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 Appeals from the United States District Court
For the Middle District of Alabama

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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August 20, 2014

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STATEMENT OF INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law was formed in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the effort to assure civil rights to all Americans. Protection of the voting rights of racial and language minorities is an important part of the Committee's work. The Committee has represented litigants in numerous voting rights cases throughout the nation over the past 50 years, including cases before this Court. *See, e.g.*, *Arizona v. Inter Tribal Council of Arizona, Inc.,* 133 S. Ct. 2247 (2013); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Reno v. Bossier Parish Sch. Bd.,* 528 U.S. 320 (2000); *Young v. Fordice*, 520 U.S. 273 (1997); *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith,* 488 U.S. 988 (1988); and *Connor v. Finch,* 431 U.S. 407 (1977). The Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, including *Shaw v. Reno,* 509 U.S. 630 (1993); *Thornburg v. Gingles,* 478 U.S. 30 (1986); and *City of Mobile v. Bolden,* 446 U.S. 55 (1980). The Committee has an interest in the instant appeal because it raises important voting rights issues that are central to its mission.

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[1] No counsel for a party has authored this brief in whole or in part, and no counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of amicus briefs.

SUMMARY OF ARGUMENT

These appeals raise serious questions of racial gerrymandering under *Shaw v. Reno*, 509 U.S. 630 (1993), and the misuse of federal civil rights protections, specifically Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, with respect to Alabama's 2012 state legislative redistricting plans.

For the reasons set forth below, neither appeal is in an adequate posture for this Court to either reverse or affirm. The judgments of the District Court dismissing the Appellants' *Shaw* claims should be vacated, and these appeals should be remanded to the District Court for reconsideration under the proper legal standards. On remand, the District Court may elect to reopen the record to permit the plaintiffs and the defendants to supplement the record with the benefit of this Court's guidance.

The District Court committed at least three significant legal errors that require *vacatur* of its finding that race was not the predominant motive for any district under *Miller v. Johnson,* 515 U.S. 900 (1995).

First, the District Court failed to conduct a district-specific analysis with respect to several crucial categories of evidence presented by the Appellants, including racially-imbalanced precinct splits, county splits and population swaps. The District Court unjustifiably confined its review of district-specific data to aggregate statistics, and

failed to assess the Appellants' evidence of racial gerrymandering district-by-district.

Second, the District Court treated the State's 2001 redistricting plans as a safe harbor for the 2012 redistricting. However, current conditions in Alabama should have been the touchstone of its review. The District Court thus erred by requiring the Appellants to demonstrate that conditions had materially changed relative to 2001.

Third, the District Court uncritically accepted the State's 2% population deviation target as an across-the-board non-racial explanation for the Appellants' substantial evidence of specific district boundaries that departed from traditional districting principles. The District Court erred by failing to consider whether alternative district boundaries could have met the State's 2% population deviation while avoiding racially-imbalanced precinct splits, county splits and population swaps.

Due to these legal errors, the District Court's factual findings on predominant motivation are inadequate for plenary review here.

On the other hand, the Court should decline the Appellants' invitation to bypass the standards for triggering strict scrutiny set forth in *Miller v. Johnson*, *supra*. The Appellants rest their claims upon Alabama's 2012 redistricting goal of keeping the black voting-age population percentages in each of the pre-existing majority-black state house and senate districts undiminished. While the Appellants

have identified several instances in which those district boundaries appear to have been distorted for racial reasons, they cast a much broader net, arguing that strict scrutiny is triggered for both redistricting plans as a whole on the basis of the State's redistricting criteria alone.

Such a generalized equal protection claim would represent a substantial, unnecessary and infeasible expansion of the current workable standards for assessing predominant motivation under *Miller*. *See United States v. Hays*, 515 U.S. 737, 746-747 (1995). The Court's *Shaw* jurisprudence to date has pointedly been conducted on a district-specific basis, including the requirements for plaintiffs' standing, the alleged harms and the remedies.

It is particularly important for this Court to consider how difficult it would be to translate a finding of liability on this record into an effective and judicially-efficient remedy. As the record now stands, the District Court would have few if any parameters to inform the remedial proceedings. The generalized theories of liability advocated by the Appellants provide no standards to distinguish constitutional from unconstitutional districts in a redrawn plan. The serious and potentially wide-reaching effects of a remedy in this case warrant a remand to make adequate findings for the essential purposes of clarifying the grounds for liability and effectuating a just remedy.

Finally, the status of Section 5 of the Voting Rights Act presents a dilemma. The Court's general jurisprudence strongly suggests that the decision in

Shelby County v. Holder, *supra*, vitiated any Section 5 compliance interest for post-2006 voting changes in Alabama, although the Court could fashion an exception in recognition of States' general reliance interests. To the extent that the Court finds that Section 5 can constitute a potentially compelling interest in this case, the District Court's contingent analysis of the standards for preclearance under Section 5 of the Voting Rights Act, which accepted Alabama's reading of those standards wholesale, was patently erroneous as a matter of law.

ARGUMENT

I. THE DISTRICT COURT MUST REWEIGH THE EVIDENCE UNDER THIS COURT'S ESTABLISHED LEGAL STANDARDS FOR DETERMINING WHETHER AN ELECTION DISTRICT IS A RACIAL CLASSIFICATION

A. This Court Applies a Well-Understood Analysis Under *Shaw v. Reno* to Decide Whether a Challenged Election District is a Racial Classification Subject to Strict Scrutiny

Claims of racial gerrymandering under *Shaw v. Reno*, *supra*, are "analytically distinct" because they are not based upon vote dilution principles, but rather involve an excessive emphasis upon racial considerations in redrawing election districts. *Shaw v. Reno*, 509 U.S. at 652. *Shaw* recognized that redistricting decision-makers routinely and unavoidably are aware of the racial consequences of their districting choices and that constitutional

concerns are not triggered by an awareness of race. *Id*. at 642.

