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

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

ADC PLAINTIFFS' REPLY BRIEF

Plaintiffs Alabama Democratic Conference, et al., through undersigned counsel, submit this reply brief in support of final judgment on their claims, in compliance with the opinion and instruction of the United States Supreme Court in the consolidated cases of *Alabama Legislative Black Caucus v. Alabama and Alabama Democratic Conference v. Alabama,* 135 S. Ct. 1257 (2015), which vacated and remanded this Court's December 20, 2013, opinion and judgment, 989 F. Supp.2d 1227 (M.D. Ala. 2013) (three-judge court). Based on the record, the additional Supplemental Exhibits and documents attached to Plaintiffs Post Remand Brief, Doc. 258 and 266-1, pursuant to this Court's Post Remand Scheduling Order, and the conclusion of law set out

in the Supreme Court's opinion, the Alabama Democratic Conference (ADC) plaintiffs are entitled to final judgment declaring unconstitutional all 36 black-majority districts in Acts 2012-602 and 2012-603.

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INTRODUCTION

The Supreme Court's opinion establishes that Alabama applied a race-based policy "prioritizing mechanical racial targets" that lacks a legally appropriate and adequate justification. *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267 (2015) ("*ALBC*"). The Court remanded for a determination of whether this policy "had a direct and significant impact on the drawing of at least some of [each black-majority district's] boundaries." *Id.* The plaintiffs' remand briefs establish, by a preponderance of the direct and circumstantial evidence, that this misguided non-retrogression policy did have a direct and significant impact on at least some of the boundaries in each district, including the 25% or so of districts in which there were not enough black people to go around for the State fully to reach its racial floor.

The plaintiffs have explained, district by district, the State's pattern of bypassing areas that would have reduced the black-population percentages of these districts – that is, whiter areas – in favor of areas that preserved or increased these black percentages. The plaintiffs have also provided district-specific maps that illustrate these choices and show where the State made oddly-shaped changes to district boundaries that, for each district and as part of a pattern, selectively pulled in relatively blacker areas as the State went about reaching or exceeding its pre-set racial floors for each district. This is equally true in the 25% of districts whose black population decreased.

The State has offered a series of ad hoc stories to account for each district, some of which are based on bits of record evidence, many of which are post-hoc. Across districts, these policies are invoked inconsistently. The State deferred to incumbents, except when it did not. The State kept districts in the "same location," except when it did not. The State avoided splitting county

boundaries, except when it did not. These policies all took a back seat to the State's primary policy of reaching or exceeding its racial floors.

But of particular importance in establishing that race predominated in each district, we call this Court's attention to two critical sets of information ADC presents on remand, not presented at trial, to which Alabama does not meaningfully respond.

First, ADC presents map after map that illustrates for each district the specific *changes* the 2011 plans made at the contorted boundaries of those districts. Over and over again, these maps illustrate new protuberances, spikes, zig-zags, and other perimeter distortions through which the districts -- individually and collectively, as part of a pattern – reach out to pull more heavily black-population areas into the district while bypassing whiter areas that would have made the boundaries more regular. The State does not directly respond to and explain away in the *specific* boundary changes illustrated on these maps.

Instead, the State produces its own visually tiny, but large-scale, before and after maps and asserts that a side-by-side comparison demonstrates that the districts changed "little." These small maps necessarily obscure the changes that did take place and the contortions they introduced at the districts' boundaries.

Second, ADC has produced tables that document the extremely large number of people moved into and out of these districts – far in excess of the extent to which a district was underpopulated. On average, the State moved into and out of each black-majority House district 23,474 people, or 52% of the ideal-sized district population; in the Senate, the average was 51,914 people, or 38% of the ideal-sized district population. The State also does not dispute this information, yet nonetheless regularly tells this Court that districts were changed "little" even with these large population changes. With the scale of the population movements now clear, it

would be all the more remarkable had the State managed to move this number of people and reach its racial floors in 75% of the districts – all without race playing a predominant role.

This evidence must be assessed in conjunction with the now-indisputable direct evidence that meeting the racial targets was the one, non-negotiable goal, with the pattern of "successful" results, and with the mapmaker's direct testimony that he reached out to pull in "black precincts" and split precincts by race as necessary to avoid retrogression, Tr. 3-142:14-18; 3-143:10-12, as the State understood it. Indeed, none of the three central actors in the redistricting process ever testified that they used only race-neutral means to reach their racial goals.

Taken as a whole, the evidence establishes for each district that the State's misguided policy "had a direct and significant impact on the drawing of at least some of" the boundaries in each black-majority district. Under the Supreme Court's mandate, race therefore predominated in the design of each of these districts. The Supreme Court has rejected already Alabama's strict-scrutiny defense, but in any event, that defense is unavailing for each district.

Argument: Racial Predominance

I. The State Misunderstands the Predominant-Motive Standard as a General Matter

The evidence establishes that Alabama's policy "had a direct and significant impact on the drawing of at least some of [each black-majority district's] boundaries." The direct testimony establishes, and the Supreme Court's opinion confirms, that reaching the State's legally unjustifiable racial floors was the one non-negotiable districting objective; any other objectives were subordinated to that first-order priority. If that is not sufficient to establish racial predominance in each district to which the State applied that policy, the direct and circumstantial evidence establishes that the redistricters also used race and race-based means to achieve that objective. There is direct testimony to that effect from Hinaman, who agreed that he would pull in black precincts, and split precincts by race, when necessary to avoid (the State's flawed understanding of) retrogression. *See* Doc. 263 at 13-19.

The State appears to deny that it used race-based means at all to meet its unjustifiable racial targets. But in addition to this direct testimony, there is strong circumstantial evidence of race-based means, such as that provided by the ADC's maps, which show that in parts of the districts where the State changed boundaries, it did so in a way that pulled in more heavily black areas while bypassing more heavily white areas – time and time again. This overall pattern should inform this Court's assessment of the State's response concerning any specific district, rather than treating each district as if it were drawn in isolation, apart from the common approach the State took to drawing all the black-majority districts (BMDs).

But if the direct evidence of non-negotiable and unjustifiable racial goals, the meeting of those goals in 75% of the districts, and the evidence of race-based means are still not enough to establish predominance, the ADC's maps also demonstrate that the State repeatedly used

irregular district boundaries, in each district and as part of a pattern, to reach each district's racial floor, to the extent feasible. In the few districts in which BPPs declined, the State did not abandon this approach; there were simply not enough black people left to meet the targets. But consistent with its approach in the other districts, here too the State used race-based means to come as close to its racial floors as feasible.

Race therefore was a predominant factor in the design of each district. We first address Alabama's mistaken understanding of the predominant-motive standard, then turn to district-specific analysis of each BMD.

A. Alabama Ignores the Role of Direct Evidence in The Predominant-Motive Analysis

Alabama effectively asks this Court to ignore that predominant motive under *Shaw* can be established by *either* direct or circumstantial evidence, as well as the combination of both. Direct evidence alone is sufficient, even if not necessary. Though this case involves both direct and circumstantial evidence, it is important to recognize the relevance of direct evidence in *Shaw* cases.

In *Shaw v. Hunt*, 517 U.S. 899, 905 (1996), the Court emphasized that plaintiffs can meet their burden "either through" circumstantial evidence "*or* through 'more direct evidence going to legislative purpose.'" (emphasis added). In recognizing this standard, the Court was simply re-affirming, and quoting, the standard established in *Miller v. Johnson*, 515 U.S. 900, 916 (1995). As *Miller* held, the plaintiffs' burden is to show through circumstantial evidence "*or* more direct evidence going to legislative purpose, that race was the predominant factor . . .". The Court has repeatedly re-affirmed that direct evidence alone is sufficient: even in racial-gerrymandering cases, "[w]hen racial classifications are explicit, no inquiry into legislative purpose is necessary." *Hunt v. Cromartie*, 526 U.S. 541 (1999).

Not surprisingly, the Court has also relied heavily on direct evidence when such evidence is available. In *Bush v. Vera*, 517 U.S. 952, 969 (1996), for example, the Court concluded that the District Court "had ample bases" on which to conclude that race had predominated. The Court then immediately turned to extensive quotation from Texas' Section 5 submission to DOJ, in which the State stated that it had rejected any alternative way of designing the district at issue that would not have produced a district with the required level of black population. The Court did the same in *Shaw v. Hunt*, where it relied on the "direct evidence" in North Carolina's Section 5 submission to help determine racial predominance. 517 U.S at 905-06. Even when direct evidence alone is not sufficient, it can be powerful evidence that shapes how courts properly view the circumstantial evidence.

There is no longer any dispute that, in designing its BMDs, Alabama "applied a policy of prioritizing mechanical racial targets, above all other districting criteria (save one-person, one-vote) . . . ." We have described this policy as involving unjustifiable racial "targets," but it is perhaps better described as one involving racial "floors." The redistricters had no objection to district changes that would increase the BPP, but they were insistent that any changes had to preserve, at least, the BPP (unless there simply were not enough black residents in the area to make that feasible). As the State represented to the Supreme Court, the State's position was that the Supremacy Clause *required* it to apply this policy to the design of the BMDs. *Id.* at 19-20.

This misguided "Supremacy Clause" obligation meant that even if the State might have been willing to accommodate the preferences of an incumbent in one district, it was willing to do so only to the extent those preferences were consistent with the State's racial-floor. The redistricters dismissed out of hand, for example, incumbent proposals that would have reduced the BPP to any extent. *Id.* at 14-15. The same was true with respect to any other state

redistricting policy the State's lawyers now advance to describe the design of any BMD: whether or not the State took various other districting considerations into account to some extent in any district, as it surely did, it always necessarily subordinated those considerations to ensuring the BPP ended up at or above the pre-set racial floor.

The State offers no example in which it intentionally subordinated these unjustifiable racial-targets to some other redistricting policy. Nor, on the State's position, would the Supremacy Clause have permitted it to do so.

As part of the predominance analysis, it is further important that the redistricters began by drawing the BMDs first and getting them right before they drew other districts. Tr. 1-36: 5-10 (Dial); Tr. 3-122:23 to 3-123:9; 3-146:25 to 3-147:23 (Hinaman); Tr. 3-221-23 (McClendon). This belies any suggestion that the redistricters consistently applied on a statewide basis race-neutral policies that just happened, in the BMDs, to turn out to preserve or increase the BPP in 75% of the districts. Instead, the State first designed the BMDs – focusing on racial demographics, as Hinaman testified – and ensured that, whatever policies it applied in a particular district, the BPP in that district would come out at or above the State's racial floor.

This goes well beyond being merely "aware" of racial demographics, *Miller*, 515 U.S. at 916. It also goes beyond race merely being one factor, along with others, in the design of districts. These racial floors were not one factor to put in the mix, along with other traditional districting principles, with tradeoffs between these factors made differently in different districts. The unjustifiable racial floors were the one factor that *could not be compromised* in designing any BMD; they predominated over all other factors because they were the one factor that was non-negotiable. It is not even correct to say that Alabama gave race "more weight" than other factors. It is that race operated for the State on a qualitatively different, more binding level

altogether. The redistricters could pursue other districting considerations, but only insofar as doing so met the overriding constraint of the BPP floor.

For any district in which Alabama applied this policy, the situation is the same as described in *Shaw v. Hunt,* 517 U.S. at 907:

> Race was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made.

Similarly, the three-judge federal court in Virginia recently concluded that strict scrutiny must be applied when race is the "'nonnegotiable' criterion" in the design of a district. *Page v. Virginia State Board of Elections*, Doc. 258 at App. C. *See also Clark v. Putnam County*, 293 F.3d 1261, 1267-68 (11th Cir. 2002) (relying heavily on direct evidence to find *Shaw* violations); *see also Smith v. Beasley*, 946 F. Supp. 1174, (D.S.C. 1996) (three-judge court).

To the extent Alabama can be taken to suggest it was indifferent to the final BPP in any district and used race-neutral policies that just happened to re-create that district's prior BPP, there is no record support for that suggestion. The legislature's choices were intentionally made in such a way as to ensure that each BMD's racial floor was reached, to the extent feasible.

B. Race Predominated in the Means Alabama Used to Re-Populate All its Black-Majority Districts

Alabama appears to assert that, if it used wholly race-neutral means to meet its racial floors, then race did not legally predominate. Alabama did, in fact, use race-based measures, as we demonstrate below. But in any event, a State cannot set a constitutionally unjustified racial-population floor for each district, then escape constitutional invalidation by using only race-neutral means to reach those floors.

The *ALBC* decision itself recognizes this principle. As the Court went out of its way to suggest, if Section 5 itself directly required preserving BPPs in majority-black districts, Section 5

might well be unconstitutional. *ALBC*, 135 S. Ct. at 1273 ("Indeed, Alabama's mechanical interpretation of Section 5 can raise serious constitutional concerns.") (citing *Miller v. Johnson,* 515 U.S. at 926). Surely a DOJ regulation promulgated in 2011 that required states to preserve or increase their BPPs in all BMDs, to the extent feasible, would be unconstitutional for the same reasons (absent some compelling justification not apparent to us). It is hard to understand how such a policy employed by Alabama to craft each of its BMDs can be any less unconstitutional.

But in any event, the record demonstrates that Alabama did use racial means to achieve its unjustifiable race-based population targets. First, the record includes important, direct testimony that the redistricters used racial means. Hinaman expressly testified, as noted above, that as he drew the BMDS, he reached out to bring black precincts into BMDs, and split precincts by race when necessary to avoid retrogression (as he understood it). *See* Doc. 263 at 13-19. Indeed, the redistricters *never* testified that they used only race-neutral means to meet their racial targets. Moreover, there would have no obvious reason for the redistricters to avoid using racial means; Hinaman was not instructed to do so, and given the redistricters' (incorrect) understanding of retrogression, nothing suggests they would have considered anything wrong with using racial-demographic data to move people by race. As confirmation, Hinaman testified that in designing the BMDs, he looked at the racial demographics and ignored other data, such as voting behavior. Tr. 3-142: 6-12. This was directly contrary to his practice in drawing the white-majority districts, where he did use voting-pattern data to design the districts. *Id.* Hinaman treated the BMDs differently: he drew them first, pursuant to the "non-retrogression" view he and the legislative leaders of the process had, and he looked at only racial demographic data as he went about meeting, or trying to meet, each district's racial population floor.

On remand, the State had the opportunity to present new evidence, including testimony from Hinaman or others, that the redistricters used only racially-neutral means to meet their racial targets. Once the Supreme Court definitively established that the redistricters had prioritized numerical racial targets that likely directly affected the drawing of district lines, the State had a strong incentive to have the redistricters testify in response, if they legitimately could, that they had not used racial means in reaching these racial floors. The State declined, however, to put on any new testimony.

Second, the direct evidence of the priority given to meeting the racial targets, the fact that the State did so in 75% of the districts, and Hinaman's direct testimony that he reached out to pull "black precincts" into the BMDs as necessary, should establish, at a minimum, a strong presumption that race predominated, at least in the districts that did reach their racial floors. The mostly post-hoc rationalizations for these districts that the State's lawyers now offer must be viewed through a lens that requires them to be sufficient enough to overcome the strong presumption that the direct evidence creates.

Third, in evaluating the evidence regarding any specific district, this Court should not lose sight of the aggregate pattern of evidence across these districts. As the Supreme Court's opinion, *ALBC*, 135 S. Ct. at 1265, and common sense recognize, that pattern is relevant to interpreting the evidence concerning any specific BMD.

Alabama's position that race did not predominate in a single district would have this Court believe that the State moved tens of thousands of people between districts, reached or exceeded the racial floors it explicitly set in 75% of the districts, yet all of this came about as a happy coincidence from the use of race-neutral means in all districts. Alabama asserts this pattern of outcomes "can just as well be explained by race-neutral criteria." (Doc. 263 at 33.)

The legal standard, of course, is not whether this pattern "could" be explained, but whether in fact Alabama produced these results, across all these districts, through the use of non-racial means. In evaluating the State's claim in any specific district of using only race-neutral means to reach its racial floors, this overall pattern is highly relevant.

Finally, Alabama misunderstands the racial predominance standard when it argues that Hinaman was not "single-mindedly looking for black persons to add to minority districts," Doc. 263 at 31. That is hardly what the predominant-factor analysis requires. Race can be the predominant factor in the design of a district without the changes to the district being "purely race-based." *Bush*, 517 U.S. at 959 (emphasis omitted). As another three-judge court recently noted, "when racial considerations predominated in the districting process, the mere co-existence of race-neutral redistricting factors does not cure the defect." *Page*, at n. 23.

C. Even in the Districts that Came in Below the BPP Targets, Alabama Sought to Meet Those Targets to the Extent Feasible

The only factual question about Alabama's policy is whether Alabama abandoned it, for some reason, in any specific BMD. In particular, the fact that the BPP decreased in a small percentage of the districts understandably raises a question, as reflected in both the majority and dissent in this Court's prior opinion, of whether the policy was applied in those districts. But Alabama offers no direct evidence that the redistricters abandoned this policy in any district; indeed, their direct testimony about their Section 5 obligations, as they understood them, is to the contrary. In addition, there is no direct testimony that the redistricters ever intentionally sacrificed the objective of re-creating the BPP in any district to any other redistricting policy – except when doing so was necessary to meet the racial target in some other BMD.

In each district in which the BPP declines, the State suggests this decline itself shows that the State did not do its best to reach a racial floor. *See, e.g.,* Doc. 263 at 162, 163 (stating that no

reason to believe race predominated because the BPP came in below "Hinaman's alleged target"). But that is neither logical nor persuasive, given the direct testimony about the redistricters' understanding of their legal obligations. Moreover, now that the parties have addressed this question directly, the record shows that where the State fell short, that was because there were simply not enough black voters left in the geographic area once the State had met its targets in nearby districts. The Court must examine the district-specific facts, but race can predominate even in these districts where the BPP decreased.

D. Alabama Offers Up Novel Definitions of Predominance Inconsistent with the Supreme Court Decisions, Including the Court's Decision in This Case

Alabama asserts, without citation, that "the plaintiffs must show that but for the drafters' consideration of race, the challenged district would be substantially different." Doc. 263 at 2. That is not the correct legal standard, and it is not surprising that the State does not quote or invoke a case that reflects this novel view. If people are illegitimately classified by race, plaintiffs do not also have to prove the counterfactual of what the district would have been looked like, and whether it would be "substantially different," had race not been used unconstitutionally.

