Nos. 13-895, 13-1138

In the
Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*
Appellants,
v.
ALABAMA, *et al.*
Appellees.

ALABAMA DEMOCRATIC CONFERENCE, *et al.*
Appellants,
v.
ALABAMA, *et al.*
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

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QUESTIONS PRESENTED

Appeal No. 13-1138 and Appeal No. 13-895 have been consolidated for a single argument. This brief addresses the following questions:

1. Whether the plaintiffs proved that Alabama's legislative redistricting plans for the House and Senate unconstitutionally classify black voters by race on a statewide basis, even though they did not show that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.

2. Whether the plaintiffs in Appeal No. 13-1138 have standing to challenge the House and Senate plans.

PARTIES

All parties are listed in the two appellants' briefs.

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

Legislative History

TABLE OF ABBREVIATIONS

ADC	Alabama Democratic Conference; also the plaintiffs associated with the Alabama Democratic Conference
ALBC	Alabama Legislative Black Caucus; also the plaintiffs associated with the Alabama Legislative Black Caucus
ALBC Br. App.	The appendix to the ALBC's Brief in appeal No. 13-895
App.	The appendix to this brief
APX	An exhibit introduced at trial by the ALBC
C	A "common" exhibit introduced at trial by all parties
DOJ	Department of Justice
DX	An exhibit introduced at trial by the defendants
HD	House district
J.A.	Joint Appendix
J.S. App.	The appendix to ALBC's jurisdictional statement in Appeal No. 13-895
Rep.	Representative
SD	Senate district
Tr.	Trial transcript; citations are to volume.page number (ex.: Tr. 1.123)

INTRODUCTION

For much of the previous century, Alabama was notorious for its refusal to comply with federal election law. This is why Congress passed the Voting Rights Act of 1965. This is why the Court ruled in *Reynolds v. Sims*, 377 U.S. 533 (1964), that states must have legislative districts of equal population. This is why Alabamians march across the Edmund Pettus Bridge every spring. This history is powerful. Its toll is heavy.

The weight of this history motivated Alabama's new Republican leaders in 2010 to comply strictly with federal law, cooperate with black legislators, and draw fair redistricting plans for the state House and Senate. The plans they adopted kept the percentage of majority-black districts on a statewide basis proportional to the black voting population. The plans created an additional, compact majority-black House district in an area where the black population was growing. And, as explained below, the plans are not consistently different from the plans that the plaintiffs in this litigation proposed during the legislative process. The plans did not, however, preserve specific features of a 2001 partisan gerrymander designed to elect white Democrats. And that is what this litigation is about.

For their part, the plaintiffs are not asking the Court to undo a racial gerrymander, but to order one. The plaintiffs suppose that gerrymandering is the best explanation for why the majority-black districts in Alabama have "supermajority percentages" of black persons. But that would come as a surprise to

the many black Alabamians who live in counties and cities that are mostly populated by members of their own race.

Consider, for example, the plaintiffs' suggestion that the black population of HD 67 in Dallas County is best explained by the application of a "quota" or "policy." The population of Dallas County is 70% black. App. 7a. The county to the southeast, Lowndes County, is 74% black. The county to the northwest, Perry County, is 69% black. The county to the southwest, Wilcox County, is 73% black. *Id.* It would take a naked racial gerrymander to make the population of HD 67 anything but what it is. The same is true in Birmingham, Montgomery, and many of Alabama's small towns and rural areas.

We agree with the United States that the plaintiffs' blunderbuss attack on these House and Senate plans cannot succeed. The plaintiffs' statewide claims are inconsistent with this Court's caselaw and contrary to common sense. When a state's legislative leaders say they prioritized compliance with federal law in a statewide redistricting plan, they are recognizing the Supremacy Clause, not confessing to a racial gerrymander.

We part ways with the United States on the notion of a remand, however. With the exception of four Senate districts that the district court separately and thoroughly addressed, the plaintiffs have always disclaimed any district-specific challenges. The three judges on the district court should not have their four-day trial and final judgment undone to let the plaintiffs make new arguments about districts they have never challenged. The Court should affirm the district court.

STATEMENT

I. Alabama's 2010 redistricting process

After the 2010 census, the Alabama Legislature's Reapportionment Committee held an unprecedented 21 public hearings at locations throughout Alabama, consulted lawmakers of both parties, and hired a redistricting expert to use modern computer modeling. J.S. App. 30-36. The Committee developed proposals for Alabama's 105 House districts and 35 Senate districts, which were enacted in substantial form on party-line votes. They were submitted for preclearance under Section 5 of the Voting Rights Act and approved by DOJ.

A. The Legislature adopted a 2% deviation, which limited opportunities for manipulation and gamesmanship.

After listening to several days of live witness testimony about the way these plans were drafted, the district court found as a matter of fact that, "[a]bove all," the drafters' foremost subjective goal was to "create more equality among districts throughout the State." J.S. App. 144. *See also* J.S. App. 94-105 (recounting testimony and expressly crediting testimony). Because of its focus on greater population equality, the Legislature drew new electoral maps with population differences that do not exceed 2%. *See* J.S. App. 27. A 2% variation allows for plus or minus 1% deviation from the "ideal" district. In real terms, this meant the population of each Senate district could vary only within a range of 2,730 people (2% of

136,564). Tr. 2.86. House districts could vary within a range of 910 people (2% of 45,521). By contrast, a deviation of 10% would permit a variance of 13,564 people in the Senate and 4,552 people in the House. *Id.*

The drafters' decision to adopt a 2% deviation had several important effects.

First, it ended key features of a previous partisan gerrymander. The Democrat-controlled Legislature in 2001 engaged in a "successful partisan gerrymander" by using a 10% deviation to "systematically under-populate[] majority-black districts at the expense of majority-white districts that the Legislature, in turn, overpopulated." J.S. App. 18, 145. *See* J.S. App. 17-24 (recounting history of the 2001 gerrymander). This strategy allowed the Democrats to spread black voters into neighboring majority-white districts so they could vote in support of white Democratic candidates. The partisan gerrymander meant that, with just 51% of the statewide vote in 2002, the Democratic Party controlled 71% of the Senate seats and 60% of the House seats. J.S. App 24.

Because of the previous partisan gerrymander and organic population changes, all the majority-black districts were grossly under-populated after the 2010 census, and most of the majority-white districts were over-populated. Nine of the majority-black House districts were under-populated by more than 20% compared to the ideal district. J.S. App. 18. Similarly, seven of the eight majority-black Senate districts were under-populated by more than 10%, and two of those by more than 20%. J.S. App. 19. Performing the Democrats' 2001 partisan gerrymander in reverse, the drafters repopulated these majori-

ty-black districts by removing contiguous population from majority-white districts.

Second, the 2% deviation "reduced, from the outset," the Legislature's "ability to pack voters for any discriminatory purpose, whether partisan or racial." J.S. App. 144-45. The 2% deviation thus represents the best practices of other States. *See* J.S. App. 29-30. *See also* J.S. App. 106-07 (recounting expert testimony about other States' practices). California, Florida, Georgia, Illinois, Indiana, Iowa, Minnesota, Nevada, Oklahoma, Utah, Virginia, Washington, and Wisconsin all used a 2% deviation or less to redistrict one or both houses of their legislatures after the 2010 census. J.S. App. 29-30.

Third, the 2% deviation required the drafters to split precincts and counties. As we discuss *infra* 52-54, one of the plaintiffs' experts explained at length that the 2% deviation caused the number of county and precinct splits in the drafters' plans.

B. The Legislature complied with the Voting Rights Act.

The district court also expressly credited the testimony of the plan's drafters that, after population equality, their next highest subjective goal on the statewide level was to comply with the Voting Rights Act. *See* J.S. App. 94-105 (recounting and crediting testimony). The Alabama Legislature had to comply with Sections 5 and 2 of the Voting Rights Act to ensure that the plans were precleared by DOJ and withstood any vote-dilution litigation.

1. The credible evidence is that a safe majority-black district in Alabama should be more than 60% black.

It is undisputed that black political leaders told the drafters and district court that only districts with sizable black majorities, not bare majorities, would allow black voters to elect their candidates of choice as required by the Voting Rights Act. *See* J.S. App. 31, 96, 99. This includes the "dean of Alabama redistricting," Dr. Joe Reed, who has led the ADC since the 1970s and drawn numerous state and local districting plans in Alabama. J.S. App. 162, 165. He testified that districts must be at least 60% black, and sometimes more than 65% black, to allow black voters to elect the candidate of their choice. J.S. App. 76-77. *See also* J.S. App. 165 (expressly crediting Reed's testimony). These figures are supported by caselaw. *E.g.*, *Texas v. United States*, 831 F. Supp. 2d 244, 263 (D.D.C. 2011).

Dr. Reed and other black political leaders told the drafters that the percentage of black persons in a district does not accurately indicate the percentage of black persons who vote. J.A. 50-51, 177. Indeed, because the black population is younger than average, it is undisputed that the percentage of *voting-age* black persons in a district is generally two to three percentage points lower than the percentage of black persons overall. *See* J.S. App. 49-50, 76. This means that black persons are likely a minority of voters in a district that is 51% black.

Although black political leaders also warned the drafters against "packing," they indicated that packing would only be a concern when black population

percentages reached materially higher levels than 60% to 70%. Rep. Jackson, for example, warned the drafters at a committee meeting that he was "very concerned about" packing minority voters into a district that is "ninety-nine percent minority." J.A. 178. Instead, to prevent packing, he suggested that a minority district should be "sixty-two percent or sixty-five percent" black. J.A. 178. Senator Sanders similarly explained that "the majority African-American districts . . . ought not be less than 62 percent" and, separately, "I would hope that there's not packing." *See also* J.A. 177. Black political leaders were also concerned with manipulating black populations to help "conservative white Democrats." J.A. 174.

2. The drafters believed that black population percentages significantly below those in the prior plan would violate Section 5.

The drafters of the reapportionment plan believed that Section 5 of the Voting Rights Act prohibited them from "lowering the overall total number of majority African American districts in either plan" or making the minority population of a district "significantly below" what it was "looking at 2010 census [data] as applied to 2001 lines." J.A. 88. They were especially concerned about "large deviations from previous percentages" that they would have to explain to DOJ. APX 75 at 24-25 (Hinaman Depo.). As a strategy to comply with Section 5, the drafters decided to avoid reducing the black population of preexisting majority-black districts where possible.

This strategy did not impact the shape of some majority-black districts at all. Randy Hinaman, the political consultant who drew the new district lines, explained that he would add *any* contiguous precincts to the under-populated majority-black districts. J.A. 88 (explaining that he "may add a majority white precinct" or "a majority African American precinct"). Only after adding population to the under-populated majority-black districts "en masse" would he look at the "end number" for that district. J.A. 87-88. "And so in some districts I could add in anything I wanted, and it didn't matter because" the district did not need much additional population or "the changes I added didn't matter" for the black percentage. J.A. 87.

Although the ALBC says that the political consultant "selected particular areas, precincts or census blocks" on the basis of race, ALBC Br. 13, there is no citation for that sentence because that is not what the consultant did. Instead, the political consultant was adamant that he looked at race only *after* repopulating the majority-black districts based on other criteria. "I was trying to look at the overall total change to the district, not to any one specific precinct." Tr. 3.144. "I would look at the changes I made in toto to see what it did to the overall black percentage of the district . . . . It was the overall number." Tr. 3.145. "I tried to look at the additions en masse, not just a precinct." J.A. 87-88. Only when these additions led him to be "concerned about retrogressing" did he "look at the nature of the precincts [he] was adding." J.A. 87.

Sometimes the drafters did not come close to the prior black percentages in the districts, but some-

times they did. The ALBC uses figures from our trial exhibits to compare the old and new districts. *See* ALBC Br. 5a-7a. But these figures differ from the ones in the plaintiffs' own court submissions, which are the only figures in the Joint Appendix.[1] *See* J.A. 103-108. Regardless, both sets of numbers show that the drafters varied from the previous districts from about -9% up to about +9% in the House and from about -14% up to about +9% in the Senate. *See* ALBC Br. 5a-7a.

Alabama's plans successfully complied with the Voting Rights Act. The plans kept the same number of majority-minority districts in the Senate and added an additional majority-minority district in the House. J.S. App. 36, 46-48. The majority-black districts in the new plan are comparable to the districts in the old plan, which was drafted by black leaders and approved by the Democrat-controlled Legislature. *See* J.S. App. 46-56.

C. The drafters changed all the districts, majority-black and majority-white, "the least amount possible."

The drafters had many other goals, which they also accomplished. Most of the drafters' other goals had to do with keeping the new districts the same as the old ones. In fact, it was a "goal to change each

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[1] We are not sure why there are discrepancies between the plaintiffs' figures in the Joint Appendix and the figures in our exhibits in the district court. We note that the majority and dissent below also put slightly different numbers in their charts. Nonetheless, the differences are minor and do not meaningfully change the comparison.

district," whether majority-white or majority-black, "the least amount possible." J.A. 112-113. This means that "if Senate District X had these four counties," the drafters would "try to keep it as close to those four counties as possible." J.A. 113. The drafters also attempted to preserve the core of existing districts, satisfy the wishes of incumbents, and not make incumbents run against each other. J.S. App. 33.

A comparison between the old maps and new maps shows that the drafters generally accomplished their goal of consistency between the old and new districts. *See* J.A. 191-194. The unusual geographic features of the new districts are the same as they were in the prior plan. For example, SD 23 still has a triangular incursion into Conecuh County. The north/south line dividing Marengo and Clarke Counties between SD 23 and SD 24 still follows Highway 43. *Compare* J.A. 191 *with* J.A. 192. SD 24 had an "arm" stretching into Tuscaloosa County in the old plan and still has that "arm" now. *Compare* J.A. 191 *with* J.A. 192. Old SD 27 followed a jagged path through Lee and Russell Counties, and it still follows that unusual path. *Compare* J.A. 191 *with* J.A. 192.

The story is the same in the House. For example, old HD 33 east of Birmingham had a narrow "tail" running north along HD 32, and that feature remains in the new plan. *Compare* J.A. 193 *with* J.A. 194. There are many more examples that the Court can see by comparing the old and new maps.

It is unsurprising that the drafters placed such a high premium on changing all the districts, majority-black and majority-white, "the least amount possible." J.A. 112-13. In 2010, the Republican Party won

control of the Alabama Legislature for the first time since the 1800s. As one of the plaintiffs' experts testified, "when legislators draw districts, we all know that partisanship is the most important factor." J.A. 116.

D. Some changes reduced the influence of the Democratic Party.

Two significant changes in Montgomery and Birmingham reduced the influence of the Democratic Party in the state House of Representatives. There were also some minor changes in the Senate plan that altered purported "influence" districts.

Montgomery County is in the center of a broad geographic belt across the southern portion of the state—stretching from HD 71 and HD 65 in the west to HD 83 and HD 84 in the east—in which all the House districts were under-populated in 2001 and had lost significant population since then. We have reproduced a map of the old districts in the appendix to this brief that shows the under- or over-population in each district. *See* App. 12a. Under the benchmark 2001 plan, Montgomery County itself was divided into six House districts, three majority-black districts (76, 77, 78) and three other districts (73, 74, 75). J.S. App. 37. HD 78 and HD 77 were majority-black districts represented by black legislators, and they were respectively the most under-populated (-32.16%) and the fourth most under-populated (-23.12%). J.S. App. 47. HD 69 was a majority-black district in neighboring Lowndes County that was under-populated by 17%. *See* App. 12a.

