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

BRIEF OF THE SPEAKER OF THE ALABAMA HOUSE OF REPRESENTATIVES AND PRESIDENT PRO TEMPORE OF THE ALABAMA SENATE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

Christopher W. Weller
Counsel of Record
CAPELL & HOWARD, P.C.
150 South Perry Street
P. O. Box 2069
Montgomery, AL 36102
cww@chlaw.com
(334) 241-8000

Marc James Ayers
BRADLEY ARANT BOULT CUMMINGS LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203
mayers@babc.com
(205) 521-8598

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INTEREST OF THE AMICI CURIAE

Amici curiae, the Speaker of the Alabama House of Representatives, Mike Hubbard, and the President Pro Tempore of the Alabama Senate, Del Marsh, are constitutionally-recognized presiding officers of their respective legislative chambers and were involved in passage of the redistricting plans at issue in this case. Through this brief, *amici* seek not only to represent the interests of their respective chambers in upholding the redistricting plans, but also in preserving fundamentally important principles of federalism regarding the essentially local function of redistricting.[1]

SUMMARY OF ARGUMENT

The district court correctly granted judgment in favor of the Appellees with regard to the challenges to the Alabama Legislature's 2012 redistricting plans. The district court's judgment takes proper account of the realities facing the Alabama Legislature at the time, including the historical context for the Legislature's enactment of the 2012 redistricting plans by addressing Alabama's difficult, but successful, efforts to provide equal access to the voting process and equal

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief.

participation by minorities in state government. The monumental task the 2012 Legislature faced in conforming the districts to the constitutional mandate of one person, one vote, is illustrated by the history of the Democrat-controlled Legislature's gross malapportionment of the districts in the 1993 and 2001 redistricting plans, as exposed by the 2010 Census.

In reality, the Appellants' challenge to the redistricting plans is a naked political dispute raised in response to the dramatic realignment of political power in Alabama during the last two decades. In rejecting such politically-based arguments and in focusing only on the relevant facts, the district court maintained a proper respect for the important, guiding principles of federalism often emphasized by this Court in redistricting matters. As the district court did here, when reviewing legislative redistricting enactments courts should exercise caution and accord a presumption of good faith in the absence of a plainly-demonstrable violation of federal constitutional and statutory principles.

ARGUMENT

I. Alabama Has Thrown Off the Heavy Yoke of Its Discriminatory Past.

A brief review of Alabama's arduous journey on the road to providing equal access to the voting process and equal participation by minorities in state government provides important context and illuminates the Alabama Legislature's motivations for enacting the challenged redistricting plans, *see* 2012 Ala. Acts No. 602

(House Plan) and No. 603 (Senate Plan). As set forth below, that motive was, above all, to ensure fairness and equal representation pursuant to the bedrock constitutional principle of "one person, one vote."

Much ink has been spilled in recounting Alabama's tragic history during the early civil rights era. As it engaged in the 2012 redistricting process, the first Republican-controlled Legislature since Reconstruction was burdened by Alabama's tumultuous history of systemic and invidious discrimination indelibly printed on the culture of its state government and citizenry. When Congress applied Section 5's preclearance mechanism to Alabama in 1965, the State had dismally low black voter registration and turnout rates, and regularly witnessed elections characterized by overt appeals to race. Less than 20% of eligible black voters were registered to vote, whereas over 70% of eligible white voters were registered to vote. *See* H.R. Rep. No. 89-439, at 5; S. Rep. No. 94-295, at 6 (1975); *see also Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2624 (2013) (noting that "[s]hortly before enactment of the Voting Rights Act, only 19.4 percent of African-Americans of voting age were registered to vote in Alabama. . . . .") (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966)).

Minority participation in state government was likewise nonexistent. White Democrats dominated and controlled the Legislature.[2] In the summer of 1970,

[2] Just four years before the infamous civil rights march in the City of Selma across the Edmund Pettus Bridge on "Bloody Sunday," March 7, 1965, only 156 of 15,000 voting-age blacks in Lowndes County were registered to vote. *See* H.R. Rep. No. 89-439, at 5 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441. Today, Selma is

when the state Democratic Party nominated George Wallace, Alabama did not have a single black legislator. *See* Charles S. Bullock, III & Richard Keith Gaddie, *An Assessment of Voting Rights Progress in Alabama* tbl.5 (Am. Enter. Inst. 2005), *available at* http://www.aei.org/files/ 2006/05/05_VRAAAlabama-study.pdf (hereinafter, "Bullock & Gaddie"). During this same time, the Department of Justice sued multiple state agencies for systemic employment discrimination, as blacks representing 25% of Alabama's population held only 3.1% of state merit systems positions. *See United States v. Frazer*, 317 F. Supp. 1079, 1086-87 (M.D. Ala. 1970).