Miller v. Johnson, *supra*, set out what is by now a well-understood analysis for identifying districts that require a compelling interest and narrow tailoring to be upheld. That analysis clearly distinguishes routine considerations of race from situations in which racial considerations have distorted the redistricting process:

> 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. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. . . . 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. The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a

> particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines."

Miller v. Johnson, 515 U.S. at 916, *quoting Shaw v. Reno*, 509 U.S. at 647 (internal citations omitted).

S*haw* claims are tightly focused upon the bounding choices affecting specific districts. This Court never has applied strict scrutiny solely upon a State's decision to achieve a particular racial percentage within a particular district. Neither awareness of racial demographics, nor irregular shape, nor split political subdivisions is sufficient alone to trigger strict scrutiny. *See Shaw v. Reno,* 509 U.S. at 633-634 (12th Congressional District in North Carolina); *Shaw v. Hunt*, 517 U.S. 899 (1996) (same); *Easley v. Cromartie*, 532 U.S. 234 (2001) (same); *United States v. Hays*, 515 U.S. at 741-742 (2nd and 4th Congressional Districts in Louisiana); *Miller v. Johnson*, *supra* (11th Congressional District in Georgia); *Abrams v. Johnson*, 521 U.S. 74, 77-78 (1997) (2nd and 11th Congressional Districts in Georgia); *Bush v. Vera*, 517 U.S. 952 (1996) (18th, 29th and 30th Congressional Districts in Texas). *See*

also King v. Illinois State Bd. of Elections, 522 U.S. 1087 (1998) (summarily affirming three judge court decision concerning 4th Congressional District in Illinois).

Since the decision in *Easley v. Cromartie* in 2001, this Court has not had occasion to decide further *Shaw* claims, largely because the *Miller* standards are well-understood and have been followed.

B. The District Court Applied Erroneous Legal Standards in Concluding that the Challenged Election Districts are not Racial Classifications

The District Court ruled that "[r]ace was not the predominant motivating factor for the Acts as a whole. And race was not the predominant motivating factor for drawing Senate Districts 7, 11, 22, or 26." J.S. App. at 140.[2] Although the District Court did find that "race was a factor in the creation of the districts," it found that "the Legislature did not subordinate traditional, race-neutral districting principles to race-based considerations."[3] *Id*. at 143.

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[2] "J.S. App." refers to the Appendix attached to the ALBC Appellants' Jurisdictional Statement.

[3] The District Court rejected all of the plaintiffs' racial gerrymandering claims by finding that none of them met the threshold burden of establishing that the Legislature subordinated race-neutral traditional districting principles to race. J.S. App. at 140-173 (relying, *inter alia*, on *Bush v. Vera*, 517 U.S. at 964-965 (only when race is the predominant factor motivating the legislature's redistricting decision will strict scrutiny apply.)) Although the majority acknowledged that race was a factor in the creation of the districts, it concluded that

Because the District Court committed several serious errors of law that jeopardized the validity of these findings and its ultimate disposition of the Appellants' claims, its judgments should not be affirmed. The case should be remanded to the District Court for reconsideration under correct legal standards.

1. The principal flaw in the District Court's analysis is that it failed at critical junctures to conduct a district-specific analysis of the Plaintiffs' evidence. To be sure, the District Court did provide some discussion of individual challenged districts. *See, e.g.,* J.S. App. at 36-43, 166-173. However, this was largely confined to describing aggregate population shifts and overall district populations.

The Appellants provide persuasive examples of the District Court's failure to properly analyze evidence of racially-disparate precinct splits and racially-disparate county splits. *See, e.g*., ADC Br. at 12-19; ALBC Br. at 12-13, 41-54.

The District Court's legal analysis of the split-precinct evidence was further marred by its treatment of the Voting Rights Act considerations as being non-racial in nature. The District Court asserted that Mr. Hinaman's "testimony confirms

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racial considerations were not the predominate motivation and, instead, "one person, one vote trumped every other redistricting principle." J.S. App. at 151-152. The majority found that Mr. Hinaman, the consultant who drew the redistricting maps for the Republican majority in the Legislature, "balanced and satisfied five lawful objectives with respect to the majority-black districts in the plan." *Id*. at 146-147.

that race was not the predominant motivating factor in precinct splitting." J.S. App. at 159.

However, the District Court immediately followed that assertion with the statement that "where it occurred, precinct splitting was less of an evil to be avoided in redistricting than the subordination of other redistricting criteria, such as compliance with the Constitution and the Voting Rights Act." *Id.* The District Court thus appears to have reasoned that precinct splitting was a lesser evil than failing to comply with the Voting Rights Act. That may – once strict scrutiny review is complete – prove to be correct. But for purposes of a predominant motivation analysis, it represents a critical concession by the District Court that "where it occurred" in the challenged plans, the precinct splitting was racial in nature.

This confusion of Voting Rights Act compliance with non-racial factors is shown by the District Court's supporting citation to *Larios v. Cox*, 314 F. Supp. 2d 1357, 1360 (N.D. Ga. 2004) (stating that traditional districting principles "*of compactness, contiguity, minimizing the splits of counties, municipalities, and precincts, and recognizing communities of interest*" were secondary to ensuring compliance with the Constitution and the Voting Rights Act) (emphasis in original).