Instead, as the Court stated in *ALBC,* the standard is the basis on which the legislature chooses to place additional voters in districts. As the Court put it, "if the legislature must place 1,000 or so additional voters in a particular district in order to achieve an equal population goal, the 'predominance' question concerns which voters the legislature decides to choose, and specifically whether the legislature predominantly uses race as opposed to other, 'traditional' factors when doing so." *ALBC*, 135 S. Ct. at 1271.

In a similar effort to deflect attention from its use of race, the State invests a great deal of weight, also, in the Court's statements that *Shaw* violations exist when a "significant number" of

people are affected. *See, e.g., Miller*, 515 U.S. at 916. The State attempts to show for each district that, even if it did commit *Shaw* violations, they should be overlooked, because they did not affect significant numbers of people. But as the *Shaw* cases recognize, and the *ALBC* decision confirms, "the harms that underlie a racial gerrymandering claim … are personal." They include being "personally … subjected to [a] racial classification. . . .". *Id.* (quoting *Vera,* at 957). Indeed, that is why, as this Court emphasized in its prior opinion, standing requires that a *Shaw* plaintiff reside in the district being challenged. No court, as far as we are aware (and none the State offers) has found that race was a predominant factor in moving some people between districts, but concluded that "not enough" people were affected to constitute a *Shaw* violation. Given the personal harms involved, that is not surprising.

As a factual matter in any event, as this Court is well aware, all the BMD's were significantly underpopulated. As Tables 2 and 3 in our opening brief document, it is also undisputed that, in most districts, Alabama moved vastly more people into and out of the districts than even the substantial numbers of people by which those districts were underpopulated. (Doc. 258 at 22, 45-46.) As a result, Alabama did move significant numbers of voters into and out of each district, and did so pursuant to its policy that the new district's BPP had to meet or exceed that district's specific racial target. *ALBC*, 135 S. Ct. at 1267 (plaintiffs must show that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.").

E. Both in Practice and Doctrine, Plaintiffs in *Shaw* Cases Are Not Required to Produce Alternative Maps

The State argues that plaintiffs have failed "the very first step of proving a racial gerrymandering claim" because we have not produced a 2% total-population deviation map that

creates districts with lower black-population percentages in some or all districts. Doc. 263 at 17. But there is no such first step required in *Shaw*.

First, plaintiffs are not required to submit any alternative map at all, and often do not, in *Shaw* cases. In *Shaw* itself, for example, the plaintiffs did not submit an alternative plan to show how North Carolina could have met its various objectives, including VRA compliance, with a differently drawn district. Three-judge federal courts regularly determine the existence of unconstitutional racially gerrymandering without engaging in a comparison with some proposed alternative plan. *See, e.g.*, *Page v. Virginia State Bd. of Elections*, 2015 WL 3604029, *10-13 (E.D. Va. June 5, 2015); *Clark v. Putnam County*, 293 F.3d 1261, 1267-72 (11th Cir. 2002); *see also Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996) (referencing only an alternative plan rejected by the legislature); *Johnson v. Mortham*, 915 F. Supp. 1574, 1578 (N.D. Fla. 1996) (concluding plan was product of racial gerrymander without reference to alternative plans); *Hays v. Louisiana*, 936 F. Supp. 360 (W.D. La. 1996) (summarizing series of decisions striking down Louisiana congressional district in cases not involving alternative maps).

The determination of whether race predominates is a factual question: it either does or does not, regardless of possible alternative district designs. The State appears to confuse *Shaw* cases with Section 2 cases under *Thornburg v. Gingles*, 478 U.S. 39 (1986); in Section 2 cases, plaintiffs do have to submit an alternative plan to show that it is possible to craft an additional, reasonably compact minority district. But in *Shaw* cases, plaintiffs are not asking for the State to construct a new district; they are asking the State to stop from using a district in which race unconstitutionally predominated in the district's design.

To the extent the State believes plaintiffs must submit an alternative map that shows how the State could have achieved all its other objectives, along with its VRA requirements, without

drawing the precise districts it did, Doc.263-19, this once again is not a requirement in *Shaw* cases. In *Shaw* itself, the Democratic Party created the extremely bizarre VRA district in the specific location at issue in order to avoid creating a VRA district where a senior incumbent already lived. *Shaw,* 509 U.S. at 635. But the plaintiffs were not obligated to produce a map, and did not, showing how that incumbent could be protected while also creating a VRA district. It is no defense of *Shaw* violations for a State to assert those violations are the only way for the State to meet its VRA obligations while also preserving other districting goals, including partisan ones.

Alabama's reliance for this assertion on *Easley v. Cromartie,* 532 U.S. 234 (2000) is misguided. The contested issue there was whether black residents have been moved into a single district as blacks or as Democrats, in a context in which race and partisanship correlated highly. Though disentangling the two was complex, the Court ultimately concluded that they had been moved as Democrats. After reaching that conclusion, the Court summarized its holding by stating that, "[i]n a case *such as this one* . . . where racial identification correlates highly with political affiliation, the plaintiff must show that the legislature could have achieved its legitimate political objectives in some other way that was also consistent with traditional districting principles."

This case, by contrast, is not one in which Alabama claims, or the record supports, that the redistricters moved black residents as Democrats, rather than by race, to meet its district-specific racial targets. Hinaman, who did the moving, testified repeatedly and unequivocally that he did not use political data, such as voting patterns, in meeting his racial targets for the black-majority districts. He constantly used racial demographic data and total population figures in repopulating these districts. *See* Doc. 258 at 16-17. *Easley* is thus not analogous here; to the

extent there is any uncertainty about this concluding passage in *Easley,* the Court made clear in *ALBC*, in any event, that the question is whether the legislature chose "to place a significant number of voters within or without a particular district" using race as the predominant factor to do so.

F. Republican Legislatures Cannot Commit *Shaw* Violations Any More than Can Democratic Ones

The 2012 plans might well reflect a Republican gerrymander and the prior plan, a Democratic gerrymander. But States cannot commit *Shaw* violations as part of their means of partisan gerrymandering. The Democrats did so in the 1990s, as the *Shaw* cases often attest; indeed, in *Shaw* itself, the Democratically-controlled North Carolina legislature drew the "thin-as-a-highway" Congressional District 12 in the location and shape they did, rather than where the Department of Justice had identified a possible additional majority-minority district, for clear partisan reasons. Neither party can commit *Shaw* violations as a means to partisan gerrymander.

Alabama might have genuinely believed Section 5 required it to re-create the BPPs in its districts, or the legislators might have used this view of Section 5 and their racial targets as an excuse behind which to shield their partisan gerrymandering efforts. As we stated to the Supreme Court, the ultimate purposes do not matter. The Constitution prohibits the use of race as a proxy for partisan voting preferences, *Vera*, 517 U.S. at 968, and race cannot be the "predominant factor" in a district's design, even if partisan advantage seeking is the ultimate goal. In some cases, it can be difficult to determine whether voters were moved by race or by their partisan voting patterns, but not in this one. The redistricters here testified firmly that they did not look at any data, including voting patterns, and only looked at the racial demographics, when they sat down and began drawing their plans by repopulating the black-majority districts to reach or exceed their prior racial floors. Indeed, that was so even though Hinaman had loaded

the data on voting patterns onto his redistricting program and used that data in designing the white-majority districts. *See* Doc. 258 at 16-17. And when separating census blocks within precincts, Hinaman could not, in any event, have relied on political data, because it is not available at that census-block level, though the racial demographic data is available at the block level.

* * *

The predominance test must be understood and applied consistently with the general principles the Supreme Court has defined concerning the VRA and the Constitution. For the last 30 or so years, virtually every Supreme Court decision concerning the VRA has insisted that the Act be interpreted and applied in ways that ensure its application remains closely tied to where current conditions genuinely require its remedial use, and that the Act itself not become a means through which race is used in excessive and unjustified ways.

Shelby County v. Holder, 133 S. Ct. at 2629, of course, reflects the principle that Congress must ensure that any pre-clearance regime itself be carefully tied to "current conditions." In rejecting expansive readings of the VRA, the Court reminded lower courts and others, in *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994), that "[i]t bears recalling, however, that for all the virtues of majority-minority districts as remedial devices, they rely on a quintessentially race-conscious calculus aptly described as the 'politics of the second best.'" In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Court held that the then-version of Section 5 did not always require ability-to-elect districts, because such a requirement "risks isolating minority voters from the rest of the state, and risks narrowing political influence to only a fraction of political districts." *Id.* *Bartlett v. Strickland*, 556 U.S. 1 (2009), held that Section 2 required plaintiffs to establish they would be an effective majority in a district and rejected the position that Section 2 also required the creation of "influence" districts; otherwise, the Court noted, race

would be "unnecessarily infuse[d] into virtually every redistricting." Many of these VRA interpretations are expressly informed by the "serious constitutional concerns" that would otherwise be raised about the scope of race-based districting. *Bartlett*, 556 U.S. at 21-23; *see also Georgia v. Ashcroft,* 539 U.S. at 491-92 (Kennedy, J., concurring). The *Shaw* cases themselves, on which this case is directly based, recognize that the Act does not require the maximization of minority districts and that the Constitution does not permit the excessive and unjustified use of race in designing districts.

These decisions reflect the Equal Protection Clause's more general concern that, when public institutions use race in governmental decision-making, they do so in ways justified as remedial to identifiable discrimination. *Adarand Construction, Inc. v Pena*, 515 U.S. 200 (1995). And even when private actors must sometimes use race to comply with federal anti-discrimination laws, the "strong basis in evidence" requirement exists to ensure that excessively race-based actions not take place out of misguided or exaggerated fears of potential liability, *Ricci v. DeStefano*, 557 U.S. 557 (2009).

These principles have no less force when minority plaintiffs invoke them. The VRA at times requires race-based districting, but it must not be the basis for "entrench[ing] racial differences," by expanding a "statute meant to hasten the waning of racism in American politics," *Bartlett*, 556 U.S. at 25, through separating voters by race into election districts unnecessarily. Alabama's misguided approach to Section 5 does exactly that by failing to tailor its use of race to what is needed under "current conditions" to preserve the ability to elect. This Court should apply the predominant-motive test in light of these constitutional and VRA principles that inform that test.

Argument: Strict Scrutiny

Because race predominated in each BMD, strict scrutiny requires the State to bear the burden of proving both a compelling purpose for the use of race and that this use of race was narrowly tailored to achieve that purpose. The State has failed to meet this burden on either prong of strict scrutiny. For purposes of this decision, it does not matter on which of these two prongs this Court invalidates these districts. But for purposes of analytical clarity, it is useful to explain why, on each prong, the State has failed to meet its burden.

I. The State Does Not Have a Compelling Interest in Complying with a Categorically Incorrect Legal Understanding of the VRA

For purposes of this remand, we are willing to assume that compliance with Section 5 can, in principle, constitute a compelling interest for the use of race, despite the Supreme Court's decision in *Shelby County v. Holder*.[1] But as the ADC's opening brief established, Supreme Court precedent makes clear the obvious point that a State cannot have a compelling interest in complying with its own fundamentally incorrect legal understanding of what Section 5 actually means and requires. Alabama offers only two arguments in response.

First, Alabama takes issue with this argument because the Supreme Court has often struck down unconstitutional racial gerrymanders that the VRA purportedly justified on narrow tailoring grounds, not lack of a compelling interest. Doc. 263 at 47. True enough, but Alabama

[1] We have argued at earlier stages in this litigation that, in light of *Shelby County*, Alabama cannot assert a compelling interest for using race in compliance with Section 5 for any elections after the date of the Supreme Court's decision. A majority of this Court has rejected that position, however, and we do not devote space here to rearguing that issue before this Court. The ADC does, however, continue to preserve its position on the prospective effect of *Shelby County*, contrary to the assertion the State makes in its brief. Doc.263 at 45. This issue is currently pending before the Supreme Court in *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042 (D. Az. 2014), *prob. juris. noted* (June 30, 2015).

then ignores the cases, cited in our opening brief, which define a compelling interest in complying with Section 5 as "a compelling interest in complying with *the properly interpreted* Voting Rights Act." *Shaw v. Hunt*, 517 at 909 n.4 (emphasis added). For this reason, in *Miller v. Johnson*, the Court held unconstitutional Georgia's districts: "the plan challenged here was not required by the [Voting Rights] Act under a *correct reading of the statute.*" 515 U.S. 900, 921 (emphasis added). Similarly, in *Shaw v. Hunt*, 517 U.S. 899 (1996), the Court described its holding in *Miller* in precisely these terms. *See, e.g., id.* at 911 (noting that *Miller* held that the districts were "not required by a correct reading of Section 5 and therefore compliance with that law could not justify race-based districting."). And in *Shaw v. Hunt,* the Court struck down North Carolina's district for *both* lack of a compelling purpose and narrow tailoring. *Id.* ("we find that creating an additional majority-black district was not required under a correct reading of Section 5 *and* that District 12, as drawn, is not a remedy narrowly tailored to the State's professed interest in avoiding Section 2 liability.").

As the Supreme Court held several times during the 1990s, even when the Department of Justice misconstrued the meaning of Section 5, the States did not then have a compelling interest in complying with DOJ's incorrect interpretation. *See, e.g., Miller,* 515 U.S. 900. Surely Alabama cannot have a compelling interest in complying with its *own* fundamentally incorrect interpretation of Section 5 (indeed, an interpretation that the relevant DOJ Guidelines, DOJ practice, and DOJ's position before the Supreme Court rejects).

Alabama also argues that our "no compelling interest" point is wrong because we "ignore[] the difference between the State and individual legislators." Doc. 263 at 47. We confess not to understand what this means. Alabama acts only through its public officials. Both the State's redistricters, and the State's legal representatives in court throughout this litigation,

uniformly and consistently have described and defended the districts at issue as designed to re-create the BPPs, to the extent feasible, in order to avoid retrogression under Section 5. In most (probably all) previous racial-gerrymandering cases, the Supreme Court has relied on the testimony and understanding of individual state actors in reaching the conclusion that the State had used race excessively and unconstitutionally because "the State" had gone beyond what the VRA required. We are mystified as to what more can be said in response to Alabama's assertion that ADC's argument "ignores the differences between the State and individual legislators."

This case is an easy one on the compelling-interest prong because, as the Supreme Court held, Alabama made a categorical mistake in understanding what Section 5 actually requires. In applying Section 5 in each BMD, Alabama asked the fundamentally wrong legal question. Section 5 required Alabama to ask what was necessary to preserve African-American voters' "present ability to elect the candidate of its choice," 135 S. Ct. at 1274; instead, the State asked "How can we maintain present minority percentages in majority-minority districts." *Id.* As the Court's precedents establish, Alabama cannot have a compelling interest in complying with such a fundamentally mistaken understanding of federal law.

II. Districts Drawn Based on a Fundamentally Incorrect Interpretation of the VRA By Definition Are Not Narrowly Tailored to Comply with the VRA and Alabama's Uses of Race Are Not in Fact Narrowly Tailored

Alabama fares no better if this Court chooses to see this case instead through the lens of the "narrow tailoring" prong of strict scrutiny. The problem is the same: Section 5 permits States to use race to the extent necessary to preserve the ability to elect. Section 5 "prohibits only those diminutions of a minority group's proportionate strength *that strip the group within a district of its existing ability to elect its candidates of choice.*" *Id.* at 1272-73 (*quoting* Brief of the United States as *Amicus Curiae*). In this case, Alabama's predominant use of race in the

BMDs was instead done to preserve the BPPs, to the extent feasible. By definition, that is not a use of race narrowly tailored to preserve the ability to elect. Narrow tailoring does not require the States to be perfect, but it does require them to be asking the right question, at the least. This Court can (and should) end its narrow tailoring analysis at this point: because Alabama did not make a judgment about what was necessary to preserve the ability to elect, the districts cannot be narrowly tailored.

A. There Would Be No "Strong Basis in Evidence" For A 65% Rule, Had Alabama Applied Such a Rule

Alabama tries to salvage at least some of the districts by arguing, counterfactually, that *had* the State made an ability-to-elect judgment, a judgment that 65% BPP districts were needed to preserve that ability *would have been* a narrowly tailored judgment. That is, because the State could have decided 65% was needed, any district that came out as 65% or below ought to be treated as narrowly tailored, even though the State did not intentionally design the district based on the actual judgment strict scrutiny requires – the district is narrowly tailored by accident, in essence.

There are at least three fatal confusions to this argument. First, the plaintiffs do not argue that race predominated in the districts *only* because the State set an unjustified racial floor for each district. The State did indeed do that, but in addition, plaintiffs have pointed out for each district ways in which the State created contorted district boundaries and split precincts in racial patterns to meet its targets. Even if some specific black-population percentage were in fact necessary to preserve the ability to elect, the point of *Shaw* is that States still cannot subordinate race to traditional districting principles in this way. Put another way, if the only way to avoid losing a 55% BP majority-minority district is to create an extremely bizarrely shaped 55% BP district, because the black population has dispersed, that does not make such a district narrowly

tailored. Quite the opposite: *Shaw* precludes doing so because such highly bizarre district boundaries cannot be justified as narrowly tailored. The State's "65%" argument is at most responsive (though still wrong) to the claim that the only reason race predominated was because the State made it non-negotiable that each district had to at least meet its prior racial floor, to the extent feasible. But that is not the only claim plaintiffs make on remand; otherwise, we would not have submitted all the maps and the district-by-district information provided.

Second, even if the only narrow-tailoring question were whether the State had a "strong basis in evidence" for the particular level of BPP it made its priority in each district, the State's "65%" argument would be wrong. As initial matter, narrow-tailoring analysis is not a counterfactual inquiry, which is what the State now asks this Court to indulge. This is not a rational-basis inquiry, in which the Court must only inquire into whether there is any "conceivable basis" for the State's use of race. Strict-scrutiny doctrine, in redistricting and elsewhere, is clear that "the institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative-action program.'" *Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (quoting 517 U.S. 899, 910 (1996) (quoting *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 277 (1985) (plurality opinion) (emphasis in *Wygant*). When the constitutionally compelling interest "did not actually precipitate the use of race in the redistricting plan," *id.*, the use of race cannot be retrofitted to an appropriate compelling interest and then be deemed narrowly tailored post hoc. Alabama did not make any considered judgment that 65% was necessary to preserve the ability to elect, then use race as needed to reach that goal. It made a considered judgment that all districts were to be re-populated at their prior BPP level, to the extent feasible, regardless what that prior level had been. Because the State made no actual judgment about ability to elect, in any district or in

general, this case does not involve plaintiffs or this Court making judgments in hindsight about what turns out to be actually be necessary to preserve the ability to elect.

