FILED
2019 Oct-21 PM 07:59
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LAKEISHA CHESTNUT, et al.	)	
	)	
Plaintiffs,	)	
	)	Case No. 2:18-cv-00907-KOB
v.	)	
	)	
JOHN H. MERRILL, in his official Capacity as Alabama Secretary of State	)	
	)	
	)	
Defendant.	)	

PARTIES' PROPOSED PRINCIPLES OF LAW

AGREED PRINCIPLES OF LAW

I. Framework of a Vote Dilution Claim Under Section 2 of the Voting Rights Act

1. Section 2 of the Voting Rights Act ("VRA") renders unlawful any state "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a).

2. A single-member congressional district plan that dilutes the voting strength of a minority community may violate Section 2. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 423–42 (2006) (*LULAC*).

3. "Dilution of racial minority group voting strength" in violation of Section 2 "may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986).

4. Dilution of a minority community's voting strength violates Section 2 if, under the totality of the circumstances, the "political processes leading to nomination or election in the State . . . are not equally open to participation by members of [a racial minority group] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

5. "The essence of a Section 2 claim . . . is that certain electoral characteristics interact with social and historical conditions to create an inequality in the minority and majority voters' ability to elect their preferred representatives." *City of Carrollton Branch of the N.A.A.C.P. v. Stallings*, 829 F.2d 1547, 1554–55 (11th Cir. 1987) ("*Carrollton Branch*").

6. "[P]roof that a contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters[] is not required under Section 2 of the Voting Rights Act." *Carrollton Branch*, 829 F.2d at 1553.

7. Rather, the question posed by a Section 2 claim is "whether as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Gingles*, 478 U.S. at 44 (internal quotation marks and citation omitted); *see also Ga. State Conf. of N.A.A.C.P. v. Fayette Cty. Bd. of Comm'rs*, 775 F.3d 1336, 1342 (11th Cir. 2015) ("*Fayette Cty.*") ("A discriminatory *result* is all that is required; discriminatory intent is not necessary.").

8. While "federal courts are bound to respect the States' apportionment choices," they must intervene when "those choices contravene federal requirements," such as Section 2's prohibition of vote dilution. *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993).

II. *Gingles* Preconditions

9. A Section 2 plaintiff challenging a districting plan as dilutive must satisfy three criteria, first set forth by the Supreme Court in *Gingles*.

10. The three *Gingles* preconditions are: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group must be "politically cohesive"; and (3) the white majority must "vote[] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50.

11. "The 'geographically compact majority' and 'minority political cohesion' showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district. And the 'minority political cohesion' and 'majority bloc voting' showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population." *Growe v. Emison*, 507 U.S. 25, 40 (1993).

A. *Gingles* First Precondition

12. The first *Gingles* precondition requires the plaintiff to identify a minority group that "is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50.

13. "When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994).

1. Numerousness

14. "[T]he majority-minority rule [of the first *Gingles* precondition] relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2." *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009).

15. The burden of proof is "a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent." *Bartlett*, 556 U.S. at 19–20.

2. Geographic Compactness of the Minority Group

16. "The first *Gingles* condition refers to the compactness of the minority population, not the compactness of the contested district." *LULAC*, 548 U.S. at 433 (quoting *Bush v. Vera*, 517 U.S. 952, 997 (1996) (Kennedy, J., concurring)).

17. "The first *Gingles* precondition does not require some aesthetic ideal of compactness, but simply that the black population be sufficiently compact to

constitute a majority in a single-member district." *Houston v. Lafayette Cty., Miss.*, 56 F.3d 606, 611 (5th Cir. 1995) (quoting *Clark v. Calhoun Cty., Miss.*, 21 F.3d 92, 95 (5th Cir. 1994)).

18. Traditional districting principles include maintaining communities of interest and traditional boundaries, geographical compactness, contiguity, and protection of incumbents. *LULAC*, 548 U.S. at 433; *Larios v. Cox*, 300 F. Supp. 2d 1320, 1325 (N.D. Ga. 2004).

B. *Gingles* Second Precondition

19. The second *Gingles* precondition requires that "the minority group must be able to show that it is politically cohesive." *Gingles*, 478 U.S. at 51.

