended in 1894 to establish six Appellate Court Districts composed of whole parishes, each able to elect one Court of Appeals judge. 1894 La. Acts, No. 193 §§ 2, 3. The Court of Appeals was divided into two Circuits, with the three judges elected from the First, Second and Third Districts comprising the First Circuit, and the three judges elected from the Fourth, Fifth and Sixth Districts comprising the Second Circuit. *Id.*

112. Under the 1898 Louisiana Constitution, Court of Appeals judges were designated by the Supreme Court. La. Const. art. 99 (1898).

113. The 1906 amendment to the 1898 Constitution returned to electing Courts of Appeals judges, establishing two Court of Appeals Circuits, each Circuit divided into three Districts composed of whole parishes, with one judge elected from each District. 1906 La. Act. No. 137 § 3.

114. The Louisiana Constitutions of 1913 and 1921 made no changes in the method of electing judges of the Courts of Appeal.

115. The 1958 Amendment to the Constitution of 1921 reorganized the Courts of Appeals, establishing four Court of Appeals Circuits, each composed of whole parishes. 1958 La. Act No. 561. The First, Second and Third Circuits each consisted of three Districts. *Id.* It also authorized the Legislature to increase the number of Court of Appeals judges. *Id.*

116. In 1968, the Fourth Circuit was divided into three Districts with one judge elected from the combined First and Third Districts, two judges elected from the First District, five judges elected from the Second District and one judge elected from the Third District. 1968 La. Act No. 696.

117. An additional judgeship position was added in the Third Circuit, elected at-large from that Circuit. 1968 La. Act No. 10. The United States Department of Justice objected under

Voting Rights Act, Section 5 to certain judicial election procedure changes, including the additional judgeship position in the Court of Appeals, Third Circuit, implemented under Act 10. Letter from John R. Dunne, U.S. Department of Justice, Assistant Attorney General, Civil Rights Division to Richard P. Ieyoub, Attorney General of the State of Louisiana (Mar. 17, 1992), available at: https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/LA-1910.pdf.

118. The Louisiana Constitution of 1974 divided the State into at least four Court of Appeals circuits, with each circuit divided into at least three districts, with at least one judge elected from each district, subject to change by the Legislature. La. Const. art. V, §§ 8-9 (1974).

119. The Court of Appeals was reorganized in 1975 such that: (1) the First Circuit had nine judges, three judges elected from each of the Circuit's three Districts, (2) the Second Circuit had five judges, two judges elected from the Circuit at large and one judge elected from each of the Circuit's three Districts, (3) the Third Circuit had six judges, three elected from the Circuit at large and one judge elected from each of the Circuit's three Districts, and (4) the Fourth Circuit had nine judges, one judge elected from the combined First and Third Districts, two judges elected from the First District, five judges elected from the Second District and one judge elected from the Third District. 1975 La. Act No. 114. The United States Department of Justice objected under Voting Rights Act, Section 5to certain judicial election procedure changes, including changes to the Court of Appeals, First, Second and Third Circuits implemented under Act 114. *See* Letter from Wm. Bradford Reynolds, U.S. Department of Justice, Assistant Attorney General, Civil Rights Division to Kenneth C. DeJean, Office of the Attorney General, State of Louisiana, Chief Counsel (Sept. 23, 1988), available at: https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/LA-1660.pdf.

120. Additional Court of Appeals judges were added in 1977 and 1980. 1977 La. Act No. 620, 1980 La. Act No. 661.

121. A new Court of Appeals, Fifth Circuit was added which had six judges elected from three districts: four judges elected from the First District, one judge elected from the Second District and one judge elected from the Third District. 1980 La. Act No. 661, 1981 La. Act No. 3.

122. Additional judgeship positions were created in the Court of Appeals, Second and Third Circuits. 1987 La. Act No. 801. The United States Department of Justice objected under Voting Rights Act, Section 5 to certain judicial election procedure changes, including the additional judgeship positions in the Court of Appeals, Second and Third Circuits, implemented under Act 801. Letter from John R. Dunne, U.S. Department of Justice, Assistant Attorney General, Civil Rights Division to Richard P. Ieyoub, Attorney General of the State of Louisiana (Mar. 17, 1992), available at: https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/LA-1910.pdf.

123. Minority plaintiffs challenged the method of electing Louisiana's Court of Appeals judges from multi-member districts under Section 2 of the Voting Rights Act. *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988), *modified sub nom*., *Clark v. Roemer*, 777 F. Supp. 445 (M.D. La. 1990), *vacated*, 750 F. Supp. 200 (M.D. La. 1990), *cert. granted*, 501 U.S. 1246 (1991), *supplemented*, 777 F. Supp. 471 (M.D. La. 1991).

124. The Louisiana Legislature in 1989 adopted legislation, contingent upon voter approval, revising the State's appellate judicial election procedures. 1989 La. Act Nos. 842, 844. Louisiana voters rejected the proposed revisions. *See* Louisiana Secretary of State, Official Election Results for Election Date 10/7/1989, available at:

https://voterportal.sos.la.gov/static/1989-10-07/resultsRace/Statewide (Amendments #5 and #6 defeated 25.05% to 74.95% and 23.62% to 76.38%, respectively).

125. A consent decree was entered in February 1992 stipulating that majority African American sub-districts would be implemented in Court of Appeals, Second Circuit, Districts One and Three. The Louisiana Legislature passed legislation creating sub-districts within the Court of Appeals, Second and Third Circuits. 1992 La. Act Nos. 513, 1069.

126. Minority plaintiffs in 2005 challenged under Voting Rights Act Section 2 the at-large method of electing Court of Appeals judges in the Court of Appeals, Fifth Circuit, First District. *Williams v. McKeithen*, No. 05-1180 (E.D. La. filed Mar. 29, 2005). The Louisiana Legislature in July 2007 enacted legislation creating two election sections within the Fifth Circuit, First District. *See* 2007 La. Act No. 261. A consent judgement was entered in October 2007 memorializing Act 261. Consent Judgment, *Williams v. McKeithen*, No. 05-1180 (E.D. La. Oct. 31, 2007).

127. Thereafter, the Louisiana Legislature provided for sub-districts in the Court of Appeals, First Circuit, First District and the Second Circuit, Second District. 2008 La. Act No. 369; 2009 La. Act No. 133.

128. The Court of Appeals, First Circuit currently has three districts and 12 judges, with four judges elected from each of the three districts. La. Rev. Stat. 13:312(1), 13:312.1A. The First Circuit, First District is further subdivided to election section one electing one judge, and election section two electing one judge, and two judges elected from the First District at-large. *Id.* 13:312.1A.

129. The Court of Appeals, Second Circuit currently has three districts and nine judges, with three judges elected from each of the three districts. *Id.* 13:312(2), 13:312.1B. The

Second Circuit, First District is further subdivided into election section one which elects one judge and election section two which elects two judges. *Id.* 13:312.1B. The Second Circuit, Second District is further subdivided into election section one which elects one judge and election section two which elects one judge, and one judge is elected from Second District at-large. *Id.* 13:312.1B. The Second Circuit, Third district is further subdivided into election section one which elects one judge, and election section two which elects two judges. *Id.* 13:312.1B.

130. The Court of Appeals, Third Circuit currently has 12 judges and three districts, with three judges elected from each of the First and Second Districts and six judges elected from the Third District. *Id.* 13:312(3), 13:312.1C. The Third Circuit, Second District is further subdivided into election section one which elects one judge and election section two which elects two judges. The Third Circuit, Third District is further subdivided into five election sections each of which elects one judge and one judge is elected from the Third Circuit, Third District at-large. *Id.* 13:312.C

131. The Court of Appeals, Fourth Circuit currently has 12 judges and three districts. *Id.* 13:312(4), 13:312.1D. Two judges are elected from the Fourth Circuit at-large, eight judges are elected from the Fourth Circuit, First District, one judge is elected from the, Fourth Circuit, Second District, and one judge is elected from the Fourth Circuit, Third District. *Id.* 13:312.1D.

132. The Court of Appeals, Fifth Circuit currently has eight judges and three districts. *Id.* 13:312(5), 13:312.1E. Six judges are elected from the Fifth Circuit, First District, which is further subdivided into election section one which elects five judges and election section two which elects one judge, one judge is elected from the Fifth Circuit, Second District, and one judge is elected from the Fifth Circuit, Third District. *Id.* 13:312.1E.

**Mississippi – Supreme Court**

133. Mississippi became a State in 1817. The State's 1817 Constitution vested the "judicial power" in "one supreme court and such superior and inferior courts of law and equity, as the legislature may, from time to time, direct and establish." Miss. Const. of 1817, Art. V, § 1.

134. The 1817 Constitution did not state who had the authority to select supreme court justices, but until 1832, the Mississippi General Assembly assumed that authority for itself.

135. Mississippi's 1832 Constitution created one court of last resort, the High Court of Errors and Appeals. Miss. Const. of 1832, Art. IV, § 1. Three justices served on the High Court of Errors and Appeals. The 1832 Constitution created three supreme court electoral districts. Each justice was elected by the people of each of the three electoral districts. Miss. Const. of 1832, Art. IV, § 1.

136. Mississippi's 1868 Constitution eliminated the High Court of Errors and Appeals and replaced it with a Supreme Court consisting of three justices appointed by the governor "by and with the advice and consent of the Senate." Miss. Const. of 1868, Art. VI, §§ 1-2. The Governor appointed one justice from each of three districts created by the Legislature:

> The Supreme Court shall consist of three Judges, who shall be appointed by the Governor, by and with the advice and consent of the Senate, any two of whom, when convened shall form a quorum. The Legislature shall divide the State into three Districts, and the Governor, by and with the advice and consent of the Senate, shall appoint one Judge for each District. Miss. Const. of 1868, Art. VI, § 2.

137. This selection method remained largely in place when Mississippi adopted its current Constitution in 1890. Article VI, Section 145 of the 1890 Constitution states:

> The supreme court shall consist of three judges, any two of whom, when convened, shall form a quorum. The legislature shall divide the State into three supreme court districts, and the governor, by and with the advice and consent of the senate, shall appoint one judge for and from each district…"

Miss. Const., Art. VI, § 145

138. In 1914, Mississippi amended the 1890 Constitution by, among other things, increasing the size of its supreme court to six justices (up from three) and restoring district-based popular elections, as set out below:

139. In 1914, Article VI, § 145 was amended to read:

> The Supreme Court shall consist of three judges, any two of whom, when convened, shall form a quorum. The Legislature shall divide the state into three Supreme Court districts, and there shall be elected one judge for and from each district by the qualified electors thereof at a time and in the manner provided by law.

140. In 1914, Article VI, § 145A was added to read:

> The Supreme Court shall consist of six judges, that is to say, of three judges in addition to the three provided for by Section 145 of this Constitution, any four of whom when convened shall form a quorum. The additional judges herein provided for shall be selected one for and from each of the Supreme Court districts in the manner provided by Section 145 of this Constitution, or any amendments thereto. Their terms of office shall be as provided by Section 149 of this Constitution, or any amendment thereto.

141. In 1952, Mississippi amended its Constitution to include Article VI, §145B, which increased the size of Mississippi's Supreme Court to nine justices:

> The Supreme Court shall consist of nine judges, that is to say, of three judges in addition to the six provided for by Section 145A of this Constitution, any five of whom when convened shall constitute a quorum. The additional judges herein provided for shall be selected one for and from each of the Supreme Court districts in the manner provided by Section 145A of this Constitution or any amendment thereto. Their terms of office shall be as provided by Section 149 of this Constitution or any amendment thereto.

142. Mississippi currently has three multimember districts with three justices elected from each district. The justices serve staggered, eight-year terms. Miss. Const. Art. VI, § 149.

143. The Chief Justice of the Mississippi Supreme Court is chosen by seniority. Miss. Code 9-3-11 ("The judge of the Supreme Court who has been for the longest time continuously a member of the court shall be chief justice…").

144. Mississippi in 1994 passed the Nonpartisan Judicial Election Act. The law prohibits judicial candidates from campaigning or qualifying for office under a party affiliation. Miss. Code §§ 23-15-974-76.

**Mississippi – Appellate Courts**

145. In 1994, Mississippi's Legislature passed a law creating the Court of Appeals of the State of Mississippi. Miss. Code § 9-4-1.

146. Ten appellate judges sit on the court of appeals. *Id.*

147. Mississippi Code § 9-4-1 states in part:

> There is hereby established a court to be known as the 'Court of Appeals of the State Mississippi,' which shall be a court of record…The Court of Appeals shall be comprised of ten (10) appellate judges, two (2) from each Court of Appeals District, selected in accordance with Section 9-4-5.

148. The appellate judges are elected from multimember districts using numbered posts. There are five multimember districts, with two judges elected from each district. Mississippi Code § 9-4-5 sets forth the geographic contours of the five multimember districts. Judicial candidates in each district, run for election in numbered posts – Position 1 and Position 2:

> For purposes of all elections of members of the court, each of the ten (10) judges of the Court of Appeals shall be considered a separate office. The two (2) offices in each of the five (5) districts shall be designated Position Number 1 and Position Number 2, and in qualifying for office as a candidate for any office of judge of the Court of Appeals each candidate shall state the position number of the office to which he aspires and the election ballots shall so indicate. Miss. Code § 9-4-5(2)(a).

149. The appellate judges serve staggered, eight-year terms. Miss. Code § 9-4-5(2)(a).

150. The Chief Justice of the Supreme Court of Mississippi appoints the Chief Judge of the Court of Appeals. Miss. Code § 9-4-7.

151. The Chief Judge of the Court of Appeals selects two other members of the Court of Appeals to serve as presiding judges. Miss. Code § 9-4-9.

**Alabama Population Statistics**

152. As of the 2010 Census, Alabama had a total population of 4,779,736 people. African Americans comprised 26.0% of the total population in 2000 and 26.2% in 2010. Over the same time period, the white total population percentage declined marginally from 71.1% in 2000 to 68.5% in 2010. Doc. 117 ¶ 18. (DFOF ¶ 120)

153. Alabama's population in 2010 was 68% White and 26.2% African American. Joint Stip. ¶ 20. Alabama's voting age population between 2008 and 2012 was 70.7% White and 24.9% African American. *Id.* (PFOF ¶ 24.)

154. The African American population is largely concentrated in Jefferson County and in Black Belt counties which run from the Mississippi border to the Georgia border across the south-central region of Alabama. Doc. 117 ¶ 19. (DFOF ¶ 121)

155. Mr. Cooper provided four illustrative districting plans for the Supreme Court of Alabama and four plans for the Alabama Court of Civil Appeals and the Alabama Court of Criminal Appeals. Tr. II-149:3-11 (Cooper); Tr. Exs. P-95 through P-97 (Illustrative Plan SC 1); P-98 through P-100 (Illustrative Plan SC 2); P-101 through P-103 (Illustrative Plan SC 3); P-104 through P-106 (Illustrative Plan SC 4); P-107 through P-109 (Illustrative Plan AC 1); P-110 through P-112 (Illustrative Plan AC 2); P-113 through P-115 (Illustrative Plan AC 3); P-116 through P-118 (Illustrative Plan AC 4). (PFOF ¶ 27.)

156. The most recent population and racial demographics for Alabama are as follows:

| | **Total Population – 2010 Census** | | **Voting Age Population – 2008-2012 ACS** | |
|---|---|---|---|---|
| White alone | 3,275,394 | 68.5% | 2,576,913 | 70.7% |
| African American alone | 1,251,311 | 26.2% | 906,778 | 24.9% |
| Other | 252,031 | 5.3% | 163,586 | 4.5% |
| **Total** | **4,779,736** | | **3,647,277** | |

Doc. 117 ¶ 20. (DFOF ¶ 122).

**Voting and Elections in Alabama**

157. Alabama county-level voter-registration-by-race-data maintained by the Alabama Secretary of State and available at http://sos.alabama.gov/alabamavotes/voter/election-data, are true and correct. Doc. 117 ¶ 43. (DFOF ¶ 123.)

158. Alabama election results data by county maintained by the Alabama Secretary of State and available at http://sos.alabama.gov/alabamavotes/voter/election-information, are true and correct. Doc. 117 ¶ 44. (DFOF ¶ 124.)

159. After 1874, no Republican nominee for the Supreme Court of Alabama won the general election until Perry Hooper, Sr., in 1994. Doc. 117 ¶ 10. (DFOF ¶ 126.)

160. In 1970, Democrats were elected to all statewide offices in Alabama, and the Republican Party fielded only one candidate for statewide office. Ex. D-103 at 3-4. (DFOF ¶ 129.)

161. In 1972, only Democrats appeared on the ballot for appellate judicial offices. Ex. D-103 at 5. (DFOF ¶ 130.)

162. In 1974, Democrats were elected to all statewide offices in Alabama, and the Republican Party fielded no candidates for statewide office. Ex. D-103 at 6-7. (DFOF ¶ 131.)

163. In 1978, Democrats were elected to all statewide offices. Republicans fielded no candidates for appellate judicial offices. Ex. D-103 at 9-10. (DFOF ¶ 133.)

164. In 1980, Republicans fielded no candidates for appellate judicial offices, and Jeremiah Denton, a Republican, was elected to the United States Senate. Ex. D-103 at 11. (DFOF ¶ 134.)

165. No African American has ever served on either Alabama's Court of Criminal Appeals or Alabama's Court of Civil Appeals. Doc. 117 ¶ 49. (DFOF ¶ 135.)

166. Two African Americans have been elected to statewide office in the history of Alabama. In both instances, that office was Associate Justice of the Supreme Court of Alabama, and each Justice was initially appointed to that office by the Governor. Doc. 117 ¶ 50. (DFOF ¶ 136.)

167. No African American had ever run for an appellate court seat in Alabama prior to 1982 when Justice Oscar Adams was elected Associate Justice of the Alabama Supreme Court. Doc. 117 ¶ 51. (DFOF ¶ 137.)

168. No African American has ever won an election to a non-judicial statewide office in the history of Alabama. Ex. P-121 at 11, n.20. All current non-judicial statewide officeholders in Alabama are White. Tr. III-213:2-214:9 (Hall). (PFOF ¶ 35)

169. No African-American candidate has been elected to any statewide office—judicial or otherwise—in Alabama in the past twenty years. Joint Stip. ¶ 55; Tr. III-213:2-214:4 (Hall). (PFOF ¶ 122)

170. As shown below, there have been eight statewide judicial general elections since 2000 that included an African-American candidate. Joint Stip. ¶ 63, Ex. P-121 at 12.

| Year | Contest | Judicial office | African American candidate |
|---|---|---|---|
| 2000 | General | Associate Justice of Supreme Court, Place 1 | Ralph Cook |
| 2000 | General | Associate Justice of Supreme Court, Place 3 | John England, Jr. |
| 2000 | General | Court of Criminal Appeals, Place 2 | Aubrey Ford |
| 2002 | General | Court of Civil Appeals | Vicky Toles |
| 2006 | General | Associate Justice of Supreme Court, Place 2 | Gwendolyn T Kennedy |
| 2006 | General | Associate Justice of Supreme Court, Place 4 | John England, Jr. |
| 2006 | General | Court of Criminal Appeals, Place 1 | Aubrey Ford |
| 2008 | General | Court of Criminal Appeals, Place 1 | Clyde Jones |

(PFOF ¶ 37.)

171. In 1982, Democrats were elected to all statewide offices, and Republicans fielded a candidate in only one of eight appellate judicial contests. Oscar Adams was elected as a Democrat to the Alabama Supreme Court. Ex. D-103 at 12-13. (DFOF ¶ 138.)

172. Justice Oscar William Adams, Jr., the first African American to serve on the Alabama Supreme Court, was appointed to the position of Associate Justice by Governor Fob James on October 10, 1980. He won re-election in statewide races in 1982 and 1988. Justice Adams retired on October 31, 1993. Doc. 117 ¶ 52. (DFOF ¶ 139.)

173. Judge Adams strategically retired a year early to permit Judge Cook the opportunity to be appointed, to become known to the Bar, and benefit from incumbency. Tr. IV-85:17-87:21 (Cook); *see also* Tr. I-75:18-23 (Jones). (PFOF ¶ 127)

174. In 1984, Republicans fielded no candidates for appellate judicial offices. Ex. D-103 at 14. (DFOF ¶ 143.)

175. Judge John England testified that he was elected to the Tuscaloosa City Council in 1985 "as a result of [a] lawsuit" he filed challenging the at-large method of electing; before that, "[t]here had been no blacks who had ever served . . . on the city government." Tr. I-32:21-33:12 (England). (PFOF ¶ 126)

176. In 1986, Guy Hunt won the election for Governor as a Republican, defeating Democrat Bill Baxley. Democrats won all other statewide judicial offices. Republicans fielded no candidates for appellate judicial offices. D-103 at 15-16. (DFOF ¶ 144.)

177. In 1988, Democrats won all statewide judicial elections, but Republicans fielded more candidates than in previous years, appearing on the ballot in six of seven races. D-103 at 17. (DFOF ¶ 145.)

178. One of the Democrats who prevailed in 1988 was Alabama Supreme Court Justice Oscar Adams, an African American. Adams defeated Republican Champ Lyons by a vote of 675,216 to 499,058. Ex. D-103 at 17. (DFOF ¶ 146.)

179. In 1990, Democrats won all statewide offices except for Governor. Republicans fielded candidates for Governor, Lt. Governor, Secretary of State, Attorney General, Agricultural Commissioner, State Auditor, and one of six appellate judicial races. D-103 at 18-19. (DFOF ¶ 147.)

180. In 1992, Democrats prevailed in all four appellate judicial races, but Republicans fielded candidates in all four judicial races. D-103 at 20. (DFOF ¶ 148.)

181. In October 1993, Governor Jim Folsom appointed Justice Ralph Cook, who is African American, to fill the vacancy left by Justice Adams' retirement. Doc. 117 ¶ 53. [NOTE: The parties stipulated that Governor James appointed Justice Cook, but Justice Cook clarified at trial that Jim Folsom, Jr. was Governor in 1993, and he appointed Justice Cook, Trial Tr. vol. IV: 85 (Cook).] (DFOF ¶ 149.)

182. In 1994, Judge England's opponent ran advertisements saying that as a civil rights leader, Judge England "couldn't be fair." Tr. I-37:25-38:5 (England). (PFOF ¶ 105)

183. When Justice Cook was elected to the District Court of Jefferson County (Bessemer Division) in 1976, the electorate was about 35% or 36% black. Trial Tr. vol. IV: 77 (Cook). (DFOF ¶ 150.)

184. Absent his appointment to the Supreme Court by the Governor, Judge Cook likely would not have run for that office. Tr. IV-87:16-21 (Cook) (Q. "Do you think you would have run statewide for the supreme court position if you had not been first appointed?" A. "It would have been very, very difficult. And I would have thought long and long and long about it and probably would not have done it. I would not have had the advantages that I've described to you"). (PFOF ¶ 125)

185. In 1994, Justice Cook campaigned in each of Alabama's 67 counties, introducing himself to people who did not know him. Trial Tr. vol. IV: 92 (Cook). (DFOF ¶ 152.)

186. Judge Cook believes that Bobby Allison's signal to White voters was critical to his victory in 1994, yet he still won by only the narrowest of margins, with approximately 50.5% of the vote. Tr. I-126:11-128:22 (White), Tr. IV-88:17-89:22; Tr. Iv-91:14-19 (Cook). (PFOF ¶ 112)

187. Running as a Democrat, Justice Cook won reelection in a statewide campaign in 1994, defeating Republican Mark Montiel by 551,042 votes to 539,947 votes. Doc. 117 ¶ 53. Montiel is white. Doc. 117 ¶ 53; D-103 at 22. (DFOF ¶ 154.)

188. Justice Cook attributes his victories to having a good reputation as a jurist, as one who "called balls and strikes," and to the fact that he tried to respect and treat people fairly. Trial Tr. vol. IV: 91-92 (Cook). (DFOF ¶ 156.)

189. In 1996, Republicans swept the statewide judicial races, winning all five appellate court races on the ballot. Ex. D-103 at 24. (DFOF ¶ 159.)

190. In 1998, Democrat Don Siegelman won the gubernatorial election over Fob James, but Republicans won all other executive offices. In appellate judicial races, Democrats won three of the four races on the ballot. Ex. D-103 at 25-26. (DFOF ¶ 160.)

191. In September 1999, Governor Don Siegelman (a Democrat, Ex. D-103 at 25) appointed Justice John H. England, Jr., who is African American, to fill a vacancy on the Supreme Court of Alabama. Trial Tr. vol. I: 39-40 (England). (DFOF ¶ 161.)

192. Justice Cook again ran for re-election as a Democrat in 2000 and was defeated by Republican Lyn Stuart who had 824,895 votes to his 742,946 votes. Doc. 117 ¶ 53. Stuart is white. Doc. 117 ¶ 53. (DFOF ¶ 165.)

193. Judge Cook's opponent, Lyn Stuart, ran ads in 2000 stating she would be "tough on crime," a message that Cook perceived to be an appeal to White Alabamian voters. (PFOF ¶ 108 (in part).)

194. Democrat John England lost to Republican Tom Woodall in 2000 by a vote of 714,429 to 846,287. Ex. D-103 at 27. (DFOF ¶ 166.)

195. England and Cook, each African-American, received more votes in their races than Al Gore received in the Presidential election in Alabama (692,611). Ex. D-103 at 27. (DFOF ¶ 167.)

196. After losing his 2000 election, Justice England was appointed to fill a vacancy on the Circuit Court of Tuscaloosa County, Alabama. Trial Tr. vol. I: 40 (England). (DFOF ¶ 171.)

197. In 2000, African-American candidate Yvonne Saxon ran in the Democratic primary for the Court of Criminal Appeals and lost. The majority of African-American and White voters supported her White opponent, incumbent Sue Bell Cobb. Ex. P-121 at 15, Table 6; Tr. II-100:3-14;101:11-18 (Handley). (PFOF ¶ 43.)

198. Since 2000, African-American preferred candidates lost every single statewide election Dr. Handley analyzed, except for one election where African-American voters preferred the White candidate. African-American voters were cohesive in every single election analyzed. Tr. II-103:7-10;103:18-25 (Handley). (PFOF ¶ 48)

199. Since 2000, there have been three African American candidates in the general election for Associate Justice in Alabama: Ralph Cook in 2000, John H. England, Jr., in 2000 and 2006, and Gwendolyn Kennedy in 2006. No African American has won an election to any of the three appellate courts since 1994, and no African American has served on these courts since January 2001. Doc. 117 ¶ 55. (DFOF ¶ 173.)

200. Eight statewide judicial election contests since 2000 have included an African American candidate, all of whom ran as Democrats. The African American candidates in these eight election contests are as follows: in 2000, Ralph Cook and John England, Jr. ran for Associate Justice of the Supreme Court of Alabama, and Aubrey Ford ran for the Alabama Court of Criminal Appeals; in 2002, Vicky Toles ran for the Court of Civil Appeals; in 2006, Gwendolyn T. Kennedy and John England, Jr. ran for Associate Justice of the Supreme Court of Alabama, and Aubrey Ford ran for the Alabama Court of Criminal Appeals; and, in 2008, Clyde Jones ran for the Alabama Court of Criminal Appeals. All were defeated by white Republican candidates. Doc. 117 ¶ 63. (DFOF ¶ 174.)

201. In 2006, Sue Bell Cobb, a Democrat, defeated incumbent Drayton Nabers, Jr., a Republican, 634,494 votes to 596,237 votes, for Chief Justice of the Supreme Court of Alabama. Ex. D-103 at 32. Both candidates are white. Doc. 117 ¶ 59. (DFOF ¶ 178.)

202. Justice England ran for Associate Justice in 2006 as a Democrat and was defeated by white Republican Glenn Murdock who had 651,057 votes to England's 532,837 votes. Doc. 117 ¶ 54; Ex. D-103 at 33. (DFOF ¶ 180.)

203. The last time that an African American candidate ran for the Supreme Court of Alabama, the Court of Civil Appeals, or the Court of Criminal Appeals was in 2008. Doc. 117 ¶ 56. (DFOF ¶ 185.)

204. "The term of office of each judge of a court of the judicial system of this state shall be six years." Ala. Const. art., VI § 154. See also doc. 117 ¶ 23. (DFOF ¶ 186.)

205. All nineteen of the current members of the Supreme Court of Alabama, the Court of Civil Appeals, and the Court of Criminal Appeals are white. Doc. 117 ¶ 48. (DFOF ¶ 187.)

206. In 2014, three African American candidates ran as Democrats for statewide non-judicial offices as follows: James Fields ran for Lieutenant Governor, Lula Albert-Kaigler ran for Secretary of State, and Miranda Joseph ran for Auditor. Ex. D-103 at 39. Each was defeated by a white Republican candidate. Doc. 117 ¶ 57; Ex. D-103 at 39. (DFOF ¶ 191.)

207. For the Supreme Court of Alabama in 2018, the Republicans ran two candidates for Chief Justice (Tom Parker and Lyn Stuart), three candidates for Place 1 (Debra Jones, Brad Mendheim, and Sarah Hicks Stewart), one candidate for Place 2 (Tommy Bryan), one candidate for Place 3 (Will Sellers), and two candidates for Place 4 (John Bahakel and Jay Mitchell). The Democrats ran Bob Vance, Jr. for Chief Justice and Donna Wesson Smalley for Place 4. All of these candidates are white. Doc. 117 ¶ 60. (DFOF ¶ 195.)

208. For the Alabama Court of Civil Appeals in 2018, the Republicans ran three candidates for Place 1 (Christy Olinger Edwards, Pat Thetford, and Michelle Manley Thomason), two candidates for Place 2 (Chad Hanson and Terri Willingham Thomas), and one

candidate for Place 3 (Terry A. Moore). The Democrats did not field any candidates for this Court. All of the Republican candidates are white. Doc. 117 ¶ 61. (DFOF ¶ 196.)

209. For the Alabama Court of Criminal Appeals in 2018, the Republicans ran two candidates for Place 1 (Richard Minor and Riggs Walker), three candidates for Place 2 (Rich Anderson, Chris McCool, and Dennis O'Dell), and two candidates for Place 3 (Donna Beaulieu and Bill Cole). The Democrats did not field any candidates for this Court. All of the Republican candidates are white. Doc. 117 ¶ 62. (DFOF ¶ 197.)

210. There are currently 27 African-American Members of the Alabama House of Representatives. Each represents a district that has a majority African-American voting-age population, except for one Member whose district is 47% African American. There are currently seven African-American Members of the Alabama State Senate. All seven represent districts with a majority African-American voting-age population. One white House Member and one white Senator were elected from a majority-African-American district. Only one African American, James Fields of Cullman County, has ever been elected to the Alabama Legislature from a majority-white district, and he was defeated by a white Republican in the next election. Doc. 117 ¶ 58. (DFOF ¶ 205.)

211. Glenn Murdock served as a Judge on the Alabama Court of Criminal Appeals from 2001 to 2007, and as an Alabama Supreme Court Justice from 2007 until January 2018. Trial Tr. vol. VI: 7-8 (Murdock). (DFOF ¶ 236.)

212. The Alabama Democratic Party's 2018 candidate for Governor was white. Trial Tr. vol. VI: 205 (McKee). (DFOF ¶ 277.)

213. The Alabama Democratic Party's 2018 candidate for Chief Justice was white. Trial Tr. vol. VI: 205 (McKee). (DFOF ¶ 278.)

214. Doug Jones, Alabama's junior Senator in the United States Senate, is a Democrat and he is white. Trial Tr. vol. VI: 205 (McKee). (DFOF ¶ 279.)

215. The State chairwoman of the Alabama Democratic Party is white. Trial Tr. vol. VI: 205 (McKee). (DFOF ¶ 280.)

216. Former Justice John England has encouraged younger lawyers and judges who are African American to run as a Republican for judicial offices. Trial Tr. vol. I: 63 (England). (DFOF ¶ 308.)

**Alabama Lawyers and Judges: Demographic Make-Up**

217. Approximately 7% of the Alabama Bar is African American. The State of Alabama has approximately 14,000 lawyers, of whom approximately 1,000 are African American. Doc. 117 ¶ 21. (DFOF ¶ 362.)

218. There are 67 counties in Alabama. Doc. 117 ¶ 42. (DFOF ¶ 363.)

219. The map produced by the Alabama State Bar, filed in this case as document 75-1 and Defendant's Exhibit 63, is an accurate reflection of the number of lawyers in each Alabama County, and may be admitted without need for a witness from the Bar. As the parties previously agreed (see ECF No. 75), (a) the numbers provided on the Bar's web site and set out on the map [ECF No. 75-1] are authentic, so there is no need for a Bar witness; (b) these numbers, while imprecise, are sufficient to make reasonable estimates of the number of potential candidates in the proposed districts; (c) Plaintiffs will provide data for the population splits in the proposed plans where counties are split; and (d) the population splits provide a reasonable basis to allocate the reported lawyers between the two districts that have a portion of the split county. Doc. 117 ¶ 83. (DFOF ¶ 365.)

220. Pursuant to the stipulations in the preceding paragraph, the number of attorneys in

each district of Mr. Cooper's illustrative plans are as follows:

| District | SC1 – 9 Districts | SC2 – 9 Districts | SC3 – 8 Districts | SC4 – 8 Districts |
|---|---|---|---|---|
| **1** | 1948 | 1945 | 2018 | 2019 |
| **2** | 1539 | 1531 | 1684 | 1684 |
| **3** | 772 | 811 | 884 | 826 |
| **4** | 779 | 747 | 662 | 1121 |
| **5** | 4175 | 4194 | 4650 | 3595 |
| **6** | 1882 | 1880 | 1559 | 2603 |
| **7** | 584 | 636 | 1206 | 685 |
| **8** | 1120 | 1068 | 1071 | 1201 |
| **9** | 935 | 921 | | |
| **Total** | **13734** | **13734** | **13734** | **13734** |

| District | AC1 – 5 Districts | AC2 – 5 Districts | AC3 – 5 Districts | AC4 – 5 Districts |
|---|---|---|---|---|
| **1** | 5545 | 5545 | 5580 | 5621 |
| **2** | 2271 | 2244 | 2227 | 2252 |
| **3** | 1479 | 1506 | 1471 | 1561 |
| **4** | 2861 | 2861 | 2853 | 2789 |
| **5** | 1578 | 1578 | 1603 | 1511 |
| **Total** | **13734** | **13734** | **13734** | **13734** |

Doc. 117 ¶ 84. (DFOF ¶ 366.)