Third, even if Alabama were permitted to invoke this 65% justification after the fact, Alabama cannot credibly argue that it would have a "strong basis in evidence" for the judgment that 65% was necessary. Among many reasons, the most obvious is that the State represented to the Department of Justice in its 2001 Section 5 submissions that 55% BVAP provided African-Americans with a reasonable opportunity to elect the representative of their choice even back then. ADC Supp. Ex. 1, 2, and 3. That judgment was supported by an expert analysis of racially-polarized voting patterns a decade ago in Alabama, which Alabama submitted in support of these submissions. DOJ precleared those plans, which included reducing SD 28, for example, from a 59.269% BP district to a 56.458% one.

The State must be taken to be aware, of course, of its representations to the United States a decade ago regarding 55% districts being sufficient. But in addition, we submitted these 2001 Section 5 submissions to the United States Supreme Court in a post-argument submission that was served on the State. Yet in arguing that 65% is necessary, Alabama remarkably still makes no mention of these submissions and the State's prior representation that 55% is sufficient, in order then to offer reasoned explanation to this Court as to why there is suddenly a "strong basis in evidence" a decade later that 65% is now necessary. Indeed, the State had no evidence before it during the redistricting process, and offers none now, about registration rates, voter turnout rates, or racially-polarized voting patterns, to support its contention that 65% black districts are necessary and narrowly tailored.

That is not surprising. As explained in our brief to the Supreme Court, black registration has exceeded that of whites in the last presidential and mid-term elections and has been roughly

equal to white registration over the last decade; black turnout has exceeded white turnout in all elections since 2004, except in 2006, when it was only 1.8 percentage points below white turnout. *See Amici Curiae Brief of Professors Ronald Keith Gaddie, Charles S. Bullock, III, and Stephen Ansolabehere in Support of Neither Party,* filed in *Alabama Democratic Conference v. Alabama,* No. 13-1138 (2014).[2] This data suggest the level needed to preserve the ability to elect is even lower today than a decade ago.

To be sure, we are not suggesting that the State was required to reduce all majority-black districts to 55%. Rather, the point is that the State did not have a "strong basis in evidence" to conclude that 65% districts were required, even if the State had actually made that conclusion (which it did not).

The State does know how to conduct an expert racial-polarization analysis to determine what is necessary under current conditions to preserve the ability to elect because that is precisely what the State did as part of its 2001 Section 5 submissions. Many covered jurisdictions do indeed do such analyses before drawing their Section 5 districts. *See, e.g., Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042 (D. Az. 2014), *prob. juris. noted* (June 30, 2015). We do not argue that the State was required to do so. But if the State is going to depart so dramatically from (1) its own detailed analysis and legal representations a decade ago and (2) the easily-gathered data on black/white registration and turnout rates today, the State surely has to do a far more compelling job than it has here to explain why there is a "strong basis in evidence" that 65% is necessary.

Indeed, even without employing a statistical expert, all the State had to do was look at its own recent elections. All majority-black districts at all population levels were electing the

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[2] Available at
http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-1138_np_amcu_profs-rkg-etal.authcheckdam.pdf.

minority community's candidate of choice. Moreover, under the existing 2001 plan (with the 2010 Census data), three House districts with even less than, or just barely, 50% BVAP were electing candidates of choice. The BVAPs of HD 73, 84, and 85 were, respectively, 48.44%; 50.61%; and 47.94%. Doc. 263 – 2, Exhibit 2 at 3. Even in the then-recent 2010 elections (a landslide for Republicans nationally and in Alabama), HDs 84 and 85 had elected black officeholders and HD 73, a white candidate of choice of the minority community. *See* NPX 32, pp.16-20, para. 20-22 (Lichtman Report). Had the State judged 65% to be necessary, it would have had no strong basis in evidence for that judgment.

1. Neither the Department of Justice Nor Any Court Requires a 65% Black District to Maintain the Minority Community's Ability to Elect. Instead of discussing its own prior, 2001 evidence-backed judgments on what is necessary in Alabama to preserve the ability to elect, or election patterns for state legislative elections in Alabama, the State tries to enlist the authority of courts (primarily from other states) to support its position that 65% is reasonably necessary in Alabama today.

It is true that at the very dawn of the vote-dilution era, courts and the Department of Justice did initially take the view that 65% districts were necessary, to account for much lower black registration and turnout rates – as in the 1977 case the State cites, *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977). But as black registration and turnout rates improved, due to the effects of the VRA itself, both courts and the Department of Justice soon recognized that 65% was far in excess of what was needed.

Thus, it is telling that nearly all the cases the State cites for the proposition that 65% is a "useful rule of thumb" are from the 1980s. As the First Circuit noted more than a decade ago, "By 1990, fifty-five percent was generally considered sufficient" [for the ability to elect]),

vacated on other grounds en banc, 363 F.3d 8 (1st Cir. 2004). *Metts v. Murphy*, 347 F.3d 346, 356 (1st Cir. 2003). No case in the post-2010 redistricting cycle (or even the post-2000 redistricting cycle) has relied on 65% as a "rule of thumb" to measure black voters' ability to elect the candidates of their choice.

Similarly, it has been decades since the Department of Justice applied anything like a 65% rule. The Department of Justice "expressly disclaimed any reliance on a sixty-five percent standard" more than 25 years ago. Jack Quinn et al., *Congressional Redistricting in the 1990s: The Impact of the 1982 Amendments to the Voting Rights Act,* 1 Geo. Mason U. Civ. Rts. L. J. 207, 239 (1990). That is borne out in the preclearance practice of the Department of Justice. In the 2000 round of redistricting, of which Alabama must have been aware, the Department precleared even plans that dropped black voting age population under 50%, finding that those districts still afforded the black community the opportunity to elect candidates of choice. See *Alabama Democratic Conference, et al. v. Alabama*, No. 13-1138, Br. of Alabama Democratic Conference at 28-31 (discussing examples of Department of Justice preclearance in other states). In the post-2010 redistricting cycle, the Department of Justice routinely precleared redistricting plans with black voting age populations far below 65%.

In addition to relying primarily on cases from 30 years ago, the State badly misrepresents many of the cases, including one of the only two post-1980s cases it cites.[3] Thus, the State

[3] The State's only other cite to a case more recent than the 1980s is to *Cottier v. City of Martin*, 604 F.3d 553 (8th Cir. 2010). The State claims that in *Cottier*, the Court "continu[ed] to apply the 65% figure as a guideline." Resp. Br. 58. The State's cite for this proposition, however, is to the dissent, not to the majority opinion, which rejected the premise that a remedial district must be drawn at all (let alone a supermajority remedial district) where the minority community had not proven that the white community voted as a block to defeat the minority candidate of choice. Moreover, it appears the State missed the point the dissent was making, which was that in light of "the lack of reasoned authority for imposing a 60–percent or 65–percent per se rule, I would remand to the district court for reconsideration of plaintiffs' [remedial plans] … [and] direct the district court to gather any additional statistical evidence, evaluate

invokes *Texas v. United States*, 831 F. Supp. 2d 244, 263 (D.D.C. 2011), as an example of a modern case in which courts mentioned the 65% figure. But as the State recognizes, the preclearance court there was discussing the ability to elect of Hispanic, not black, voters in the Texas district at issue. It is well-established that Hispanic ability-to-elect districts are analyzed differently than black ability-to-elect districts because Hispanics, unlike blacks, have dramatically lower citizenship rates than non-Hispanics. Indeed, in that very case, the State of Texas determined that a district that was 40% BVAP would provide black voters the opportunity to elect candidates of choice, while a Hispanic district would need to be 50% Hispanic citizen voting age population. *Id.* at 263 n.23. It is disingenuous at best for the State to suggest that black and Hispanic districts should be analyzed in the same manner.

Similarly, the State is equally disingenuous in invoking Judge Thompson's holding that 56% and 63% black-populations in Pickens County were not sufficient in 1986 to protect the ability-to-elect in local government elections there. The State simply takes this statement out of context by leaving out the reason for Judge Thompson's conclusion: "the credible and reliable evidence clearly reflects that these two districts do not have black voting age majorities." *Dillard v. Crenshaw County*, 649 F. Supp. 289, 298 (M.D. Ala. 1986). The State has provided nothing like a "strong basis in evidence" for the view that 65% BP districts are necessary in any of the districts today to meet the substantive standard Judge Thompson was applying, which was to ensure that ability-to-elect districts have black voting-age majorities.

While 65% black districts may have been necessary in the 1980s to preserve minority ability to elect, there is no evidence that current conditions require such districts in Alabama.

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such evidence, and *conduct a particularized inquiry to determine what percentage of minority voters is necessary to provide such voters with a reasonable opportunity to elect a representative of their choice*." *Id.* at 571 (emphasis added).

See Shelby Cty. v. Holder, 133 S. Ct. 2612, 2631 (2013) (noting that "[o]ur country has changed" and that any race-based remedial action must be based on "current conditions"). Nor can the State invoke the specter of unsuccessful suits to justify a 65% rule; as the Supreme Court has held, "avoiding meritless lawsuits" cannot constitute an "acceptable reason" for race-based districting not required by a legitimate interpretation of Section 5. *See Shaw v. Hunt*, 517 U.S. at 908 n.4.

2. *The Comparison with Prior Decades Does Not Help the State's Strict Scrutiny Defense.* The State often compares the black-population levels in the 1993 districts to those in this plan to suggest, apparently, that the State did nothing all that different here. The majority of this Court in the prior opinion referenced those numbers as well. But before endorsing any such implication, we ask the Court to recall that the 1990 round of redistricting was the first conducted pursuant to Congress' adoption of the "results" test in the 1982 amendments to the VRA and to the Court's landmark decision interpreting the "results" test in *Thornburg v. Gingles*, 478 U.S. 39 (1986).

The Court-drawn plan in 1993, see *Brooks v. Hobbie*, 631 So. 2d 883, 884 (Ala. 1993), crafted the 1993 districts under this new legal mandate. At the time, the black-population levels actually necessary, as well as perceived to be necessary, led to supra-majority black-population districts. In the early 1990s, for example, a nearly 10 point black/white gap existed in voter registration rates and another 7-11 point black/white gap in turnout. In dramatic contrast, at the time the 2012 plans were drafted, black registration rates *exceeded* white ones by 1-5 points, and black turnout rates equaled or exceeded white turnout rates by up to 4 points. Based on just these numbers, a roughly 20 point black deficit in participation rates had become a roughly 5

point surplus.[4] This 25 point swing, which the Court rightly celebrates in *Shelby County*, 133 S. Ct. at 2626-27, means that what might have been thought necessary to protect the ability to elect in the early 1990s is far in excess of what is needed today.

To the extent the State emphasizes the fact that its racial targets and means of districting re-created BP districts at similar levels to those in the 1990s, that should be cause for judicial concern, not endorsement. *Shelby County* is fundamentally based on the constitutional principle that the structure and application of the VRA must be tied to "current conditions" and "cannot rest simply on the past." 133 S. Ct. at 2629. The purpose of strict scrutiny is to ensure that when there are compelling purposes for the State to use race, that use is not excessive in relation to what is actually needed to achieve those aims.

3. The State Misunderstands How Narrow Tailoring Works. Though this Court need not reach this issue, the State is also wrong in its assumption that a general racial threshold applied across all regions and districts of a State, such as designing all its districts under a 65% rule, would be narrowly tailored (if Alabama had actually applied such a rule). Three-judge federal courts have rejected such "racial thresholds," even at the 55% BP level.

In holding recently that Virginia's legislature likewise failed to ask the right question in its design of Virginia Congressional District 3, the court in *Page v. Virginia State Bd. of Elections*, 2015 WL 3604029 (E.D. Va. 2015), explained that the use of "racial thresholds" does not constitute narrow tailoring. There, the State used a 55% threshold "as a proxy for the racial composition needed for a majority-minority district to achieve DOJ preclearance." *Id.* at *18. The court held that the "legislature's use of a BVAP threshold, as opposed to a more sophisticated analysis of racial voting patterns, suggests that voting patterns in the Third

[4] See supra note 2.

Congressional District were not 'considered individually'" and that therefore the congressional plan was "not narrowly tailored to achieve compliance with Section 5." *Id.*

The court also noted that "[s]imilar ad hoc uses of racial thresholds have been rejected under a narrow tailoring analysis by other three-judge courts," citing the court's decision in *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996). Like *Page*, *Beasley* explained the way that narrow tailoring actually works. As the court held: "[A] plan seeking to ameliorate past discrimination does not require super-safe majority-minority districts of at least 55% BVAP to accomplish this purpose. Such districts should be narrowly tailored so that *each district is considered individually and lines are drawn so as to achieve a district where minority citizens have an equal chance of electing the candidate of their choice*." *Id.* at 1210 (emphasis added). The *Beasley* court further noted that "[d]istricts in which most minority citizens register and vote will not need 55% BVAP to elect a candidate of choice. To be narrowly tailored, such facts should be considered when district lines are drawn. This was not done in the present cases because of the insistence that all majority-minority districts have at least 55% BVAP with no evidence as to registration or voter turnout." *Id.*

The State conducted no analysis at all about what would be required in any individual district. Instead, it now argues for an across-the-board rule that 65% black districts (or under) are narrowly tailored. For the reasons explained in *Page* and *Beasley*, the State's post-hoc arguments about narrow tailoring based on a racial threshold should be rejected.

4. To the Extent There is Hard Evidence From Trial That Establishes Ability-to-Elect Levels in Alabama Today, That Evidence Suggests Far Lower Levels Than 65%. This Court did not make any findings in its prior opinion concerning what is actually needed to preserve the ability to elect and need not make any on this record to reject Alabama's position that there is a

"strong basis in evidence" for a 65% figure. But it is worth recalling that at trial plaintiffs submitted an expert report from Dr. Alan Lichtman, a frequent social-science expert in voting-rights cases. Dr. Lichtman examined the kind of evidence, such as actual voting patterns, that the State had not introduced and concluded that in Alabama, the "very high degree of black political cohesion combined with white crossover [voting] demonstrates that it is not necessary to draw supermajority African American districts to provide African Americas a reasonable opportunity to elect candidates of choice to the state legislature." NPX 32 at para. 24. The ADC also produced illustrative district maps with BPPs ranging from 48.4% to 55.7% in several counties and Dr. Lichtman found that these districts would provide an "excellent opportunity to elect candidates of [the black community's] choice." This analysis was consistent with Dr. Lichtman's findings regarding opportunities for African-American communities to elect candidates of choice in districts with 50% BVAP or even lower in Alabama and other states. This Court did not question Lichtman's testimony on any of these points. Nor did the State submit any analysis of its own on this issue.

5. Reliance on Isolated Statements from Black Legislators Does Not Provide the Basis Necessary to Establish Narrow Tailoring. Pulling isolated statements out of context, the State also claims that "suggestions of black political leaders" provided the State with a "strong basis in evidence" to conclude that 65% black districts were necessary. Doc. 263 at 54-56. The State's cherry-picked record leaves out the testimony of many other black legislators, who urged the State not to "pack" or "race pack[]" black-majority districts. CE 10 at 6, 9; CE 21 at 7-9; CE 232 at 27-28. And it omits the testimony of community leader who criticized the plans as a "racial gerrymander" that involved "packing and stacking" black residents. CE 20 at 9, 17. Moreover, the State fails to indicate any way in which the plans were changed in response to these

comments. They cannot have provided the State with a "strong basis in evidence" when the State was actually drawing the plans.

Indeed, when actually drawing the plans, the State ignored the advice of its own counsel, who informed the Committee that Section 5 required the State to engage in a functional analysis of the population levels necessary for the minority community to elect its candidates of choice and that the State's racial targets could lead to a denial of preclearance because it would pack black voters into supermajority districts without sufficient justification. As the Committee's own counsel explained:

> In the past it used to be 65 or 65 - above 65 . . . I'm pretty sure that if you were to send a district that was 65 percent black to the Department of Justice now, they would wonder why you were packing it, and they'll be looking for, my understanding is, much lower levels. I mean a black majority would certainly be above 50, but 55 may be extreme in some cases.

SDX 441 at 17.

Moreover, even if every black legislator had testified that 65% districts were necessary (and they did not), "[t]he history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 501 (1989); *see also Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 214 (4th Cir. 1993) (applying *Croson* and concluding that police chief's testimony did not constitute strong basis in evidence to justify race-conscious remedy even though the testimony was "based on his significant experience in the field of law enforcement"); *Wessmann v. Gittens*, 160 F.3d 790, 806 (1st Cir. 1998) (noting that "anecdotal evidence, which includes testimony based on significant personal experience, rarely suffices to provide a strong basis in evidence" for a race-based remedy).

As the Court knows, these redistricting plans were not supported by minority legislators. When the final plans were enacted into law, every black member of the State House and Senate voted against them. The isolated statements of a few individuals does not provide the requisite "strong basis in evidence" to conclude that 65% black districts would be narrowly tailored to survive strict scrutiny.

* * *

Alabama's strict scrutiny arguments are the same across the board for all districts. They should similarly be rejected across the board. Alabama had no compelling justification for seeking to re-create BPPs in its VRA districts and there is no strong basis in evidence for the position that 65% BP districts are necessary, or even reasonably necessary, in Alabama to preserve the ability to elect, even had Alabama adopted a 65% rule.

III. In Its Defense of Each Individual District, Alabama Makes Certain Recurring Errors of Fact or Law

In arguing that race did not predominate in the drawing of any district, Alabama recurringly makes certain assertions that should be rejected each time they arise in discussing specific districts. That is because these assertions either involve errors of law, are unresponsive to ADC's arguments or misrepresent them, are inconsistent with the Supreme Court's opinion, or involve the same factual mistake that the State repeats across many districts. To assist the Court's consideration of this case, it is helpful to identify these recurring problems concisely in one place, at the outset. These are not the only flaws in the State's district-specific analysis, but because there is a recurring pattern of these particular mistaken assertions, we highlight them here:

1. The State repeatedly asserts that various districts are "compact," and appears to mean by that they cover a relatively small area. But these districts are in fact non-compact as the Supreme Court understands compactness in the *Shaw* cases. The Court's decisions also routinely recognize districts as non-compact when their perimeters twist and turn, meander in and out of surrounding districts, have odd-protrusions, and the like. *See, e.g., Bush v. Vera,* 517 U.S. at 958-65. In some cases, the Court invokes the quantitative measurement of perimeter compactness to characterize these non-compact perimeters. *Id.* at 960. Many of the districts the State calls "compact," even if they cover a relatively small area, nonetheless have boundaries and edges that demonstrate precisely the kind of race-based non-compactness the Court treats as essential to the *Shaw* analysis.