The District Court's error is further confirmed by its subsequent supporting citation to the Department of Justice's "Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act," 76 Fed. Reg. 7470-01 (Feb. 9, 2011) (explaining that

"compliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain redistricting criteria," such as precinct splitting, "to avoid retrogression"). J.S. App. at 159.

Compliance with the Voting Rights Act, as properly interpreted, is a compelling state interest, but it is racial in nature. The Voting Rights Act in some circumstances properly can require a jurisdiction to make a limited departure from strict adherence to certain traditional redistricting criteria such as precinct splitting, but that departure is decidedly not non-racial in nature. The District Court thus erred as a matter of law by finding that the State's professed VRA compliance provided a non-racial explanation for precinct splitting "where it occurred."

It is possible that the county and precinct splitting in the challenged plans can be attributed to non-racial objectives. It is equally if not more plausible, however, that these were predominantly attributable to the objective of achieving specific racial population thresholds. If that is the case, then strict scrutiny is implicated under *Miller*. A substantial portion of this Court's opinion in *Cromartie* involved parsing just this type of evidence to determine whether the district court had correctly inferred the State's motivations in distinguishing racially-driven precinct splits from partisan-driven precinct splits. *Easley v. Cromartie*, 532 U.S. at 244-257.

The Appellants also explain how the District Court overlooked other strong evidence of racial boundary manipulations in Senate Districts 25 and 26. ALBC Br. at 49-54; ADC Br. at 12-15.

The District Court's failure to review highly-relevant district-specific evidence of boundary manipulations and other departures from traditional districting principles represented a fundamental analytic error that prevented the District Court from making critical factual findings, and may well have altered the District Court's ultimate conclusions about whether any of the challenged districts were racial classifications. These errors warrant the appeals to be remanded for further fact-finding under the correct legal standards.

2. The District Court erroneously treated the State's 2001 redistricting decisions as representing the baseline for constitutional compliance while fundamentally disregarding current conditions.[4] Specifically, the District Court treated the 2001 Plans, which were upheld in *Montiel v. Davis*, 215 F. Supp. 2d 1279 (S.D. Ala. 2002), as setting the standard for the plaintiffs' claims of racial gerrymandering, which were based upon current conditions. This is illustrated in the following passage:

> We refuse to apply a double standard that requires the Legislature to follow one set of

[4] The majority concluded that the plaintiffs had not offered any "credible evidence that the percentages of the black population in the majority-black districts adopted in 2001 were no longer warranted." J.S. App. at 163-164.

> rules for redistricting when Democrats control the Legislature and another set of rules when Republicans control it. After the 2000 Census, nothing changed that would have relaxed the constitutional and statutory standards that governed redistricting. On the contrary, in 2006, Congress amended section 5 of the Voting Rights Act to make the standard for retrogression 'more stringent.' *Shelby Cnty.*, 133 S. Ct. at 2617. And in *Larios*, a three-judge district court in this Circuit expressed concern that an overall deviation in population of 10 percent was no longer a "safe harbor" for purposes of the one person, one vote command of the Equal Protection Clause, particularly in the light of developing technology that makes it possible to achieve substantially greater population equality. *At trial, the plaintiffs offered no credible evidence that the percentages of the black population in the majority-black districts adopted only ten years earlier were no longer warranted.*

J.S. App. at 163-164 (emphasis added).

It is axiomatic that current conditions must be the focus for equal protection claims. On remand the District Court should be instructed to give primary weight to current conditions in Alabama.

3. The District Court also erroneously reviewed the State's 2% deviation guideline.

The second prong of the District Court's stated rationale for finding that race was not a predominant

motivation was its assertion that majority-black districts were underpopulated based upon the State's 2% population deviation criterion. J.S. App. at 151-152, 158. This begs the question, however, because it can neither prove nor disprove that any district's boundaries trumped traditional districting considerations for racial reasons.

The Appellants argue that the State could have added nearby majority-white areas to underpopulated majority-black districts, but that overwhelmingly-black areas were added instead in order to maintain specific racial percentages. ALBC Br. at 49-53; ADC Br. at 12-19. This is an argument with teeth. If such changes were done in derogation of traditional districting principles, then *Miller* calls for strict scrutiny.

Notwithstanding what appear to be very specific racially imbalanced boundary changes in the record, the District Court failed to make any finding as to whether these boundary changes were the unavoidable consequence of achieving a 2% deviation. Nor did the District Court make any finding as to whether these boundary changes departed from traditional districting principles.

Specifically, the Appellants point to districts in which overwhelmingly black areas were reassigned to districts that would have remained majority-black even if all of the new population was white. These racially imbalanced population transfers may nominally have been done in service of a 2% deviation, but that does not prove that such transfers were necessary. The Appellants contend that

racially-balanced alternatives were available, ADC Br. at 16-17, 34-35; ALBC Br. at 10, and that some of these districts included racially imbalanced split precincts. ALBC Br. at 46-49; ADC Br. at 12-14.

The District Court thus erred because it gave decisive weight to the generic goal of bringing the underpopulated majority-black districts into one-person one-vote compliance, without considering whether more racially balanced transfers were possible. The District Court then compounded that error by failing to consider the district-specific evidence of racially imbalanced population transfers.

This is an issue of causation and predominant motivation, not narrow tailoring. To illustrate, assume that the State constructed a district using a series of precincts split along racial lines, and that it placed the overwhelmingly black portions of those split precincts within the hypothetical district. If a 2% deviation was unattainable but for that series of split precincts, then the 2% goal has legitimate power as a non-racial explanation. On the other hand, if the 2% goal was attainable without employing such racially imbalanced departures from traditional districting principles, then the 2% goal explains nothing and the *Miller* standard for predominant motivation would be implicated.

