No. 13-895

In the
Supreme Court of the United States

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

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

APPELLEES' JOINT MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED (RESTATED)

The district court's decision does not implicate the questions set forth in the jurisdictional statement for several reasons. First, Alabama's local delegations do not "exercise general governing authority over counties." J.S. i. Second, all three judges below agreed that the plaintiffs have offered no standard to distinguish necessary population differences relating to local delegations from "unnecessary" ones. *Id.* See J.S. App. 315, 404. Third, the new districts do not "pack[]" black voters in districts or otherwise discriminate on the basis of race.

In light of the record, this appeal actually presents the following questions:

County-splitting Claim:

1. Whether the district court correctly concluded that the ripeness doctrine deprived it of subject-matter jurisdiction, given that the relevant Legislature will not be elected until November 2014 and will not adopt any relevant rules regarding local legislation until 2015.

2. Whether, in the alternative, the district court correctly concluded that the standing doctrine deprived it of subject-matter jurisdiction, given that the plaintiffs offered no evidence that a cognizable claim was redressable through their requested relief.

3. Whether, in the alternative, the district court correctly determined, under the specific facts prof-

fered by the plaintiffs, that these particular local delegations do not trigger the one-person, one-vote rule.

Racial Gerrymandering Claim:

1. Whether, after a four-day bench trial, the district court clearly erred by crediting the testimony of the redistricting plan's drafters and determining as a factual matter that race was not the predominant motivating factor behind the plans?

PARTIES TO THE PROCEEDING

All parties are listed in the jurisdictional statement.

There were two groups of plaintiffs below, and the other group has also appealed in Appeal No. 13-1138. The plaintiffs in the other appeal expound on the racial classification claim cursorily addressed on pages 39 and 40 of the jurisdictional statement in this case, and the defendants have a more comprehensive response to that issue there.

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MOTION TO DISMISS OR AFFIRM

The Appellees in this matter—Alabama, its Secretary of State, and the co-chairs of its Legislature's Reapportionment Committee—respectfully ask this Court to summarily affirm the judgment below.

The ALBC plaintiffs seek to revive two claims in their appeal, neither of which has legal or factual merit. First, although they claim that the redistricting plans "unnecessar[ily]" split counties, the plaintiffs provide no guidance as to what splits are "necessary" and what splits are "unnecessary." The district court offered three independent and equally valid reasons the plaintiffs cannot prevail on this claim. Each of these grounds is tied to this case's particular facts, and each is tied to jurisprudential problems created by litigation decisions these particular plaintiffs have made. Second, the plaintiffs claim that the State of Alabama's entire legislative redistricting plan is unconstitutional because it is purportedly motivated by racial considerations. The district court held a four-day bench trial on this claim and found as a matter of fact that race was not the predominant factor behind the plan. The Department of Justice investigated this claim as part of Alabama's preclearance submission under Section Five of the Voting Rights Act and also found it to be without merit. The plaintiffs have not even argued that these findings were clearly erroneous. This Court should affirm for the reasons expressed here and in the motion to affirm in the companion appeal, Appeal No. 13-1138.

STATEMENT OF THE CASE

The plaintiffs' statement overlooks key facts that undermine their claims, including live testimony that the district court expressly credited. The district court's record-specific fact-findings are uniquely suited for summary affirmance.

I. The Legislature drew the new maps to comply with federal law and the wishes of incumbent legislators.

The district court expressly found that race was not the predominant motivation behind Alabama's plans. J.S. App. 86, 93, 105, 129-33, 140, 143, 151, 159, 167, 169, 170, 172. Thus, the plaintiffs are wrong, as a factual matter, when they say that "[t]he drafters of Alabama's 2012 House and Senate redistricting plans . . . drew plans with the predominant purpose of maintaining [black] supermajority percentages." J.S. 3.

There may be additional facts that are relevant to the plaintiffs' racial gerrymandering claim. For example, some of the changes that the plaintiffs allege "reduce[] [African-Americans'] ability to influence the outcome of legislative elections," J.S. 17, were themselves proposed by African-American legislators. *E.g.*, J.S. App. 30-31, 35-36, 65. These facts are discussed in more detail in the defendants' motion to affirm in Appeal No. 13-1138, which was filed by another group of plaintiffs that challenged the State of Alabama's legislative districts.

A. The Legislature strictly complied with one-person one-vote, which limited opportunities for manipulation or gamesmanship.