At first, Alabama was a reluctant traveler on the journey towards equal access and participation for minorities. Other covered states likewise progressed unhurriedly, compelling Congress to renew Section 5 in 1970, 1975 and 1982. As this Court stated, Alabama was one of those states all too "familiar to Congress" in 1965 as a "geographic area[] where immediate" and extraordinary action was "necessary." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). Like an enormous freighter, Alabama moved slowly but inexorably toward reform following the 1982 reauthorization of Section 5.

Under the watchful eye of the Department of Justice, Alabama began to right the ship in the late 1980s and 1990s. By 2000, blacks had closed the voter registration and turnout gaps. *See* Edward Blum & Lauren Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the*

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governed by an African-American mayor. *Shelby Cnty.*, 133 S. Ct. at 2626.

Voting Rights Act (Am. Enter. Inst. 2006), *available at* http://bdgrdemocracy.files.wordpress.com/2012/02/20060515_blumcampbellreport-vra-gaddie.pdf. In every year since 1990, blacks have registered and voted in larger percentages in Alabama than in states outside the South. *See* Bullock & Gaddie, *supra*, tbls. 2 & 3; Voting Rights Act: the Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 44-45 (2005) (statement of Ronald Gaddie). When Congress renewed and amended Section 5 in 2006, there were no gaps. As this Court recently acknowledged in *Shelby County, Ala. v. Holder*, "[v]oter turnout and registration rates now approach parity," "minority candidates hold office at unprecedented levels," and "[t]he tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years." 133 S. Ct. at 2621, 2625 (internal quotations omitted).

The widespread disenfranchisement that characterized Alabama during the early civil rights era has long vanished. Black voters are now more likely to register and politically mobilize in active support of candidates.[3] *Alabama Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1286 (M.D. Ala. 2013) ("*ALBC*"). In fact, in the 2004, 2008 and 2012 general elections, Alabama black voter participation exceeded white voter participation. *See* S. Rep. No. 109-295, at 11 (July 26, 2006); Bullock & Gaddie, *supra*, tbl.3; *Voting and Registration in the Election of November 2008*, U.S. CENSUS BUREAU tbl.4b, *available at*

[3] The Court recently discussed these marked improvements in black voter registration and participation in *Shelby County*, 133 S. Ct. at 2625-26.

http://www.census.gov.hhes/www/socdemo/voting/publications/p20/2008/ tables.html; *Voting and Registration in the Election of November 2012*, U.S. CENSUS BUREAU tbl.4b, available at http://www.censusgov/hhes/www/socdemo/voting/publications/p20/2012/tables.html. In the 2012 general election, black voter participation exceeded white vote participation by 4% (66.2% v. 62.2%). *Voting and Registration in the Election of November 2012*, *supra*, tbl.4b.

As this Court noted in *Shelby County*, "history did not end in 1965." 133 S. Ct. at 2628. In contrast to the early days of the Civil Rights Act, the Alabama of today is no longer the defiant Alabama of water cannons, police dogs and voter intimidation; rather, it has joined the community of states providing equal access to the voting process and equal participation by minorities in state government. The electoral results of the last two decades reflect this progress. Since 1993, black voters have successfully elected candidates of their choice in majority-black districts. *ALBC*, 989 F. Supp. 2d at 1286. Currently, black members of the Democratic Party represent 26 of 27 majority-black House districts and 7 of 8 majority-black Senate districts. The number of majority-black Alabama House and Senate districts is roughly proportional to the black voting-age population in Alabama. Under the challenged Acts, 22.86% and 26.67% of the Senate and House districts, respectively, are majority-black districts and are populated by roughly the same percentages of Alabama's black population as in the 1993 and 2001 plans. *Id.* at 1253. By 2006, the number of black elected officials in Alabama had increased almost 500%, from 161 to 756. Bullock & Gaddie, *supra*, tbl.4.

This dramatic transformation is further evidenced by a record devoid of any evidence of overt, invidiously discriminatory voting rights violations or campaigns laced with appeals to offensive racial stereotypes. Long gone are literacy and knowledge-of-government tests and other cynical mechanisms of electoral gamesmanship used to deny black Alabamians their franchise and proper representation in state government. Moreover, it is undisputed that the Department of Justice has not objected to a single statewide preclearance submission in more than 17 years.[4] In fact, in the decade preceding Congress's renewal of Section 5 in 2006, the DOJ objected to only 0.06% of preclearance submissions from all levels of government in Alabama. *Id.*

Not only did black representation greatly increase in state government during the 1990s through the present, but also equal employment opportunities in merit systems positions across state agencies increased dramatically. By 2003, "African-Americans constituted 39% of Alabama's government workforce, a figure more than 10 percentage points greater than their representation in the general population." *United States v. Flowers*, 444 F. Supp. 2d 1192, 1193 (M.D. Ala. 2006) (known as "*Frazer/Flowers*"). Based on this progress, the Department of Justice agreed to the dissolution of all outstanding injunctive orders entered in *Frazer/Flowers*, explaining that the injunction was no longer appropriate