Rep. Thad McClammy, a black representative from Montgomery, proposed a new map for the area that solved the under-population problem in the region. The map expanded the borders of some of the under-populated districts to consume all of the population of HD 73. J.S. App. 35. By 2012, HD 73 had become a district with a plurality black population that was represented by a freshman white Democrat named Joe Hubbard. J.S. App. 35. Rep. McClammy's map was the consensus recommendation of the legislators in the Montgomery area, except for Rep. Hubbard. *See* J.A. 100-01; Tr. 3.234. The drafters accepted Rep. McClammy's recommendation and created a "new" HD 73 in Shelby County, where the districts were over-populated by up to 60%. J.S. App. 18, 35-37; App. 12a.

A similar scenario played out in Jefferson County. The majority-black House districts that were clustered together in the Birmingham area were all under-populated. J.S. App. 37. In 2001, Jefferson County was divided into nine majority-black districts (52 through 60) and nine majority-white districts. J.S. App. 37-38. Six of the nine majority-black districts were under-populated by roughly 20% or more. J.S. App. 47. These nine majority-black districts were collectively under-populated by 76,427 people, which is the population of approximately 1.5 "ideal" House districts. DX 406 at 4-5 (chart with deviations); Tr. 2.86.

Accordingly, as they did in Montgomery, the drafters used the population of one of the under-populated districts to bring the population of the surrounding districts up to the ideal population. J.S. App. 38. The drafters chose to eliminate HD 53 be-

cause they believed that the incumbent from that district intended to retire because of his age. APX 75 at 132:9-14 (Hinaman Depo). (The incumbent later passed away. J.S. App. 12.) This change allowed the drafters to create a new majority-black district in the Huntsville area where the population had been growing. J.S. App. 37-39, 103-04.

There were also a few changes in the Senate plan that disrupted districts that had previously been gerrymandered to help elect white Democrats. The ADC specifically challenged the drafters' changes to three majority-white "influence" districts: SD 7 in Huntsville, SD 11 in east Alabama, and SD 22 in south Alabama. The district court separately addressed these challenges and found, without contravention by the dissenting judge, that these changes were not related to race. *See* ALBC J.S. App. 39-42, 61-62, 70-74, 166-71.

II. Procedural history

In the court below, the district court was "presented with one set of plaintiffs who argued about discriminatory purpose and another set of plaintiffs who argued about strict scrutiny, but no set of plaintiffs who argued both." J.S. App. 128. The ADC argued below that the lines of four specific Senate districts were race-based, three majority-white (SD 7, SD 11, SD 22) and one majority-black (SD 26). The ALBC never argued that the lines of any specific district were predominantly driven by race. To the extent that the ALBC discussed specific districts and counties, it was only to illustrate its allegation that the plans were *partisan* gerrymanders with "the

purpose and effect of minimizing the opportunities for black and white voters who support the Democratic Party." Doc. 60 ¶¶ 69-70, 72-81, 84.

After granting judgment for the state defendants on most of the plaintiffs' claims, the three-judge court held a consolidated bench trial on the ALBC and ADC's claims of intentional discrimination on the basis of race. J.S. App. 11-12; *see also* J.S. App. 278-79, 418-26. At trial, both sets of plaintiffs reiterated their "statewide" claim that the plans "systematically packed" all of the majority-black districts, showing "intentional discrimination in violation of the 14th and 15th Amendments." Tr. 1.4-5, 7. The ALBC's post-trial proposed findings of fact and conclusions of law suggested that the court find that race was the predominant factor in drawing the plans statewide, but did not suggest any fact-findings about the racial gerrymandering in any specific district. Doc. 194 ¶¶ 112-16. The ADC's post-trial filing mentioned specific districts to support its Section 2 claim and county-splitting arguments, but suggested no fact-findings about the lines of specific districts in support of their gerrymandering claim. Doc. 195-1 ¶¶ 11-15, 144, 176, 179-262.

As the district court explained, to the extent that the plaintiffs made any racial gerrymandering claim, it was a statewide one. J.S. App. 127-28. The court explained that "[t]he Black Caucus plaintiffs routinely cited decisions of the Supreme Court on claims of racial gerrymandering, but never identified which districts they alleged were racially gerrymandered and introduced little evidence to prove a discriminatory intent." J.S. App. 127. The court therefore "construe[d] the filings of the Black Caucus plaintiffs . . .

as arguing that the Acts as a whole constitute racial gerrymanders." J.S. App. 127. It rejected that claim because it found, as a factual matter, that "[r]ace was not the predominant motivating factor for the Acts as a whole." J.S. App. 140-65.

The court concluded that the ADC lacked standing to bring a statewide claim of racial gerrymandering. J.S. App. 138. It also construed the ADC's filings "to present district-specific racial gerrymandering challenges to SD 7, 11, 22, and 26," even though the ADC did not mention SD 26 in its complaint. J.S. App. 138, 171. The district court rejected those claims, concluding that race was not the predominant factor in drawing SD 7, 11, 22, or 26. J.S. App. 140, 152, 166-73.

This appeal followed.

SUMMARY OF ARGUMENT

This brief proceeds in four parts. First, we address failings in the plaintiffs' statewide legal theories. Second, we address the district court's fact-findings. Third, we address the ADC's lack of standing. And, fourth, we address whether the plans meet rational basis and strict scrutiny on a statewide basis.

I. On appeal, the plaintiffs have renewed their statewide claims against the redistricting plans "as a whole." These claims are inconsistent with this Court's precedents, which require plaintiffs to prove that the lines of specific districts were drawn because

of race. There are four compelling reasons not to change the law in the way the plaintiffs suggest.

A. Because of the Supremacy Clause, redistricters must always prioritize compliance with federal law in a plan "as a whole." But this does not mean that race was the most important factor, or even a factor, with respect to the lines of any particular district. Other redistricting criteria can still determine where redistricters draw specific lines, even if they have statewide goals related to race.

B. The Court cannot apply strict scrutiny in a meaningful way to the plaintiffs' statewide allegations. Section 5 imposed undisputed requirements on the state, which cannot be isolated from the drafters' preclearance strategy. The plaintiffs do not argue that all the majority-black or majority-white districts are problematic. And some majority-black districts are indisputably consistent with the plaintiffs' own view of Section 5.

C. There is also no remedy for the plaintiffs' claims. Vacating the plans in their entirety is inconsistent with the presumption in favor of legislative districting. Vacatur would also not lead to meaningful remedial changes. It would be error for a court to draw a new plan with the goal of creating "influence districts." And there is no reason to believe that the Republican Legislature would propose a remedial plan that intentionally helps more Democrats be elected.

D. Finally, because Section 2 already protects against "packing," there is no reason for the Court to change equal protection caselaw to address the plaintiffs' statewide claims. The plaintiffs made a

Section 2 "packing" claim below, but it failed under well-established Section 2 precedents.

II. The Court should also reject the plaintiffs' statewide claims on the facts of this case. The district court was correct that the features of the plans that the plaintiffs criticize are attributable to the 2% deviation and other race-neutral districting criteria, not the drafters' preclearance strategy.

A. The plaintiffs' competing plans do not draw majority-black districts with consistently different populations of black persons. The plaintiffs' majority-black districts have characteristics that they criticize in the drafters' plans, such as districts that are more than 70% black. Where there are major differences, they are attributable to the plaintiffs' disagreement with the drafters' race-neutral criteria. The consistent difference between the Legislature's plans and the competing plans is that the plaintiffs' plans do not comply with the 2% deviation. The ADC's chairman personally asked the district court to order the Legislature to draw new plans, "follow[ing] their own rules, except for this one person—this plus or minus one" percent.

B. The district court also explained that, on a statewide basis, race-neutral districting criteria accounts for most of the similarity between the majority-black districts in the old plan and the new plan. Voters are not fungible units that can be moved around to create artificial 50% black districts; they are tied to specific geographic locations. This is why some of the majority-black districts in plaintiffs' own plans are close to the "quota" and why the new plan

is similar to the 2001 plan, even using 2001 census figures.

Moreover, the drafters used preexisting district lines to draw the new districts, which limited the population that they could move. There are very few counties in the new majority-black districts that were not in the old ones, and vice versa. And the black population in many of the *majority-white* districts also stayed almost exactly the same. If a new district follows the lines of the old one, then it will contain the same people.

C. The district court also found that the drafters did not preserve the black population in some majority-white "influence" districts because of race-neutral criteria. The plaintiffs have done nothing to show that these districts were altered because of a "quota" or "policy." The plaintiffs' proposed plans reduce many of these districts' black populations as well. These changes are also explained, on a statewide level, by: (1) partisanship and (2) the requests of incumbent legislators. The Republican drafters had no reason to preserve black populations in districts that had been gerrymandered to elect white Democrats.

D. The district court also found that race-neutral criteria led to the county- and precinct-splitting that the plaintiffs criticize. The plaintiffs' own expert attributed this splitting to the 2% deviation. There are also good reasons to split precincts and counties—such as following municipal lines and former district lines. Although the plaintiffs produced an exhibit that identifies every precinct and county split, they have never identified any that they believe to have been split on the basis of race.

E. The district court also found that DOJ preclearance undermined the plaintiffs' statewide claims. The DOJ expressly considered whether "minorities are over concentrated in one or more districts," and the plaintiffs made the same statewide packing claims to DOJ that they are making here. DOJ preclearance indicates that the population percentages in the majority-black districts are mostly explained by the application of race-neutral criteria to concentrated black populations.

F. Finally, the four senate districts that the ADC challenged in the district court are not best explained by the drafters' purported "quota" or "policy." SD 7 and SD 11 are majority-white districts that do not even border majority-black districts, so their black population could not have been reduced to comply with a "policy" or "quota" for majority-black districts. Similarly, the only way to draw majority-white SD 22 with a higher black population is to split another district across Mobile Bay, which violates traditional redistricting criteria and was opposed by all the legislators in the area.

SD 26 is a majority-black district in Montgomery that has always been more than 70% black. The drafters preserved it as an urban district and its neighbor, SD 25, as a rural and suburban district. Because of consistent black populations in the City of Montgomery, this had the effect of raising the district's black population from 73% to 75%.

The district court did *not* find that districts of equal population could not be gerrymandered. It found that non-racial districting criteria, not the drafters' preclearance strategy, explain the aspects of

the plans that the plaintiffs dislike. This finding is amply supported by the record.

III. The district court was also correct that the ADC lacks standing to challenge the statewide plans. The ADC is making exactly the same arguments that this Court rejected in *United States v. Hays*. It has not brought a "*Shaw* claim" based on dignitary harms. And the harms that it alleges, such as precinct splits, are not "fairly traceable" to the "policy" it challenges. Moreover, the remedy that the ADC has requested—vacating the plans—will not redress the purported harms that the ADC has identified because it will not create more "integrated" districts. The ADC's dispute with these plans is political, not legal.

IV. The drafters' plans also meet rational basis and strict scrutiny. The drafters tried to avoid reducing the black population in preexisting majority-black districts as a strategy to comply with Section 5. They relied on the best evidence available to them to ensure that they did not "diminish" black voters' "ability to elect": the Democrat's redistricting practices, the views of black legislators, and the preexisting districts.

A. The drafters understood that their plans would be retrogressive if they "significantly" reduced the black population in majority-black districts. They did not want a district to "go[] from 60 percent to 51 [percent] or something like that." The goal of the drafters' strategy was to avoid such reductions.

B. The drafters had a strong basis in evidence to avoid reducing black population in majority-black districts to prove that the plans did not have a retrogressive effect. The burden under Section 5 is on the state to prove that its plans do not retrogress. DOJ's regulations and the caselaw provide that, if a plan preserves a supermajority percentage of minority voters in a district, there is no need to evaluate other factors to determine "ability to elect." The drafters had no reason to turn the question of Section 5 compliance into a battle of experts. Their strategy is consistent with how the Democrats redistricted in 2001 and how other states redistricted in this cycle.

The drafters' strategy is also supported by the text of the 2006 amendments to Section 5. By overturning *Georgia v. Ashcroft*, Congress instructed the states to focus on the "comparative ability of a minority group to elect a candidate of choice" between the old and new plans. This language forbids changes that "diminish" safe districts by turning them into more competitive districts, just as much as it forbids changes that turn safe districts into hopeless districts. Alabama's preexisting districts were in the 50s, 60s, and 70s in black population. Any substantial drop in these numbers would necessarily "diminish" the districts by making them more competitive.

The drafters' strategy is also supported by the history of the Section 5 reauthorization. A law professor told Congress that its proposed statutory language would "lock into place minority districts in the south at populations" that he said would "not serve minority interests." But Congress expressly approved of redistricting plans that "maintained the black vot-

ing age population in the [] majority black districts … at almost exactly their pre-existing levels."

C. The drafters' strategy also helped them prove that the plans were not motivated by a "discriminatory purpose," broadly defined. In 2006, Congress imposed the requirement that the state affirmatively disprove that its plans were motivated by a discriminatory purpose. In light of this change, the drafters were not free to drastically alter the majority-black districts, disregard the advice of black political leaders, flood majority-black districts with white voters, or create bare-majority black districts.

D. The Court should not require legislators to conduct a "functional analysis" for every majority-black district. That would increase the federalism costs of Section 5 and require the use of race in highly subjective ways. States should have the leeway to comply with Section 5 by reference to objective criteria. The plans are constitutional under any standard of review.

ARGUMENT

I. The plaintiffs' statewide claims fail as a matter of law.

As a preliminary matter, we agree with the United States that the plaintiffs cannot make a race-based districting claim to the plans as a whole. *See* U.S. Br. 15-20. *See also* Lawyers Comm. Br. 5-8, 16-26. We believe the right rule is that any harm from race-conscious redistricting only manifests itself when specific district boundaries are warped along racial lines. *See* U.S. Br. 17. The statewide challenges that the plaintiffs bring do not show that kind of

harm because they do not attempt to prove that race predominated with respect to the lines of any particular district. No judge in the lower court agreed with the plaintiffs' statewide theories, and for good reason.

A. The plaintiffs' theories equate the abstract goal of complying with the Voting Rights Act with an improper fixation on race.

The plaintiffs' theories rest on the notion that, whenever a non-lawyer state legislator testifies that he prioritized compliance with the Voting Rights Act as a general matter, race is *per se* the driving factor statewide. But, with respect to a plan overall, a drafter must always, in the abstract, prioritize compliance with the Voting Rights Act. This is not a confession to gerrymandering; it is a recognition that federal law is supreme.

That is one reason why this Court has always evaluated a claim of racial gerrymandering with a district-by-district approach. A plan does not warrant strict scrutiny unless "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without *a particular district*." *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (emphasis added). A plaintiff must introduce evidence about specific districts to show that "race predominated over legitimate districting considerations." *Bush v. Vera*, 517 U.S. 952, 965 (1996). As the United States explains, the Court has required plaintiffs to establish that race was predominant with respect to a specific district "even in the

presence of evidence that the plan drafters had overarching statewide goals relating to race." *See* U.S. Br. 16 (citing *Vera*, 517 U.S. at 965-75; *Miller*, 515 U.S. at 917; *Shaw v. Hunt*, 517 U.S. 899, 904-907 (1996); *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999)).

