No. 13-1138

In The Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, ET AL.,

Appellants,

v.

ALABAMA, ET AL.,

Appellees.

On Appeal From The United States District Court For The Middle District Of Alabama

REPLY BRIEF FOR APPELLANTS

JAMES H. ANDERSON
WILLIAM F. PATTY
BRANNAN W. REAVES
JACKSON, ANDERSON & PATTY, P.C.
P.O. Box 1988
Montgomery, AL 36102

PAUL M. SMITH
JESSICA RING AMUNSON
MARK P. GABER
JENNER & BLOCK LLP
1099 New York Avenue NW
Suite 900
Washington, DC 20001

RICHARD H. PILDES
Counsel of Record
Vanderbilt Hall
40 Washington Square South
New York, NY 10012
(212) 998-6377
pildesr@law.nyu.edu

JOHN K. TANNER
3743 Military Road NW
Washington, DC 20015

October 28, 2014

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

WALTER S. TURNER
P.O. Box 6124
Montgomery, AL 36106

KEVIN RUSSELL
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

REPLY BRIEF FOR APPELLANTS

Twenty-eight times, Alabama's brief tells this Court that the state had a preclearance "strategy" of re-populating each and every black-majority district as closely as possible to its prior black-population percentage (the fixed BPP policy). As those repeated statements demonstrate, Alabama's policy was applied in every black-majority district; each had to be re-populated to end up "as close as possible" to its racial-target figure.

That fact is the critical one here. This policy is unconstitutional in itself. But if the unconstitutionality of those ends is not enough alone, Alabama's use of systematic race-based means to achieve these unconstitutional ends, such as race-based splitting of precincts, further demonstrates the unconstitutionality of this policy.[1] Section 5 does not justify Alabama's policy; the Equal Protection Clause does not permit it.

I. Liability: Alabama Applied a "Fixed BPP" Policy That is Unconstitutional In Itself

Alabama adopted and *applied* an unconstitutional policy in designing all its black-majority districts and – as is virtually inevitable given that policy

[1] The ALBC reply brief documents these means, including race-based precinct splitting.

– also systematically used an unconstitutional means to achieve that policy. The welter of district-specific factual matter obscures whether Alabama disputes that it applied the fixed BPP *policy* or whether it disputes that it used race-based *means* to implement that policy. In fact, Alabama did both; this brief primarily addresses the former, and the ALBC brief, incorporated here by reference, addresses the latter.

The mapmakers acknowledge that they adopted this policy at the outset, but say they believed Section 5 required it. Compliance with that policy was, and had to be, their highest priority (along with population equality) because, as the state argues, the Supremacy Clause required it. Alabama Br. 2, 16 (AL Br.) Having defined re-creating the prior BPPs as their federal obligation, the mapmakers rightly understood themselves to be obligated to subordinate all other non-federal objectives to meeting these racial targets. Those targets were the one outcome that could not be negotiated or compromised. As Hinaman logically testified, a goal such as "to change each district as little as possible" was "a goal, but it's certainly down on the list from one person, one vote and not retrogressing the minority districts. . . ."[2]

Similarly, there is no dispute that the redistricters *first* designed the black-majority districts to get those districts "right." As one of the mapmakers

[2] Tr. III at 162. Tr. III = Trial Transcript Vol.III.

testified: "After making sure that the black-majority districts met our obligations under the VRA, we tried to take care of the rest of the State." McClendon Affidavit, APX 64, at 3 (same).

At times, the state suggests ADC's claim is based on circumstantial evidence – as if the plaintiffs notice the high BPP levels in the black-majority districts and now try to infer that Alabama must have set rigid racial targets based on the prior map. But ADC's case is a direct-evidence one. There is no need to infer the policy Alabama employed; the state has confessed it, consistently and repeatedly. That the new districts largely match the BPPs of the prior districts merely confirms that the state did what it set out to do.