[4] Minority registration and voting levels, minority participation in government and preclearance submissions and DOJ objections serve as guideposts in assessing progress of states covered by the Voting Rights Act. *See City of Rome v. United States*, 446 U.S. 156, 180-181 (1980).

because "the racial make-up of Alabama's government [wa]s dramatically different from what it was in 1970."[5] *Id.*; *see also* 11/20/2012 Order, *United States v. Director of the Ala. Dep't of Personnel, et al.*, Case No. 2:68-cv-02709 (M.D. Ala. 2012). The same district court allowed a 12-year consent decree to expire in December 2006 in a related class action brought on behalf of black merit system employees and applicants challenging racially discriminatory employment practices by the Alabama Department of Transportation. *See Reynolds v. Ala. Dep't of Transp.*, No. 2:85cv665-MHT, 2006 WL 3924790 (M.D. Ala. 2006). That court also decertified a related class action against 27 state agencies for alleged racially discriminatory employment practices. *See* 11/30/2009 Order, *In re Employment Discrim. Litig. Against the State of Alabama, Eugene Crum, Jr., et al. v. State of Ala., et al.*, No. CV-94-T-356-N (M.D. Ala. 2009).

The record established in the court below reveals a State that has thrown off the heavy yoke of its discriminatory past and that has achieved substantial progress in the area of civil rights. It is no longer a state characterized by "concerted acts of violence, terror and subterfuge in order to keep minorities from voting." *Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 197, 226 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part.). In fact, this Court recently invalidated Section 4(b)'s coverage

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[5] The *Frazer/Flowers* injunctive orders set out an extensive remedial framework to redress discrimination. The district court also terminated various provisions of the *Frazer/Flowers* consent decree in 2005 and 2006. *See United States v. Flowers*, 444 F. Supp. 2d 1182 (M.D. Ala. 2006) (*Flowers II*); *United States v. Flowers*, 372 F. Supp. 2d 1319 (M.D. Ala. 2005) (*Flowers I*).

formula in *Shelby County, Alabama v. Holder*, based in part on Alabama's sustained level of progress. 133 S. Ct. 2612 (2013). The "blight of racial discrimination in voting" that "infected the electoral process" is no more. *Katzenbach*, 383 U.S. at 308.[6]

In every material respect, the Alabama of today is significantly different from the defiant and unrepentant Alabama of previous decades. Alabama does not claim to have successfully rooted out every last vestige of racial discrimination; like many states, Alabama still grapples with these issues in 2014. Any claim that Alabama remains a permanent prisoner of its tragic past, however, is unsupported by the record.

Cognizant of Alabama's turbulent civil rights history, the 2012 Legislature undertook significant,

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[6] As evidence of alleged "racial cleavage" in Alabama, the NAACP points to unsuccessful voter referenda in 2003 and 2004 to remove the remnants of Jim Crow provisions, including invalidated poll tax language, from the Alabama Constitution. NAACP Br. at 10. Yet when the Republican-controlled legislature passed similar legislation in 2012, Alabama Democrat party leaders, including ADC Chairman Joe Reed and Senator Hank Sanders, vocally and publically opposed the amendment, calling it "a hoax on the people of Alabama" and a "wolf in sheep's clothing." *See* Debbie Elliot, *Ala. Racist Language Draws Unexpected Foes*, NAT'L PUB. RADIO (Nov. 1, 2012, 12:38 PM), http://www.npr.org/2012/11/02/164107184/ala-racist-language-measure-draws-unexpected-foes; Kim Chandler, *Black lawmakers, AEA urge voters to reject amendment taking Jim Crow language out of Alabama Constitution*, AL.COM (Oct. 19, 2012), http://blog.al.com/spotnews/2012/10/black_lawmakers_urge_voters_to.html. Furthermore, to be clear, the failure of the referenda had nothing to do with the desire of Alabama citizens to remove racist language from the Alabama Constitution, but rather they failed due to an ancillary fight regarding the alleged effect of the referenda on education funding. *Id.*

additional steps to ensure a fair, race-neutral redistricting process based on the overriding constitutional principle of "one person, one vote" to correct two decades of intentional and severe malapportionment by Democrat-controlled legislatures.

II. A History of Gross Malapportionment of Districts by Democrat-Controlled Legislatures, and Not Issues of Race, Greatly Affected Creation of the Challenged Plans.

A. *The Democrat-controlled Legislature created significantly malapportioned districts in 1993 and 2001.*

A review of Alabama's 1993 and 2001 redistricting plans is also crucial to a proper understanding of how and why the Legislature drew the districts approved by the 2012 Acts. The lasting effect of those plans compellingly establishes that race was not the primary factor affecting the Legislature's creation of the 2012 plans, but rather correcting the severe and systematic malapportionment of districts by previous Democrat-controlled Legislatures.