This general failure of the District Court's analysis requires reconsideration of the record. On remand, before crediting the State's 2% deviation goal as providing a non-racial explanation for racially imbalanced splits of precincts or counties, the District Court must find that more balanced

population reassignments were not reasonably feasible. On the other hand, if the District Court finds that more-balanced population swaps were reasonably feasible and would have better comported with traditional districting principles, then strict scrutiny is directly implicated.

C. Both Appellants' Theories of Liability Unnecessarily Depart from the Workable *Miller v. Johnson* Formulation

These appeals do not require the Court to expand the circumstances under which an election district must be subjected to strict scrutiny as a racial classification. Both Appellants seek to shortcut the Court's established standards for delimiting presumptively unconstitutional racial classifications from routine election districts, but neither Appellant has set forth a workable decision rule.[5]

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[5] The majority found that only the Alabama Legislative Black Caucus plaintiffs had standing to bring their racial gerrymandering claim. J.S. App. at 134-140. The majority concluded that the Alabama Legislative Black Caucus had standing because it established that its members resided in nearly every challenged district, the parties stipulated that the Alabama Legislative Black Caucus was "composed of every African-American member of the House and Senate," and the Caucus represented voters whose rights to equal protection of the law would be violated by redistricting plans that constituted a racial gerrymander. The Court determined the Alabama Democratic Conference did not have standing because it failed to clearly establish in the record which districts its members resided in based on the new district lines and failed to establish that its members were classified by race in the redistricting plans. *Id.* 134-140.

1. The Appellants expend little effort arguing that the District Court was clearly erroneous with respect to specific districts.[6] Instead, the Appellants propose new constitutional formulations under which entire redistricting plans – not merely individual districts – may be challenged as presumptively unconstitutional racial classifications. The Appellants present somewhat differing theories for reaching strict scrutiny, but neither theory provides a persuasive basis to reverse the District Court.

The ALBC Appellants argue that "[b]ecause race was the predominant motivating factor in the redrawing of the majority-black districts, the state must establish that the redistricting plan satisfied strict scrutiny." ALBC Br. at 54.

The ADC Appellants explicitly reject the rule of standing announced in *United States v. Hays*, *supra*,[7] arguing that "this case involves a constitutional challenge not to the design of any one specific district, but to a statewide policy applied directly in every black-majority district," ADC Br. at 57, and reiterate that "[h]ere, plaintiffs challenge not one district in isolation, but a statewide policy, applied

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[6] The ALBC Appellants provide important examples for the Court, but they provide no systematic analysis of the districts with respect to which they contend the District Court erred as a matter of fact or law. ALBC Br. at 6-9; 12-13; 29-34; 47-54. The ADC Appellants adopt by reference the ALBC merits brief discussion of the District Court's legal error and/or clear factual error in concluding that race was not the redistricters' predominant motive. ADC Br. at 47.

[7] "*Hays* is not the proper framework to analyze standing in this case." ADC Br. at 52.

directly in every majority-black district and necessarily affecting other districts." *Id.* at 54.

This places the ADC in tension not only with *Hays*, but with the Court's fundamental principles of standing. The "irreducible constitutional minimum of standing" requires the plaintiff, *inter alia*, to have suffered an injury in fact which is "concrete and particularized." *United States v. Hays*, 515 U.S. at 743, *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). "In light of these principles, we have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *Id.* "We therefore reject appellees' position that 'anybody in the State has a claim,' and adhere instead to the principles outlined above." *Id* at 744 (internal citation omitted).

Absent a district-specific focus, the ADC claims amount only to generalized grievances. The ADC suggests that the Court should vacate and remand for the District Court to consider the ADC's organizational standing claims. ADC Br. at 55-56. Because remand on other issues is appropriate for the reasons we explain elsewhere in this Brief, remand would provide a suitable opportunity for the ADC to perfect its standing by establishing the specific districts in which the ADC and/or its members claim to suffer "concrete and particularized" injuries.[8]

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[8] The ADC appears to have shown standing for Plaintiff Stallworth, who resides in House District 77. ADC Br. at 52-53.

The ALBC Appellants are less direct in disclaiming *Hays* as the basis for their standing, but their brief similarly fails to identify any specific district or set of districts that they contend to be unconstitutional.

2. Neither Appellant's approach to racial classifications provides a meaningful basis to distinguish constitutionally suspect districts from districts that implicate no equal protection concerns.

The ADC Appellants provocatively cast the State's decisions as a "racial quota" in their jurisdictional statement. ADC J.S. at i; ADC Br. at i. The ALBC Appellants similarly cast the State's decisions as "racial ratios." ALBC Br. at 14-18.[9]

But it must be the *implementation* of the State's target policy, and not the fact that the State had targets *ab initio*, that ultimately determines whether particular districts are racial classifications. The fact that a State set a population target for a district is not a basis for subjecting that district to strict scrutiny if the challenged district does not offend traditional districting principles.

Alabama identified particular minority population percentages as redistricting targets, but this alone cannot establish that the legislature

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[9] The ADC Appellants incorrectly suggest that a State might "stumble" into "excessively-segregated election districts" that violate the Constitution through "good faith." ADC Br. at 3. This Court's equal protection jurisprudence makes clear, however, that intent is necessary for a constitutional violation. *See Washington v. Davis,* 426 U.S. 229 (1976).

subordinated traditional race-neutral districting principles to racial considerations in any particular district that it actually adopted. Nor does the minority population percentage in any district actually adopted by the State necessarily indicate the predominance of race over traditional districting principles.