Alabama *applied* this policy in every black district because it claimed to believe it had no choice. To the extent there is any potential confusion about that, it stems from two issues. First, although the mapmakers managed to re-create the BPPs with remarkable precision in most districts, in some districts doing so was not possible as a practical matter. They could not, of course, achieve 100% "perfection" everywhere. But even where not possible, they still tried to come as close to meeting those targets as the black-population distributions permitted. The state necessarily applied its fixed BPP policy to every black district, even if it fell a small amount short in some places. The only reason the state ever offered for missing its racial targets in some districts is that "it was obviously . . . unavoidable because there was

just not the African-American population to enter those districts." ADC Br. 16 (quoting Hinaman). As Hinaman testified many times, he "tried to be as close as possible" to the prior numbers, ALBC Br. 23 n.35, but "[s]ometimes there's no way to avoid it."[3] The state has never argued that it abandoned its fixed BPP policy, in any district, in order to reach some other objective. Alabama necessarily *applied* that policy in those districts, even if the policy could only be *realized* all of the way in some districts.

Second, whether Alabama could have created districts at the same BPP levels had it adopted some *other* policy is irrelevant to the factual issue of what policy Alabama actually did apply. In fact, Alabama applied its fixed BPP policy in all black districts.

A. Alabama's Policy is Unconstitutional.

1. ADC's argument is not that a simple target figure for BPPs would, in itself, be inconsistent with Section 5 and the Constitution. The defect in Alabama's policy is that, in an area of significant constitutional sensitivity, Alabama used race-based target BPP *figures that reflect no policy judgment at all regarding the ability to elect and are not even a good-enough proxy for that ability* (had Alabama even employed that policy as a proxy). The state simply

[3] Tr. III at 163.

looked at racial percentages and decided to keep them constant. It adopted this policy as a preclearance strategy, nothing more.

That policy is unconstitutional; the legal reason why can be stated in several ways. In ADC's view, the most direct way is that this race-based policy lacks any legitimate justification. The state's only justification is that Section 5 required its policy; as we have demonstrated, that is clearly wrong. The result is a naked policy of race-based population targets that has no legitimate justification at all. Such a policy is, in itself, unconstitutional.

To clarify this point, suppose that voting were no longer racially polarized in Alabama. Yet the state adopted its fixed BPP policy for the same reason as here – because it thought Section 5 required it, or that the policy was a cunning preclearance strategy. Is there any doubt the policy would be unconstitutional? Section 5 could not justify that policy; it would certainly bear no relationship to the ability to elect. Similarly, black voter registration and turnout rates in Alabama in 1990 were 16.6 points below that of whites; at that time, to ensure the ability to elect in the teeth of racially-polarized voting, districts with 65-69% BPP districts were required. Amicus Brief Prof. Gaddie et al. But today, black participation rates in Alabama equal or exceed those of whites. Section 5 cannot justify using race-based population targets from the 1990s or ones that do not bear a proper relationship to the ability to elect in current conditions.

When a state adopts a race-based policy for a constitutionally illegitimate end, that policy is unconstitutional, even if race-neutral means of implementation are used. Race-based public-university admissions quotas are "facially invalid." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978). Race-neutral means to achieve that quota would still leave the quota unconstitutional. In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Court held Alabama's criminal-disfranchisement provisions, enacted for racially-discriminatory purposes, unconstitutional on their face, even though the means used (the crimes selected) were facially neutral. Similarly, *Grutter v. Bollinger,* 539 U.S. 306, 330 (2003), described "outright racial balancing" as "patently unconstitutional." When the ends a policy seeks to realize themselves lack a legitimate justification, such a policy is unconstitutional, regardless of the means of implementation.

The issue is not different in redistricting merely because race can be a factor or because redistricters will "almost always be aware of racial demographics. . . ." *Miller v. Johnson,* 515 U.S. 900, 916 (1995). That race was a factor in Alabama's redistricting is not, of course, what makes the fixed BPP policy unconstitutional. It is that the race-based, fixed BPP policy, which the state justifies only as necessary to comply with Section 5, is not tied in any meaningful way to current conditions regarding the ability to elect – and was not even based on a judgment about that. As a result, the policy becomes a form of "racial

balancing" (or, perhaps, "imbalancing") for its own or no sake – at the very best.