The 2010 census revealed that Alabama's existing legislative districts had become grossly malapportioned. Under this Court's precedents, the Legislature had an obligation to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). The Alabama Legislature created a redistricting committee that held public hearings at 21 locations in the state, consulted lawmakers of both parties, and hired a redistricting expert to use modern computer modeling. J.S. App. 25-27, 30-36. The Committee ultimately developed proposals to redistrict the legislature, which were enacted in substantial form on party-line votes. J.S. App. 58-59. They were submitted for preclearance under Section Five of the Voting Rights Act and approved by the U.S. Department of Justice. J.S. App. 61, 162-63, 183.

After listening to four days of live witness testimony about this process, the district court found as a matter of fact that "the main priority of the Legislature was to comply with the constitutional mandate of one person, one vote." J.S. App. 142. "[T]he consistent testimony of [the plans' drafters] established that the constitutional requirement of one person, one vote trumped every other districting principle." J.S. App. 151. *See also* J.S. App. 94-105 (recounting testimony); J.S. App. 105 (expressly crediting testimony). "Above all," the Legislature's goal was to

"create more equality among districts throughout the State." J.S. App. 144.

To achieve its primary goal of population equality, the Legislature drew new electoral maps with population differences that do not exceed 2%. *See* J.S. App. 28. The drafters adopted this 2% deviation figure—which allows for plus or minus 1 percent deviation from the "ideal" district—for essentially three reasons.

First, that deviation represents stricter compliance with one-person, one-vote than the State's last two controversial redistrictings, where the maps allowed deviations of up to 10%. J.S. App. 27-28. As the lower court explained, the Democrat-controlled legislature in 2001 had engaged in a "successful partisan gerrymander" by using the 10% deviation to "systematically under-populate[] majority-black districts at the expense of majority-white districts that the Legislature, in turn, overpopulated." J.S. App. 18, 145. *See* J.S. App. 17-25 (recounting history of the 2001 gerrymander). The partisan gerrymander meant that, with just 51% of the state-wide vote in 2002, the Democratic Party controlled 71% of the Senate seats and 60% of the House seats. J.S. App 24. The use of a 2% deviation necessarily "eliminated the partisan gerrymander that existed in the former districts." J.S. App. 146. It also "reduced, from the outset," the Legislature's "ability to pack voters for any discriminatory purpose, whether partisan or racial." J.S. App. 144-45.

Second, the chair of the legislative redistricting committee testified, and the district court expressly found, that "the Committee wanted to avoid future litigation about compliance with the requirement of

one person, one vote." J.S. App. 94. The chair's concerns were well-founded. A three-judge district court in the Eleventh Circuit had previously cast doubt on the presumptive constitutionality of a 10% deviation. *See* J.S. App. 28-29 (discussing *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947, 124 S.Ct. 2806 (2004)). And the Democrats' partisan gerrymander in 2001 had been the subject of controversy and litigation because of the population disparities between districts. *See* J.S. App. 4-5.

Third, the 2% deviation represents the best practices of other States. *See* J.S. App. 29-30. *See also* J.S. App. 106-107 (recounting expert testimony about other States' practices). California, Florida, Georgia, Illinois, Indiana, Iowa, Minnesota, Nevada, Oklahoma, Utah, Virginia, Washington, and Wisconsin all used a 2% deviation or less to redistrict one or both houses of their legislatures after the 2010 census. J.S. App. 29-30.

B. The Legislature split counties for innocuous reasons, having to do with population equality and the requests of incumbents.

The plaintiffs have *never* proposed a competing state-wide redistricting plan with an overall deviation in population of 2 percent or less. *See* J.S. App. 146. Instead, the plaintiffs contend that the State should have prioritized county boundaries over population equality. *See* J.S. 30-31, 38-39. And they are effectively arguing that federal law required the Legislature to maintain the 2001 partisan gerrymander that systematically underpopulated and overpopu-

lated certain districts. *See* J.S. 38 (complaining that the use of "±1% restriction on all House and Senate districts systematically increased the instances in which" counties were split).