An election district's minority percentage is not mathematical evidence of racially driven distortions of district boundaries. Reaching a 40% minority target might require extensive geographic contrivances in one region, whereas in another region a 60% minority district could be the natural result of following traditional districting principles to the letter. In other regions, a State might have to violate traditional districting principles in order to *prevent* the creation of a 75% minority district. Needless to say, a district with a 70% minority population does not involve twice the racially driven boundary manipulations of a 35% minority district; neither figure necessarily indicates that any unusual boundary manipulations occurred.

In Alabama, political units of 70% or greater are unexceptional: counties with 70% or greater black population include Bullock (70.59%), Greene (81.85%), Macon (83.13%), Sumter (74.12%), Wilcox (73.08%) and Lowndes (74%).[10] If an election district in Alabama has a black percentage of 70 percent there is no reason to infer that its boundaries

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[10] *See* U.S. Census Bureau 2012 *American Community Survey 5-year Estimates Table B02001*. Many Alabama cities, towns, Census designated places and school districts also have African American populations of 70% or greater. *Id.*

represent a departure from the general rules of redistricting, let alone that such a departure was predominantly attributable to racial considerations, or that it classified voters or stigmatized voters on the basis of their race, any more than a resident of the City of Birmingham, the most populous city in Alabama, could assert a constitutional harm by virtue of the fact that the boundaries of the city yield a 73.4%[11] percent African American municipality. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

Alabama unquestionably set out to maintain the pre-existing numbers of majority-black house and senate districts. But this too, standing alone, is insufficient to establish that a racial classification affected any particular district. When adhering to the bounds of traditional districting criteria, some districts may be majority-black and others majority-white, but for constitutional purposes they are "just districts." There is no constitutional basis to deem majority-white election districts as normative, or to presuppose that majority-minority election districts deviate from the norm. Such a rule would abandon this Court's understanding of equal protection because it would create explicitly different rules for black and white citizens.[12]

A State's decision to draw a majority-minority election district, or to set a target minority

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[11] U.S. Bureau of the Census, State and County Quickfacts for Birmingham, Ala. (2010 Census).

[12] *See* ADC Br. at 2 (characterizing districts with black voting-age populations of 29% as "integrated districts," and districts with white voting-age populations of 30% as "super-concentrated black districts.").

percentage in a particular district, are examples of routine race-conscious action, not *prima facie* evidence of a racial classification. States have three choices with respect to the number of majority-minority districts drawn during redistricting: they may decide to maintain the existing number, or to either increase or decrease the existing number. Feigned ignorance of how many majority-minority districts are drawn is not a fourth option; once again, it is unrealistic to suggest that Alabama can, would or should act unaware of the racial implications of its decisions.

Any State with a sizable minority population will be aware of the racial consequences of its boundary changes, particularly where the racial composition of the districts has a predictable and substantial impact on election outcomes, as is the case in Alabama. It is unrealistic to believe that prohibiting States from acknowledging racial considerations in their redistricting decisions will prevent States from having such considerations in the first place. States assuredly will consider the racial impact of their redistricting decisions; a hair-trigger on strict scrutiny merely will require States to resort to ever more subterfuge and dissembling about their redistricting.

Had the State abandoned its initial targets in favor of districts to the Appellants' liking, it is most doubtful that Appellants would have pressed a constitutional claim against the State's redistricting plans, notwithstanding the State's initial targets. Even if Appellants pressed such a claim, this Court would have no reason take cognizance of such an

ephemeral claim if the targets had no practical impact on the actual boundaries. If the Appellants had filed a constitutional challenge after the State had set its targets, but before the final plans were adopted, no ripe Article III dispute would have existed. See *Texas v. United States*, 523 U.S. 296, 297-302 (1998) (declaratory judgment action concerning whether Section 5 of the Voting Rights Act applied to the implementation of certain sections of the Texas Education Code not ripe for adjudication). Any harm inherent in setting such targets only ripens into a case or controversy if it causes the eventual district boundaries to be deformed along racial lines affecting an individual. More colloquially, the proof is in the pudding.

3. Neither of the Appellants has grappled with important remedial shortcomings inherent in their theories of liability.

One of the principal benefits of the *Miller* formulation is that it precisely identifies the remedial obligations of the lower courts. If a district has been drawn with features that subordinate traditional districting principles to race without sufficient justification, then the straightforward remedial obligation of the district court is to ensure that the unconstitutional district is redrawn so as to remove the offending features. If the State fails to do so, then the district court must fashion a remedy that corrects the unconstitutional features but respects the State's districting policies and choices so far as possible. See *Vera v. Bush*, 933 F. Supp. 1341, 1351 (S.D. Tex. 1996). *See also Perry v. Perez*, 132 S. Ct. 934, 941 (2012). Even this may prove

complicated in practice, but when *Miller* is followed both the State and the district court have the benefit of correcting specific identified flaws.

Conversely, if this Court were to reverse the District Court and remand for remedial proceedings based upon the current record, there would be few if any parameters to guide the District Court in fashioning a suitable remedy. On the current record, there are no findings that traditional districting principles were subordinated – whether for racial reasons or for non-racial reasons – with respect to any district. For example, the District Court would have no idea whether any of the State's precinct splits should be respected or disallowed.

Furthermore, the brief for the ALBC Appellants does not identify which districts they contend must be redrawn. The brief for the ADC is somewhat more specific, apparently contending that District 26 was unconstitutional. ADC Br. at 12-15. The ADC also challenged the constitutionality of Senate Districts 7, 11 and 22 at trial. J.S. App. at 166-173.