Thus, the means Alabama used in specific districts to achieve its unconstitutional ends are not legally essential. The state goes to great length to try to show that it employed race-neutral means. But even if true – it is not – the use of these racial-target figures well above the levels necessary to ensure an ability to elect (indeed, with no judgment on that issue at all) is not justified by Section 5.[4]

Given that the policy lacks a legitimate justification, ADC believes the Court need not enter into the complexities of predominant-motive analysis. But if the Court were to apply a predominant-motive and narrow-tailoring analysis, that analysis should be applied to the state's *policy,* not to the design of each particular district one-by-one. Because Alabama believes the Supremacy Clause obligated it to meet

[4] Alabama seems to argue that the plaintiffs do not have a cause of action because Section 2 of the VRA makes "race-packing" of districts illegal. But Alabama misunderstands ADC's claim, Section 2 law, or both. To prove a Section 2 race-packing claim, plaintiffs must meet the requirements of *Thornburg v. Gingles*, 478 U.S. 30 (1986) and *Bartlett v. Strickland*, 556 U.S. 1 (2009); in particular, they must prove, at the least, that another reasonably compact, majority-black district could be created if other districts were "unpacked." *See, e.g., Hall v. Virginia*, 385 F.3d 421, 429 n.12 (4th Cir. 2004); *NAACP v. Snyder*, 879 F. Supp. 2d 662, 677 (E.D. Mich. 2012). Not all constitutionally excessive uses of race in districting are covered by packing or dilution claims under the VRA.

these fixed BPP targets as closely as possible, the conclusion that this race-based policy satisfies the predominant motive test is unavoidable. It was the end that could not be compromised, along with the population-equality requirement that any plan must meet. Indeed, because this fixed BPP was the predominant motive for the design of all black-majority districts, the predominance of that race-based requirement is even more clear here than in *Shaw* itself. *See Shaw v. Reno*, 509 U.S. 630 (1993).

2. If proof is needed that Alabama also employed race-based means to achieve its (unconstitutional) ends, the record establishes that Alabama did that, too. The district court itself actually found that as a matter of fact, but failed to appreciate the legal significance of its own findings.

In both Montgomery and Jefferson Counties, the court found that districts (HD 73 and 53) had been eliminated and moved elsewhere "to avoid retrogression" – as the state understood it – in the nearby black-majority districts. JS App. 36-37; JS App. 49; JS App. 38 ("to avoid retrogression" the mapmakers "used the population that had previously been located with District 53 to repopulate the other majority-black districts in Jefferson County"). These statements and findings mean that Hinaman moved large numbers of black residents, as such, out of HD 73 and 53 for the purpose of meeting his racial targets. The court concluded Section 5 *justified* the state's approach, but the fact that Hinaman used racial means to meet his racial targets is contained in the court's

own findings. The ALBC briefs document these race-based means in extensive detail.

But it is not the means that make Alabama's approach unconstitutional; it is the illegitimate race-based ends that they serve. Indeed, it is virtually inevitable that such a policy would require race-based means of deciding which voters to retain or move in and out of districts, particularly when the state's new 2% population standard required hundreds of thousands of voters to be redistributed. That is part of why it is essential for the Court to recognize that such policies fail constitutional scrutiny when Section 5 is wrongly invoked to justify them.

B. Alabama's Defenses are Unavailing.

1. The Section 5 Defense. Alabama asserts the post-2006 version of Section 5 required the state to avoid any small BPP reduction. That was not the law before 2006; Alabama thus argues that Congress made an avulsive change in 2006.

Alabama asserts that the terms "diminishing the ability to elect" now in Section 5 mean any non-trivial reduction in BPPs. 42 U.S.C. 1973c(b). But those terms have a long history in voting-rights law and had not meant, before 2006, any non-trivial reductions in BPP that did not actually affect an equal opportunity for "the" ability to elect. Congress specifically relied on that history when it incorporated these terms of art into Section 5.

The "diminishing the ability to elect" language appeared at least as early as the House Report that accompanied the 1975 re-authorization of Section 5. U.S. Br. 23. As the United States points out, this Court used that language in *Beer v. United States*, 425 U.S. 130 (1976) and *Bush v. Vera*, 517 U.S. 952, 983 (1996) (plurality opinion).