2. The State repeatedly asserts that the drafters made "only a few changes to a district," e.g., Doc. 263 at 90, or made only "minimal changes." These assertions are often accompanied with new, before-and-after maps that show a district *generally* appearing to be roughly the same in location and shape.[5] Two consistent problems recur with this assertion.

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[5] The State did not file these maps with the Supplemental Exhibits the Court's remand-scheduling Order required.

First, they are factually wrong or misleading with respect to each and every BMD. In our opening brief at Tables 2 and 3, the ADC provides information not available to this Court before that documents the number of people actually moved into and out of each of these districts. Measured in terms of what matters – the movement of significant numbers of people into and out of the district – there is no virtually no BMD in which there was "limited" or "minimal" population change.

As these Tables demonstrate, the average number of people moved into and out of the House BMDs was 23,474, or 52% of the new district's ideal population. In the Senate, the average was 51,914, or 38% of the new ideal population. The districts were not underpopulated to this extent, of course, but the State did not confine itself to minimal changes needed simply to rectify the under-population; it typically moved tens of thousands of people in reconfiguring the districts.

The State simply ignores this data most of the time when it asserts that it made "limited changes." As one example, the State asserts that SD 28 "changed little," Doc. 263 at 90, but the State moved nearly 70,000 people into and out of this district, though it mentions nothing about these numbers. The State certainly did not apply a least-change policy to the BMDs.

Second, the high level of visual distance and generality at which the State presents its new, before-and- after maps obscures the more fine-grained changes along the boundaries of the districts that are critical. These changes to the perimeters can be difficult to see and require careful squinting on the maps the State now offers. But as the Supreme Court's cases make clear, it is these changes at the boundaries of the districts on which the predominant-motive inquiry focuses. Our district-specific analysis describes these changes. In response to the State's new exhibits, we also occasionally provide maps that overlay the new districts over the old ones where doing so is particularly helpful, which is a much more useful way for the Court visually to recognize where changes were made.

3. The ADC repeatedly identifies contexts in which the State bypassed adding relatively whiter-population areas to the BMDs and chose relatively blacker-population areas instead. Each time, the State responds by asserting that, to have made the choice to include these whiter areas, would have been for the State to engage in unconstitutional racial gerrymandering. *See, e.g.,* Doc. 263 at 37, 100.

   This misrepresents ADC's position and, in any event, is legally confused. We do not argue that the State had an affirmative obligation to add relatively whiter census blocks. If the State had instead adopted a consistent policy of adhering to county lines, or keeping political subdivisions intact, or keeping communities of interest together, or expanding

underpopulated districts into nearby overpopulated ones, or even applied a grid to designing the new districts, and somehow the old districts had come out to the same black percentages as the prior ones, there would have been no racial gerrymander. And racially-neutral practices whose effect would have been to add more white areas to the BMDs would hardly constitute a racial gerrymander.

We point to the pattern of these contiguous, whiter areas being bypassed regularly as part of the evidence that race predominated when the State set out to reach its racial floors for each district -- both with respect to individual districts and consistently, as part of an overall pattern in repopulating the BMDs. Indeed, this aggregate pattern is telling in providing the most plausible account for why the State bypassed whiter areas for blacker areas in repopulating any specific BMD. It is the pattern of choices that is most probative of racial predominance, in conjunction with the other direct and circumstantial evidence plaintiffs offer.

4. Similarly, the State consistently defends by invoking redistricting objectives at too high a level of generality to be responsive. For many districts, the State represents that it preserved "the core" of an existing district. But as the Supreme Court has held already, redistricting policies stated at this level of generality are "not directly relevant to the origin of the *new* district inhabitants. . ." *ALBC,* 135 S. Ct. at 1271-72. The question is the role race played in choosing those parts of the district that were reconfigured, and which removed or added thousands of new residents, particularly at the boundaries where the district was changed.

   In addition to "preserving district cores," the State invokes other principles at similar irrelevant levels of abstraction. The State repeatedly refers to its goal of leaving incumbents in their prior districts or avoiding pairing incumbents, for example, but unless the State can demonstrate that doing so accounts for why the district's boundaries were drawn in a specific way, that policy as such is stated at too high a level of generality to be relevant. We acknowledge that at one or two points, the State does make the specific assertion that a district had to be extended in a particular way to keep an incumbent in the district. But much of the time, the State adverts to these policies at too high a level of generality to be meaningful to the *Shaw* inquiry.

   To the extent that the State also means that an incumbent's preferences played a partial or central role in a district's design, a district designed in such a way that race predominates does not become any less so merely because the preferences of an incumbent – black or white – played a role in that district's design. In addition, a district that would otherwise violate *Shaw* does not become constitutional merely because an incumbent wanted the district designed that way.

5. The State offers numerous districting policies, of course, to explain the design of various specific districts. Leaving aside for the moment the accuracy of these assertions with respect to any specific district and the extent to which, in specific contexts, these are post-hoc explanations generated by the State's counsel, it is important to recognize the pattern of inconsistent invocations of these explanations across districts. In evaluating whether race predominated for any specific district, the courts regularly discount ad hoc explanations that a State invokes inconsistently on a statewide basis, as our opening brief demonstrates. Doc. 258 at 10 (citing cases).

   As one example, the State asserts at several points that it deferred to the preferences of incumbents – except when it did not. The State rejected out of hand any plan incumbents offered, including those of black and white incumbents, if those plans did not ensure the BPP floor was met. To the extent the State was deferential to an incumbent in any particular district, that deference was turned on or off depending on whether the incumbent's preference met or exceeded the State's pre-set racial targets.

   Similarly, the State was willing, for example, to cross county boundaries for various purposes, including meeting its total population and BPP goals --- except when doing so would add whiter areas to the BMDs. As documented further below, for example, the State insisted that the BMD Senate districts in Birmingham had to be re-populated while keeping those districts wholly within Jefferson County, thus minimizing the white population that might have been added, while the State was willing to split Jefferson County to configure every single white Senate district there. Doc. 258 at 39.

   Particularly given the unusually compelling direct evidence of racial intent in this case, this Court should not accept redistricting policies that the State invokes inconsistently to explain away apparent race-based districting in any specific district.

6. The State's effort to show that un-splitting precincts would not dramatically change the BPP of particular districts misses the point. At times, the State appears to argue that any race-based pattern of precinct splits did not affect "significant" enough numbers of people to establish liability under *Shaw*. *See, e.g.,* Doc. 263 at 94-95. Even were this true – it is not – no court has rejected *Shaw* liability because the *Shaw* violations did not affect a "significant" enough number of people, and the State does not identify any such case.

   But in any event, the plaintiffs do not argue that the only, or even most significant, means the State used to meet its racial floors was by splitting precincts. Indeed, that would be an extremely inefficient way of doing so. Indeed, Hinaman himself testified that when he was repopulating the BMDs he was "reaching out to find black precincts." Tr. 3-142:14-18. That means bringing in relatively more heavily black-population precincts in their

entirety, because of their racial demographics, which is a much more efficient means of making sure to reach the racial floors. Hinaman also specifically testified that he split precincts by race if necessary to avoid retrogression. Tr. 3-144: 5:7.

The split-precinct data is relevant only as one additional source of illustration of the extent to which the State was willing to fine-tune its plans to meet the racial floors, regardless whether that race-based fine-tuning was necessary to preserve the ability to elect – not to show that this was the central means by which the State reached its racial floors.

Far more important, as the ADC's maps demonstrate, was the State's selective incorporation of whole areas at the distorted boundaries of the districts, including whole precincts and census blocks, that were relatively more black than the bypassed white areas.

7. The State argues that plaintiffs have "waived" their claims with respect to certain districts. As law of the case, the Supreme Court's decision rejects this argument. The Court noted that plaintiffs' complaints, properly understood, challenged each majority-black House and Senate district and affirmed both Judge Thompson and ADC counsel at argument on this point. In response to this Court's post-remand Orders, plaintiffs identified all these districts, to which the State did not object, and the Court's Orders contemplate that specific additional evidence could have been offered on any of these districts. As plaintiffs demonstrate below, the existing record evidence is sufficient to establish racial predominance for each district about which the State claims "waiver."

In conjunction with the compelling direct evidence of race-based decision-making, we request the Court to keep these general points in mind in evaluating the district-specific evidence.

SENATE DISTRICTS

A. SDs 18-20 (Jefferson County)

The State argues here that the BPPs in these districts were determined by local demographics and the preferences of incumbent Senator Smitherman.

1. *Demographics.* First, the State asserts that the "general shape" of these districts "changed little" from their 2001 contours. Doc. 263 at 65. The State does not provide any before and after maps on which it bases this statement, most likely inadvertently.

The ADC maps, which specifically focus on the changes made, show that they were significant and reflect a race-based pattern of sorting. *See, e.g,* ADC Supp. Exs. 34B, 35D and 35E, 36G, and 36H. In our remand brief, we called out the odd hook added at the northwestern area of SD 20, which bypasses white-majority areas and then swings back around to capture additional black residents to pull into the district. ADC Supp. Exs. 36H and 36G, for example, show the race-based pattern of precinct splits that make up this odd hook, such as between SD 20 and white-majority SD 17. The State does not respond at all to our identifying, for example, this race-based pattern in this oddly configured part of SD 20.

The State does not assert that these districts are compact. Certainly elongated SD 18 and bizarrely shaped SD 20, pinched at the center and hooked at the extremity, are not; and the vagaries of the borders of SD 19 show clear evidence of racial sorting unnecessary to any traditional redistricting criterion. ADC Supp. Ex. 34 B and 35D-H. As is the case throughout, the State does not address these specific maps and the racial-sorting patterns they display.

Instead of addressing the ADC maps and explaining the specific boundary changes to the districts, the State relies on general information about the demographics of a series of black-majority cities within Jefferson County that are (and were) primarily within SDs 18-20 under the

2001 plan. The State then asserts that the new "[d]istricts that cover these areas will necessarily reflect the area demographics." Doc. 263 at 66. The argument is a tautology: districts that cover particular areas reflect those areas. The State insinuates, as it does repeatedly in respect to various districts, that it had no choice but to create these levels of supermajority black populations in all three districts.

But while SDs 18-20 did occupy much of this area in the 2001 plan, each of those districts was substantially underpopulated in 2010. Each had to grow significantly. The choice before the Legislature was what population to add in order to bring the districts to population equality. And despite the State's insinuation that demography made them do it, the State in fact had many choices.

The Birmingham area contains heavily white and racially mixed cities adjacent to SDs 18-20. The Legislature did indeed have many options as to what population to include and exclude in each district. As the State's own Def. Supp. Ex. 6 shows, in making these choices and searching for black population to add to the three districts, Mr. Hinaman grabbed what black population he could from predominantly white cities and left the whiter portions of those cities in the adjoining white-majority districts: (a) Fultondale, SD 20 portion, 38.76% black; SD 17 portion, 8.11% black; (b) Gardendale, SD 20 portion, 35.82% black; SD 17 portion, 4.75% black; (c) Graysville, SD 19 portion, 31.27% black; SD 5 and 17 portions, 4.05% black; (d) Homewood, SD 18 portion, 27.88% black; SD 15-16 portions, 3.95% black; (e) Hueytown, SD 19 portion, 30.47%; SD 5 portion, 11.14% black).

In addition, Mr. Hinaman managed to pinch a 70 percent black portion from heavily white Trussville (6.6% black) for SD 20, *id.* at 27, Def. Supp. E. 8 at Bates 831, and carve a white area of black majority Tarrant City to exclude from SD 20. *Id.* at 27, Def. Supp. E. 8 at

Bates 799. The parts of the City of Birmingham itself that Mr. Hinaman excluded from SDs 18-20 are disproportionately white: SD 5, 152 total, 2 black; SD 15, 2,666 total, 224 black; SD 16, 1514 total, 214 black; SD 17, 18 total, 1 black. Def. Supp. Ex. 6 at 5; 21, 22 24.

Our remand brief further points out that, in addition to the hunt for black population to add to the three districts, in order to meet, as nearly as possible, the 2001 districts' black percentages, the State cannibalized SD 20 to try to meet the racial targets for SD 18 and 19. The State does not take issue with our description of the numbers concerning the way black residents were shifted from the most heavily black district, SD 20, to SD 18 and SD 19. SD 19 already had sufficient black population, even as underpopulated, to constitute a 57% BP majority in an equally-populated district with no additional black population, while the black population of SD 18 was sufficient to form a 49.5 percent plurality (and a 54.78% minority-majority) in a fully-populated, zero-deviation district. Doc. 258 at 24 (Table 1). Each of these three Senate districts could have moved in any direction to add population, including into virtually all-white areas – and still have remained wholly within Jefferson County. That is, myriad alternative configurations would have provided for three black-majority districts with population deviations of less than one percent. The State identifies no incumbent residence that stood in its way.

Rather than simply expand underpopulated districts outward to overpopulated districts in a racially neutral manner, the natural course in redistricting, the State removed 13,833 black residents from *under*populated SD 20, ADC Supp. Ex. 5; NPX-340 at 1, and transferred all but 15 -that is not a typo - of the 13,833 into either SD 18 and 19. *Id*. The number is tantamount to a mathematical demonstration that the only reason for choosing this way to repopulate SDs 18 and 19 was to meet the 2010 black percentages in those districts (which, despite Mr. Hinaman's

best efforts, they were unable to do). The ADC map at Supp. Ex. 36F shows the transfer of overwhelmingly black populations from SD 20 to SDs 18 and 19 to meet these targets.

2. *The "Smitherman Made Us Do It Defense."* The pattern of racial sorting for these districts is clear. But the State also relies heavily on the fact that Sen. Rodger Smitherman had provided a suggested map for these districts to Senator Dial. Doc. 263 at 64-65. In its prior opinion, this Court credited Senator Smitherman's testimony that the redistricters incorporated "a majority of that map [Smitherman's] into the new districts." 989 F. Supp. 2d 1261. At this stage, what is critical is how the State got to the precise racial percentages it did in each of these districts, as well as the parts of Smitherman's map that the redistricters rejected or modified.

Setting aside the relevance in a *Shaw* case of the race of a legislator who drew a given plan, the State vastly overstates the extent of Mr. Hinaman's reliance on Sen. Smitherman's plan. His plan is not the State's plan and the devil is in the details.

Senator Dial told Hinaman that he should, "to the extent possible follows these maps . . . ." APX 75, p.43:2-6. While Mr. Hinaman "endeavored to duplicate" that map in the Senate plan, Tr. 3-121:15, doing so was not straightforward because the map was nothing more than a single sheet of paper. SDX 469. Moreover, as Mr. Hinaman testified, Smitherman's map "didn't have any demographic information." *Id.* Hinaman "was not handed any numeric or other documentation other than that map, so [the way Hinaman designed the actual districts] was my attempt to recreate that [Smitherman map] visually from what I had." APX 75, p. 43:12-14. As Hinaman was asked: "So you had to eyeball it." He answered: "Yes, sir." *Id.* Given that Smitherman's map did not contain numerical information, Hinaman thus inevitably had to do his own calculations and line-drawing to ensure the three districts met their population targets, while also meeting Hinaman's BPP targets as well, to the extent feasible. Although Hinaman's

recollection was that "except around the very fringes" he "probably followed [Smitherman's maps] about 95%," Sen. Smitherman did not accept this characterization when he was specifically asked about it by Judge Watkins. Instead, he was prepared to accept as fact only that "a majority" of what he brought to Senator Dial was adopted as in his original plan. Tr. 2-41:14-18. Smitherman testified that Hinaman made changes to the plans, but that Hinaman did not discuss any of these changes with Smitherman.

The actual district boundaries in fact depart in meaningful ways from the Smitherman draft. SD 19 is shifted dramatically to the southwest. The shape of SD 20 was contorted to create a hook at the northwestern border connected to the rest of the district by a single block. The interstices of the areas are predominantly white in population.

Moreover Senator Dial testified that, in his view, attempting to meet the racial targets for each of these districts precluded bringing them up to population equality by expanding any of them into the relatively whiter-population areas or districts that were adjoining. As Senator Dial put it, doing so would have violated "guidelines that we had established," which meant not "regressing" the BPP of the districts, to the extent feasible. Tr. 1-114:13-19.

As he testified, "as I grew those three districts, they had to grow with minorities. They couldn't grow – I couldn't move Senator Smitherman over the hill into Mountain Brook and Vestavia. It would have regressed his district." APX 66, p. 49:4-8. Yet Mr. Hinaman and Sen. Dial had no problem with SD 18 reaching "over the hill" (Red Mountain) into the City of Homewood to grasp black population for Sen. Smitherman's district, as documented above. The general locations and shapes of the districts in the "majority" of Senator Smitherman's map that Hinaman adopted do not explain the more fine-grained, racial sorting pattern revealed here.

Set against a full picture of the alternatives available to the State, the changes in the Jefferson County Senate districts show a clear pattern of racial sorting, whether looked at in toto or in detail. The focus on reaching as close to the 2001 plan's 2010 black percentages as possible, the systematic fragmentation of cities and voting precincts in the search for additional black populations, the contortions in district boundaries to achieve racial results, all demonstrate that race predominated in the configuration of these districts.

B. SDs 23 and 24 (Western Black Belt)

The State argues that its choices here were mandated by demography and incumbent preference. The State notes that the Western Black Belt includes counties with high racial percentages, Doc. 263, pp. 72-73, and lists most of the counties that have portions included in the 2012 districts – all of those over 40% black in 2010. Yet the State omits from its list Washington County, which was 24.91% black, and Tuscaloosa, 29.60% black. *Id*. at 85, APX 4, Doc.30-44.