Only district-specific litigation can account for the practical and political complexities of balancing compliance with federal law with other objectives. Small "p" political factors—communities of interest, former district lines, municipal boundaries, county lines, residences of incumbents—can influence the configuration of a particular district even if race also has an impact. Indeed, when questioned about specific districts, the drafters of Alabama's plans invariably explained that consistency with their preclearance strategy was an added benefit of a district-specific decision that they also made for political and practical reasons. *See, e.g.*, J.A. 110 (various benefits of expanding SD 23 and 24 south instead of north or east); J.A. 25 (same).

Because "a State is permitted great flexibility in deciding how to comply" with the Voting Rights Act, compliance may not require a plan's drafters to make any specific decisions based predominantly on that goal. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 520 (2006) (Scalia, J., dissenting and concurring) ("LULAC"). For example, 213,000 people live in Birmingham and 73% of them are black. *See* App. 10a. Even though federal law requires that the City be divided into several compact majority-minority districts, it does not tell a plan's drafters where to draw the lines. And the drafters testified at trial that the dividing lines between these majority-black districts were extensively negotiated

by the area's legislators. *See, e.g.*, J.A. 76-77, 83. Although the Voting Rights Act may have had some bearing on the configuration of these districts, other factors were also at play that cannot be accounted for without district-by-district litigation.

In short, the Voting Rights Act *requires* state lawmakers to be race-conscious and to draw districts in which black voters can elect representatives of their choice. *See* NAACP Br. 8-11. If a statewide racial gerrymander can be proven by abstract statements like "priority is to be given to the Voting Rights Act," ALBC Br. 26, or "the Voting Rights Act . . . makes it almost impossible to keep all counties intact," ALBC Br. 44, then the Voting Rights Act is a trap for honest lawmakers.

B. Strict scrutiny is not meaningful on a statewide basis.

Moreover, the narrow-tailoring aspect of strict scrutiny is impossible to apply in a meaningful way to the kind of claim that the plaintiffs have made. This is so for two reasons.

First, there is no way to isolate the effect of the drafters' preclearance strategy. The plaintiffs argue that the drafters of these plans were wrong to comply with the Voting Rights Act by maintaining majority-black districts as they had been. We disagree, as explained in Part IV below. But, more importantly, it is undisputed that Section 5 required the drafters to maintain (1) the same number of majority-black districts as in the benchmark plan (2) with large enough black populations to elect the black population's can-

didate of choice. As the United States also notes, "there is a substantial chance that the obligations of Section 2 and Section 5 in Alabama's redistricting are coextensive." U.S. Br. 28.

There is no way to disentangle the effects of the purportedly improper motive—maintaining black population percentages—from proper motives on a statewide basis. The plaintiffs' briefs suggest that *every* mention of the Voting Rights Act in the drafters' testimony is a reference to black-population-percentages, which ignores the undisputed obligations that the Voting Rights Act imposed. *See, e.g*, ALBC Br. 44 (county-splitting); ALBC Br. 56 n. 97 (relative absence of 30% black districts). There are also scores of majority-white districts in the plans that the drafters' preclearance strategy could not have affected at all.

Second, even on the plaintiffs' theories, at least some of the majority-black districts have the right black population, regardless of how that population arrived there. The two groups of plaintiffs do not even agree on which districts pose a problem. The House districts that the ALBC criticizes as being too close to the "quota" are not, with two exceptions,[2] the same districts that the ADC criticizes as having "extremely high" black populations. *Compare* ALBC Br. 30 *with* ADC Br. 31.

HD 53 is the best example of a district that complies even with plaintiffs' view of Section 5. The ALBC criticizes the drafters' decision to move HD 53 from Birmingham to Huntsville while, at the same

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[2] The two exceptions are HD 67 and HD 55. We discuss HD 67 extensively below.

time, keeping its black population percentage close to 55%. But, because the black population skews younger than the population overall, the new, compact district in Huntsville contains a *bare majority* of black voters—something *the plaintiffs* say Section 5 requires. *See, e.g.,* J.A. 63-65 (plaintiffs' expert testifying that an ability-to-elect district must have at least 51% black voter age population). There are several other districts like this in the plans, such as HD 54, HD 84, and HD 85.

C. There is no judicial remedy.

There is also no appropriate judicial remedy for the statewide claims that the plaintiffs have brought. The ALBC's brief does not suggest any remedy at all. For example, the ALBC spends much of its brief criticizing the drafters' decision to resolve the underpopulation in Birmingham by dividing HD 53's population among the remaining districts. But this move also allowed the drafters to create a new majority-black district in Huntsville. The ALBC does not explain what should happen to this new majority-black district if it prevails.

The ADC argues that the plans should be invalidated in their entirety. But it solves nothing to invalidate a statewide plan for the reasons that the plaintiffs have raised. A state must have legislative districts. And, if a federal court undoes a plan as a racial gerrymander, it must be able to suggest ways in which the districts could be redrawn to eliminate the constitutional problem. Otherwise, there will be neither a court-ordered remedy nor any standard by which to evaluate a state-proposed remedy.

The plaintiffs' failure to identify a discrete remedy is an especially significant problem given the inherently legislative nature of redistricting. The Court has long recognized that "'reapportionment is primarily a matter for legislative consideration and determination.'" *White v. Weiser*, 412 U.S. 783, 794 (1973) (quoting *Reynolds*, 377 U.S. at 586)). It requires drawing sometimes arbitrary, "inconsistent, illogical, and ad hoc" lines between groups of voters. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)(plurality). *Accord id.* at 306-07 (Kennedy, J., concurring in the judgment) (noting "lack of comprehensive and neutral principles for drawing electoral boundaries"). Courts that become entangled in redistricting "risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* at 307 (Kennedy, J., concurring in the judgment). *See also LULAC*, 548 U.S. at 415-16 ("[A] lawful, legislatively enacted plan should be preferable to one drawn by the courts.").

The ADC's suggestion that the Court vacate the plans in their entirety is inconsistent with these principles. The Court has recognized that even a limited judicial districting remedy "represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. In the context of redistricting, therefore, lower courts must use legislative plans as the starting point, changing them only as necessary to remedy specific violations of federal law. *See Perry v. Perez*, 132 S. Ct. 934, 943-45 (2012) (per curiam) (criticizing district court's interim remedial plan for "unnecessarily ignor[ing] the State's plans in drawing certain individual districts").

Because the plaintiffs have not shown that race warped the lines of any specific district, there is no reason to believe that a court-drawn plan would create more "racial balance" overall. The Voting Rights Act does not require the creation of coalition, influence, or other non-majority-minority districts. *Bartlett v. Strickland*, 556 U.S. 1, 14-20 (2009). Nor does the Voting Rights Act require the state to maximize the political influence of a racial minority. *Johnson v. De Grandy*, 512 U.S. 997, 1016-17 (1994). A federal court would thus have "no basis" to "set out to create a minority coalition district" as part of a remedial plan, "rather than drawing a district that simply reflected population growth." *Perry*, 132 S. Ct. at 944. And, as we show in Part II below, similar black population percentages are likely in any plan because of the demographics of Alabama.

There is also no reason to believe that a legislative do-over would create greater racial balance or, more to the point, any additional districts in which black voters can combine with white voters to elect a white Democrat. The plaintiffs have not suggested how the drafters could meet their legitimate policy goals—foremost among them, consistency between the old and new districts and the 2% deviation—in a way that would create more "integrated" districts. Nor have the plaintiffs suggested why the (almost certainly) Republican majority in the next Legislature would propose altering the existing plans in a way that would help Democrats be elected. *Cf. Palmer v. Thompson*, 403 U.S. 217, 225 (1971) (noting the "element of futility" inherent in any "judicial attempt to invalidate a law because of the bad motives of its

supporters"). A statewide do-over would put us, at most, in the same place we are now.

D. Section 2 already protects against the dilution of black voters' statewide influence.

Finally, Section 2 of the Voting Rights Act already protects against the dilution of minority influence by "packing" minority voters into too few districts. *See Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986). There is thus no reason for the Court to address these statewide "packing" claims under new equal-protection theories.

The plaintiffs made a Section 2 "packing" claim in the district court. But it failed, in part, because the drafters' plans provide black voters proportional representation in the Legislature. *See De Grandy*, 512 U.S. at 1014 ("[W]e do not see how these district lines, apparently providing political effectiveness in proportion to voting-age numbers, deny equal political opportunity"). According to the 2010 Census, the voting-age African-American population of Alabama is about 25% of the total voting-age population. The Senate plan creates 8 majority-black districts, or 22.9% of the total of 35, and the House plan creates 28 majority-black districts, or 26.7% of the total of 105. On the other hand, the plaintiffs' proposed plans "actually create fewer opportunities for black voters to elect the candidates of their choice." J.S. App. 112. Like their Section 2 claims, the plaintiffs' racial gerrymandering claims request that the Court maximize the number of Democratic districts, not ensure fairness for black voters.

* * *

Both groups of plaintiffs in this litigation rely on statewide theories that are inconsistent with this Court's caselaw. Except for the four Senate districts that the ADC challenged at trial, the plaintiffs "never identified" any districts that "they alleged were racially gerrymandered." J.S. App. 127. They did not introduce any evidence about specific districts. They did not propose, in their post-trial briefing, fact-findings about specific districts. Many of the districts they discuss in their briefs have never been addressed at any other point in this litigation. To the extent they have district-specific arguments, they have waived them. The district court crafted a fact-based response to the plaintiffs' scattershot allegations that race explains the statewide plans "as a whole." But it could also have rejected these shifting statewide claims as a matter of law.

II. The plaintiffs did not show that race was the predominant factor statewide or in any specific district.

If the Court wants to entertain the plaintiffs' claims that the plans are improperly motivated by race "over all," then those claims should be rejected. The district court gave the only response to the plaintiffs' statewide claim that the facts would allow. The district court found, as a factual matter, that racial considerations did not predominate statewide. J.S. App. 144. The dissenting judge similarly rejected

the plaintiffs' statewide claim but did not meaningfully engage with the claim as the plaintiffs formulated it, suggesting instead that the plaintiffs should have challenged specific districts. *See* J.S. App. 227.

In this section, we evaluate the record evidence to explain why the district court found that race was not the overriding factor statewide and, instead, suggested that the 2% deviation predominated. This finding was not the error that the plaintiffs and the United States believe it to be. Instead, it is a compelling explanation for the specific features of the drafters' statewide plans that the plaintiffs say they dislike. First, we compare the drafters' plans to the plaintiffs' competing plans, which all use a 10% instead of 2% deviation. Second, we discuss the similarities between the majority-black districts in the old and new plans, which are mostly explained by nonracial considerations as a statewide matter. Third, we address the reasons the drafters did not preserve majority-white "influence" districts as a statewide matter. Fourth, we discuss the county-splitting and precinct-splitting that the plaintiffs now say is an indication that race predominated statewide. Fifth, we discuss the significance of DOJ preclearance. Lastly, we apply this statewide discussion to the four specific Senate districts that the ADC plaintiffs challenged and about which there is actual district-specific evidence in the record. All of this evidence supports the district court's fact-finding that race did not predominate statewide or as to any specific district that the plaintiffs actually challenged.

A. The consistent difference between the Legislature's plans and the plaintiffs' competing plans is the standard of deviation, not the population of the majority-black districts.

The place to start in evaluating the district court's fact-finding is by comparing the Legislature's plans with competing plans that the plaintiffs proposed during the legislative process.[3] "In a case such as this one," a plaintiff "must show *at the least* that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and "that those districting alternatives would have brought about significantly greater racial balance." *Easley v. Cromartie*, 532 U.S. 234, 258 (2001) (emphasis added).

If the drafters' strategy to comply with Section 5 were the driving factor for the plans overall, it would be easy to prove: the plaintiffs would simply need to propose a plan that meets the drafters' race-neutral

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[3] These are plans proposed in the Legislature as alternatives to the Republicans' plan by members of the ALBC, such as Rep. McClammy, Rep. Knight, and Senator Sanders, and by Dr. Joe Reed, the head of the ADC. The ALBC cites APX 20-23, which include voting-age population statistics for the plans drafted by William Cooper and introduced by Rep. Knight in the House as HB16 and Senator Sanders in the Senate as SB5. ALBC Br. 10 & n.26. We instead use the total black population percentages in C-46 (Knight Plan) and C-47 (Sanders Plan) for ease of comparison with the other alternative plans, which lack voting-age statistics. *See* C-45 (McClammy House Plan), C-42 (ADC House Plan), C-48 (ADC Senate Plan). We refer to Dr. Reed's plans as "the ADC plans."

criteria. *See id.* But the plaintiffs have always refused to propose a plan that meets those criteria, especially the 2% deviation. Instead of race, the most consistent statewide difference between the plaintiffs' plans and the Legislature's plans is that none of the plaintiffs' proposed plans comply with the standard of population deviation that the Legislature adopted.

We have created the charts below, which compare the black population percentage in each majority-black House and Senate district under the various plans. Blank entries exist where the plan at issue does not create a majority-black district. A similar chart comparing the black population percentage in every district, both majority-black and majority-white, is in the appendix.

Comparison of black population percentages in majority-black House districts

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
19	61.25%	67.07%	67.01%	75.39%
32	60.05%	58.40%	56.68%	
49				62.65%
52	60.13%	62.27%	61.34%	54.07%
53	55.83%	62.00%	56.61%	55.86%
54	56.83%			58.72%
55	73.55%	62.92%	66.66%	64.03%
56	62.14%	61.06%	58.16%	54.02%

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
57	68.47%	62.27%	61.89%	60.27%
58	72.76%	66.20%	76.98%	61.09%
59	76.72%	66.62%	64.85%	61.27%
60	67.68%	62.26%	65.38%	59.55%
67	69.15%	69.21%	68.63%	69.43%
68	64.56%	53.87%	55.19%	56.29%[4]
69	64.21%	57.56%	56.92%	57.62%
70	62.03%	61.18%	61.66%	57.21%
71	66.90%	60.42%	59.43%	54.45%
72	64.60%	60.37%	55.37%	56.25%
76	73.79%	75.62%	64.36%	83.58%[5]
77	67.04%	67.34%	62.31%	59.38%
78	69.99%	73.03%	74.21%	58.70%
82	62.14%	61.14%	57.22%	53.63%
83	57.52%	61.87%	55.99%	
84	52.35%	51.40%	52.00%	71.97%[6]
85	50.08%	47.96%	53.94%	54.21%

[4] Rep. Knight renumbered many of his districts, making comparison difficult. Where it is possible to identify a particular district in Knight's plan that covers the same geographical area as a district in the other plans, we have included the black population for that district and noted the new number. Rep. Knight renumbered HD 68 as HD 90.

[5] Rep. Knight renumbered HD 76 as HD 73.

[6] Rep. Knight renumbered HD 84 as HD88.

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
97	60.66%	63.00%	63.59%	57.19%
98	60.02%	60.22%	61.57%	63.75%
99	65.61%	62.92%	63.55%	57.98%
103	65.06%	62.08%	63.03%	62.45%[7]

Comparison of black population percentages in majority-black Senate districts

Senate District	Plan as Passed	Senator Sanders Plan	ADC Plan
18	59.10%	58.49%	61.32%
19	65.31%	65.30%	62.89%
20	63.15%	62.82%	65.10%
23	64.84%	57.75%	61.23%
24	63.22%	56.90%	60.43%
26	75.13%	71.28%	68.44%
28	59.83%	51.55%	60.38%
33	71.64%	71.83%	65.83%

If the drafters had the "predominant" statewide goal of "packing" districts with "supermajority percentages" of black persons, then we would expect to see stark differences between their plans and the plaintiffs' plans, which do not share that goal. But

[7] Rep. Knight renumbered HD 103 as HD101.

we do not. In the House plan, the Legislature's plan has 23 districts that are over 59% black; Rep. McClammy's plan has 22. The only real difference in the House is in the Birmingham districts (HD 52-60) because the plaintiffs' plans manipulate the area's black population to create a new 30% black district that could be won by a white Democrat (HD 54), eliminating a majority-black district from the statewide plan.