20. Plaintiffs can establish minority cohesiveness by showing that "a significant number of minority group members usually vote for the same candidates." *Solomon v. Liberty Cty., Fla.*, 899 F.2d 1012, 1019 (11th Cir. 1990) (Kravitch, J., concurring); *see also Gingles*, 478 U.S. at 56 ("A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and, consequently, establishes minority bloc voting within the context of § 2.") (internal citations omitted).

C. *Gingles* Third Precondition

21. The third *Gingles* precondition requires that "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51.

22. As to the third *Gingles* precondition, "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Gingles*, 478 U.S. at 56.

23. No specific threshold percentage is required to demonstrate bloc voting, as "[t]he amount of white bloc voting that can generally 'minimize or cancel' black voters' ability to elect representatives of their choice . . . will vary from district to district." *Gingles*, 478 U.S. at 56.

24. Courts rely on statistical analyses to estimate the proportion of each racial group that voted for each candidate. *See, e.g.*, *Gingles*, 478 U.S. at 52–54; *Nipper v. Smith*, 39 F.3d 1494, 1505 n.20 (11th Cir. 1994) (citing *Nipper v. Chiles*, 795 F. Supp. 1525, 1533 (M.D. Fla. 1992)).

25. Courts have recognized Ecological Inference as an appropriate analysis for determining whether a plaintiff has satisfied the second and third *Gingles* preconditions. *See, e.g.*, *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 691 (S.D. Tex. 2017); *Benavidez v. City of Irving, Tex.*, 638 F. Supp. 2d 709, 723–

24 (N.D. Tex. 2009); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1003 (D.S.D. 2004), *aff'd* 461 F.3d 1011 (8th Cir. 2006).

III. Totality of the Circumstances

26. Once a Plaintiff satisfies the three *Gingles* preconditions, the court considers whether the "totality of the circumstances results in an unequal opportunity for minority voters to participate in the political process and to elect representatives of their choosing as compared to other members of the electorate." *Fayette Cty.*, 775 F.3d at 1342.

27. The determination of whether vote dilution exists under the totality of the circumstances requires "a searching practical evaluation of the past and present reality," which is an analysis "peculiarly dependent upon the facts of each case and requires an intensely local appraisal of the design and impact of the contested" district map. *Gingles*, 478 U.S. at 79 (internal quotation marks and citations omitted).

28. To determine whether vote dilution is occurring, "a court must assess the impact of the contested structure or practice on minority electoral opportunities on the basis of objective factors. The Senate Report [from the 1982 Amendments to the VRA] specifies factors which typically may be relevant to a § 2 claim[.]" *Gingles*, 478 U.S. at 44.

29. The "Senate Factors" include: (1) "the history of voting-related discrimination in the State or political subdivision"; (2) "the extent to which voting in the elections of the State or political subdivision is racially polarized"; (3) "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting"; (4) "the exclusion of members of the minority group from candidate slating processes";[1] (5) "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process"; (6) "the use of overt or subtle racial appeals in political campaigns"; and (7) "the extent to which members of the minority group have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 44-45; *Solomon v. Liberty Cty. Comm'rs*, 221 F.3d 1218, 1225 (11th Cir. 2000). "The [Senate] Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's . . . use of the contested practice or structure

[1] This factor is included here for purposes of completeness, but it is not relevant in this case.

is tenuous may have probative value." *Gingles*, 478 U.S. at 45; *Solomon*, 221 F.3d at 1225.

30. The Senate Report's "list of typical factors is neither comprehensive nor exclusive." *Gingles*, 478 U.S. at 45.

31. "[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1566 n.33 (11th Cir. 1984) (quoting S. Rep. No. 97-417, at 29 (1982)).

32. "The authors of the Senate Report apparently contemplated that unresponsiveness would be relevant only if the plaintiff chose to make it so, and that although a showing of unresponsiveness might have some probative value a showing of responsiveness would have very little." *Marengo Cty.*, 731 F.2d at 1572.

33. "However, should plaintiff choose to offer evidence of unresponsiveness, then the defendant could offer rebuttal evidence of its responsiveness." *Marengo Cty. Comm'n*, 731 F.2d at 1524 n.48 (quoting 1982 Senate Report at 19 n.116).

34. An additional factor relevant to the equality-of-opportunity analysis is the extent to which there is proportionality or disproportionality between "the

number of majority-minority voting districts" and "minority members' share of the relevant population." *De Grandy*, 512 U.S. at 1014 n.11.