But these are not the only counties adjacent to SDs 23 and 24. Others include Autauga (17.67% black) and Bibb (22.02% black), portions of both of which had been included in the 2001 districts, and Chilton (9.69% black). Also at the periphery of the new districts are Baldwin (9.38% black) and Lamar (11.28% black). The Legislature avoided all of these heavily white counties in adding population to SDs 23 and 24, just as it avoided adjacent white areas in redrawing SDs 18-20 (and other districts, discussed later).

When we look at the counties that are racially mixed in this region, we see the same pattern as in the Jefferson County districts: the more heavily black parts of these counties are pulled into SDs 23 and 24, while their whiter areas are placed in white-majority districts:[6]

	County B %	SD 23-24 B%	Excluded B %
Conecuh	47.0%	60.01%	14.65%

[6] These numbers are taken from CE 40 at 14, 36, 63, 65, 68, 70-72, 75, 77, 81, 83, 85, 88.

Clarke	44.3%	67.68%	22.02%
Choctaw	43.7%	54.42%	4.41%
Hale	59.02%	67.08%	26.06%
Monroe	41.68%	67.92%	17.87%
Pickens	42.2%	74.01%	22.55%
Tuscaloosa	29.60%	60.88%	13.90%
Washington	22.02%	81.76%	17.61%

In conjunction with all the other evidence, it is not credible that these results are accidental. Instead, they are consistent with the stated goal of maintaining the prior districts' BPPs and with the use of racial sorting to get there. In addition, these numbers are consistent with the pattern of the 38 precinct splits involved in the changes made to SDs 23 and 24. These, too, show a stark and consistent pattern of racial selection. See Doc. 258-2 at 3-6.

The two districts involved 44 split precincts. In 82% of the split precincts, the portion placed in SD 23 or SD 24 has a black majority. *Id.* The portions of those split precincts included only one (2.27%) with a black minority. The same stark pattern holds true in the whole precincts included in both districts: over 80% of these had black majorities, while in the areas of these counties that the State left outside SDs 23 and 24, only two of the 84 (2.38%) whole precincts had black majorities. The precinct splits are hardly "insignificant" by any standard.

The bare numbers of racial sorting, compelling by themselves, come to life, moreover, in the evidence provided by the detailed maps, which show the block-by-block selection of relatively more black-populated areas and the exclusion of relatively more white-populated areas that marked Mr. Hinaman's work here (as elsewhere). These maps were not available to the Court, of course, for its prior decision. For SD 23, see ADC Supp. Ex. 37D (SD 23 extends to

grab black areas of Conecuh County while white area remains in white-majority SD 22); Supp. Ex. 37F (inclusion of highly concentrated black populations, exclusion of predominantly white areas in southern SD 23 (Monroe, Clarke, Washington, and Conecuh Counties)) and ADC Supp. Ex. 37G and 37H (racially-split precincts in the same area); and for SD 24, see ADC Supp. Ex. 38D, 38E and 38J (Tuscaloosa "hook" sorts black and white populations at northeastern extremity), ADC Supp. Ex. 38J (racial precinct splits at the "hook"); ADC Supp. Ex. 38F, 38 and 38M (racial sorting and precinct splits in Pickens County); ADC Supp. Ex. 38 H and 38I (racial sorting in Clarke and Choctaw Counties).

There was nothing straightforward or "mandatory" about these choices. The racial fine-tuning necessary to reach the racial targets is all the more significant because of the remarkable number of people moved into and out of the districts: 52,738 for SD 23, and 64,414 for SD 24. ADC Supp. Ex. 5. Those changes amount to nearly three times the population needed to bring the districts up to the ideal population and comprise 39% and 47% of the ideal Senate district population.

There was no need for such gymnastics. As stated in our remand brief, the State had the straightforward option of simply adding two whole rural counties to the rural districts, Butler to SD 23 and Pickens to SD 24, and then doing no more than making minor adjustments to the lines within Marengo County to bring both districts within the State's 2% total deviation standard. Such changes would have epitomized racially neutral redistricting: minimal changes that restored county boundaries, separated incumbents, avoided or at least minimized precinct splits, and such changes would also, with minimal internal and no external shifts, have maintained the district cores in exemplary fashion. *See also* Doc. 195, pp. 72-74 (reuniting split precincts and counties within SD 23 and SD 24). The minimal change nature of such

adjustments also serves the State's "important race-neutral objective" of "keeping the districts in as close to the same location as possible." Doc. 263 at 88-89.

The State struggles to take exception to this or any other alternative. It argues that adding Pickens County to SD 24 would split SD 21, Doc. 263 at 72, but SD 21 had not been drawn when the State configured SD 24. Mr. Hinaman always drew the black majority districts first, and SD 21, therefore, at a later date. Tr. 1-36:5-10 (Dial); Tr. 3-122:23 to 3-123:9, 3-146:25 to 3-147:23 (Hinaman); Tr. 3-221-23 (McClendon). The Legislature would have had any number of options for SD 21, such as shifting it more into the SD 5 area of Tuscaloosa County (presumably its core since the SD 21 incumbent lives there, Def. Supp. Ex. 4), with appropriate adjustments in the Lamar-Fayette "core" area of the district (where no incumbent lived and, with no impact on the Walker County (the home of the incumbent, *id*.), or swapping population within Jefferson County. Other options abounded, but would not have enabled the redistricters to meet their racial targets.

With respect to the SD 23 minimal change, the State invokes in a curious way Sen. Sanders, whom it says asked to be removed from Autauga County:

> If the drafters of the State's plans could have expanded SD23 into Autauga County, even though the incumbent opposed that expansion, then they might have adopted a plan like the ADC's plan for SD23. But the drafters had to reject these possibilities because they were applying *race-neutral criteria*, not because they were focused on a racial target. (Doc. 263 at 74.)

It is by no means clear what this means, especially the italicized "race-neutral criteria." The State gives no examples. Is it their invocation of adding the remainder of Clarke County to the district, *id*., a possibility raised in a plan that Mr. Hinaman never saw – and thus could hardly reject? APX 75, p.138:16-139:14. Mr. Hinaman openly was trying to (and did) meet or exceed specific racial targets in SD 23 and SD 24, in a manner that was hardly race

neutral. And while Sen. Sanders may well have wished not to expand into the growing white suburbs of Autauga County, the State has presented no evidence that he would object to maintaining his 2001 district intact with the addition of Butler County: such an assumption goes well beyond the testimony. In any event, Mr. Hinaman clearly felt free to ignore inconvenient parts of requests from black legislators, as discussed above in reference to Sen. Smitherman. The only goal that the minimal change approach outlined in our brief would not meet is the State's racial targets.

The State further defends the changes to SD 23 and 24 with familiar but unsupported claims. The State asserts that the "southern border [of SD 23] remained almost unchanged from the previous plan. Doc. 263 at 71. On a small copy of a large scale map, that might appear true, but in fact, it is not. As set forth above, the southern border of SD 23 is marked by a series of county and precincts splits, all reflecting a racial pattern.

The State defends the border within Tuscaloosa County by saying, again based on small copies of large scale maps and assertions at a high level of generality, that the bizarrely-shaped hooks into Tuscaloosa County that plaintiffs have identified are "much the same hook" as in the 2001 plan. Doc. 263 at 75. Again, the detailed ADC maps – which illustrate the *changes* to the prior district – demonstrate otherwise beyond dispute. As ADC Supp. Exs. 38D, 38E, 38J, and 38L all show, the newly configured areas in this highly-contorted part of the district consistently are shaped in a way that pulls in areas of high black-population concentrations. The pattern of subordinating compactness to race is clear. Because Marengo County is divided into 25 precincts, almost all with very small populations, avoiding any splits is certainly achievable.

The State's point that "[t]here is no way to divide these counties into Senate districts without creating majority-black districts," Doc. 263 at 73, is true as far as it goes. But that point

does not go very far. Both districts started with a large enough black population that, even at exactly ideal population, they would have had been black-majority had not a single white person been added. SD 23 would have been 53.08% BP and SD 24 would have been 54.63% BP. Doc. 258 at 30.

Taken in conjunction with the direct evidence and the overall pattern reflected in other districts as well, the most convincing conclusion is that the redistricters engaged in racial sorting to ensure that these districts reached the racial floor set for them in advance. Race predominated, here as elsewhere.

C. SD 26 (Montgomery County)

The Supreme Court held that "there is strong, perhaps overwhelming, evidence that race did predominate as a factor" in the design of SD 26. *ALBC,* 135 S. Ct. at 271. Nonetheless, the State presses its case that race did not predominate even here. But nothing the State offers makes that evidence any less overwhelming.

The stark fact of SD 26 as redrawn by the State is the net population change: the State added a net of 14,826 persons to the district, of whom only 36 were white. Doc. 258 at 35. The State approaches this fact in a curious manner, by observing that during the course of moving over 50,000 people in and out of SD 26[7] to get to the these racially-stark final results, "there were in fact 11,473 whites (out of 35,824 persons) added to SD26," so that the "population added to SD26 was 32% white and 60.2% black, meaning that the population added to the district had *fewer* blacks proportionally than the end result." Doc 263 at 90-91. The State argues that "the district has 36 more whites *net* than it had before, but to say that the Legislature added only 36 whites without mentioning the "net" part of the equation is misleading." *Id.* at 91.

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[7] While our brief indicates that the state moved 51,700 persons into and out of the district, Doc. 258 at 36) the actual number appears to be 55,863. ADC Supp. Ex. 5.

Well of course. But no one was saying that. The State's is the first suggestion that the changes being discussed here are not net changes. There is not, nor has there ever been, a claim that the population patterns of SD 25 contained such a large area with so few white residents that this area could just be dumped into SD 26. *See, e.g.,* Doc. 195-1 p. 64 ("193. The net mathematical result of the State's changes to district 26 speaks volumes)"; Doc. 258 at 38 ("There was not a portion of SD 25 that contained 14,806 blacks but only 36 whites. The only way to achieve that exceptional result was to swap predominantly white areas in SD 26 for predominantly black areas of SD 25; the *net* effect of such an exchange could be to add only blacks to SD 26.);" (emphasis in original). Rather than being a "gotcha" fact, the fact that the State had to transfer well over 50,000 people to meet a population deficit of less than a third of that number is evidence, once again, of how extraordinary Mr. Hinaman's efforts had to be to reach or exceed the prior black percentage – a percentage that he and Sen. Dial expressly admitted was unnecessary, in any event, to maintain SD 26 as an ability-to-elect district. Doc. 258 at 36.

The maps submitted by the ADC illustrate the racial pattern of selections Mr. Hinaman made to get to a net 14,826 blacks and 36 whites added. ADC Supp. Ex. 39A shows the boundaries of SD 26, which the Supreme Court described as "irregular," *ALBC,* 135 S. Ct. at1271, and which varies radically from the "rectangular" shape of the 2001 district. *Id.* The ADC maps at Supp. Ex. 39B – 39F illustrate the block-by-block nature of Mr. Hinaman's sorting of the black and white populations of the county.

In the face of overwhelming evidence, the State resorts to familiar and familiarly inaccurate arguments. First, they claim the absence of any alternative. Mr. Hinaman could have added adjacent Crenshaw County to SD 26 to meet most but not all of SD 26's population deficit. The

State begins with the switch of SD 30 as the bridge between the North and South Alabama districts – the funnel through which any population imbalance would flow -- that left SD 30 short of population, some of which it took from SD 25. Doc. 263 at 94-95. At that point, the State's counsel asserts,

> SD25 needed to add population. The solution was to use the sparsely-populated rural area of Montgomery County — an area with a population of around 12,000, and that was about 65% white, to connect SD25 to Crenshaw County. Then, to round out SD26, the Legislature added a few contiguous "additional precincts in the City of Montgomery north of Alabama Route 80," a "reasonable response to the underpopulation of the District." *Id.* (internal citations omitted).

The State's argument is mathematically inaccurate. The State explains how SD 25 grew with the addition of population from Crenshaw County and from underpopulated SD 26, but glosses over how SD 26 made up the expanded deficit. In fact, it made it up by adding a net 14,836 residents, of whom only 36 were white to SD 26. SD 26 was, in effect, enclosed within SD 25: it includes no portion of any other county. As adopted, SD 25 and SD 26 comprise a closed set, a unit with sufficient population for two Senate districts, and the lines between the two could be redrawn so as to add Crenshaw County to the pre-existing SD 26 boundaries and make SD 26 the bridge (Crenshaw-Montgomery SD 26, Montgomery-Elmore SD 25). This is indisputable.

The State's argument also fails because, as Senator Dial and Mr. Hinaman testified, they redrew the black majority districts first. Tr. 1-36:5-10 (Dial); Tr. 3-122:23, to 3-146:25 to 3-147:23 (Hinaman). SD 30 therefore necessarily came later and therefore did not yet need population: its northern boundaries were wide open. It may well be that the decision to break up SD 30 as drawn in 2001 was made early on, but there is no evidence that the details of populating any white majority district were set. The State's post-hoc argument is inconsistent with the record.

The State also argues, this time with a twist, that the demography of the City of Montgomery forced the contours chosen by the Legislature. Ninety-eight percent of the population of SD 26 is within the City of Montgomery, and that explains the 75% black supermajority. Doc, 263 at 99. But the City of Montgomery is only 56.6% black. Def. Supp. Ex. 6 at Bates 567. SD 26 includes less than 64 percent of the total city population but 86 percent of the city's black population. *Id.* Moreover, the State did not have a consistently applied policy of drawing or extending districts so completely within individual cities, as Def. Supp. Ex. 6 abundantly demonstrates. As that exhibit shows, the State divided Hunstville, for example, among five districts (SDs 1-3 and 8-9). As is the case throughout, the State conveniently invokes ad hoc explanations in particular districts that it ignores in others to explain away a pattern of racial sorting.

The State also attempts to explain the "lagoon" of white areas of Montgomery in the western portion of SD 25 by relying on similar but by no means identical lagoons in the Montgomery County Commission districts. Doc. 263 at 83-84. Tip-toeing by the question of the motives of the Montgomery County Commissioners and setting aside the irrelevance of county commission lines to state legislative lines, *Connor v. Finch*, 431 U.S. 407, 424 (1977), the fact is that the Montgomery County Commission districts look much more like the 2001 Senate districts than do the 2012 districts. Compare the maps at Doc. 263 at 82 with Supp. Def. Ex. 10. Under the 2001 plan SD 26 included the great bulk of the two southern districts and portions of the central city. The Senate district lines adopted by the State destroy this pattern and generally play havoc with the county commission districts and whatever communities of interest they may represent.

Finally, the State attempts to revive three of the factors it has claimed help shape SD 26, preserving the core district, county lines, and highways, but that the Supreme Court discounted. Doc. 263 at 85-86. Defendants concede that the Supreme Court said that core preservation "is not directly relevant to the origin of the new district inhabitants." *ALBC*, 135 S. Ct. at 1271. *Id*. at 85. This is particularly true here, where the closest the State has come to defining the core of a district is what it described as the "important race-neutral objective" of "keeping the districts in as close to the same location as possible." Doc. 263 at 77. The State obviously did not maintain the core of SD 26. Similarly, far less of the SD 26 boundaries match county boundaries under the 2012 plan than under the 2001 plan. And as ADC Supp. Ex. 39B-F show, in drawing the new lines the State actually departed from highway lines in favor of meandering boundaries through neighborhoods and precincts. If there is anything left of these interests as redistricting criteria, they do not support the State.

The State claims that the district's unusual shape takes place because of the Montgomery County precinct lines and the need to keep Sen. Ross' home precinct, which comprises the "crab claw": "to the extent the district is an unusual shape, it takes that shape because of precinct lines, not in spite of them." Doc. 263 at 87. The precinct lines offered by Defendants, Def. Supp. Ex. 9, are dated 2014, and reflect the post-redistricting lines rather than those at the time of redistricting. More to the point, the lines were irregular only because the legislature *removed* adjacent areas in the course of getting to 36 of 14,826. It was the removal that made the crab claw.

The State argues that "like rivers, city limits, bodies of water, and other features that are not mentioned in the guidelines, highways divide neighborhoods and communities of interest. Preserving communities of interest *is* in the guidelines." Doc. 263 at 86. That says

nothing. Streets and other features also connect neighborhoods and meander through communities of interest. The mere use of highways (or here, residential streets which define the vast majority of census blocs in Montgomery), gets Defendants nowhere.

D. SD 28 (Macon, Bullock, Barbour, Henry, Lee and Houston Counties)

The State's defense here is that this district is "largely unchanged" from its 2001 contours and that "[t]he only new feature resulted from moving a *small* portion of Houston County from SD31 to SD28." Doc. 263 at 91 (emphasis added).

Indeed, few changes were needed. SD 28 was underpopulated by a relatively modest 6,541 persons. The changes to the district, however, were anything but small in terms of population. The "small portion" of Houston County that was added contains 23,362 persons (of whom 16,069, or 68.78% are black). CE 40 at 102. This "small" portion thus adds over three times as many people as needed to bring the district to the ideal population; the black additions alone are twice the total population deficit. Overall, the State moved 69,322 people into and out of the district (37,937 added, 31,385 removed). ADC Supp. Ex. 5. These are hardly "small" changes. The State offers its physically small, but large scale, before-and-after maps to suggest that any changes were "small." But as usual, these maps obscure the manipulations of the district's boundaries and do nothing to identify, or focus on, the areas of the district changed in 2012.

ADC Supp. Ex. 40A illustrates more clearly the perimeter protrusions and contortions at the northern and southern ends of the district. To focus on the *specific ways* in which the district was changed, ADC Supp. Ex. 40B and 40E show in detail census blocks added in Lee County; ADC Supp. Ex. 40C and D do so for Russell County; and ADC Supp. Ex. 40I does so for Houston County. These detail maps show that the additions and subtractions are, as usual, along

racial lines. The State says nothing to refute any of this or explain away this pattern. ADC Supp. Ex. 40G, 40 H, and 40I show, respectively, precinct splits in Russell, Lee and Houston Counties and the racial sorting that marks them. The over-riding racial pattern of the shifts is stark: to meet its 6,541 person deficit the State added a net 15,470 black people, while the net change in white population was *minus* 5,896. ADC Supp. Ex. 5. The racial sorting in SD 28 was even greater than that in SD 26. Race predominated in the design of SD 28.