The ADC says it is frustrated by the "staggeringly high black populations" in the drafters' majority-black districts, "including many in the 70-77% range." ADC Br. 2-3. But most of the Legislature's majority-black districts are similar to the ADC's. The ADC's plan provides for 2 House districts with black population percentages above 70%; the Legislature's plan has 4. In eight of the majority-black House districts, the ADC's proposed plan has a higher black-population percentage than the Legislature's. (HD 19, 52, 53, 58, 78, 85, 97, 98). In the Senate, all of the ADC's proposed majority-black districts are more than 60% black.

Moreover, some of the largest racial differences between the plans are directly traceable to non-racial criteria. The ADC drew SD 33 as 65.83% black instead of 72% black only because it split Mobile and Baldwin Counties and extended SD 34 across a large body of water, Mobile Bay. *See* J.A. 201 (ADC's map). The ALBC's brief also suggests splitting these counties across Mobile Bay to lower SD 33's black population percentage. *See* ALBC Br. 10 & n.28. Similarly, in the House, the ADC's efforts to manipulate the black population percentages across the southern middle of the state led it to change a host of districts

from how they were under the 2001 plan. *See* J.A. 202 (ADC's map). For example, HD 68 is in a completely new location on the border of Mississippi instead of in Monroe and Conecuh counties. *See* J.A. 202 (ADC's map), 194(2001 map).

Rep. Knight's House plan and Senator Sanders' Senate plan were drawn by the plaintiffs' expert William Cooper "to split as few counties as possible." *See* Tr. 2.111. These plans put incumbent legislators in the same districts. *See id*. Rep. Knight's plan changes the existing House districts so much that it is difficult even to identify which districts in his plan correspond to the districts in the other plans. Nonetheless, the black population percentages in Rep. Knight's majority-black districts go as high as 83% in Montgomery and are similar to those in the drafters' plan in many of the majority-black House districts. Senator Sanders' Senate plan is almost exactly the same as the drafters' in four of the eight districts (18, 29, 20, 33).

The greatest and most consistent statewide difference between the drafters' plans and the competing plans is the standard of deviation, not the racial composition of majority-black districts. As the district court explained, the reason the plaintiffs have never proposed a 2% plan is self-evident: the 2% deviation necessarily "eliminated the partisan gerrymander that existed in the former districts." J.S. App. 146. The plaintiffs' plans instead use a more forgiving 10% deviation that allows them to manipulate district lines to help elect the maximum number of white Democrats. At trial, the ADC's chairman personally asked the district court, as a remedy, to order the Republicans to draw new plans, "fol-

low[ing] their own rules, except for this one person—this plus or minus one" percent. Tr. 2.172.

B. The majority-black districts are similar between the old and new plans mostly because of nonracial factors.

Because the plaintiffs never proposed a plan that meets the drafters' race-neutral districting criteria, they have no counterproposal to show that race was the driving force for the drafters' plans "over all." Instead, the plaintiffs cite the consistency with which the drafters kept the racial percentages of the majority-black districts roughly the same. *See* ALBC Br. 30-33. And, even then, the plaintiffs cherry-pick the districts that they discuss, ignoring those districts with significant variations between the old and new plans. *See id.* 30-41, 49-53. This method of attempting to show that race was the driving factor in the state overall, or in any particular district, has serious flaws. As the United States notes, "some majority-black districts deviated significantly from the goal of maintaining the same percentage of black residents," and "in some districts the percentage of black residents may have remained relatively constant based on boundaries drawn in a manner consistent with traditional districting principles." U.S. Br. 20-21. The district court expressly found that the application of race-neutral districting principles to fixed demographics explains most of the similarity between the old and new majority-black districts. J.S. App. 143-44.

1. The similarities between the old and new districts are mostly explained by demographic reality.

From reading the plaintiffs' briefs, one gets the misimpression that black population is spread evenly throughout Alabama. In fact, many areas of Alabama have almost no black population. *See* App. 7a-9a (showing black population in each county). Instead, the black population is concentrated around the City of Birmingham and in counties across the middle and southern sections of the state. These counties include Greene (81.8% black), Sumter (75.2% black), Perry (69.0% black), Dallas (70.0% black), Wilcox (72.8% black), Lowndes (73.9% black), Montgomery (55.4% black), Macon (83.5% black), and Bullock (70.6% black). App. 7a. Likewise, the City of Birmingham is 73.4% black. App. 10a-11a. And Birmingham's western suburbs have similar populations, such as Bessemer (71.2% black), Fairfield (94.6% black), and Midfield (81.6% black). App. 10a. The population of these areas did not change just because district lines were shifted.

Because "[v]oters are not fungible commodities that can be moved anywhere in a state," the district court explained that the majority-black districts mostly reflect "racial groups tied to particular geographical locations." J.S. App. 145. This demographic reality explains why the black populations of some of the *plaintiffs'* proposed districts are similar to the drafters' purported "quota." The black populations of several of the ADC's proposed districts are only one percentage point away from the "quota," including HD 53 (0.90 difference), HD 58 (0.88 difference), HD

67 (0.51 difference), HD 70 (0.17 difference), HD 78 (0.05 difference), HD 82 (0.09 difference), HD 83 (0.93 difference), HD 84 (1.39 difference), SD 18 (1.4 difference), and SD 33 (0.98 difference).[8] ALBC Br. 5a-7a; *supra* 34-36. Senator Sanders' plan for SD 28 is only 0.57 above the "quota" of the 2010 numbers in the 2001 lines (51.55 compared to 50.98), making him much closer to the "quota" than the Legislature's plan (59.83). *Id.*

The district court was making the same point when it compared the demographics of the 2001 districts, using 2001 figures, to the demographics of the new districts, using 2010 figures. J.S. App. 46-56. The court used the comparison to illustrate that "the percentages of the black voting-age populations in the majority-black districts . . . remain relatively constant" over time. J.S. App. 182. Although the ALBC argues that this comparison was an error, the comparison is not based on the "wrong table." ALBC Br. 36-37. The district court was simply making a point that the ALBC does not appreciate: the black population figures in the Legislature's plans were mostly determined by historical residential patterns.

In fact, the percentage of black population in these districts has been stable ever since the court-ordered plan in 1993. J.S. App. 21, 46. Although population has increased in some areas and declined in others, the racial demographics of these areas have not changed.

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[8] These are comparisons between the figures in the ADC plan and the "quota" for each district in the appendix to the ALBC brief. As we have explained already, *supra* 9 n.1, the figures are a little different if one uses the chart in the Joint Appendix.

2. The similarities between the old and new districts are also explained by the drafters' race-neutral goal of changing every district "as little as possible."

The drafters' race-neutral districting criteria also worked to keep the demographics of the districts roughly the same. Changing all the districts "as little as possible" was an express goal. The drafters also wanted to preserve the cores of districts and prevent incumbents from having to run against each other. The Court has recognized that these goals are an important part of redistricting. *See Vera*, 517 U.S. at 977 ("maintaining communities of interest and traditional boundaries"). In fact, most *court-drawn* plans are also "least-change" plans that preserve as much as possible from the most recent plan. *See* Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131, 1161 (2005).

The record includes exhibits that break down each district by county and identify the number of people in each portion of a county within each district. DX 408 (2001 Senate), DX 401 (2012 Senate), DX 412 (2001 House), DX 404 (2012 House). The old majority-black Senate districts covered all or part of 24 counties. DX 408. Only two of those counties are no longer part of those districts. *Compare* DX 408 *with* DX 401. And, of the 26 counties included in the new majority-black Senate districts, only 4 were not already part of a majority-black district under the old plan. *Compare* DX 401 with DX 408. Only 1% of the people in the old majority-black districts live in

counties that are no longer part of those districts in the new plan. *Compare* DX 408 *with* DX 401. And only 5% of the people in the new majority-black districts live in counties that were not part of the districts in the old plan. *Compare* DX 401 *with* DX 408.[9]

And a comparison of the House districts shows an even smaller difference between the counties in the old and new plans. The new majority-black House districts encompass the same counties involved in the old districts. *Compare* Exh. 404 *with* Exh. 412. The new majority-black districts extend to parts of only four additional counties, and the population from those counties is only 1% of the total population in the new majority-minority districts. *Compare* Exh. 404 *with* Exh. 412.[10]

The district court explained that "more than 90 percent of the total black population remained in the same kind of district where they had resided earlier." J.S. App. 151. A cursory glance at the statewide

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[9] A comparison of DX 408 and DX 401 reveals that only Autauga and Bibb Counties were part of the majority-black Senate districts in 2001 but not 2012. In 2001, those counties contributed a total of 10,480 people, or 1%, of the 992,983 people in the 2001 majority-black Senate districts. DX 408. A similar comparison reveals that only Butler, Washington, Pickens, and Houston Counties were part of the majority-black districts in 2012 but not 2001. *Compare* DX 408 *with* DX 401. In 2012, those counties contributed a total of 53,613, or 5%, of the 1,089,323 people in the 2012 majority-black Senate districts.

[10] A comparison of DX 404 and 412 reveals that only Baldwin, Washington, Pickens, and Tallapoosa Counties were part of the majority-black House districts in 2012 but not 2001. In 2012, these counties contributed a total of 13,020 people, or 1%, of the total 1,269,931 people in the 2012 majority-black House districts. DX 404.

maps confirms the import of these statistics: the new House and Senate districts look substantially similar to the old districts and share the same unusual features. J.A. 191-94. Even within each county, the old and new districts occupy close to the "same space." J.A. 81.

The goal of changing each district "as little as possible" likely explains why the racial percentages of many of the *majority-white districts* are substantially the same between the old and new plans. The drafters had no goal to preserve black populations in majority-white districts, but the racial percentages in many of the majority-white House districts are almost identical between the old and new plans nonetheless:

Comparison of black population percentage in selected majority-white House Districts under old and new plans[11]

House Districts	2010 Black Population in New Districts	2010 Black Population in Old District Lines
10	16.18%	16.22%
16	10.38%	10.73%
22	5.74%	5.78%
25	15.99%	16.17%
35	16.08%	15.45%
41	11.97%	10.92%

[11] Figures for the new districts come from App. 1a-4a. Figures for the 2010 black population in old district lines come from our exhibits. *See* DX 406.

House Districts	2010 Black Population in New Districts	2010 Black Population in Old District Lines
49	12.92%	11.92%
66	25.16%	27.26%
75	26.43%	27.61%
89	32.00%	32.53%
90	34.65%	35.54%
93	17.11%	17.83%
104	15.79%	15.35%

The black population percentage of these majority-white districts remained the same, despite the fact that the drafters had to depopulate them by as much as 10.43% (HD 10), 42.68% (HD 25), 60.76% (HD 41), and 32.11% (HD 75). DX 406.

Because the drafters "used existing House and Senate districts to draw the new district lines," their "choice of which voters to add or subtract from each district was limited by which populations abutted the existing districts." J.S. App. 145-46. This limitation worked to keep the black population percentages the same in the majority-black districts far more than any focus on race. If the Legislature draws a new district in the same geographical area as the old one, it will contain the same or similar people. This is logic, not race-based districting. *See* Lawyers Comm. Br. 20-21.

3. Changes to the majority-black districts were consistent with other race-neutral principles.

The district court also explained that, when the drafters changed majority-black districts, they did so based on race-neutral redistricting criteria. J.S. App. 142-143. SD 23 changed to end the unnecessary splits of Lowndes, Perry, and Autauga counties. *Compare* J.A. 191 with J.A. 192. SD 26 contracted from the sparsely populated rural areas south and east of the City of Montgomery and became a more compact, urban district.

The ALBC argues that the drafters' decision to move HD 53 from Birmingham violated traditional redistricting criteria. But the drafters intentionally chose to consume the district of an older representative, who was in poor health and who they believed would not run again.[12] APX 75 at 132:9-14 (Hinaman Depo.). This decision also allowed the redistricters to preserve the core and character of surrounding districts, which were under-populated by more than a full House district. The plaintiffs' plans also use the population of an under-populated majority-black House district to repopulate the other districts, but they create a majority-white "influence" district (HD 54) in Birmingham for the first time instead of a replacement majority-black district in Huntsville.

Race-neutral districting criteria also presumably explain why the racial composition of many of the plaintiffs' proposed districts is very similar to the

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[12] This representative, Demetrius Newton, later passed away.

drafters' districts, even where those percentages differ substantially from the former districts. For example, the black population percentages in new majority-black SD 19 and SD 20 are about 10 percentage points lower than they were in the old districts. But all three competing Senate plans draw these districts within a few percentage points of each other. *See supra* 34-36. Similarly, the ADC's plan for SD 28 is less than one percentage point different from the Legislature's, but both are about 10 percentage points higher than the old district. As the chart above shows, *supra* 34-36, the black population percentage in most of the majority-black districts is similar across the competing plans.

* * *

HD 67 is a House district that *both* plaintiffs discuss in their briefs. *Compare* ALBC Br. 30 *with* ADC Br. 31. But it is also the most obvious example of why the plaintiffs' focus on population statistics does not show that race predominated. HD 67 was a one-county district in the former plan, and it is essentially a one-county district in the new plan. DX 404, 412. That county, Dallas, has 43,820 people in it, which is only about 1,000 people short of an ideal House district. And 70% of the people in Dallas County are black. App. 7a. Any plan for HD 67 that does not seriously disrupt the district's prior lines will thus be around 70% black, whether or not race is a consideration.

But, even if a line-drawer did not share the drafters' concern with continuity between the old and new plans, HD 67's black population would be almost im-

possible to change because of demography. Almost all of the counties that surround Dallas County are also 70% black, *see supra* at 2, which makes it highly improbable that anyone would draw a district with a meaningfully different black population percentage regardless of the neutral principles he or she applied. Contrary to the dissent's declaration that "[o]ne factor and one factor alone[:] . . . race" explains HD 67's black population percentage, it would have taken a gerrymander to *change* that district's racial demographics. J.S. App. 219. And, sure enough, HD 67 is 69% black in *every* proposed plan. *See* App. 3a.

The plaintiffs have not introduced any evidence to show that the similarities between all, most, or even many of the old and new districts are explained by a "quota" or "policy" instead of the application of race-neutral districting criteria to the unchanged demographics of Alabama.

C. Nonracial considerations changed the "white Democratic districts."

The district court's finding that race did not predominate is also supported by evaluating majority-white "influence" districts. In the court below, the plaintiffs and their witnesses argued that the plans were predominantly motivated by race because they reduced the black population in "white Democratic districts." J.A. 116. The plaintiffs now refer to these districts in more anodyne terms: "districts in which blacks had been between 30% and 50% of the population," ALBC Br. 9, and "inter-racial coalition districts," ADC Br. 17. But they still mean "white Democratic districts."