Similarly, lower federal courts, where most VRA litigation occurs, had also used this or closely similar language in dozens of cases over many years.[5] Similar language had long been used in Section 2 cases as well.[6] The term "diminish the ability to elect" must be read, not in a vacuum, but against this long history of judicial decision and DOJ administration, documented in our opening brief, to which Congress repeatedly referred. *See* S. Rep. No. 109-295, at 18-19 (2006); H.R. Rep. No. 109-478, at 70-71 (2006). *See generally Stewart v. Dutra Constr. Co.,* 543 U.S. 481, 487 (2005) (legal terms of art should be read in accord with their established meaning). Those words must

---

[5] *See, e.g., Colleton Cnty. Council v. McConnell,* 201 F. Supp. 2d 618, 645-46 (D.S.C. 2002); *Bodker v. Taylor*, No. CIV.A.1:02-CV-999ODE, 2002 WL 32587312 at *10 (N.D. Ga. June 5, 2002); *Georgia v. Reno,* 881 F. Supp. 7, 13 (D.D.C. 1995); *Clark v. Putnam Cnty*., 293 F.3d 1261, 1277-78 (11th Cir. 2002); *Prejean v. Foster*, 227 F.3d 504, 517 n.24 (5th Cir. 2000); *Theriot v. Parish of Jefferson*, 185 F.3d 477, 489 (5th Cir. 1999).

[6] *See, e.g., Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ*., 4 F.3d 1103, 1115-16 (3d Cir. 1993); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 652 (N.D. Ill. 1991) (three-judge court).

also be read in the context of the problem Congress aimed to solve, which was, as Congress stated repeatedly, to "restore" the *Beer* standard. *See, e.g.,* S. Rep. No. 109-295, at 21; H.R. Rep. No. 109-478, at 71.[7]

A version of Section 5 that required preserving black population numbers for their own sake, without any regard for the ability to elect, might well be unconstitutional – as would be districts drawn under that command. Reading Section 5 as Alabama does still leaves the state's policy unconstitutional.

2. The "Mt. Healthy" Defense. Alabama appears to suggest, in essence, a partial *Mt. Healthy* defense, without citing the case by name. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). The state argues that "at least some of the majority-black districts have the right black population, regardless of how that population arrived there." AL Br. 26. Once again, the state focuses on

[7] Alabama cites testimony before the Senate Judiciary Committee of the ADC's counsel, who urged Congress to leave *Georgia v. Ashcroft*, 539 U.S. 461 (2003) intact and not restore the *Beer* standard's exclusive focus on the ability to elect. AL Br. 80. That testimony argued that an exclusive focus on "the ability to elect" was too "mechanical" in contemporary circumstances. That was not, as Alabama would like to suggest, an argument against creating a new standard far *more* restrictive than *Beer* itself; no one was suggesting or proposing such a thing. We agree that the amendment restored the *Beer* standard.

racial percentages alone, rather than on the actual components of any given district. Of course, that counterfactual might be true for some districts regarding the one dimension of BPP taken in isolation, but that does not make the state's policy constitutional. Alabama would bear the burden of proof on this *Mt. Healthy* argument, but more importantly, it makes no sense to apply *Mt. Healthy* to redistricting – and the Court has never done so. Unlike an employment decision involving a single individual, redistricting involves hundreds of interlocking decisions.

The counterfactual policy Alabama would have employed to get to the "same" outcome in district A would have to be a policy the state would have applied in a consistent, non-pretextual way to all other districts in the state. A policy of keeping counties intact to the maximum extent possible might produce in district A the "same" black population level, but it would also change the design of that district along many other important dimensions; just as significantly, it would also change the design of other districts. No intelligible way exists to apply *Mt. Healthy* to redistricting, at least when as many districts are at issue as here.

3. The Ability-to-Elect Defense. To salvage its policy, Alabama now attempts to rationalize it as if the policy reflected a considered judgment on BPP levels that were actually needed to preserve the ability to elect. The state asserts it *relied* on the "best evidence" for that judgment, AL Br. 71; in reality, the state adopted a preclearance "strategy" to use these

racial targets, whether actually necessary for the ability to elect or not.