In its defense under strict scrutiny of this district, the State makes one argument unique to this district. We address the strict scrutiny arguments as a general matter later, but because this one is peculiar to SD 28, we address it here. At the time of the Census, SD 28 had a 50.98% BP. Given that the district was "barely majority black," the State tells the Court it decided the district "should be near 60% when it can be made so by observing traditional districting criteria." Doc. 263 at 95. Note that the State does not say that it should do so, or did do so, through race-neutral means that did not classify by race the residents it moved to pump up the BP in this district to 60%.

Put most charitably, the State appears to argue here that it needed to increase the BP to 60% here to preserve the ability to elect. As a matter of law, this is incorrect. The district was already electing a candidate of choice of the black community. The State subtly insinuates that this is not the case because Senator Beasley is white, Doc. 263 at 91. But white candidates can be candidates of choice, as the courts have repeatedly and understandably held;[8] the State offers no evidence that Senator Beasley was not; and indeed, Senator Beasley was the overwhelming

[8] *See, e.g, Cousin v. Sundquist*, 145 F.3d 818, 825 (6th Cir. 1998) ("The proper inquiry is not whether white candidates do or do not usually defeat black candidates, but whether minority-preferred candidates, whatever their race, usually lose."); *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1015 (2d Cir.1995) ("We decline to adopt an approach precluding the possibility that a white candidate can be the actual and legitimate choice of minority voters. Such an approach would project a bleak, if not hopeless, view of our society—a view inconsistent with our people's aspirations for a multiracial and integrated constitutional democracy.")

choice of black voters in the Democratic primary.[9] Black candidates, moreover, have regularly won election-in the four House districts that overlap SD 28 with black percentages of 47.94% (HD 85), 50.61% (HD 84), 56.92% (HD 83), and 57.13% (HD 85). Moreover, Hinaman only looked at racial data, not voting data, when he designed all the BMDs, including this one. In any event, as a matter of law, Section 5 requires preservation of the ability to elect, not augmentation of it. *ALBC*, 135 S. Ct. at 1272-74.

Senator Dial told the incumbent his district "had to grow" in black population, purportedly based on Senator Dial's misunderstanding of Section 5. Having been told that by the Senate's redistricting Chair, Senator Beasley, the incumbent, was "okay" with picking up some population in Houston County. The record does not reflect whether he was "okay" with adding predominantly black populations in other counties, but individual incumbents always want their seats as safe as possible. That does not mean strict scrutiny permits a racial sorting to dramatically increase the black population of an ability-to-elect district when Section 5 does not reasonably require it.

SD 33 (Mobile County)

Again, the State asserts it made "few changes" to this district, while selecting 42,767 persons to move in or out. As we demonstrated, the race-based pattern of that selection is powerful: 80% of those added were black, 84% of those removed were white. Even more remarkable, *all* of the net 25,000 people added to the district were minorities and over 99% of them were black. The net white population actually *decreased* by 1,304. Doc. 258 at 28.

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[9] Sen. Beasely won handily in 2014, http://www.alabamavotes.gov/downloads/election/2014/general/2014GeneralResults-WithoutWriteIn.pdf. At 15-16. He was unopposed in the primary. http://www.alabamavotes.gov/downloads/election/2014/primary/2014-Pri-CertifiedResults-DemParty_2014-06-13.pdf

Mobile County contained two overpopulated districts, SD 32 and SD 34, and two underpopulated districts, SD 33 and SD 35. *Id.* At the start of the process, underpopulated SD 33 was 62.45% BP and on its adjoining, southern boundary, underpopulated SD 35 was nearly 32% BP. After redistricting, SD 33 was 71.64% BP and SD 35 was 19.11% BP. Doc. 263 at 96. Essentially, the redistricters moved SD 33 south to pull in black residents from underpopulated SD 35 – rather than moving SD 33 north or west, into SDs 32 or 35, where it would have been filled out by relatively whiter populations.

The State asserts that its race-based objective had "nothing to do" with SD 33's final racial percentage, in part because the black population went *up* 7 points. Instead, the State offers a convoluted explanation of the demographic forces that left "no other way" to draw SD 33's lines." Doc. 263 at 102.

According to the State, circumstances drew SD 32 north to fill population deficits outside Mobile County; that in turn drew overpopulated SD 34 north. Doc. 263 at 98. Now, because SD 35's incumbent lived to the southwest of SD 33, SD 33 could not move west into SD 35, where the whiter populations were. Instead, SD 33 "had" to move south – which meant picking up black population from *under*populated SD 35. Hence, SD 33 became 71.64%, while SD 35 declined from 32% to 19% black. *Id.*

This account is both counterintuitive and unconvincing. First, the district did not "have" to move south. The State's explanation that an incumbent's residence blocked moving SD 33 west or north is not sustainable. After SD [32 or 34]'s boundaries were extended to include additional population to the north, SD 34 still had plenty of population to the north and west, well away from the SD 34 incumbent's home, Def. Supp. Ex. 5, to enable both SD 33 and SD 34 to add population in those directions.

Second, why would the redistricters choose to move south in order to pick up population from *under*populated SD 35 instead? In light of all the other evidence in this case, the best explanation is that moving SD 33 south enabled the redistricters to add black population *qua* black population to reach their racial floor for SD 33. We know that Senator Dial and Hinaman were determined to ensure that SD 33 would end up at least at 62.45% BP, its prior level, to "avoid retrogression." Yet even if they had added no new black persons to populate SD 33 up to size, SD 33 had sufficient black population to form a 53% BPP majority in a zero-deviation district. Doc. 258 at 24. And because the Mobile County population outside SD 33 was 23% black, adding any area would have bumped that number up.

Taking the evidence as a whole, the clear explanation for moving SD 33 south is that doing so enabled the redistricters to add black population *qua* black population to meet their racial floor for SD 33. As a result, race predominated in the redrawing of SD 33.

House Districts

A. HDs 19 and 53 (Madison County)

The State relies heavily on the fact that their House plan creates a second black- majority House district in Madison County, Doc. 263 at 103-107. The creation of a second district was an act well justified by the extraordinary growth in minority population in the Huntsville area, and one to which the ADC takes no exception. Creating an additional district, however, does not negate or excuse a *Shaw* violation; the *Shaw* issue lies in how the district was created.

HD 19

The State defends HD 19 as a compact district with little net population change. Neither argument holds up.

As usual, on compactness let us go to the maps. The State offers very small, large-scale maps that minimize the nooks and crannies of the district boundaries. Doc. 263 at 105. ADC Supp. Ex. 6A shows a truer picture of a wandering district with numerous odd extensions and gaps: the district is grotesque by any standard. ADC Supp. Ex. 6B and 6C demonstrate, moreover, that the excrescences to the east and west reach out and picked up such black population as available in racially mixed areas. Indeed, the State acknowledges that "HD19 is less compact than its predecessor, owing to the need to incorporate more sparsely populated rural areas into this district." Doc. 263 at 105. While the excrescences may be more fairly characterized as urban/suburban, the need to extend into those particular areas was to pick up additional black population in order to maximize the black percentage in HD 19 and get it, if not up to its former percentage, at least over an arbitrary 60% hump, since that was as high as was feasible due to the fact that HD 19 also fed black population to HD 53 to enable the latter to meet its racial target on the head. The precinct splits at ADC Supp. EX. 6D and 6E and in Doc. 258-1

at 2 further substantiate the racial sorting of HD 19.

The State argues that HD 19 is "compact" because it "is visibly not even the largest district by land area in Madison County." Doc. 263 at 105. "In other words, the shape of HD19 shows nothing more than an attempt to comply with redistricting guidelines and traditional redistricting criteria." *Id.* As we noted at the outset of this brief, *Shaw* is concerned about manipulations of a district's perimeters, not just whether a district covers a small land area.

The State also argues that too few people were moved by race for there to be a *Shaw* violation, because the district changed by a net of 2,697 persons. Doc. 263 at 107. On this view, if a State carved contorted boundaries to move 5,000 blacks by race out of a district and 4,900 whites by race in, there could be no *Shaw* violation, because the district would have changed by "only" a net of 100 people. In this case, 17,753 people were moved out of HD 19, in significant part to meet the racial target in HD 53, and then thousands of people (19,454) had to be moved back in, yet in such a way to keep HD 19's BPP as close to its prior level as remained possible at that point. More specifically, 9,545 blacks were removed from HD 19, while 7,612 black persons were added. *See* ADC Supp. Ex. 4. The race-based "balancing" between these districts combined with highly irregular jigsaw-puzzle pieces design of the districts means that race predominated and more than a few individuals were involved.

HD 53

HD 53, of course, is a new creation. The district number was moved from a 53.71% black district in Birmingham, a district that had long elected the choice of its black residents. The State argues that the new HD 53 "is compact, preserves an urban community of interest, and its boundaries follow readily recognizable road or water features," Doc. 263 at 108, and that the precincts split in its creation "are consistent with efforts to allocate people between majority-

black HD19 and its new majority-black neighbor, HD53." *Id.* at106.

A quick look at ADC Supp. Ex. 9A shows that this district, is not, in fact, compact. And in admitting that the boundaries and the precinct splits were a result of Mr. Hinaman's "efforts to allocate people between majority-black HD19 and its new majority-black neighbor, HD53" – meaning to get both districts to meet their racial targets -- the State essentially admits to racial predominance in the line-drawing. Doc. 263 at 106. The stalagmites and stalactites that mark the boundary between HD 19 and HD 53 signal the extraordinary effort to balance the racial percentages between the districts. See ADC Supp. Ex. 6A and 9A.

As Mr. Hinaman testified, the effort to balance the black populations was based exclusively on the percentage of total population in a given districts. *ALBC*, 135 S. Ct. at 1274 (Appendix B). In SD 53, Mr. Hinaman hit his target to a fare-thee-well with a 55.83% black total population. NPX 332 at 5; CE 41 at 143. The arbitrariness of the target percentage is undeniable in HD 53. It was an entirely new district "moved" from an entirely different city and county100 miles away. *See LULAC v. Perry*, 548 U.S. 399 (2006). The selection of population to include in HD 53 (along with the selection of population to shift from or to HD 19) was predominantly based on race, on an unfounded, stereotypical presumption that the black populations of two very different parts of the State were identical – fungible. Since Hinaman testified that he looked to the racial demographics alone in constructing these and all the other BMDs – not patterns of voting, not economic or community-of-interest factors -- that is not surprising. Race predominated here, as elsewhere.

B. HD 32 (Calhoun and Talladega Counties)

The State argues that it "preserved the core of the district and added contiguous population where it could be found," Doc. 263 at 110, and, while the State acknowledges the

precinct splits resulted in the addition of predominantly black populations, it nonetheless asserts that this Court should accept that "there is no reason to believe that those [race-based] splits were in *contravention* of other redistricting criteria, instead of consistent with them.

The phrase "added contiguous population *where it could be found*" is telling and fairly characterizes what Mr. Hinaman did in HD 32 (and across the State). The district, underpopulated as it was in 2010, still had sufficient black population to comprise a majority of an ideally-apportioned district even if all of the population added were white (which would not, in any event, be the case). Doc. 258-4. But the State's changes to the very shape of HD 32, which was elongated to start with, show that Mr. Hinaman had to work hard in order to match or exceed the district's 59.34% black 2010 black population share. Doc. 263 at 110, ADC Supp. Ex. 7A. While the State cites alternative plans' proposed black majorities for HD 32 as evidence, once again, of demographic destiny, the fact is that each alternative's black percentage was lower than the State's target. Doc. 263 at 111. Rather than adding population to make HD 32 and adjacent district more compact, however, Hinaman created a district that is even longer and narrower at the southern tail than the 2010 district, and that has now sprouted additional growths along its edges. The residence of no incumbent would have interfered with smoother, more compact lines. Def. Supp. Ex. 1, 2.

ADC Supp. Ex. 7C illustrates the district's addition of an oddly-shaped antenna and ADC Supp. Ex 7D is an example of Mr. Hinaman reaching out to add a racially mixed area to add black population; ADC Supp. Ex 7E establishes that the lengthening and narrowing of the tail resulted from racial sorting – adding black and removing white areas. ADC Supp. Ex 7F shows some of the precinct splits along racial lines. The State does not directly respond to any of the evidence in these maps. The evidence establishes that race predominated here as well.

C. HDs 52, 54-60 (Jefferson County)

In its introductory discussion of the black majority districts in Jefferson County, the State first notes generally that these districts were underpopulated and goes on to argue that the large black majorities were a result, again, of the area's natural demographic patterns. (See the discussion of SDs 18-20, above). Here, the State points out that "HD55, for example, shares borders with majority-black HD52, 57, and 60, and only a small shared border with majority-white HD16. HD55 is 73.55% black because that area of urban Jefferson County is 73% black." Doc. 263 at 115. But that was not true *before* Mr. Hinaman drew the districts. At that time, HD 55 shared a very large border with HD 15. Doc. 263 at 114 (map). And nearly all the black-majority districts were adjacent to some white-majority ones. The 2001 plan map indicates that HD52 was adjacent to HD16,[10] HD 53 was adjacent to HD 46, HD 54 was adjacent to HDs 45 ad 46, HD 56 was adjacent to HDs 15 and 46, HD 57 was adjacent to HD 15, HD 58 was adjacent to HDs 44 and 45, HD 59 was adjacent to HDs 44 and 52, and HD 60 was adjacent to HDs 15 and 51. *Id.*

The State also points to what it characterizes as similar (but often significantly lower) black percentages in alternative plans proposed at the close of the legislative session, and which Mr. Hinaman never saw. Doc. 263 at 128 (Table), Hinaman Depo. 138 line 16- 139 line 14. The Table is misleading: each of the alternative plans also had a majority black district (HD 53) in

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[10] The State tweaks us: "The ADC incorrectly states that HD52 was adjacent to the 'overpopulated' HD56 in the 2001 plan. (Doc. 258 at 58)." Doc. 263 at 117. The correct district, of course, is HD 46.

Jefferson County and the relevance of the Table is particularly unclear. The State also highlights involvement of three black legislators in last-minute changes to those districts, Doc. 263 at 127, but their involvement was strictly constrained: they could only swap population with each other within the bounds of Mr. Hinaman's plan. Tr.3-120:19-25.

Another theme runs through the discussions of the individual districts: frequently, the split precincts brought more white population into a given black majority district. We have discussed this in connection with the Senate Districts 18-20 and elsewhere, above. To save the hide of a dead horse, we simply note once more that, in his efforts to meet or exceed the 2010 black population percentages in these districts, Mr. Hinaman often obviously had to stretch and reach to extremes in order to pull in pockets of black or racially-mixed population. This stretching and reaching characterizes many of the split precincts and the other changes to the district boundaries. Other changes and split precincts are characterized by the careful allocation of concentrated black population among majority black districts, again solely for the apparent purpose of meeting or exceeding the 2010 black percentages in each district. Both of these features are common across the plans and they are particularly evident in Jefferson County, where Mr. Hinaman did a heroic job of nailing his targets. Indeed, four of the 2012 districts (52, 55, 56, and 57) are within 0.05 percent of the 2010 target, and two others (54 and 60) are within 0.27 of the target. Only in HDs 58 and 59, where the State graciously allowed black incumbents to swap population between their two supermajority districts (72.76% and 76.72%), are the numbers not so closely identical to the prior districts.

HD 52

The State relies on its familiar "demography made us do it" assertion again here. As our remand brief noted, but the State does not address, HD 52 was underpopulated by a modest

2,362 persons and had sufficient black population to form a 56.99% majority of an ideally populated district even had only white population been added: there was not much to do. Doc. 258-4. But the State managed to move a total of 19,284 persons into and out of the district. Doc. 258 at 49. While the district gives up a white area of Homewood in the northeast, its main changes involve the apportioning of racially mixed populations with other black majority districts discussed above and in the plaintiffs' remand briefs, including the transfer of a large block of territory to HD 56 to its southwest. Doc. 263 at 114. ADC Supp. Ex. 8A. The changes leave HD 52 with a slingshot sort of shape and a black percentage of 60.13%, or only a hair above its 2010 level of 60.11%. NPX 332 at 5.

HD 54

The State briskly argues, "[f]irst, the district was drawn to satisfy the incumbent, whose district was largely preserved." Doc. 263 at 119. This is a breathtaking statement, as a glance at the State's own small map shows. *Id.* at 114. *See also* ADC Supp. Ex. 10A. The original district area has shrunk and a grotesquely-shaped, spiked something-or-other (apparently larger than the original district), seems to have sprung from a pinhole in what was the east but is now the center of the new district. Mr. Hinaman moved 31,351 people into and out of the district. Doc. 258 at 49, ADC Supp.Ex. 4. The result, a 56.73% black district in 2010 became a 56.83% black district in 2012. Under *Shaw*, such a mathematical and cartographic phenomenon takes more explanation than Defendants offer. We know the redistricters were committed to reaching their racial floors, and worked with racial demographics, not other information, in moving the black population in these districts. Given the district's bizarre shape, the number of people moved, and the exactness of the pre-and post-match, the sorting of population by race to meet these pre-determined targets provides the best explanation of these changes.

HD 55

The State argues that the black population in the HD 55 area has been growing and "this portion of Jefferson County has been becoming more and more black," and that "HD55 is almost entirely bordered by other majority-black districts, and that "the plaintiffs have never suggested that HD55 could be drawn differently as part of a plan that meets the undisputed requirements of applicable law, including the Voting Rights Act and the Legislature's guidelines." Doc. 263 at120-121. The State also refers vaguely to notes of meeting with black legislators that the State links to shifts of population involving HD 55. *Id*. at 120.

First, the "portion of Jefferson County" that HD 55 now occupies is much different than before the redistricting. APX 40 and 41. The State's inset maps at Doc. 263 at 114 do not show the western portion of HD 55, 56 and 57. Second, HD 55 had, as we have noted, a long border with predominantly white HD 15 – a longer border, it appears, than it had with majority black districts. *Id*. Third, an obvious, race-neutral option would have been to expand underpopulated HD 55 into then-overpopulated HD 15, perhaps into areas that the State transferred away from HD 15 in any event.[11] Although underpopulated, HD 55 had sufficient black population to comprise, without more, 57.47% of an ideally populated district; the addition of areas of HD 15 would only increase that percentage. Fourth, HD 55 had a 73.55% black majority under the 2001 plan and has an identical 73.55% black majority under the enacted plan, and that did not just happen: it was the result of the racial sorting necessary to meet the State's misinterpretation of Section 5. The State realized that a 73.55% black majority was not necessary in HD 55 or anywhere else in Jefferson County to allow black voters to elect legislators of their choice, with districts well below 60 percent black repeatedly electing and re-electing black legislators.