But neither Appellant appears to have ever clearly identified what it contends to be the constitutionally-acceptable minority percentages for the challenged plans as a whole, nor has either Appellant identified the minority percentages that it contends are required to comply with the Voting Rights Act in remedial house and senate plans as a whole. The District Court made no useful findings on these issues, having found that the plaintiffs'

evidence on this issue was in conflict at trial.[13] The District Court also found that the Appellants provided no alternative redistricting plans that are acceptable under the State's redistricting rules, J.S. App. at 72, 88-89, 114, 116-119, and so there is no finding that an illustrative plan exists to demonstrate the contours of a constitutional plan.

A general admonition to the State to redraw its districts without setting racial targets would have little practical value if the findings of liability do not identify the essential differences between constitutional districts and unconstitutional districts, and would render an attempt to fashion a

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[13] The District Court noted that the ADC plaintiffs' expert, Theodore S. Arrington, testified that "[A] 51 percent voting-age population is enough to give minority voters the opportunity to elect the candidate of their choice anywhere in the State, and he suggested that, "[c]ertainly, 54–56% concentration is enough everywhere. (Ex. NPX 323, 15, 17)." J.S. App. at 91. He explained that, although experts used to think that a minority presence of 65 % was necessary to ensure that the minority group would be able to elect the candidate of its choice, the increased registration and mobilization of black voters has reduced that number. (Ex. NPX 323, 19)." *Id*. However, the District Court noted that Dr. Joe Reed, the Chairman of the Alabama Democratic Conference since 1970, testified that a majority-black district in Alabama ordinarily needed to be about 60% African American in total population to allow African American voters to elect their candidate of choice. *Id*. at 164-165. The Court also cited to testimony by Senator Dial (R), who co-chaired the legislature's redistricting committee, in which he said that State Senator Hank Sanders (D) and State Representative Thomas Jackson (D), who were African Americans representing majority-black districts, requested during public hearings that their districts have an African American population of 62% and 62 to 65%, respectively. *Id*. at 30-31.

remedy on this record an essentially standardless exercise, resulting in further confused appeals to this Court.

The District Court on remand should provide an opportunity for the parties to supplement the record with additional evidence, and then reexamine the record with respect to specific districts.[14]

District-specific findings will permit any eventual remedy to provide a focused, predictable and judicially economical resolution.

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[14] *See, e.g.*, 28 U.S.C. § 2160 (this Court may remand and require such further proceedings as may be just under the circumstances); *Perry v. Perez*, *supra* (remand was ordered where the record was unclear whether the District Court followed the appropriate standards in drawing interim maps for the 2012 Texas elections); *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 235-236 (2000) (remand ordered where the record below was unclear on facts germane to the constitutional question to be resolved on appeal); *Lucas v. South Carolina Coastal Council* 505 U.S. 1003 (1992) (although the Court established the legal framework on remand, it found that further factual development in the lower court would be necessary for a final determination); *Rapanos v. United States*, 547 U.S. 715, 757 (2006) (remand ordered due to "paucity" of the record and because of the lower court's application of an incorrect legal standard); *Bragdon v. Abbott*, 524 U.S. 624, 654-55 (1998) ("When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court").

II. THE MERITS OF STRICT SCRUTINY ARE NOT ADEQUATELY PRESENTED FOR PLENARY REVIEW

A. This Court Has No Occasion to Address the Merits of Strict Scrutiny if it Affirms the District Court's Holding that the Challenged Districts are not Racial Classifications

We have argued above that the District Court's predominant motivation analysis is legally and factually flawed under the Court's existing legal standards, and therefore merits a remand for reconsideration under the correct legal standards. If this Court does affirm the District Court's findings that race was not a predominant motivation for any of the challenged districts, however, then that should mark the conclusion of these appeals.

The District Court addressed the Section 5 issue merely as a contingency in the event that its predominant motivation analysis was to be reversed. There is no need to consider whether Section 5 of the Voting Rights Act provided a compelling interest for the State, or whether the challenged plans were narrowly tailored to that interest, if this Court concludes that neither challenged plan has a racially gerrymandered district per *Miller*. "Strict scrutiny would not be appropriate if race-neutral, traditional districting considerations predominated over racial ones." *Bush v. Vera*, 517 U.S. at 964.

B. The Question of Whether Section 5 of the Voting Rights Act Can Constitute a Compelling Interest is Presented if the Court Reaches the Merits of Strict Scrutiny Review

Section 5, while it applied to Alabama, would provide a compelling interest if the State acted in justifiable reliance upon it. But *Shelby County v. Holder*, *supra*, left Section 5 of the Voting Rights Act functionally inoperative. If this Court reaches strict scrutiny, it will then have to grapple with the question of what force, if any, continues to be exerted by Section 5 of the Voting Rights Act.

The District Court assumed that, notwithstanding *Shelby County* Section 5 could provide a compelling interest for the State's challenged redistricting plans. The District Court then went on to conclude that Section 5 provided such an interest, and that the challenged plans were constitutionally narrowly tailored to that interest. J.S. App. at 176-186. Judge Thompson vigorously disagreed, arguing in dissent that because Section 5 was inoperative with respect to Alabama at the time of the District Court's decision, the District Court was obliged to disregard Section 5 as a possible compelling interest. J.S. App. 267-269.

If as a result of this appeal the District Court takes up the question of remedy, then Section 5 clearly would not provide a constraint on the State or the District Court in fashioning new districts, absent a new coverage enactment by Congress. Yet the District Court found that Section 5 would provide a compelling interest for the State to go on using

otherwise unconstitutional election districts. To uphold the District Court, this Court would therefore have to arrive at the seemingly paradoxical conclusion that Section 5 is simultaneously both dead and alive with respect to post-2006 redistricting in Alabama. Resolving this paradox would turn upon the question of whether Section 5 can justify an otherwise unconstitutional election district solely because it was in force at the time the law was enacted.