For 136 consecutive years following Reconstruction, the State Democratic Party controlled both houses of the Alabama Legislature and, beginning in 1993, began drawing districts to protect those majorities. Under the 1993 and 2001 plans, the Democrat-controlled Legislature used a population deviation number of 10% (±5%) to "systematically underpopulate[] majority-black districts at the expense of majority-white districts that the Legislature, in turn, overpopulated." *ALBC*, 989 F. Supp. 2d at 1294-95. As

noted by the United States, "[t]he malapportionment was particularly severe in Alabama's majority-black districts, all of which were under populated." U.S. Br. at 4. The Democrats began this pattern of malapportionment with the creation of the Reed-Buskey plans in 1993, when they proposed, and a state court approved, 27 majority-black districts, of which 25 were underpopulated by more than 4%. *ALBC*, 989 F. Supp. 2d at 1242. The Reed-Buskey plan also underpopulated all eight majority-black Senate districts, six of them by more than 4%. *Id.*

This trend continued following the 2000 Census. As acknowledged by the United States, the Democrat-controlled legislature "had generally underpopulated majority-black districts and overpopulated nearby majority-white districts." U.S. Br. at 4-5. The district court found, "the districts established in 2001 were severely malapportioned in the light of the population data from the 2010 Census. . . ." *ALBC*, 989 F. Supp. 2d at 1241. The Democrat-controlled Legislature systematically underpopulated majority-black House districts and overpopulated adjacent predominantly white districts as part of their self-described successful partisan gerrymander in 2001.[7] In the 2001 plans, 22 of 27 majority-black House districts were underpopulated by more than 5%, and six of eight majority-black Senate districts were underpopulated, with four of those

[7] As noted by the district court, State Democratic Party leaders filed, as *amici curiae*, a brief in this Court citing the 2001 districts as an example of a successful partisan gerrymander. *ALBC*, 989 F. Supp. 2d at 1243-44 (citing Brief for Leadership of the Alabama Senate and House of Representatives: Lowell Barron, et al. as Amicus Curiae Supporting Appellees, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02-1580)).

districts underpopulated by more than 4%. *Id.* at 1242. The resulting malapportionment was manifest in the 2002 General Election results. Then, the Democrat leadership openly bragged that in 2002, with just 51% of the statewide vote, the Democratic Party controlled 71% of the Senate seats and 60% of the House seats. *Id.* at 1244.

During this same time period, Alabama underwent a significant realignment of political power. Republicans began winning presidential and statewide elections with increasing frequency. Additionally, despite the Democrats' overtly-partisan 2001 gerrymander, Republicans won a supermajority in both houses of the Legislature in 2010. By 2012, not one Democrat occupied a state-wide elected office. As set out more fully below, *see* discussion *infra* § III, this wholesale realignment of political power in Alabama is *the* motivating factor in this litigation.

B. *The 2010 census exposed the gross malapportionment the Democrat-controlled Legislature created in its 1993 and 2001 plans.*

New data from the 2010 Census dramatically exposed the gross malapportionment of Alabama's existing districts, revealing that the population in 80 of the 105 Alabama House districts deviated from the ideal population by more than 5%, of which 22 districts deviated above or below the ideal population by more than 20%. *Id.* at 1241. District 41, a majority-white House district in Shelby County, was overpopulated by 60.76%. *Id.* Six other white majority districts were overpopulated by 21.65 to 42.68%. *Id.* In contrast, the

2010 Census also revealed that nine of the 27 majority-black House districts were underpopulated by more than 20%, and that all 27 majority-black districts in the House were underpopulated by more than 5%, the maximum deviation used under the 2001 plan. *Id.*

The Senate districts were no better. According to the 2010 Census, 24 of 35 districts deviated from the ideal population by more than 5%, of which four districts deviated by more than 20%. *Id.* Four white-majority districts were overpopulated between 15.09 and 31.12%. *Id.* at 1242. The malapportionment was especially significant in the majority-black Senate districts. Seven of the eight majority-black Senate districts were underpopulated by more than 10%, and two of those districts were underpopulated by more than 20%. *Id.* at 1241. Plaintiffs' expert, William Cooper, acknowledged that the Legislature needed to make *significant changes* to district lines because of the severe malapportionment of the existing districts. *Id.* at 1271.

This bulwark of systematic, persistent and gross malapportionment by the Democrat-controlled Legislature was the state of affairs when the 2012 Legislature set out to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).[8] Facing this monumental challenge, the Legislature's goal, "[a]bove all," was "to correct the

[8] The dissenting district judge ignores the 20-year pattern of gross malapportionment wrought by Democrat-controlled Legislature, choosing instead to discount the thorny challenges the Democrats created with their overtly partisan gerrymanders.

severe malapportionment," creating "more equality among districts throughout the State[,]" in order "to comply with the constitutional mandate of one person, one vote." *ALBC*, 989 F. Supp. 2d at 1294, 1296-97. At the same time, the Legislature was facing a more stringent preclearance standard under the 2006 amendment to Section 5.[9] *Shelby Cnty.*, 133 S. Ct. at 2621 (noting that in 2006, Congress extended the operation of Section 5 and amended its text "to prohibit more conduct than before").