But accepting the state's effort to convert its pure-numbers policy into a judgment about the ability to elect, there is no strong basis in evidence that Alabama's policy is justified in these terms.

Because the state used different numbers in different districts, it is not altogether clear *what* the actual policy is for which Alabama believes it had a strong basis in evidence. In describing the "best evidence" it relied on, the state suggests several times it applied a 65% rule. AL Br. 71.

Alabama claims to have relied, in part, on "caselaw" for this view. But to the extent the courts or DOJ once applied a 65% rule, doing so was necessary decades ago to compensate for lower black registration and turnout rates. *See, e.g., Ketchum v. Byrne*, 740 F.2d 1398, 1415 (7th Cir. 1984) ("[The 65%] figure is derived by augmenting a simple majority with an additional 5% for young population, 5% for low voter registration and 5% for low voter turn-out, for a total increment of 15%."). It has been decades since courts applied anything like a 65% rule. *See, e.g., Metts v. Murphy*, 347 F.3d 346, 356 (1st Cir. 2003) ("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).

Moreover, a 65% rule in Alabama in 2012 self-evidently lacks justification. Although Alabama tells the Court how much has changed there, the state

ignores this point when it comes to asserting such high BPPs remain functionally necessary.

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 point below white turnout. Gaddie Br. If a 65% district was necessary at some point in the past, a 53% district would be the rough equivalent in Alabama today (3 points must be added to 50% for the relatively larger size of the black community's non-voting age population). When the 1990s districts were created, in contrast, black registration and turnout were a combined 16.6 points below that of whites – an ability-to-elect district back then might well have required a 69.6% district.[8]

But to suggest such a district is necessary today is insupportable. Indeed, the Redistricting Committee's own lawyer, now-Deputy Attorney General Dorman Walker, publicly stated that the 65% figure was a relic of the past and that DOJ might even consider 55% too extreme today. ADC Br. 10-11. The redistricters apparently ignored his legal view.

Alabama asserts that the "plaintiffs introduced almost no evidence below to show" that BPPs below

[8] 50% + 16.6 + 3 (for the younger black population, using today's figure for that). Figures in this paragraph are for general illustrative purposes, not as assertions above the levels actually required.

65% were sufficient. AL Br. 70. But as Walker's statement indicates, it takes no sophisticated analysis to know 65% is not necessary. Surely Alabama's legislative leaders recognize that black registration and turnout rates today are on par with those of whites; their amicus brief in this case, indeed, makes that point at length. Indeed, Sen. Dial testified that he knew the 75.2% black majority in SD 26 was unnecessary. ADC Br. 15. In any event, ADC did offer two experts whose analyses showed that 65% BPP districts were not necessary (the state did not introduce any expert analysis on this question). JA 142-45; JS App. 86-88 (Lichtman testimony that below 50% can be adequate); JS App. 91 (Arrington testimony that 54-56% is sufficient).[9]

But the issue is *not* what levels of BPP are actually necessary in fact. The issue is that Alabama (1) made no judgment at all but just simply reproduced BPP numbers that (2) were at such high levels in many districts that, on their face, those levels were not necessary. After the plans were enacted, the ADC's witnesses at trial varied a bit on how low the

[9] The court did not credit this testimony because in a 2000 Alabama local-government case, Dr. Arrington had testified that higher levels were necessary (as he explained at the time in that case, "blacks were not mobilized to vote at the same rate as whites. . . ."). *Wilson v. Jones*, 130 F. Supp. 2d 1315, 1320 (S.D. Ala. 2000). In rejecting Dr. Arrington as inconsistent, the court lost sight of the fact that black registration and turnout in the 1990s were significantly lower than those of whites. See Pol. Sci. Am. Br.4, 8.

BPP could be and still preserve the ability to elect, but Alabama could not have relied on those views;[10] nor, in picking and choosing among them can Alabama find support for the claim that, had it considered the ability to elect, the state would have chosen essentially the same levels its fixed BPP policy created.