Nonetheless, it is undisputed that the one-person one-vote rule makes it, as the plaintiffs put it, "impossible" to draw *any* legislative plan in Alabama that does not split a significant number of counties, regardless of the deviation one uses. J.S. 7. The maps adopted after the last two censuses, which used a more lenient 10% disparity between districts, prove the point. *See* Doc. 76 at 4-5. The 1993 maps split 32 counties in the Senate and 36 counties in the House, and the 2001 plans split 31 counties in the Senate and 39 counties in the House. *See id.* Meanwhile, the plans at issue here split 33 counties in the Senate and 50 in the House. *See id.*

The district court expressly found that these county splits were motivated by efforts "to comply with the overall deviation in population of 2 percent" and "to further the interests of incumbents." J.S. App. 57. For example, the plaintiffs complain about "House District 61, which contains only 12 residents of Greene County (0.03%)." J.S. 11. But the plan's drafters explained at trial, and the district court expressly found, that Greene County was split simply because the incumbent representative from House District 61 requested it. He "asked to have his district include a portion of Greene County in which he owned property" because "he might move to that property in the future." J.S. App. 57. "[T]he representative whose district had previously included that property agreed to a change in which 12 people were

moved." J.S. App. 57. This is the stuff of routine legislative compromise.

II. The relevant rules concerning local delegations will not be proposed or established until January 2015.

The plaintiffs are challenging the effect that Alabama's electoral maps will have on local delegations after the first election conducted under those maps in November 2014. *See* J.S. 33. The plaintiffs have assumed that the courts can discern how the local delegations will operate when that Legislature convenes. But the facts do not bear out their assumption. The relevant rules regarding local delegations will not be crafted until after that election, and until then the courts cannot know what those rules will be. J.S. App. 116.

A few facts about the Alabama Legislature provide important context. As the district court explained, each member of the Legislature is elected to the same four-year term, so each stands for election, every four years, "on the same day." J.S. App. 280. The term of each current legislator is set to expire the day after the election in November 2014, *see id.* at 300-01, and there is no guarantee that any particular legislator will be re-elected to the new four-year term that will begin at that time.

Each new Legislature sets the procedural rules that will govern its four-year term during a constitutionally mandated "organizational session" that occurs during the January following the election. J.S. App. 280 (citing Ala. Const. art IV, §48.01). Critically for present purposes, the district court found that

during this opening session, the separate houses adopt their respective "rules for local legislation, including the use of local delegations." J.S. App. 282. The separate houses also use this session to appoint "'standing committees of the senate and house of representatives for the ensuing four years.'" *Id.* at 280 (quoting Ala. Const. art IV, §48.01). These include the committees that address local legislation. *Id.* at 282.

The fact that these rules and committees are created at the beginning of each Legislature's term means they dissolve at the end of the preceding session. *See* J.S. App. 282, 299 (citing Rules of Senate of Alabama, Alabama State Senate, *available at* http://www.legislature.state.al.us/senate/senaterules/senaterulesindex.html (last visited Apr. 17, 2014)). As the district court put it, these rules and committees "cease to exist" when the four years have run. J.S. App. 282. It is then up to the next Legislature to "adopt[] a system," in its own organizational session, to govern its own term. *Id.* Thus, although the "rules for local legislation that have been adopted by each Legislature have been fairly consistent over the last twenty years," they are not set in stone, and must be affirmatively adopted with each new Legislature. *Id.* at 282-83. "[N]ew local legislative committees have been created." *Id.* at 283. The House has "created new local delegation committees," and the Senate "has increased the number of standing committees." *Id.*

The district court explained that the plaintiffs "offered no evidence to support their assertions that the local delegations exist continuously without any action from the Legislature at the organizational ses-

sion." *Id.* at 290. Thus, the plaintiffs were simply wrong when they repeatedly insisted to the district court that "legislators are assigned to local legislative delegations *by statute*, not by internal rules of the Legislature." Doc. 67 at 4.

All this means that there is currently nothing for the plaintiffs to challenge. As the district court explained, "we can neither know whether the Legislature elected in 2014 will adopt a system of local delegations, nor how that system, if adopted, will be structured." J.S. App. 300. Indeed, we do not even know who the members of that Legislature will be.

III. Alabama citizens do not elect local delegations, and local delegations do not exercise governmental authority over counties.

Two additional facts about the local delegations are relevant to the county-splitting claim.