The plaintiffs have never shown that these majority-white districts were changed because of a "quota" or "policy" for the majority-black districts. We address the three Senate "influence" districts that the ADC challenged in Section F below. The plaintiffs also complain that the drafters reduced the black population below 30% in six House "influence" districts.[13] *See* ALBC Br. 9; ADC Br. 17-18. But so did many of the competing plans. No proposed plan preserves HD 45 or HD 61 as districts with more than 30% black population. *See* App. 2a, 3a. And only one of the three competing House plans preserves HD 6, HD 38, HD 73, or HD 74 as 30% black "influence" districts. *See* App. 1a-3a. Moreover, the drafters clearly dropped the black percentage of HD 6 because they created a *new* majority-black district in the Huntsville area (HD 53), not because they were preserving the population of an existing district. The black population of the only preexisting majority-black district in the area, HD 19, declined from 69% to 61%. *See* ALBC Br. App. 5a.

The district court gave two main answers for why the drafters did not maintain preexisting levels of black population in "white Democratic districts" on a statewide basis. *See* J.S. App. 142. The plaintiffs have not even addressed these answers, much less refuted them.

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[13] The plaintiffs do not explain why they use 30% (ALBC) and 29% (ADC) as the cutoff.

1. Partisanship

The district court's main answer for why the drafters did not preserve or create "white Democratic districts" was partisanship. J.S. App. 161. That answer is obviously correct. "[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact." *Cromartie*, 526 U.S. at 551. Here, the plaintiffs' expert testified that "[b]lacks vote overwhelmingly 90 percent or more for Democrats, and everybody in Alabama knows that." J.A. 118. In fact, according to the same plaintiffs' expert, "[t]he major way that you know how a precinct has voted in most of Alabama is the percentage of blacks in that precinct." J.A. 118.

Although the drafters of these plans denied that they had any systematic goal to eliminate Democrats, they also consistently testified that they had to craft plans that would pass the Legislature. *See* App. 27-28; *see also* J.S. App. 46. The Legislature was controlled by Republicans, and these plans were passed on party-line votes. J.S. App. 59, 161. Faced with a choice between removing voters from Republican-controlled districts to repopulate the majority-black districts or removing Democratic voters from "white Democratic districts," the Republican drafters understandably chose the latter option. As the district court explained, "under the new plans, the number of Republicans in the Alabama House would likely increase from 66 representatives to 68 to 70 representatives and that the number of Republicans in the

Senate would increase from 22 senators to 23 to 25." J.S. App. 101.

To be clear, we are not suggesting that partisanship drove the plans overall, only that the Republican drafters had no reason to preserve or increase the black population in "white Democratic districts" as they equalized population between the districts. Partisanship explains why the drafters were content to solve Montgomery's under-population problem by moving Democrat-controlled HD 73 to Republican Shelby County. And partisanship explains why the drafters solved the under-population problem in Birmingham by moving HD 53 to Huntsville, instead of gerrymandering a "white Democratic district" in the Birmingham area as the competing plans suggest. As one Senator from Birmingham testified, this decision ensured that "the county would be controlled by the people in [the Republican] party." J.A. 43.

2. Incumbent preferences

Similarly, the district court explained that the drafters removed black population from "white Democratic districts" in ways that incumbent legislators wanted. *See* J.S. App. 142, 158, 167. Sen. Dial testified that he wanted to make the redistricting process "more transparent" than it had been in the past, with input from other legislators about how they wanted their districts changed. J.A. 21, 25-28. Rep. McClendon likewise offered to meet with each representative and worked with those who brought plans or concerns to him. J.A. 99-100 (Mobile), J.A. 100-01 (McClammy in Montgomery); *see also* Tr. 3.120-21.

For this reason, black legislators had an outsize influence in how their own districts were repopulated. They universally requested that their districts be repopulated in ways that maintained or increased the black population at the expense of "white Democratic districts." For example, Senator Sanders of SD 23 suggested repopulating his district by taking all of Lowndes County (73.9% black) instead of Autauga County (18.3% black). J.A. 24-26; App. 7a-8a. And HD 73 was moved from Montgomery because black legislators from the Montgomery area wanted to expand the borders of their under-populated districts to consume all of HD 73's population. J.S. App. 35.

There is no evidence that black legislators were focused on race when they made these suggestions. Instead, it is much more likely that these legislators wanted to repopulate their districts with communities of interest that were demographically, economically, and politically similar to the communities that they already represented. The effect was to put contiguous black communities together in the same district, instead of splitting them between districts as in the Democrats' 2001 gerrymander.

D. County and precinct splits are better explained by the need to equalize population than by racial considerations.

The plaintiffs argue that the county and precinct splits in the drafters' plans are an indication that the drafters' foremost concern was race. But, as the district court explained, there are several factual problems with this theory.

The first is that the plaintiffs' own expert, William Cooper, attributed the raw amount of county and precinct splitting to the 2% deviation, not race. His report, Doc. 125-11, attests that the 2% deviation "forced the legislature to subordinate traditional redistricting principles such as avoidance of county and precinct splits." Doc. 125-11 ¶6. The report explains in detail how the 2% deviation makes it impossible to keep many precincts and counties whole. *See* Doc. 125-11. A tight population deviation means that there will often be counties and precincts at the edges of districts that must be split so that the right amount of population gets placed into each adjoining district.[14] *See also* ALBC J.S. 38 (complaining that the 2% deviation "systemically increased the instances in which" counties were split).

Another problem with the plaintiffs' argument is that there are many good reasons to *want* to split precincts and counties. As the plaintiffs' expert explains in his report, precinct splits are often necessary to follow roads or municipal boundaries. *See* Doc. 125-11. The plaintiffs' expert explained that "[m]any precincts in Alabama split municipal boundaries, so if precinct splits are minimized[,] . . . it is difficult to avoid numerous municipal splits regardless of the deviation range." Doc. 125-11 ¶16 n.4. And, of course, the drafters had to *preserve* previous precinct and county splits to keep the new districts

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[14] For example, under a 2% deviation, a 5,000 person precinct cannot be added to a House district that already has 43,000 people. That would put the district over the limit. But the precinct also cannot be left out of the district entirely, because that would keep the district under the population deviation. Instead, the precinct must be split.

in the same locations as the old ones. The district court explained that "the districts adopted in 2001 had a similar number of precinct splits as the [new] Acts." J.S. App. 89.

A third problem with the plaintiffs' reliance on precinct splits to show a racial motivation is that the plaintiffs have never identified any specific precinct that they allege was split because of race. There was no "testimony at trial that majority-black districts incurred more precinct splits." J.S. App. 155. The only trial exhibit on precinct splitting "shows high concentrations of precinct splitting in 26 counties composed exclusively of majority-white House and Senate districts." J.S. App. 155. The exhibit also shows that "the Legislature split zero precincts" in many majority-black areas. J.S. App. 155. In other words, the only evidence on this point is that "precinct splits occurred throughout the State" for a variety of reasons. J.S. App. 155. Even though the plaintiffs produced an exhibit that identifies every precinct split, they have never pointed to one and said, "this precinct was split because of race."

Similarly, the plaintiffs failed to show, or even allege, that any particular counties were split because of race. The only county split that the plaintiffs discuss in their briefing as purportedly being racially motivated is the expansion of HD 69 into Montgomery County.[15] *See* ALBC Br. 44. But the political consultant testified that he expanded HD 69 in Mont-

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[15] The plaintiffs say that two county splits resulted from what they say was the racially motivated decision to move HD 53, but they do not say that the drafters intentionally split the county because of race. *See* ALBC Br.45 & n.80.

gomery because he needed population—not black population, just *population*—to bring that underpopulated district up to deviation. *See* APX 75 at 94:11-17. The maps support this testimony. HD 69 took up all of Wilcox and Lowndes counties and part of Autauga County in the old plan. It is almost exactly the same in the current plan, *except* that it expanded into Montgomery County to pick up additional population. *Compare* J.A. 193 *with* J.A. 194.

We concede that the political consultant who drew the maps testified that he *may* have split *some* precincts and counties *somewhere* on the basis of race. There are 36 majority-black districts between these two plans, some of which are barely majority black. This testimony—that some precincts and counties somewhere may have been split because of race—is not evidence that race "predominated" with respect to the plans "over all."

E. DOJ rejected the plaintiffs' statewide arguments when it precleared the plans.

The district court also reasoned that DOJ preclearance undermined the plaintiffs' statewide gerrymandering claims. *See* J.S. App. 162-63, 183. DOJ's regulations say that, in making the preclearance determination, it expressly considered whether "minorities are over concentrated in one or more districts" and whether "the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial

boundaries." 28 C.F.R. § 51.59(a)(4) & (6). This inquiry gave "particular attention . . . to[] the requirements of the 14th, 15th, and 24th Amendments to the Constitution." 28 C.F.R. § 51.55(a). The plaintiffs made the same arguments about statewide "packing" to DOJ, and DOJ necessarily rejected those arguments when it precleared these plans. J.S. App. 162-63.

To be clear, we agree with the United States that DOJ did not determine that *no* district was racially gerrymandered. *See* U.S. Br. 7 n.1. That would take the kind of district-by-district analysis that the United States proposes in its brief. But the fact that DOJ precleared these plans is good evidence that—on a statewide basis—"minorities are [not] over concentrated" in the majority-black districts. DOJ preclearance suggests that the racial percentages in the majority-black districts are mostly explained by race-neutral districting criteria.

F. The plaintiffs did not establish that race predominated as to any of the four Senate districts the ADC challenged in the district court.

In addition to finding that race did not predominant "over all," the district court evaluated the four specific Senate districts that it believed the ADC had challenged and found that those districts were also not predominantly motivated by racial purposes. *See* J.S. App. 39-40, 61-62, 70-74, 79-81, 140, 166-173. These districts are SD 7, SD 11, SD 22, and SD 26. Only one of these districts, SD 26, is a majority-black district.

The plaintiffs do not contest the district court's reasoning about these districts, they do not make district-specific claims about these districts, and they have not attempted to prove their standing to bring *Shaw* claims with respect to these districts. Nonetheless, they do mention these four Senate districts as part of their statewide challenges to the Senate plan, so we address them here.

1. SD 7 and SD 11

SD 7 is in Huntsville, and SD 11 is east of Birmingham. The plaintiffs claim that SD 7 and SD 11 were purported influence districts in the old plan, even though they were represented by white Republicans. The plaintiffs suggest, without analysis, that the black population in SD 7 and SD 11 was reduced because of the drafters' "quota" or "policy" for the majority-black districts. *See* ALBC Br. 7-9; ADC Br. 18. But that contention is obviously wrong because SD 7 and SD 11 do not border any majority-black districts.

The closest majority-black districts to SD 7 and SD 11 are miles away in Birmingham. Two of those majority-black districts (SD 19 & SD 20) are 10% and 14% *below* their purported "quota." *See* ALBC Br. App. 7a. And every competing plan puts the same percentage of black persons in those Birmingham-area Senate districts—between 60% and 65%. *See supra* 36. The black population in SD 7 and SD 11 was not "siphoned out" and "moved into black-

majority districts" to meet a "quota" or "policy."[16] ADC Br. 17.

2. SD 22

SD 22 is a majority-white district located in the south of Alabama that was represented by a white Democrat. It bordered majority-black districts to the north, but it moved further south into a majority-white area. The district court found that the main reason SD 22 moved south is that it had to take population from an over-populated majority-white district (SD 32) wedged between SD 22, the Gulf of Mexico, Mobile Bay, and the State of Florida. *See* J.S. App. 170-71; J.A. 110. As the district court explained, there was literally nowhere else in Alabama for that excess population to go without crossing a body of water. J.S. App. 169-70.

The only competing plan with different racial percentages in this area is the ADC's plan, which sends a Senate district stretching across Mobile Bay. *See supra* 37; J.A. 201. All of the legislators from this area opposed extending a district across Mobile Bay, and such a district violates traditional redistricting criteria in any event. J.S. App. 170-71. Moreover, as between the two plans that did not extend a district across this large body of water, the drafters' plan for majority-white SD 22 actually has a slightly *higher* black population (21.52%) than Senator Sanders'

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[16] A much better explanation for the way SD 11 was drawn can be inferred from the fact that a co-chair of the redistricting committee, Rep. McClendon, is the present Republican nominee for the Senate seat.

Senate plan (20.43%). *See* App. 6a. There is no reason to believe that the black population in majority-white SD 22 is best explained by a "quota" or "policy" for the majority-black districts.

3. SD 26

SD 26 is a majority-black district. The drafters preserved SD 26 as a district centered on the City of Montgomery, and its neighbor SD 25 as a predominantly suburban and rural district. To accomplish this, the political consultant explained that he moved "some precincts in the city of Montgomery" into under-populated SD 26 and out of over-populated SD 25. *See* J.A. 77. He also "took some of the rural parts of Montgomery County and put those into Senate District 25" to "connect up to Crenshaw County," which had been part of former SD 30. Tr. 3.129-30. The rural areas that were moved out of SD 26 and into SD 25 contained only 12,000 people. Tr. 3.130, 176. (An ideal Senate district is 136,564 people. Tr. 2.86.)

The "precincts in the City of Montgomery" that the political consultant moved into SD 26 to repopulate it were predominantly black because of the demographics of the City of Montgomery. According to a plaintiff who was deposed in this litigation, the "west side" of Montgomery where SD 26 has always been is "about 98 percent black." *See* Doc. 125-8 at 17:20-23 (Jiles Williams Depo.). One reason SD 26 was under-populated is that this black population had been expanding into other parts of Montgomery. Another plaintiff testified that there has been "a steady growth of black population" in the rest of the

City of Montgomery over the last ten years. Tr. 2.181 (Lynn Pettway). Although the rest of Montgomery once was majority-white, it is "more blacks now than it is whites." Tr. 2.183. As the district court explained, the "slight percentage increase of the black population in District 26 does not evidence gerrymandering of black voters; instead, it evidences consistent concentrations of black population in the City of Montgomery." J.S. App. 153.

The plaintiffs say that the drafters split precincts between SD 25 and SD 26 along racial lines, but they have never identified any precinct that they allege was split because of race. Instead, this assertion is based on the off-hand remark of SD 26's incumbent legislator, which the district court did not credit.[17] For their part, the drafters testified that they repopulated SD 26 by "put[ting] some precincts back together" that had been split in 2001, Tr. 3.183 (Hinaman testimony), and split other precincts because "precinct lines don't necessarily follow roads and boundaries." Tr. 3.184.

SD 26 has been over 70% black since 1993. J.S. App. 153. The ALBC suggests that the drafters should have repopulated SD 26 with the 13,906 people in rural Crenshaw County, thereby bringing its

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[17] The district court explained that the legislator did not even know the racial composition of SD 26 under the new plan. J.S. App. 69-70. He testified that it was 71% black under the new plan, when it is actually 75% black. J.S. App. 70. Nor did he know the racial composition under the old plan. He suggested that 71% black was a "much higher" number than the district had previously been. J.A. 45. In fact, of course, the district has always been higher than 70% black and was almost 73% black in 2010. J.S. App. 153.

black population percentage down to the high 60s. ALBC Br. 49. But only someone intent on *committing* a racial gerrymander would think to add a rural county to a district centered on the urban core of the City of Montgomery. If joining Crenshaw County to SD 26 were the "obvious solution," ALBC Br. 49, then the drafters of alternative statewide plans would have used it. But the plaintiffs' plans put Crenshaw County in SD 31 instead. *See* J.A. 201 (ADC map), C 47 (Sanders map).