221. The parties stipulated to information obtained from the Alabama Bar Association showing, as of November 2018, the number of lawyers in each county and the number of African-American lawyers in each county, as shown on the following chart (filed as Ex. D-101 and D-102):

| County | Caucasian | African- | Other | Total |
|---|---|---|---|---|
| "Invalid" | 33 | 4 | 0 | 37 |
| Autauga | 75 | 1 | 1 | 77 |
| Baldwin | 550 | 7 | 6 | 563 |

| | | | | |
|---|---|---|---|---|
| Barbour | 35 | 0 | 0 | 35 |
| Bibb | 18 | 1 | 0 | 19 |
| Blount | 51 | 1 | 0 | 52 |
| Bullock | 15 | 3 | 0 | 18 |
| Butler | 26 | 1 | 0 | 27 |
| Calhoun | 193 | 8 | 1 | 202 |
| Chambers | 32 | 1 | 1 | 34 |
| Cherokee | 16 | 0 | 0 | 16 |
| Chilton | 43 | 1 | 0 | 44 |
| Choctaw | 17 | 0 | 0 | 17 |
| Clarke | 30 | 0 | 0 | 30 |
| Clay | 13 | 0 | 0 | 13 |
| Cleburne | 8 | 0 | 0 | 8 |
| Coffee | 83 | 1 | 0 | 84 |
| Colbert | 77 | 2 | 0 | 79 |
| Conecuh | 10 | 2 | 0 | 12 |
| Coosa | 5 | 1 | 0 | 6 |
| Covington | 55 | 0 | 2 | 57 |
| Crenshaw | 13 | 0 | 0 | 13 |
| Cullman | 103 | 1 | 0 | 104 |
| Dale | 38 | 1 | 1 | 40 |
| Dallas | 46 | 26 | 0 | 72 |
| Dekalb | 67 | 0 | 0 | 67 |
| Elmore | 120 | 5 | 0 | 125 |
| Escambia | 49 | 1 | 0 | 50 |
| Etowah | 165 | 6 | 0 | 171 |
| Fayette | 14 | 1 | 0 | 15 |
| Franklin | 21 | 0 | 2 | 23 |
| Geneva | 24 | 0 | 0 | 24 |
| Greene | 7 | 3 | 0 | 10 |
| Hale | 10 | 3 | 0 | 13 |
| Henry | 18 | 0 | 0 | 18 |
| Houston | 238 | 2 | 2 | 242 |
| Jackson | 48 | 0 | 2 | 50 |
| Jefferson | 4,981 | 509 | 69 | 5,559 |
| Lamar | 11 | 0 | 0 | 11 |

| | | | | |
|---|---|---|---|---|
| Lauderdale | 191 | 4 | 2 | 197 |
| Lawrence | 32 | 1 | 0 | 33 |
| Lee | 255 | 3 | 2 | 260 |
| Limestone | 73 | 2 | 2 | 77 |
| Lowndes | 8 | 2 | 0 | 10 |
| Macon | 5 | 20 | 0 | 25 |
| Madison | 877 | 74 | 19 | 970 |
| Marengo | 19 | 1 | 1 | 21 |
| Marion | 32 | 0 | 1 | 33 |
| Marshall | 120 | 1 | 2 | 123 |
| Mobile | 1,220 | 69 | 13 | 1,302 |
| Monroe | 30 | 3 | 0 | 33 |
| Montgomer | 1,461 | 189 | 13 | 1,663 |
| Morgan | 154 | 5 | 1 | 160 |
| Perry | 8 | 3 | 0 | 11 |
| Pickens | 19 | 0 | 0 | 19 |
| Pike | 48 | 1 | 2 | 51 |
| Randolph | 14 | 0 | 1 | 15 |
| Russell | 55 | 3 | 1 | 59 |
| Shelby | 672 | 41 | 4 | 717 |
| St. Clair | 101 | 1 | 0 | 102 |
| Sumter | 15 | 2 | 0 | 17 |
| Talladega | 89 | 5 | 0 | 94 |
| Tallapoosa | 58 | 1 | 0 | 59 |
| Tuscaloosa | 544 | 21 | 2 | 567 |
| Walker | 123 | 4 | 1 | 128 |
| Washingto | 18 | 0 | 0 | 18 |
| Wilcox | 7 | 4 | 0 | 11 |
| Winston | 28 | 0 | 0 | 28 |
| Total | 13,634 | 1,052 | 154 | 14,840 |

(DFOF ¶ 368.)

222. Exhibit D-1, admitted by stipulation (see doc. 117 ¶ 85) lists the county of residence of the 165 persons who have served as a judge on one of Alabama's appellate courts. Ex. D-1 is dated 9/6/2017. Sixty-one out of 165 persons (36.97%) who have served on Alabama appellate courts lived in either Jefferson County (17) or Montgomery County (44) when elected

or appointed. Ex. D-1. To focus on more modern times, one could eliminate persons admitted to the Bar before 1900 and narrow the list down to 92 persons. Of those, 49 persons (37.82%) lived in either Jefferson County (12) or Montgomery County (32) when first elected or appointed. (DFOF ¶ 370.)

223. According to the Alabama Judicial System's web site, which the parties stipulated to contain a complete list of all judges and justices (see doc. 117 ¶ 85), members of the Alabama Appellate Courts at the time the trial started and their counties of residence when first appointed or elected are as follows:

**Alabama Supreme Court**

| | |
|---|---|
| Lyn Stuart, C.J. | Baldwin |
| Michael F. Bolin | Jefferson |
| Tommy Bryan | Montgomery |
| James Main | Montgomery |
| Brady E. Mendheim Jr. | Houston |
| Tom Parker | Montgomery |
| William B. Sellers | Montgomery |
| Gregory Shaw | Montgomery |
| Alisa Kelli Wise | Montgomery |

**Alabama Court of Civil Appeals**

| | |
|---|---|
| Scott Donaldson | Tuscaloosa |
| Terry A. Moore | Mobile |
| Craig Pittman | Mobile |
| Terri Thomas | Cullman |
| William C. Thompson | Jefferson |

**Alabama Court of Criminal Appeals**

| | |
|---|---|
| Michael Joiner | Shelby |
| J. Elizabeth Kellum | Montgomery |
| Samuel Welch | Monroe |
| Mary B. Windom | Montgomery |

(DFOF ¶ 371.)

224. Liles Burke, of Marshall County, was a Judge on the Alabama Court of Criminal Appeals until October 2018, when he became a federal judge. His seat was vacant the day trial started. (DFOF ¶ 372.)

225. A review of the 2018 election returns and the information currently available at the Alabama Judicial System's web site shows that the newly-elected appellate judges include Sarah H. Stewart of Mobile County and Jay Mitchell of Jefferson County. See Ex. D-103 at 43-44 and doc. 117 ¶ 85. (DFOF ¶ 373.)

226. The same documents show that the newly-elected judges on the Court of Criminal Appeals are J. William Cole of Jefferson County, Richard J. Minor of St. Clair County, and J. Chris McCool of Pickens County. See Ex. D-103 at 43-44 and doc. 117 ¶ 85. These documents also reflect that McCool took office in 2018. Defendants understand that McCool was sworn in while the trial was on-going. (DFOF ¶ 374.)

227. The same documents show that the newly-elected judges on the Court of Civil Appeals are Christy Edwards of Montgomery County and Chad A. Hanson of Jefferson County. See Ex. D-103 at 43-44 and doc. 117 ¶ 85. (DFOF ¶ 375.)

228. The current members of the Alabama Appellate Courts and their counties of residence when first appointed or elected are as follows:

**Alabama Supreme Court**

| | |
|---|---|
| Tom Parker, C.J. | Montgomery |
| Michael F. Bolin | Jefferson |
| Tommy Bryan | Montgomery |
| Brady E. Mendheim, Jr. | Houston |
| Jay Mitchell | Jefferson |
| William B. Sellers | Montgomery |
| Gregory Shaw | Montgomery |
| Sarah H. Stewart | Mobile |
| Alisa Kelli Wise | Montgomery |

**Alabama Court of Civil Appeals**

| | |
|---|---|
| Scott Donaldson | Tuscaloosa |
| Christy Edwards | Montgomery |
| Chad A. Hanson | Jefferson |
| Terry A. Moore | Mobile |
| William C. Thompson | Jefferson |

**Alabama Court of Criminal Appeals**

| | |
|---|---|
| J. William Cole | Jefferson |
| J. Elizabeth Kellum | Montgomery |
| J. Chris McCool | Pickens |
| Richard J. Minor | St. Clair |
| Mary B. Windom | Montgomery |

(DFOF ¶ 376.)

**Partisan v. Non-partisan Elections**

229. Plaintiffs have not requested that the Court order Alabama to move to non-partisan elections as a form of relief for their alleged injuries. However, the Court took testimony on the advantages and disadvantages of partisan and nonpartisan elections as part of its understanding and evaluation of the totality of the circumstances. (DFOF ¶ 378.)

230. Judge Clyde Jones, who has campaigned for Alabama appellate and trial court positions, testified that switching to non-partisan judicial elections "would not change a thing in Alabama" because people would still know who the Republican and Democratic candidates are. Trial Tr. vol. I: 109-10 (Jones). (DFOF ¶ 386.)

231. Similarly, when Justice Murdock was asked "If Alabama had nonpartisan elections, do you think that candidates would use code words to try to convey that they are Republicans?", he answered "Yes. I think they would use the word 'Republican.'" Trial Tr. vol. VI: 39 (Murdock). Justice Murdock continued, "I think they would put elephants on their signs, like they do now, and they would say, vote for John Smith, the Republican choice for Supreme Court, the Republican -- your Republican choice for Court of Civil Appeals, the conservative

Republican candidate for the Court of Criminal Appeals. Absolutely." Trial Tr. vol. VI: 39 (Murdock). (DFOF ¶ 387.)

232. Non-partisan elections probably would not have a tremendous impact on money a judicial candidate would have to raise, and it would not eliminate polarized voting. Trial Tr. vol. IV: 127 (Cook). (DFOF ¶ 390.)

**Polarized Voting**

233. Around 83% of African-Americans in Alabama identify as strong or weak Democrat, and 50 % of white voters in Alabama identify as strong or weak Republican. Ex. P-123 at 45 (Figure 2). (DFOF ¶ 408.)

234. According to Dr. Handley's analysis, around 30% of white voters supported the candidates of choice for African-American voters in all of the General Elections for judicial office that Handley analyzed, except for Clyde Jones, and he received about a quarter of the white vote:

| *General Elections* | | Percent of White Voters who Support | |
|---|---|---|---|
| **Judicial Office** | **Candidate of Choice for African American Voters** | **Two-Equation Regression** | **Ecological Inference: King** |
| **2000** | | | |
| Supreme Court Place 1 | Ralph Cook | 37.4% | 35.8% |
| Supreme Court Place 3 | John England, Jr. | 35.2% | 32.8% |
| Court of Criminal Appeals Place 2 | Aubrey Ford, Jr. | 34.0% | 32.7% |
| **2002** | | | |
| Court of Civil Appeals | Vicky Toles | 32.0% | 30.3% |
| **2006** | | | |
| Supreme Court Place 2 | Gwendolyn T. Kennedy | 32.4% | 31.3% |
| Supreme Court Place 4 | John England, Jr. | 34.0% | 31.7% |
| Court of Criminal Appeals Place 1 | Aubrey Ford, Jr. | 34.7% | 33.0% |
| **2008** | | | |
| Court of Criminal Appeals Place 1 | Clyde Jones | 26.9% | 24.7% |

Ex. P-121 at 17-22 (tables). (DFOF ¶ 416.)

235. Handley applied statistical techniques "to produce estimates of the percentage of blacks who voted for each candidate and the percentage of whites who voted for each of those candidates." Trial Tr. vol. II: 77-78 (Handley). (DFOF ¶ 423.)

236. Bonneau assumed Handley's analysis was correctly performed. Trial Tr. vol. V:17 (Bonneau). (DFOF ¶ 436.)

237. Today Alabama is a one-party Republican dominated state, where the majority of Whites align with the Republican Party and the majority of African Americans align with the Democratic Party. Ex. P-123 at 39-45, Tr. VI-183:25-184:25 (McKee). (PFOF ¶ 157)

238. Most White Alabama voters had been life-long Democrats, and Alabama Democratic officials in offices below the presidential level were largely "unreconstructed" through the mid-1970s. They continued to support segregation despite the national Democratic Party's position on race causing a split-level alignment: White voters realigned to the Republican Party at the presidential level; but remained aligned with the Democratic Party below the presidential level. Tr. VI-156:22-157:19;159:13-161:11 (McKee). (PFOF ¶ 167)

239. Today, every single one of Alabama's Republican Legislators is white; there are no Republicans in the Alabama Legislative Black Caucus. Tr. III-207:17-208:21 (Hall). (PFOF ¶ 181)

240. At the time of trial, of the Alabama's 42 Democratic State Legislators, 35 were African American. Tr. III-209:21-210:14 (Hall). (PFOF ¶ 183)

**Past Discrimination**

241. During Reconstruction, no African Americans were elected to statewide offices in Alabama. Doc. 117 ¶ 8. (DFOF ¶ 446.)

242. White Radical Republicans dominated the 1867 Constitutional Convention, which adopted Alabama's Reconstruction Constitution that enfranchised blacks and was ratified in 1868. Democrats and many Republican members of the Convention wanted Supreme Court justices to be appointed, as was done in other Republican controlled Southern states. But Whites were being encouraged to boycott the 1868 ratification election, and the Radicals put popular election of Supreme Court justices in the Constitution, betting that, with the help of the Black vote, they could win all seats. The Republican slate of three White justices did win in the same, white-boycotted election that ratified the 1868 Constitution, but the Republicans lost their bet when the Conservative Democratic slate won in the 1874 Redeemer elections. No Republican

would again be elected to the Alabama Supreme Court until Perry Hooper Sr. in 1994. No Blacks were elected to any statewide offices during Reconstruction, and Roddy Thomas, who was elected to a circuit judgeship in Dallas County, was the only black judge elected at any level until 1970, when William McKinley Branch was elected probate judge in Greene County. Tr. III-174:4-181:17 (Norrell). (PFOF ¶ 69)

243. The 1868 Constitution, Article VI, § 11, provided: "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...." The 1875 Constitution, Article VI, § 12, provided: "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...." (PFOF ¶ 70 n.3)

244. A purpose of the 1901 Constitution was to disenfranchise African Americans. *See Hunter v. Underwood*, 471 U.S. 222 (1985). Doc. 117 ¶ 11. (DFOF ¶ 447.)

245. After 1901 White factions still challenged Conservative Redeemers' control of white solidarity. In 1915 a Prohibitionist faction pushed a second-choice primary statute through the Legislature, which removed the majority-vote requirement for primary elections and allowed voters to select a second choice for each statewide office. If no candidate received a majority of first-choice votes, the second-choice votes for each candidate were added to his total. The second-choice system gave the candidates of minority factions a better chance to win the primary and endangered White solidarity. Tr. III-198:22-199:21 (Norrell). "[T]he necessity for white – racial solidarity and party unity was always a concern among the Conservative Redeemers,"

because a few thousand Blacks were still on the voter rolls, and in a close general election they potentially could swing the election for a Republican. NAACP branches were founded in four Alabama cities in the 1920s, and civil rights leaders like John LeFlore of Mobile were becoming very active. Tr. III-240:23-242:9 (Norrell). So the Conservative Redeemers were always worried about "a resurgence of black political influence." Tr. III-201:2-25 (Norrell). A Conservative push for a change to appointed judgeships failed. Supreme Court candidates had to run in the second-choice primary, and in 1926 several candidates favored by the Prohibitionists and the Ku Klux Klan were elected to statewide offices, including Bascom Brown for the Supreme Court, Bibb Graves for Governor, and Hugo Black for U.S. Senate. Tr. III-202:1-20 (Norrell). (PFOF ¶ 73)

246. **Alabama Statewide White Primary**: In 1902 the State Democratic Party compounded the disenfranchising effects of the 1901 Constitution with a Whites-only primary for statewide elections, including appellate judicial elections. Tr. III-190:19-192:9 (Norrell). Alabama's Democratic Party used the statewide, Whites-only primary to foster solidarity among various White factions to ensure White supremacy and White control at the polls. Id.; Ex. P-85 at 13 ("The origins of the statewide primary [ ] lay with the need to mollify Populist and anti-Redeemer whites and to reconcile them to the Democratic Party—with the understanding that the change in electoral form would bolster white supremacy"). Alabama's Governor Oates viewed the Whites-only primary as a means to "purify politics," stating "a fair White primary means economy, wise government, elimination of the negro and the correction of all errors and abuses." Ex. P-85 at 13-14; Tr. III-191:7-15 (Norrell). (PFOF ¶ 58)

247. The Conservative Redeemer faction regained control after the Prohibitionist-Klan faction opposed Al Smith, the wet, pro-alcohol Democratic nominee for President, and voted for Republican Herbert Hoover in 1928. Redeemer Democrats like Sam Earle Hobbs campaigned

among White voters urging them not to break ranks with the Democratic Party. Hobbs recalled the dark days of Reconstruction and time and again referred to the black circuit Judge Roddy Thomas. Tr. III 242:16-244:3 (Norrell). Senator "Cotton" Tom Heflin was denied the right to run on the Democratic ticket in Alabama because of his "bolt" for Herbert Hoover. The Conservative Democrats swept the 1930 Alabama elections and undid the whole Prohibitionist-Klan faction. Tr. III 252:5-23 (Norrell). (PFOF ¶ 75)

248. In 1946, the Alabama Legislature enacted the Boswell Amendment. The Boswell Amendment required individuals who applied to register to vote in Alabama to be able to read and write, and to "understand and explain" any article of the U.S. Constitution. The Boswell Amendment was declared unconstitutional in violation of the Fifteenth Amendment in *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949) (three judge court), *aff'd* 336 U.S. 933 (1949). Doc. 117 ¶ 16. (DFOF ¶ 450.)

249. **Boswell Amendment**: In 1946, after several federal court decisions that invalidated disenfranchising tools used throughout the South—including the Supreme Court's 1944 decision in *Smith v. Allwright* outlawing White primaries—Alabama enacted the Boswell Amendment to keep African Americans from gaining voting strength. Ex. P-85 at 22; Tr. III-256:1-257:9; 258:4-259:9 (Norrell). The Boswell Amendment demanded that all new voting applicants demonstrate an "understanding" of the U.S. Constitution to be eligible to vote and delegated discretion to the State's Board of Registrars to determine who passed the test. Ex. P-85 at 22; Tr. III-258:13-18 (Norrell). The law prevented, as intended, many African Americans from registering to vote. Tr. II-210:12-22 (McCrary). (PFOF ¶ 60)

250. ***Davis v. Schnell* findings re Boswell Amendment**: In 1949, the Boswell Amendment was struck down by a federal court, which found that the Amendment "gave

abundant discretion to voter registrars to interpret how ... a prospective registrant understood constitutional provisions" and such discretion was used to ensure the disenfranchisement of African Americans seeking the ability to register to vote. Tr. II-210:23-211:1 (McCrary). (PFOF ¶ 61)

251. Ten years after *Brown v. Board of Education*, African-American students were still not allowed to attend the state's law school, forcing Judge Cook to attend law school out of state at Howard University. Tr. IV-73:11-74:8 (Cook). (PFOF ¶ 94)

252. In 1957, the Alabama Legislature passed a law to gerrymander nearly all African Americans out of the city of Tuskegee. *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Doc. 117 ¶ 17. (DFOF ¶ 451.)

253. The most recent objections that the Department of Justice made to any Alabama State law submitted for preclearance was 1994. Trial Tr. vol. III: 40 (McCrary). (DFOF ¶ 457.)

## PLAINTIFFS' PROPOSED FINDINGS OF FACT TO WHICH DEFENDANTS CANNOT STIPULATE

The following is a list of Plaintiffs' Proposed Findings of Fact to which Defendants cannot stipulate, pursuant to paragraph 2(b) of the Court's Order:

**Plaintiffs Have Standing**

1. Districting would redress Curtis Travis's injuries from dilution of African American votes for appellate judges in Alabama whether or not he would reside in a majority-minority district in a final remedial plan drawn by the State. Tr. II-20:18-22 (Travis). (PFOF ¶ 14.)

2. Districting would redress John Harris's injuries from dilution of African American votes for appellate judges in Alabama whether or not he would reside in a majority-minority district in a final remedial plan drawn by the State. Tr. II-61:12-62:2 (Harris). (PFOF ¶ 23.)

***Gingles* Prong 1 – The Subject Minority Group Is "Sufficiently Large And Geographically Compact."**

3. The testimony and illustrative districting plans of expert witness Mr. William Cooper prove that African Americans in Alabama make up a minority group that is sufficiently large and geographically compact to be a majority of the voting age population in a single-member district for the Alabama Supreme Court and for the Alabama Courts of Civil and Criminal Appeals under multiple districting options. (PFOF ¶ 25.)

4. Mr. Cooper is qualified to testify as an expert on judicial election district plans in Alabama. Tr. II-150:12-16 (Cooper). (PFOF ¶ 26.)

5. In Illustrative Plan SC 1 for the Supreme Court, African Americans comprise 55.30% of the voting age population in Mr. Cooper's potential District 1 and 50.28% of the voting age population in Mr. Cooper's potential District 5 and therefore as a group they are "sufficiently large" under *Gingles* Prong 1. *See* Tr. Exs. P-95 through P-97; Tr. II-166:6-10 (Cooper). (PFOF ¶ 28.)

6. In Mr. Cooper's Illustrative Plan AC 1 for the Courts of Civil and Criminal Appeals, African Americans comprise 56.27% of the voting-age population in Mr. Cooper's potential District 1 and therefore as a group are "sufficiently large" under *Gingles* Prong 1.[1] Tr. Exs. P-107 through P-109; Tr. II-169:3-172:13 (Cooper). (PFOF ¶ 29.)

7. Mr. Cooper's other illustrative plans for these Courts also satisfy the majority requirement for particular districts. Tr. II-168:21-169:2 (Cooper); Tr. Exs. P-95 through P-97 (Illustrative Plan SC 1); P-98 through P-100 (Illustrative Plan SC 2); P-101 through P-103 (Illustrative Plan SC 3); P-104 through P-106 (Illustrative Plan SC 4); P-107 through P-109 (Illustrative Plan AC 1); P-110 through P-112 (Illustrative Plan AC 2); P-113 through P-115 (Illustrative Plan AC 3); P-116 through P-118 (Illustrative Plan AC 4). (PFOF ¶ 29, n.1.)

8. Plaintiffs' potential districting plans also reflect the required geographic compactness. The plans show contiguous districts; they split administrative boundaries only when necessary; and they satisfy the one-person, one-vote criteria. Tr. II-152:19-153:23;155:18-22;168:21-169:2 (Cooper). (PFOF ¶ 30.)

**_Gingles_ Prongs 2 and 3 – Alabama's African-American Voters Are Politically Cohesive, And The White Majority Votes As A Bloc To Enable It To Usually Defeat The African-American Preferred Candidates**

9. The State of Alabama is more than one-quarter African American, and all 19 of its appellate judges are White. Joint Stip. ¶¶ 18, 48. (PFOF ¶ 31.)

10. No African American has ever been elected to the Alabama Courts of Civil or Criminal Appeals. Joint Stip. ¶ 49. (PFOF ¶ 32.)

11. No African American has won an election for the Alabama Supreme Court since 1994. Joint Stip. ¶ 55. (PFOF ¶ 33.)

12. No African American has won an election for the Alabama Supreme Court without first being appointed to office by the Governor—and that has only occurred three times in almost 200 years. Joint Stip. ¶¶ 50-54. (PFOF ¶ 34.)

13. Dr. Lisa Handley is qualified to testify as an expert in the field of minority vote dilution analysis. Tr. II-67:22-68:6 (Handley). (PFOF ¶ 36.)

14. Plaintiffs' expert Dr. Lisa Handley applied each of the three court-accepted techniques – ecological inference, ecological regression, and homogenous precinct analysis – to estimate the proportion of each racial group that voted for each candidate in these eight elections. Ex. P-121 at 6-10. (PFOF ¶ 38.)

15. Dr. Handley used county-level data—the only data the Alabama Secretary of State makes publicly available—from all 67 Alabama counties, which provided the demographic

spread needed to conduct the analyses, and precinct-level data from Jefferson County, the largest in Alabama, the largest county in the State. The application of all three statistical methods to both data sets demonstrated a clear pattern of racially polarized voting. Tr. II-76:5-77:1;94:1518 (Handley) Ex. P-121 at 5-6, 11-16. (PFOF ¶ 39.)

16. Dr. Handley concluded and the Court finds that all eight election contests were racially polarized. Ex. P-121 at 12, 15, Tr. II-73:1-8;94:15-19 (Handley); *see also* Tr. VI-192:19-193:5 (McKee). Dr. Lisa Handley's analysis proves that over the last twenty years, voting has been racially polarized and African-American voters have consistently been unable to elect their statewide judicial candidates of choice. Tr. II-69:2-4;103:7-10 (Handley). (PFOF ¶ 40.)

17. Dr. Handley analyzed two Democratic primaries for statewide judicial office that included African-American candidates. The only instance where voting was not racially polarized was when African-American voters preferred a White candidate. Ex. P-121 at 15, Tr. II-73:9-13 (Handley). (PFOF ¶ 41.)

18. In 2000, two African-American incumbents, Ralph Cook and John England, Jr., ran for the Alabama Supreme Court and lost; and African-American candidate Aubrey Ford, Jr. ran for the Court of Criminal Appeals and lost. African-American voters overwhelmingly voted for the African-American candidates, and a strong majority of White voters supported their opponents. Ex. P-121 at 12-13, Table 1; Tr. II-95:17-98:9 (Handley). (PFOF ¶ 42.)

19. In 2002, African-American candidate Vicky Toles ran for the Court of Criminal Appeals and lost. African-American voters overwhelmingly voted for her and a strong majority of White voters supported her White opponent. Ex. P-121 at 13, Table 2; Tr. II-98:19-22 (Handley). (PFOF ¶ 44.)

20. In 2006, African-American candidates Gwendolyn Kennedy and John England,

Jr. ran for the Alabama Supreme Court and lost, and African-American candidate Aubrey Ford, Jr. ran for the Court of Criminal Appeals and lost. African-American voters overwhelmingly voted for the African-American candidates, and White voters strongly supported their White opponents. Ex. P-121 at 13-14, Table 3; Tr. II-98:23-99:1(Handley). (PFOF ¶ 45.)

21. In 2008, Judge Clyde Jones ran for a seat on the Court of Criminal Appeals and lost. African-American voters overwhelmingly supported Jones. White voters strongly supported his opponent. Ex. P-121 at 14, Table 4; Tr. II-99:16-23 (Handley). (PFOF ¶ 46.)

22. The three African American candidates who ran in the 2014 general elections for statewide non-judicial office each lost. The contests were remarkably racially polarized, and White voters overwhelmingly supported their White opponents. Ex. P-121 at 14, Table 6; Tr. II-101:20-102:2 (Handley). (PFOF ¶ 47.)

23. The complete inability of African-American voters to elect African-American judges deprives those voters of the full opportunity, equal to that of White voters, to elect their preferred candidates. Tr. II-73:17-74:3 (Handley). (PFOF ¶ 49.)

24. Defendants' proposed expert witness, Dr. Bonneau, does not dispute Dr. Handley's findings. Tr. V-17:5-19;26:17-27:22;84:6-11 (Bonneau). (PFOF ¶ 50.)

25. Dr. Bonneau suggests he may have done things differently but he is unqualified to opine on racially polarized voting. He has no experience in racially polarized voting analyses, he has never been qualified by any court as an expert in racially polarized voting, and, indeed, never attempts to use any of the three judicially-accepted statistical methods for assessing racially polarized voting. Dkt. Nos. 100, 104; Tr. V-80:23-86:11;93:9-94:4 (Bonneau). (PFOF ¶ 51.)

26. From 2000 to 2016, the percentage of White registered voters who vote in Democratic primaries declined. In 2000, 5-10% of White registered Alabamian voters cast

ballots in the Democratic primary. In 2008, this percentage decreased to between 3 and 6% of White registered voters. In 2016, just 1 to 2% of White registered voters cast a ballot in the Democratic primary for U.S. Senate. Ex. P-121 at 15 n.29. (PFOF ¶ 52.)

27. Voting patterns have become even more racially polarized between 2000 and the present. The percentage of Black registered voters supporting African-American candidates in general elections has remained relatively constant over period. In 2000, between 82 and 90% of Black voters supported the three African Americans running for statewide judicial office. In 2008, between 90 and 94% of Black voters supported the sole African American competing for a statewide judicial seat. In 2014, between 85 and 93% of Black voters supported the African-American candidate for U.S. Senate. Ex. P-121 at 17-18, 22, 24. (PFOF ¶ 53.)

28. To assess the degree to which voting continues to be polarized, Dr. Handley examined three non-judicial contests from 2014. Ex. P-121 at 14. (PFOF ¶ 53, n.2.)

29. The percentage of White registered voters supporting African-American candidates in general elections has declined dramatically over time. In 2000, roughly a third of White voters supported the three African Americans running for statewide judicial office. In 2008, about 25% of White voters supported the sole African American competing for a statewide judicial seat. By 2014, this percentage had decreased to between 14 and 18%. Ex. P-121 at 14 n.28. (PFOF ¶ 54.)

**Totality Factor 1 – Alabama's History of State-Sponsored Voting Discrimination and Dilutive Mechanisms**

30. Alabama has a long history of official racial discrimination with respect to voting rights. (PFOF ¶ 55.)

31. The Court heard testimony on Alabama history from Dr. Jeff Norrell and Dr. Peyton McCrary. Drs. Norrell and McCrary are qualified to testify as expert on Alabama history

and voting rights history and the analysis of voting behavior, respectively. Tr. II-206:1-6 (McCrary); III-166:22-25 (Norrell). (PFOF ¶ 56.)

32. **The 1901 State Constitution:** In the wake of Reconstruction, conservative Whites retook control of Alabama in 1874 and in 1901 and enacted a state constitution that had the primary purpose of disenfranchising African Americans. Tr. III-190:2-18 (Norrell). Plaintiffs' expert Dr. Jeff Norrell testified: "[T]he big thing that the 1901 Constitution did was to disenfranchise African American voters." Tr. III-190:4-5 (Norrell). The 1901 Constitution "set a literacy requirement, a property requirement, established a cumulative poll tax" and was successful at removing "all but 3,000 of the approximately 100,000 black people who were still on the voting rolls in 1901." Tr. III-190:7-15 (Norrell). While courts over time have invalidated many of these disenfranchising mechanisms, the 1901 Constitution remains in place today. Ex. P-85 at 13. (PFOF ¶ 57.)

33. **1927 Law – Statewide Election of Judges – Discriminatory Purpose**: "[R]ace was a factor" in Alabama's passage of a 1927 law ("Act 348") creating numbered posts for the election of statewide officeholders, including appellate judges. Tr. III-240:10-19 (Norrell); Ex. P-1. Leading up to Act 348's passage, factions within Alabama's Democratic Party had threatened White solidarity at the polls. Tr. III-242:16-244:9 (Norrell) ("And so I think it's a fairly straight line to see that racial solidarity became – had sort of new importance to especially the Conservative Democrats"). This circumstance, coupled with growing Black political strength through civil rights activists and organizations like the NAACP, caused concern among conservative White Alabamians that they would lose their political power. Tr. III-241:5-242 (Norrell) ("And it occurred and sort of indicated, I think, to the white folks' influence and power that African Americans were not going to be docile about their rights going, after World War

I."); Tr. III-246:9-250:4. The motivation for Act 348 was to "solidify white unity behind incumbents" to quell the threat of Republican "black" rule. Tr. III-251:1-5 (Norrell). (PFOF ¶ 59.)

34. **Voter Qualification Amendment & Literacy Tests:** As was common in Alabama when a mechanism for African-American voter disenfranchisement was found unconstitutional and overturned, the Alabama Legislature sought to refine the mechanism to cure the constitutional defect, while still having the same effect on the ability of African Americans to register and vote. Tr. II-210:7-212:12 (McCrary); Ex. P-122 ¶ 17. In response to the decision in *Davis v. Schnell*, in 1951, the Alabama Legislature adopted a new constitutional amendment that charged the Alabama Supreme Court with devising a racially discriminatory literacy test that the registrars could implement. This test was in effect until it was struck down pursuant to Section 4 of the Voting Rights Act in 1965. Tr. II-211:8-14 (McCrary). This Alabama Constitutional Amendment created a mechanism by which the all-White Alabama Supreme Court itself became a tool for disenfranchising African-American voters in Alabama when, in 1961, the Alabama Legislature "charged the Supreme Court with devising a series of questionnaires to administer the literacy test that could be alternated on a month-by-month basis," which would prevent civil rights organizations from training African Americans in how to pass the literacy test. Tr. II-212:20-213:6 (McCrary). (PFOF ¶ 62.)

35. **Act 221:** In 1961, the Alabama Legislature enacted Act 221, which was designed to apply to all elections in Alabama conducted on an at-large election basis. While it is true that the 1927 law was the advent of at-large elections for judicial positions in Alabama, the 1961 law was written to apply to all elections conducted on an at-large election basis, so as written would have also applied to judicial elections. Act 221 required all candidates for these at-large positions

to qualify for a particular place or post, which effectively eliminated single-shot voting in Alabama. Tr. III-23:9-16 (McCrary); *see also* Ex. P-85 at 23 ("The purpose of Act 221 was to ensure white majoritarian control in every election, including appellate court elections"). Conservative Democrat Frank Mizell, who endorsed the law, argued that African Americans were prone to single-shot voting, "which could be prevented by [the] numbered-post arrangement" contemplated by the law. Ex. P-85 at 23. (PFOF ¶ 63.)

36. **Barriers to African Americans in Legal Profession:** As Professor McCrary noted in his testimony at trial, Alabama's long history of racially segregated education has had a lasting impact on the African-American community in Alabama, and especially for Black lawyers. For many years they were forced to go out of the state to seek a legal education: they were barred from admission to the State's only accredited law school (the University of Alabama). Judge Cook was forced to leave Alabama to attend law school out of state at Howard University. Tr. IV-73:11-74:8 (Cook). This not only prevented many Black Alabamians from seeking a law degree, but served to reduce the number of Black lawyers who might challenge the racially discriminatory institutions that existed in Alabama. Tr. II-214:14-216:2 (McCrary). (PFOF ¶ 64.)

37. **Preclearance Enforcement by DOJ:** The Voting Rights Act of 1965 authorized the Justice Department to send federal observers to examine elections and authorized federal examiners to register voters in jurisdictions where there was evidence that local registrars were not participating in a fair registration process. This was certainly the case in Alabama for many years, as Professor McCrary noted at trial and explained in more detail in his declaration. Tr. II-216:15-21 (McCrary); Ex. P-122 ¶ 22-23. This intervention by the federal government led to a dramatic increase in Black voter registration and participation in the electoral process. The

Voting Rights Act also dismantled many of the institutional mechanisms that had been used to disenfranchise Black voters. (PFOF ¶ 65.)

38. In 1986, in *Dillard v. Crenshaw County*, a case that involved challenges under the Voting Rights Act to Alabama county commissions that retained at-large elections, where historically no African Americans had been elected to the commissions, a federal court made findings about the history of discrimination in Alabama that affected voting and the intent underlying the maintenance of at-large elections by Alabama. Tr. II-220:1-10 (McCrary); *see Dillard v. Crenshaw Cty.*, 640 F.Supp. 1347 (M.D. Ala. 1986). Almost all challenged jurisdictions agreed to settle the lawsuit. Tr. II-220:16-17 (McCrary). Primarily as a result of that litigation, African-American representation in Alabama local governing bodies increased. Tr. II-219:23-221:6 (McCrary). (PFOF ¶ 66.)

39. Dr. Robert J. Norrell focused his testimony on the history of racial discrimination underlying the methods used to elect members of the Alabama Supreme Court and the Courts of Appeals. He "concluded that race has persistently been a factor in the maintenance of electoral forms and the rules for implementing those forms for the selection of judges in Alabama. And I further concluded that the at-large method was changed as needed from 1868 to 1973 to preserve white supremacy." Tr. III-168:4-8 (Norrell). (PFOF ¶ 67.)

40. Under the Alabama Constitutions of 1819 and 1865 only white males could vote. Slaves and free blacks were disfranchised. Tr. III-169:7-13 (Norrell). Members of the Alabama Supreme Court were elected by the Legislature, and only White males could be legislators. Tr. III-169:14-22 (Norrell). (PFOF ¶ 68.)

41. The Redeemers won the 1874 election by making party identification a race issue, by drawing the color line. Even though the Redeemers favored an appointment system, they kept

(modified)[4] election of Supreme Court justices in the 1875 Redeemer Constitution, because they were afraid the lower economic classes of yeoman farmers and shopkeepers, being distrustful of the wealthier Democratic Party elites, might not ratify the Constitution if elections were removed. Tr. III-182:17-183:14 (Norrell). For the next forty years after 1874 all the members of the Supreme Court were Conservative Democrats chosen through the party convention system. Tr. III-183:15-184:10 (Norrell). (PFOF ¶70.)