First, as a consequence of each Legislature's duty to implement its own rules during its organizational session, Alabama citizens do not vote for members of local delegations in any formal way. Citizens simply vote for the representatives assigned to their districts. *See* J.S. App. 337. Because the organizational session has not occurred at the time of the election, citizens do not know, when they cast their ballots, how the local delegations will work or even if the newly elected Legislature will choose to use local delegations. *See id.* Thus, as the district court found below, "there can be no dispute that both members of committees and local delegations are selected

through a process that occurs after the election of the legislators." *Id.*

Second, the plaintiffs are wrong when they assert that "local legislative delegations . . . exercise general governing authority over counties." J.S. i. As the district court explained, it is certainly true that "the Constitution of Alabama limits the power of local governments." J.S. App. 280.[1] But it is "the Alabama Legislature," not the local delegations, that bears ultimate responsibility for local legislation. *Id.* Although the Legislature traditionally has used local delegations and committees "to facilitate the passage

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[1] Alabama appears to be one of many States that employs the so-called "Dillon's Rule," which limits the power of local governments. *See* Adam Coester, *Dillon's Rule or Not*?, NAT'L ASS'N OF COUNTIES RESEARCH BRIEF, Jan. 2004, available at http://www.celdf.org/downloads/Home%20Rule%20State%20or%20Dillons%20Rule%20State.pdf (last visited Apr. 17, 2014). The plaintiffs misleadingly and unfairly imply that a district court has found that Alabama is currently using this system for racist reasons and to a racist end. *See* J.S. 5 ("Since adoption of the 1875 'Redeemer' Alabama Constitution, the state has denied home rule to its counties in order to 'guarantee[] the maintenance of white supremacy in majority-black counties.'" (quoting *Knight v. Alabama*, 458 F. Supp. 2d 1273, 1284-85 (N.D. Ala. 2004)). What that court held was that as an *original* matter, the "general hostility to home rule" in the 1875 and 1901 state constitutions was "motivated at least in part by race." *Knight*, 458 F. Supp. 2d at 1284. The plaintiffs presumably do not believe that state leaders' *current* use of local delegations still has either a racist purpose or effect, as they have disclaimed any intent to challenge the local delegations and indeed repeatedly argued below that local delegations should remain in place. *See* J.S. App. 33-34; *cf. Knight*, 458 F. Supp. 2d at 1312-13 (concluding that the once-discriminatory tax provisions challenged in that case "do not continue to have a segregative effect").

of this legislation," *id.* at 281, the final power to promulgate these laws lies with the Legislature as a whole. Legislators are thus "free to oppose local legislation on the floor," and any member of the House can contest local legislation in a way that requires extraordinary steps before the bill gets a vote. *Id.* at 281-82. As the district court found, "[l]ocal delegations exercise no general regulatory powers over counties; that is, local delegations cannot impose taxes; administer schools; or provide emergency services, housing, transportation, utilities, roads, sanitation services, health services, or welfare." *Id.* at 330. "And local delegations cannot enact laws for the counties." *Id.* To the contrary, no local legislation is "enacted until it receives a majority vote in both houses of the Alabama Legislature and is signed by the Governor." *Id.* at 282.

ARGUMENT

I. The Court should summarily affirm on the county-splitting claim.

The Court should summarily affirm the county-splitting claim on any of the three independent grounds offered by the district court.

A. The county-splitting claim is not ripe.

The district court properly held that the county-splitting claim is not ripe. J.S. App. 116, 297-303. This case involves no lower-court split or novel question about what standard governs the ripeness in-

quiry. Everyone agrees that "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" J.S. App. 299 (quoting *Texas v. United States,* 523 U.S. 296, 300 (1998)). The ripeness question here involves the district court's fact-bound and correct application of this principle to the particular facts in this record. It is particularly suited for summary affirmance.

As the district court explained, the plaintiffs' claim rests upon contingent events that may not occur as anticipated, or at all. The plaintiffs assert "that the redistricting Acts violate the Equal Protection Clause because of the way in which they interact with" a "system of local delegations" that "has not been adopted for the Legislature that would be elected in [November] 2014 in accordance with the new district maps." J.S. App. 299. As the district court found, "only the newly elected Legislature will be able to adopt that system." *Id.* at 299-300. "Because we can neither know whether the Legislature elected in 2014 will adopt a system of local delegations, nor how that system, if adopted, will be structured, the claim under the Equal Protection Clause in count three rests on contingent future events and is not sufficiently concrete and definite to be fit for judicial review." *Id.* at 300.