[11] We note again that Mr. Hinaman drew the black majority districts before drawing the remainder of the plan.

Nonetheless, the State moved 28,143 individuals into and out of HD 55 in the process of matching the 73.55% figure, Doc. 258 at 49 (Table), and in the process the redistricters drastically redrew the district, removing what had been a solid core area and leaving a long, multi-sided and incoherent figure. ADC Supp. Ex. 11A.

The State, perhaps understandably, does not mention the district shape or the transfer of much of the core to HD 16. As in HD 52 and 54 and many other districts, the new lines also show the inconsistency with which the State's invokes is racially neutral goal of "keeping the districts in as close to the same location as possible." Doc. 263 at 76-77.

The evidence establishing that HD 55 was drawn predominantly on the basis of race stands is unrefuted.

HD 56

The State again invokes natural demography, this time to explain how a district that began as 62.13% black ended at 62.14% black, while Mr. Hinaman moved 14,241 persons into and out of this district -- nearly three times, by the way, its population deficit (4,457).[12] NPX 332 at 5, Doc. 258 at 49. Achieving that level of racial precision in outcome took some work, and that work shows racial sorting.

HD 56 wound up as compact, but it became so by counterintuitive means. Although it was underpopulated, HD 56 gave up substantial territory and white population at its western edge to HDs 15 and 16. NPX L, M. A race-blind improvement of compactness would have been to widen the pinched area near the district's center in the course of taking needed population from the adjoining, overpopulated majority-white HD 15. APX 40 and 41. HD 56 already had sufficient black population in 2010 for a 56.04% black majority in an ideally populated district,

[12] The State mistakenly characterizes HD 56 as a 61% black population district.

even if only white persons could have been added. But by not taking this route, the State also failed at "keeping the districts in as close to the same location as possible." Doc. 263 at 76-77. The convoluted route taken instead and the remarkable precision with which Mr. Hinaman met his target show that race predominated in the changes to HD 56.

HD 57

Here, the State simply asserts that it added population from HDs 15 and 55, without giving any reason. Doc. 263 at 122. It does not say why it split Pleasant Grove, nor does it mention the scope of its revisions or the completely changed shapes of HD 57 and 55 that resulted from these moves. The State observes that the 2012 black percentage is "slightly higher" than the 2010 percentage.

That is an odd description of a district that came in so precisely at its prior black-population level: the black percentage "rose" from 68.42% to all of 68.47%. The 0.05 point shift involved going the long way around, for the State moved 21,590 persons to end up there. ADC Supp. Ex. 4. NPX 332 at 5. Those shifts transformed a relatively compact HD 57, APX 40 and 41 (the maps at Doc. 263 at 114 do not show the western areas of HD 57) into a much larger and less regular feature. ADC Supp. Ex. 13A. ADC Supp. Ex. 13B and 13C show how the irregular extensions to the north and west grabbed black populations, while 13E shows the block by block sorting of citizens of Pleasant Grove by race. These kinds of race-based patterns are a logical outgrowth of the commitment to reach the racial floor, even while substantially reconfiguring the district.

The State's response – "that splitting the Pleasant Grove precinct did not make much difference" Doc. 263 at 122 – misses the issue. Such racial sorting makes a difference under the

Constitution and along with other precinct splits[13] and overall changes in the district establishes that race predominated in HD 57.

HDs 58 and 59

The State points out that it allowed these districts to be affected by an agreement of the black incumbents, Doc. 263 at 122-126, who altered Mr. Hinaman's lines within the districts. This appears to be the one time the redistricters permitted a black-majority district (HD 58) to decline in population due to the preference of incumbents – though of course, here the incumbents were simply trading black residents, rather than adding additional white population to either district. While HD 58 dropped 5.10 percentage points in BP, HD 59 rose 9.69. Both remained well over 70% black.

The State apparently posits that the participation of black legislators somehow protects the State from a *Shaw* claim. *Id*. They offer, of course, no authority for this proposition. The black incumbents in most of the *Shaw* cases defended their districts in the litigation. The State familiarly points to demographic pressures and argues that the effects of the precinct splits are inconsequential. *Id*.

Looking more deeply, the districts were in fact adjacent to white majority HDs 44, 45 and 52, (Doc. 60-26, 60-27, APX 40 and 41) and could have expanded without the constraints that the State placed on itself by its misplaced insistence on maintaining existing supermajorities. The State has identified no barrier to such expansion. The black legislators, moreover, were constrained in their exchanges to swaps between their own districts (with some participation by

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[13] The drafters split four additional precincts with adjacent black districts to meet racial targets in HD 57 and the other districts. CE 41 at 110-111.

the HD 54 incumbent), and their districts together comprised an area just under 75% black in population.[14]

The predominance of race in the construction of HD 58 and 59 is apparent. Over 20,000 people were moved in and out of each district. ADC Supp. Ex. 4. Both districts have irregular borders. ADC Suppl. Ex. 14A and 15A. The ADC Supplemental maps, 14B (HD 58's contortions bring in heavy concentrations of black population to the district), 15B (protrusion to select heavily black areas from into white-majority HD 44 into HD 59), and 15C (racial sorting with HD 58) underline the racial selectivity of Mr. Hinaman's choices in drawing the districts. See also the precinct splits involved in the districts. Doc. 258-1 at 4, CE 41 at 112-116.

HD 60

The State says little to explain HD 60. This is one of the few places, however, where the State mentions the number of people moved into and out of the district, perhaps because the fewest people were indeed moved to re-create this district of all the Birmingham districts. Doc. 263 at 125-126 ("some 80% of the old district's population (36,309 of the approximately 45,000 people in an ideal House district) stayed in the new district").

Indeed, there were fewer changes here than in other districts but those changes are significant and were guided by the State's decision to match the 2010 percentage. And that the redistricters did: HD 60 was virtually unchanged at 67.68% in 2012 compared to 67.41% in 2010. NPX 332, CE 41 at 118. ADC Supp, Ex.16B shows the a black majority area added in an extension to the east, and 16C shows the major extension south into the heart of Birmingham, deep into the complex population exchanges among black majority district to meet the State's

[14] HD 58 is 77.76% black and HD 59 is 76.72% black.

targets with precision. HD 60 is deeply implicated in and shaped by the predominance of race in the construction of the Jefferson County districts.

D. HDs 67-72 (Western Black Belt and Tuscaloosa)

The State acknowledges that Hinaman did not explain at trial why these underpopulated districts were filled out as they were. Doc. 263 at 127. But the State asserts that the plan re-populated the district "by the only means possible." *Id*. at 127-128. The evidence does not support that assertion.

The State begins by asserting that the BPP in each district has remained stable, *id*. at 141 (although their chart shows that the percentages in most districts had fallen from 1993 to 2001 and then got moved back up in the 2012 plans), with the districts built around a core of majority black counties whose number gradually expanded as population declined, *id*. at 139-140 (although the chart indicates a spike in the number of new county segments from three in 2001 to eight in 2012).

The State's "no other option" explanation is familiar and, as usual, skates over the many options actually available to add population in a racially neutral manner. Abutting the underpopulated districts were predominantly white Butler, Chilton, Pickens and Washington Counties, NPX 328, and predominantly white portions of Autauga, Bibb, Choctaw, Clarke, Montgomery, and Tuscaloosa Counties. Doc. 263 at 130, 31, 134, and 138. Not abutting the underpopulated districts, but added in 2012, was a majority-black sliver of Baldwin County, as well a small majority-black area of Washington County, which it barely abutted. NPX F. Rather than draw on this general area in a racially neutral manner, the State in *every* case added areas where black persons comprised a majority – often an overwhelming majority: HD 67, Perry (59.54% black); HD 68, Baldwin (78.03% black) and Washington (82.12% black); HD 69,

Montgomery (60.45% black), HD 71, Choctaw (81.42% black) and Pickens, (73.50% black); and HD 72, (79.73% black) and (65.21% black). CE 41 at 136, 143-145, 147, 149, 151, and 153. This pattern of racial selection was unnecessary to maintain black majorities in the districts. Although underpopulated, each had sufficient black population to form a majority of an ideal district (or in the case of HD 68, a plurality) and in the circumstances of the area, a racially neutral selection would have brought in a substantial number of black citizens. Doc. 258 at 49. As we document for each district, there were indeed other means possible to fill out these districts and the choices the State made instead reflect systematic race-based selection patterns that manage to meet the State's misguided racial targets.

HD 67

The State's defense here is that "[a]lmost all of the counties surrounding Dallas County" have black majorities, Doc. 263. at 130-131, and that it is undisputedly impossible to draw HD67 with any different black population percentage." *Id.* at131.

The State simply ignores the point in our remand brief that the repopulation of this district was done in a counterintuitive way, at odds with the basic race-neutral redistricting task of shifting population from over- to underpopulated districts. The choices here are best explained by the State's race-based pursuit of its racial targets. The key fudge word in the State's description is "almost." For Dallas County also touches two heavily white counties, rapidly growing Autauga and Chilton County in overpopulated HD 42. Doc. 263 at 142, NPX 328, 340 at 4. Instead of drawing on population from these counties to fill the small population deficit as he began the redistricting process, Mr. Hinaman decided to take population from Perry County in HD 72 -- which was underpopulated. NPX 332 at 6. This precipitated a cascade, as HD 72, now even more underpopulated, drew population from underpopulated HD 71, which in

turn drew population from underpopulated HD 68, and underpopulated HD 69 drew population from underpopulated HD 78, and so on. The Legislature thus once again, counter to basic redistricting principles, made it unnecessarily hard on itself to fulfill its basic responsibility to equalize the population of the districts. These choices are difficult to explain, except for the fact that they did enable the State to hit its target of matching the 2010 black percentage (60.11%) with a 60.13% district. The racial patterns reflected in the State's choices are best explained by race being a predominant factor in HD 67's design.

HD 68

The State blithely asserts this district is "reasonably compact," Doc. 263 at 133, but it certainly is not. ADC Supp. Ex. 18A. The State asserts that it reflects the aim of "keeping the districts in as close to the same location as possible, Doc. 263 at 131, but the plan removes HD 68 entirely from one county, adds parts of two new counties, and swaps white for black population in the remaining portions of three counties -- all in the service of moving a total of 30,769 persons, more than three times the number of the district's under-population.

The State offers an involved explanation for the contours of HD 68, as well it might. Doc. 263 at 143-145. The post-hoc story is that underpopulated HD 68 had to give up population to HD 65 and HD 71, and neither could expand west into Mississippi, of course, of course; thus HD 65 had to move east and north into HD 68, pushing HD 71 north, and HD 71 had no choice to move north, south and east . *Id.* Indeed, says the State, both districts moved as far as they could without pairing incumbents. *Id.* But as always, the State rejected more logical and race-neutral options in favor of the one that would enable it to reach its racial floor. First, because Mr. Hinaman drew the black districts first, the options for moving the districts were wide open. And in fact the State plan *pulled in* heavily black areas from HD 65 to HD 68 from

Clarke and Washington Counties, see ADC Supp. Ex. 18D, before pushing out from HD 68 other, more heavily white population. The Clarke-Washington transfer blocked HD 65's further expansion into the booming population of adjacent Baldwin County, the logical area for it to make up its population deficit. And HD 71 could have moved north on the eastern rather than western edge of Pickens County or north or east into the areas of Tuscaloosa County adjacent to its territory there. The State once again was "prevented" from the traditional outward expansion of underpopulated areas into areas of population growth only because a predominant factor was the State's need was to meet or exceed its racial target of 64.16% black (in 2010), which it did at 64.21%. In any event, in order to meet this target the State expanded east selectively, replacing predominantly white areas with black areas of Marengo, ADC Supp. EX. 18C, and Conecuh Counties, EX. 18B. ADC Supp. Ex. 18E gives examples of two of the 33 precincts split on racial lines in HD 65. For once the State has nothing to say about the race-based pattern of precinct splits involved to make all this possible.

HD 69

The State explains that it needed to add population to HD 69 and, as usual, faced "limited options, " Doc. 263 at 135, i.e., the district was bounded by underpopulated HD 67, HD 68, and HD 90, and, to the north, HD 42, which had a surplus smaller than HD 69 needed. *Id*. However, urban Montgomery County beckoned, and the State responded. *Id*.

This is the kind of post hoc, inconsistent explanation the State opportunistically invokes to explain away a racial pattern of choices more convincingly explained by the State's efforts to meet its racial targets. As discussed many times above (and below), the State regularly expanded underpopulated BMDs into other underpopulated BMDs in pursuit of meeting its racial targets. In other circumstances, Mr. Hinaman would have reached out to the adjacent rural areas and

perhaps built bridges to others, a la HD 68 to Baldwin County. It will come as no surprise, therefore, that there were other options, most notably HD 88, which was 10,978 persons over the ideal population, NPX 332 at 7, and from which, indeed, HD 69 drew to reach black populations. APSX 51 (Safe Harbor Precinct split to reach black population), Doc. 263 at 134. Meanwhile, HD 69 gave up heavily white territory to its northeastern border to *over*populated HD 42 (Billingsley precinct, 8.26% black). Doc. 263 at 134. CE 41 at 84, http://emaps.emapsplus.com/standard/autaugacoal.html. This overall pattern provides a more credible explanation as to why the State expanded HD 68 as it did, rather than that the State's "limited options" required it to search out urban Montgomery.

The State also avers that the "precinct splits in HD69 make it less black, not more." Doc. 263 at 135. But the point here is not that Mr. Hinaman was trying to add as many black persons as possible. It is that Mr. Hinaman added population selectively to hit his target in HD 69 (64.16%) with a 64.21% black majority in the new district, yet did so while moving 24,373 people into and out of the district. Doc. 258 at 49. The pattern of race-based, fine-tuning precinct splits shows the obsession with racial demographics that enabled Hinaman to achieve his racial goal with remarkable precision.

HD 70

The State asserts that HD 70 had to move east because the population grew, and that it "is at least as compact, if not more compact, than its predecessor." Doc. 263 at136.

The latter comment is comprehensible only as the State uses "compact" in terms of the total land areas covered rather than in terms of an irregular shape. And irregular HD 70 is, irregular enough to jump out of even the State's small map, *id*., and more startling in ADC Supp. Ex. 20A. The district began as a solid area with, appropriately enough, a sort of elephant's trunk

in the east. Doc. 263 at 136. The district now looks more like a roaring tiger or, if you prefer, a tiger upon which an elephant has sat. ADC Supp. Ex.20A. ADC Supp. Ex. 20 B and 20C show the racial sorting, with 20C vividly showing the addition of black areas and the removal of white areas from the district that create truly bizarre contours around the tiger's mouth and neck, while 20D highlights the block by block racial sorting at the precinct level.

The move of HD 70 dramatically eastward to accommodate HD 71 is best accounted for as part and parcel of the targeting of population to meet the racial percentage goals. Both districts already had sufficient black population to comprise a majority in an ideally populated district, Doc. 258-4 at 2; each could just as easily expand northwest and/or southeast as east within Tuscaloosa County to gain population, and the black majority would only have increased. Doc. 263 at 137. Mr. Hinaman affirmatively selected the east, which just happened to manage to pick up majority black areas, for the same reason he did so in every other black majority district – to manipulate the racial percentage of total population. The sheer number of people moved (41,607 in HD 70 and 41,605 in HD 71) shows how hard he worked and how the State clearly failed in "keeping the districts in as close to the same location as possible." Doc. 263 at 76-77. The State has failed to rebut overwhelming evidence that race predominated in sculpting HD 70.

HD 71

The State's rationale for HD 71 has been discussed in terms of HDs 68 and 70, and the State adds little here. The State criticizes the ADC description of alternative courses Mr. Hinaman could have taken had reaching the black percentage floor not been the top priority because the ADC's alternatives insufficiently consider "the population needs of surrounding districts." Doc. 263 at 139. This ignores the fact that Mr. Hinaman started with the majority black districts and that the ADC alternative does in fact consider incumbent residences and the

need not to "box in" population islands that would create malapportioned districts. In the case of HD 71, indeed, the alternatives include going into "population-rich Tuscaloosa County," Doc. 263 at 139, either on a more northerly or southerly track (or both) that would broaden the attenuated district and allow HD 70 to remain "as close to the same location as possible." Doc. 263 at 76-77.

Oddly, the State offers as a defense that Mr. Hinaman could have done a better job matching the 2010 black percentage (64.28%) in the 2012 district (66.90%) if he had been really trying. Doc. 263 at 139-140. But Hinaman's approach was based on the understanding that non-retrogression required that the district populations be at least as high as before: higher was good, too. The fact remains that the changes adopted by the Legislature were predominantly motivated by race.

HD 72

Once again, the State argues that because the BPP went up in this district, the redistricters must not have had a racial target for it, Doc. 263 at 141, even though their understanding of retrogression was that the BPP had to be *at least* as high as in the prior district. In addition, the State produces a new map and a new, post-hoc rationale for the changes to HD 72:

> The boundaries of HD72 were driven by the need to include the populations of various small towns at its edges. There is a small city to the southeast, another small city to the southwest, another small city to the northwest, and yet another small city to the northeast. The population centers are the obvious explanation for the purportedly unusual shape of HD72. (Doc. 263 at 142-143.)

A close look at the map reveals, however, that the towns in question are split by the HD 72 lines. The boundaries of Demopolis, Eutaw, Brent, Centreville, and Marion are divided between HD 72: respectively HD 71 (Demopolis), 71 (Eutaw), 49, (Brent and Centreville) and

67 (Marion).[15] This obviously is another post-hoc rationale. And, we note, Brent is split along racial lines, with 1,044 persons -- of whom 165 are black --placed in HD 49, and 3,903 persons -- of whom 2,483 are black -- placed in HD 72; similarly the Centreville portion in HD 49 is 15.03% black while the HD 72 portion is 47% black (51% combined minority population). The State's unconvincing, post-hoc explanation only strengthens the evidence of the predominance of race in HD 72 and HDs 67 and 71.

E. HDs 76-78 (Montgomery County)

The State avers that HDs 76-78 were designed by an incumbent legislator, Rep. McClammy. But this description is not an accurate account of what the State did in Montgomery County. To begin, Rep. McClammy drew five districts that were coterminous with Montgomery County: there were no splits in the county boundary. CE 45. The State's map, Doc. 263 at 145, shows that the State divided Montgomery County into seven districts, 69, 74, 75, 76, 77, 78, and 90, three of which extend outside the County boundaries. As described above, HD 69 in particular utterly disrupted the black population within Montgomery County.