The District Court majority cited no legal authority in support of its decision to apply the law existing at the time the Acts were adopted, and the majority's decision was inconsistent with the long-standing general principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974). As the dissent noted below, "changed circumstances may . . . transform a compelling interest into a less than compelling one." J.S. App. at 268, *citing United States v. Antoine*, 318 F.3d 919, 921 (9th Cir. 2003), *cert. denied, Antoine v. United States*, 540 U.S. 1221 (2004).

At least one district court has found that Section 5 objections interposed after 2006 are no longer binding on States. In *Henry D. Howard, et al., v. Augusta-Richmond County, Georgia Commission, et al.,* CV 114-097 (S.D. Ga., May 13, 2014), the District Court determined that the plaintiffs' Section 5 enforcement action with respect to post-2006 voting

changes was moot in the wake of the *Shelby County* decision and dismissed the plaintiffs' claims.

Further, in *Texas v. Holder*, 133 S. Ct. 2886 (2013), the Court vacated the judgment of the three-judge district court for further consideration in light of *Shelby County*. On remand, the District Court dismissed all of the plaintiffs' claims based on *Shelby County*. *See Texas v. Holder*, 2014 WL 3895624 (August 11, 2014) (the District Court discussed the dismissal of the plaintiffs' claims in its decision denying an attorneys' fee claim by one of the parties).[15]

These decisions strongly – if not conclusively – indicate that Section 5 is no longer a constraint on the implementation of post-2006 voting changes.

This Court's general jurisprudence also strongly suggests that *Shelby County* retroactively vitiated any Section 5 interest that might once have existed with respect to the challenged redistricting plans. In *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993), the Court held that when it applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of

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[15] *See also Hall v. Louisiana*, No. 12-00657-BAJ-RLB, 2013 WL 5405656, at *6 (M.D. La. Sept. 27, 2013) (concluding that *Shelby County* applied retroactively to nullify all of the plaintiff's claims); *Bird v. Sumter Cnty Bd. of Educ.*, No. l:12-CV-76, 2013 WL 5797653, at *3 (M.D. Ga. Oct. 28, 2013) (Finding that after *Shelby County*, "[t]he issue of preclearance is no longer extant").

whether such events predate or postdate the Court's announcement of the rule. *Id*. at 97.

Arguably, a limited exception could be fashioned in this case in recognition of the State's legitimate expectation of consistency in the conduct of its elections. This Court could, in a roughly parallel sense to *Reynolds v. Sims*, 377 U.S. 533 (1964), fashion a rule that would credit a State's justifiable reliance upon the federal redistricting standards in effect when a plan was adopted, even if those standards are later rendered inoperative.[16] As discussed in the following section, that rule would be unavailing in defense of the District Court's unjustifiable interpretation of Section 5 in this case, but it could assist in providing guidance to the District Court on remand or to other courts presented with similar claims.

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[16] In *Reynolds v. Sims*, 377 U.S. at 583-584, this Court found that Alabama's state senate and house districts were unconstitutionally malapportioned, but recognized that there was a need for a limit upon how frequently a state might be required to redistrict in order to achieve population equality. The *Reynolds* Court settled upon ten-year intervals as sufficient. *Id*. In doing so, it was implicit that intervening population changes might result in districts that would not satisfy the constitutional standards, but the state's interests in predictability and continuity provided countervailing considerations.

C. If Section 5 *Can* Constitute a Compelling Interest, the Cases Should Be Remanded to the District Court for Reconsideration Under a Correct Statutory Interpretation

Assuming that this Court: 1) reverses the District Court with respect to the threshold determination regarding racial gerrymandering; 2) concludes that strict scrutiny must apply; and 3) finds that Section 5 of the Voting Rights Act can – as a matter of law – provide a compelling interest, then the case should be remanded to the District Court for reconsideration under a proper reading of Section 5.

The Appellants correctly have identified the irredeemably flawed reading of Section 5 that the State professed to have followed, which was uncritically adopted by the District Court. *See, e.g.*, ALBC Br. at 23-28, 46, 55, 58-61; ADC Br. at 24-43. The District Court cited no authority for its construction of the Section 5 retrogression standard, which in fact contravened this Court's longstanding decisions and ignored the actual administrative practice of the Department of Justice.

When the Court first formulated the retrogression standard in *Beer v. United States*, 425 U.S. 130, 141 (1976), it looked to the functional ability to elect candidates of choice. The Court in *Beer* found that the application of the retrogression standard to the facts of that case was "straightforward." The Court noted that under the previous plan, none of the districts had a clear majority of African American voters and no African Americans had been elected to the New Orleans City Council. Under the new plan,

the Court determined that African Americans would constitute a majority of the population in two of the five districts and a clear majority in one of them. Thus, the Court found that there was every reason to predict that at least one and perhaps two African Americans could be elected to the Council under the plan, and that it was erroneous for the District Court to conclude that the plan violated Section 5. *Id.* at 142.

The Court also construed Section 5 retrogression in a functional sense in *City of Lockhart v. United States*, 460 U.S. 125, 133-134 (1983). The Court, citing *Beer v. United States*, *supra*, held that the changes to the voting system were not retrogressive because they did not "increase the degree of discrimination against blacks." The Court reversed the District Court's findings to the contrary as clearly erroneous and concluded that the changes did not have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group.

In *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 478-479 (1997) (*Bossier I*) the Court looked at the number of majority-black districts, not whether individual-district reductions of the minority population had occurred, in assessing whether the proposed plan was retrogressive.

To the extent that the State might assert that some uncertainty nonetheless remained after these decisions, this Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003) left no doubt whatsoever that preventing retrogression under Section 5 did not lock

States into maintaining preexisting levels of minority population.