As the dissenting district judge's opinion illustrates, failure to consider the Democrat-controlled Legislatures' prolonged history of political chicanery and the resulting significant malapportionment of the districts offers a severely skewed recitation of the facts and one that ignores the Legislature's paramount concern: creating districts that satisfy the constitutional principle of "one person, one vote." Context matters, however, because it is this past that illuminates the present.

[9] Congress added subsections (b) through (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" and stated that the purpose of that new language was "to protect the ability of such [voters] to elect their preferred candidates of choice." Voting Rights Act § 5, 42 U.S.C. § 1973c.

III. This Is a Political Dispute Masquerading as a Legal Controversy.

A. *There has been a dramatic political realignment in Alabama.*

This case is not about race or even civil rights issues generally; rather it is about the Alabama Democratic Party's loss of 136 years of uninterrupted legislative power. As their party affiliation rapidly declined, Democratic Party leaders pulled out all the stops in 2001 to create what they publicly touted as the perfect political gerrymander. Those redistricting plans ran directly into a brick wall of political realignment, as the Democratic Party began suffering consistent election losses in both state and federal elections.

Between 1875 and 1987, no Republican served as Governor. Since 1987, a Republican has held the Governor's office for 21 of the last 27 years. In 1994, no Republican served on the Supreme Court of Alabama. In contrast, no Democrat has served on the court since 2011. Four decades ago, not one Republican held a statewide elected executive branch office. Now, not one Democrat holds a statewide executive branch elected office. In 2009, the Democrat Party controlled both houses of the Alabama Legislature with healthy majorities of 60 of 95 House seats and 20 of 35 Senate seats. In 2010, Republicans won supermajorities in both houses of the Legislature, winning 22 of 35 Senate seats and 65 of 95 House seats, and they did so using the same gerrymandered districts the Democrat-controlled Legislature created in 2001. This single election cycle ended 136 uninterrupted years of Democratic Party control of both houses of the Legislature.

The outcome in federal elections mirrors Republican successes in state elections. From 1877 to 1980, no Republican served as an Alabama U.S. Senator. Republicans now have held both U.S. Senate seats since 1996. In 1991, Democrats held five of the seven U.S. House seats. Now, Republicans hold six of the seven U.S. House seats. No Democratic presidential candidate has prevailed in Alabama since Jimmy Carter. Thus, in just two decades, there has been a dramatic change in the body politic of Alabama.

This rapid loss of political influence drove the Alabama Democratic Conference and the Alabama Legislative Black Caucus to file their lawsuits in one last desperate attempt to hold on to the artificial advantage they created through their severely malapportioned districts in 1993 and 2001. Politics, and not civil rights, is the wellspring of their lawsuits; Appellants simply want the Court to redraw the districts to shield them from their significant losses and to enshrine the unfair advantage created through earlier partisan gerrymanders.

B. *The record establishes the political nature of the Appellants' challenge.*

The record compellingly reveals the naked political character of this dispute. For example, rather than offer evidence that race motivated the Republican-controlled Legislature to unfairly draw the districts in 2012, the record is rife with testimony by Democrat representatives lamenting their loss of political power and status. Principal among their complaints is the Republicans' frequent use of cloture votes to shut off debate and to vote on legislation that the Democrats strongly oppose, *e.g.*, the 2013 Alabama Accountability

Act.[10] One Democrat representative (Representative Laura Hall) lamented that she had been "clotured more during this last quadrennium than the entire 20 years [she had] been in session." *ALBC*, 989 F. Supp. at 1265. Of course, her testimony is not surprising given that her party retained control of the Alabama House of Representatives for the preceding 136 years until 2010. Another Democrat representative, Senator Quinton Ross, testified that the Republican supermajority had "abused its power" by adopting legislative procedures to pass bills opposed by his party. *Id.* at 1263. Others complained about the loss of their ability to adequately represent their districts in light of their minority status and the inability to engage in debate and offer legislative amendments in the manner they previously had done as members of the majority party. *Id.* at 1262-63. As the district court found, however, these complaints are the natural consequences of losing elections; that "the decision to invoke the rule of cloture to pass legislation being filibustered by a minority party is not an invidiously discriminatory tactic." *Id.* at 1260.