The ALBC also points to the shape of SD 26 as evidence of a gerrymander, comparing it to a giant sand fiddler crab. ALBC Br. 52. But the core of SD 26's shape is the west side of the City of Montgomery, and that shape was developed in 2001. J.A. 197 (comparison maps of SD 26). The part of neighboring district SD 25 that reaches into SD 26 around Interstate 85 is nearly the same in the old and new plans. J.A. 197. This part of SD 25 is different only because the drafters moved some precincts on its borders into under-populated SD 26. The "crab claws" follow roads. J.A. 197.

Moreover, the alternative plans have similar black population percentages for SD 26, despite their use of a population deviation exceeding 2%. SD 26 in the ADC plan is 68.44% black and over-populated by 2.58%. C 48 at 1, 6. SD 26 in Senator Sanders' plan is 71.28% black, despite being under-populated by 3.77%. C 47 at 1, 6. The plaintiffs have not refuted the district court's express fact-finding that SD 26's racial composition is mostly explained by the application of race-neutral districting criteria to the demographics of the area.

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After full discovery and a trial, the district court reasonably concluded that the plaintiffs failed to show that the drafters elevated considerations of race over other redistricting criteria on a statewide basis or with respect to any particular district in either the House or Senate plan. If the law allows the plaintiffs to bring a statewide racial gerrymandering claim, then they have failed to prove it.

The United States and the plaintiffs criticize the district court's reasoning about the predominance of the 2% deviation, but they are missing the point. The district court's point was *not* that districts of equal population can never be gerrymandered. The district court's point was that the 2% deviation makes it hard to manipulate districts for any purpose. J.S. App. 144-45. The district court's point was that the features of the statewide plans that the plaintiffs dislike—such as precinct splits—are mostly attributable to the 2% deviation. J.S. App. 156-58. The district court's point was that the consistent difference between the plaintiffs' plans and the drafters' plans is the 2% deviation. J.S. App. 146. The district court's point was that there is no way to use a 2% deviation, comply with traditional criteria, *and* create more "white Democratic districts." J.S. App. 146. The plaintiffs know all this, which is why they expressly challenged the 2% deviation below and in their jurisdictional statements.

We do not deny that the drafters' strategy to secure preclearance may have played a role in how some of Alabama's 140 districts were shaped. Our

only point is that the plaintiffs failed to prove that it played a significant role as to all the districts or any specific district. That is why the dissenting judge below could not say "that the plaintiffs should prevail as to all the districts" or confidently identify the specific districts as to which he thought the plaintiffs should prevail. *See* J.S. App. 227. The district court was right to reject the plaintiffs' racial gerrymandering claims.

III. The ADC lacks standing to challenge the plans on the grounds that it is challenging them.

In addition to being correct on the merits, the district court was correct that the ADC lacks standing to make the arguments that it is making. This Court requires that a plaintiff demonstrate (1) he has suffered an "injury in fact" that is "concrete and particularized;" and "not 'conjectural' or 'hypothetical'"; (2) the injury is "fairly . . . trace[able] to the challenged action of the defendant"; and (3) it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). The ADC did not establish any of these requirements in the district court, and it has not established any on appeal either.

A. The ADC has not been injured by the "fixed BPPs policy" that it is challenging.

The Court has recognized a single kind of cognizable harm caused by good-faith, race-based redistricting: the dignitary harm to the individual of being placed in a district on the basis of race, as opposed to other factors. A plaintiff challenging a district must "demonstrate that he or she, personally, has been injured" by a racial classification. *United States v. Hays*, 515 U.S. 737, 744 (1995). Because individual dignitary harm is the only recognized injury, the claim may be brought only to the extent that a person was injured "as a direct result of having *personally* been denied equal treatment." *Id.* at 746 (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)).

The ALBC at least attempts to make its statewide claim fit within the *Shaw* framework. The ADC does not. Instead of identifying the kind of harm recognized in *Shaw* and *Hays*, the ADC's arguments rest on the disturbing proposition that "super-concentrated" majority-black districts are inherently harmful, while "integrated" majority-white districts are inherently beneficial. *See* Lawyers Comm. Br. 21. The district court was right to reject the ADC's standing to make this kind of claim.

1. The ADC focuses on generalized harms common to all people.

The ADC has never identified an individualized harm to itself or its members as the basis for stand-

ing. Instead, the ADC has always asserted that "[o]ur case is different" because it is based on "other sorts of harm" arising from "race-based redistricting." ADC J.S. 21.

The problem is that these "other sorts of harm" are merely "generalized grievance[s] against governmental conduct of which [the ADC] does not approve." *Hays*, 515 U.S. at 745. The ADC asserts a harm arising from the purported fact that "no level of government claims decision-making responsibility" for Alabama's districts. ADC Br. 2. The ADC asserts harm from the reduction in its influence in certain districts, which affects its "mission" of advancing its political interests. ADC Br. 55. The ADC complains that the Legislature's districts are "excessively[] segregated" as compared to the "integrated" districts the ADC says it prefers. ADC Br. 3.

These are precisely the generalized harms that this Court rejected as a basis for standing in *United States v. Hays*. In *Hays*, the Court explained that there is no "personal right to a government that does not deny equal protection of the laws." 515 U.S. at 744 (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489-90 n.26 (1982)). The Court held that a plaintiff who lives in an allegedly racially gerrymandered district has standing to challenge the denial of equal treatment *only* because he or she has been personally subjected to a racial classification, which inflicts special dignitary harms. *Hays*, 515 U.S. at 745. But "where a plaintiff does not live in such a district, he or she does not suffer those special harms" and, therefore, lacks standing. *Id.*

The ADC's brief repeats verbatim the arguments that the plaintiffs unsuccessfully made in *Hays*. In *Hays*, the plaintiffs argued that it was dispositive for their standing that they were challenging the plan "in its entirety" instead of any district "in isolation." *Id.* at 746. Here, the ADC argues that it is dispositive that it "challenge[s] not one district in isolation, but a statewide policy." ADC Br. 57. In *Hays*, the plaintiffs argued that they had standing to challenge districts because "the racial composition of [one district] would have been different if the legislature had drawn [a neighboring district] in another way." 515 U.S. at 745. Here, the ADC argues that it has standing because the drafters' view of Section 5 "necessarily affect[ed] other districts . . . like a domino." ADC Br. 57. This Court unanimously rejected these arguments in *Hays*, and it should reject them again now.

2. To the extent the ADC alleges specific harms to itself or its members, it has not shown that those harms are "fairly traceable" to the policy that it challenges.

As we have explained above, on this record, it is impossible to say that the drafters' preclearance strategy had a definitive effect on the plans over all. *See also* U.S. Br. at 20-21. Nonetheless, the ADC attempts to assert three kinds of harms purportedly arising from the "fixed BPPS policy." Even assuming that these are cognizable harms under *Hays*, they are not "fairly traceable" to the drafters' so-called "policy."

First, the ADC says that plaintiff Stallworth "resides in proposed HD 77," so she "has standing to challenge the application of the State's policy to her district at least." ADC Br. 52. But HD 77 was a district that the drafters *dropped* from 73.52% black to 67.04% black. *See* ALBC Br. App. 5a. The ADC has identified no reason to believe that the drafters' preclearance strategy explains why they drew HD 76 in the way that they did.

Second, the ADC says that the drafters' "policy" "result[ed] in new, confusing precinct reassignments that often require citizens in a single county to cast ballots in different precincts for State House and Senate races." ADC Br. 56. But, as we have explained above, this harm—to the extent it is not a generalized grievance shared by every voter—is not traceable to the "fixed BPPs policy" that the ADC challenges. The 2% deviation—which the ADC does not now challenge—is what caused this precinct and county splitting. That was the testimony of the plaintiffs' expert. And it is why the ADC's chairman personally asked the district court to order the Republicans to draw new plans "follow[ing] their own rules, except for this one person—this plus or minus one" percent. Tr. 2.172.

Finally, the ADC argues that it has representational standing because, contrary to the district court's finding, the ADC has members in every district. ADC Br. 58-61. There are at least two problems with this argument. The first is that the ADC never established this fact below. The ADC claims that the trial court decided the issue *sua sponte*, but the defendants challenged the ADC's standing well before trial. *See* J.A. 204, 205, 208. The briefing below in-

cluded an argument that the "Newton Plaintiffs" (which are now the ADC plaintiffs) lacked standing to challenge a legislative district because none of the individual plaintiffs lived in that district. *See* J.A. 205 (citing *Hays*, 515 U.S. 737). The defendants argued further that "the claim asserted requires the participation of the individual ADC members." J.A. 208. The defendants' position has always been that the plaintiffs must prove their standing under *Hays*.

The more important point, however, is that the ADC has never made a claim on behalf of its individual members. Instead, it has expressly disclaimed a "*Shaw* claim" that would be based on individualized harm to a member. *See* ADC Br. 55, 58. Whatever kind of claim the ADC is litigating, that claim is not a claim made on behalf of the ADC's individual members who live in the majority-black districts.

B. The purported injuries identified by the ADC are not redressible.

As explained above, there is also no remedy for the kind of statewide claim that the ADC has brought. *See supra* 27-30. The "excessively-segregated" districts that the ADC says it dislikes will not be redressed by vacating the plans.

The ADC's dispute with these plans is political, not legal. In the trial court, the ADC's chairman, Dr. Reed, testified that majority-black districts in Alabama should be at least 60% to 65% black to ensure that black voters can elect their candidate of choice. The district court expressly credited this testimony, calling Dr. Reed the "dean of Alabama redistricting."

J.S. App. 162, 165. But the ADC's brief does not mention this testimony, and instead asks the Court to adopt the contrary testimony of Dr. Allan Lichtman, a white political scientist from Bethesda, Maryland. His testimony was offered in support of the ADC's Section 2 claim that the drafters should have created even *more* majority-black districts.

This disparity—between what the ADC says it wants on appeal and what the ADC actually wants in practice—underscores why the Court decided *Hays* in the way it did. There will always be a political loser when new lines are drawn, and the Democratic Party was the political loser here. Although the ADC dislikes the Legislature's redistricting plans because they reduce the Democratic Party's influence, that generalized grievance does not create standing to sue.

IV. The plans meet rational basis and strict scrutiny.

The drafters had a strong basis in evidence for their efforts to comply with the Voting Rights Act. The plaintiffs have dropped their argument that Alabama's plans cannot be supported by Section 5 at all, and the United States persuasively explains why those arguments are wrong anyway. *See* U.S. Br. 28-33. There is no dispute that the drafters of Alabama's plans subjectively wanted to comply with federal law in good faith. There is no dispute that federal law required them to maintain at least the same number of majority-black districts under the 2012 plan as under the 2001 plan. *See, e.g.*, NAACP Br. 7-

12. There is no dispute that federal law required them to ensure that black voters could elect their candidates of choice in those districts. The only dispute is whether the drafters went about the process in the right way.

As a strategy to secure preclearance under Section 5, the drafters avoided lowering the black population in the preexisting majority-black districts. The Court has recognized that states have leeway to use race in redistricting to comply with federal law. *See* U.S. Br. 28-34. And a redistricting plan meets strict scrutiny if a state's use of race was "reasonably necessary to avoid retrogression." *Shaw v. Reno*, 509 U.S. 630, 655 (1993). Although the state needs a "strong basis in evidence" to support its consideration of race, *id*. at 656, it does not have to "get things just right," *Vera*, 517 U.S. at 978 (plurality opinion).

The plaintiffs introduced almost no evidence below to show that lower percentages would preserve black voters' ability to elect in Alabama's majority-black districts. The only witness who testified that the percentages could be lower was plaintiffs' expert, Theodore Arrington. J.S. App. 90-93. But the district court made an express determination that his testimony on this point was not credible. J.S. App. 91-93. For example, his testimony here is contrary to his testimony in previous redistricting cases in Alabama, in which he testified that black-voting-age-population percentages of 61% would create toss-up districts that gave black voters only a "chance" to elect a candidate of choice. J.S. App. 91-92 (discussing *Wilson v. Jones*, 130 F. Supp. 2d 1315 (S.D. Ala. 2000)). The plaintiffs now rely on Allan Lichtman, but his testimony was specific to the three districts

he examined as part of the plaintiffs' Section 2 claim: "I'm not making any points about any other aspects of the elections. That's not what I studied. I simply studied the *Gingles* factors." Tr. 3.101-03, 107.

Alabama's drafters relied on the best evidence available to them to ensure that they did not diminish black voters' ability to elect: established caselaw, the existing districts, the Democrats' prior redistricting practices, and the suggestions of black political leaders. J.S. App. 184. Black political leaders and the caselaw suggested to the drafters that safe districts are 65% black. In this respect, it is telling that only 4 of the 13 House districts that the ALBC criticizes as being too close to the "quota" are above 65% black. ALBC Br. 30. None of the Senate districts that are criticized as being too close to the "quota" are above 65% black. *See* ALBC Br. App. 7a. The plaintiffs are wrong to attack the drafters' good-faith preclearance strategy.

A. The drafters believed that Section 5 prohibited "significant reductions" in black population.

The plans were drafted on the premise that "significant" or "sizable" reductions in black population percentages in the preexisting majority-black districts would almost certainly be retrogressive. The district court expressly found that the drafters "understood 'retrogression' under section 5 of the Voting Rights Act to mean the reduction in the number of majority-black districts or a significant reduction in the percentage of blacks in the new districts as com-

pared to the 2001 districts with the 2010 data." J.S. App. 33.

In an attempt to show that the drafters believed Section 5 to prohibit any *minimal* reduction in black percentage, the plaintiffs rely almost exclusively on the testimony of Senator Dial. But he is not an expert or a lawyer, he did not draw the lines of any particular district, and he had "very little input" into the House plan. APX 66 at 27:1-8, 28:4-14, 40:2-16; Tr. 1.55. Moreover, the plaintiffs take some of Senator Dial's testimony out of context. The plaintiffs say that Senator Dial rejected Senator Sanders' statewide plan merely because it decreased the black population percentage in some of the majority-black Senate districts. But Senator Dial said that he "can't remember" all the reasons for rejecting Senator Sanders' plan. APX 66 at 42:5. Senator Sanders' plan did not comply with the 2% deviation, and he did not propose the plan until deep into the legislative process. J.S. App. 58-59, 98-99. The plan also violated what Senator Sanders himself had told Senator Dial was necessary for the majority-black districts (i.e. at least 62% black). J.A. 177.

Randy Hinaman, the consultant who actually drew the lines, testified that he was concerned that preclearance would be denied if the black population percentage in a majority-black district was "significantly below" the old percentage. J.A. 88. This was the political consultant's testimony about his understanding of Section 5 when responding to a direct question at trial: "[I]f I was significantly below [the 2010 census percentages as applied to 2001 lines] I was concerned about that being retrogression that would be looked upon unfavorably by the Justice De-

partment under Section 5." J.A. 88. He similarly testified in his deposition that: "I thought if we had large deviations from previous percentages that that would potentially create preclearance problems with the Department of Justice." APX 75 at 24-25. He did not want a district to "go[] from 60 percent to 51 [percent] or something like that." APX 75 at 61:7-11.

B. The drafters had a strong basis in evidence to avoid reducing black population in the preexisting majority-black districts to prove that the plans had no retrogressive effect.

The drafters' strategy was a reasonable way to prove that the new plans did not have retrogressive effects. The burden under Section 5 is on *the state* to establish that a plan does not have the effect of retrogressing the position of a racial minority. *See South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966). It is not a matter of defending against litigation; it is a matter of proving the *absence* of retrogression.