IV. Jurisdiction

A. Standing

35. In a suit with multiple plaintiffs, Article III's standing requirement is satisfied so long as one plaintiff has standing. *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981).

B. 28 U.S.C. § 2284

36. This Court has ruled that "[b]ecause Plaintiffs' complaint raises a challenge only under Section 2, which is not a constitutional challenge to an apportionment plan or an act of Congress requiring a three-judge panel [under 28 U.S.C. § 2284(a)], the court cannot send this case to a three-judge panel." *Chestnut v. Merrill*, 356 F. Supp. 3d 1351, 1357 (N.D. Ala. 2019).

C. Mootness

37. "[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 100*, 567 U.S. 298, 307 (2012) (internal quotation marks omitted).

38. "[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. … [A] previously justiciable

case is moot when the requested relief, if granted, would no longer have any practical effect on the rights or obligations of the litigants." *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, Ga.*, 868 F.3d 1248, 1264 (11th Cir. 2017) (internal citations, quotation marks and footnotes omitted).

39. The Section 5 retrogression standard and the need for a Section 5 "benchmark" are no longer applicable. *See Shelby County v. Holder*, 570 U.S. 270 (2013).

V. Legal Principles Related to Defendant's Defenses

A. Retrogression

40. In 2011, Alabama was covered under Section 5 of the Voting Rights Act, which forbade "voting changes with any discriminatory purpose as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, to elect their preferred candidates of choice." *Shelby County*, 570 U.S. at 539 (internal quote marks and citations omitted).

41. The principle of retrogression under Section 5 of the Voting Rights Act is defined as a "decrease [in] African American voters' opportunities to elect candidates of choice." *Georgia v. Ashcroft*, 204 F. Supp. 2d 4, 12 (D.D.C. 2002).

42. "[Section] 5 is satisfied if minority voters retain the ability to elect their preferred candidates." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273 (2015).

43. "Section 5 . . . does not require a covered jurisdiction to maintain a particular numerical minority percentage." *Ala. Legislative Black Caucus*, 135 S. Ct. at 1272.

44. "Nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral success; it merely mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." *Bush*, 517 U.S. at 982–83.

B. Race-Neutral Causes of Vote Dilution

None

C. Racial Gerrymandering

None

D. Functionality of Majority-Minority Districts

None

PLAINTIFFS' ADDITIONAL PRINCIPLES OF LAW

I. Framework of a Vote Dilution Claim Under Section 2 of the Voting Rights Act

None

II. *Gingles* Preconditions

A. *Gingles* First Precondition

1. Numerousness

1. When a voting rights "case involves an examination of only one minority group's effective exercise of the electoral franchise[,] . . . it is proper to look at *all* individuals who identify themselves as black" when determining a district's black voting-age population ("BVAP"). *Georgia v. Ashcroft*, 539 U.S. 461, 474 n.1 (2003); *Ga. State Conf. of the N.A.A.C.P. v. Fayette Cty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1343 n.8 (N.D. Ga. 2015) ("[T]he Court is not willing to exclude Black voters who also identify with another race when there is no evidence that these voters do not form part of the politically cohesive group of Black voters in Fayette County.").

2. Geographic Compactness of the Minority Group

2. "While no precise rule has emerged governing § 2 compactness," *LULAC*, 548 U.S. at 433, a plaintiff satisfies the first *Gingles* precondition when

her proposed majority-minority district is "consistent with traditional districting principles," *Davis v. Chiles*, 139 F.3d 1414, 1425 (11th Cir. 1998).

3. "[W]hile Plaintiffs' evidence regarding the geographical compactness of their proposed district does not alone establish compactness under § 2, that evidence, combined with their evidence that the district complies with other traditional redistricting principles, is directly relevant to determining whether the district is compact under § 2." *Ga. State Conf. of N.A.A.C.P. v. Fayette Cty. Bd. of Comm'rs*, 950 F. Supp. 2d 1294, 1307 (N.D. Ga. 2013) ("*NAACP v. Fayette Cty.*") (citations omitted), *aff'd in part, vacated in part, and rev'd in part on other grounds by Fayette Cty.*, 775 F.3d 1336.[2]

4. "[T]here is more than one way to draw a district so that it can reasonably be described as meaningfully adhering to traditional principles, even if not to the same extent or degree as some other hypothetical district." *Chen v. City of Houston*, 206 F.3d 502, 519 (5th Cir. 2000).