Other facts establish that this lawsuit is merely political sour grapes. As cogently described by the district court, the Plaintiffs offer a "heads I win, tails you lose" argument. *Id.* at 1303. They complain about a loss of power and the rise of allegedly-oppressive Republican supermajorities that occurred under their watch *and*

[10] Passage of the Accountability Act of 2013 was a particularly sore subject for the Democratic Party. The Act, which an Alabama teachers' union (the Alabama Education Association) vehemently opposed, created a scholarship program to provide tuition and other assistance to enable K-12 students to escape chronically-failing public schools.

using their gerrymandered district maps. Now that the Republicans are in charge, Democrats claim that simply maintaining the relative black populations in majority-black districts they created is discriminatory because it overpopulates those districts and dilutes the black vote.[11] It takes a brass neck to make this argument. The Democrat-controlled Legislature did the same thing in 2001 after the 2000 Census revealed that majority-black districts were substantially under-populated. It redrew the districts by shifting more black voters into the majority-black districts, while carefully maintaining the same relative black populations of 60% in each district.

Second, several black elected officials and Democratic Party leaders conceded at trial that they had recommended that the Legislature maintain existing majority-black districts with black populations of 60 to 65%, claiming that the population statistics were much higher than the actual voters in the district.[12] *ALBC*, F.

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[11] The Democrats, who now claim that the Republicans have exercised their authority in an unfair manner, have very short memories regarding their own tactics. For example, in 1998, after Steve Windom became the first Republican to win the Lieutenant Governor seat since 1874, the Democrat-controlled Senate voted to strip the Lieutenant Governor of the power to make committee assignments and direct the flow of legislation. *See* David Firestone, *In Alabama, Senate Ends Bitter Rift Over Leader*, N.Y. Times, Mar. 31, 1999, *available at* http://www.nytimes.com/1999/03/31/us/in-alabama-senate-ends-bitter-rift-over-leader.html.

[12] Although now claiming racial unfairness, black Democrat Senator Hank Sanders recommended during public hearings that the black population of majority-black districts be maintained at 62%, and black Representative Tom Jackson asked that the black population of his majority-black district be maintained at 62 to 65%. *ALBC*, 989 F. Supp. 2d at 1246. Joe Reed, chairman of the Alabama Democratic Conference since 1970 and designer of several

Supp. 2d at 1246, 1266, 1302. Third, the Democratic Conference's expert previously testified in another Alabama case that even a 61% majority-black district could not guarantee black voters could elect the candidate of their choice and that no clear minimum could be set to determine across jurisdictions what voting-age population is necessary to provide a minority group the opportunity to elect its candidate of choice. *Id.* at 1272, 1303.

In addition, the Legislative Black Caucus and Democratic Conference plaintiffs cynically attack large portions of the maps they proposed and that the Permanent Legislative Committee on Reapportionment accepted. For example, the Committee incorporated substantial portions of the Montgomery County House district maps Representative Thad McClammy submitted. *Id.* at 1248, 1275, 1302. McClammy, a black Democrat, proposed the district map as a "consensus map" created by black representatives serving in Montgomery House districts. *Id.* at 1248. Notably, McClammy's proposed map also moved House District 73 to Shelby County, about which Plaintiffs now complain. *Id.*

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redistricting plans in Alabama, recommended maintaining black populations of majority-black districts at 60 to 65%. *Id.* at 1266, 1302. Senator Dial, a former Democrat and co-chairperson of the Reapportionment Committee, provided undisputed testimony that no member who represented a majority-black Senate district ever asked for a district with a black population of only 55% and that, in fact, black Senators would have rejected any proposal to populate majority-black districts at a 55% level. *Id.* at 1275. The record contains no evidence of any consensus as to the minimum black population necessary for a majority-black district to elect a candidate of its choice.

Senator Roger Smitherman, a black Democrat, acknowledged that he submitted a map for the majority-black districts in Jefferson County (Birmingham) to the Committee on Reapportionment co-chairperson Senator Dial; that he asked Dial to maintain a similar racial balance as the previous districts, which Dial agreed to do as long as it did not result in retrogression in other districts; and that Dial adopted a substantial majority of Smitherman's proposed map. *Id.* at 1261, 1274. The Committee also deferred to the requests of black Democrat Senator Vivian Figures, as well as other members of the Mobile legislative delegation not to create a new district in Mobile.[13] *Id.* at 1274-75. Another black Democrat, Senator Hank Sanders, wanted to gain minority members from a bordering district and give up population in Autauga County, which Senator Dial partially accommodated. *Id.* The Committee on Reapportionment further accommodated requests for changes to the final plans made by several Democratic representatives who wanted to swap precincts in the Birmingham area and others who made requests regarding a shared district border in northwest Alabama. *Id.* at 1252. The fact that they now attack the districts they helped create further exposes their political skullduggery.[14]

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[13] Senator Figure's lament regarding the loss of political power as a member of the minority party should fall on deaf ears. As the district court found, Figures had no problem voting for the Democrats' deliberate partisan gerrymander and for majority-black districts with similar percentages of black voters in 2001. *ALBC*, F. Supp. 2d at 1302.