It is "never easy to prove a negative." *Elkins v. United States*, 364 U.S. 206, 218 (1960). But in 2006, Section 5 became even more burdensome because Congress amended the Voting Rights Act to prohibit any plan with the "effect of diminishing the ability" of racial minorities in a majority-minority district to "elect their preferred candidates of choice." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, P.L. 109-246, 120 Stat. 577 (2006). To prove that the plans did not "diminish the ability of" black

voters to elect their "candidates of choice," the drafters reasonably sought, where possible, not to decrease the black population in the preexisting black districts.

1. The drafters' preclearance strategy was reasonable.

The drafters focused on the black population percentages in the districts because DOJ's guidelines told them to. Those guidelines state that a "comparison of the census population of districts in the benchmark and proposed plans" is "the important starting point of any Section 5 analysis." *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011). Indeed, when a state submits a plan for preclearance, the DOJ's regulations require it to provide *only* population data and maps. *See* 28 C.F.R. §§51.27(q); 51.28(a)(1) & (b)(1). DOJ's guidelines say that it will use that data as "the important starting point" to determine "whether the submitted change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race…." 28 C.F.R. § 51.52(a).

This is consistent with Section 5 caselaw, which holds that a deeper inquiry into a minority's ability to elect is unnecessary if population statistics alone reflect that ability. "Placing black voters in a district in which they constitute a sizable and therefore 'safe' majority ensures that they are able to elect their candidates of choice." *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993). Therefore, under Section 5, if a racial minority "constitutes a supermajority in a dis-

trict," there is "no need to make further inquiries into minority voters' ability to elect." *Texas*, 831 F. Supp. 2d at 263. The Court's retrogression analysis in *Beer* consisted, entirely, of a "straightforward" comparison of the racial characteristics of the old and new districts. *Beer v. United States*, 425 U.S. 130, 142 (1976). *See also Vera*, 517 U.S. at 983 (Section 5 could "justify maintenance . . . of the African-American population in District 18"); *United Jewish Org. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 164 (1977) ("[T]he percentage of eligible voters by districts is of great importance to [Section 5] inquiry.").

We agree with the plaintiffs that it is *theoretically possible* for a plan to reduce a majority-black district's population and still be precleared. *See also* NAACP Br. 12. The plans here, for example, reduced the black population in a number of districts. But the counterpoint is also true: avoiding a reduction in a majority-black district is *one way* that a state can meet *its* burden to establish non-retrogression.[18] The state had to generate evidence to prove the negative proposition that its plans were not retrogressive. By avoiding a reduction of black population in preexisting majority-black districts, the state generated that evidence, foreclosing a battle of experts about black voting patterns, registration rates, and other factors.

In fact, as the district court points out, this process is how the plaintiffs themselves redistricted when they were in power. J.S. App. 161-62. Dr. Reed,

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[18] The only time DOJ has apparently denied preclearance to a plan that kept the minority population stable was in a plan that replaced one group of Hispanics with another group of Hispanics that was less likely to vote.

the ADC's chairman, testified that his foremost goal in the previous round of redistricting was: "We're not going to lower the black districts." Tr. 2.165. The ALBC's brief notes that the Democrats in 2001 did not repopulate the majority-black districts to the level of the most recent election. *See* ALBC Br. App. 8a. Instead, they repopulated the majority-black districts to the same level *as they had been in 1993*. J.S. App. 21, 46. The ALBC does not explain how the difference in determining the purported "quota" justifies the Democrats' use of a "quota" but not the Republicans'.

Alabama's legislators were also not alone in preserving the population of existing majority-minority districts as a strategy to comply with Section 5 after the 2006 reauthorization. Although critical of the practice, one law professor reports that redistricters in California, Florida, North Carolina, South Carolina, Texas, and Virginia intentionally sought to preserve minority population percentages in majority-minority districts during the most recent redistricting cycle. *See* Justin Levitt, *Color by Numbers: The New Misreading of the Voting Rights Act*, 21-29 (Aug. 23, 2014) (unpublished manuscript).[19]

The plaintiffs argue that, instead of the simple task of avoiding drops in black population, the drafters should have performed a district-by-district "functional analysis." But the drafters had no reason to turn the question of compliance into a "Monday-morning 'battle of the experts.'" *Edwards v. Aguillard*, 482 U.S. 578, 596 (1987). "[D]eference is

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[19] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487426 (last visited Oct. 6, 2014).

due to [states'] reasonable fears of, and to their reasonable efforts to avoid . . . liability." *Vera*, 517 U.S. at 978. The "strong basis in evidence" standard gives the states leeway in considering race to avoid liability under the Voting Rights Act. *See Ricci v. DeStefano*, 557 U.S. 557, 582-583 (2009); *LULAC*, 548 U.S. at 520 (Scalia, J., dissenting and concurring) ("[A] State is permitted great flexibility in deciding how to comply" with the Voting Rights Act.). The drafters' strategy was within that leeway.

2. The drafters' strategy is consistent with Section 5's 2006 text.

The drafters' strategy is also consistent with the text of the 2006 reauthorization. In *Georgia v. Ashcroft*, the Court held that a court under Section 5 "should not focus solely on the comparative ability of a minority group to elect a candidate of choice . . . [because this factor] cannot be dispositive or exclusive." 539 U.S. at 480. Congress disagreed with *Georgia v. Ashcroft* and expressly reversed it. It made the "comparative ability of a minority group to elect a candidate of choice" the "dispositive or exclusive" factor.

To overturn *Georgia v. Ashcroft*, Congress added subsections (b) and (d) to Section 5 to prohibit "[a]ny" voting change that "has the purpose of or will have the effect of diminishing the ability of any" voter "on account of race or color . . . to elect their preferred candidates of choice." Voting Rights Act § 5, 42

U.S.C. § 1973c.[20] The relevant question for judging retrogressive effect is now whether minorities' preferred candidate "under the benchmark plan is *equally likely* to win under the new plan." Nathaniel Persily, *The Promise & Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 223 (2007) (emphasis added). "If not, then minorities' ability to elect their preferred candidate is diminished." *Id.*

This "ability to elect" standard is a comparative inquiry that recognizes that districts move along a continuum in their "ability to elect." "[T]he ability to elect preferred candidates, like the ability to play the violin, is a matter of degree, not a difference in kind." Persily, *supra*, at 243. Therefore, "[d]iminishing a district's ability to elect does not necessarily mean reducing it from a safe district to a hopeless district;" it could also "mean reducing a safe district to a competitive district." *Id.* As the district court explained, a plan that "substantially reduce[s] the percentages of black voters within the majority-black districts" will necessarily "diminish black voters' ability to elect their preferred candidates," even if it does not result in black voters having *no* chance to elect a candidate of choice. J.S. App. 181.

This is especially true with respect to the preexisting districts in Alabama. None of these districts was 99% black. They were all in the 50s, 60s, and 70s. And black voting-age population is two or three points less than total black population, such that a 60% black district actually has a 57% black voting-

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[20] Section 5 has recently been reclassified at 52 U.S.C. § 10304. We use the old citations so that our citations match the district court's and appellants'.

age-population. Reducing a district from 65% black voting-age population to 55% black voting-age-population will obviously "diminish" black voters' "ability to elect a candidate of choice" by making the district more competitive. In fact, the plaintiffs' expert testified that black voters in these kinds of districts would have only a "fighting chance" or "reasonable opportunity" to elect a candidate of choice. Tr. 3.51-52, 58.

3. The drafters' strategy is consistent with the 2006 legislative history.

The drafters' strategy to comply with Section 5 also finds support in the legislative history of the 2006 reauthorization. Congress was well aware that its 2006 changes would lead redistricters to preserve existing black populations in existing majority-minority districts.

First, by overturning *Georgia v. Ashcroft*, Congress effectively approved of the district court opinion that this Court had reversed. That district court had held, "[i]n large part, the retrogression inquiry looks to the plan's effect on minority voting strength by considering the number of potential African American voters in the existing and proposed districts." *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 78 (D.D.C. 2002). The court noted that "there is a correlation between a district's [black voting age population] and the likelihood that a candidate of choice will be elected in that district" and highlighted the fact that "reductions of over 10% are present" in Georgia's plan. *Id.* at 80, 82. Even though Georgia produced an expert to opine that black voters would

still have an excellent chance to elect their candidate of choice in the new districts, the district court held that Georgia had not met its burden and denied preclearance. The district court expressly reasoned that Section 5 was a "one-way ratchet." *Id.* at 98 (Edwards, J., concurring). *Compare* J.S. App. 263 (dissenting opinion) (arguing that Section 5 is *not* a "one-way ratchet").

Only one witness testified against overruling *Georgia v. Ashcroft* in the Senate, warning the Judiciary Committee that "overrul[ing]" it would be "a mistake." That witness was the ADC's counsel, Professor Richard Pildes. *See The Continuing Need for Preclearance: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 2d Sess. at 11 (2006) (statement of Richard H. Pildes).[21] When asked why he did not want Congress to impose a "diminished ability to elect" standard, Prof. Pildes responded with the same policy arguments that the ADC makes in its brief. He told Congress that a "no 'diminished ability to elect'" standard "has a rigidity and a mechanical quality that can lock into place minority districts in the south at [high black] populations that do not serve minority interests." *Id.* at 12. *See, e.g.,* ADC Br. 37 (criticizing Alabama's compliance efforts as "too rigid and mechanical"). He suggested, as an example, that "dropping the minority population" of a district "from 60 percent to 55 percent" could violate the standard. *Id.* Congress adopted the "diminished ability to elect" standard anyway.

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[21] Available at http://www.gpo.gov/fdsys/pkg/CHRG-109shrg28753/pdf/CHRG-109shrg28753.pdf (last visited Oct. 8, 2014).

Second, when overruling *Ashcroft*, Congress expressly approved of state districting plans that intentionally preserved black population in majority-black districts. The House report noted approvingly that, when Georgia redrew its congressional districts after a court overturned them in 2005, "[t]he plan it drew maintained the black voting age population in the two majority black districts . . . at almost exactly their preexisting levels, and it did the same for the other two districts . . . that had elected black Members of Congress." H.R. Rep. No. 109-478, at 24 (2006), *reprinted in* 2006 U.S.C.C.A.N 618. The ACLU's report to Congress also lauded Georgia's 2005 plan, explaining that the plan complied with Section 5 because "[t]he black percentages in the majority black districts . . . were kept at almost exactly the same levels as under the plan that had been passed by the Democratic controlled legislature in 2002." *See* Laughlin McDonald, *The Case for Extending and Amending the Voting Rights Act: Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union*, ACLU Voting Rights Project at 136 (Mar. 2006).[22]

On the other hand, when the House Committee surveyed recent practices that it said supported the reauthorization of Section 5, it highlighted redistricting plans that had reduced black population in majority-black districts. Among those practices was a Virginia county's decision to "reduce[] the African American population" in a particular district. H.R. Rep. No. 109-478, at 38. The Committee noted that

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[22] Available at https://www.aclu.org/files/pdfs/votingrights report20060307.pdf (last visited Sept. 12, 2014).

DOJ objected because "even a minute reduction would have greatly impaired African American voters' ability to elect candidates of choice." *Id.*

C. The drafters had a strong basis in evidence to avoid reducing black populations to prove that the plans did not have a "discriminatory purpose."

Under the new Section 5, the state also had the burden to prove that the plans were *not* motivated by a discriminatory purpose, as broadly defined. In *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), the Court held that Section 5 does not prohibit changes that, although motivated by a discriminatory purpose, are non-retrogressive. Congress explicitly reversed *Bossier Parish* in 2006, amending Section 5 to provide that a forbidden purpose is "any discriminatory purpose," not merely a retrogressive purpose. 42 U.S.C. § 1973c(c). Because it is the state's burden to overcome Section 5, this provision effectively created a presumption that the plans were discriminatory.

To disprove the presumption that their plans were motivated by a discriminatory purpose, the drafters based their majority-black districts on the preexisting districts that black legislators had drawn when their party was in power. They also incorporated the views and suggestions of black legislators for their own districts. J.S. App. 184. Most of those legislators told the drafters to maintain the black population in the majority-black districts at between 60% and 65%, and they proposed changes to their own districts that accomplished that goal. J.A. 51,

177, 178. This focus is consistent with voting-rights caselaw from Alabama. As we have already noted, one of the plaintiffs' experts testified in a previous Section 2 case that a 61% black district would be a district in which black voters only *might* be able to elect their candidate of choice. J.S. App. 91-92. The drafters had no reason to ignore this advice and caselaw. As Senator Dial testified, "if [he] had told" black political leaders that he knew what was best for black people in Alabama, they would have "asked [him] when [he] was going to the mental institute." Tr. 1.44-45.[23]

Imagine the strength of the purposeful discrimination argument if the Republican drafters had: (1) ignored the suggestions of black legislators for their own districts, but incorporated the suggestions of white legislators for their districts, (2) reduced the black populations in majority-black districts by flooding them with white voters who tend to vote Republican, (3) created scores of districts that were less than the 60% to 65% threshold that black political leaders referenced and caselaw supported, and (4) acted in a substantially different manner than the Democrats had when they redistricted in 2001. It would have been very difficult for the state to bear *its* burden to establish that those plans did *not* have a discrimina-

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[23] This kind of thing has not gone over well in other states. In North Carolina, for example, a "white ACLU attorney" criticized a black legislator's approach to redistricting, and he responded, "I've been black all my life, I've fought for black causes, and I don't need some white woman from Atlanta telling me what to do." Maurice T. Cunningham, *Maximization, Whatever the Cost: Race, Redistricting, and the Department of Justice*, 123-24 (Praeger Publishers 2001).

tory purpose. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-67 (1977).

D. The state should have the discretion not to perform a subjective and expensive "functional analysis" for every majority-minority district.

Finally, the ADC's view—that legislators *must* perform a functional analysis for each majority-black district as part of the redistricting process—raises serious practical and constitutional problems. It is also inconsistent with the principle of allowing legislators discretion to comply with Section 5.

First, requiring state legislators to perform a race-focused functional analysis for each and every majority-black district greatly exacerbates the federalism costs of Section 5. Allowing states to compare, based on current census data, the number and population of majority-minority districts in the benchmark plan and proposed plan simplifies the process. It is an objective standard to judge retrogression that legislators can easily apply.

Second, requiring a "functional analysis" for all districts would inject racial stereotyping into redistricting in unwarranted ways. A functional analysis requires, at its first step, the identification of minority voters' purported "candidate of choice." Then the question is how many minority voters must be in a district to elect that "candidate of choice." This process, as described by the plaintiffs, "encourages a racially based understanding of the representative function," under which "geographic districts are

merely a device to be manipulated to establish 'black representatives' whose real constituencies are defined, not in terms of the voters who populate their districts, but in terms of race." *Holder v. Hall*, 512 U.S. 874, 907 (1994) (Thomas, J., concurring).

This is also a highly subjective way of complying with Section 5. For example, the plaintiffs' expert, Allan Lichtman, opined that the white incumbent in HD 73 was black voters' candidate of choice, and the ADC's brief repeats this assertion. *See* ADC Br. 33. But the ADC's chairman apparently disagreed. He testified that this incumbent legislator would not win an election if his district were majority black, instead of plurality black. The chairman explained that, in the ADC's proposed plan, he intentionally reduced the black population in HD 73 so that the white Democrat could continue to be elected. *See* J.A. 53. The ADC's chairman believed that, if there were "too many" black voters in the district, "some black would run against [the incumbent white Democrat], and we can't stop it." *See id.*

The way to avoid this stereotyping and subjectivity is by allowing states the leeway to comply with Section 5 based primarily on population statistics. If enough black voters are in a district, then we can be confident that the candidate of choice supported by black voters will win. There is no need for the state to identify black voters' "candidate of choice" so that it can then determine how many black voters must be in a district to elect *that* candidate. The voters in a district will tell the state who they want to represent them, not the other way around.