42. The statewide, at-large, general elections held under the 1868 and 1875 Constitutions had no majority-vote requirement, staggered terms, or numbered places; the top three vote getters were elected, and after 1874 they were always the Conservative Democratic candidates nominated by the state party convention. Tr. III-185:6-24 (Norrell). But the use of party identification to unify whites in the general election was threatened by discontent among the White working classes, who resented the Redeemers' fraudulent control of Black votes in the Black Belt. The populist revolt in the 1890s and populist outrage over two gubernatorial elections won allegedly by stolen Black votes caused Democratic Party leaders to initiate county primary elections and to consider a statewide Democratic primary in an attempt to unify the white vote. Finally, the Conservatives and populists agreed to follow Mississippi's lead and disfranchise Blacks in the 1901 Constitution. Tr. III 185:25-189:21 (Norrell). (PFOF ¶ 71.)

43. The purpose of the 1901 Constitution was "to establish white supremacy in this State." *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (quoting the Convention President). The drafters used literacy and property requirements, a cumulative poll tax and a long list of

[4] The 1868 Constitution, Article VI, § 11, provided: "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...." The 1875 Constitution, Article VI, § 12, provided: "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...."

disqualifying crimes to disfranchise nearly all Black citizens and many poor Whites. The 1901 Constitution also required, for the first time, staggered elections of Supreme Court justices, requiring only two associate justices to run in the same election. Until now candidates for the Supreme Court had to run in a "huddle," a plurality win, first-past-the-post general election. Then, in 1902 the Democratic Party by regulation created a statewide, all-white primary with a majority-vote requirement, which gave some insurance that by appealing to race Conservatives could win all statewide primary elections. In 1903 the Legislature increased the number of justices to seven (including the Chief Justice). So, the six associate justices elected in 1904 drew lots for staggered terms. But due to deaths and resignations only one seat on the Court was up for election most of the time thereafter. Ex. D-65; Tr. III-189:22-194:9 (Norrell). (PFOF ¶ 72.)

44. "The chief justice and associate justices of the supreme court shall be chosen at an election to be held at the time and places fixed by law for the election of members of the house of representatives of the congress of the United States, until the legislature shall by law change the time of holding such election. The term of office of the chief justice, who shall be elected in the year nineteen hundred and four, shall be as provided in the last preceding section. The successors of two of the associate justices elected in the year nineteen hundred and four shall be elected in the year nineteen hundred and six, and the successors of the other two associate justices elected in nineteen hundred and four shall be elected in the year nineteen hundred and eight. The associate justices of said court elected in the year nineteen hundred and four shall draw or cast lots among themselves to determine which of them shall hold office for the terms ending, respectively, in the years nineteen hundred and six and nineteen hundred and eight, and until their respective successors are elected or appointed and qualified." 1901 Const. Article VI, § 156. (PFOF ¶ 72, n.4.)

45. The Supreme Court struck down the Texas white primary statute in Nixon v. Herndon, 273 U.S. 536 (1927). Tr. III-244:4-247:15 (Norrell). The Democratic Party press repeatedly expressed worry over this and other national events that threatened Alabama's White primary and disfranchisement of blacks, recalling Giles v. Harris, 189 U.S. 475 (1903), and raising an alarm about "minority rule." Tr. III-246:9-250:4 (Norrell). This was the context that made race a factor in passage of the 1927 statute that established numbered places for all multi-member offices elected statewide, including members of the Alabama Supreme Court and Court of Appeals. The 1927 session of the Alabama Legislature was dominated by Redeemer Democrats' attempts to repeal the second-choice primary law. They failed, but without any fanfare Albert Tunstall, a Redeemer Democrat, managed to obtain passage of the numbered place law "to solidify white unity behind incumbents." Tr. III-250:15-252:4 (Norrell). (PFOF ¶ 74.)

46. As soon as the Redeemer Conservatives regained control, out of "concern with black voters," they repealed the second-choice primary law in the 1931 Legislature. In its place they established the majority-vote, runoff primary, numbered-post election system that would govern all statewide judicial elections from 1931 to the present. Tr. III-253:3-22 (Norrell). This statute, Act 1931-56, also contained an anti-single-shot provision for all statewide primary elections. Tr. III-261:24-262:5 (Norrell); Ex. P-2, § 24. Dr. Norrell testified he was "not aware of any electoral system that is more thorough in its protection of White voters over Black voters than the system here in Alabama." Tr. III-254:6-14 (Norrell). (PFOF ¶ 76.)

47. Dr. Norrell further expressed his opinion as an historian "that the electoral form for electing appellate judges in the state was so created to enforce and uphold white supremacy because of the majority vote, statewide, numbered post -- all of those mechanisms ensured that

the courts would be -- would be essentially an institution to uphold segregation, white supremacy, and disfranchisement." Tr. III-273:18-23 (Norrell). (PFOF ¶ 77.)

48. Senator Sam Engelhardt, who represented Macon County, presided over the Democratic Executive Committee meeting that discussed "the state legislature's open and unabashed racist motive" for enacting Act 1961-221, which required the use of numbered places for "all state, county and municipal at-large elections, both primary and general." *Dillard v. Crenshaw Count*y, 640 F.Supp. 1347, 1357 (M.D. Ala. 1986). Dr. Norrell produced evidence that was missing in *Southern Christian Leadership Conference of Alabama v. Evans*, 785 F.Supp. 1469, 1489 (M.D. Ala. 1992): in a December 31, 1961, article columnist Bob Ingram wrote that Act 221 "was aimed at Negroes as much as anything else." Tr. III-262:8-263:20 (Norrell); Ex. P-31. (PFOF ¶ 78.)

49. Dr. Norrell explained how race was a factor in the adoption of the 1973 Judicial Reform Act, which amended the judicial article of the Alabama Constitution. Judges Howell Heflin and Bo Torbert, along with the bar committee they had created five years earlier, wanted to institute a merit system of selecting judges, replacing popular elections. But Governor Wallace, who had built his segregationist career on demonizing federal courts, told the reformers he would campaign against ratification of the new Judicial Article if it called for judges to be appointed rather than elected. So, the sponsors backed away and did not include a merit system for fear it would cause defeat of the entire amendment. During the ratification campaign supporters emphasized to voters that the amendment was not calling for something like the federal system. "And in the context of how they talked about the federal courts during the campaign for the judicial reform, it's clear that they've got this demonization of judges, federal judges, on a racial basis on their mind. And that, then, shapes the judicial article and what it --

what it ultimately implemented on judicial election." Tr. III-270:1-271:12 (Norrell). (PFOF ¶ 79.)

**Totality Factor 2 – Racially Polarized Voting**

50. Plaintiffs incorporate by reference all facts in PFOF ¶¶ 31-54, *Gingles* Prongs 2 and 3. (PFOF ¶ 80.)

**Totality Factor 3 – Procedures To Enhance Discriminatory Potential**

51. The use of an unusually large election district enhances the potential for discrimination. (PFOF ¶ 82.)

52. A statewide election increases the cost in time and money for candidates and qualifies as an extreme example of an unusually large election district that enhances the potential for discrimination. Tr. III-32:5-11 (McCrary), Ex. P-122 ¶ 45. (PFOF ¶ 83.)

53. The Alabama Legislature enacted Act 221 in 1961, which applied to all at-large elections in the state. Tr. III-23:9-16 (McCrary). (PFOF ¶ 84.)

54. Act 221 required candidates for at-large positions to qualify for a particular place or post. Tr. III-23:9-16 (McCrary). (PFOF ¶ 85.)

55. Act 221 eliminated the ability of Alabama voters to use single-shot voting for candidates in at-large elections. Tr. III-23:9-16 (McCrary). (PFOF ¶ 86.)

56. The Alabama legislature was informed that minority voters frequently used single-shot voting to increase the likelihood that their candidate(s) of choice would be elected to an at-large office. Ex. P-85 at 23-24. (PFOF ¶ 87.)

57. Act 221 was enacted with a discriminatory intent. Ex. P-85 at 23; Tr. III-24:8-24 (McCrary); Tr. III-275:7-13 (Norrell). (PFOF ¶ 88.)

58. Appellate judicial candidates must win a partisan primary election with a majority

vote to advance to the general election. Joint Stip. ¶ 45. (PFOF ¶ 89.)

**Totality Factor 4 – Slating**

59. Mark White provided eyewitness testimony regarding the exclusion of African Americans from the candidate selection process. Mark White testified to what was effectively the "slating" of white judicial candidates by Karl Rove in the mid-1990's. Tr. I-135:14-137:7 (White). During the mid to late 1990's, Karl Rove was selecting, and effectively, slating white candidates for Alabama appellate courts while excluding African Americans from this selection process. Karl Rove's backroom slating strategy, which excluded Blacks, eventually led to the current all white Republican Alabama appellate bench. Id. (PFOF ¶ 90.)

60. Professor McCrary defined the slating process under the Senate Factors as "the slating of candidates by influential community group of political leaders" who were "unelected" but who would proffer a list of candidates that were "this would be a set of favored candidates slated by some body that's -- it's public, but it's not a democratically elected body." Tr. III-52:19 – 54:9 (McCrary). (PFOF ¶ 91.)

**Totality Factor 5 – Long-Term Effects Of Discrimination**

61. Alabama for years maintained an unequal segregated public school system and barred African Americans entirely from state's only public law school. Tr. III-26:5-16 (McCrary); Ex. P-122 ¶¶ 24-28. (PFOF ¶ 92.)

62. Plaintiffs in this action attended Alabama's segregated schools, as did Judges England and Cook. Tr. I-29:1-12 (England); Tr. I-152:15-25 (Simelton); Tr. I-175:24-176:2 (Norfleet); Tr. IV-73:3-10 (Cook). (PFOF ¶ 93.)

63. The effects of depriving generations of African-American Alabamians equal educational opportunities last for a lifetime and affect future generations. Tr. II-215:10-216:2

(McCrary). (PFOF ¶ 95.)

64. Far fewer African-American than White Alabamians finish high school. There is an even greater disparity between the proportion of African American and White Alabamians that go on to obtain a college degree. Tr. II-177:12-19 (Cooper); Ex. P-89 at 12; Ex. P-90 at 3 (12.6% of White Alabamians and 18.0 % African American Alabamians aged 25 and over have not finished high school); Tr. II-177:20-178:1 (Cooper); Ex. P-89 at 12; Ex. P-90 at 3 (27.3% of White Alabamians and only 17.7% of African American Alabamians aged 25 and over have a bachelor's degree or higher). (PFOF ¶ 96.)

65. African American Alabamians are more than twice as likely to be unemployed, more than twice likely to live below the poverty level, and three times as likely to rely on food stamp programs. Tr. II-178:2-11 (Cooper); Ex. P-89 at 14; Ex. P-90 at 5 (White Alabamian unemployment rate is 4.8%, African American Alabamian unemployment rate is 10.2%); Tr. II-176:11-18; Ex. P-89 at 5; Ex. P-90 at 7 (27.4% African American poverty rate, 12.2% White poverty rate); Tr. II-177:7-11 (Cooper); Ex. P-89 at 11, Ex. P-90 at 6 (28.3% African American receipt of food stamp/SNAP benefits, 9.2% White recipients). (PFOF ¶ 97.)

66. African American Alabamians in the workforce are paid far less than White Alabamians, and are far less likely to be employed in management or professional roles. Tr. II-176:24-177:6 (Cooper); Ex. P-89 at 10; Ex. P-90 at 7 (median White Alabamian income is $29,671, median African American Alabamian income is $18,483); *see also* Tr. II-176:19-23 (Cooper); Ex. P-89 at 8; Ex. P-90 at 6 (median White Alabamian household income is $52,312 and African American Alabamian household income is $31,621); Tr. II-178:12-16 (Cooper); Ex. P-89 at 15; Ex. P-90 at 5 (38.2% of employed White Alabamians and 24.7% of African American Alabamians are in management or professional occupations). (PFOF ¶ 98.)

67. African American Alabamians are nearly twice as likely not to own their homes, and the homes African American Alabamians own are valued at a fraction of White Alabamians' homes. Tr. II-178:17-24 (Cooper); Ex. P-89 at 16; Ex. P-90 at 7 (76.5% of White Alabamian householders are homeowners and 50% of African American Alabamian householders are homeowners); Tr. II-179:5-14 (Cooper); Ex. P-89 at 20; Ex. P-90 at 8 (median home value for White homeowners is $149,900, median home value for African Americans is $89,000). (PFOF ¶ 99.)

68. African American Alabamians are over three times as likely not to have a car. Tr. II-178:25-179:4 (Cooper); Ex. P-89 at 17; Ex. P-90 at 8 (4.0% of White Alabamian households and 12.7% of African American Alabamian households are without a vehicle). (PFOF ¶ 100.)

69. Among the most important effects of segregation on political participation came from the public schools which provided inferior educational opportunities to African-American students. Ex. P-122 at ¶ 23. (PFOF ¶ 101.)

70. Lower socioeconomic status – such as that of African-American Alabamians as compared to White Alabamians – inhibits the ability to participate in the political process. The economic disadvantages also make it more difficult for African-American Alabamians to participate in political campaigns (e.g., volunteering) and put candidates representing the African-American community at a distinct disadvantage, particularly for statewide elections, while relying on a less affluent community for campaign funds. Tr. III-26:20-30:14 (McCrary); Ex. P-122 at ¶¶ 56-58. (PFOF ¶ 102.)

71. At the time of trial, November 2018, African Americans constituted 26% of Alabama's voting age population, but the constituted 52.5% of the population incarcerated Alabama's state prisons according to official state records. *See Alabama Department of*

*Corrections November 2018 Monthly Statistical Report*, accessed at http://www.doc.state.al.us/docs/MonthlyRpts/2018-11.pdf. (PFOF ¶ 103.)

**Totality Factor 6 – Racial Appeals In Political Campaigns**

72. Up until the late 1960s, the Alabama Democratic Party ballot was emblazoned with the words "white supremacy." Ex. P-133; Tr. III-266:12-17 (Norrell). (PFOF ¶ 104.)

73. In 2000, Judge Jones' opponent distributed racially charged flyers in White neighborhoods attempting to tie Judge Jones to Birmingham's first African-American mayor. This was a racial appeal. Tr. I-76:11-22 (Jones). (PFOF ¶ 106.)

74. In 1994, the Republican Party left Greg Griffin's picture out of its campaign literature—he was the only African-American Republican candidate that year, and the only candidate whose picture was omitted. This omission evidences a political party branding itself as a White party. Tr. I-57:23-58:6 (England). (PFOF ¶ 107.)

75. This was a racial appeal. Tr. IV- 96:23-97:11 (Cook). (PFOF ¶ 108 (in part).)

76. Judge England did not use a picture of himself in any of his 1994 campaign ads, because he understood that many Alabamians vote based on a candidate's race and he did not want to give them a reason to vote against him. Tr. I-36:7-37:12 (England). (PFOF ¶ 109.)

77. Judge Cook also ran a "stealth campaign" (he did not use his picture) in 1994. Tr. IV-88:10-16; Tr. IV-92:11-14 (Cook). (PFOF ¶ 110.)

78. Judge Cook in 1994 ran a campaign commercial in which famous race car driver Bobby Allison, who was White, assured viewers that Judge Cook is "one of us," which was understood as a racial appeal to White voters. Tr. I-126:11-128:14 (White); Tr. IV-88:23-89:7; Tr. IV-89:25-90:5 (Cook). (PFOF ¶ 111.)

79. In 2000, Judge Cook, as a matter of personal principle, used his picture in his

campaign ads, and also raised $1.2 million in campaign funds, twice as much as for his 1994 campaign, but he lost to a White opponent. Tr. IV-90:25-91:3; Tr. IV-94:15-25; Tr. IV-96:3-13; Tr. IV-97:12-15; Tr. IV-98:5-25 (Cook). (PFOF ¶ 113.)

80. In Alabama's most recent election cycle—November 2018—the White Republican candidate who was elected Chief Justice of the Alabama Supreme Court made prominent and explicit racial appeals throughout his campaign ads. Exs. P-135, P-136. Tr. III-228:7-19 (Hall); Tr. IV-113:15-114:13; Tr. IV-116:13-117:12 (Cook). Chief Justice Parker derided his opponent as a "social justice advocate," and his ads state that he will oppose organizations intended to protect minority rights, like the Southern Poverty Law Center and the ACLU. Tr. III-228:7-13 (Hall); Tr. IV-113:15-114:13; Tr. IV-116:13-20 (Cook). Chief Justice Parker's ads included images of a burning vehicle and text threatening that the "leftist mob tries to destroy our society" beneath an image of African American Congresswoman Maxine Waters (from a state thousands of miles away, no less), Tr. IV-114:14-115:15 (Cook), and played to heightened fears in Alabama about immigrants by showing migrant caravan footage which Chief Justice Parker describes as "an invasion." Tr. IV-116:4-12 (Cook). Chief Justice Parker closed his racially charged ads by declaring that he is "standing for what we believe in" and "fighting for us." Ex. P-136 (emphases in original). Chief Justice Parker's ads were directed toward Alabama's White majority—referred to as "us," just as in Bobby Allison's 1994 commercial for Judge Cook—and are virtually unprecedented in modern-day politics in the extent to which they actively seek to divide voters along racial lines. Tr. III-228:14-19 (Hall); Tr. IV-116:23-117:12 (Cook). (PFOF ¶ 114.)

81. Race and racial appeals have been and remain a significant factor in Alabama's politics. Tr. IV-106:21-107:13 (Cook). (PFOF ¶ 115.)

**Totality Factor 7 – African Americans Elected To Public Office In Alabama**

82. There has not been a single African-American appellate judge in Alabama for nearly twenty years. Joint Stip. ¶ 55. (PFOF ¶ 117.)

83. In Alabama's entire history, there have only been three African-American appellate judges, all of whom were first appointed by White governors, and only two of whom won an election. Joint Stip. ¶¶ 50-54; Tr. IV-106:24-107:13 (Cook) ("We have been a state since 1819. And if my math is correct, that's about 199 years. And only 20 of those years has there been representation from the African-American community [] on the Supreme Court – never on the courts of appeal. [] Now, if you run that forward to, let's say, 1965 when the Voting Rights Act was passed and all of the impediments were eliminated in Alabama, that gives us over 50 years. And there is a problem in this state. There is absolutely a problem. And to ignore it is like sticking your head in the sand like an ostrich. [] [I]t's unfortunate that we are still dealing with this issue, but we are"). (PFOF ¶ 118.)

84. No African-American candidate has ever won an election by running for an open seat or by challenging an incumbent. Joint Stip. ¶¶ 50-54. (PFOF ¶ 119.)

85. In the past twenty years, African-American candidates have run for eight statewide judicial offices, and every single one has been defeated by White opponents. Joint Stip. ¶ 63. (PFOF ¶ 121.)

86. To the extent African-American candidates have been elected to public office in Alabama, it is from districts and almost always from majority-minority districts. Ex. P-122 at ¶ 34; Tr. III-6:18-8:8 (McCrary); Tr. IV-156:21-24 (Gray) (Q. "Is there ever going to be a point at which -- at which districts are not needed for black candidates to be elected in Alabama?" A. "We would both be dead"). (PFOF ¶ 123.)

87. Plaintiff John Harris ran for Opelika City Commission in the 1970s and lost; it was only after the city changed from electing representatives citywide to electing them from districts (as a result of Section 2 litigation) that Mr. Harris was able to run again and win election. Tr. II-53:22-56:1. (PFOF ¶ 124.)

88. In 2018, the overwhelming majority of African-American candidates elected to state legislative positions – including all seven current African-American Alabama state senators – have been elected from majority African-American districts. Nearly every current African-American state representative in Alabama represents a majority African-American district, the sole exception being an African-American state representative representing a district that is 47% African American. Joint Stip. ¶ 58. (PFOF ¶ 128.)

89. The vast majority of the State's African American trial judges are elected from majority minority districts, many of which are the result of Section 2 litigation. Tr. II-219:23-221:6 (McCrary); Ex. P-122 ¶¶ 60, 61. (PFOF ¶ 129.)

**Totality Factor 9 – Tenuous Policy Underlying Alabama's Voting Practices**

90. Unlike trial courts, appellate courts act as multimember collegial bodies where decisions are made as a group. Tr. IV-53:14-57:20 (Thibodeaux) ("The decision-making process is quite different." For appellate courts "it's a system of shared responsibility and a respect for your colleague's opinion and the degree to which you can persuade that colleague of your position."); Tr. IV-110:4-17 (Cook) (noting differences between trial courts and appellate courts); Tr. IV-53:14-57:20 (Thibodeaux). (PFOF ¶ 130.)

91. On appellate courts, diverse perspectives from different regions of the state are of enhanced value, not only to facilitate robust analysis of a legal question but to counteract individual biases. Tr. I-43:1-47:6 (England) ("Each individual has a perspective on a broad range

of issues that's discussed and the opportunity to know some things that I may not be aware of..."); Tr. IV-109:14-110:1 (Cook) ("And so the opinion that is prepared and disseminated to the other justices I think has to be supported by the law as it related to the facts in order to persuade four other justices to support it"); Tr. IV-47:11-48:23;48:22-49:23;51:16-53:13 (Thibodeaux) (illustrating how diversity on appellate courts matters in counteracting implicit biases of judges). (PFOF ¶ 131.)

92. The State failed to support its contention that Plaintiffs' proposed districting remedy will lead to "home cooking," i.e., encourage appellate judges to promote the interests of people in their district over the interest of those outside their district. The state's expert Dr. Gaylord was asked whether he "knew of any case where [ ] district elections promoted home cooking . . ."; he could not name one. Tr. III-123:11-25 (Gaylord). Nor could he say there has been a loss of confidence in the appellate judiciaries of Illinois, Kentucky, Louisiana, or Mississippi where appellate judges are elected by district. Tr. III-124:1-16 (Gaylord) ("I do not know of that in the four states that have that"). Judge Murdock similarly could offer no evidence in support of the State's theory. Tr. VI-63:12-15 (Murdock) (Q. "And you don't have any evidence that any past, present, or even future justice of the Alabama Supreme Court would ignore their oath and, instead, make a decision based on bias, do you?" A. "I don't have any evidence of that."); *see also* Tr. IV-41:8-22 (Thibodeaux) (describing how home-cooking is not a concern where districts exist in Louisiana). (PFOF ¶ 132.)

93. Alabama judges do not consider a litigant's address when making decisions on who to rule for. Tr. I-46:3-47:6 (England); Tr. I-91:21-25 (Jones) (noting "it doesn't make any difference where people live"). A litigant's residence as within or outside a judge's electoral base plays no role in his or her decision-making and may often be unknown to the judge. Tr. IV-35:4-

17 (Thibodeaux) (Q. "Now, I want to turn to another subject, and that is if you have one litigant from within your electoral base, an opposing litigant outside it, how do you – how does that affect how you decide cases?" A. "It doesn't affect it at all."); Tr. IV-35:18-36:6 (Thibodeaux) (Q. "All right. With respect to the litigants who are within the district that elected you, do you accountable to them in any way?" A. "No. I mean, I was never – I never ran for political office...I've never given any preference"); Ex. P-139a at 32:41:36 (Banks) (Q. "[W]as there ever a time when a litigant appealed to you based on the fact that the litigant was from the district from which you were elected." A. "Never."). (PFOF ¶ 133.)

94. The State failed to support its contention that districting will decrease the pool of judicial candidates. Dr. Gaylord did not examine Plaintiffs' districting plans or consider how the pool of qualified judicial candidates "would break out." Tr. III-128:2-129 (Gaylord). "I don't like to comment on what I haven't seen or looked at exactly..." *Id.* (PFOF ¶ 134.)

95. There are plenty of qualified lawyers and judges in each proposed Alabama district to run for appellate judicial positions. Tr. I-51:11-20 (England) ("I couldn't imagine a district where you wouldn't have plenty of very qualified lawyers who would be able to serve . . ."). (PFOF ¶ 135.)

96. There are approximately 14,840 attorneys across the state (Ex. D-102). There will be more qualified attorneys in each district in a districting plan with eight or nine districts than there are currently in each of the 41 trial districts in the state. (PFOF ¶ 136.)

97. The State failed to support its contention that districting will further marginalize minority voters. Dr. Gaylord did not examine the "influence that black voters have on the elections of judges in Alabama" today. Tr. III-129:3-25 (Gaylord) ("That was not part of my report"). And he could not assess the effect that "creating minority majority districts" would

have on African Americans' right to vote: "[Y]ou need to know what the actual districting plan is to see what the changes are with respect to that baseline. And I have not seen those plans or the baseline." *Id.* (PFOF ¶ 137.)

98. To the contrary, Alabama's current method of electing appellate judges via a statewide method greatly marginalizes, and effectively disenfranchises, the vast majority of African-American voters. Tr. I-175:9-11 (Norfleet) ("I'm a strong believer, sir, if I am a registered voter and a part of the State of Alabama, of that community, I should have the same rights and privileges [as] anyone else."); Tr. I-180:5-8 (Norfleet) (Q. "So when you think about the Alabama Supreme Court and the justices that are on there, would say that your preferred candidates have been elected to that court?" A. "No, sir."); Tr. II-40:10-18 (Muhammad) ("I don't pay attention to statewide elections, because for the most part, being that Alabama is predominately white, Caucasian, the candidate of my choice, if they're African American, nine times out of ten won't get elected . . . I mean, there's no way that – if it's at-large voting, that African Americans, with 30 percent of the population, could vote somebody in, in my opinion"), I-162:5-13 (Simelton) ("It's been so often that [when] there are no black judges on the bench, then immediately you feel that I'm [] already tried and convicted. It's similar to going before an all-white jury.") *id.* 163:23-164:2 "[W]hen people come to [the NAACP] they tell us that [] they don't feel comfortable [] appealing their case or that they don't even want to try to appeal the case because they [already] seem to know the results . . . ."). (PFOF ¶ 138.)

99. African Americans lack confidence in the fairness of the current system because of its complete lack of racial diversity. Tr. I-162:5-17 (Simelton) ("It's been so often that [when] there are no black judges on the bench, then immediately you feel that I'm [] already tried and convicted. It's similar to going before an all-white jury."); 163:23-164:2 (Simelton) ("[W]hen

people come to [the NAACP] they tell us that [] they don't feel comfortable [] appealing their case or that they don't even want to try to appeal the case because they [already] seem to know the results . . . ."); Tr. V-175:1-3 (Harwood) (Q: "[D]o you believe that black Alabamians view all-white courts as fair and impartial bodies?" A: "I would think they could have concerns about that."; id. Tr. V-175:7-177:2 (Harwood) ("The first case I ever had, I was appointed to defend a young African American, Howard Turner. And Howard Turner was accused of having broken in to the mayor's house . . . Howard Turner, when we're in the courtroom, is the only black in the courtroom. No -- I mean, just -- that's it. No deputies, no -- no court staff, nobody. Just Howard Turner. And then when I got ready to try the case, the judge said, usual stipulation? I said, what's that? He said, well, we just take the blacks off the jury. And I thought, I can't stipulate to that . . . So I learned a lot about the unfairness that a black litigant or a black criminal defendant would have there." Q: "Thank you, Judge Harwood. Let me tell you [] what I took from that and see if you agree that it's important as it applies to this case. One of the things you said was that, you know, the usual stipulations included striking the black jurors. You would agree with me, would you not, that just because things have been done a certain way forever doesn't mean it's right. Isn't that true?" A: ("I think more -- I would say it a little reverse. I think there are a lot of wrong things that have been done the same way forever"). Q: ("So speaking of those things, do you believe that African Americans should be allowed to elect their candidate of their choice for appellate and supreme court judges and justices?" A: ("Yes, I do"). (PFOF ¶ 139.)

100. A district-based electoral method would substantively enfranchise many of Alabama's African-American voters. Tr. I-92:10-21 (Jones) "[I]t's my hope that regardless of your color, that you could run statewide, that, you know, people look at your qualifications . . . [b]ut at least [districts] would give you the opportunity. It would give the opportunity of black

folk to elect their representatives. . . And I think that it's not a perfect system. But it's not a perfect system now. And at least [districts] would give black voters the opportunity to elect candidates of their choice"); Tr. I-49:23-50:24 (England) (Q: THE COURT: "What, if any, downsides, would you see . . . from going from the current system to a district-based system?" A: "I honestly don't see any downside. I see a lot of upside, but I don't see any downside. I see the [racial] diversity. . . I honestly don't see any downside unless -- unless the lack of diversity, having one mind, [] is valued above all else"); *see also* Tr. III-126:20-25 (Gaylord) (Q: "[I]s accountability to the people . . . accomplished by district elections as well as by statewide elections?" A: "At some level, as soon as you interject elections into the process, you're going to have to be accountable to the people. *Now it's a matter of what cross-section of the people* [.]") (emphasis added). (PFOF ¶ 140.)

101. The State failed to support its contention that districting will lead to increased partisan rhetoric and divisive elections. Dr. Gaylord had no evidence that judicial elections are more partisan or divisive in the states using districts to elect their appellate judges. Tr. III-127:17-128:1 (Gaylord) (Q: "Yeah. But in terms of your information, you don't have information that that's happened?". . . A: "I do not, out of those four jurisdictions that do it that way."). (PFOF ¶ 141.)

102. Dr. Gaylord agreed that highly partisan and divisive rhetoric can be a problem in jurisdictions electing their appellate judges using a statewide system, including Alabama. In response to Ex. P-135, the first of Alabama Chief Justice Tom Parker's campaign ads offered by Plaintiffs, Dr. Gaylord explained, "If the point is can you have a candidate that may run ads that are offensive or directed at playing on public sentiment in certain ways, then yes....[that's possible under a statewide system.]" Tr. III-134:2-137:13 (Gaylord). (PFOF ¶ 142.)

103. Trial showed that Alabama's appellate elections are already hyper-partisan. See Ex. P-135 (depicting rioting, a burning vehicle and text threatening that the "leftist mob tries to destroy our society" beneath an image of African American Congresswoman Maxine Waters, and stating that "[t]he leftist mob doesn't like that. They want judges who will overturn our laws and look the other way when the leftist mob tries to destroy our society"); *see also* Ex. P-136-37; Tr. IV-114:14-115:15 (Cook). It is because of this hyper-partisanship that Mark White lamented, "the Bar would rather do anything than what we have now. Nobody likes to have a judge come up and ask them for money." Tr. I-144:17-19 (White). (PFOF ¶ 143.)

104. The evidence at trial did not show that elections would be made any more partisan if Alabama moved to elections by district. (PFOF ¶ 144.)

105. The State failed to produce any evidence showing Alabama's specific motivations for maintaining its numbered-post, at-large election method. Dr. Gaylord could not identify a single reference made by the Alabama legislature or State of Alabama explaining its motivations for adopting and maintaining its statewide system for electing appellate judges. Tr. III-114:20-115:3;115:21-116:11;120:4-121:8 (Gaylord). (PFOF ¶ 145.)

106. Districting has already been implemented under the VRA in Mississippi and Louisiana without any loss of confidence in those judiciaries. Tr. IV-21:11-22:20 (Thibodeaux) (noting that after implementation of districts, "[w]e [the judges] came to know each other, everything was fine. We worked together very cooperatively"); Ex. P-139a at 33:28:25 (Banks) (Q. "Has the topic ever come up concerning confidence in judicial decisions being affected one way or the other because the judges are elected in districts instead of statewide." A. "No, not to my knowledge."). To the contrary, moving to districts enhanced African American voter confidence in the judiciary in Mississippi, (*see* Ex. P-139a at 36:04:14-37:27:07 (Banks)); would

give voters a better opportunity to know who the candidates are and what their qualifications are; would be more cost-effective; and would make it easier for candidates to fund raise. Tr. I-49:25-50:25 (England). (PFOF ¶ 146.)

107. No representative of state government testified to assert what, if any, interest the State currently has in maintaining its state-wide method of electing Alabama's appellate judiciary. (PFOF ¶ 147.)

**The Facts Do Not Support The State's "Party, Not Race" Defense**

108. Defendant's expert witness on racially polarized voting, Dr. Bonneau - who, like Dr. Gaylord has no experience with the Voting Rights Act - did no analysis at all to determine which candidates White and African-American voters preferred. Tr. II-110:11-113:12;113:21-114:5;114:10-115:5 (Handley); V-96:1-97:1 (Bonneau). (PFOF ¶ 148.)

109. Plaintiffs' rebuttal expert, Professor Seth McKee, is qualified to testify as an expert in the field of southern politics, political behavior, and party system change in the American South. Tr. VI-127:21-128:1 (McKee). (PFOF ¶ 149.)

110. Dr. McKee testified, "And to me, the second point I would make, beyond not entertaining or even trying to understand why the State has become what it has in terms of these two parties and how race is so strongly aligned with either one, is that I guess his key argument and the argument of the State is that it's all about party and it has nothing to do with race, which, to me, on its face, is an absurdity, just frankly, to think that it's all about party and not about race." Tr. VI-128:19-129:1 (McKee). (PFOF ¶ 150.)

111. If one wanted to look for racial bias, "you should be looking at the white support given to Republicans and Democratic candidates, not just among one party or the other," Tr. VI-168:24-169:7 (McKee), yet, Dr. Bonneau's analysis neglects entirely voting patterns and racial

attitudes of White Republicans. Tr. VI-168:24-169:7 (McKee); V-98:20-100:12 (Bonneau). (PFOF ¶ 151.)

112. Dr. Bonneau is wrong to assume that if White and African-American Democratic candidates "perform the same" then "it's not the race of the candidates" and "[s]o it doesn't matter," because his comparison is based solely on Democratic Party voters, it makes no attempt to discern the preferences of African-Americans, and it makes no attempt to determine whether African-American voters are able to elect their preferred candidates. It also completely ignores the possibility that White and African American Alabamians tend to prefer different political parties because of the party's positions on issues such as civil rights. Tr. V-27:7-14;74:14-25 (Bonneau); VI- 231:18-232:20 (McKee). (PFOF ¶ 152.)

113. As Dr. Bonneau repeatedly acknowledged, there were no Black Republican candidates to analyze, Tr. V-105:20-106:14 (Bonneau) ("There's only one party [] that has a diversity of candidates"), which supports the conclusion that race is a factor in Alabama politics. Tr. V-90:22-91:9;105:23-106:2 (Bonneau); VI-168:6-23 (McKee). (PFOF ¶ 153.)

114. There is no evidence that any other court has ever accepted Dr. Bonneau's theory to prove that race is not a factor among the electorate, nor is there any academic support for his theory. Tr. VI- 169:8-21 (McKee); Ga. State Conference of NAACP v. Fayette Cty. Bd. of Comm'rs, 118 F. Supp. 3d 1338, 1346-47 (N.D. Ga. 2015). (PFOF ¶ 154.)

115. Dr. Bonneau could not conclude that African-American candidates lose solely because of their political affiliation. Tr. V-89:12-90:17;98:14-100:12;124:16-126:19;109:3-18 (Bonneau). (PFOF ¶ 155.)

116. Dr. McKee testified that views on race and civil rights have been the primary cause of the political divisions in Alabama. Tr. VI-131:12-25;157:20-159:12;199:15-18

(McKee). (PFOF ¶ 156.)

117. White voters historically aligned with Alabama's Democratic Party, and from the turn of the century until well into the 1960s, Alabama was a one-party Democratic state. Ex. P-123 at 5-11, Tr. VI-129:15-131:11 (McKee). (PFOF ¶ 158.)