Similarly, ADC's alternative plans do not determine whether Alabama's policy is itself constitutional. But in any event, the state obscures crucial differences between the ADC's plans and the enacted ones that illustrate the elimination of coalitional districts and the intentional creation of unnecessarily packed ones. In the House, for example, the ADC plan creates 3 districts between 35-50% BPP, which is precisely the range in which black-white political coalitions elect candidates of choice the minority community largely supports; the enacted plan has no districts in this BPP range. Instead, the state plan has 12 districts at 65% BPP or higher; the ADC plan only has 6 such districts. The ADC's plans were produced during the redistricting process for the legislature, not for litigation; the plans were designed to be palatable to the Republican legislature while persuading it to respect the integrity of

[10] Dr. Reed thought 60% BPP today was ordinarily enough for the ability to elect, JA 51; the social scientist, Dr. Lichtman, testified that he "would absolutely disagree" with the view that even 60% districts are necessary. JA 66.

county boundaries by showing how much better the longstanding 10% population deviation rule would do that. They were not designed as the ADC's ideal plans, nor as trial exhibits to show the effects of a race-neutral plan that preserved the ability to elect without excessively concentrating black voters.

II. Remedy: The Court Should Invalidate the Plans

1. The state's unconstitutional policy was applied to all 36 majority-black House and Senate districts. While an appropriate remedy might be to invalidate only those districts, the more appropriate remedy here is to invalidate the plans as a whole. Some districts were moved to completely different parts of the state because their black populations had to be drained to meet the state's BPP quotas in other districts; HD 53 was moved from the center of the state, in Birmingham, all the way up to the border with Tennessee; HD 73 was moved from Montgomery over to Shelby County. If the state had acted constitutionally, it is impossible to know whether those districts would have stayed where they were or in what form. What would an order to re-design HD 53 without the offending policy mean – to re-draw it in Birmingham, where it might have remained absent that policy, or in Madison, where it now sits?

Problems of this sort are endemic with any effort to craft a surgically targeted remedial order when all black-majority districts were designed pursuant to an

unconstitutional policy. ADC recognizes that federal remedies in redistricting cases should not "'intrude upon state policy any more than necessary.'" *White v. Weiser,* 412 U.S. 783, 795 (1973) (citation omitted). But in this context, the most appropriate remedy would be to require the plans to be redrawn, through constitutional means and in compliance (now) with Section 2 of the VRA.

2. Against this remedy, Alabama might be taken to be making a severability argument – an implicit suggestion that the Court should hold the fixed BPP policy constitutional as applied to districts in which those BPPs are in fact necessary to preserve the ability to elect. But the Court does not generally sever statutes that rest on constitutionally forbidden purposes or justifications. Severance is appropriate for statutes that are overbroad, not ones lacking a constitutionally legitimate justification. *See, e.g., Hunter*, 471 U.S. 222 (not severing law enacted for racially-discriminatory purposes between crimes for which blacks were and were not disproportionately convicted); *see also United States v. Lopez*, 514 U.S. 549 (1995) (facially invalidating congressional statute without severing for cases that had a sufficient inter-state jurisdictional nexus).

Shelby County, which rejected a similar argument to the one Alabama makes here, exemplifies the point: the Court rejected any effort to hold Section 4 of the VRA constitutional as applied to Shelby County, even if Section 4 might be unconstitutional as applied to other covered jurisdictions. *Shelby Cnty. v. Holder*,

133 S. Ct. 2612, 2659 (2013). In the majority's view, Section 4 was unconstitutional in all its applications because Congress had not provided a rational or legitimate justification for it. The fixed BPP "formula" Alabama employed here lacks a constitutionally legitimate justification, which makes severance inappropriate.

3. The United States suggests three reasons a remand is appropriate. The first appears to be uncertainty about whether Alabama applied its policy in all black-majority districts. We have demonstrated already why no need exists for a fact-finding remand on that question. Second, the United States argues that district-specific litigation is required to determine if Alabama's policy subordinated traditional districting principles in specific districts. But ADC's claim is that the *policy* itself is unconstitutional. Third, the United States suggests a remand to determine what BPP levels are necessary for the ability to elect. But no additional facts on that are required to hold Alabama's policy unconstitutional. The state's policy was simply to re-create BPPs, at whatever level, without any regard for the ability to elect.