* * *

Alabama's new legislative leaders sought to comply with federal voting laws that their forebears would have resisted. They did not gerrymander "white Democratic districts" to undermine their own political party. But they balanced competing interests and preserved the status quo. They did not maximize black political influence, but they ensured that black voters would be represented in the Legislature in proportion to their share of the population. The plans they adopted may not be perfect, but they are constitutional.

CONCLUSION

The Court should affirm the judgment of the district court.

Respectfully submitted,

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APPENDIX

Comparison of black population percentages between the competing plans in all House Districts

This table compares the black population percentages for all districts in the House plan as passed, DX 403 at 1-8, the McClammy plan, C45 at 6-13, the ADC plan drafted by Dr. Reed, C42 at 6-13, and the Knight plan drafted by Mr. Cooper, C46 at 6-13.

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
1	14.90%	17.63%	17.63%	17.60%
2	3.97%	1.98%	2.06%	2.48%
3	23.74%	18.53%	18.62%	23.62%
4	12.75%	8.77%	11.44%	15.14%
5	12.42%	10.23%	9.73%	9.44%
6	16.58%	30.60%	26.45%	27.59%
7	3.85%	16.70%	11.19%	2.34%
8	20.00%	25.62%	24.46%	24.74%
9	1.89%	2.55%	11.86%	6.24%
10	16.18%	13.41%	14.11%	5.56%
11	0.58%	0.39%	0.47%	0.61%
12	1.47%	1.51%	1.47%	1.68%
13	6.27%	6.35%	1.45%	5.65%
14	2.64%	2.98%	7.11%	12.20%
15	13.78%	10.31%	9.38%	10.13%
16	10.38%	10.08%	9.00%	7.52%
17	4.18%	3.38%	2.76%	6.24%
18	5.38%	4.39%	4.39%	4.27%
19	61.25%	67.07%	67.01%	75.39%

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
20	3.84%	3.67%	3.12%	10.88%
21	8.51%	26.87%	29.64%	20.06%
22	5.74%	6.89%	6.30%	16.96%
23	3.80%	3.73%	3.72%	3.51%
24	1.50%	1.50%	1.46%	1.00%
25	15.99%	19.05%	15.60%	22.71%
26	1.55%	1.44%	1.52%	1.57%
27	1.51%	1.70%	1.65%	0.91%
28	29.35%	16.49%	17.52%	29.04%
29	3.50%	16.92%	16.31%	2.12%
30	4.37%	3.88%	5.93%	3.97%
31	15.85%	20.96%	21.06%	8.75%
32	60.05%	58.40%	56.68%	21.65%
33	21.22%	22.34%	21.30%	19.27%
34	1.73%	1.57%	1.86%	0.73%
35	16.08%	13.48%	14.98%	36.43%
36	12.19%	12.44%	10.46%	10.42%
37	29.31%	23.74%	20.85%	19.67%
38	17.93%	18.31%	29.41%	16.31%
39	5.23%	4.26%	4.24%	12.33%
40	13.25%	11.79%	13.46%	38.94%
41	11.97%	14.08%	16.04%	10.09%
42	10.97%	10.08%	11.93%	9.69%
43	6.64%	6.55%	8.09%	8.52%
44	11.48%	19.96%	27.02%	9.69%
45	15.18%	9.49%	7.86%	13.37%
46	7.53%	6.09%	6.94%	21.97%
47	20.13%	16.96%	16.48%	6.78%
48	5.65%	10.05%	9.93%	10.46%

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
49	12.92%	13.30%	11.33%	62.65%
50	8.41%	8.57%	9.09%	5.77%
51	5.88%	14.09%	7.83%	7.32%
52	60.13%	62.27%	61.34%	54.07%
53	55.83%	62.00%	56.61%	55.86%
54	56.83%	31.46%	31.40%	58.72%
55	73.55%	62.92%	66.66%	64.03%
56	62.14%	61.06%	58.16%	54.02%
57	68.47%	62.27%	61.89%	60.27%
58	72.76%	66.20%	76.98%	61.09%
59	76.72%	66.62%	64.85%	61.27%
60	67.68%	62.26%	65.38%	59.55%
61	18.89%	25.02%	18.43%	14.41%
62	15.50%	15.12%	16.53%	17.99%
63	13.41%	24.15%	20.47%	22.08%
64	14.22%	12.76%	34.38%	31.91%
65	23.98%	29.45%	26.59%	14.81%
66	25.16%	28.20%	6.00%	2.54%
67	69.15%	69.21%	68.63%	69.43%
68	64.56%	53.87%	55.19%	25.43%
69	64.21%	57.56%	56.92%	57.62%
70	62.03%	61.18%	61.66%	57.21%
71	66.90%	60.42%	59.43%	54.45%
72	64.60%	60.37%	55.37%	56.25%
73	10.23%	22.54%	38.20%	83.58%
74	24.52%	27.36%	39.83%	26.18%
75	26.43%	30.03%	21.78%	20.14%
76	73.79%	75.62%	64.36%	24.45%
77	67.04%	67.34%	62.31%	59.38%

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
78	69.99%	73.03%	74.21%	58.70%
79	11.62%	14.12%	13.55%	32.55%
80	17.19%	17.32%	17.51%	15.08%
81	19.86%	28.96%	25.39%	5.60%
82	62.14%	61.14%	57.22%	53.63%
83	57.52%	61.87%	55.99%	13.30%
84	52.35%	51.40%	52.00%	26.29%
85	50.08%	47.96%	53.94%	54.21%
86	13.46%	16.11%	14.59%	40.50%
87	8.86%	8.45%	8.82%	25.83%
88	18.23%	14.11%	16.70%	71.97%
89	32.00%	30.47%	30.25%	17.38%
90	34.65%	29.39%	39.63%	56.29%
91	15.73%	15.59%	18.03%	18.05%
92	12.64%	14.54%	13.15%	10.79%
93	17.11%	19.07%	13.81%	8.17%
94	8.21%	8.35%	8.87%	10.76%
95	4.94%	4.87%	4.86%	6.84%
96	10.23%	11.37%	11.22%	5.26%
97	60.66%	63.00%	63.59%	57.19%
98	60.02%	60.22%	61.57%	63.75%
99	65.61%	62.92%	63.55%	57.98%
100	14.98%	14.12%	10.31%	18.89%
101	17.02%	20.83%	22.65%	62.45%
102	7.90%	8.80%	8.12%	10.67%
103	65.06%	62.08%	63.03%	17.92%
104	15.79%	13.42%	13.30%	12.33%
105	9.06%	10.18%	10.30%	13.49%

Comparison of black population percentages between the competing plans in all Senate Districts

This table compares the black population percentages for all districts in the Senate plan as passed, DX 400 at 1-3, the Sanders plan drafted by Mr. Cooper, C47 at 4-6, and the ADC plan drafted by Dr. Reed, C48 at 4-6.

Senate District	Plan as Passed	Senator Sanders Plan	ADC Plan
1	10.98%	10.55%	12.75%
2	24.40%	19.69%	13.86%
3	13.68%	11.11%	10.90%
4	1.74%	1.17%	1.43%
5	6.41%	9.51%	3.41%
6	15.04%	11.09%	7.05%
7	27.34%	41.26%	47.17%
8	3.28%	2.56%	2.90%
9	1.52%	5.91%	4.61%
10	12.27%	6.07%	13.04%
11	14.96%	26.67%	33.76%
12	20.10%	11.29%	11.99%
13	20.64%	27.79%	26.65%
14	14.08%	14.81%	11.71%
15	14.49%	11.53%	8.24%
16	11.83%	12.48%	11.81%
17	5.36%	6.66%	7.31%
18	59.10%	58.49%	61.32%
19	65.31%	65.30%	62.89%
20	63.15%	62.82%	65.10%

Senate District	Plan as Passed	Senator Sanders Plan	ADC Plan
21	15.50%	17.29%	16.96%
22	21.52%	20.43%	29.66%
23	64.84%	57.75%	61.23%
24	63.22%	56.90%	60.43%
25	22.82%	34.06%	28.89%
26	75.13%	71.28%	68.44%
27	21.15%	22.75%	20.16%
28	59.83%	51.55%	60.38%
29	15.01%	18.77%	13.24%
30	21.95%	18.63%	14.90%
31	19.40%	23.63%	19.83%
32	7.84%	7.74%	7.81%
33	71.64%	71.83%	65.83%
34	12.69%	14.17%	11.34%
35	19.11%	18.87%	25.12%

Population by county in Alabama from APX 19.

County	Total Population	% Black Population
Macon	21,452	83.5%
Greene	9,045	81.8%
Sumter	13,763	75.2%
Lowndes	11,299	73.9%
Wilcox	11,670	72.8%
Bullock	10,914	70.6%
Dallas	43,820	70.0%
Perry	10,591	69.0%
Hale	15,760	59.2%
Montgomery	229,363	55.4%
Marengo	21,027	52.2%
Barbour	27,457	47.4%
Conecuh	13,228	47.0%
Clarke	25,833	44.3%
Butler	20,947	43.8%
Choctaw	13,859	43.7%
Russell	52,947	42.8%
Jefferson	658,466	42.5%
Monroe	23,068	42.4%
Pickens	19,746	42.2%
Chambers	34,215	39.4%
Pike	32,899	37.4%
Mobile	412,992	35.3%
Escambia	38,319	32.5%
Talladega	82,291	32.3%

County	Total Population	% Black Population
Coosa	11,539	31.4%
Tuscaloosa	194,656	30.1%
Henry	17,302	29.1%
Tallapoosa	41,616	27.1%
Houston	101,547	26.6%
Washington	17,581	25.3%
Madison	334,811	25.1%
Crenshaw	13,906	24.1%
Lee	140,247	23.4%
Bibb	22,915	22.4%
Calhoun	118,572	21.4%
Elmore	79,303	20.6%
Randolph	22,913	20.6%
Dale	50,251	20.6%
Autauga	54,571	18.3%
Coffee	49,948	17.6%
Colbert	54,428	16.8%
Etowah	104,430	15.8%
Clay	13,932	15.6%
Limestone	82,782	13.3%
Covington	37,765	13.1%
Morgan	119,490	12.6%
Lawrence	34,339	12.0%
Fayette	17,241	11.9%
Lamar	14,564	11.9%
Shelby	195,085	11.1%
Lauderdale	92,709	10.7%
Chilton	43,643	10.2%

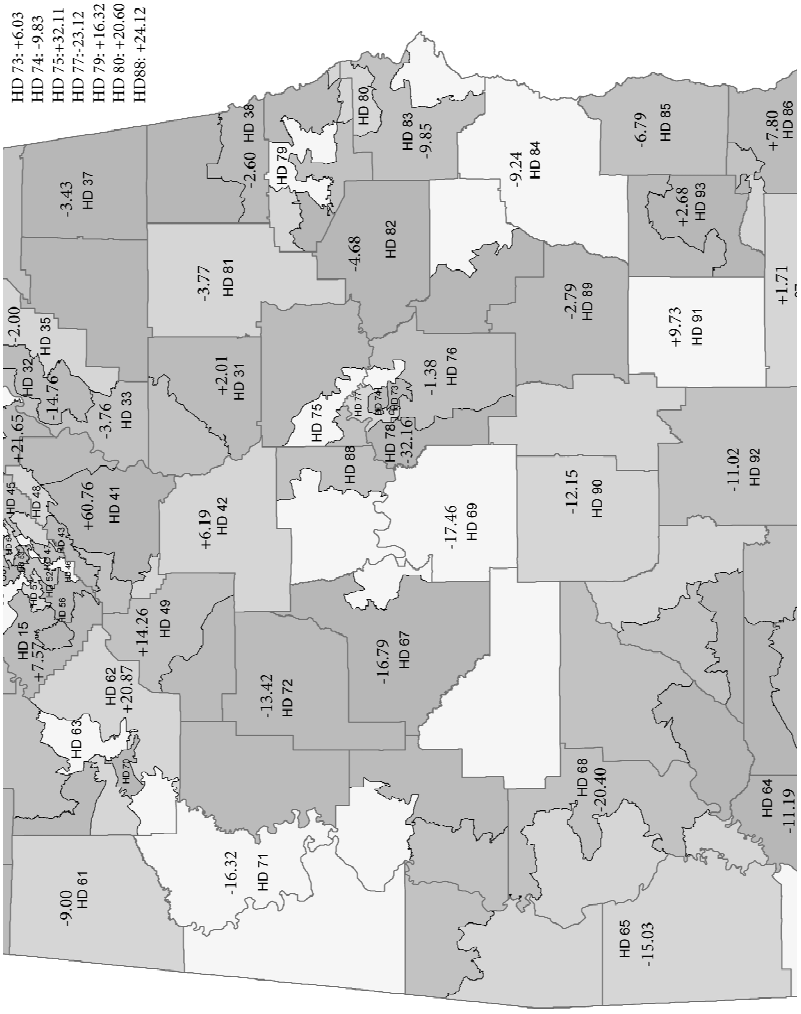
County	Total Population	% Black Population
Geneva	26,790	10.1%
Baldwin	182,265	9.9%
St. Clair	83,593	9.0%
Walker	67,023	6.4%
Cherokee	25,989	5.1%
Franklin	31,704	4.4%
Marion	30,776	4.2%
Jackson	53,227	3.9%
Cleburne	14,972	3.7%
Marshall	93,019	2.1%
DeKalb	71,109	1.8%
Blount	57,322	1.6%
Cullman	80,406	1.3%
Winston	24,484	0.7%

Population of various cities/towns in Alabama's majority-black districts from Census.gov.

To view this information online, select "Advanced Search" at the top of the American FactFinder page of the Census.gov website (http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml). Enter table name "DP-1:Profile of General Population and Housing Characteristics:2010" and click "Go." Then select the "Geographies" filter on the left side of the page and select "Place—160" in the dropdown box. In the next dropdown box, select "Alabama" and then "All Places within Alabama." Next click "Add to your Selections." When these words appear in the "Your Selections" box, close the dialog box. Select the "2010 Demographic Profile SF" dataset. From the resulting page, either download the entire data set for all Alabama cities or select the desired city from the dropdown box labeled "Geography."

City/Town	Total Population	% Black Population
Bessemer	27,456	71.2%
Birmingham	212,237	73.4%
Center Point	16,921	62.9%
Clayton	3,008	63.8%
Eutaw	2,934	80.2%
Evergreen	3,944	62.4%
Fairfield	11,117	94.6%
Forestdale (CDP)	10,162	71.4%
La Fayette	3,003	68.8%
Lanett	6,468	57.5%

City/Town	Total Population	% Black Population
Livingston	3,485	63.9%
Marion	3,686	64.1%
Midfield	5,365	81.6%
Mobile	195,111	50.6%
Monroeville	6,519	55.7%
Montgomery	205,764	56.6%
Prichard	22,659	85.8%
Selma	20,756	80.3%
Selmont-West Selmont (CDP)	2,671	93.9%
Tuskegee	9,865	95.8%
Union Springs	3,980	71.8%
York	2,538	85.6%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