118. During this time, African Americans were systematically prevented from voting in Alabama through a variety of state laws instituted by the Democratic Party such as poll taxes, literacy tests, and the White Democratic primary. Ex. P-123 at 5. (PFOF ¶ 159.)

119. White allegiance to the Democratic Party began to erode in the 1960s with enactment of the Civil Rights Act and the VRA, and the national Democratic Party's decision to embrace the cause of civil rights. Tr. VI-129:22-131:11 (McKee). (PFOF ¶ 160.)

120. The Alabama Democratic Party removed "white supremacy" from its ballot logo in 1966, highlighting the party leadership's realization that National Democratic support for civil rights and voting rights, which caused a huge influx of Black voters, was driving White Alabamians into the Republican Party. Tr. VI-152:19-154:23 (McKee). (PFOF ¶ 161.)

121. The Democratic Party was thereafter perceived as more supportive of the civil rights movement, with newly enfranchised African Americans aligning overwhelmingly with the Democratic Party. Tr. VI-129:22-131:11 (McKee). (PFOF ¶ 162.)

122. In direct response, White voters began to shift away from the Democratic Party to the Republican Party in order to maintain political control without having to align with African-American voters. Tr. VI- 131:12-25;148:25-150:23 (McKee). (PFOF ¶ 163.)

123. White candidates in Alabama were actively recruited to switch to the Republican Party; but during this same period there is no evidence that a single African-American candidate was ever recruited by the Republicans. Tr. I-39:15-40:16, I-77:21-79:6, I-48:12-15 (England)

("[S]ome of my good friends including, I guess, the defendant in this case, John -- John Merrill, can seamlessly go from being a Democrat to a Republican, John England can't do that because John England is black"). (PFOF ¶ 164.)

124. It took decades for Alabama to completely transition to a one-party Republican state. Tr. VI- 159:13-160:19 (McKee). (PFOF ¶ 165.)

125. Democratic control of the solid South ended in 1948, when Alabama Democrats walked out the national convention in protest over the party platform's civil rights plank and formed a Dixiecrat ticket that carried Alabama and three other Deep South States. Tr. VI-140:21-142:12 (McKee). "It was all over at the presidential level after '48. People forget that." Tr. VI-142:11-12 (McKee). (PFOF ¶ 166.)

126. During this transition period many Democratic Party politicians in Alabama were still able to win elections by cobbling together biracial coalitions. These politicians would campaign in African-American communities with progressive positions while out of sight of White constituents, and express more conservative views in White communities. But these coalitions broke down in the 1990s as a new generation of White voters came of age who had no previous allegiance to the Democratic Party and more closely identified with the Republican Party's rhetoric. Tr. VI- 151:9-152:18; 154:24-156:16;156:22-157:19 (McKee). (PFOF ¶ 168.)

127. Alabama political party elites assembled a suite of policy positions—including positions on civil rights—intended to attract sufficient rank-and-file voters to win elections. Tr. VI-132:6-133:16;164:23-166:10 (McKee). (PFOF ¶ 169.)

128. As African Americans became Democrats, White voters shifted to the Republican Party, where, they could control party positions without having to broker compromises with African-American voters, enabling them to continue to control Alabama politics. Tr. VI-161:12-

162:16 (McKee). (PFOF ¶ 170.)

129. Scholars have demonstrated that the movement of Whites to the Republican Party, as Black voting for Democrats increased, goes beyond mere correlation to "a direct causation." That is, the growth of African Americans in terms of voter registration and political power in the Democratic Party caused Whites to shift to the Republican Party. Tr. VI-149:10-151:8 (McKee). (PFOF ¶ 171.)

130. Issues involving civil rights, for example, and the Democratic Party's espousal of pro-civil rights issues were one of the reasons that Whites left the Democratic Party. Tr. V-191:10-18 (Bonneau); Tr. I-48:20-25;53:8-13 (England) "[T]here is a reason why the Democratic Party is called the [] party for civil rights. There's a reason why something – what was it called? The southern strategy for Richard Nixon? I mean, it was [] successful. Alabama went completely for the non-civil rights party)." (PFOF ¶ 172.)

131. Today the Democratic Party is viewed largely by the state's electorate as the party of African Americans, and Alabama is now the most Republican state in the South. Tr. VI-167:2-14;180:16-22;186:8-187:10 (McKee), Ex. P-123 at 39-45. (PFOF ¶ 173.)

132. A mere 1-2% of White registered voters cast a ballot in the 2016 Democratic Primary. Just 0.4% of African-American Alabamians currently identify with the Republican Party. Ex. P-123 at 45, Ex. P-121 at 15, n.29, *see also* Tr. V-187:20-25 (Harwood) ("If (an Alabama Supreme Court justice was) elected as a Republican, then they can feel comfortable that as long as I have accommodated the Republican Party interests, I'm going to get reelected"). (PFOF ¶ 174.)

133. Race is the main factor in Alabama's political realignment, not tort reform or litigation over the outcome of Alabama's 1994 election contest for chief justice, i.e., the

Hooper/Hornsby controversy. Tr. I-67:8-22 (Jones); VI-169:8-170:24;174:5-7;172:17-174:24; 196:15-198:14; 213:12-23; 215:9-24; 225:15-228:25 (McKee). The realignment began decades before Alabama's tort reform of the 1990s, and it has continued decades after that issue subsided. Tr. I-67:8-22 (England). And Defendants have no explanation for why tort reform would have driven only White voters to the Republican Party. Tr. VI- 169:22-170:24 (McKee) (tort reform is "too ephemeral to account for the greater issue of partisan transformation in Alabama politics. And quite frankly, it's just not that important if you look at the bigger picture of what's going to realign voters."). It is also contrary to the overwhelming consensus in the field of Southern political science. Tr. VI-169:8-21 (McKee). (PFOF ¶ 175.)

134. Most Alabama voters could not describe the Republican or Democratic Party platforms. They could not correctly identify conservative or liberal policy positions. Tr. VI-196:15-198:1;207:16-208:5;225:15-226:1 (McKee). (PFOF ¶ 176.)

135. The Democratic Party in Alabama is, to many, "the party of blacks." White Alabamians today are aware that Black Alabamians are Democrats; and Black Alabamians are similarly aware that the vast majority of White Alabamians are Republicans. Tr. VI-167:6-19; 173:4-174:14 (McKee); I-48:20-49:8 (England). (PFOF ¶ 177.)

136. As Dr. McKee testified: "Q. Now, I'd like to ask you something about that last statement you made that the Democratic Party in Alabama is viewed as the party of African Americans. What's -- what's the basis of your statement? A. The basis of my statement is fact. And what I mean by fact is look at the party in the electorate. Look at the rank-and-file voters in Alabama. The vast majority of those who are African American are Democrats. That's just a fact. There's no disputing that. The majority of Democratic officeholders in Alabama are black Democrats, not white. They're black. The majority of those who hold office as Democrats in the

state are African American. The majority of their supporters are also African American. Those two things are facts." Tr. VI-167:6-19 (McKee). (PFOF ¶ 178.)

137. It remains the case even today that there are many Alabamians that vote based upon the color of the candidate's skin. Even a White candidate who is seen as being aligned with the African-American community is less likely to win a statewide contest because that perception is sure to result in a loss of support from White voters. Tr. I-48:20-49:6 (England); II-41:8-18 (Muhammad). (PFOF ¶ 179.)

138. In the 1960s and earlier, when the party positions on race and civil rights were reversed, at which time White Alabama voters aligned overwhelmingly with the Democratic Party, the Alabama Democratic Party cued race overtly by labeling ballots with the words "white supremacy." Ex. P-133. (PFOF ¶ 180.)

139. At the time of trial, all 130 Republicans who holds any type of state office in Alabama (statewide or in the state legislature) was White. Tr. III-208:14-21;213:2-214:9 (Hall). There have not been any African-American candidates for Alabama's House, Senate or other statewide office in the Republican Party in over twenty years. Tr. I-22:20-23:2 (England); 122:23-123:5 (White). (PFOF ¶ 182.)

140. The Democratic Party took a position in support of civil rights and is known as the "civil rights party." But being viewed by the electorate as part of the "civil rights party" is a distinct disadvantage in Alabama. In contrast, the Republican Party took the opposing position on civil rights and is known as the "not civil rights" party. And with the transition now complete, Alabama politics are controlled by that "not civil rights" party. Tr. I-48:21-25;52:813;69:15-70:3 (England). (PFOF ¶ 184.)

141. Political party identification is very often a proxy for race in Alabama, which

remains the ultimate driving factor. Tr. I-115:11-23;128:15-22;132:8-20;139:19-140:5;146:1115 (White), VI-194:13-195:9 (McKee). (PFOF ¶ 185.)

142. Race is itself the most important political cue. Tr. VI-198:2-14; 228:9-16 (McKee). (PFOF ¶ 186.)

143. And it is not simply that the Democratic Party is perceived as "most hospitable" to Alabama's African-American voter interests, the Republican Party is perceived as hostile to those interests. Tr. V-74:19-25 (Bonneau); VI-231:18-232:20 (McKee). (PFOF ¶ 187.)

144. In the contemporary Alabama electorate, although the political parties have become, to a significant degree, proxies for race, race remains the ultimate driving factor. Even if party designation was eliminated entirely, some new symbol—quite possibly the candidate's own face—would be used to cue for race. Tr. I-108:22-110:4 (Jones); 115:11-23;128:15-22;132:8-20;139:19-140:5;146:11-15 (White) . (PFOF ¶ 188.)

145. Alabama is "extremely racially polarized" when it comes to voting. It is, "if not the most racially polarized" voting state in the nation, it is one of the most racially polarized voting states in the nation. Tr. VI-192:19-193:5 (McKee). (PFOF ¶ 189.)

146. To the extent African-American candidates are elected as Republicans in the South, they are generally not the preferred candidates of African-American voters. African-American candidates that have been able to win contemporary Republicans nominations in the South typically adopt conservative policy positions that mirror those of a typical White Republican and are perceived as slightly (if not significantly) more conservative, by conservative White voters than are White candidates running for these same offices. Tr. VI-189:4-192:14 (McKee). (PFOF ¶ 190.)

**Appellate Court History of Other States**

147. The Louisiana Legislature passed the legislation described in Undisputed Fact ¶ 108, *supra*, as a result of the *Chisom* litigation. *Chisom v. Edwards*, 659 F. Supp. 183 (E.D. La. 1987), *rev'd*, 839 F.2d 1056 (5th Cir.), *cert. denied sub nom. Roemer v. Chisom*, 488 U.S. 955 (1988); No. CIV. A. 86-4057, 1989 WL 106485 (E.D. La. Sept. 19, 1989), *remanded*, 917 F.2d 187 (5th Cir. 1990), *rev'd and remanded*, *Chisom v. Roemer*, 501 U.S. 380 (1991).

148. Louisiana Supreme Court Justice Revius Ortique won election in 1992 from the newly-created majority-Black district resulting from the legislation described in Undisputed Fact ¶ 108, *supra*. He was the first African American on Louisiana's Supreme Court. Justice Ortique retired in 1994.

149. Louisiana Supreme Court Justice Bernette Joshua Johnson, who is also African American and is currently the Chief Justice, won election in 1994 to the Louisiana Supreme Court seat previously held by Justice Ortique.

150. In 2000 and again in 2010, Justice Johnson ran unopposed and was re-elected to the Louisiana Supreme Court from the sole majority African-American district.

151. The Louisiana Legislature in 1989 passed the legislation described in Undisputed Fact ¶ 124, *supra*, as a result of the *Clark* litigation. *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988), *modified sub nom.*, *Clark v. Roemer*, 777 F. Supp. 445 (M.D. La. 1990), *vacated*, 750 F. Supp. 200 (M.D. La. 1990), *cert. granted*, 501 U.S. 1246 (1991), *supplemented*, 777 F. Supp. 471 (M.D. La. 1991).

152. The Louisiana Legislature passed the legislation described in Undisputed Fact ¶ 125, *supra*, as a result of the *Clark* litigation and objections of the U.S. Department of Justice under Voting Rights Act Section 5.

153. The Louisiana Legislature passed the legislation described in Undisputed Fact ¶ 126, *supra*, as a result of the *Williams* litigation. *Williams v. McKeithen*, No. 05-1180 (E.D. La. filed Mar. 29, 2005).

**Fourteenth And Fifteenth Amendments To The U.S. Constitution**

154. Plaintiffs incorporate by reference all facts under "Senate Factor 1 – Alabama's History of State-Sponsored Voting Discrimination and Dilutive Mechanisms" (PFOF ¶¶ 55-79), and "The Facts Do Not Support The State's 'Party, Not Race' Defense" (PFOF ¶¶ 148-190), explaining the relationship between race and politics in Alabama. (PFOF ¶ 191.)

155. The gubernatorial appointments of Justices Adams, Cook, and England demonstrated the likelihood that the merit system blocked by Governor Wallace in 1973 would have yielded African-American appellate judges. Joint Stip. ¶¶ 50, 52-54; Tr. III-269:16-271:12 (Norrell); *see also* Tr. III-270:10-13 (Norrell) (explaining that George Wallace's "whole political career was staked on demonizing -- using race"). (PFOF ¶ 192.)

156. Mark White testified to what was effectively the "slating" of White judicial candidates by Karl Rove in the mid-1990s. Tr. I-135:14-137:7 (White). During the mid to late 1990s, Karl Rove was selecting, and effectively slating White candidates for Alabama appellate courts. Karl Rove continued this backroom slating strategy, which excluded Blacks, and it eventually led to the current all White Republican Alabama appellate bench. *Id.* (PFOF ¶ 193.)

157. The defeat of Justices Cook and England in 2000 demonstrated the continued effectiveness of the 1931 election scheme to unify Whites behind winners of the primary elections and to minimize the ability of African-American voters to elect candidates of their choice with the support of White minority factions in the general election. Joint Stip. ¶¶ 53, 54; Tr. III-253:3-22; Tr. III-254:6-14; Tr. III-261:24-262:5; Tr. III-273:18-23 (Norrell); Ex. P-2, §

24. (PFOF ¶ 194.)

158. The bills introduced by members of the Legislative Black Caucus in 2001 and 2004 to elect Supreme Court justices from districts failed to advance because White Alabama legislators—Democrats and Republicans alike—feared backlash from their majority-White constituencies. Tr. III-218:1-220:10 (Hall). (PFOF ¶ 195.)

**DEFENDANTS' PROPOSED FINDINGS OF FACT TO WHICH PLAINTIFFS CANNOT STIPULATE**

The following is a list of Defendants' Proposed Findings of Fact to which Plaintiffs cannot stipulate, pursuant to paragraph 2(c) of the Court's Order:

1. The State has argued that it has sovereign immunity as to all claims brought against it, doc. 86, and that issue is on appeal. (DFOF ¶ 8 (in part).)

**Experts**

2. Dr. Scott Gaylord is a law professor at Elon University who holds a J.D. from Notre Dame School of Law (1999) and a Ph.D. in philosophy from the University of North Carolina at Chapel Hill (1996). Ex. D-25 at 60. Dr. Gaylord has studied, spoken, and written on the subject of judicial selection for more than a decade. Ex. D-25 at 60-68. His writings on relevant topics include articles titled Judicial Independence Revisited: Judicial Elections and Missouri Plan Challenges, 90 N.C. L. Rev. Addendum 61 (2012); Partisan Judicial Elections Promote Democracy, News & Observer (Raleigh, North Carolina), June 24, 2013; and Judicial Selection—The Elon Debate, North Carolina State Bar Journal (Spring 2010). Ex. D-25 at 60-68. He has made presentations on judicial selection to the North Carolina Senate Select Committee on Judicial Reform and Redistricting, the Federalist Society, and the Judicial Independence Committee of the North Carolina Bar Association. Ex. D-25 at 63-66. (DFOF ¶ 9.)

3. While Dr. Gaylord cited to a lot of judicial opinions in his report, he is expressing his own opinions and notes where his opinions align with court decisions. Trial Tr. vol. III: 92 (Gaylord). (DFOF ¶ 10.)

4. Dr. Chris Bonneau holds a Ph.D. in political science from Michigan State University and is a professor of political science at the University of Pittsburg. He has written books and numerous peer-reviewed articles on the subject of judicial elections, including distinctions between partisan and non-partisan elections. Such writings include Voters' Verdicts: Citizens, Campaigns, and Institutions in State Supreme Court Elections, Charlottesville, VA: University of Virginia Press (2015); In Defense of Judicial Elections, New York: Rutledge (2009); "Party Identification and Vote Choice in Partisan and Nonpartisan Judicial elections," Political Behavior 37 (March): 43-66; "Does Quality Matter? Challengers in State Supreme Court Elections," American Journal of Political Science 50 (January):20-33; and "Judicial Selection in the States: A Look Back, A Look Ahead," in Routledge Handbook of Judicial Politics, New York: Rutledge (2017). Ex. D-24 at 25-45. (DFOF ¶ 11.)

5. Both Dr. Gaylord and Dr. Bonneau are experts who offer testimony helpful to the Court in resolving this important litigation. The Daubert challenges to the experts are rejected, and the Court will consider their testimony as appropriate and will give that testimony appropriate weight. (DFOF ¶ 12.)

6. Plaintiffs also relied on experts, and the Defendants did not raise Daubert challenges but have instead relied on the Court to give that testimony only the weight to which it is due. (DFOF ¶ 13.)

**History of Judicial Selection in the United States and in Alabama**

7. The Founders believed that a separation of powers of government is necessary to protect liberty, and thus sought to ensure that the Judicial Branch would be independent from the Executive and Legislative Branches. Ex. D-25 at 4-13. Securing the independence of the Judicial Branch safeguards liberty, acknowledges the unique role of judges as impartial interpreters of the law, and ensures that the Judiciary can be a check on the other Branches. Ex. D-25 at 6-7. Trial Tr. vol. III: 65-66 (Gaylord). (DFOF ¶ 15).

8. The Founders were concerned not only that judges be independent from the other Branches, but also from political pressures generally. Ex. D-25 at 8. (DFOF ¶ 16).

9. The Founders were less concerned about the Judicial Branch's accountability because the Judiciary, without control of the "sword" or the "purse," was originally viewed as the weakest Branch. Ex. D-25 at 9; Trial Tr. vol. III: 67 (Gaylord). The Federal Judiciary was seen as much stronger after the Supreme Court confirmed the power of judicial review in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Ex. D-25 at 10. (DFOF ¶ 17).

10. The Founders also provided for a "vertical" separation of powers between the States and the new Federal Government, further protecting liberty. Ex. D-25 at 13-14. Consequently, States retain the right to choose their own form of government and judicial selection. Ex. D-25 at 14. (DFOF ¶ 18).

11. The original States were likewise concerned about separation of powers and judicial independence. Trial Tr. Vol. III: 69 (Gaylord). Accordingly, they followed the Federal model and chose an appointment method for judicial selection: Five States chose appointment by the Governor, and eight States chose appointment by the Legislature. Ex. D-25 at 15. (DFOF ¶ 19).

12. When Alabama became a State in 1819, it followed the trend of the time and provided that appellate judges would be appointed by the Legislature. Ex. D-25 at 16-17; Trial Tr. vol. III: 69-71 (Gaylord). While this provided independence from the Executive Branch, there was less independence from the Legislature, which had the power of appointment, impeachment, and "removal by address." Ex. D-25 at 16-17. (DFOF ¶ 20).

13. In the first half of the 19th Century, States began to re-examine the way they balanced separation of powers with respect to the Judiciary. One reason was that in the early 1800s, the Jeffersonian Republicans sought to weaken the Federal Judiciary. After the election of 1800, when the Federalists lost control of Congress and the Presidency, the outgoing Federalist Congress sought to entrench their control of Judiciary by adding judgeships in the Judiciary Act of 1801 (which led to the famous decision in *Marbury v. Madison*). Ex. D-25 at 19. When Thomas Jefferson assumed office as President, he and his fellow Jeffersonian Republicans sought to weaken the Judiciary through use of the impeachment power, going after Judge Thomas Pickering and Justice Samuel Chase. Ex. D-25 at 19. These efforts appear to have chastened the Judiciary, because the Supreme Court did not exercise the power of judicial review again until the infamous *Dred Scott* decision in 1857. Ex. D-25 at 20. (DFOF ¶ 21).

14. Another reason States were re-examining separation of powers was Legislative excess, which led to financial crises in several States, leading many to believe that the Judiciary should be more independent from, and a check upon, the Legislative Branch. Ex. D-25 at 17-18, 22-23; Trial Tr. vol. V: 45 (Bonneau). (DFOF ¶ 22).

15. Another factor during this period was the rise of Jacksonian Democracy, which emphasized the need to empower the people and to increase participation in all facets of government by providing for the election of more State officials. Ex. D-25 at 18-19; Trial Tr.

Vol. III: 72-73 (Gaylord). (DFOF ¶ 23).

16. With the need for judicial independence, it did not "make sense to a lot of people [to] have a third coequal branch of government [that] derives its personnel from the other two branches of government." Trial Tr. vol. V: 45 (Bonneau). (DFOF ¶ 24).

17. For these and other reasons, States began to embrace popular election of judges. Georgia began electing some judges in 1812, and Mississippi began electing all judges in 1832. Trial Tr. vol. III: 71 (Gaylord). By 1861, 20 of the 34 States were electing all judges and four additional States were electing some judges. Ex. D-25 at 24; Trial Tr. vol. III: 72 (Gaylord). (DFOF ¶ 25).

18. Partisan judicial elections have existed since the 1820s, with one of the central arguments for electing judges being to provide independence from other political actors. Ex. D-24 at 3. (DFOF ¶ 26).

19. From the 1820s through the 1840s, Alabama, again following the trends of the other States, began to look at popular elections for judges. After Mississippi adopted elections in 1832 and Georgia did so in 1835, the call for popular judicial elections increased in Alabama. Alabama citizens rejected a constitutional amendment in 1843 to elect county judges, but adopted an amendment in 1849 to provide for popular election of county and circuit judges. Ex. D-25 at 25-26; Trial Tr. Vol. III: 77-78 (Gaylord). (DFOF ¶ 27).

20. Some thought the 1849 amendment did not go far enough, and calls for popular election of *all* Alabama judges persisted. The driving forces for the election of Alabama's appellate judges remained the same: a desire to strengthen the separation of powers, do away with partisan appointments, promote accountability, and extend popular sovereignty to every Branch. Ex. D-25 at 27; Trial Tr. vol. III: 78 (Gaylord). (DFOF ¶ 28).

21. Alabama finally provided for popular election of appellate judges in the 1868 "Reconstruction" Constitution for the purpose of promoting judicial independence and accountability, not racial discrimination. Ex. D-25 at 27. (DFOF ¶ 29).

22. News articles from that era show that Alabamians were concerned about the role the Legislature had been playing in judicial selection and the corruptive influence that had on the political system. Popular elections were thought of as a way to move the behind-closed-doors politics into the open where people could see, hear, and actually participate in them. Trial Tr. vol. III: 146 (Gaylord). (DFOF ¶ 31).

23. The *New York Times* reported on Alabama's 1867 Constitutional convention and noted that convention delegates rejected a proposal for gubernatorial appointments. Appointments were proposed to discriminate against African Americans because some feared that African Americans would win judicial elections. Ex. D-25. at 27-28; Trial Tr. vol. III: 114 (Gaylord). (DFOF ¶ 32).

24. Mississippi was already using districts to elect judges by 1867 when the framers of Alabama's 1868 Constitution met, so the delegates to Alabama's constitutional convention knew that districts were an option. Trial Tr. vol. III: 126 (Gaylord). (DFOF ¶ 33).

25. A fair inference to draw from Alabama's rejection of the appointment system at that time, and its selection of statewide elections in particular, was that Alabama wanted both African Americans and whites to participate in judicial selection. Trial Tr. vol. III: 125 (Gaylord). (DFOF ¶ 34).

26. There is no evidence that Alabama chose statewide popular elections for appellate judges for a discriminatory purpose. Trial Tr. vol. III: 145 (Gaylord). (DFOF ¶ 35).

27. Plaintiffs' expert Dr. Norrell agrees that Alabama's adoption of popular statewide

judicial elections in 1868 "was not instituted for the purpose of discriminating against blacks. You might say it was instituted in order to help African Americans." Trial Tr. vol. III: 280 (Norrell). (DFOF ¶ 36).

28. Plaintiff's expert agrees that there was a national movement towards electing judges in 1868. Trial Tr. vol. III: 282 (Norrell). (DFOF ¶ 37).

29. The historical process, Alabama following trends set by other States, and the debates at the time as reflected in contemporaneous media reports are all evidence that Alabama chose statewide popular elections to select appellate judges because of interests such as judicial independence and accountability, not because of race. Trial Tr. vol. III: 113-114 (Gaylord). (DFOF ¶ 38).

30. From the time Alabama became a State and through the 1868 convention, Alabama followed trends in other States when considering judicial selection. Trial Tr. vol. III: 79 (Gaylord). (DFOF ¶ 39).

31. When framing the 1875 Constitution of Alabama, some of the "Redeemers" – those who wanted to roll back the rights of African-Americans – wanted to move to an appointment system for judges, but elections had caught on with the general population and many voters believed that an appointment system would benefit the "inside crowd." Trial Tr. vol. III: 182-83 (Norrell). (DFOF ¶ 40).

32. Since 1868, Alabama has never elected judges from districts and has never stopped using popular elections to select appellate judges. Ex. D-25; Trial Tr. vol. III: 79-80 (Gaylord). (DFOF ¶ 41).

**Alabama's Appellate Courts: Design, Authority, and Election Mechanics**

33. Alabama began using numbered places when there were no African American lawyers in Alabama, and therefore no potential African American judges. Trial Tr. vol. III: 285 (Norrell). (DFOF ¶ 48.)

34. Numbered places were adopted when several white factions were feuding (Conservatives, Progressives, Prohibitionists, and the Ku Klux Klan); none of these groups were pro-African American. Trial Tr. vol. III: 286 (Norrell). (DFOF ¶ 49.)

35. A vast majority, if not all, of States that elect judges use numbered places to do so. Trial Tr. vol. III: 80 (Gaylord). See also P-139B (Banks Dep. Tr.) at 5-6, 10 (Mississippi Supreme Court justices elected using numbered posts). (DFOF ¶ 50.)

36. Dr. Norrell knows of no States that do not use primaries, numbered places or a majority vote requirement. Trial Tr. vol. III: 280-81 (Norrell). (DFOF ¶ 51.)

37. Alabama provided for appellate judges to run for numbered places in 1927, not in order to discriminate, but as a means of incumbent protection. Trial Tr. vol. III: 250 (Norrell). (DFOF ¶ 52.)

38. Numbered places prevent incumbent judges from competing against each other in elections and therefore promote collegiality on the courts. Trial Tr. vol. III: 80-81 (Gaylord). Eliminating numbered places and forcing judges to run against each other could affect collegiality on the court. Trial Tr. vol. V: 165 (Harwood). (DFOF ¶ 53.)

39. Many States use numbered places, and none have abruptly changed their system to eliminate numbered places, so it is not possible to point to examples of the effect that eliminating numbered places would have. Trial Tr. vol. III: 118 (Gaylord). (DFOF ¶ 54.)

40. A 1961 Alabama law providing for numbered places in elections did not change the manner of electing appellate judges, because numbered places for judicial elections had been in place since 1927. Trial Tr. vol. III: 44 (McCrary). (DFOF ¶ 55.)

41. Bills were introduced in the Alabama Legislature in 2000 and 2004 to provide for districted elections for appellate judges, but two never made it out of committee and the third did not make it to the floor for a vote. Trial Tr. vol. III: 219-221 (Hall). White Democrats were chairs of the committees. Trial Tr. vol. III: 222 (Hall). (DFOF ¶ 80.)

42. Representative Laura Hall has no evidence that racial bias was behind the death of the bills. She asserts simply that the fact that the bills never came out of committee is such evidence. Trial Tr. vol. III: 230 (Hall). (DFOF ¶ 81.)

43. The Court declines to so find. Many bills die in every session of the Alabama Legislature, and they die for a variety of reasons. Trial Tr. vol. III: 230 (Hall). Moreover, Rep. Hall is not aware of any Legislator who opposed one of the bills, HB 45. Trial Tr. vol. III: 231. And, no comments were made about the bills that Rep. Hall interpreted to be the product of racial bias. Trial Tr. vol. III: 232 (Hall). (DFOF ¶ 82.)

**Modes of Judicial Selection in Use Around the Country**

44. States use various models to select judges. Trial Tr. vol. III: 82-85 (Gaylord, describing the different models). Those models include the following: (1) democratic appointment by the Legislature, as in South Carolina and Virginia; (2) appointment by the Governor with confirmation by the Legislature, as in Maine and New Jersey; (3) appointment by the Governor with confirmation by the Attorney General and members of the Judicial branch, as in California; (4) the "Missouri Plan," where the Governor appoints judges from a list developed by a commission, as in Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri,

Nebraska, Oklahoma, South Dakota, Tennessee, and Wyoming; (5) "hybrid" States, which combine elements of the Missouri Plan with democratic appointments, as in Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Utah, and Vermont; (6) partisan elections, as in Alabama, Illinois, Louisiana, New Mexico, North Carolina, Pennsylvania, and Texas; and (7) non-partisan elections, as in Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, West Virginia, and Wisconsin. Ex. D-25 at 34-35. (DFOF ¶ 84.)

45. Twenty-two States use popular elections to choose judges in the first instance; of these, 18 use statewide elections and four use districts. Trial Tr. vol. III: 155. Of the four States that use districts, two use partisan elections and two use non-partisan elections. Trial Tr. vol. III: 156 (Gaylord). (DFOF ¶ 87.)

46. Sixteen States use retention elections, and each of those uses statewide elections. Trial Tr. vol. III: 157 (Gaylord). (DFOF ¶ 88.)

47. Thirty-four States therefore use statewide elections at some point in the process of selecting or retaining appellate judges. Trial Tr. vol. III: 158 (Gaylord). (DFOF ¶ 89.)

48. Several States have moved away from partisan elections in recent years, though electing judges remains quite popular with the public in those States with judicial elections. Polls (both nationwide and within States) show that between two-thirds and three-quarters of voters prefer to elect their judges. Ex. D-24 at 4. (DFOF ¶ 85.)

49. The districts used in Louisiana intermediate appellate court elections vary widely in size, with the average being 50,000 or 60,000 in population and smaller districts as low as 20,000 or 30,000. Trial Tr. vol. IV: 23 (Thibodeaux). (DFOF ¶ 93.)

**Advantages and Disadvantages of Judicial Selection Methods**

50. There are no objective criteria to weigh the various advantages and disadvantages of the various methods that States use to select judges. Ex. D-25 at 34; Trial Tr. vol. III: 97-98 (Gaylord). (DFOF ¶ 100.)

51. There is no one method that results in more qualified judges than other methods. Trial Tr. vol. V: 44 (Bonneau). (DFOF ¶ 101.)

52. Empirical evidence does not show that any particular method of selecting judges will result in more qualified judges serving on the bench. Trial Tr. vol. III: 63 (Gaylord). (DFOF ¶ 102.)

53. No system of selecting judges, including the Federal system, gets all politics out of selecting judges. Trial Tr. vol. I:139 (White); Trial Tr. vol III: 99 (Gaylord). (DFOF ¶ 103.)

54. Even though a county-level nominating commission was involved, politics played a role when Justice Harwood was proposed to fill a vacancy on the Tuscaloosa County Circuit Court. He at first did not receive the nomination because he donated to the Governor's opponent. Trial Tr. vol. V: 155 (Harwood). He was appointed to fill a later vacancy, but only after agreeing to run for re-election as a Republican. Trial Tr. vol. V: 155-56 (Harwood). (DFOF ¶ 104.)

55. A "Missouri Plan" system does not remove politics from the process; the politics are relegated to the back room, out of sight, and continue to occur on the judicial nominating commissions. Trial Tr. vol. III: 151 (Gaylord). (DFOF ¶ 105.)

56. Empirical evidence shows that in States where judges are appointed, the judges are far less likely to engage in judicial review than in States where they are elected. Trial Tr. vol. V: 46 (Bonneau). (DFOF ¶ 106.)

57. Judges could run campaign commercials that appear to appeal to the baser instincts of a certain population in any system that includes elections, whether the State uses

districts or statewide elections. Trial Tr. vol. III: 140-41 (Gaylord); Trial Tr. vol. III: 229 (Hall). (DFOF ¶ 107.)

58. This Court takes judicial notice that current Alabama Chief Justice Tom Parker, who referenced the Southern Poverty Law Center in one of his 2018 campaign commercials, was the subject of a judicial ethics complaint filed by the SPLC. The SPLC objected to comments Parker made in a radio interview suggesting that lower courts should perhaps ignore United States Supreme Court precedent concerning same-sex marriage. The SPLC also objected to comments Parker made publicly that addressed a same-sex marriage-related matter pending before the Alabama Supreme Court at that time. The Alabama Judicial Inquiry Commission declined to bring charges. Parker successfully challenged the constitutionality of certain Alabama Canons of Judicial Ethics governing speech. *See Parker v. Judicial Inquiry Comm'n of Alabama*, 295 F. Supp. 3d 1292 (M.D. Ala. 2018). (DFOF ¶ 108.)

59. Jerome Gray, a civil rights activist, testified that if there had been racial appeals in the elections involving Ralph Cook, John England, or other minority judicial candidates, he would remember it, but he does not recall any such racial appeals. Trial Tr. vol. IV: 150-51 (Gray). Judge Jones is not aware of any racial appeals made in his 2008 election. Trial Tr. vol. I: 101 (Jones). (DFOF ¶ 109.)

60. States may balance different factors, such as judicial accountability and judicial independence, and weigh those factors differently, in order to arrive at different methods of judicial selection. Trial Tr. vol. III: 63-64 (Gaylord). (DFOF ¶ 110.)

61. Empirical studies show that district-based judicial elections do not result in less campaign spending overall, and there are no differences in the amount of money raised by candidates in district-based judicial elections compared to statewide elections. Ex. D-24 at 4;

Trial Tr. vol. V: 50 (Bonneau). (DFOF ¶ 111.)

62. Voter participation is lower in district-based Supreme Court elections compared to statewide elections, and district-based partisan elections for a State Supreme Court are less likely to be contested. Ex. D-24 at 4-5; Trial Tr. vol. V: 50, 55 (Bonneau). (DFOF ¶ 112.)

63. For instance, Judge Thibodeaux, who has been on the ballot in numerous districted elections in Louisiana, has never been opposed: "I have never run a race for any office." Trial Tr. vol. IV: 14, 35 (Thibodeaux). (DFOF ¶ 113.)

64. The average ballot roll-off in all States with intermediate appellate court elections from 2000 through 2007 was 29.1%. But in Alabama, it was only 8.1%, showing that Alabama had far more voter participation than many other States. Ex. D-24 at 11; Trial Tr. vol. V:57-58 (Bonneau). (DFOF ¶ 114.)

65. District-based State Supreme Court elections have lower levels of electoral competition compared to statewide races; that is, candidates win with a higher percentage of the vote in districts compared to statewide races. Ex. D-24 at 6. (DFOF ¶ 115.)

66. Judicial elections in Alabama that are contested tend to be competitive. Trial Tr. vol. V: 59-60 (Bonneau). (DFOF ¶ 116.)

67. The smaller fundraising base of district-based State Supreme Court elections seems to hurt the ability of challengers to raise money. Ex. D-24 at 6. (DFOF ¶ 117.)

68. District-based elections for intermediate appellate courts are not less expensive than statewide races, even though they occur in smaller geographic areas. Ex. D-24 at 6. (DFOF ¶ 118.)