III. The ADC Appellants Have Standing

Contrary to Alabama's view, ADC's challenge does not present a generalized grievance. The appellants claim that Alabama *applied* a fixed BPPs policy, to the extent possible, in all black-majority districts. Appellants have suffered relevant injury-in-fact fairly traceable to this BPP policy, which is redressable

by designing districts and plans that do not apply unconstitutional racial targets. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). To the extent any questions exist concerning the appropriate scope of remedy for the constitutional violation, those issues go not to standing, but to remedy.

A. Individual Appellants and ADC's Members Suffer Concrete Cognizable Injury

The state does not dispute that ADC has some members living in the black-majority districts. ADC has members in virtually every county, JA 183, and eleven of those counties are themselves fully contained within three of the eight majority-black Senate districts, ADC Br. 59; the same eleven counties are fully contained within one or more majority-black House districts. JA 195.

In addition, the Chair of the ADC, Dr. Reed, resides in SD 26 and HD 77, the same House District as named plaintiff Stallworth.[11] Alabama asserts residents in HD 77 were not injured, because the district's BPP dropped from 73.5% to 67.0%, as if this suggests the racial targets were not applied in this district. But they were; Alabama's policy was to come "as close as possible" to the prior numbers.[12]

---

[11] Dr. Reed's address is in the record and the resulting district he is in is a matter of public record. ADC Br. 60 n.28.

[12] The ADC plaintiffs who resided in HD 73, ADC Br. 60, have standing as well; Hinaman eliminated HD 73 to sort voters by race into HDs 77 and 78 to meet 70%+ BPP targets there.

(Continued on following page)

Alabama also does not dispute that the only reasonable inference from the record is that ADC has members in numerous other majority-black districts as well. ADC Br. 60. *Lujan*, 504 U.S. at 561 (elements of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof. . . ."). Indeed, the state never argued that ADC had to prove members in the black-majority districts, perhaps for that reason.[13] Facts about the district residences of ADC members were not "controverted" at trial. *See* id. at 561 (standing "facts (*if controverted*) must be 'supported adequately by the evidence adduced at trial.'") (emphasis added, citation omitted). However, in an abundance of caution, ADC has lodged a supplemental affidavit providing approximately 70 relevant district residence addresses from among its more than 3,000 members.[14]

United States v. Hays, 515 U.S. 737 (1995), did not bar all claims by non-residents of black districts, but required that such residents produce *specific* evidence that members of their district had been classified by race. The facts about HD 73 provide that evidence.

[13] The state misleadingly suggests it did, citing to JA 205, but all the state argued there was that no named plaintiff lived in one specific district – SD 11, a white-majority district. The state argued only that ADC members had to be joined on the theory that ADC's claim "requires the participation of the individual ADC members." AL Br. 68. The district court did not accept that view. Having challenged residency with respect to only one district, Alabama can hardly complain about the lack of detailed evidence regarding the others.

[14] ADC's letters in support of that lodging provide the full procedural history regarding the standing issue that justifies this lodging.

Alabama asserts that ADC lacks standing to represent its members because it "never made a claim on behalf of its individual members." AL Br. 68. But the state cites no authority for the position that when an organization sues, it is required to make such a further assertion, and the court below plainly understood ADC to be asserting representational standing on behalf of its members.

B. In addition, ADC Suffers Organizational Injury-In-Fact

ADC also has standing in its own right. *See* ADC Br. 54-58. The state does not dispute that ADC pressed this organizational standing argument below or that the court simply neglected to address it. Accordingly, remand on this issue might be appropriate.

In any case, the state's objections to ADC's organizational standing are misplaced. First, Alabama's position appears to be that organizations can never have standing to enforce "personal rights," because people, not organizations, possess such rights. AL Br. 64. But this Court has never endorsed such a principle and has recognized organizational standing, including in voting-rights cases.