The district court majority convincingly explained why the dissent, insofar as it reached a contrary conclusion, had misunderstood the facts. The plaintiffs had asserted that "the local delegation system has existed continuously from time immemorial," *id.*, and the dissenting judge agreed, *see id.* at 351-53. But the majority rightly found that "the undisputed rec-

ord evidence forecloses that argument." *Id.* at 300. "[S]worn testimony from the clerks of both houses of the Alabama Legislature" had shown that the rules "governing local legislative delegations . . . are adopted each quadrennium at the organizational session" and "apply only to the sitting Legislature." *Id.* at 300-301. "The next legislature," the majority noted, "will establish its own rules and committees in January 2015." *Id.* at 301. The district court noted that the plaintiffs had "submitted no evidence to contradict" the testimony the State submitted on these issues. *Id.* Moreover, undisputed evidence shows that the Legislature had, in previous organizational sessions, changed longstanding procedural rules. *See* J.S. App. at 291-92, 307-08.

The plaintiffs adopt the dissenting judge's argument that the claim is ripe because it is "sufficiently likely" that the 2015 Legislature will enact a local-delegation system like the current one. *Id.* at 350. See J.S. 32-24. But, as the majority explained, that sort of speculation does not allow plaintiffs to challenge legislative action that may never "occur at all." *Id.* at 302-03. If the rule were otherwise, then a plaintiff could challenge a law as unconstitutional *before* Congress actually passes it—on the theory that it was "sufficiently likely," as a political matter, that the law was going to be enacted. Just as challengers in the usual case have to wait until Congress actually goes through the political process and enacts a statute, the same is true of the plaintiffs here.[2]

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[2] The district court also persuasively rejected the dissent's argument that the Legislature was substantially likely to continue with current practices, and that the plaintiffs' claim was ripe, based on the dissenting judge's "own theory that it would

The majority also was right to say that the plaintiffs will suffer no hardship from having to wait for the new Legislature to decide how it wants to deal with local delegations. As the majority noted, "the use of the new districts" during the election "will not, by itself, cause any harm to the" plaintiffs. J.S. App. 300. Instead, the harm they are complaining about "is dependent upon the future decision of the Alabama Legislature to adopt a system of local delegations." *Id.* And the plaintiffs could address that purported harm in two ways at that time. First, they could try to persuade the new Legislature to adopt a local-delegation system that eliminates the plaintiffs' equal-protection concerns. *Cf.* Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105, 188 n.461 (1992) (noting that legislatures could adopt a weighted voting system that limits local delegates' power to the percentage of their constituents who reside in the county at issue). Second, if the plaintiffs cannot persuade the Legislature to choose an acceptable system, then they can file a lawsuit, if they can satisfy the requirements for

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be potentially illegal under the Voting Rights Act for the Alabama Legislature to not adopt a system of local delegation." J.S. App. 307. As the majority noted, this "speculation about the legality of the decision of a future Alabama Legislature not to adopt a system of local delegations" is "unwarranted" because "no federal court has ever considered – let alone decided – that issue." *Id.* The majority also took note of evidence showing that previous Legislatures, without consequence under the Voting Rights Act, had "altered longstanding rules in response to political changes in memberships." *Id.* The plaintiffs have wisely chosen not to assert the dissent's argument on this point. *See* J.S. 30-39.

justiciability, seeking to enjoin whatever system the Legislature does choose. This is what plaintiffs in similar cases have done. *See DeJulio v. Georgia*, 290 F.3d 1291, 1294 (11th Cir. 2002); *Vander Linden v. Hodges*, 193 F.3d 268, 272 (4th Cir. 1999); *McMillan v. Love*, 842 A.2d 790, 793 (Md. 2004).

Either way, the district court correctly held that there is no ripe controversy now.

B. The plaintiffs lack standing.

The district court's alternative holding on standing is also suited for summary adjudication. As is true of ripeness, the standing question involves no lower-court split or novel issue about the appropriate legal standard. It is well established that "[t]o have standing under Article III, a plaintiff must establish three elements":

(1) that the plaintiff suffered "'an injury in fact'";
(2) that the injury was caused by the "'challenged action of the defendant'"; and
(3) that it is "'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'"

J.S. App. 304 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The district court correctly held that the plaintiffs could not establish the first two of these elements for all the same reasons they could not establish ripeness. *See id.* at 303-10. And critically for present purposes, the court also held, for independent reasons, that the plaintiffs

could not satisfy the third and essential requirement of redressability, either. *See id.* at 310-13.