69. Empirical evidence thus shows that if Alabama is forced to elect judges by districts, campaign spending and fundraising would stay as high as it is now, fewer candidates

will participate in judicial elections, challengers will have a more difficult time mounting a campaign, and elections are less likely to be contested so that voters have less choice. Trial Tr. vol. V: 79 (Bonneau). (DFOF ¶ 119.)

**Alabama's Shift from Democratic Dominance to Republican Dominance: In General**

70. Defendants do not dispute that most black African American voters in Alabama tend to prefer different candidates than most white voters in Alabama. However, Defendants deny that the voters' different choices are on account of race. (DFOF FOF ¶ 125.)

71. Alabama was essentially a one-party State dominated by of the Democratic Party in the 20th Century. Trial Tr. vol. I: 138 (White). (DFOF ¶ 127.)

72. Even though Republicans had little success in the 1980s and earlier, they had the opportunity to build up the Party, and that's what they did. Trial Tr. vol. V: 195 (Harwood). (DFOF ¶ 128.)

73. In 1976, only Democrats appeared on the ballot for appellate judicial offices. Ex. D-103 at 8. (DFOF ¶ 132.)

74. Justice Adams enjoyed wide support from the Alabama Bar. Trial Tr. vol. I: 117 (White). (DFOF ¶ 140.)

75. Justice Adams could not have won his election without support from white voters. Trial Tr. vol. IV: 147 (Gray). (DFOF ¶ 141.)

76. Justice Adams had been a member of the Republican Party, but switched to the Democratic Party because, in the 1980s, the belief was that a person was not going to get elected in Alabama unless he or she was a Democrat. Trial Tr. vol. I: 118-19 (White). (DFOF ¶ 142.)

77. While Justice Cook testified that he did not use his images on campaign literature during the 1994 election, Trial Tr. vol. IV: 88 (Cook), Mark White, who was his campaign

manager, testified that Justice Cook was open about his race in that campaign, Trial Tr. vol. I: 132 (White). (DFOF ¶ 151.)

78. Mark White testified that Justice Cook's opponent attempted to "play the race card" in the 1994 election, but that such attempts were not supported by the Republican Party. Trial Tr. vol. I: 141 (White). (DFOF ¶ 153.)

79. Justice Cook won his 1994 Supreme Court election with biracial support. Trial Tr. vol. I: 135 (White). (DFOF ¶ 155.)

80. In 1994, Republicans were elected in two judicial races: Republican Perry Hooper defeated Democrat Sonny Hornsby for Chief Justice of the Alabama Supreme Court, and Republican Long defeated Democrat Bowen for a place on the Court of Criminal Appeals. Democrats won all other statewide elections and Republicans fielded candidates for all executive offices and seven of ten judicial offices. D-103 at 21-23. (DFOF ¶ 157.)

81. Hooper was the only Republican nominee for an Alabama appellate court who won in 1994; the others, including Greg Griffin, who is black, lost. Trial Tr. Vol. VI: 117 (Murdock). Ralph Cook, who is black, won his Supreme Court race that year as a Democrat. Trial Tr. Vol. VI: 117 (Murdock). (DFOF ¶ 158.)

82. Prior to serving on the Supreme Court, Justice England was appointed to the Circuit Court of Tuscaloosa County in 1993 and was reelected in 1994. Trial Tr. vol. I: 33-35 (England). Justice England had the support of the local Bar, which at the time was primarily white, and support in the general community. Trial Tr. vol. I: 35 (England). Tuscaloosa County is 25% to 30% African-American. Trial Tr. vol. I: 37 (England); Trial Tr. vol. II: 7-8 (Travis). People in Tuscaloosa County are aware that Justice England is African-American. Trial Tr. vol. I: 60 (England). (DFOF ¶ 162.)

83. In 2000, Republicans won ten of the eleven statewide judicial elections on the ballot, the exception being Democrat Sue Bell Cobb's election to the Court of Criminal Appeals. Ex. D-103 at 27-28. (DFOF ¶ 163.)

84. In 2000, four Democrats lost their elections for Supreme Court of Alabama. The African-American candidates, Ralph Cook and John England, each received more votes than the two losing white Democratic candidates for Supreme Court of Alabama. Ralph Cook received 46.4% of the vote and John England received 45.8% of the vote Ex. D-24 at 9; Ex. D-103 at 27. (DFOF ¶ 164.)

85. That suggests that thousands of Alabama voters who voted for George W. Bush for president also voted for one or more African-American Democrats to serve as Alabama Supreme Court justices. Trial Tr. vol. V: 151 (Bonneau); Ex. D-103 at 27. (DFOF ¶ 168.)

86. Justice Cook had enjoyed a reputation as a conservative jurist, but after serving for several years and casting votes in tort-reform type cases, he did not have the same reputation in 2000. Trial Tr. vol. VI: 99 (Murdock). (DFOF ¶ 169.)

87. Justice Cook ran in five general elections and won the first four of those. In each instance the electorate was majority-white. Trial Tr. vol. IV: 79, 119 (Cook). (DFOF ¶ 170.)

88. Former Justice Bernard Harwood, who now practices often in front of Judge England, testified that Judge England enjoys bipartisan and biracial support in majority-white Tuscaloosa County and is "probably the most popular judge we've got." Trial Tr. vol. V: 166 (Harwood). (DFOF ¶ 172.)

89. In 2002 executive office elections, Democrats were elected Lt. Governor, Secretary of State, and Agriculture Commissioner, while Republicans were elected Governor, Attorney General, State Treasurer, and State Auditor. Ex. D-103 at 29. In appellate judicial races,

Republicans won all four contests. Ex. D-103 at 29-30. (DFOF ¶ 175.)

90. In 2004, Republicans won all four appellate judicial races. Ex. D-103 at 31. (DFOF ¶ 176.)

91. In 2006, Republicans won all executive offices except for Agriculture Commissioner and Lt. Governor, and ten of eleven appellate judicial offices on the ballot, though Democrat Sue Bell Cobb won the Chief Justice election. Ex. D-103 at 32-33. (DFOF ¶ 177.)

92. Sue Bell Cobb was the candidate of choice for African American voters generally in 2006. Trial Tr. vol. II: 125 (Handley). She was the candidate of choice for Plaintiff Curtis Lee Travis. Trial Tr. vol. II: 26 (Travis). (DFOF ¶ 179.)

93. In 2006, John England received 45.0% of the vote, a higher percentage than white Democratic candidates for the Supreme Court of Alabama who were unsuccessful, Ex. D-24 at 10, including incumbent Mark Kennedy, Ex. D-103 at 33. (DFOF ¶ 181.)

94. Judge Jones acknowledged that his opponent in the 2008 election for the Court of Criminal Appeals had run an unsuccessful campaign for the same court in 2006, and that there is a learning curve to campaigning. Trial Tr. vol. I: 103-104 (Jones). (DFOF ¶ 182.)

95. Judge Jones has been re-elected to the Circuit Court bench in Jefferson County with support of both black and white voters. Trial Tr. vol. I: 105-106 (Jones). (DFOF ¶ 183.)

96. Judge Jones testified that the "top of the ticket" was important in voting in 2008, and that he believed that a lot of voters "pulled a straight ticket voting." Trial Tr. vol. I: 87 (Jones). He testified, "The same thing happened to one of my good friends, Aimee Cobb Smith, who was also running for the Court of Criminal Appeals [as a Democrat], a white female. And she lost her race also." Trial Tr. vol. I: 87 (Jones). Judge Jones is not aware of any Democrats that won that year in statewide elections. Trial Tr. vol. I: 87 (Jones). (DFOF ¶ 184.)

97. In 2010, Republicans won all executive offices and all five appellate judicial races. Ex. D-103 at 35-36. (DFOF ¶ 188.)

98. In 2012, Republicans won all eleven statewide judicial races. Democrats fielded a candidate in only one race. Ex. D-103 at 37-38. (DFOF ¶ 189.)

99. In 2014, Republicans won all executive offices and five of five appellate judicial offices; Democrats fielded no candidates for appellate judicial offices. Ex. D-103 at 39-40. (DFOF ¶ 190.)

100. Jerome Gray, who was the state field director for the Alabama Democratic Conference for nearly four decades, Trial Tr. vol. IV: 140-41, does not know who Lula Albert-Kaigler is, Trial Tr. vol. IV: 147, even though she was the Democratic candidate for a statewide office. (DFOF ¶ 192.)

101. In 2016, Republicans won three of three statewide judicial offices; Democrats fielded no candidates for appellate judicial offices. Ex. D-103 at 41. (DFOF ¶ 193.)

102. In 2018, Republicans won all statewide offices, including all executive offices and eleven appellate judicial offices. Ex. D-103 at 43-44. Democrats fielded candidates in only two of the eleven appellate judicial races. Ex. D-103 at 43-44. Tom Parker, who won the election for Chief Justice, received the fewest votes of any Republicans in statewide races. Ex. D-103 at 43. (DFOF ¶ 194.)

103. The President of the Alabama NAACP does not contend that any current Alabama appellate judges are racist. Trial Tr. vol. I: 165 (Simelton). (DFOF ¶ 198.)

104. Plaintiff Curtis Travis denies that any Alabama appellate judge is discriminating on the basis of race. Trial Tr. vol. II: 21 (Travis). (DFOF ¶ 199.)

105. Chris McCool, a white Republican candidate for the Court of Criminal Appeals in 2018, was the candidate of choice for plaintiff Curtis Lee Travis, an African-American. Trial Tr. vol. II: 28 (Travis). (DFOF ¶ 200.)

106. While intermediate-level appellate court races were consistently contested between 2000 and 2010, since 2012, the Democratic Party has failed to field any candidates for these seats. Ex. D-24 at 11. (DFOF ¶ 201.)

107. In the 2018 elections in Alabama, "black and white statewide Democrats all lost by about the same margin. If it was about skin color, you would have expected the statewide Democratic African-American candidate to do worse than the statewide white Democratic candidate, I would think, but they all had about the same percentage." Trial Tr. vol. VI: 88 (Murdock). (DFOF ¶ 202.)

108. Both black and white candidates need biracial support to win at the appellate judicial level. Trial Tr. vol. I: 142 (White). (DFOF ¶ 203.)

109. As these election results show, Alabama began a shift in 1994 and, over a decade, transitioned from an all-Democratic Supreme Court to an all-Republican Supreme Court. Ex. D-24 (DFOF ¶ 204.).

110. Blacks are better represented in the Alabama Legislature than they are in Legislatures of most other States. Trial Tr. vol. III: 223-24 (Hall) (DFOF ¶ 206.)

**Alabama's Shift from Democratic Dominance to Republican Dominance: Reasons for the Shift**

111. A prolonged election contest between Bill Baxley and Charlie Graddick, opponents in the Democratic gubernatorial primary, and the public backlash that resulted, led to the 1986 election of a Republican Governor Guy Hunt and had an impact on Alabama's switch

from a one-party Democratic State to a one-party Republican State. Trial Tr. vol. IV: 148 (Gray). (DFOF ¶ 207.)

112. The Court takes judicial notice that Hunt was the first Republican elected Governor in Alabama since Reconstruction. (DFOF ¶ 208.)

113. Tort reform, not racial bias, was the driving force in the realignment of the Alabama Supreme Court. Ex. D-27 at 2-3. Scholars such as Stephen Ware and Jed Shugerman agree. Trial Tr. vol. III: 103-04 (Gaylord). (DFOF ¶ 209.)

114. The similar experience in Texas, the timing of the tort reform debate, and the fact that the partisan shift came at a time when Republic candidates were campaigning on a tort reform platform, lead to the reasonable inference that tort reform was the cause of the shift. Trial Tr. vol. III: 147-48 (Gaylord). (DFOF ¶ 210.)

115. Beginning in the 1980s, Republicans and business interests shifted their attention to winning judicial elections, emphasizing socially conservative issues (such as tort reform and separation of powers) and increasing spending in key races. Ex. D-26 at 3. (DFOF ¶ 211.)

116. In the 1980s and early 1990s, Alabama was referred to as "tort hell" because of runaway jury verdicts, including the famous multi-million-dollar paint job in BMW v. Gore. Ex. D-27 at 5-7; Trial Tr. vol. III: 103 (Gaylord); Trial Tr. vol. VI: 9-10 (Murdock). Some members of the defense bar referred to the plaintiff-friendly Supreme Court of Alabama as the "tort of the month club," because of the Court's willingness to recognize new causes of action and expand existing causes of action. Trial Tr. vol. VI: 10 (Murdock). (DFOF ¶ 212.)

117. Insurance companies were leaving the State because of the litigation environment, and businesses were not coming to Alabama. Trial Tr. vol. VI: 10 (Murdock). (DFOF ¶ 213.)

118. Concern for run-away jury verdicts was biracial: Justice Harwood, before he went on the Court, had clients who were African-American business owners who felt the system was out of control. Trial Tr. vol. V: 193 (Harwood). (DFOF ¶ 214.)

119. The Alabama Legislature passed tort reform legislation in 1987, but the Supreme Court of Alabama struck down many of the key provisions as unconstitutional. Ex. D-27 at 6; Trial Tr. vol. VI: 11 (Murdock). These decisions added separation of powers concerns to the already heated tort reform issue. Ex. D-27 at 6. (DFOF ¶ 215.)

120. As in Alabama, appellate courts in Texas and Ohio negated legislative efforts to reform the tort system. Trial Tr. vol. VI: 11 (Murdock). (DFOF ¶ 214.)

121. As in Alabama, tort reform was a central issue in Texas in the 1980s and 1990s, including efforts to replace pro-plaintiff judges with pro-business, "rule of law" judges. Ex. D-27 at 4. (DFOF ¶ 217.)

122. Texas Republicans hired Karl Rove to run a "Clean Slate '88" campaign in 1988 in an attempt to break the Democratic hold on the Texas supreme court. Ex. D-27 at 4-5. Rove spearheaded a campaign that emphasized tort reform and populist themes. Ex. D-27 at 4-5. "Clean Slate" Republicans won three of the six seats on the ballot that year, while pro-business conservative Democrats won two others. Ex. D-27 at 4-5. A decade later, Republicans occupied all nine seats on the court. Ex. D-27 at 4-5. (DFOF ¶ 218.)

123. Based on Rove's success in Texas, the Business Council of Alabama hired Rove in 1994 to break the Democrats' monopoly on the Supreme Court of Alabama. As in Texas, Rove ran a group of Republican candidates, emphasizing the same pro-business, tort reform themes that proved successful in Texas. Ex. D-27 at 5. See also Trial Tr. vol. I: 135-140 (White)

(testifying about Rove's work in Alabama on behalf of Republican judicial candidates); Trial Tr. vol. VI: 11-12 (Murdock). (DFOF ¶ 219.)

124. Throughout the 1994 Alabama Supreme Court campaign, Republican challengers reminded voters that the Democratic incumbents had been soliciting (and receiving) donations from trial lawyers who had cases before the court, emphasizing "jackpot justice" by "wealthy personal injury lawyers." Ex. D-27 at 7-8. (DFOF ¶ 220.)

125. Rove "tried to make it [tort reform] relevant to the average Joe, the average voter, and explain how the unlevel playing field and this jackpot justice meant some people were getting rich while it was hurting our economy and jobs for the average Alabamian." Trial Tr. vol. VI: 12 (Murdock). (DFOF ¶ 221.)

126. The critiques of pro-plaintiff Justices and calls for civil justice reform proved successful in 1994, as Hugh Maddox, a conservative Democrat, was elected after defeating a primary opponent supported by the trial lawyers, and as Republican Perry Hooper, Sr. won a contentious Chief Justice election over Democrat Sonny Hornsby, a former president of the Alabama Trial Lawyers' Association. Ex. D-27 at 8. (DFOF ¶ 222.)

127. Karl Rove continued to work for Republican judicial candidates in 1996 and through 2000, continuing the narrative of "jackpot justice, unfair playing field, rule of law." Trial Tr. vol. VI: 12, 29 (Murdock). Rove pushed the same narrative in the 1998 elections when he worked on Glenn Murdock's unsuccessful Supreme Court campaign. Trial Tr. vol. VI: 12 (Murdock). (DFOF ¶ 223.)

128. Advocates for tort reform made further gains in 1996 when Republican Harold See defeated incumbent Democrat Kenneth Ingram for a seat on the Supreme Court of Alabama. Ex. D-27-8. (DFOF ¶ 224.)

129. In 1998, conservatives gained a majority on the Alabama Supreme Court for the first time ever. Justice Gorman Houston, who served as a conservative Democrat, was re-elected after changing his party affiliation to Republican; Alabamians elected Republican Jean Brown; and Governor Fob James appointed Champ Lyons to fill the vacancy created by the retirement of Justice Terry Butts. Ex. D-27 at 8. (DFOF ¶ 225.)

130. In 2000, Alabama voters re-elected Champ Lyons and elected three first-time Republican candidates: Lyn Stuart, Thomas Woodall, and Robert Harwood. Ex. D-27 at 8-9. (DFOF ¶ 226.)

131. Tort reform was still very much an issue when Justice Harwood ran for the Supreme Court in 2000. Trial Tr. vol. V: 163 (Harwood). (DFOF ¶ 227.)

132. By the year 2000, the perception was that the business interests were more aligned with the Republican Party or that it more closely represented their interests. Trial Tr. vol. V:164 (Harwood). (DFOF ¶ 228.)

133. After the 2004 election cycle, the partisan transition was complete, and nine Republicans sat on the Supreme Court of Alabama. Ex. D-27 at 8-9. (DFOF ¶ 229.)

134. Alabama voters, motivated by the ongoing tort-reform battle, were electing justices with a more conservative judicial philosophy to promote the rule of law and to protect the separation of powers, aligning with Republican judges to prevent judicial overreach. Ex. D-27 at 9-10. (DFOF ¶ 230.)

135. Plaintiff Curtis Lee Travis, an African-American, testified that tort reform was the cause or a primary cause of the transition of the Alabama Supreme Court from all-Democrat to all-Republican. Trial Tr. vol. II: 29 (Travis). (DFOF ¶ 231.)

136. The sharp increase in spending on judicial races during this time period demonstrates the importance of the tort-reform battle as a factor in the partisan realignment of Alabama's appellate courts. Ex. D-27 at 10; Trial Tr. vol. III: 103 (Gaylord). Similar increases were seen in Illinois, Michigan, and other States. Ex. D-27 at 10-11. (DFOF ¶ 232.)

137. African-American candidates for the Supreme Court of Alabama spent significantly less money than their opponents. In 2000, Cook spent $437,481 while his Republican opponent Lyn Stuart spent $1,254,450. Ex. D-24 at 10. In 2000, John England spent $500,680 while his Republican opponent Tom Woodall spent $1,107,838. In 2006, John England spent $966,549 while his Republican opponent Glenn Murdock spent $1,473,984. Ex. D-24 at 10. (DFOF ¶ 233.)

138. At the intermediate-appellate court level, the average amount of money spent by losing candidates is $285,198. However, African-American losing candidates spent an average of only $54,976. Ex. D-24 at 12. (DFOF ¶ 234.)

139. The Defendant's expert evidence concerning the history of tort reform and the Hooper/Hornsby controversy, and their impact on the partisan shift in Alabama courts, is further supported by the testimony of former Supreme Court Justice Glenn Murdock. (DFOF ¶ 235.)

140. From his experience on the court, his personal involvement in the tort reform debate and serving as counsel for Perry Hooper, Sr., in an election contest, and campaigning for judicial offices, Murdock believes that the partisan shift on Alabama's appellate courts is a result of the tort reform debate, the election contest between Hooper and Sonny Hornsby that brought election integrity to the forefront, and the fact that Alabama voters came to support a conservative judicial philosophy. Trial Tr. vol. VI: 9 (Murdock). (DFOF ¶ 237.)

141. In the 1994 race between Perry Hooper and Sonny Hornsby for Chief Justice, election night returns reflected that Hooper won by a few thousand votes. Trial Tr. vol. VI: 14 (Murdock). (DFOF ¶ 238.)

142. The next morning, updated returns reflected that Hornsby was ahead by roughly 600 votes. Trial Tr. vol. VI: 14 (Murdock). (DFOF ¶ 239.)

143. Murdock was one of the lawyers representing the Hooper campaign, and their first effort was to see if reports of voting fraud were true and if there was evidence of fraudulent ballots that could turn the tide in the election. Trial Tr. vol. VI: 14 (Murdock). The reports of fraud occurred throughout the State, and there have been prosecutions of Democrats and Republicans alike for voter fraud in Alabama. Trial Tr. vol. VI: 90-91. Prosecutions were conducted jointly by a Republican Attorney General and a Democratic United States Attorney, Doug Jones, who now represents Alabama in the United States Senate. Trial Tr. vol. VI: 91 (Murdock). (DFOF ¶ 240.)

144. As local jurisdictions corrected tabulation errors, the vote totals shifted and Hooper took the lead by 262 votes. Trial Tr. vol. VI: 15-16 (Murdock). (DFOF ¶ 241.)

145. With Hooper then in the lead, the Hornsby campaign filed a State court action seeking a court order requiring that 1,700 absentee ballots be counted. Trial Tr. vol. VI: 17 (Murdock). These ballots were not properly witnessed or notarized in accordance with Alabama law, but the Hornsby campaign argued that they should be counted anyway because they "substantially complied" with Alabama law. Trial Tr. vol. VI: 17-18 (Murdock). Judge Gene Reese on the Circuit Court of Montgomery County ruled in favor of the Hornsby campaign. Trial Tr. vol. VI: 17 (Murdock). (DFOF ¶ 242.)

146. The Hooper campaign then filed federal actions seeking to stop the counting of unlawful ballots, first a Section 5 preclearance action and then a Due Process claim that argued against changing the rules after the election. Trial Tr. vol. VI: 17-25 (Murdock). The litigation was prolonged and highly publicized. Trial Tr. vol. VI: 23-24 (Murdock). (DFOF ¶ 243.)

147. At one point in the litigation, the Eleventh Circuit certified a question of State law concerning the legality of the ballots to the Supreme Court of Alabama. Trial Tr. vol. VI: 25 (Murdock). Most of the sitting justices, including Ralph Cook, declined to recuse in a case involving their colleague, and they took heat for it in subsequent elections. Trial Tr. vol. VI: 25-26 (Murdock). (DFOF ¶ 244.)

148. While Hooper was ultimately declared the winner after prevailing in the federal lawsuit, the race for Chief Justice was unsettled for a year. Trial Tr. vol. VI: 26 (Murdock). During that time, and with all the media coverage, the narrative of Democrats seeking to win with unlawful votes and the Republicans seeking to keep the election honest became ingrained in voters' minds and conditioned the way people thought about judicial races. Trial Tr. vol. VI: 26 (Murdock). (DFOF ¶ 245.)

149. Polling conducted by national experts for the Murdock campaigns in 1998, 2000, and 2006 showed that the themes of tort reform and election integrity resonated with voters. Trial Tr. vol. VI: 34-35, 84-86 (Murdock). (DFOF ¶ 246.)

150. In Murdock's 1998 Supreme Court campaign, he advertised that he was a lawyer who helped fight against election fraud. Trial Tr. vol. VI: 31 (Murdock). (DFOF ¶ 247.)

151. In Murdock's 2000 campaign for the Court of Civil Appeals, his opponent was Gene Reese, the Circuit Court Judge who had ruled for Hornsby when ordering the counting of illegal ballots. Trial Tr. vol. VI: 32 (Murdock). Murdock's theme in that successful campaign

was that Judge Reese was for counting illegal ballots and Murdock fought for fair elections. Trial Tr. vol. VI: 33 (Murdock). Murdock had the largest margin of victory that year of any contested race in Alabama except for the Presidency. Trial Tr. vol. VI: 33 (Murdock). (DFOF ¶ 248.)

152. Any candidates for a judicial office will have a difficult time winning elections in Alabama if they are unable to convince voters that they have a conservative philosophy and that they will apply traditional values when making judgment calls. Trial Tr. vol. VI: 69-70 (Murdock). (DFOF ¶ 249.)

**Alabama's Shift from Democratic Dominance to Republican Dominance: The Fall of the Democratic Party and the Fallacy of Plaintiffs' Focus on Race**

153. Alabama voters were not motivated by race during the transition from an all-Democrat court to an all-Republican court. Ex. D-27 at 9. (DFOF ¶ 250.)

154. The lack of success of African-American candidates is not because of their race; rather, it is because they all run as members of the Democratic party. Ex. D-24 at 19. (DFOF ¶ 251.)

155. The condition of the Democratic Party in Alabama has fallen as that of the Republican Party in Alabama has risen. Trial Tr. vol. V: 197 (Harwood). (DFOF ¶ 252.)

156. Democrats are unlikely to be elected in a statewide election in Alabama regardless of their race and regardless of whether they are the candidate of choice of African American voters. Ex. D-26 at 2. (DFOF ¶ 253.)

157. "The Democratic Party's position is significantly weaker now than it was 20 years ago on all levels, leadership, funds, ability to help their candidates. It's across the board weaker." Trial Tr. vol. I: 69 (England). (DFOF ¶ 254.)

158. "The condition [of] the Democratic Party, with the exception of when they're dealing with federal elections, the ability to raise money and stuff like that is not as great." Trial Tr. vol. II: 33 (Travis) (DFOF ¶ 255.).

159. The late Paul Hubbard was a strong power in the Democratic party, and his loss weakened the party. Trial Tr. vol. V: 197-98 (Harwood). (DFOF ¶ 256.)

160. A weak party infrastructure makes it harder to recruit qualified candidates, harder to support candidates with phone banks and get-out-the-vote campaigns, and harder to raise money. Trial Tr. vol. V: 69 (Bonneau). (DFOF ¶ 257.)

161. After the 2018 elections, Democratic candidates complained about the poor support provided by the Alabama Democratic Party, and McKee acknowledges that those candidates have legitimate complaints. Trial Tr. vol. VI: 217-223 (McKee). (DFOF ¶ 258.)

162. White Democrats are having no more success than African-American Democrats in Alabama elections. Trial Tr. vol. VI: 215-16 (McKee). (DFOF ¶ 259.)

163. While Greg Griffin, an African-American, ran for a seat on an intermediate appellate court and lost running as a Republican, that was 1994, before the partisan shift and a year when every Republican lost except Perry Hooper. Trial Tr. vol. VI: 117 (Murdock). (DFOF ¶ 260.)

164. From 2000 to 2016, excluding races won by Sue Bell Cobb, the average percentage of the vote earned by Democratic African-American candidates was 47.8%, while it was 45.95% for Democratic white candidates; thus, African-American candidates performed slightly better than white candidates. Ex. D-24 at 13; Trial Tr. vol. V: 31, 65 (Bonneau). (DFOF ¶ 261.)

165. Dr. Bonneau reviewed General Election data, which includes white Republican voters. He considered whether white voters are any less likely to vote for an African American and concluded they are not. Trial Tr. vol. V: 91 (Bonneau). Dr. Bonneau did not exclude Republicans from his analysis. Trial Tr. vol. V: 103 (Bonneau). (DFOF ¶ 262.)

166. Dr. Bonneau sees no evidence that African Americans are losing elections on account of race or that white voters are rejecting candidates because of the race of those candidates. Trial Tr. vol. V: 38-39 (Bonneau). (DFOF ¶ 263.)

167. The data is more consistent with the inference that the reason African Americans candidates have been unsuccessful in recent elections is Party, not race. Trial Tr. vol. V: 109 (Bonneau). "It's more likely to be because of their political party than it is because of their race." Trial Tr. vol. V: 125 (Bonneau). (DFOF ¶ 264.)

168. The vote totals contain no evidence that either Justice Cook or Justice England was penalized because of his race; a higher percentage of all Alabama voters (including both Democratic and Republican voters) voted for Justice Cook and Justice England than for white Democrats running for the Supreme Court. Ex. D-24 at 9-10. (DFOF ¶ 265.)

169. If an African-American candidate runs in Alabama on a conservative philosophy, he or she could win elections. Trial Tr. vol. VI: 76 (Murdock). If African-American candidates "are conservative, they can be elected to the Supreme Court. If they are liberal, they can't be. And that is true of the whites that run as liberals equally well with the blacks that run as liberals." Trial Tr. vol. VI: 116 (Murdock). (DFOF ¶ 266.)

170. Any candidates for a judicial office will have a difficult time winning elections in Alabama if they are unable to convince voters that they have a conservative philosophy and that

they will apply traditional values when making judgment calls. Trial Tr. vol. VI: 69-70 (Murdock). (DFOF ¶ 267.)

171. It is likely that an African-American Republican would defeat a white Democrat in a statewide election in Alabama. Ex. D-26 at 3; Trial Tr. vol. V: 177 (Harwood); Trial Tr. vol. VI: 54-55 (Murdock); Trial Tr. vol. VI: 189, 191 (McKee). (DFOF ¶ 268.)

172. McKee contends that white Alabamians are not sophisticated enough to vote on the basis of issues, but they instead vote on the basis of race "[b]ecause it is such a darn simple concept. It's there. It's in front of you. It doesn't take sophistication on the voter to identify who's black and who's white. … This notion of conservatism and liberalism, that's hard." Trial Tr. vol. VI: 198 (McKee). This opinion is unsubstantiated and in conflict with his acknowledgements below, and is not credited. (DFOF ¶ 269.)

173. McKee acknowledges that a conservative African-American Republican could probably win statewide in Alabama, Trial Tr. vol. VI: 188-189, 213-14 (McKee), and he acknowledges that "white conservatives are as likely to vote for a black Republican as they are a white Republican," Trial Tr. vol. VI: 191 (McKee). (DFOF ¶ 270.)

174. McKee acknowledges that he cannot simply look at the color of a voter's skin and know how he or she voted or why, or how that person feels about political parties. Trial Tr. vol. VI: 203-4 (McKee). (DFOF ¶ 271.)

175. McKee says that he knows white Republicans in Alabama view the Democratic party as "the party of blacks" because (i) the majority of Democratic voters in Alabama are African-American, and (ii) the majority of Democratic officeholders in Alabama are African-American. Trial Tr. vol. VI: 167 (McKee). This opinion is unsubstantiated and is not credited. (DFOF ¶ 272.)

176. Plaintiffs have cited no empirical evidence to support McKee's claim that most whites view the Democratic Party as the party of African-Americans. Ex. D-26 at 1; Trial Tr. vol. V: 72 (Bonneau). (DFOF ¶ 273.)

177. While many Democratic voters and office-holders are African- American, that fact does not, as a matter of social science, establish how white voters view the Democratic party. Ex. D-26 at 1. (DFOF ¶ 274.)

178. Plaintiff Curtis Lee Travis denies that the Democratic Party has become known as "the party of African Americans." Trial Tr. vol. II: 34 (Travis). (DFOF ¶ 275.)

179. Glenn Murdock denies that Democrats are known as the "black party" in Alabama, and believes instead that they are known as the liberal party. Trial Tr. vol. VI: 89 (Murdock). (DFOF ¶ 276.)

180. With a white chair and white nominees for the most prominent races in recent years, it is not plausible that voters would view the Democratic Party as the "party of blacks." (DFOF ¶ 281.)

181. McKee did not present empirical evidence to support his contention that race and party are causally related, as opposed to being correlated. Ex. D-26 at 4-5. (DFOF ¶ 282.)

182. As far as McKee is concerned, race is the explanation for partisan realignment in Alabama without the need for any analysis: "[T]hat's not something that necessarily takes any in-depth analysis. I think it's face validity." Trial Tr. vol. VI: 131 (McKee). (DFOF ¶ 283.)

183. Dr. McKee does not claim that if a white voter in Alabama supports Republicans, it is because the voter does not like African-Americans. Trial Tr. vol. VI: 232 (McKee). (DFOF ¶ 284.)

184. McKee acknowledges that the Republican Party made inroads in the South in 1952 and 1956, and that "race was not a salient issue in either '52 or 56." Trial Tr. vol. VI: 142 (McKee). (DFOF ¶ 285.)

185. McKee acknowledges that younger Republican voters have gravitated to the Republican Party because of issues (younger generations of white southern "were much better aligned, in terms of conservative values and conservative views, being associated with the Republican Party.") Trial Tr. vol. VI: 157 (McKee). (DFOF ¶ 286.)

186. An incendiary comment made by a *Democrat*, who was accusing white *Republicans* of harboring racial prejudice – which was relied upon by McKee, Trial Tr. vol. VI: 163 (McKee) – is not evidence that white Republicans in Alabama vote Republican because of race. (DFOF ¶ 287.)

187. A statement by someone from South Carolina – which was relied upon by McKee, Trial Tr. vol. VI: 163 (McKee) – is not evidence that white Republicans in Alabama vote on the basis of race. (DFOF ¶ 288.)

188. Dr. McKee contends that white voters do not care about civil rights. Trial Tr. vol. VI: 190 (McKee). This opinion is unsubstantiated and is not credited. (DFOF ¶ 289.)

189. McKee believes that any African-American Republican is "representing the interests of white voters," Trial Tr. vol. VI: 190 (McKee), and that an African-American who enjoys the support of white voters is "playing on the white team," Trial Tr. vol. VI: 214 (McKee). These opinions are unsubstantiated and are not credited. (DFOF ¶ 290.)

190. Dr. McKee presented evidence that Alabamians are Republicans, but not that Alabamians are hostile to African-American candidates on account of race. Ex. D-26 at 3. (DFOF ¶ 291.)

191. Partisan sorting (voters with more conservative viewpoints gravitating toward Republicans and voters with more liberal viewpoints gravitating toward Democrats) is a nationwide phenomenon: "[T]he days of, you know, New England Republicans and southern Democrats are gone. We're pretty well sorted now as a country." Trial Tr. vol. V: 143 (Bonneau). (DFOF ¶ 292.)

192. As the national Democratic party has taken more liberal views, it has pushed many Alabama voters away. Trial Tr. vol. VI: 75 (Murdock). (DFOF ¶ 293.)

193. McKee acknowledges that "people understand that when you talk about conservatism, it belongs to the Republican Party. When you talk about liberalism, it belongs to the Democratic Party." Trial Tr. vol. VI: 195 (McKee). (DFOF ¶ 294.)

194. McKee acknowledges that there are "red" (Republican) States and "blue" (Democratic) States, and that the average voter in California is likely to disagree with the average voter in Wyoming on a lot of issues. Trial Tr. vol. VI: 214-15 (McKee). He agrees that the average voter in Vermont or New York would disagree with the average voter in West Virginia on a lot of issues. Trial Tr. vol. VI: 214-15 (McKee). (DFOF ¶ 295.)

195. McKee acknowledges that over the decades, people who are conservative have come to understand that they belong with the Republican Party, and people who are liberal have come to understand that they belong with the Democratic Party. Trial Tr. vol. VI: 195-96 (McKee). (DFOF ¶ 296.)

196. Despite his assertions that Alabama voters do not vote based on issues, McKee acknowledges that voters know that the Democratic Party is a pro-choice party, and that the Republican Party is a pro-life party. Trial Tr. vol. VI: 207 (McKee). He admits, "You can take

salient issues and people know where the parties stand on them." Trial Tr. vol. VI: 207 (McKee). (DFOF ¶ 297.)

197. McKee acknowledges that most Alabama voters would know which party is more pro-Second Amendment and more pro-life. Trial Tr. vol. VI: 208-09 (McKee). (DFOF ¶ 298.)

198. The Court credits the testimony of Mark White, who managed appellate judicial races in Alabama, that Alabama voters are motivated by issues such as gun control, abortion, religious rights and liberty. Trial Tr. vol. I: 146-47 (White). (DFOF ¶ 299.)

199. McKee admits that the Alabama Republican Party platform plank expressing support for a traditional, strict constructionist view of the Constitution, and rejecting judicial activism, is a Republican position. Trial Tr. vol. VI: 210 (McKee). (DFOF ¶ 300.)