5. The remedial plan that the Court eventually implements if it finds Section 2 liability need not be one of the districts proposed by Plaintiffs. *See Clark*, 21 F.3d at 95–96 & n.2 ("[P]laintiffs' proposed district is not cast in stone. It [is]

---

[2] *See Fayette Cty.*, 775 F.3d at 1343–44 ("[W]e cannot say that the district court misconstrued our precedent or reached its conclusions based on a misunderstanding of the applicable law.").

simply presented to demonstrate that a majority-black district is feasible in [the jurisdiction]. . . . The district court, of course, retains supervision over the final configuration of the districting plan.").

B. *Gingles* Second Precondition

None

C. *Gingles* Third Precondition

None

III. Totality of the Circumstances

6. "[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of the circumstances." *Fayette Cty.*, 775 F.3d at 1342 (quoting *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir. 1993)).

7. In cases where Plaintiffs have satisfied the *Gingles* preconditions but the court determines the totality of the circumstances does not show vote dilution, "the district court must explain with particularity why it has concluded, under the particular facts of that case, than an electoral system that routinely results in white voters voting as a bloc to defeat the candidate of choice of a politically cohesive minority group is not violative of § 2 of the Voting Rights Act." *Jenkins*, 4 F.3d at 1135.

8. The most important Senate Factors are "the extent to which minority group members have been elected to public office in the jurisdiction and the extent to which voting in the elections of the state or political subdivision is racially polarized." *Gingles*, 478 U.S. at 48 n.15 (internal quotation marks and citations omitted). While the presence of other Senate factors might be "supportive of" a vote dilution challenge, they are "*not essential to*, a minority voter's claim" under Section 2. *Id*.

IV. Jurisdiction

A. Standing

9. A plaintiff has standing to bring a Section 2 challenge to a districting scheme so long as she "reside[s] in a reasonably compact area that could support" more majority-minority districts than currently exist. *Pope v. Cty. of Albany*, No. 1:11-cv-736 (LEK/CFH), 2014 WL 316703, at *5 (N.D.N.Y. Jan. 28, 2014).

B. 28 U.S.C. § 2284

10. A three-judge panel under 28 U.S.C. § 2284(a) is "not required for a claim raising only statutory challenges to" a districting map. *Thomas v. Bryant*, 919 F.3d 298, 308 (5th Cir. 2019); *Johnson v. Ardoin*, Civ. A. 18-625-SDD-EWD, 2019 WL 2329319, at *3 (M.D. La. May 31, 2019) ("[T]he three-judge statute applies only when the constitutionality of apportionment is being challenged. Such

a challenge is not made in this case," which challenged Louisiana's congressional district map under Section 2.).

C. Mootness

None

V. Legal Principles Related to Defendant's Defenses

A. Retrogression

None

B. Race-Neutral Causes of Vote Dilution

11. "It is the *difference* between the choices made by blacks and whites—not the reasons for that difference—that results in blacks having less opportunity than whites to elect their preferred representatives. Consequently, . . . under the 'results test' of § 2, only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters." *Gingles*, 478 U.S. at 63 (plurality opinion).

12. "[T]he legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent." *Carrollton Branch*, 829 F.2d at 1557–58 (quoting *Gingles*, 478 U.S. at 74 (plurality opinion)).

13. To the extent Defendant argues that race is not a factor in Alabama's elections—and if that argument is deemed relevant to Plaintiffs' claim—Defendant has "the obligation to introduce evidence" and "affirmatively prove, under the totality of the circumstances, that racial bias does not play a major role in the political community." *Nipper*, 39 F.3d at 1524–26 & nn.60, 64. Section 2 plaintiffs are under "no obligation" to "search . . . out" such evidence "and disprove [non-racial explanations] preemptively." *Id.* at 1525 n.64.

14. "It is important to note that, by demonstrating the absence of racial bias, a defendant is not rebutting the plaintiff's evidence of racial bloc voting." *Nipper*, 39 F.3d at 1524 n.60.

15. Plaintiffs are not required "to prove racism determines the voting choices of the white electorate in order to succeed in a voting rights case." *Askew v. City of Rome*, 127 F.3d 1355, 1382 (11th Cir. 1997); *NAACP v. Fayette Cty.*, 950 F. Supp. 2d at 1322 n.29 (explaining that plaintiffs "are not required to prove[] racial animus" within the electorate).