As the district court explained, the plaintiffs' requested injunction would not redress any arguable one-person, one-vote problem in this case. The plaintiffs' requested relief is an injunction against the current acts' enforcement. *See* Doc. 60 at 56. But the district court observed that "no party has contended that it would be possible to create a [new] plan that is equitably apportioned at both the statewide and local delegation levels." J.S. App. 311. The plaintiffs' "proposed plans" did not "satisfy that requirement." *Id.* Nor did the plans the State implemented over the previous decade. *See id.* Accordingly, "an injunction to prevent the use of the redistricting Acts would not remedy" the equal-protection problem the plaintiffs claimed arose from the current redistricting maps. *Id.* at 310.

It bears emphasis that this redressability problem arises from limitations that the plaintiffs themselves intentionally placed on their request for relief. People who have brought similar cases in the past have sought redressable relief by actually challenging local-delegation practices. *See DeJulio*, 290 F.3d at 1294; *Vander Linden*, 193 F.3d at 272; *McMillan*, 842 A.2d at 793. But here, the plaintiffs "repeatedly asked [the court] not to enjoin the use of local delegations." J.S. App. 311. Future plaintiffs who wish to assert a redressable one-person, one-vote challenge might seek an injunction against local-delegation practices. The present plaintiffs affirmatively waived any such claim.

The dissent's response on this point had no grounding in the law. The dissent argued that the

plaintiffs' claim was redressable because "a redistricting remedy by itself could remedy the one-person, one-vote violation in at least *some* Local Delegations." J.S. App. 363 (emphasis added). As the majority countered, that argument makes no sense. "[A] failure to comply with the requirement of one person, one vote is not the sort of injury that can be redressed by *partial* compliance." *Id.* at 312 (emphasis added). "[A] governmental body is either elected in accordance with the requirement of one person, one vote, or it is not." *Id.* The majority noted, without rebuttal from either the dissent or the plaintiffs, that "[n]o court has held that partial compliance can be sufficient to redress an injury caused by inequitable apportionment." *Id.* The plaintiffs have not even tried to defend the dissent's contrary reasoning in this Court. *See* J.S. 30-34.

The plaintiffs are instead advancing an unprecedented theory that the dissent prudently declined to adopt. The plaintiffs premise their claim on the theory that although they believe the one-person, one-vote rule generally applies to local delegations, a Legislature should be allowed to violate the rule as to a particular delegation if doing so is "necessary" to satisfy the rule as to a particular district. J.S. 37-38. All three of the judges below recognized two fundamental problems with that argument. First, as the dissent noted and the majority agreed, the plaintiffs pointed to nothing "in the law, constitutional or statutory, that says that achieving one-person, one-vote for Local Delegations should be subordinated to achieving one-person, one-vote for both houses of the Legislature or vice versa." J.S. App. 404; *accord id.* at 315-16 (majority opinion). Second and just as im-

portant, both the majority and dissent agreed that the plaintiffs had failed "to define the word 'necessary'" for these purposes "or provide any other standard with which [the court] could adjudicate this claim." *Id.* at 315; *accord id.* at 404 (dissenting opinion). Even in their papers to this Court, the plaintiffs have refused to meet that obligation. *See* J.S. 34-39.

These standing problems thus arise from case-specific procedural moves the plaintiffs have made. Future plaintiffs may be able to avoid these problems by taking a different approach. In this case, summary affirmance on the standing ground is the correct disposition.

C. The plaintiffs' claim fails on the merits.

The district court's alternative holding on the merits is yet another independent reason to summarily affirm. As with the ripeness and standing questions, this issue concerns only the application of an established legal standard to the facts at hand. The applicable rule, set forth by *Hadley v. Junior College District,* 397 U.S. 50 (1970), requires "'each qualified voter'" to "'be given an equal opportunity to participate'" when a government selects persons "'by popular election'" who are to "'perform governmental functions.'" J.S. App. 320 (quoting *Hadley,* 397 U.S. at 56). If this Court does not affirm on jurisdictional grounds, the district court's fact-bound application of the *Hadley* rule will be worthy of summary affirmance for at least two reasons.

1. The district court's merits ruling was correct and consistent with the decisions of other courts.

As an initial matter, the district court's application of *Hadley*'s "governmental functions" requirement was correct. The court determined that even if it could assume that the 2015 Legislature will use a local-delegation system like the current one, the plaintiffs had not shown that those delegations exercise "governmental functions." J.S. App. 314-39. The plaintiffs' principal argument before the district court on this issue was the same one it is making here—namely, that the delegations exercise governmental functions because they engage in "[l]awmaking." J.S. 35. The district court explained why the plaintiffs' argument is factually and legally wrong.