200. McKee admits that the Alabama Republican Party platform plank providing that "we condemn decisions by activist judges" is a Republican position. Trial Tr. vol. VI: 211 (McKee). (DFOF ¶ 301.)

201. McKee admits that if someone identifies as a conservative, it does not make sense for him or her to align with the Democratic Party. Trial Tr. vol. VI: 211 (McKee). (DFOF ¶ 302.)

202. Rep. Laura Hall believes that at least some voters choose a political party because the party's stand on issues aligns with the voter's stand on issues. Trial Tr. vol. III: 237 (Hall). (DFOF ¶ 303.)

203. Justice Ralph Cook acknowledges that at least some voters choose parties because of issues. Trial Tr. vol. IV: 120-21 (Cook). He cannot say how many voters are influenced by race and how many are influenced by issues. Trial Tr. vol. IV: 125 (Cook). (DFOF ¶ 304.)

204. Judge Clyde Jones testified that "Alabama is the most conservative state in the Union. I think everybody knows that. If you aren't a Republican candidate, I don't think you really have a chance in 99 out of a hundred cases." Trial Tr. vol. I:88 (Jones). (DFOF ¶ 305.)

205. Alabamians tend to be conservative, pro-life, and believers in traditional values and the traditional family. They want to be able to protect their family and believe in religious liberty, low taxes, low regulations, and a strong military. Trial Tr. vol. VI: 55 (Murdock). The conservatives Murdock knows are not racist and they would embrace an African American candidate running on such a platform. Trial Tr. vol. VI: 56-59 (Murdock). (DFOF ¶ 306.)

206. African-American conservatives are in fact winning local races in majority-white areas of Alabama, including Shelby County (superintendent), Elmore County (Circuit Judge), and Escambia County (school board). Trial Tr. vol. VI: 59-60, 70-71 (Murdock). (DFOF ¶ 307.)

**The State's Linkage Defense**

207. Alabama links the jurisdiction of its judges to their electorates. Ala. Const. art. VI, § 152. ("All judges shall be elected by vote of the electors within the territorial jurisdiction of their respective courts."). (DFOF ¶ 309.)

208. Statewide elections promote the integrity of courts because electing by districts would sever the "linkage" between a Judge's jurisdiction and his electorate. Ex. D-25 at 39-40. (DFOF ¶ 310.)

209. Linkage promotes the independence of appellate courts by holding judges accountable to a broad section of the population. Ex. D-25 at 40-41. Statewide elections make it much more difficult for any faction to capture or control an appellate judge. Ex. D-25 at 41.

Consistent with James Madison's writing in The Federalist No. 10, the broader electoral base of non-districted elections helps prevent "capture" – excessive influence of a faction or special interest – by "extending the sphere" of influence. Trial Tr. vol. III: 86-88 (Gaylord). The broader the electoral base, the harder it is for a coalition or faction to put pressure on a Judge. Trial Tr. vol. III: 141 (Gaylord). (DFOF ¶ 311.)

210. There is tension between the ideal judicial role and choosing Judges by popular elections, and "linkage" helps to reconcile that tension. Ex. D-25 at 48; Trial Tr. vol. III: 131-32 (Gaylord). (DFOF ¶ 312.)

211. Linkage advances Alabama's interest in preserving public confidence in the integrity of the judiciary. Ex. D-25 at 47. (DFOF ¶ 313.)

212. All the State's linkage interests apply with equal or greater force to appellate judges; if anything, it applies to an even greater extent to appellate courts, because appellate judges have the power to "make" common law and immense power to shape the State's constitution. Ex. D-25 at 40; Ex. D-24 at 18; Trial Tr. vol. III: 88 (Gaylord). This is true for judicial independence, Trial Tr. vol. III: 88; judicial accountability, Trial Tr. vol. III: 89; having a fair and impartial justice system and preserving public confidence in the courts, Trial Tr. vol. III: 89; and ensuring a strong pool of candidates, Trial Tr. vol. III: 90-91 (Gaylord). (DFOF ¶ 314.)

213. As is true for trial courts, Alabama has an interest in promoting judicial accountability and independence, judicial integrity, a large pool of candidates, and the fair and impartial administration of justice (and the appearance thereof), in her appellate courts, and linkage promotes these interests in appellate courts. Ex. D-25 at 50-52. (DFOF ¶ 315.)

214. Alabama's interests in independence, accountability, separation of powers, popular sovereignty, and the integrity of its courts apply to both its trial and appellate courts, and Alabama's substantive interest in preserving linkage should apply with the same force to appellate courts. Ex. D-25 at 55; Trial Tr. vol. III: 88- 89 (Gaylord). (DFOF ¶ 316.)

215. Judicially-forced districting ignores the State's considered judgments in how best to balance various interests such as judicial independence and accountability. Trial Tr. vol. III: 96-97 (Gaylord). (DFOF ¶ 317.)

216. Rep. Laura Hall, who testified for the Plaintiffs, believes that if Alabama uses districts to elect judges, the role of an Alabama Supreme Court justice, in terms of whether they should vote on cases with the good of their district in mind, "would be just as I see my role as a member of the House of Representatives." Trial Tr. vol. III: 233-34 (Hall). (DFOF ¶ 318.)

217. However, the Judicial role is very different from the Legislative role. Judges do not represent people or have a "constituency" the way that a Legislature does, and while Legislators are representatives or advocates for the particular voters who elect them, Judges represent the law. Ex. D-25 at 38. The Judge's responsibility is to the law and to say what the law is, not what the Judge wants it to be or what a constituency wants it to be. Trial Tr. vol. III: 94-95 (Gaylord). (DFOF ¶ 319.)

218. While appellate courts are unlike trial courts in that they are multi- member bodies, the role of an appellate judge is different from the role of a member of other multi-member bodies, such as a Legislature. Ex. D-25 at 51. (DFOF ¶ 320.)

219. Judges do not have constituencies. Ex. D-25 at 51; Trial Tr. vol. VI: 40 (Murdock). "Judges don't represent districts. They represent the law. … And for a statewide judge, there's only one law. It's a statewide law. It's not a black law. It's not a white law. It's not

a district one law, not a district seven law. There's just one body of law." Trial Tr. vol. VI: 40 (Murdock). (DFOF ¶ 321.)

220. Moreover, judges do not engage in dealing and log-rolling with other members of the body. Ex. D-25 at 51. (DFOF ¶ 322.)

221. The Court agrees with Justice Harwood that having African American districts and white districts to elect judges could make race more of perceived issue in the administration of justice. Trial Tr. vol. V: 196 (Harwood). (DFOF ¶ 323.)

222. While it is common and appropriate for voters to consider a member of the Legislature or a County Commission to be his or her representative, the idea that a member of an appellate court represents a fraction of the population is not consistent with the proper role of the Judiciary. Trial Tr. vol. III: 150 (Gaylord). (DFOF ¶ 324.)

223. Linkage promotes the appearance of fair and impartial justice, because having African American judges accountable to African American districts and white judges accountable to white districts would foster the idea that judges should be responsive to constituents along racial lines. Ex. D-25 at 44. Districting would send a message that race matters in the administration of justice. Ex. D-25 at 45. (DFOF ¶ 325.)

224. Alabama has the sovereign right and duty to insist that race is not relevant to the fair and just administration of justice, and may take that into account in selecting and maintaining statewide elections. (DFOF ¶ 326.)

225. Race-based districting for legislative offices, where districts are drawn for the express purpose of forming majority-African-American districts, has made it more difficult to form bi-racial coalitions and for white Democrats to be elected, because such districting results in many African-American voters being concentrated in a few districts while other African-

American voters form a tiny minority in the remaining mostly-white districts. Ex. D-27 at 13-14; Trial Tr. vol. III 104-05 (Gaylord). Such districting may also have increased polarized voting. Ex. D-27 at 15. (DFOF ¶ 327.)

226. In rural areas, advertising dollars could go further in districted elections and increase the impact of money in a campaign. Trial Tr. vol. VI: 43 (Murdock). It could be easier for a group to "buy" a Judge – to ensure his election with a large donation – whereas the same donation would be diluted in a statewide campaign. Trial Tr. vol. VI: 44 (Murdock). (DFOF ¶ 328.)

227. Districting would divide up or "Balkanize" the appellate courts; whereas, with statewide elections, it does not matter where the parties come from and the parties to a case are before Judges who have been elected by all the voters of the State. Trial Tr. vol. VI: 45 (Murdock). (DFOF ¶ 329.)

228. Former Supreme Court Justice Murdock testified persuasively about concerns that districting could encourage bias or potential bias, or even over- compensation by Judges seeking to avoid bias; lead to parties not perceiving decisions as fair; and, create the appearance of impropriety to the general public. Trial Tr. vol. VI: 48 (Murdock). (DFOF ¶ 330.)

229. Districting would add an additional unhealthy temptation for a judge, providing one more thing that "judges have to deal with and compartmentalize or overcome or risk maybe even compensating for." Trial Tr. vol. VI: 63 (Murdock). Districting would add "structural risks, given human nature being what it is." Trial Tr. vol. VI: 110 (Murdock). "[I]t's not a healthy risk to inject into the system." Trial Tr. vol. VI: 109 (Murdock). (DFOF ¶ 331.)

230. Former Supreme Court Justice Harwood believes that "it's helpful to have sort of the dissipation or the diffusion of the entire state as your electorate. You don't have to worry

about your standing with any particular localized district as a judge when various hot-button issues come before you." Trial Tr. vol. V: 160 (Harwood). (DFOF ¶ 332.)

231. Justice Harwood testified that if judges are accountable to only part of the State, "I just think there's mischief in that. My main concern is because of the – the focus and the narrowing of the accountability the judge would have to have in the back of his or her mind when issues come up that involved his or her locale that was going to be responsible for his election versus some other area of the state." Trial Tr. vol. V: 167 (Harwood). (DFOF ¶ 333.)

232. "[O]nce you shrink the voters to whom a judge has to look for his or her election or reelection, you focus and narrow the amount of pressure that judge could feel as far as issues that come before the Court." Trial Tr. vol. V: 184 (Harwood). (DFOF ¶ 334.)

233. Justice Harwood testified, "[I]t's a healthy thing to have a judge looking to the entire state and having to do like I did, get out and visit and go among the state and learn about the state. I think that gives you some good perspectives that you won't have if you're simply pocketed in a particular area and that's all you ever have to worry about in getting elected." Trial Tr. vol. V: 186 (Harwood). (DFOF ¶ 335.)

234. A Judge who is elected statewide would tend to be a little more insulated from political pressure than a judge who is elected from a district. Trial Tr. vol. V: 161 (Harwood). (DFOF ¶ 336.)

235. Public perception of "home cooking" could be affected by electing from districts, or if the public perceives that some judges represent African American Alabamians and some judges represent white Alabamians. Trial Tr. vol. V: 161 (Harwood). (DFOF ¶ 337.)

236. The idea that districts could increase the risk of capture or the temptation to engage in "home cooking" is widespread in the literature. Trial Tr. vol. III: 148 (Gaylord). (DFOF ¶ 338.)

237. It is possible to have a threat of capture by special interests even in a statewide system, but districting increases the risks of capture. Trial Tr. vol. III: 137- 38 (Gaylord). (DFOF ¶ 339.)

238. Interests against "capture," and avoiding the appearance of impropriety if a judge is called to rule in a case where a party is from his or her district, is similar to the interests behind diversity jurisdiction in federal courts. Trial Tr. vol. III: 123 (Gaylord). (DFOF ¶ 340.)

239. Linkage at the appellate level also serves to preserve judicial accountability. Appellate Judges in Alabama are accountable to all the voters in the State who are impacted by their rulings. Ex. D-25 at 42-43. (DFOF ¶ 341.)

240. When elections are held statewide, candidates must campaign statewide and as a result learn about the State. Trial Tr. vol. V: 157 (Harwood). (DFOF ¶ 342.)

241. Assuming that Plaintiffs' theory is correct and African-American votes are "diluted" because African Americans are a minority in statewide elections, districting would make the "dilution" worse for most African-American voters by leaving them as a smaller minority in districts that are much "whiter" than the State as a whole. Trial Tr. vol. V: 70 (Bonneau). (DFOF ¶ 343.)

242. Creating one or more majority- African American districts would leave most African-American voters in Alabama in a district where they are an even smaller minority. Ex. D-25 at 43-44; Trial Tr. vol. II: 88 (Cooper). (DFOF ¶ 344.)

243. None of Plaintiffs' plans include 50% or more of African-American Alabama

voters in a majority-African-American district. Trial Tr. vol. II: 188 (Cooper). (DFOF ¶ 345.)

244. Plaintiffs' five-district plan puts 42.9% of all African-American voters in single district; around 57% of African-American voters would be in white districts under this plan. Ex. D-24 at 17. (DFOF ¶ 346.)

245. In Plaintiff's eight-district plan, only 25.1% of African-American voters are in a majority-African-American district, and in a nine-district plan, only 23.8% of African-American voters are in a majority-African-American district. Ex. D-24 at 17-18. (DFOF ¶ 347.)

246. Statewide elections allow every Alabamian to vote on each of the nine members of the Alabama Supreme Court and each of the five members of both the Alabama Court of Civil Appeals and Alabama Court of Criminal Appeals, whereas districting would limit voters to voting on only those judges representing the district in which the voter lives. Trial Tr. vol. III: 93-94 (Gaylord). (DFOF ¶ 348.)

247. Plaintiff Curtis Travis acknowledges that it is important to him to have a voice in electing each of the circuit judges in Tuscaloosa County. Trial Tr. vol. II: 24 (Travis). (DFOF ¶ 349.)

248. Rep. Laura Hall feels that she has a voice in Alabama Supreme Court elections and that her vote counts as much as everyone else's vote in Alabama Supreme Court elections. Trial Tr. vol. III: 232 (Hall). (DFOF ¶ 350.)

249. As a voter, Justice Harwood appreciates having a voice in the election of all the members of the Supreme Court. Trial Tr. vol. V: 165 (Harwood). (DFOF ¶ 351.)

250. There are decisions by the Alabama Supreme Court where not all Justices vote; some cases are decided by panels of five, and Justices sometimes recuse. Trial Tr. vol. V: 158 (Harwood); Trial Tr. vol. VI: 49 (Murdock). (DFOF ¶ 352.)

251. A third or more of cases decided by the Alabama Supreme Court are decided by panels of five Justices. Trial Tr. vol. VI: 49 (Murdock). If a panel reaches a unanimous decision, the other four Justices have no vote on the case and no input into the decision. Trial Tr. vol. VI: 50 (Murdock). (DFOF ¶ 353.)

252. When Bernard Harwood was a Justice, there were times when an opinion would come out and it would be the first time that he knew the case existed, because it had been decided by the other panel. Trial Tr. vol. V: 158 (Harwood). (DFOF ¶ 354.)

253. If the Justices were selected by districts and if the Supreme Court of Alabama continued to decide cases in panels and/or sometimes have Justices recuse, then in each case where a Justice is not part of the decision-making process the voters in the district from which he or she was elected would be voiceless. (DFOF ¶ 355.)

254. Similarly, if the Court of Criminal Appeals or the Court of Civil Appeals were districted and a Judge recused from a case or the Court determined to use panels, then in each case where a Judge was not part of the decision-making process the voters in the district from which he or she was elected would be voiceless. (DFOF ¶ 356.)

255. Doing away with linkage through the creation of districts would limit the pool of candidates. Ex. D-25; Trial Tr. vol. III: 90-91 (Gaylord). (DFOF ¶ 357.)

256. If there is a residency requirement, districting would limit the pool of candidates further because two prominent, qualified attorneys who live in the same district would be forced to run against each other and only one could be elected. Ex. D-25 at 46. (DFOF ¶ 358.)

257. Such a requirement would "cut out a lot of talent from even having the opportunity to run for the court." Trial Tr. vol. VI: 41, 104-05 (Murdock). (DFOF ¶ 359.)

258. There have been many occasions when the Alabama Supreme Court has included

more than one person from a geographical region, including Drayton Nabers, Mike Bolin, and Tom Woodall from Jefferson County; Dugger Johnstone and Champ Lyons from Mobile; Harold See and John England from Tuscaloosa; and, Ralph Cook and Janie Shores from Jefferson County. Trial Tr. vol. VI: 41-43 (Murdock). That would not be possible with districts, and districts thus interfere with Alabama's ability to choose the "best and brightest" for her courts, regardless of where they live. Trial Tr. vol. VI: 41 (Murdock). (DFOF ¶ 360.)

259. Even if districting does not include a residency requirement, as a practical matter, a candidate is likely to be successful only if he or she lives in that district. Trial Tr. vol. IV: 62 (Thibodeaux). Running in a district in which the candidate does not live would be "political suicide." Trial Tr. vol. IV: 62 (Thibodeaux). Justice Murdock agrees, saying, "[G]ood luck getting elected in a district that you don't live in." Trial Tr. vol. VI: 103 (Murdock). (DFOF ¶ 361.)

260. Districting would limit the pool of candidates because potential candidates for appellate judgeships (lawyers) are not evenly distributed within the State. Ex. D-25 at 45-46; ex. D-24 at 19. While there are good lawyers throughout the State, there is a concentration of talent in urban areas such as Birmingham and Mobile, where the larger firms tend to operate, and a concentration of lawyers interested in constitutional law in the State capital. Trial Tr. vol. VI: 41 (Murdock). (DFOF ¶ 364.)

261. The number of potential eligible candidates therefore varies wildly from district to district. In some cases, as in plans SC1 and SC3, one district has seven times the number of attorneys as another. See, e.g., Districts 7 and 5 in doc. 117 at 20 ¶ 84. (DFOF ¶ 367.)

262. Using the same stipulations and method used to derive the total number of lawyers per district in Plaintiffs' illustrative plans (Doc. 117 at 20 ¶¶ 83-84), the following chart shows

the number of African-American attorneys in each district in Plaintiffs' illustrative plans:

| District | SC1 | SC2 | SC3 | SC4 | AC1 | AC2 | AC3 | AC4 |
|---|---|---|---|---|---|---|---|---|
| **1** | 262 | 262 | 264 | 263 | 615 | 615 | 619 | 597 |
| **2** | 74 | 74 | 76 | 76 | 85 | 84 | 84 | 87 |
| **3** | 11 | 12 | 13 | 12 | 70 | 71 | 64 | 89 |
| **4** | 19 | 18 | 21 | 57 | 189 | 189 | 193 | 186 |
| **5** | 405 | 407 | 451 | 342 | 89 | 89 | 88 | 89 |
| **6** | 131 | 129 | 108 | 202 | | | | |
| **7** | 9 | 9 | 81 | 13 | | | | |
| **8** | 81 | 81 | 34 | 83 | | | | |
| **9** | 56 | 56 | | | | | | |
| **Total** | **1048** | **1048** | **1048** | **1048** | **1048** | **1048** | **1048** | **1048** |

(DFOF ¶ 369.)

263. An initial move to districts is likely to throw Alabama's appellate courts into turmoil, with incumbents who live in the same district required to run against each other, harming collegiality, slowing down the judicial process, and leading to a loss of expertise. Ex. D-24 at 19. (DFOF ¶ 377.)

**Partisan v. Non-partisan Elections**

264. Many voters have a general sense of how political parties align on issues, so a party label gives them important information about judicial candidates. Trial Tr. vol. III: 159 (Gaylord). (DFOF ¶ 379.)

265. Non-partisan elections withhold information important to the electorate. Trial Tr. vol. III: 159 (Gaylord). (DFOF ¶ 380.)

266. Typically, citizen voters know little about the candidates and look at party affiliation to make judgments about a candidate's merits. Trial Tr. vol. II: 31 (Travis). (DFOF ¶

381.)

267. Plaintiff Clarence Muhammed considers the political party of candidates "for the most part." Trial Tr. vol. II: 39 (Muhammed). (DFOF ¶ 382.)

268. When party labels are not provided on the ballot and voters lack that information, there is a significant decrease in voter participation in judicial elections. Trial Tr. vol. III: 159-60 (Gaylord). (DFOF ¶ 383.)

269. Empirical evidence shows that fewer voters participate in non-partisan elections than partisan elections, and that the voters who do participate in nonpartisan elections can identify their co-partisans. Trial Tr. vol. IV: 43 (Bonneau). (DFOF ¶ 384.)

270. Even in nonpartisan elections, a candidate's party affiliation is available for voters who want to find it. Trial Tr. vol. III: 161 (Gaylord); Trial Tr. vol. VI: 39 (Murdock). (DFOF ¶ 385.)

271. From 2008 to 2014, around one-half of Alabama voters used straight-ticket voting, with about one quarter of Alabamians voting straight-ticket Democrat and about one quarter of Alabamians voting straight-ticket Republican. Ex. D-24 at 7; Trial Tr. vol. V: 57 (Bonneau). (DFOF ¶ 388.)

272. Voters who cast straight ticket ballots may inadvertently not vote in non-partisan judicial elections. Not only is this intuitively obvious, but Defendants' expert Bonneau testified he had made the mistake more than once: "When I lived in Michigan, which has nonpartisan elections, I never voted for judge because I would go in, I would color my straight ticket. It was optical scan off of ballots. I would color my straight-party ticket and I would walk out and go back to my office and realize what I did. And I knew better." Trial Tr. vol. V: 44 (Bonneau). (DFOF ¶ 389.)

273. When the Democratic Party was strong in Alabama, it benefitted from partisan judicial elections and resisted calls for a change to non-partisan judicial elections. Trial Tr. vol. V: 161-63 (Harwood). (DFOF ¶ 391.)

274. Race predominated in drawing Plaintiffs' illustrative districts where Plaintiffs' split Jefferson County along starkly racial lines. Ex. D-89. (DFOF ¶ 394)

**Race Predominated When Drawing Plaintiffs' Illustrative Districts**

275. Switching to districted elections requires drawing districts, and those districts would then be subject to challenge. (DFOF ¶ 392)

276. Plaintiffs' expert demographer, Bill Cooper, drew illustrative plans. Cooper drew eight-district and nine-district plans for the Supreme Court and five-district plans for the Court of Civil Appeals and the Court of Criminal Appeals. Under the eight-district plans for the Supreme Court, the Chief Justice would be elected statewide; under the nine-district plans for Supreme Court, the Chief Justice, like the other Justices, would be elected from a district. (DFOF ¶ 393)

277. In plan SC1, Jefferson County is split between Districts 5 (which is 48.38% voting-age African American) and 6 (which is 13.76% voting-age African American). Ex. P-95. Cooper, put 96.75% of the African American Jefferson County population in District 5, and 3.25 % of the African American Jefferson County population in District 6. The portion of Jefferson County that is in District 5 is 51.04% African American, and the portion of Jefferson County that is in District 6 is only 6.7% African American. Ex. D-89. (DFOF ¶ 395)

278. In plan SC2, Jefferson County is split between Districts 5 (which is 48.16% voting-age African American) and 6 (which is 14.74% voting-age African American). Ex. P-98. Cooper put 96.81% of the African American Jefferson County population in District 5, and 3.19% of the African American Jefferson County population in District 6. The portion of

Jefferson County that is in District 5 is 50.84% African American, and the portion of Jefferson County that is in District 6 is only 6.69% African American. Ex. D-89. (DFOF ¶ 396)

279. In plan SC3, Jefferson County is split between Districts 5 (which is 44.43% voting-age African American) and 6 (which is 7.74% voting-age African American). Ex. P-101. Cooper put 99.13% of the African American Jefferson County population in District 5, and 0.87% of the African American Jefferson County population in District 6. The portion of Jefferson County that is in District 5 is 46.95% African American, and the portion of Jefferson County that is in District 6 is only 3.23% African American. Ex. D-89. (DFOF ¶ 397)

280. In plan SC4, Jefferson County is split between Districts 5 (which is 47.92% voting-age African American) and 6 (which is 13.08% voting-age African American). Ex. P-104. Cooper put 93.69% of the African American Jefferson County population in District 5, and 6.31% of the African American Jefferson County population in District 6. The portion of Jefferson County that is in District 5 is 59.96% African American, and the portion of Jefferson County that is in District 6 is only 7.71% African American. Ex. D-89. (DFOF ¶ 398)

281. In plans AC1 and AC2, Jefferson County is split between Districts 1 (which is 54.32% voting-age African American) and 4 (which is 11.59% voting-age African American). Ex. P-107; Ex. P-110. Cooper put 94.46% of the African American Jefferson County population in District 1, and 5.54% of the African American Jefferson County population in District 4. The portion of Jefferson County that is in District 1 is 56.82% African American, and the portion of Jefferson County that is in District 4 is only 7.71% African American. Ex. D-89. (DFOF ¶ 399)

282. In plan AC3, Jefferson County is split between Districts 1 (which is 54.17% voting-age African American) and 4 (which is 13.29% voting-age African American). Ex. P-113. Cooper put 94.89% of the African American Jefferson County population in District 1, and

5.11% of the African American Jefferson County population in District 4. The portion of Jefferson County that is in District 1 is 56.55% African American, and the portion of Jefferson County that is in District 4 is only 7.27% African American. Ex. D-89. (DFOF ¶ 400)

283. In plan AC4, Jefferson County is split between Districts 1 (which is 52.34% voting-age African American) and 4 (which is 10.90% voting-age African American). Ex. P-116. Cooper put 94.89% of the African American Jefferson County population in District 1, and 5.11% of the African American Jefferson County population in District 4. The portion of Jefferson County that is in District 1 is 56.55% African American, and the portion of Jefferson County that is in District 4 is only 7.27% African American. Ex. D-89. (DFOF ¶ 401)

284. The statistics in the preceding paragraphs are summarized in table form as follows:

| Jefferson County Splits | | | | |
|---|---|---|---|---|
| **Plan** | **Proposed District** | **%18+ Black** | **% of African-Am. Pop. Placed in Each Segment** | **% of Pop. In Each Segment that is African-Am.** |
| SC1 | (Supreme Court 1) | | | |
| | 5 | 48.38% | 96.75% | 51.04% |
| | 6 | 13.76% | 3.25% | 6.7% |
| SC2 | (Supreme Court 2) | | | |
| | 5 | 48.16% | 96.81% | 50.84% |
| | 6 | 14.74% | 3.19% | 6.69% |
| SC3 | (Supreme Court 3) | | | |
| | 5 | 44.43% | 99.13% | 46.95% |
| | 6 | 7.74% | 0.87% | 3.23% |
| SC3 | (Supreme Court 4) | | | |
| | 5 | 47.92% | 93.69% | 59.96% |
| | 6 | 13.08% | 6.31% | 7.71% |
| AC1 & AC2 | (Civil Appeals Court and Criminal Appeals Court 1& 2) | | | |
| | 1 | 54.32% | 94.46% | 56.82% |
| | 4 | 11.59% | 5.54% | 7.71% |
| AC3 | (Civil Appeals Court and Criminal Appeals Court 3) | | | |
| | 1 | 54.17% | 94.89% | 56.55% |
| | 4 | 13.29% | 5.11% | 7.27% |
| AC4 | (Civil Appeals Court and Criminal Appeals Court 4) | | | |
| | 1 | 52.34% | 94.89% | 56.55% |
| | 4 | 10.90% | 5.11% | 7.27% |

(DFOF ¶ 402)

285. As detailed in the above paragraphs and the table, Cooper put more than 90% of the African-American population of Jefferson County in the majority- African American district in each of these illustrative plans. In three of the four Supreme Court plans, Cooper put more than 95% of the African-American population of Jefferson County in the majority-African American district. (DFOF ¶ 403)

286. Jefferson County's population does not require it to be split in a five-district plan, but Cooper split Jefferson County in all of his five-district plans because it was necessary to have a majority-African American district. Trial Tr. vol. II: 187 (Cooper). (DFOF ¶ 404)

287. Cooper is aware of no analysis of whether an African-American candidate could in fact be elected in the plans that he drew. Trial Tr. vol. II: 185-6 (Cooper). (DFOF ¶ 405)

288. Another one of Plaintiffs' experts, Seth McKee, believes that a district must be at least 50% African-American for an African-American candidate to prevail in an election. Trial Tr. vol. VI: 229 (McKee). (DFOF ¶ 406.)

289. Cooper did not have addresses for sitting appellate judges and does not know if his plans would require any incumbents to run against each other. Trial Tr. vol. II: 188-89 (Cooper). (DFOF ¶ 407)

290. Dr. Handley's polarized voting analysis suffers some significant analytical defects and adds nothing to this case given that it is undisputed that most African American voters prefer Democratic candidates and that a majority of white voters in Alabama tend to prefer Republican candidates in most elections. (DFOF ¶ 409.)

291. The language in this field is skewed against defendants. Not only does racially polarized voting – per Handley – mean only that African American and white candidates prefer different candidates, see Trial Tr. vol. II:69-70 (Handley), but cohesive voting among African Americans is cast positively as "cohesive" and the same practice by whites is cast negatively as "racial bloc voting," Trial Tr. vol. II:117-18 (Handley). (DFOF ¶ 410.)

292. Dr. Handley contends that voting is racially polarized if minorities and whites "prefer different candidates. In other words, if [they], voting separately, would have elected different candidates" then voting is racially polarized. Trial Tr. vol. II:69 (Handley). She believes racial polarization has legal significance if the minority-preferred "candidates usually lose." Trial Tr. vol. II:69 (Handley). If they minority-preferred candidates usually win, there would still be

racially polarized voting, but "it wouldn't rise to the level of legally significant." Trial Tr. vol. II:69-70 (Handley). (DFOF ¶ 411.)

293. By contrast, Dr. Bonneau would only apply the term racially polarized voting to situations where voting is polarized on account of racial bias. Trial Tr. vol. V:19, 29-30 (Bonneau). (DFOF ¶ 412.)

294. African-American voters everywhere prefer Democratic candidates, all across the country and in every district. Trial Tr. vol. V:27, 62 (Bonneau). (DFOF ¶ 413.)

295. Because African-American voters overwhelmingly prefer Democrats in every State, voting is racially polarized (by Dr. Handley's definition) wherever a majority of white voters happen to prefer Republican candidates. (DFOF ¶ 414.)

296. White voters in Alabama are not monolithic. Table 1 of Dr. Handley's report shows approximately 35% of white voters statewide supported Ralph Cook in his 2000 election against Lyn Stuart. Ex. P-121 at 17; see also Trial Tr. vol. II:94-95 (Handley) (explaining Table 1). (DFOF ¶ 415.)

297. Handley agreed that if 85% of white voters and 55% of African American voters support the same candidate, then despite the 30% spread in support, there is *no* racially polarized voting, as she defines it. Trial Tr. vol. II:132 (Handley). (DFOF ¶ 417.)

298. Handley agreed that if 53% of whites and 48% of African Americans support the same candidate then there *is* racially polarized voting, as she defines it, even though there is only a 5% spread in their levels of support. Trial Tr. vol. II:132-33 (Handley). (DFOF ¶ 418.)

299. Importantly, Handley's analysis says nothing about the *intent* of white or African-American voters. Trial Tr. vol. II:130 (Handley). (DFOF ¶ 419.)

300. Handley expresses no opinion on the cause of the racial polarization. Trial Tr. vol. II: 143 (Handley). (DFOF ¶ 420.)

301. The methodologies that Dr. Handley used do not explain the cause for any polarization and are not adequate tools to do so. Trial Tr. vol. III: 14-15 (McCrary). (DFOF ¶ 421.)

302. None of Dr. McCrary's data concerning polarized voting include any discussion of why voters of different races prefer different candidates. Trial Tr. vol. III: 43 (McCrary). (DFOF ¶ 422.)

303. Handley's polarized voting analysis concerns "estimates. They're not fact." Trial Tr. vol. II:142-43 (Handley); *see also* Trial Tr. vo. II:91 (Handley) ("And that is his [Gary King's] best guess of the percentage of blacks for who voted for Jones.") (explaining King's ecological inference). (DFOF ¶ 424.)

304. The only exception is for the homogenous precinct analysis. Trial Tr. vol. II: 96 (Handley). Handley could only perform that analysis for about half the precincts in Jefferson County. Trial Tr. vol. II: 79, 136 (Handley). She could not perform a homogenous county analysis because no Alabama county was 90% African-American or white. Trial Tr. vol. II: 79 (Handley). (DFOF ¶ 425.)

305. Voting behavior in homogenous precincts may not be the same as voting behavior in other precincts. Trial Tr. vol. II:137 (Handley). (DFOF ¶ 426.)

306. Handley looked only at elections occurring in the year 2000 or later. Trial Tr. vol. II:68, 118 (Handley). Thus, she excluded the elections where Oscar Adams and Ralph Cook won, and started with the year that Ralph Cook and John England lost. Trial Tr. vol. II:119-20. (DFOF ¶ 427.)

307. McKee criticized Bonneau for starting his analysis in 2000, Trial Tr. vol. VI:166-67 (McKee), but Bonneau had begun with Handley's analysis, assumed it was correctly performed, and sought to figure out the why behind her results, Trial Tr. vol. V:17-19 (Bonneau). Accordingly, McKee's criticism on the date to begin the polarized voting analysis is actually directed at Handley. (DFOF ¶ 428.)

308. Handley also looked only at elections that included African-American candidates. Trial Tr. vol. II:68, 122 (Handley). Thus, she included the 2000 primary where Sue Bell Cobb, the choice of African-American voters, defeated Yvonne Saxon, who is African American, but excluded the fact that Cobb went on to win the General Election that year as well as Cobb's subsequent election as Chief Justice in 2006. Trial Tr. vol. II:125-26 (Handley). (DFOF ¶ 429.)

309. Handley focused on judicial elections beginning in 2000 that had African-American candidates, but since the last was in 2008, she also looked at three non-judicial statewide races in 2014. Trial Tr. vol. II:68, 75, 118, 122 (Handley). That is, Handley's analysis of judicial elections is limited to the period of 2000 to 2008, and the only data that she analyzed after 2008 was for three non-judicial races in the year 2014. (DFOF ¶ 430.)

310. Despite the fact that she had not analyzed a judicial appellate race since 2008 or any race since 2014, Handley testified that the "end date of [her] opinion" was "right now," Trial Tr. vol. II:144. (DFOF ¶ 431.)

311. Handley's analysis of judicial elections only included eight General Elections and two Primary Elections, for a total of 10 judicial elections. Trial Tr. vol. II: 124-25 (Handley). (DFOF ¶ 432.)

312. Handley does not know how long Alabama has been electing appellate judges statewide. Trial Tr. vol. II: 121. (DFOF ¶ 433.)

313. There was no change in Alabama's manner of electing appellate judges statewide that caused Handley not to consider elections before 2000. Trial Tr. vol. II: 122. (DFOF ¶ 434.)

314. Handley did not consider incumbency, name recognition, education, experience, campaign funding, endorsements, the issues in the race, whether there were racial appeals, political party, or straight-ticket voting. Trial Tr. vol. II: 130-31 (Handley). (DFOF ¶ 435.)

315. Bonneau could easily perform the standard statistical techniques that Handley performed to assess polarized voting. Trial Tr. vol. V:17 (Bonneau). (DFOF ¶ 437.)

316. If Bonneau had undertaken to perform the analysis Handley performed, he would have looked at all judicial races, not just those that involved an African-American candidates. Trial Tr. vol. V:17-18 (Bonneau). Handley's method was "self-selecting into a result." Trial Tr. vol. V:18 (Bonneau). (DFOF ¶ 438.)

317. Blacks have elected their candidate of choice under Alabama's statewide system: they supported Sue Bell Cobb, Oscar Adams, Ralph Cook, and Doug Jones. Trial Tr. vol. V:28 (Bonneau). (DFOF ¶ 439.)