[14] The Republican-controlled Legislature not only used the same procedures adopted by the Democrat-controlled Legislature in 2001, but also it improved on those procedures. For example, whereas the

Other facts similarly give away the political nature of the Democrats' challenge. For example, the votes on the 2012 plans were straight-party votes in both houses, and not votes on racial lines. Moreover, the results of the 2012 plans are contrary to any claim that the plans were drawn to harm black voter interests through packing. The House plan actually added a new majority-black district (for a total of 28); slightly increased the black population for 14 majority-black House districts, while slightly decreasing the black population of 13 majority-black House districts; and slightly increased the black population in five of eight majority-black Senate districts, while slightly decreasing the black population of the remaining three majority-black Senate districts – hardly the stuff of a packing case. *Id.* at 1253.

Moreover, the Democratic Conference's expert conceded at trial that if the Republican-controlled Legislature had intended to pack black voters into majority-black districts, it could have systematically overpopulated all of the majority-black districts, which the 2012 Acts did not do. *Id.* at. 1272.[15] In fact, the 2012

2001 Reapportionment Committee held its hearings on their 2001 plans *after* the Legislature passed the plans, the 2012 Committee solicited public comments before drafting the plans. *ALBC*, 989 F. Supp. 2d at 1246. The 2012 Committee also held more public hearings than in 2001. *Id.* at 1289. Moreover, the Legislature considered and voted on the 2012 plans in a Special Session dedicated solely to redistricting. *Id.* at 1258, 1275.

[15] More specifically, the Republican-controlled Legislature, using a $\pm$1% population deviation guideline, could have maximized its partisan advantage by overpopulating majority-black districts by 2%, while underpopulating adjacent majority-white districts by 2%.

Legislature did the opposite, limiting its ability to draw the district lines (even for partisan gerrymandering) by adopting a ±1% population deviation guideline to ensure greater population equality. The Legislature also slightly underpopulated the overwhelming majority of majority-black districts. Even under the 2012 Acts, 21 of 28 majority black House districts and six of the eight majority-black Senate districts remain underpopulated, which is contrary to any allegation of packing.

Particularly telling is the fact that neither group of plaintiffs (nor the dissenting district judge) offer any alternative plan (or even plans for the Madison, Jefferson and Montgomery County districts) that would have added another majority-black House or Senate district as a part of a state-wide plan with 60% or more black voters in those districts that would satisfy the constitutional mandate of one person, one vote under the Equal Protection Clause of the Fourteenth Amendment while using an overall deviation in population of ±1%. *Id.* at 1264, 1266-67. All of these facts supported the Department of Justice's preclearance decision and demonstrate that race was not the primary motivating factor in the creation of the 2012 plans; that the plans "d[id] not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Section 5, 42 U.S.C. § 1973c.

In sum, this action is "a political dispute masquerading as a legal controversy." *ALBC*, 989 F. Supp. 2d at 1236. The State Democratic Party apparatus, its power rapidly waning, asks the Court to intervene and redraw the districts to protect their dwindling political interests. The Court should decline

that invitation.[16] As stated by the district court, the Voting Rights Act and the Fourteenth and Fifteenth Amendments do not mandate a "Democratic candidate Protection Program." *Id.* at 1303 (quoting Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 223 (2007)). Nor should the Court allow civil rights laws to be used to settle political scores.

IV. The District Court's Decision Properly Balances the Need for Judicial Review With Preservation of Important Principles of Federalism.

The district court's correct decision also protects the important – but sometimes forgotten – federalism interests present in any review of a state legislature's redistricting plan. As is clear in its exhaustive, detailed opinion, the district court had a proper respect for all of the facts and difficult circumstances facing the Alabama Legislature during its redistricting deliberations.

As this Court has made clear, "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well

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[16] At the same time it was losing political clout, the Alabama Democratic Party was facing an organizational and financial crisis. *See* Charles J. Dean, *The Alabama Democratic Party: Almost Bankrupt and its Executive Board Still Doubles Its Travel Budget*, AL.COM (April 11, 2013), http://blog.al.com/wire /2013/04/the_alabama_ democratic_party_a.html. Furthermore, intra-party squabbles resulted in a party split and the creation of the Alabama Democratic Majority. *See* Charles J. Dean, *The Alabama Democratic Party: 'We're Broke, Broke, Broke,'* AL.COM (May 12, 2013), http://blog.al.com/wire/2013/05/ the_alabama_democratic_ party_w.html.

settled that 'reapportionment is primarily the duty and responsibility of the State.'" *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)); *see also Growe v. Emison*, 507 U.S. 25, 34 (1993) (stating that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts"); *White v. Weiser*, 412 U.S. 783, 795 (1973) ("We have adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment.") (citing numerous cases). Of course, true, plainly-demonstrable violations of the federal constitutional and statutory principles at issue here have a proper judicial remedy which can and should be pursued with vigor. This Court has explained, however, that a state legislature's balancing of the many considerations inherent in the redistricting process should be judicially re-weighed with restraint and caution:

> Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests. Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed. The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. . . . The distinction between being aware of racial considerations and being motivated by them may be difficult to

> make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.