Despite the fact that these holdings uniformly applied a functional approach to retrogression under Section 5, the District Court adopted the State's erroneous interpretation of retrogression, i.e., that it could not reduce the relative populations of African Americans in the majority-minority districts, regardless of whether maintaining those percentages was reasonably necessary to protect the opportunity of African Americans in those districts to elect a candidate of their choice.

As the ADC Appellants also correctly note, the Department of Justice's implementation of Section 5 has posed no general barrier to States that reduce the minority percentages within particular election districts. ADC Br. at 27-32. While circumstances naturally vary from case to case, the District Court's categorical interpretation of Section 5 is indefensible both in terms of the federal court standards and what could reasonably be anticipated during Department of Justice Section 5 administrative review.

Accordingly, if this Court reaches the issue, it must vacate the District Court for its inexcusable failure to apply the correct legal standards with respect to Section 5 compliance.[17]

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[17] *See, e.g.*, *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) ("When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further

D. If Strict Scrutiny Applies and Section 5 of the Voting Rights Act Cannot Constitute a Compelling Interest, then this Appeal is Concluded and the District Court Should Be Reversed

Assuming that this Court: 1) reverses the District Court with respect to the threshold determination regarding racial gerrymandering; 2) concludes that strict scrutiny must apply; and 3) finds that Section 5 of the Voting Rights Act cannot – as a matter of law – provide a compelling interest, then this appeal will be complete, and the judgments of the District Court should be reversed. For the reasons discussed above, it would be premature and likely counterproductive to resolve this appeal by such a reversal, but should the Court do so, the only remaining issue in the case would be remedial proceedings before the District Court.

In the Appellees' Joint Motion to Dismiss or Affirm filed in the *ADC v. State of Alabama* case, the State appears to argue for the first time that its compliance with Section 2 of the Voting Rights Act required that the State retain African American populations in majority-minority districts at a rate of 60-65%, and that as a result, its redistricting plans pass strict scrutiny. *See* Appellees' Joint Motion to Dismiss or Affirm at 21-25.

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proceedings to permit the trial court to make the missing findings"). *See also Rapanos v. United States,* 547 U.S. at 757 (remand appropriate where the lower court applied the incorrect legal standard); *Maracich v. Spears*, 133 S. Ct. 2191, 2208-2209 (2013); *Paroline v. U.S.*, 134 S. Ct. 1710, 1730 (2014).

However, the role of Section 2 as a compelling interest is not properly presented in these appeals. The State never asserted in the District Court that the challenged house and senate plans were narrowly tailored to a compelling interest in complying with Section 2 of the Voting Rights Act.

Such a last-minute assertion of a general interest in Section 2 compliance does not merit plenary consideration by this Court for several reasons. To begin with, because Section 2 was not raised or considered below as a compelling state interest for purposes of strict scrutiny analysis, it is presumptively improper to assert at this juncture.

Furthermore, no exceptional circumstances are present here.[18] Nothing prevented the State from raising Section 2 in a timely fashion; evidently the State simply chose not do so. Furthermore, this Court's order noting probable jurisdiction specifically included Section 5 of the Voting Rights Act as a question presented, but was silent as to Section 2. Order of Probable Jurisdiction, June 2, 2014.

This Court may have the occasion to consider the extent of the Section 2 interest in a future appeal, but the proper case would be one where the lower court has found one or more districts to be racial classifications, the defendants have asserted that their actions were narrowly tailored to ensure compliance with Section 2, and the lower court has

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[18] *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *Wood v. Milyard*, 132 S. Ct. 1826, 1934 (2012); *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); *Arizona v. Inter Tribal Council of Arizona, Inc.,* 133 S. Ct. at 2259 n.9.

specifically assessed the evidence as to whether Section 2 is a compelling interest and the extent to which the challenged district departs from that interest.

For example, this Court summarily affirmed the judgment of a three-judge court in *King v. Illinois State Bd. Elections*, 522 U.S. 1087 (1998). The three-judge court found that a majority-Latino district in Chicago was subject to strict scrutiny because its convoluted boundaries were chosen specifically to unite Latino populations. *King v. Illinois State Bd. of Elections,* 979 F. Supp. 619, 620-626 (N.D. Ill. 1997).

Under this Court's ruling in *Miller*, there was no serious question in *King*, *supra*, that strict scrutiny was required. At the same time, the three-judge court found that this arrangement was a narrowly-tailored response to a very specific geographical dilemma, namely that the African American population in Cook County was sufficiently numerous to maintain three reasonably compact majority-black congressional districts, and that the Latino population was sufficiently numerous to draw a reasonably compact majority-Latino congressional district, but that at least one district had to be non-compact for all four to coexist. *Id* at 623. Finding that Section 2 provided a compelling reason to draw three majority-black districts and one majority-Latino district, the district court found that because the challenged district was non-compact only to the extent needed to perform an "end-run" that linked together geographically-proximate Latino neighborhoods (between which an existing majority-

black congressional district lay), it was therefore narrowly-tailored and constitutional. *Id*. at 623-626.

We have respectfully argued that the correct disposition of these appeals is for the Court to vacate and remand for reconsideration of the threshold racial gerrymandering issue under the proper legal standards. In that event, the District Court may consider reopening the record to provide the parties an opportunity to develop the Section 2 issue with the benefit of this Court's guidance. In particular, a properly conducted district-specific identification of which districts, if any, are racial classifications, and for what reasons, will significantly sharpen the focus of any consideration of the Section 2 interest.

CONCLUSION

For the foregoing reasons, the judgments of the District Court should be vacated and these appeals remanded for further proceedings.

Respectfully submitted,

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