**"Past discrimination [that] cannot, in the manner of original sin, condemn governmental action that is not itself unlawful."**[5]

318. The Court takes judicial notice that Alabama became the 22nd State of the United States on December 14, 1819. See Why a Bicentennial?, available at http://alabama200.org/about/why-a-bicentennial/ The State is currently celebrating the 200th anniversary of its statehood. (DFOF ¶ 440.)

[5] "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott v. Perez*, 585 U.S. ___, ___, 138 S.Ct. 2305, 2324 (2018) (*quoting City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion)).

319. When Alabama joined the United States, slavery was lawful and practiced in Alabama. (DFOF ¶ 441.)

320. The Founders had been unable to resolve the issue of slavery upon the country's founding. It was ultimately settled through the Civil War, which was waged from 1861 to 1865. (DFOF ¶ 442.)

321. The Thirteenth Amendment, which outlawed slavery, was adopted in 1865. U.S. Const. Amend. XIII. (DFOF ¶ 443.)

322. The Fourteenth Amendment, which provides, among other things, for "equal protection of the laws" and "due process" was adopted in 1868. U.S. Const. Amend. XIV. (DFOF ¶ 444.)

323. The Fifteenth Amendment, which prohibits the denial of the right to vote "on account of race, color, or previous condition of servitude," was adopted in 1870. U.S. Const. Amend. XV. (DFOF ¶ 445.)

324. The 1901 Constitution made no relevant change to Alabama's judicial system. (DFOF ¶ 448.)

325. Women could be lawfully denied the right to vote until the Nineteenth Amendment was adopted in 1920. U.S. Const. Amend. XIX. (DFOF ¶ 449.)

326. In 1971, the Twenty Sixth Amendment was adopted. It guaranteed the right to vote to citizens who were 18 or older. U.S. Const. Amend. XXVI. Before that, suffrage could be denied based on age, though there would be representational consequences in Congress if suffrage was denied to males aged 21 or older. U.S. Const. Amend. XIV § 2. (DFOF ¶ 452.)

327. Dr. Norrell's report on Alabama history ends in 1973, but Alabama history did not. Trial Tr. vol. III: 277 (Norrell). (DFOF ¶ 453.)

328. Dr. McCrary does not examine any data dated after 2006 to consider any disparity in voter turnout. Trial Tr. vol. III: 48-49 (McCrary). (DFOF ¶ 454.)

329. Dr. McCrary did not examine whether at-large elections have "an intended racist impact" in 2018. Trial Tr. vol. III: 52 (McCrary). (DFOF ¶ 455.)

330. According to the Alabama Legislature's website, the Constitution of 1901 has been amended 946 times. Some of these Amendments are statewide and others are local. *See* Constitution of Alabama 1901, available at http://alisondb.legislature.state.al.us/alison/CodeOfAlabama/Constitution/1901/Constitution1901_toc.htm. (DFOF ¶ 456.)

331. It has been well over 50 years since Alabama had a poll tax, an all-white primary, or a literacy test, and well over 50 years since the Democratic party used racist symbols on Alabama ballots. Trial Tr. vol. VI: 202-03 (McKee). (DFOF ¶ 458.)

332. This Court takes judicial notice that the United States District Court for the Northern District of Alabama held that, on the undisputed evidence, Alabama's photo ID law does not discriminate on the basis of race. *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253 (N.D. Ala. 2018). The case is on appeal. *Greater Birmingham Ministries v. Secretary of State for the State of Alabama*, No. 18-10151-GG (11th Cir. pending). (DFOF ¶ 459.)

## UNDISPUTED (STIPULATED) CONCLUSIONS OF LAW

The following is a list of Conclusions of Law that are undisputed (stipulated) pursuant to paragraph 3(a) of the Court's Order:

**Jurisdiction**

1. This action raises questions of federal law, and this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. (DCOL ¶ 1.)

2. Defendant the State of Alabama asserts sovereign immunity as a defense against Plaintiffs' Section 2 claims. This Court rejected Alabama's arguments by previous order. Doc. 45. (DCOL ¶ 3 (in part).)

**Standing**

3. To establish standing, a plaintiff must allege an actual or imminent injury in fact that was caused by the conduct complained of and is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). (PCOL ¶ 1.)

4. It is well-settled that "voters who allege facts showing disadvantage to themselves as individuals have standing to sue." *Baker v. Carr*, 369 U.S. 186, 206 (1962). (PCOL ¶ 2.)

5. The Alabama NAACP has standing. An organization may sue on behalf of its members if: (1) the members "would otherwise have standing to sue in their own right," (2) "the interests at stake are germane to the organization's purpose," and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). (PCOL ¶ 5.)

6. The U.S. Supreme Court has long established that claims for "prospective or injunctive relief" (such as Plaintiffs' claims here) do not require the participation of individual members in the lawsuit. *See United Food and Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996) (holding that "'individual participation' is not normally necessary when an association seeks prospective or injunctive relief for its members"). (PCOL ¶ 6.)

7. The NAACP and other voting rights organizations have frequently prosecuted Section 2 suits pursuant to organizational or associational standing. *See, e.g.*, *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990); *NAACP v. City of Evergreen*, 693 F.2d 1367 (11th Cir. 1982); *see also NAACP Philadelphia Branch v. Ridge*, No. CIV A. 00-2855, 2000 WL 1146619, at * 2 (E.D. Pa. Aug. 14, 2000). (PCOL ¶ 7.)

8. Where one plaintiff establishes standing, "there is no need to decide whether the other [plaintiffs] also have standing." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189, n.7 (2008). (PCOL ¶ 3.)

**Section 2**

9. One way an election practice may violate Section 2 is by diluting the vote of minority groups. *See Thornburg v. Gingles*, 478 U.S. 30, 48-51 (1986); *see also Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."). (PCOL ¶ 10.)

10. Judicial elections, including appellate judicial elections like the ones at issue here, are subject to vote dilution claims under Section 2. Chisom v. Roemer, 501 U.S. 380, 404 (1991). (PCOL ¶ 12.)

11. Section 2 of the VRA prohibits the imposition of a ". . . standard, practice or procedure . . . 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." 52 U.S.C. § 10301(a). (PCOL ¶ 9.)

12. To establish a vote dilution claim under Section 2, Plaintiffs must demonstrate that, under the totality of circumstances, the "political processes leading to nomination or election in the State ... are not equally open to participation by members of [a racial minority group] . . . in that its members have less opportunity than [members of the majority racial group]

to participate in the electoral process and to elect representatives of their choice." 52 U.S.C. § 10301(b). (PCOL ¶ 13.)

13. As set forth in *Gingles*, Plaintiffs must first satisfy three threshold requirements by showing that (1) the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," ("*Gingles* Prong 1"); (2) the minority group is "politically cohesive," ("*Gingles* Prong 2"); and (3) the majority group "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate" ("*Gingles* Prong 3"). *Gingles*, 478 U.S. at 49-51. (PCOL ¶ 14.)

14. Despite the submission of Plaintiffs' districting schemes, if the Court finds that the at-large method of electing judges to the courts at issue violates Section 2, the Alabama Legislature is given the first opportunity to devise a particular remedy. *See, e.g. Clark v. Calhoun Cty., Miss.*, 21 F.3d 92, 95 (5th Cir. 1994) ("[P]laintiffs' proposed district . . . was simply presented to demonstrate that a majority-black district is feasible in Calhoun County. If a § 2 violation is found, the county will be given the first opportunity to develop a remedial plan."). (PCOL ¶ 18.)

**Gingles 1**

15. *Gingles* Prong 1 requires that the subject minority group, in this case African Americans, is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50; *Georgia State Conference of NAACP v. Fayette Cty. Bd. of Comm'rs*, 775 F.3d 1336, 1347-48 (11th Cir. 2015). (PCOL ¶ 16.)

16. Plaintiffs must first show that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district. (DCOL ¶ 59.)

17. To establish *Gingles* Prong 1, Plaintiffs must submit as evidence hypothetical redistricting schemes in the form of illustrative plans. *See Gingles*, 478 U.S. at n.17; *see also Meek v. Metro. Dade Cty.*, 908 F.2d 1540, 1542-43 (11th Cir. 1990). (PCOL ¶ 17.)

18. There is no precise rule governing geographic compactness under *Gingles* Prong 1, but the "'inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries.'" *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006) (quoting *Abrams v. Johnson*, 521 U.S. 74, 92 (1997)); *see also Terrebonne Parish Branch NAACP v. Jindal*, 274 F. Supp. 3d 395, 420-423 (M.D. La. 2017). (PCOL ¶ 20.)

19. Plaintiffs drew alternative plans that included nine districts (for the nine-member Alabama Supreme Court), eight districts (for the eight Associate Justices on the Alabama Supreme Court, assuming the Chief Justice would continue to be elected statewide), and five districts (for the five-member Court of Civil Appeals and Court of Criminal Appeals). (DCOL ¶ 60)

20. Plaintiffs drew versions of each that included population deviations among the districts of plus-or-minus 5%, and versions that included population deviations among the districts of plus-or-minus 1%. (DCOL ¶ 61)

21. Plaintiffs have shown that in a nine-district and eight-district plan, the population of African-Americans is sufficiently large and geographically compact to constitute a majority in one single-member district. (DCOL ¶ 64)

22. Plaintiffs' plans SC2 and SC4 also include a second majority-minority district, District 5, that encompasses a portion of Jefferson County in each plan. (DCOL ¶ 65 (in part)).

Plaintiffs also introduced four alternative five-district plans, Plans AC1 through AC4. (DCOL ¶ 72.)

**Gingles 2 and 3**

23. To meet their burden under the second and third Gingles factors, which will be considered together, Plaintiffs must show that African-American voters are politically cohesive and vote as a bloc, and that white voters vote sufficiently as a bloc to enable them to defeat the minority's preferred candidate. (DCOL ¶ 81.)

24. *Gingles* Prongs 2 and 3 require (2) that the minority group be "politically cohesive" and (3) that "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. (PCOL ¶ 26.)

25. "Cohesion" refers to minority voters consistently supporting the same candidates. *Gingles*, 478 U.S. at 56 (citations omitted) ("A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim . . . and consequently establishes minority bloc voting within the context of § 2."). (PCOL ¶ 27.)

26. The number of elections that should be studied "vary according to pertinent circumstances," such as the number of elections in which the minority group has sponsored candidates. *Gingles*, 478 U.S. at n.25. (PCOL ¶ 31.)

27. Courts typically focus on endogenous elections – elections for the offices at issue – as the most probative in the vote dilution context. *Askew*, 127 F.3d at 1381 n.13. (PCOL ¶ 32.)

28. The analysis looks at whether current conditions deprive African-American voters "of the same opportunities to participate in the political process and elect representatives of

choice enjoyed by other voters," so recent elections are most probative. *Nipper*, 39 F.3d at 1512 (Section 2 cases call for an examination of whether current conditions deprive African American voters "of the same opportunities to participate in the political process and elect representatives of choice enjoyed by other voters"); *see also Uno v. City of Holyoke*, 72 F.3d 973, 990 (1st Cir. 1995) ("The ultimate question in any section 2 case must be posed in the present tense, not the past tense. The court must determine whether the challenged electoral structure deprives a racial minority of equal opportunity to participate in the political process at present. Though past elections may be probative of racially polarized voting, they become less so as environmental change occurs. In particular, elections that provide insights into past history are less probative than those that mirror the current political reality."). (PCOL ¶ 33.)

29. Defendants do not dispute that most black Alabama voters prefer a different candidate than most white Alabama voters, in most elections. To the extent that "racially polarized voting" means no more than that, Plaintiffs have met their burden under Gingles 2 and 3. (DCOL ¶ 83.)

**Totality of Circumstances**

30. If the *Gingles* preconditions are met, courts are required to determine whether, under the "totality of the circumstances," minority voters have less opportunity to participate equally in the political process on account of race or color. (DCOL ¶ 91).

31. After the Gingles preconditions are met, courts continue the totality of circumstances inquiry by looking to factors drawn from the Senate Judiciary Committee's report accompanying the 1982 amendments to the Voting Rights Act. *See Gingles*, 478 U.S. at 43-46. (PCOL ¶ 37.)

32. There is no requirement that "any particular number of factors be proved, or that a majority of them point one way or the other." *Gingles*, 478 U.S. at 45. (PCOL ¶ 38.)

33. The "totality" inquiry necessitates a "comprehensive, not limited, canvassing of relevant facts." *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994). (PCOL ¶ 40.)

34. The "totality" analysis depends heavily on the facts of the case. *See Johnson*, 512 U.S. at 1020–21 ("No single statistic provides courts with a shortcut to determine whether [an election structure] unlawfully dilutes minority voting strength."); *Nipper*, 39 F.3d at 1498 (declaring that Section 2 vote dilution cases "are inherently fact-intensive"); id. at 1527 ("Courts evaluating vote dilution claims . . . must consider all relevant evidence."). (PCOL ¶ 41.)

35. The totality of the circumstances is not precisely defined. Courts typically consider the various "Senate Factors" identified in Section 2's legislative history. Those factors include: 1. The history of official discrimination in voting; 2. Racial polarization of elections; 3. Voting practices that enhance the potential for discrimination against minorities; 4. Exclusive slating process; 5. The social, educational, and financial legacy of discrimination that hinders effective minority participation in the political process; 6. Racial appeals in elections; 7. The number of minorities elected to public office; 8. Elected representatives' lack of responsiveness to the minority's particularized needs; and 9. Whether the reasoning for imposing the challenged voting methodology is tenuous. *Gingles*, 478 U.S. at 37-38. (DCOL ¶ 92).

36. Factor 1 assesses "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." *Gingles*, 478 U.S. at 3637 (citing S. Rept. 97-417 (1982), Reprinted in 1982 U.S.C.C.A.N. 177, at 206-07). (PCOL ¶ 47.)

37. Factor 2 assesses "the extent to which voting in the elections of the state or political subdivision is racially polarized." *Gingles*, 478 U.S. at 36-37 (citing S. Rept. 97-417 (1982), Reprinted in 1982 U.S.C.C.A.N. 177, at 206-07). (PCOL ¶ 49.)

38. Factor 3 assesses "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group." *Gingles*, 478 U.S. at 36-37 (citing S. Rept. 97-417 (1982), Reprinted in 1982 U.S.C.C.A.N. 177, at 206-07). (PCOL ¶ 51.)

39. Factor 4 assesses, "if there is a candidate slating process, whether the members of the minority group have been denied access to that process." *Gingles*, 478 U.S. at 37 (citing S. Rept. 97-417 (1982), Reprinted in 1982 U.S.C.C.A.N. 177, at 206-07). (PCOL ¶ 53.)

40. Factor 5 assesses "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *Gingles*, 478 U.S. at 36-37 (citing S. Rept. 97-417 (1982), Reprinted in 1982 U.S.C.C.A.N. 177, at 206-07). (PCOL ¶ 55.)

41. Factor 6 assesses "whether political campaigns have been characterized by overt or subtle racial appeals." *Gingles*, 478 U.S. at 36-37 (citing S. Rept. 97-417 (1982), Reprinted in 1982 U.S.C.C.A.N. 177, at 206-07). (PCOL ¶ 57.)

42. Factor 7 assesses "the extent to which members of the minority group have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 36-37 (citing S. Rept. 97-417 (1982), Reprinted in 1982 U.S.C.C.A.N. 177, at 206-07). (PCOL ¶ 59.)

43. Factor 9 assesses "whether the policy underlying the state or political subdivision's use of such voting qualification prerequisite to voting, or standard, practice or procedure is tenuous." *Gingles*, 478 U.S. at 36-37 (citing S. Rept. 97-417 (1982), Reprinted in 1982 U.S.C.C.A.N. 177, at 206-07). (PCOL ¶ 61.)

**Fourteenth and Fifteenth Amendment**

44. The Fourteenth and Fifteenth Amendments prohibit purposeful discrimination on account of race. With respect to Plaintiffs' Constitutional claims, an at-large election system violates the Constitution if it is "conceived or operated as [a] purposeful device[] to further racial discrimination by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (internal quotation marks and citation omitted). (PCOL ¶ 76.)

45. A State violates the Constitution if it maintains an at-large voting system "for the invidious purpose of diluting the voting strength of the black population." *Rodgers*, 458 U.S. at 622. (PCOL ¶ 77.)

46. "[D]iscriminatory intent need not be proved by direct evidence." *Rogers*, 458 U.S. at 618; *Brown*, 561 F.3d at 433 ("To find discriminatory intent, direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions may be considered.") (internal quotation marks and citation omitted). (PCOL ¶ 80.)

47. Both circumstantial and direct evidence of intent (to the extent that direct evidence is available) may be considered. *See Veasey v. Abbott*, 830 F.3d 216, 235-36 (5th Cir. 2016) (acknowledging that to "require direct evidence of intent . . . would ignore the reality that neutral reasons can and do mask racial intent"). (PCOL ¶ 81.)

**PLAINTIFFS' PROPOSED CONCLUSIONS OF LAW TO WHICH DEFENDANTS CANNOT STIPULATE**

The following is a list of Plaintiffs' Proposed Findings of Fact to which Defendants cannot stipulate, pursuant to paragraph 3(b) of the Court's Order:

**Plaintiffs Have Standing**

1. Each individual Plaintiff (Norfleet, Muhammad, Harris, and Travis) is a "voter[] whose right to vote is impaired" and who live in the challenged district. They have standing to sue. *Gray v. Sanders*, 372 U.S. 368, 375 (1963) (holding that "any person whose right to vote is impaired . . . has standing to sue"). (PCOL ¶ 4.)

2. The Alabama NAACP satisfies each of the elements of organizational standing. (PCOL ¶ 8.)

**The *Gingles* Preconditions Are Satisfied**

3. Unlawful vote dilution can exist where an at-large method of election results in minority voters not having an equal opportunity to elect their preferred candidates. *See, e.g., Growe v. Emison*, 507 U.S. 25, 40 (1993) ("[A]t-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts[.]"). (PCOL ¶ 11.)

4. Plaintiffs have satisfied all three *Gingles* preconditions. (PCOL ¶ 15.)

***Gingles* Prong 1 – The Subject Minority Group Is "Sufficiently Large And Geographically Compact."**

5. For Plaintiffs to show that their minority group (African American) is "sufficiently large" under *Gingles* Prong 1, they must show "by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent." *See Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009). (PCOL ¶ 19.)

6. Plaintiffs' satisfy the "sufficiently large" and "geographic compactness" requirements under *Gingles* Prong 1 through the testimony and illustrative districting plans of expert witness Mr. William Cooper. Defendants offered no evidence to the contrary. (PCOL ¶ 21.)

7. The Eleventh Circuit has added an additional layer to *Gingles* Prong 1 that further requires Plaintiffs set forth a "plausible remedy." August 31, 2017, Mem. Opinion and Order, Dkt. No. 45, p. 6. Plaintiffs easily satisfy this criterion as well. (PCOL ¶ 22.)

8. The Supreme Court has recognized the application of Section 2 to judicial-election schemes. *See, e.g., Chisom*, 501 U.S. at 404; *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991). And the traditional and virtually universal remedy to Section 2 violations across the United States has been through the use of single-member districts. *See Growe*, 507 U.S. at 40 ("We have [] stated on many occasions that multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts . . . which is why we have strongly preferred single-member districts for federal-court-ordered reapportionment."); *Martin v. Mabus*, 700 F. Supp. 327, 332 (S.D. Miss. 1988) ("The Court therefore finds that having single-member subdistricts for election purposes within the subject chancery, circuit, and county court districts is the most plausible remedy for the Section 2 violation."); *Clark v. Roemer*, 777 F. Supp. 445, 468 (M.D. La. 1990) ("[T]he subdistrict approach suggested by plaintiffs, . . . represents the only proposal which will actually remedy the violations of Section 2 (short of devising an entirely different system)."); *see also Cane v. Worcester Cty.*, 840 F. Supp. 1081, 1091 (D. Md. 1994) (noting that single-member districts are "the traditional remedy for minority vote dilution cases"); *Williams v. City of Texarkana*, 861 F. Supp. 771, 772 (W.D. Ark. 1993) (explaining that

"single member districts are the preferred remedy where a violation of voting rights has been found") (quoting *East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636, 639 (1976)). (PCOL ¶ 23.)

9. The State's purported linkage interest does not render Plaintiffs' districting remedy improper. Linkage has never been recognized by the Supreme Court in the context of appellate elections; at most, is "merely one factor" to consider in the context of trial judges; and has never been applied by the Eleventh Circuit to defeat a Section 2 claim involving the election of appellate judges. *Houston Lawyers' Association, 501 U.S. at 21; see also Chisom*, 501 U.S. at 404. The Court concludes the state's "linkage" interest is tenuous at best and is entitled to little or no weight in the Court's totality analysis. (PCOL ¶ 24.)

**_Gingles_ Prongs 2 and 3 – Alabama's African-American Voters Are Politically Cohesive, And The White Majority Votes As A Bloc To Enable It To Usually Defeat The African-American Preferred Candidates**

10. *Gingles* Prongs 2 and 3 are the components of the Supreme Court's definition of "racially polarized voting," *Gingles*, 478 U.S. at 56. (PCOL ¶ 25.)

11. "White bloc voting" refers to minority-preferred candidates being defeated by White voters, and is legally significant when there is "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes." *Gingles*, 478 U.S. at 56. (PCOL ¶ 28.)

12. Courts rely on statistical analyses to estimate the proportion of each racial group that voted for each candidate. *See, e.g., Gingles*, 478 U.S. at 52-54; *Nipper*, 39 F.3d at 1505 n.20 (quoting *Nipper v. Chiles*, 795 F. Supp. 1525, 1533 (M.D. Fla. 1992)). (PCOL ¶ 29.)

13. Courts have formally recognized and embraced three types of statistical analyses to reliably assess racially polarized voting: ecological inference, ecological regression, and homogeneous precinct analysis. *See, e.g., Gingles*, 478 U.S. at 53 n.20 (accepting ecological

regression and homogenous precinct analysis as "standard in the literature"); *Askew v. City of Rome*, 127 F.3d 1355, 1365 n.2 (11th Cir. 1997) (accepting ecological regression analysis and homogeneous precinct analysis as among "the generally accepted methods of voting analysis"); *Wright v. Sumter Cty. Bd. of Elections & Registration*, 301 F. Supp. 3d 1297, 1305 (M.D. Ga. 2018) (noting that homogeneous precinct analysis, bivariate ecological regression analysis and ecological inference are "accepted by the courts as reliable for use in voting cases" and that "the EI [ecological inference] method is currently the 'gold standard'") (citation omitted). (PCOL ¶ 30.)

14. The pattern of racially polarized voting over time is more probative than the results of any single election. *Gingles*, 478 U.S. at 57 n.25; *see also Meek v. Metro. Dade Cty., Fla.*, 985 F.2d 1471, 1483 (11th Cir. 1993), *abrogated on other grounds, Dillard v. Chilton Cty. Comm'n*, 495 F.3d 1324 (11th Cir. 2007) (PCOL ¶ 34.).

15. Under the law of the Eleventh Circuit, election contests that include an African-American candidate are most probative for these analyses. *See Solomon v. Liberty Cty. Comm'rs*, 221 F.3d 1218, 1227 (11th Cir. 2000) ("In examining a jurisdiction's electoral history, a court may assign more probative value to elections that include minority candidates, than elections with only white candidates"); *Nipper*, 39 F.3d at 1540 (plurality opinion) ("[T]he most probative evidence of whether minority voters have an equal opportunity to elect candidates of their choice is derived from elections involving black candidates."); *S. Christian Leadership Conference of Alabama v. Sessions*, 56 F.3d 1281, 1293 (11th Cir. 1995) (en banc) (upholding the district court's conclusion that "greater weight should be given to . . . white on black judicial elections . . . ."). (PCOL ¶ 35.)

16. Dr. Handley's analysis proves that over the last twenty years, African-American voters consistently voted cohesively, and have consistently been unable to elect their statewide judicial candidates of choice as a result of White bloc voting. Defendants' expert does not dispute Dr. Handley's analysis or conclusions. (PCOL ¶ 36.)

**The Totality Of The Circumstances Weighs Heavily In Favor Of Granting Judgment To Plaintiffs**

17. "[I]t will only be the very unusual case in which plaintiffs can establish the existence of the three Gingles factors but still have failed to establish a violation of § 2 under the totality of the circumstances." *See Georgia State Conference of NAACP v. Fayette Cty. Bd. of Comm'rs*, 775 F.3d 1336, 1342 (11th Cir. 2015) (quoting *Jenkins v. Red Clay Consol. Sch. Dist.* Bd. of Educ., 4 F.3d 1103, 1135 (3rd Cir. 1993)). A discriminatory result establishes a violation – discriminatory intent is not necessary. Id. (citing *Voinovich v. Quilter*, 507 U.S. 146, 145 (1993)). (PCOL ¶ 39.)

18. In total, the *Gingles* Court identified seven factors that may, in "the totality of the circumstances," support a claim of racial vote dilution, *Gingles*, 478 U.S. at 36-37. These seven factors are often referred to as the "Senate Factors". See S. Rept. 97-417 (1982), Reprinted in 1982 U.S.C.C.A.N. 177, at 206-07. (PCOL ¶ 42.)

19. Additional factors that in some cases have probative value include "whether there is a significant lack of responsiveness on the part of the elected officials to the particularized needs of the members of the minority group" and "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Gingles*, 478 U.S. at 37. (PCOL ¶ 43.)

20. The existence of racially polarized voting and the extent to which minorities are elected to public office remain the two most important factors considered in the totality-of-circumstances inquiry. *Gingles*, 478 U.S. at 48 n.15. (PCOL ¶ 44.)

21. The "totality" inquiry is whether African-American voters have "less opportunity" than White voters to elect preferred appellate court judges. *Gingles*, 478 U.S. at 63. (PCOL ¶ 45.)

22. In this case, an analysis of the Senate Factors supports the conclusion that African American voters in Alabama have "less opportunity" than White voters in Alabama to elect preferred appellate court judges. (PCOL ¶ 46.)

23. As demonstrated in Plaintiffs' Proposed Findings of Fact ¶¶ 55 to 79, totality Factor 1 weighs in favor of granting judgment to Plaintiffs. (PCOL ¶ 48.)

24. As demonstrated in Plaintiffs' Proposed Findings of Fact ¶ 80, totality Factor 2 weighs in favor of granting judgment to Plaintiffs. (PCOL ¶ 50.)

25. As demonstrated in Plaintiffs' Proposed Findings of Fact ¶¶ 81 to 89, totality Factor 3 weighs in favor of granting judgment to Plaintiffs. (PCOL ¶ 52.)

26. As demonstrated in Plaintiffs' Proposed Findings of Fact ¶¶ 90 to 91, totality Factor 4 weighs in favor of granting judgment to Plaintiffs. (PCOL ¶ 54.)

27. As demonstrated in Plaintiffs' Proposed Findings of Fact ¶¶ 92 to 103, totality Factor 5 weighs in favor of granting judgment to Plaintiffs. (PCOL ¶ 56.)

28. As demonstrated in Plaintiffs' Proposed Findings of Fact ¶¶ 104 to 115, totality Factor 6 weighs in favor of granting judgment to Plaintiffs. (PCOL ¶ 58.)

29. As demonstrated in Plaintiffs' Proposed Findings of Fact ¶¶ 116 to 129, totality Factor 7 weighs in favor of granting judgment to Plaintiffs. (PCOL ¶ 60.)

30. Totality Factor 8, which inquires whether "elected officials are unresponsive to the particularized needs of the members of the minority group" is not applicable to the facts of this case. *Gingles*, 478 U.S. at 45. (PCOL at n.1.)

31. As demonstrated in Plaintiffs' Proposed Findings of Fact ¶¶ 130 to 147, totality Factor 9 weighs in favor of granting judgment to Plaintiffs. (PCOL ¶ 62.)

32. The State's "linkage" justification is "tenuous" at best. (PCOL ¶ 63.)

33. The United States Supreme Court in *Houston Lawyers Association* firmly held that a state's linkage interest is "merely one factor to be considered in evaluating the 'totality of circumstances,'" and even that was in the context of *trial* court judges who possess the unique power to decide cases unilaterally. *Houston Lawyers' Ass'n v. Attorney General of Texas,* 501 U.S. 419, 427 (1991). Assertion of a linkage interest is not enough to defeat a bona fide Section 2 claim. *Id.* ("[T]hat interest does not automatically, and in every [trial court judge] case, outweigh proof of racial vote dilution."). (PCOL ¶ 64.)

34. The State's linkage interest has limited weight because this case concerns appellate-court elections, not trial-court elections. *Houston Lawyers' Association*, in which the Court discussed the linkage interest, concerned only trial judges. *Chisom v. Roemer*, 501 U.S. 380 (1991), which affirmed application of Section 2 to appellate judicial elections, made no mention of linkage at all. (PCOL ¶ 65.)

35. The rationale underlying linkage in the trial court context, i.e., concerns about an autonomous decision-maker rendering biased judgments in favor of his or her electorate, are absent in the appellate court context. *Davis v. Chiles*, 139 F.3d 1414, 1421-22 (11th Cir. 1998) (noting how the state's interest in linkage in that case pertained to trial court judges, "lone decision-makers," "who would lack input from [ ] colleagues elected by the rest of the citizenry

of the jurisdiction"). *Nipper*, 39 F.3d at 1535 n.78 (plurality) (noting a state's interest in linkage differs in the context of appellate court elections because, there, the election concerns "representation on a collegial court" where "[t]he ability to bring diverse perspectives to the court" would be a relevant consideration). (PCOL ¶ 66.)

**The State's "Party, Not Race" Defense is Unavailing**

36. The State's argument that Alabamian voting behavior correlates with party preference is not a defense to a Section 2 claim. (PCOL ¶ 67.)

37. As explained by the Eleventh Circuit, Plaintiffs are not required "to prove racism determines the voting choices of the white electorate in order to succeed in a voting rights case." *Askew*, 127 F.3d at 1382. (PCOL ¶ 68.)

38. Contrary to the view of two Eleventh Circuit judges in *Nipper*, "[n]either the Supreme Court nor the Eleventh Circuit has ever held that such a showing is a necessary element of a vote dilution claim." *Id.*; *Johnson v. Hamrick*, 196 F.3d 1216, 1220 (11th Cir. 1999) ("[T]wo judges of this Court consider racial bias in the voting community to be a relevant factor."); *Solomon v. Liberty Cty. Comm'rs*, 166 F.3d 1135, 1141 (11th Cir. 1999), *reh'g en banc granted, opinion vacated*, 206 F.3d 1054 (11th Cir. 2000), and *on reh'g*, 221 F.3d 1218 (11th Cir. 2000) ("Finally, two judges of this court consider racial bias in the voting community to be a relevant factor."); *Johnson v. DeSoto Cty. Bd. of Comm'rs*, 72 F.3d 1556, 1564 (11th Cir. 1996) (dismissing plaintiffs' reliance on the plurality in *Nipper* because it was "joined only by two of the eight members of this Court."). (PCOL ¶ 69.)

39. Plaintiffs "need not prove causation or intent in order to prove a prima facie case of racial bloc voting." *City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1557-58 (11th Cir. 1987) (citations and quotations omitted). (PCOL ¶ 70.)

40. The rule in the Eleventh Circuit follows the intent of Congress, which calls for a results test. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 16 (1982), 1982 U.S.C.C.A.N. at 193 (Senate Judiciary Report on amended Voting Rights Act) ("The Committee has concluded that intent test [adopted in *City of Mobile, Ala. v. Bolden*, 446 U.S. 55 (1980)] places an unacceptably difficult burden on plaintiffs. It diverts the judicial [inquiry] from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives."). (PCOL ¶ 71.)

41. The correlation between the race of voters and the selection of certain candidates in the trial record is undisputed and undeniable. Whether this racially polarized voting behavior may also correlate with political party is irrelevant. *See City of Carrollton Branch of the N.A.A.C.P. v. Stallings*, 829 F.2d 1547, 1557-58 (11th Cir. 1987); *see also Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476, 495 (2d Cir. 1999) (concluding that the causation inquiry is "a fundamental misunderstanding of what the plaintiffs class alleged and proved to the satisfaction of the district court. The claim was that the at-large system of voting made it impossible for blacks to elect their *preferred candidates*. The Town's argument implies that if blacks registered and voted as Republicans, they would be able to elect the candidates they prefer. But they are not able to elect preferred candidates under the Republican Party regime that rules in the Town. Moreover, blacks should not be constrained to vote for Republicans who are not their preferred candidates.") (emphasis in original). (PCOL ¶ 72.)

42. To the extent Defendants want to argue that race is *not* a factor in Alabama's judicial elections, they bear the burden of proof. *See Johnson v. Hamrick*, 196 F.3d 1216, 1220 (11th Cir. 1999) ("If all three [preconditions] are shown, then the district court must review all relevant evidence under the totality of the circumstances. The defendants may present evidence

of the lack of racial bias in the community, proportionate representation, past and present electoral success, as well as proof of the other factors which are indicative of the existence or non-existence of vote dilution. The plaintiffs may respond in kind."); *Solomon v. Liberty Cty*., Fla., 957 F. Supp. 1522, 1553-54 (N.D. Fla. 1997), *aff'd sub nom. Solomon v. Liberty Cty. Comm'rs*, 221 F.3d 1218 (11th Cir. 2000); *see also Nipper*, 39 F.3d at 1524 (explaining that a "defendant may rebut the plaintiff's evidence by demonstrating the absence of racial bias in the voting community"); *id.* at 1525 n.64 ("The defendants would have the obligation to introduce evidence of such innocent explanations; section 2 plaintiffs would be under no obligation to search them out and disprove them preemptively."). (PCOL ¶ 73.)

43. The State offers no evidence that any other court has ever accepted Dr. Bonneau's theory that, because White and African American Democratic Party candidates receive similar numbers of votes in general elections, African American preferred candidates lose because of political party not race, as proving that race is not a factor among the electorate. *See Ga. State Conference of NAACP v. Fayette Cty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1346-47 (N.D. Ga. 2015) (rejecting argument "that racial bloc voting and the lack of electoral success for Black candidates was caused by partisanship as opposed to race"). (PCOL ¶ 74.)

44. If Black voters can only elect preferred candidates who are White, then Black voters are unable to elect their candidate of choice regardless of the race of that candidate. (PCOL ¶ 75.)

**Alabama's At-Large System For Electing Appellate Court Judges Violates Plaintiffs' Rights Under The Fourteenth And Fifteenth Amendments To The U.S. Constitution**

45. Plaintiffs need only show that "a discriminatory purpose [was] a motivating factor" in the challenged decision. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977). In other words, "[r]acial discrimination need only be one purpose," and

not even a primary purpose, to establish a violation of the Fourteenth and Fifteenth Amendments. *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009). (PCOL ¶ 78.)

46. In *Rogers*, the Supreme Court held that the *Zimmer* factors, properly applied in an analysis of intent, could support a finding of purposeful discriminatory maintenance of an at-large election system. 458 U.S. 620-21. The *Zimmer* court said:

> [W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, antisingle shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors.

*Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (footnotes omitted), *aff'd on other grounds, sub nom. E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976); *Rogers v. Lodge*, 458 U.S. at 616-22; *id.* at 620 n.8. (PCOL ¶ 79.)

47. The Supreme Court has explained that the history of discrimination is of particular importance in the Constitutional analysis:

> Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases . . . where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices, which, though neutral on their face, serve to maintain the status quo.

*Rogers*, 458 U.S. at 625. (PCOL ¶ 82.)

48. Alabama's current statewide, at-large method for electing its Supreme Court justices and Court of Civil and Criminal Appeals judges violates the Fourteenth and Fifteenth Amendments to the U.S. Constitution. (PCOL ¶ 83.)