In *Crawford v. Marion County Election Board*, 553 U.S. 181, 189 n.7 (2008), for example, the Court recently agreed that the state and local Democratic Party had standing to challenge Indiana's voter-identification law as a violation of the Fourteenth

Amendment's protections for the personal "right to vote." But the Indiana Democratic Party does not vote. Similarly, the Court found organizational standing in *Havens Realty Corp v. Coleman*, 455 U.S. 363 (1982), even though the fair-housing organization there could not suffer the personal injury of race discrimination. Citing *Havens,* Judge Posner for the court of appeals in *Crawford* upheld the Democratic Party's organizational standing because "the new law injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote." 472 F.3d 949, 951 (7th Cir. 2007). This Court affirmed the standing holding.[15]

Alabama's insistence that ADC cannot establish organizational standing because it is not a person confuses Art. III standing with prudential third-party standing issues. Alabama has not raised such issues; in any event, the circumstances in which the Court generally grants third-party standing are present here. *See Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004) (ADC has a "close" relationship with its members and there are considerable hindrances to those members litigating these claims as individuals).

[15] As a secondary holding, the court of appeals concluded that the Democratic Party also had standing to assert the rights of those members the law injured.

Second, Alabama asserts that ADC's harm is not fairly traceable to the challenged policy. AL Br. 67. But the ADC is in the same position as the Democratic Party in *Crawford.* Dr. Reed's affidavit details those tangible injuries, including those caused by the plans' splitting of precincts. JA 182; JS App. 77-78. Alabama asserts those tangible costs are not "fairly traceable" to its BPP policy, because they stem from the 2% rule, but Hinaman specifically testified to splitting at least some precincts to meet the BPP policy. Tr. III at 143-44. Second, Dr. Reed's testimony, consistent with ADC's complaint, states that "it is so crucial for us to be able to influence districts. That's where you get your white allies from." Tr. II at 171. The state's policy perceptibly impairs ADC's ability to develop and engage in interracial political coalitions, a core part of its mission. These harms are not abstract ideological or remote ones, but concrete, immediate, and particularized. *Havens,* 455 U.S. at 379.

Finally, *Hays* does not single out racial redistricting cases for a special bar on organizational standing. First, *Hays* simply does not address any issue concerning organizational standing. Second, the substantive claims here are analytically distinct from those in *Shaw* and *Hays*. *Shaw* rejected on the merits the claim that merely taking race into account is itself unconstitutional.

This case involves a different and distinct claim. Alabama's policy does not merely take race into account, it sets unjustifiable racial-population targets.

ADC's claim that this policy, in itself, is unconstitutional is a more conventional Equal Protection challenge to a race-based policy. *See Miller v. Johnson*, 515 U.S. at 913 (" . . . *Shaw* did not erect an artificial rule barring accepted equal protection analysis in other redistricting cases."). No constitutional bar to ADC's organizational standing is present.

* * *

This case is ultimately about whether states (in good faith or bad) will unnecessarily turn the VRA into a racial straightjacket and, perversely, into a barrier to interracial political coalitions. In *Bartlett*, this Court warned that "[o]ur holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns." *Bartlett v. Strickland*, 556 U.S. 1, 23-24 (2009). Alabama went far beyond that here: it entrenched black population numbers, purely as numbers, without any regard for whether doing so was necessary to preserve the ability to elect and without a strong basis in evidence for such a position. Section 5 does not require that. The Equal Protection Clause does not permit it.

CONCLUSION

Appellants respectfully request that the Court reverse the judgment below.

Respectfully submitted,

JAMES H. ANDERSON
WILLIAM F. PATTY
BRANNAN W. REAVES
JACKSON, ANDERSON & PATTY, P.C.
P.O. Box 1988
Montgomery, AL 36102

PAUL M. SMITH
JESSICA RING AMUNSON
MARK P. GABER
JENNER & BLOCK LLP
1099 New York Avenue NW
Suite 900
Washington, DC 20001

WALTER S. TURNER
P.O. Box 6124
Montgomery, AL 36106

RICHARD H. PILDES
Counsel of Record
Vanderbilt Hall
40 Washington Square South
New York, NY 10012
(212) 998-6377
pildesr@law.nyu.edu

JOHN K. TANNER
3743 Military Road NW
Washington, DC 20015

KEVIN RUSSELL
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814