As a factual matter, the district court observed, "the legislature, not the local delegations, is engaged in the governmental function of lawmaking." J.S. App. 321 (citing *DeJulio*, 290 F.3d at 1296). The local delegations' approval of proposed legislation does not give it the force of law. Instead, "local legislation, like all other legislation, is not officially enacted until it is approved by majorities of both houses and signed by the Governor or approved by majorities of both houses over the veto of the Governor." *Id.* at 323. Although non-local representatives often defer to the delegations as a matter of courtesy, the record contains uncontested evidence "about Alabama legislators who disregarded local courtesy to prevent the

enactment of certain pieces of local legislation." *Id.* at 324. Accordingly, the "'gatekeeping'" function performed by these delegations is no different from the function performed by "other legislative committees" such as finance or ways and means. *Id.* at 336. If the one-person, one-vote requirement applies to legislative delegations because they perform this function, then it must apply to all legislative committees. As the district court observed, that cannot be the law. *Id.* (citing *DeJulio v. Georgia,* 127 F. Supp. 2d 1274, 1298 (N.D. Ga. 2001), *affirmed, DeJulio,* 290 F.3d at 1297).

In light of that logic, it should come as no surprise that the plaintiffs have not cited a single lower-court decision supporting their view on the governmental-functions point. To the contrary, other courts appear to have uniformly concluded that gatekeeping functions do not implicate one-person, one-vote. *See DeJulio*, 290 F.3d at 1295-97 (local delegation); *Driskell v. Edwards*, 413 F. Supp. 974, 976-78 (W.D. La.) (constitutional convention), *aff'd mem.,* 425 U.S. 956 (1976); *McMillan*, 842 A.2d at 800-01 (local delegation); *Polk Cnty. Bd. of Sup'rs v. Polk Commonwealth Charter Comm'n,* 522 N.W.2d 783, 788-90 (Iowa 1994) (advisory commission). The dissent below had no choice but to argue that *each* of these decisions, including one this Court summarily affirmed, was "erroneous." J.S. App. 403-06. In what appears to be the only precedent finding a one-person, one-vote problem with a local delegation, South Carolina "conceded" that its particular delegations "perform[ed] numerous and various general county governmental functions." *Vander Linden*, 193 F.3d at 275. Those included "fiscal and regulatory powers"

that far exceed the gatekeeping functions to which the plaintiffs pointed the district court in this case. *Id.* The district court's application of *Hadley* was consistent with this body of law.

2. The district court's merits adjudication was supported by multiple additional grounds.

The holes in the plaintiffs' case on the merits are not confined to the governmental-functions issue. At least three additional problems stand firmly in the way of the plaintiffs' ultimate success here.

First, the majority and dissenting judges agreed that the plaintiffs also "failed to identify the constitutional standard that [the court] should" ultimately employ to adjudicate their equal-protection claim. J.S. App. at 315; *see also id.* at 403-04 (agreeing with the majority that "the plaintiffs fail to define 'necessary'"). The plaintiffs believe that the one-person, one-vote rule applies to local delegations unless deviation is necessary to comply with that rule for the legislature as a whole. But the plaintiffs failed "to define" when it would be "necessary" to deviate from the rule "or provide any other standard with which [the court] could adjudicate this claim." *Id.* at 315; *accord id.* at 404 (dissenting opinion). When a court "ha[s] no standard by which to measure the burden [the plaintiffs] claim has been imposed on their representational rights, [the plaintiffs] cannot establish that the alleged political classifications burden those same rights." *Vieth v. Jubelirer*, 541 U.S. 267, 313 (2004) (Kennedy, J., concurring in the judgment).

Second, the local delegations do not trigger the one-person, one-vote rule for a separate reason under *Hadley*: they are not selected "by popular election." *Hadley,* 397 U.S. at 56. The plaintiffs are mistaken when they assert that delegation members become members "'*as a matter of law* upon their various elections.'" J.S. 36 (emphasis added) (quoting *Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688, 694 (1989)). Instead, the district court found that members of local delegations "are selected through a process that occurs *after* the election of the legislators." J.S. App. 337 (emphasis added). "[T]he legislative committees and local delegations are all appointed in the same organizational session that occurs each quadrennium." *Id.* Because "[u]ntil that meeting, no such internal organization exists," the local delegations are no more "elected" by operation of law than are the members of a legislative judiciary committee. *Id.* This point also underscores the lack of ripeness: a future legislature could decide to appoint any member to any committee to function as a gatekeeper for local legislation.