**Conclusion**

49. This Court concludes, after an assessment of all the relevant facts of this case, that Alabama's at-large voting system for electing judges to the state's appellate courts unlawfully dilutes the vote of African Americans, preventing them from electing candidates of their choice, in violation of Section 2 of the VRA and the Fourteenth and Fifteenth Amendments to the U.S. Constitution. (PCOL ¶ 84.)

50. A remedy is required for this violation, such as elections by districts, to redress Plaintiffs' injury. (PCOL ¶ 85.)

## DEFENDANTS' PROPOSED CONCLUSIONS OF LAW TO WHICH PLAINTIFFS CANNOT STIPULATE

The following is a list of Defendants' Proposed Findings of Fact to which Plaintiffs cannot stipulate, pursuant to paragraph 3(c) of the Court's Order:

**Jurisdiction**

1. In this action challenging at-large elections for Alabama appellate judges, one or more of the Plaintiffs has standing because, if Plaintiffs prevail and Alabama is required to draw districts to elect appellate judges, one or more Plaintiffs would likely reside in a majority-minority district. (DCOL ¶ 2.)

**Expert witnesses**

2. The Court finds that all experts identified in this case for Plaintiffs and for the Defendants satisfy the requirements of the Federal Rules of Evidence, Daubert, and other applicable standards to testify as experts. (DCOL ¶ 4.)

3. Plaintiffs' motions to strike the expert opinions of Dr. Scott Gaylord and Dr. Chris Bonneau are denied. (DCOL ¶ 5.)

**Section 2 Claim**

4. Section 2 of the Voting Rights Act prohibits a political process that, based on the totality of the circumstances, results in minority voters having less opportunity to elect their representative of choice on account of the minority voters' race. The "political process" challenged in this case is Alabama's choice to select appellate judges through the use of statewide popular elections. (DCOL ¶ 6.)

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*." 52 U.S.C. § 10301(a) (emphasis added). 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." 52 U.S.C. § 10301(b). (DCOL ¶ 7.)

6. The Supreme Court has held that Section 2 applies to judicial elections in *Chisom v. Roemer*, 501 U.S. 380 (1991),[6] but "it left open the issue of what a plaintiff would have to establish to obtain relief." *Nipper v. Smith*, 39 F.3d 1494, 1528 (11th Cir. 1994) (plurality opinion). (DCOL ¶ 8.)

7. To establish their Section 2 claim, Plaintiffs must show that they meet the three "*Gingles*" prerequisites: (1) the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the 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. *See Thornburg v. Gingles*, 478 U.S. 30, 49–51 (1986). (DCOL ¶ 9.)

8. Moreover, in this Circuit, "[a]s part of any *prima facie* case under Section Two, a plaintiff must demonstrate the existence of a proper remedy." *Davis v. Chiles*, 139 F.3d 1414, 1419 (11th Cir. 1998), citing *SCLC v. Sessions*, 56 F.3d 1281, 1289, 1294-97 (11th Cir. 1995); *Nipper*, 39 F.3d at 1530-31 (11th Cir. 1994) (plurality opinion); *id.* at 1547 (Edmondson, J., concurring). "The inquiries into remedy and liability, therefore, cannot be separated. 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 1530-31. (DCOL ¶ 10.)

9. If Plaintiffs cross the threshold of a *prima facie* case, the Court must then examine the totality of the circumstances and determine if in fact the challenged procedure denies or abridges the vote of minority voters on account of race or color. *Johnson v. DeGrandy*, 512 U.S.

[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.

997, 1011 (1994) (holding that while it is necessary to meet all three *Gingles* prerequisites to show a Section 2 violation, those prerequisites were not sufficient by themselves to show a Section 2 violation.). (DCOL ¶ 11.)

10. The State of Alabama preserves that issue [of the State's sovereign immunity] for appellate review. (DCOL ¶ 3 (in part).)

**Remedy**

11. Implicit in the *Gingles* requirements "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." *Nipper*, 39 F.3d at 1531. Accordingly, the Eleventh Circuit held that *Gingles* "require[s] that there must be a remedy within the confines of the state's judicial model that does not undermine the administration of justice." *Id.* (DCOL ¶ 12.)

12. Under our federalist system, States retain the authority to organize their judicial systems as they see fit, consistently with the requirements of the United States Constitution. (DCOL ¶ 13.)

13. The State of Alabama has a legitimate interest in preserving the linkage between a judge's territorial jurisdiction and electoral base. (DCOL ¶ 14.)

14. Linkage serves to preserve judicial accountability and judicial independence; it shows respect for a State's constitutional model; it allows Alabama voters to have a voice on the membership of the entire court; it prevents the marginalization of minority voters; it promotes confidence in the justice system; it avoids injecting race into the administration of justice; and it

better ensures a large pool of candidates. These are all legitimate State interests, and linkage furthers these interests. (DCOL ¶ 15.)

15. 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." *Nipper*, 39 F.3d at 1543. (DCOL ¶ 16.)

16. "[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." *Id.* at 1544. (DCOL ¶ 17.)

17. "Subdistricts … would "foster the idea that judges should be responsive to constituents" and would undermine "the ideal of an independent- minded judiciary." *Id.* (DCOL ¶ 18.)

18. 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.* (DCOL ¶ 19.)

19. If Plaintiffs are correct that at-large elections dilute minority votes, districting to purposefully create one or more majority-black districts would cause more dilution, not less: "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.* (DCOL ¶ 20.)

20. In *Nipper*, *SCLC* and *Davis*, the Eleventh Circuit recognized the importance of the State's linkage interests in the context of trial courts. These interests are just as important in the context of appellate courts. (DCOL ¶ 21.)

21. Judicial accountability, judicial independence, public confidence in the justice system, avoiding the marginalization of minority voters, allowing Alabama voters to have a voice on all members of her appellate courts, avoiding injecting race into the administration of justice, and ensuring a large pool of candidates are all legitimate state interests in the context of appellate courts. (DCOL ¶ 22.)

22. Districting would harm these interests by making judges accountable to only a fraction of voters in the State. (DCOL ¶ 23.)

23. "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, [Alabama] prefers to elect judges from larger areas, diluting the reaction to individual decisions." *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1201 (7th Cir. 1997). (DCOL ¶ 24.)

24. The role of the judge is very different from the role of the legislator. (DCOL ¶ 25.)

25. While members of the executive and legislative branches "are expected to be appropriately responsive to the preferences of their supporters," *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1667 (2015), judges should be 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.* (quotation marks omitted). (DCOL ¶ 26.)

26. Alabama has an interest in avoiding even the appearance of partiality. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009). (DCOL ¶ 27.)

27. Districting would harm these interests by permitting Alabama voters to vote on only one member of multi-member appellate courts, even though all members of the appellate courts vote on cases that have profound effects on the lives of all Alabamians. (DCOL ¶ 28.)

28. Districting would harm these interests because many cases decided by the Alabama Supreme Court are decided by panels of five justices, and in those rulings, much of the State would have no voice. (DCOL ¶ 29.)

29. Districting would harm these interests by limiting the pool of judicial candidates. (DCOL ¶ 30.)

30. Districting would harm these interests by prohibiting Alabama from electing two qualified candidates from the same district. (DCOL ¶ 31.)

31. Districting would inject race into the administration of justice, or would appear to do so, because some Alabama citizens may believe that judges elected from majority-black districts represent black voters and judges elected from majority-white districts represent white voters. (DCOL ¶ 32.)

32. Districting would marginalize minority voters because most minority voters in the State would comprise a very small percentage of heavily-white districts. (DCOL ¶ 33.)

33. Districting would damage public confidence in Alabama's judicial system because of the appearance that judges should "represent" their districts and consider how their rulings affect their district. (DCOL ¶ 34.)

34. A State "has an interest in avoiding even the appearance that its judges may harbor 'home cooking' biases." *Davis v. Chiles*, 139 F.3d 1414, 1421 (11th Cir. 1998). (DCOL ¶ 35.)

35. Districting would harm the State's interest in judicial independence and separation of powers because it would give the Alabama Legislature, which possesses the authority to draw district lines, the ability to draw unfavorable districts for judges whom the Legislature does not like. (DCOL ¶ 36.)

36. Alabama may reasonably be concerned that districting could lead to bias or the appearance of bias, and may take that into account in selecting and maintaining statewide elections. (DCOL ¶ 37.)

37. Alabama may reasonably be concerned that districting could negatively impact the perceptions of the appellate courts by the parties and the public, and may take these concerns into account in selecting and maintaining statewide elections. (DCOL ¶ 38.)

38. Alabama may reasonably be concerned that districting could negatively impact the perceptions of the appellate courts by the parties and the public, and may take these concerns into account in selecting and maintaining statewide elections. (DCOL ¶ 39.)

39. Alabama has the sovereign right and duty to insist that race is not relevant to the fair and just administration of justice, and may take that into account in selecting and maintaining statewide elections. (DCOL ¶ 40.)

40. Alabama need not have suffered any particular potential harm before designing a system to avoid that harm. (DCOL ¶ 41.)

41. The State's strong interest in linkage outweighs the evidence of vote dilution in this case. (DCOL ¶ 42.)

42. Plaintiffs' requested remedy that Alabama draw districts for the election of Appellate judges is not available to them under the law. (DCOL ¶ 43.)

43. While Plaintiffs have not asked for a remedy that requires non- partisan judicial elections, the State has an interest in allowing voters to know the party affiliation of judicial candidates. (DCOL ¶ 44.)

44. Non-partisan elections would withhold important information from voters, would decrease voter participation, and would not remedy any vote dilution. (DCOL ¶ 45.)

45. A remedy of non-partisan elections is not an available remedy under the law. (DCOL ¶ 46.)

46. While Plaintiffs have not asked for a remedy that eliminates numbered places, numbered places prevent incumbent appellate judges from competing with each other and therefore promotes collegiality on Alabama's appellate courts. (DCOL ¶ 47.)

47. Eliminating place numbers or adding cumulative voting would require judges to run against each other, undermining collegiality and "dampen[ing] lawyer interest in a judicial career." *Davis*, 139 F.3d at 1545–46. (DCOL ¶ 48.)

48. Eliminating numbered places is not an available remedy under the law. (DCOL ¶ 49.)

49. "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." *SCLC*, 56 F.3d at 1297. (DCOL ¶ 50.)

50. Because Plaintiffs have no available remedy, their Section 2 claim fails as a matter of law. (DCOL ¶ 51.)

51. Section 2 claims also present the requirement that there be "a reasonable alternative practice as a benchmark against which to measure the existing voting practice." *Holder v. Hall*, 512 U.S. 874, 880 (1994). (DCOL ¶ 52.)

52. Here it is not possible for a court to say that one method of judicial selection is right and one is wrong, or even that one is better than another as a matter of law. The different methods of judicial selection represent different ways that States can legitimately balance the interests of judicial accountability, judicial independence, and other interests involved. States are free to choose to use districts to elect judges, but each system has its own advantages and disadvantages. (DCOL ¶ 53.)

53. Nor is it possible to say that districted judicial elections are a "benchmark" against which to measure non-districted judicial elections. Districting to elect judges, and introducing the elements of "representation" that result from districts, would not simply alter the way judges are elected. It would change the way that the State defines the role of the judge:

> 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.

(DCOL ¶ 54.)

54. There is therefore no "reasonable alternative practice" against which to measure Alabama's choice to elect appellate judges by statewide popular elections. Without such a benchmark, Plaintiffs' Section 2 claim fails. (DCOL ¶ 55.)

55. Reading Section 2 to require districting would raise several constitutional concerns. These include injecting into the justice system 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); harming the due process rights of Alabamians by forcing upon them a justice system where judges have the incentive to look after their own "constituents;" effectively disenfranchising voters in many races by stripping them of their right to vote on most judges and by placing them in the minority of racially-drawn districts; and pushing Section 2 beyond its "congruent and proportional" limits, *see Johnson v. Governor of Fla.*, 405 F.3d 1214, 1232 (11th Cir. 2005). (DCOL ¶ 56.)

56. "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). (DCOL ¶ 57.)

57. Even if Plaintiffs had an available remedy, their Section 2 claim fails because they have not shown that, under the totality of the circumstances, state- wide appellate elections deny or abridge the vote of African-Americans on account of race. (DCOL ¶ 58.)

58. This Court found in another case that the Alabama Legislature uses a plus-or-minus 1% deviation for districts. *See Alabama Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026, 1037 (M.D. Ala. 2017). The Court will therefore consider only those plans that comply with this Alabama policy. (DCOL ¶ 62)

59. Plaintiffs' plans SC2 (9-district) and SC4 (8-district) (Exhibits P-98, P-99, P-101, P-102) comply with the plus-or-minus 1% deviation standard. Those plans include a District 1 that encompasses most of the Black Belt counties, is reasonably compact, and has a 53.7% and 50.61% voting-age black population, respectively.

60. Plaintiffs did not meet the *Gingles* 1 requirement for this second district. (DCOL ¶ 65 (in part))

61. Race predominated in the drawing of District 5 in plans SC2 and SC4. In each case, District 5 is oddly shaped and splits Jefferson County along racial lines. (DCOL ¶ 66)

62. In SC2, 96.81% of the African-American population of Jefferson County is included in District 5; the portion of Jefferson County that is included in District 5 is 50.84% black, and the portion of District County outside of District 5 is only 6.69% black. Ex. D-89. (DCOL ¶ 67)

63. In SC4, 93.69% of the African-American population of Jefferson County is put in District 5; the portion of Jefferson County included in District 5 is 59.96% black, and the portion of Jefferson County that is outside of District 5 is only 7.71% black. (DCOL ¶ 68)

64. Moreover, District 5 is less than 50% voting-age black in SC2, where blacks are 48.51% of the voting age population, and SC4, where blacks are 47.92% of the voting age population. (DCOL ¶ 69.)

65. Section 2 does not require the drawing of "influence" or "cross-over" districts. *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 446 (2006) (If the Voting Rights Act "were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting.") (DCOL ¶ 70)

66. Plaintiffs have not shown that the African-American population is sufficiently large and geographically compact to form a majority in two single-member districts in either a nine-district or an eight-district plan. (DCOL ¶ 71)

67. Plan AC3 includes a District 1 that is 54.55% voting age black. However, race predominated when drawing that district. (DCOL ¶ 73)

68. District 1 includes the Black Belt counties and reaches up into Jefferson County. Plaintiff's expert conceded it was not necessary to split Jefferson County in a five-district plan, and the only reason he did so was to draw a majority-black district. (DCOL ¶ 74)

69. Jefferson County is split along racial lines in AC3 between District 1 and District 4. District 1 includes 94.89% of the total black population of Jefferson County, and only 5.11% of Jefferson County's population is put in District 4. Comparing the racial demographics of the District 1 portion of Jefferson County with the District 4 portion of Jefferson County is telling: The portion of Jefferson County's population that is included in District 1 is 56.55% black, and the portion of Jefferson County's population that is outside of District 1 is only 7.27% black. (DCOL ¶ 75.)

70. Only Plan AC3 complies with the plus-or-minus 1% deviation policy. (DCOL ¶ 72 in part.)

71. District 1 in Plan AC3 is not reasonably compact. (DCOL ¶ 76)

72. Jefferson County is split in the same fashion in all of Plaintiffs' five-district plans, and race predominated in drawing the majority-black district in each. (DCOL ¶ 77)

73. Plaintiffs have not shown that the African-American population is sufficiently large and geographically compact to comprise a majority in a five-district plan without engaging in unconstitutional racial gerrymandering. (DCOL ¶ 78)

74. Plaintiffs have not shown that African-Americans could in fact elect their candidates of choice in districts that are barely more than fifty percent voting age black. (DCOL ¶ 79)

75. Plaintiffs have therefore failed to meet their burden under the first *Gingles* prerequisite for a five-district plan. (DCOL ¶ 80)

**Gingles 2 and 3**

76. Most black voters in Alabama tend to support the Democratic Party, as they do throughout the country. A majority of white voters in Alabama tend to vote Republican, but white voters are not monolithic. Only 50% of white voters in Alabama identified as "strong Republican" or "weak Republican." (DCOL ¶ 82.)

77. In the Fifth Circuit, the *Gingles* factors mean more than simply proving that blacks and whites prefer different candidates. Instead, to meet their burden under the *Gingles* prerequisites, Section 2 plaintiffs in the Fifth Circuit must prove that racial bias is behind the different voting patterns:

> The scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of § 2 suggests, extends only to defeats experienced by voters "on account of race or color." Without an inquiry into the circumstances underlying unfavorable election returns, courts lack the tools to discern results that are in any sense "discriminatory," and any distinction between deprivation and mere losses at the polls becomes untenable. In holding that the failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the district court loosed § 2 from its racial tether and fused illegal vote dilution and political defeat.

*League of United Latin American Citizens v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993).[7] Citing to the text of § 2, legislative history, and *Gingles* itself, the Fifth Circuit held that legally significant racial bloc voting is not shown if people vote the way they do because of party

[7] *See also Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) ("[Section 2] is a balm for racial minorities, not political ones—even though the two often coincide.").

preferences: "The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates. *Rather, § 2 is implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats*." *Id.* at 854 (citation and internal quotation marks omitted; emphasis added). (DCOL ¶ 84.)

78. The Fifth Circuit's discussion is persuasive. And without any evidence of racial bias, there is no basis for a court to infer that bias exists simply because of differing voting patterns. The record shows that African-American voters throughout the country (not just in the South) prefer candidates affiliated with the Democratic party. Voting will therefore be polarized in any jurisdiction where a majority of white candidates happen to prefer candidates affiliated with the Republican party. That fact alone is no indication whatsoever that racial bias is at work. (DCOL ¶ 85.)

79. The Court notes that many decisions (including from this Circuit) have been inconsistent in the way they discuss the Section 2 standard, and some suggest that polarized voting is itself an indication of a Voting Rights Act violation.[8] *But see Johnson v. DeGrandy*, 512 U.S. 997 (1994) (holding that establishing the *Gingles* prerequisites is not sufficient to prove a Section 2 violation). However, there is no basis for such an assumption *unless* the polarized

[8] *See United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1567 (11th Cir. 1984) ("The surest indication of race-conscious politics is a pattern of racially polarized voting."); *Nipper v. Smith*, 39 F.3d 1494, 1525 (11th Cir. 1994) ("proof of the second and third *Gingles* factors will ordinarily create a sufficient inference that racial bias is at work"); *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1024 n.21 (2d Cir. 1995) (noting that it would be unusual for plaintiffs to show the *Gingles* factors but, after considering the totality of the circumstances, not have established a violation of section 2); *Harvell v. Blytheville School Dist.*, 71 F.3d 1382, 1390 (8th Cir. 1995) (stating that "[s]atisfaction of the necessary *Gingles* preconditions carries a plaintiff a long way towards showing a Section 2 violation"); *Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.*, 4 F.3d, 1103, 1135 (3d Cir. 1993) ("it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances"); *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 310-11 (D. Mass. 2004) ("It will, however, be the rare case in which plaintiffs meet the *Gingles* preconditions and yet fail on their section 2 claim due to the totality of the circumstances.").

voting is shown to be the result of racial bias in the electorate. Such an assumption would be valid only if, as in the Fifth Circuit, racial bias is part of the definition of polarized voting. (DCOL ¶ 86.)

80. This Court is bound by decisions of the Eleventh Circuit. The most recent applicable word from that court indicates that Section 2 plaintiffs must prove that racial bias is at work in the voting public, but the issue may be part of the "totality of the circumstances" analysis, not part of the definition of polarized voting:

> [I]t is entirely possible that bloc voting (as defined by *Gingles*) could exist, but that such bloc voting would not result in a diminution of minority opportunity to participate in the political process and elect representatives of the minority group's choice. Other circumstances may indicate that both the degree and nature of the bloc voting weigh against an ultimate finding of minority exclusion from the political process. The degree of racial polarization may not be sufficiently intense, for example; ***or what appears to be bloc voting on account of race may, instead, be the result of political or personal affiliation of different racial groups with different candidates***. "[T]o be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color, not on account of some other racially neutral cause." *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994) (en banc) (Tjoflat, C.J., plurality opinion).

*Solomon v. Liberty Cty. Comm'rs*, 221 F.3d 1218, 1225 (11th Cir. 2000) (emphasis added). (DCOL ¶ 87.)

81. The Court will not assume that it should be suspicious of a voting procedure simply because many white Alabamians in 2019 prefer Republican candidates. (DCOL ¶ 88.)

82. The Court thus concludes that Plaintiffs must prove that racial bias is behind vote polarization, and there is no need for this Court to decide where in the Section 2 analysis that proof is required. Whether part of the definition of polarized voting or party of the totality of the circumstances requirement, it must be shown. Without deciding the issue, the Court will discuss the racial bias element below as part of the discussion of the totality of the circumstances. (DCOL ¶ 89.)

83. The Court finds that Plaintiffs have met their burden of showing that black and white voters in Alabama prefer different candidates, but that this fact alone is not a basis for inferring that racial bias is at work. (DCOL ¶ 90.)

84. The history of official discrimination in voting: Alabama's history of voting discrimination is well-documented, and Defendants neither defend nor deny that history. However, Defendants contend that any evidence of historical state-sponsored discrimination is too stale to be held against Alabama in 2019. (DCOL ¶ 93).

85. Nearly all of Plaintiffs' evidence of discrimination in voting is more than 50 years old, predating passage of the Voting Rights Act of 1965. Dr. Norrell's report discusses no events after 1973, and Dr. McCrary discussed little occurring in the past 50 years. After this much time, acts of discrimination by former public officials who probably are no longer alive are entitled to little, if any, weight. (DCOL ¶ 94).

86. The Supreme Court admonishes that "history did not end in 1965" and that the purpose of the Fifteenth Amendment is "not to punish the past." *Shelby County v. Holder*, 570 U.S. 529, 552-53 (2013). Moreover, "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980). (DCOL ¶ 95).

87. Dr. McCrary testified about objections made by the Department of Justice to Alabama-related preclearance submissions between 1982 and 2006, but only 7 of the 46 pertained to *state* laws, as opposed to actions by local jurisdictions. Moreover, there is no evidence in the record about the nature of any objection or whether the practices and procedures in question were tainted by intentional discrimination. The most recent objection to any statewide law occurred in 1994, which was 25 years ago. (DCOL ¶ 96).

88. Dr. McCrary also testified about the use of at-large elections by local jurisdictions that were found to be unlawful by a federal court in *Dillard v. Crenshaw County*, 650 F. Supp. 1347 (M.D. Ala. 1986), but those were actions by counties and municipalities, not the State. And, as Dr. McCrary acknowledged in his report, many of those local jurisdictions switched to at-large elections in the aftermath of the end of the white primary in 1944, which was 75 years ago. Ex. P-122 at 22. (DCOL ¶ 97).

89. The record of historical discrimination in Alabama presented in this case is no different, and certainly no stronger, than the record presented more than 25 years ago in *SCLC*. The record was not strong enough in *SCLC* to outweigh the State's linkage interest, and it is not strong enough in this case. (DCOL ¶ 98).

90. The pre-Voting Rights Act history is too stale to be probative. Evidence of a history of discrimination after 1965 is sparse. This factor is entitled to little weight in 2019. (DCOL ¶ 99).

91. Voting practices that enhance the potential for discrimination against minorities: Dr. McCrary offered an opinion for the Plaintiffs that the use of numbered place laws enhances the discriminatory effect of statewide voting. However, the evidence is undisputed that most states that elect judges, if not all, use numbered places. That is for good reason, because without a numbered place requirement, judges on an appellate court would compete against each other in elections and collegiality would suffer. This factor is entitled to no weight. (DCOL ¶ 100).

92. Exclusive slating processes: Alabama does not "slate" candidates. This factor is entitled to no weight. (DCOL ¶ 101.)

93. The social, education, and financial legacy of discrimination that hinders effective minority participation in the political process: Alabama does not dispute that African-Americans

lag behind whites in several social economic categories, as is the case nationwide. However, the evidence does not suggest that any such disparities are in fact preventing African-Americans from participating equally in the electoral process, and this factor is entitled to little weight. (DCOL ¶ 102.)

94. Racial appeals in elections: Plaintiffs presented evidence of a campaign commercial by now-Chief Justice Tom Parker in the 2018 elections that some witnesses (who did not say that they saw the commercial before the election) interpret to include racial appeals, including a reference to Parker's dispute with the Southern Poverty Law Center ("SPLC") and the dangers of "mob rule." While some voters may associate SPLC with civil rights, Parker's dispute with SPLC concerned his public comments over same-sex marriage, and his comments about "mob rule" were a reference to the protesters in the confirmation hearings of Supreme Court Justice Brett Kavanaugh. In any event, if this was a racial appeal, it did not work: Chief Justice Parker received the fewest votes of any Republican candidate in a contested statewide election in Alabama in 2018. This factor is entitled to no weight. (DCOL ¶ 103.)

95. The number of minorities elected to public office: Representative Laura Hall testified that Alabama surpasses most other states in African-American representation on the state Legislature. Dr. Peyton McCrary testified that no African-Americans have been elected to the Alabama Court of Civil Appeals or the Alabama Court of Criminal Appeals, and only two African-American judges (Justices Adams and Cook) won elections to the Alabama Supreme Court. That is undisputed, but it is also undisputed that before the year 2000, African-Americans participated in only three Supreme Court elections and were successful each time. Moreover, Dr. McCrary did not consider data after the 1990s concerning the election of African-Americans to

offices such as circuit judgeships or local offices. Trial Tr. vol. III:36-37. This factor is entitled to little weight. (DCOL ¶ 104.)

96. Elected representatives' lack of responsiveness to the minority's particularized needs: Plaintiffs provided no evidence of a lack of responsiveness. Without such evidence, this factor weighs in favor of the Defendants. (DCOL ¶ 105).

97. Whether the reasoning for imposing the challenged voting methodology is tenuous: Alabama contends that it chose and maintains statewide elections to preserve its linkage interests, which promote judicial accountability, judicial independence, and other important interests. The Eleventh Circuit held in *Nipper* and *SCLC* that States have a legitimate interest in linking a trial judge's jurisdiction and electorate, and Defendants have proven that such an interest applies to appellate courts just as it does to a trial court. This Court is not free to ignore the Eleventh Circuit's holdings that these are important and legitimate interests, and this factor is entitled to great weight in favor of the State. (DCOL ¶ 106).

98. In fact, as discussed above concerning remedy, the State's legitimate linkage interest eliminates districting as a remedy. This interest is weighty enough to outweigh the evidence of vote dilution adduced here. (DCOL ¶ 107).

99. Racial polarization of elections: As discussed above, it is not disputed that black and white voters in Alabama tend to prefer different candidates in most elections. The question now is *why*: Is it because of racial bias in the electorate, or is it because of another factor, such as partisan politics? (DCOL ¶ 108.)

100. Plaintiffs did not meet their burden of proving that polarized voting is the product of racial bias. Indeed, if the burden had been on the Defendants to prove the negative, Defendants did so and proved that in Alabama judicial elections, to the extent African-

Americans are unable to elect their candidate of choice, it is because their candidate of choice is running as a Democrat in a heavily-Republican state, not because of the race of the candidate or because of the race of the candidate's supporters. (DCOL ¶ 109.)

101. The record shows that black judicial candidates were successful in statewide elections in Alabama up until the 1990s. During that decade, there was a turning point in judicial elections as the tort reform debate came to the forefront. In addition, there was a controversial Chief Justice election in 1994 that centered on themes of election integrity and that resulted in contests of that election with one side seeking to include unlawful ballots and the other side seeking to keep them out. (DCOL ¶ 110.)

102. Democrats were successful in Alabama judicial elections before the tort reform debate, when Alabama business interests brought in political operative Karl Rove to manage judicial campaigns. Rove managed those campaigns with the goal of helping average voters understand the need for conservative judges who would apply the law as written, and the disadvantages of a system of "jackpot justice" that enriched some while harming the economy of the State. After these campaigns, Democrats were not successful. Since 2000, the only Democrat to be successful in a statewide judicial election was Sue Bell Cobb in 2006. (DCOL ¶ 111.)

103. In 2000 and beyond, polling conducted for Glenn Murdock's judicial campaigns showed that the themes of tort reform and election integrity resonated with voters. (DCOL ¶ 112.)

104. Moreover, black candidates who lose judicial elections tend to fare better than white candidates who lose judicial elections. That is, while nearly all Democrats tend lose statewide elections at this point in Alabama history, a black Democrat is likely to get more crossover votes from white Republicans than a white Democrat. And such crossover voting does

occur, as seen in the 2000 elections when a substantial number of voters supported both George W. Bush for President and Ralph Cook for the Alabama Supreme Court. (DCOL ¶ 113.)

105. The record thus shows that a majority of Alabamians are supporting Republican judicial candidates because of issues, not because of race. (DCOL ¶ 114.)

106. Dr. Handley, Plaintiffs' polarized voting expert, concedes that her analysis cannot tell us *why* voting is polarized. (DCOL ¶ 115.)

107. Plaintiffs presented an opinion from Dr. Seth McKee that white Alabamians who vote Republican base their vote on race, but that opinion is not credited. (DCOL ¶ 116.)

108. Dr. McKee testified that white Republican voters would support an African-American candidate who ran as a Republican for a statewide judicial office in Alabama. Other witnesses agreed that white Alabamians would support an African-American judicial candidate who ran as a conservative, and this evidence is undisputed. (DCOL ¶ 117.)

109. Dr. McKee further acknowledges that voters in Alabama tend to hold conservative beliefs on issues such as abortion and gun control, and that voters know which political party agrees with them on these issues. He also acknowledges that it would make no sense for a conservative voter to align with the Democratic Party or for a liberal voter to align with the Republican Party. (DCOL ¶ 118.)

110. As Dr. Bonneau testified, the entire nation is more sorted into the parties along a conservative/liberal divide, noting that there really is no such thing anymore as a "New England" (liberal) Republican or "Southern" (conservative) Democrat. (DCOL ¶ 119.)

111. Local circumstances lend further support for the proposition that black candidates are losing statewide elections because they are Democrats, not the other way around. The State Democratic Party is in a very weak position at this time in history. Democratic candidates are

criticizing their party's leadership, and Dr. McKee acknowledges that those candidates have valid complaints. (DCOL ¶ 120.)

112. It is not plausible that Alabama voters would be willing to vote for African-American judicial candidates in the 1980s and early 1990s but not today if the issue were race. The change in fortune for black candidates, as it is for all Democratic candidates, is far better explained by partisan politics. (DCOL ¶ 121.)

113. It does not violate the Voting Rights Act for a white voter to support a Republican candidate, even when a majority of other white voters in the State do the same. The Court will not infer racial bias in the voting community simply because a majority of voters in Alabama tend to support the Republican Party. (DCOL ¶ 122.)

114. Section 2 is not a tool for courts to give an advantage to a political party, even if minority voters happen to favor that political party. (DCOL ¶ 123.)

115. Plaintiffs have not shown that voting is polarized along racial lines on account of race. Defendants has shown that polarization is due to other factors, namely party affiliation. This factor weighs heavily in favor of the State. (DCOL ¶ 124.)

116. In conclusion, Plaintiffs have not proven that Alabama's system of electing judges in statewide popular elections violates Section 2 of the Voting Rights Act. (DCOL ¶ 125.)

**Intentional Discrimination**

117. Plaintiffs claim that intentional discrimination lies behind Alabama's choice to use statewide popular elections to select appellate judges, and that this alleged intentional discrimination violates the United States Constitution. Plaintiffs failed to prove that Alabama's system of selecting appellate judges through statewide popular elections was at any point motivated by racial discrimination. (DCOL ¶ 126.)

118. To violate the Equal Protection Clause, discrimination must indeed be intentional. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) ("[P]urposeful discrimination is the condition that offends the Constitution.") (internal quotation marks omitted). (DCOL ¶ 127.)

119. "Discriminatory purpose…implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker…selected or reaffirmed a particular course of action at least in part *because of*, not merely in spite of, its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279 (citation, internal quotation marks, and footnote omitted) (emphasis added). (DCOL ¶ 128.)

120. There is no evidence that intentional discrimination played any part in Alabama's choice in 1868 to first adopt statewide popular elections to select appellate judges. (DCOL ¶ 129.)

121. The 1867 Constitutional Convention, which led to the 1868 Constitution, was controlled by "Radical Republicans" friendly to blacks and by blacks themselves. Those who wanted to limit the rights of African-Americans argued for an appointment system, but those efforts failed. (DCOL ¶ 130.)

122. Plaintiffs' expert concedes that popular elections were chosen not to harm blacks, but to *benefit* blacks. (DCOL ¶ 131.)

123. Alabama did not act alone in electing judges but was instead following a national trend. (DCOL ¶ 132.)

124. Many important State interests support Alabama's choice, including judicial independence, judicial accountability, and separation of powers. There is, in the language of the Supreme Court, an "obvious alternative" non-discriminatory theory. *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009). (DCOL ¶ 133.)

125. "As between that obvious alternative explanation" for Alabama's choice in 1868 "and the purposeful, invidious discrimination" Plaintiffs "ask[] [this Court] to infer," the Court chooses the former. *Iqbal*, 556 U.S. at 682 (internal quotation marks omitted). (DCOL ¶ 134.)

126. Concerning Plaintiffs' claim that intentional racial discrimination explains Alabama's choice to *maintain* statewide appellate judicial elections in 2019, it is not clear whose intent is at issue. Statewide elections are required by Alabama's Constitution, and an amendment to the Constitution requires action by the Alabama Legislature and a majority of Alabama voters. Ala. Const. (1901) Art. XVIII Sec. 284, 286. (DCOL ¶ 135.)

127. Here, the question is not the intent of taking some action, but whether there was discriminatory intent in *not* amending the Alabama Constitution. (DCOL ¶ 136.)

128. The only actions taken by any party in the past 150 years to adopt districts were three bills introduced in the Alabama Legislature in 2000 and 2004. Those bills, like many bills every year, died in committee. Plaintiffs have offered no evidence that these bills died for discriminatory reasons. (DCOL ¶ 137.)

129. "[T]he good faith of [the] state legislature must be presumed." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), quoting *Miller v. Johnson*, 515 U.S. 900, 915 (1995). (DCOL ¶ 138.)

130. "The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination.…[W]e have never suggested that past discrimination flips the evidentiary burden on its head." *Abbott*, 138 S. Ct. at 2324-25. (DCOL ¶ 139.)

131. The question of districts has not been put to the Alabama public, but this Court will not presume without evidence that racial bias in the electorate explains why the Alabama populace has not initiated a move to district-based judicial elections. (DCOL ¶ 140.)

132. This case simply does not present the type of evidence necessary to overcome the presumption of good faith of the Legislature, or evidence sufficient to presume racial bias on the part of the entire Alabama electorate. (DCOL ¶ 141.)

133. Alabama did not choose, nor does it maintain, its system of statewide popular judicial elections because of a racially discriminatory intent. (DCOL ¶ 142.)

**Conclusion**

134. Plaintiffs' Section 2 claim fails because Plaintiffs have not shown that they have a lawful remedy, because there is no "benchmark" for the Court to choose among all the various systems of judicial selection, because Alabama's "linkage" interest outweighs any evidence of vote dilution, and because any vote dilution is not "on account of race." (DCOL ¶ 143.)

135. Plaintiffs' intentional discrimination claim fails because the evidence does not support a conclusion that Alabama adopted or maintains statewide elections for a discriminatory purpose and because Alabama's linkage interests provide an obvious alternative explanation for its choices. (DCOL ¶ 144.)

136. Judgment will enter for the Defendants. (DCOL ¶ 145.)

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**CERTIFICATE OF SERVICE**

I certify that on September 9, 2019, I filed the foregoing document electronically via the Court's CM/ECF system, which will send a copy to all counsel of record.

/s/ Richard E. Schwartz
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