Miller, 515 U.S. at 915-16 (citations omitted); *see also Perry v. Perez*, 132 S. Ct. 934, 941 (2012) (noting that "redistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment," and that courts should be careful so as to not "displac[e] legitimate state policy judgments with the court's own preferences"); *Abrams v. Johnson*, 521 U.S. 74, 101 (1997) ("The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies."); *White*, 412 U.S. at 794-95 ("From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.'") (quoting *Reynolds*, 377 U.S. at 533); *see, e.g., Kidd v. Cox*, No. 1:06-CV-0997-BBM, 2006 WL 1341302, at *7 (N.D. Ga. May 16, 2006) (noting that, "as the Supreme Court has repeatedly advised, caution is the *sine qua non* of judicial scrutiny of districting legislation").

Accordingly, this Court "has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539-40 (1978) (citing cases); *see also White*, 412 U.S. at 795 (directing that, in evaluating redistricting plans, a federal district court "should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'") (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)). Stated another way, a reviewing court should strike down a state legislature's considered redistricting plan only where the plan is plainly out-of-step with relevant statutory or constitutional strictures. Otherwise, courts can be too easily overextended into what Justice Frankfurter famously called the "political thicket" of redistricting, *Colegrove v. Green*, 328 U.S. 549, 556 (1946), by plaintiffs – such as the plaintiffs in this case – who are simply attempting to avoid the consequences of political losses (*i.e.*, elections).[17]

Even a cursory review of the district court's detailed opinion shows that the court faithfully applied

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[17] As one jurist recently put it:

> Faced with entreaties by litigants seeking judicial intervention in the redistricting process, Justice Frankfurter famously warned that "[c]ourts ought not to enter this political thicket." Although the law has not adopted the uncompromising version of this principle urged by Justice Frankfurter, his admonition continues to resonate each decade when courts are asked to decide what are fundamentally *political* disputes.

Vandermost v. Bowen, 269 P.3d 446, 485 (Cal. 2012) (Liu, J., concurring) (citations omitted; emphasis in original).

these well-established principles in this case, and in so doing properly protected the important federalism concerns raised in any redistricting dispute. Indeed, the record supports the reasonableness of the redistricting plans in this case, which were the end product of what is a very difficult task for any state legislator – a task that certainly requires "discretion to exercise the political judgment necessary to balance competing interests." *Miller*, 515 U.S. at 915. In this case, the legislators involved in creating the plans had to balance, among other things: (1) the fundamental constitutional principle of "one person, one vote"; (2) the principle of non-retrogression under the Voting Rights Act; (3) the concern to avoid incumbent conflicts; (4) the concern to preserve communities if possible; (5) the various personal (and not always reconcilable) preferences and desired accommodations of the various senators and representatives[18]; and (6) the preferences and concerns received in public hearings. Legislators who reasonably exercise their discretion in balancing these matters – as the record shows was the case here – should have some confidence that those balanced decisions will not be

[18] As is discussed at various points above and as the district court's opinion illustrates, the record shows that the leadership of the Reapportionment Committee (Senator Gerald Dial and Representative Jim McClendon), and their consultant Randolph Hinaman, took great lengths to consider and accommodate the desires of the members of both houses, including Democratic members. *See, e.g.*, *ALBC*, F. Supp. 2d at 1273-78. Senator Dial testified that he was motivated in large part by a desire to make the redistricting process "more transparent and involve more people into it," because, in his opinion, there had been a substantial lack of transparency and involvement allowed during the 2001 Democrat-led redistricting (done when he was a Democrat). *See* Trial Trans. at Vol. 1, pp. 26-27.

easily undone through the courts by political opponents who merely seek to again wield power that the *state citizenry* has since denied them.

Rather than get distracted by what is in reality a fairly transparent political dispute (as discussed above), the district court focused on the lack of evidence that the Alabama Legislature's redistricting plan in any way violated federal law. The district court's properly-focused and properly-balanced approach should be affirmed.

CONCLUSION

Amici respectfully submit that the judgment of the district court was correct and should be affirmed.

Respectfully submitted,

Christopher W. Weller
Counsel of Record
Christopher W. Weller
CAPELL & HOWARD, P.C.
150 South Perry Street
P. O. Box 2069
Montgomery, Alabama 36102
cww@chlaw.com
(334) 241-8000

Marc James Ayers
BRADLEY ARANT BOULT CUMMINGS LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, Alabama 35203
mayers@babc.com
(205) 521-8598

Counsel for Amici Curiae

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