Third, on a more fundamental level, the plaintiffs' one-person, one-vote theory is incoherent. As to each individual legislator, the new electoral maps ensure tight conformity with the one-person, one-vote rule. So if the 2015 Legislature adopts a local-delegation system like the current one, then within each delegation, each member will be elected by roughly the same number of people. The crux of the plaintiffs' claim is thus not really one-person, one-vote. It is that some people who live outside a particular county will get to vote for a representative who will sit on that county's delegation. *See* J.S. 36-37.

Yet the plaintiffs have not come close to showing that the Constitution prohibits that sort of arrangement. People cross county lines all the time, for all sorts of business, governmental, and personal reasons. Somebody who commutes from her home in a rural county to her business in an urban county has a considerable interest in whether the urban county can charge her an income tax. And the only precedent from this Court the plaintiffs cite on this front, *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), does not hold that the Constitution precludes States from giving people who are affected by another jurisdiction's laws a say in how that jurisdiction will be governed. *See* J.S. 37 (citing *Holt Civic Club*, 439 U.S. at 68-69)). It holds only that the Constitution does not always *require* the State to take that step. And it affirmatively recognizes the "logical appeal" of occasionally extending the franchise to affected persons beyond a jurisdiction's borders. *Holt Civic Club*, 439 U.S. at 70. The very cornerstone of the plaintiffs' equal-protection claim is on exceedingly shaky ground.

II. The Court should summarily affirm the district court's rejection of the racial gerrymandering claim.

The plaintiffs briefly argue that the plans violate the Equal Protection Clause in their entirety because they purportedly categorize voters on the basis of race. J.S 39-40. Not even the dissenting district judge below endorsed that argument. *See* App. 227 ("With this dissent, I am not saying that the plaintiffs should prevail as to all the districts."). Instead,

the dissenting district judge suggested that the court should separately review the drafters' decisions with respect to each individual district—a claim that the plaintiffs never made below and have not suggested now on appeal.[3] *Id.*

Despite their cursory arguments, the plaintiffs' jurisdictional statement does not sufficiently present their racial gerrymandering claim on appeal. First, in light of the district court's unchallenged fact-findings, the plaintiffs' argument on appeal that the State lacks a compelling interest to "classify voters by race" is beside the point. J.S. 39-40. The district court held a four-day bench trial and expressly found as a matter of fact that race was *not* the predominant reason for adopting these plans and that the plans do *not* classify voters on the basis of race. The plaintiffs have not argued that these fact-findings are clearly erroneous. *See Easley v. Cromartie*, 532 U.S. 234 (2001) (reviewing such rulings for clear error). The State must identify a compelling interest only if race is the "*predominant* factor motivating the legislature's redistricting decision." *Bush v. Vera*, 517 U.S. 952, 959 (1996). Because the plaintiffs have not attacked as clearly erroneous the district court's finding that race was *not* the "predominant factor," they have effectively forfeited their racial gerrymandering claim.

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[3] *Compare* dissenting opinion, J.S. App. 238 ("the court must scrutinize each and every individual district to see whether race was the predominant factor") *with* plaintiffs' brief, J.S at 39 ("It is unnecessary to scrutinize district shapes and census statistics to see that Alabama's 2012 House and Senate plans classify voters by race.").

Second, even if the plaintiffs had shown the district court's fact-findings to be clearly erroneous, their claim would fail. The plaintiffs are challenging the drafters' decision to comply with Section Five of the Voting Rights Act by keeping the majority-black districts under the new plan roughly the same as the ones under the old plan. *See* J.S. 39-40. They argue that compliance with Section Five is not a "compelling interest" because, after these plans were enacted and pre-cleared, this Court held that Alabama does not have to secure preclearance of voting changes going forward. *Id.* at 40. But the Legislature obviously has a compelling interest in complying with federal law as it exists when the Legislature acts. And, more fundamentally, the plaintiffs cannot seriously contend that African-American voters in Alabama would be better off if the Legislature had ignored the U.S. Department of Justice and intentionally violated Section Five.

The plaintiffs' state-wide racial gerrymandering claim also fails for several additional reasons. These reasons are addressed in the defendants' motion to affirm in Appeal No. 13-1138.

CONCLUSION

The Court should summarily affirm the judgment of the district court.

Respectfully submitted,

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