In addition, the changes from the McClammy plan are many and obvious. For example, McClammy HD 76 occupied the entire southern portion of the county and HD 78 was firmly anchored in the northwest. CE 45. But under the State's plan, HD 76 has lost the great majority of its area and shrunk to the southern portion of the city. *See* Doc. 263 at 145. HD 78 no longer occupies the northwest border and has swung around to the north central and northeast, so that it

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[15] It appears from the map at Doc. 263 p.143 and from Google Maps, https://www.google.com/maps/place/Livingston,+AL/@32.629064,-88.210273,17z/data=!3m1!1e3!4m2!3m1!1s0x88844ceb4e400765:0xe46c63dfdae75b86, that the city limits of Livingston are split between HD 71 and HD 72, but it appears from Def. Supp. Ex. 3, that the HD 71 portion of Livingston was unpopulated in 2010.

now occupies much of the territory of the former HD77. *Id.* To say that Rep. McClammy drew the 2012 plan is a substantial distortion.

In fairness, as Mr. Hinaman testified and as we have seen, in drawing the majority black districts the state uniformly was focused on their total black population percentages, not on their contours. What Mr. Hinaman took from the McClammy plan was racial percentages, and a license to increase black percentages in HD 77 and HD78 despite the reduction in available black population by the transfer of over 10,000 black residents to HDs 69 and 90. CE 41 at 145, 181. Mr. Hinaman transferred over 120,000 people into and out of the three districts. ADC Supp. Ex. 4. HD 76 was only underpopulated by 627 people, NPX 332, yet Mr. Hinaman moved 43,080 people into and out of the district – over 68 times the population deficit. ADC Supp. Ex. 4. In HDs 77 and 78, the number of people moved in and out exceeded the size of the 2010 district. *Id.* Rep. McClammy did not select the blocks to remove from and add to each district, Mr. Hinaman did. It is his plan.

The effort to hide Hinaman's choices behind McClammy's plan is compounded by a remarkable post hoc explanation of the Montgomery County lines. The State now comes forward with an entirely new representation that contradicts its own prior representations to this Court, the testimony of its key witness, Hinaman, and this Court's prior findings about the critical key move the redistricters made that affected all of these districts: the destruction of HD 73 and its relocation to Shelby County. This Court specifically found that the State chose to dismember overpopulated HD 73 because its black population was needed to re-populate these three underpopulated districts up to their prior racial floors, in order to avoid retrogression (as the State understood it). Doc. 203 at 33. Mr. Hinaman testified quite clearly to that and that is the reason, the State previously told this Court, that HD 73 had to be dismembered, then moved.

The Supreme Court's decision makes clear that the State had no basis for this decision in Section 5, because non-retrogression did not require re-producing these prior BPPs. As our opening brief points out as well, even if no new black population had been added to any of these districts, they would have remained majority-black districts. Doc. 258-4 (App. D). HD 73 was a strong black-plurality district and overpopulated by six percent. Doc. 340 at 6. Meanwhile, HD 74 was underpopulated by close to 10%, *id.*, and, as an underpopulated district, was the more logical one to eliminate and move to Shelby County. But the State could not do that, we were previously told, because the black population of HD 73 was needed to avoid "retrogression" in the other three black-majority districts.

Now that this rationale has been exposed as lacking a valid legal basis, the State shifts gears and offers a new story that contradicts its own witnesses. The State chose to dismember and then transfer HD 73, not HD 74, for partisan political reasons. Doc. 263 at 146. The State no longer says anything about this Court's finding or Hinaman's testimony that HD 73 was destroyed in order to repopulate the black-majority districts.

The State does not address the considerable evidence presented by plaintiffs concerning the substance of the precinct splits, racial sorting and district shapes. The State does argue that "the plaintiffs' arguments about county-splitting have no role to play with these districts. All three reside entirely within Montgomery County, and none crosses a county line." Doc. 263 at 148. But that is only part of the significance of county boundaries. Under the 2010 plan, the three black Montgomery County districts were bounded by almost the entire county border, much as was SD 26. *Id.* at 143, 72. Like SD 26, they now occupy only a fraction of that border, and the remainder is split among several districts. *Id.* As the Supreme Court held with respect to SD 26, the loss of adherence to a neutral border raises questions, at the least, about the racial

neutrality of the lines. This Court found that an illustrative district with a bare black voting age majority was viable for black voters to elect candidates of their choice: these huge supermajorities were unnecessary. NPX 300, Doc. 203 at 89. Shattering the county boundaries, dividing populations along racial lines, and excessive black majorities are additional evidence of the predominance of race. In conjunction with all the direct and other circumstantial evidence of racial predominance, the State has not offered a credible non-racial explanation for its actions.

F. HDs 82-84 (Eastern Black Belt)

The State argues that the counties that make up HDs 82-85 have not changed much since 1993, with only the addition in 2012 of Tallapoosa County. Doc. 263 at 149-50. Again, however, the relevant issue is how the State selected population *among* those counties and, again, the evidence establishes that race was the predominant motive for moving a significant number of voters to repopulate each of these districts.

HD 82

The State avers that HD82 is "reasonably compact" and "generally follows county lines." Doc. 263 at 150. But the district is not compact even in the sense of being small. The district does retain all of Macon County, but from there it goes off on a drunken spree, playing loose with county lines and (1) adding two separated areas of Tallapoosa County, one of which has a ridiculous shape, ADC Supp. Ex. 26C, and the other a "merely" uncouth precinct split, ADC Spp. Ex. 26D, APSX 270; and (2) replacing a relatively compact portion of a bizarre section of Lee County with a bizarre area (obscured by a district number on the State's small map) in the shape of sort of open mouth with a forked tongue, *id.*, ADC Supp. Ex. 26A, APSX 136, that was created by adding black and subtracting white population from the district. ADC Supp. Ex. 26B.

Each of these grotesqueries is transparently a result of block by block selection of people on account of their race. But the State does not respond to the compelling evidence of racial sorting in the additions, subtractions, and split precincts in the maps offered by the plaintiffs.

The State argues that the "ADC complains that 2012 HD82 extends into Tallapoosa County, but ignores the need to add population… [T]here was nowhere for HD82 to find additional population but to the north. Accordingly, HD82 went north into Tallapoosa County to incorporate the communities of Camp Hill and most of Dadeville." Doc. 263 at 152.

But these general protestations do not answer the question why these particular parts of Camp Hill and Dadeville were added, which together were 67.93% black (while the remainder of the split precincts was only 20.66% black). The pattern of racial sorting is apparent and defendants have offered no specific explanation to counter it.

Adding only the southern portion of Tallapoosa County (all of Camp Hill and beyond) would create an actual compact district, and the incumbent lived far to the north in Alexander City. Def. Supp. Ex. 1, 2. Had the State retained all of the district's existing population in fast-growing Lee County, the State could have moved the district eastward on a more regular, race-neutral line, into HD 79, which, along with HD 80 was overpopulated (the HD 79 incumbent resides in the southeastern part of the district, far from potential HD 82 lines). Def. Supp. Ex. 1, 2. It simply is not credible that the State could have added population on non-racial lines, distorted district boundaries, and shifted over 25,000 people into and out of the district in the process, ADC Supp. Ex. 4, and still have met or exceeded its target without racial sorting.

Taken in conjunction with all the direct and other evidence, the choices that Mr. Hinaman made here are convincing evidence that race played a predominant role in the design of the

district, and the State's alternative "explanations" are offered at such a high level of generality as to be unresponsive.

HD 83

The State asserts that "the shape of the district is the same as it was in 2001 and is driven by the need to join the population centers of Opelika and Phenix City." Doc. 263 at 153. The map on that page shows otherwise. *Id.*

HD 83 both adds and loses population in Lee County, where it seems to have grown a new antler, and exchanges population in Russell County as well. *Id.* The new antler in fact reaches out to take in relatively black areas. ADC Supp. Ex. 27C. APSX 140 shows the block by block racial sorting in the Opelika B precinct. The State shifted 18,466 persons into and out of this district to fill a 4,482 person population deficit. ADC Supp. Ex. 4. The resulting district is oddly shaped, ADC Supp. Ex. 27A, and all that to satisfy first and foremost the State's racial target: at 57.52% black HD 83 stays within a single percentage point of its 2010 level of 56.92%. Race was a predominant factor here as well.

HD 84

The State's defense of HD 84 is conclusory:

> HD84 is not a gerrymandered district. It contains two whole counties and half of another. HD84 needed an additional 3,092 people to reach ideal population, and this was accomplished by giving the district all of Bullock County and a little more of Russell County. The resulting district is compact, mostly follows county lines, preserves communities of interest, protects the incumbent, and maintains the core of the previous district. (Doc. 263 at 143.)

But that is hardly all the story. Within the 2001 boundaries, HD 84 was 50.61% black in population but only 43.37% white, as the district has a substantial (6.01%) population of other minorities. NPX 332 at 7. The district was underpopulated by 4,204 people and, with 20,911 black and 2,485 "other" minority residents under the 2001 plan, needed no (0/zero) additional minority population to maintain a minority majority in an ideally populated district; it needed only 1,850 black residents to maintain a black-only majority. NPX 332 at 7, Doc. 258-4 (Appendix D).

The redistricters moved 5,491 people into and out of the district. ADC Suppl. Ex. 4. When done, they had met their objective of equaling or increasing the prior BPP; the district rose to 52.35 % in black population and over 59% in minority population. CE 41 at 174. The prior black-white ratio, which was a 53.28% black, became 55.50% black.

Mr. Hinaman achieved this by shifting the remainder of Bullock County to HD 82, and shifting boundaries in Russell County, adding 3,324 black and 1,667 white persons to HD 84 and removing 305 white persons and 195 black persons, all within Russell County. The Russell County boundary change carefully apportioned the higher black proportion (62.08%) into HD 83, which had a higher target (56.92% vs. 50.61%), and a lower proportion 46.39%. CE 41 at 173, 174.

The State maintains that "[t]here [wa]s no way to draw HD84 with a meaningfully different black population percentage." Doc. 263 at 156. It is true the State limited itself here to moving only slightly more than the population deficit into and out of the district. But Hinaman still used his unjustifiable racial target and met it despite having other options had that target not directly affected the choice of at least some of the district's boundaries. Given that he drew the black-majority districts before tackling the remainder of the state, his willingness to split

precincts, and the legislature's relaxed stance toward compactness and the shapes of districts when it suited the legislature's other purposes, the evidence indicates race predominated here, as elsewhere.

G. HD 85

The State maintains that the "new HD85 maintains the core of the previous district, preserves communities of interest, protects the incumbent, mostly follows county lines, and is compact: indeed, the State avers that "HD85 as redrawn is as compact as its predecessor." Doc. 263 at 157. Even the State's map, however, shows that this is inaccurate. *Id.*

In 2010, the Houston County portion of HD 85 was relatively compact. *Id.*; *see also* ADC Supp. Ex. 29B. But the changes made to the border in this area in the 2012 plan create a new, bizarrely shaped perimeter. ADC Supp. Ex. 29A. The map at ADC Supp. Ex. 29C shows vividly the racial sorting involved in the nine precinct splits within Dothan. The State divided the HD 85 portion of one precinct into three separate sections, two of which do not touch any other part of HD 85 within Houston County. The Houston County portion of HD 85 is 63.41% black. CE 41 at 175. The State removed 3,167 persons, over 83% of whom were white, from the underpopulated district. Doc. 258 at 49. It contains over two thirds (67.65%) of all of the black population in Houston County but only 27.50% of the total population. NPX 332. No incumbent's residence needed to be avoided needed. Def. Supp. Ex. 1, 2. The State has not addressed these facts and offers no credible non-racial explanation of why the redistricters added and subtracted these particular people.

H. HDs 97-99, 103 (Mobile County)

The State makes much of the fact that Mr. Hinaman fell short of his targets here, averring

that these districts "all have a lesser percentage of black population than Hinaman's alleged target." Doc. 263 at 159. This is not quite correct: in HD 97, Mr. Hinaman hit his target on the button: 60.66% black before and after redistricting. NPX 328 at 8, CE 41 at 191. In the other districts, the percentages did go down but, as in the Jefferson County Senate districts, that was because there was too little black population to meet the State's targets, as our opening brief documents.

As redrawn, the districts have a total of 97,587 black residents, or nearly 80% of the county total. CE 41 at 191, 193, 195, 200; NPX 328. The remainder of the county is only 10.23% black: Mr. Hinaman clearly got what he could. *Id.* At the same time, three of the four districts had sufficient existing black population to comprise substantial majorities of ideally populated districts; indeed, the area within the four adjacent districts' 2010 borders, taken as a whole, was 56.93% black. Doc 258-4. The most convincing explanation for why Hinaman stretched and contorted the districts as he did was that doing so was necessary.to get these districts as close to their racial targets as possible, given the limited number of reachable black residents to go around for all four districts.

HD 97

HD 97 was 47.94% black in 2010 and 10,115 under the ideal population. NPX 332 at 8. The State added 9,987 persons to the district and removed only 332 (of whom 81% were white), ADC Supp. Ex. 4, but it did so with surgical precision. Mr. Hinaman sliced up 12 separate precincts in remaking HD 97. CE 41 at 190-191. The State does not mention the odd shape of the district, ADC Supp. Ex. 30A, or the graphic evidence of racial sorting involved in reaching out to black areas to the south. *See* ADC Supp. Exs. 30B-30F. The State argues that, "[t]he

effect of unsplitting those 10 (sic)[16] precincts, while maintaining the overall deviation for HD97, would be to *increase* the minority percentage of the total population of HD 97 by 4.1%, bringing it to 64.8% of the district "total". Doc. 263 at 160. Precisely. With the black population spread thin, Mr. Hinaman could not allow HD 97 to increase by that much. Similarly, when the State argues that two precincts splits between white- and black- majority districts *moved more white residents than black residents into majority-black HD97*" *id.* (emphasis original), it is pointing out that, as elsewhere, Mr. Hinaman had to stretch to meet his target, as he did here so accurately. The State did not provide its usual small map for the Mobile area, but ADC Supp. EX. 30A-E show the odd shape, particularly the elongation of the district to the north, south and west to pick up back population. Race was the predominant factor in HD 97.

HD 98

The State again notes that it failed to reach its target in HD 98 and argues that precinct splits in HD 98:

> do not show racial gerrymandering. The effect of unsplitting the precincts… would be to increase the minority population of HD98 by 4.9%, from 60.02% to 64.9% of the total. In other words, these splits did not help create a majority-black district— these splits lowered the black population percentage of the district.

Doc. 263 at 162.

This is HD 97 all over again. As set forth above, there was not enough black population to maintain the extreme black supermajorities in HDs 98, 99 and 103. It was not for lack of trying, however. Mr. Hinaman moved 24,806 people into and out of HD 98 and split 14 precincts, juggling among black districts and wringing black population from white districts.

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[16] The parties have provided different numbers of split precincts in HD 97. The 12 precincts, as set forth in C41, are 1. Saraland; 2, Chickasaw; 3. Vigor HS; 4. Bishop State; 5. Whitney Schol; 6. 100 Black Men; 7. Figures Rec. Ctr.; 8. Murphy HS; 9. Mobile Civic Ctr.; 11. Rock of Faith; and 12. St. Andrews.

Doc. 258 at 49. As ADC Supp. Ex. 31A shows, the district has an odd shape. This is a radically changed shape from the prior district, as NPX F shows. The new district portions reach up along the US 43 corridor north all the way to the Washington County line to pick up the black portions of the white majority communities that straddle the highway – Chickasaw, Creola, Saraland and Satsuma -- each time picking up a relatively black portion to eke out the population of HD 97 with a majority over 60 percent. Def. Supp. Ex. 3, 8 at 153, 209, 738, and 740. This is essentially a reprise of *Shaw* itself, in which North Carolina had followed the highway to search out far-flung black communities to pull into a reshapen, elongated district.

The State has not addressed the shape or racial sorting of the district and the evidence establishes that race predominated.

HD 99

The State makes the same general assertions here that it does for the prior two districts. But the State has have not addressed the factors set forth in our initial brief that evidence a pattern of racial sorting – the moving of 13,651 people to meet an under-population of 5,730 people, NPX 332 at 9, ADC Supp. Ex. 4; the change from a relatively compact district to a jagged district with three bulk areas and small pinched areas connecting them, ADC Supp. Ex. 32A; and the various prongs that jut out and down to pick up black and mixed population in the southeast, west, and southwest, ADC Supp. Ex. 32B, 32 C, 32D. All of these facts constitute unrebutted evidence of the choices the State made as to what to include and exclude from HD 199. Taken in conjunction with all the other evidence, this further circumstantial evidence that the State does not adequately explain establishes that race predominated here.

HD 103

The State's defense of HD 103 is that outlined above, what may be called the "Mobile Defense" here condensed into a paragraph and capable of being expressed in two clauses: we missed our target and unsplitting precinct would just make things worse. Doc. 263 at 163. Gone is the interest in "keeping the districts in as close to the same location as possible," Doc. 263 at 76-77, and the claim of compactness. The State does not, at least, claim that it had no choice but to move 12,324 people to fill a 4,910 gap. But the State also has no explanation as to why HD 103 had to expand to the northwest, taking in black population block by block, or why the district had to extend south to add black majority blocks and then stop, or why the western excrescence had to be over 75% black and split a voting precinct. ADC Supp. Ex. 33B-E. Again, we have a district that had enough black population to comprise a 62.13% district – clearly enough in Mobile given the lower percentages in other districts there – if only white population had been added, which would have been impossible to do, in any event. Yet the district ended up 65.06% black in order to come closer to the State's aim of re-creating the prior BPP. Taken in conjunction with the direct and other circumstantial evidence about how the black-majority districts were repopulated, the most convincing explanation is that race predominated in the construction of HD 103.

CONCLUSION

This Court should declare that all eight majority-black Senate districts and all 28 of the majority-black House are unconstitutional.

Respectfully submitted this 7th day of August, 2015.

s/ James H. Anderson
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I hereby certify that on the 7th day of August, 2015, I filed the foregoing document using the Court's CM/ECF system which will send electronic notification of such filing to all registered parties:

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