16. When "Plaintiffs have proved the *Gingles* factors, it is up to the . . . Defendant[] to rebut Plaintiffs' proof of vote dilution." *NAACP v. Fayette Cty.*, 950 F. Supp. 2d at 1321.

17. "Proof of the second and third *Gingles* factors—demonstrating racially polarized bloc voting that enables the white majority usually to defeat the

minority's preferred candidate—is circumstantial evidence of racial bias operating through the electoral system to deny minority voters equal access to the political process. Accordingly, the existence of those factors, and a feasible remedy, generally will be sufficient to warrant relief." *Nipper*, 39 F.3d at 1524; *see also id.* at 1525 ("[P]roof of the second and third *Gingles* factors will ordinarily create a sufficient inference that racial bias is at work.").

18. "The surest indication of race-conscious politics is a pattern of racially polarized voting." *Marengo Cty. Comm'n*, 731 F.2d at 1567.

C. Racial Gerrymandering

19. "The question under the first prong of *Gingles* in a § 2 case of whether the district was created 'consistent with traditional districting principles' is distinct from" the question posed in racial gerrymandering cases "of whether in drawing district lines traditional districting principles were 'subordinated to racial objectives.'" *NAACP v. Fayette Cty.*, 950 F. Supp. 2d at 1307 (quoting *Davis*, 139 F.3d at 1425). "Based on the directives of the Supreme Court and the Eleventh Circuit," a district court adjudicating a Section 2 claim "considers only the first question." *Id.*

20. Racial gerrymandering cases and Section 2 cases "address very different contexts." *Davis*, 139 F.3d at 1425.

21. "Further, the Supreme Court and the Eleventh Circuit's 'precedents *require* plaintiffs to show that it would be possible to design an electoral district, consistent with traditional districting principles, in which minority voters could successfully elect a minority candidate.' Accordingly, '[t]o penalize [the plaintiff] . . . for attempting to make the very showing that *Gingles* . . . demand[s] would be to make it impossible, as a matter of law, for any plaintiff to bring a successful Section Two action." *NAACP v. Fayette Cty.*, 950 F. Supp. 2d at 1306 (quoting *Davis*, 139 F.3d at 1425).

22. Accordingly, courts adjudicating Section 2 claims should "not determine as part of the first *Gingles* inquiry whether Plaintiffs' Illustrative Plan[s] subordinate[] traditional redistricting principles to race." *NAACP v. Fayette Cty.*, 950 F. Supp. 2d at 1306; *see also Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1400–01 (E.D. Wash. 2014).

23. Even "assuming for the sake of argument that [a] proposed redistricting plan must survive strict scrutiny under an equal protection analysis because it favors race over all other traditional districting criteria, that does not preclude a finding of liability for a § 2 violation[,]" because "'it is possible that a district created to comply with § 2 that uses race as the predominant factor in drawing district lines may survive strict scrutiny.'" *Montes*, 40 F. Supp. 3d at 1400–01 (quoting *NAACP v. Fayette Cty.*, 950 F. Supp. 2d at 1305); *see also*

Davis, 139 F.3d at 1425 n.23 ("[A]lthough *Gingles* . . . would not support the judicial imposition of an electoral district drawn solely (or predominantly) to reflect racial considerations absent a compelling interest, a majority of the Supreme Court has assumed that the need to remedy a Section Two violation itself constitutes a compelling state interest.").

24. To the extent Defendant contends that a remedial plan adopted to remedy the Section 2 violation is a racial gerrymander, that argument is not ripe for review. *Clark*, 88 F.3d at 1407.

25. Once a Section 2 violation has been found and the Court orders adoption and implementation of a remedy plan, the new majority-minority district is permissible so long as it does not "override all other traditional districting principles any more than reasonably necessary to remedy the violation." *Sanchez v. Colorado*, 97 F.3d 1303, 1327 (10th Cir. 1996); *see also Clark*, 88 F.3d at 1408.

D. Functionality of Majority-Minority Districts

26. The issue of whether a proposed majority-minority district will result in actual election of a candidate preferred by the minority group is relevant only at the remedial stage of a Section 2 case. *Bone Shirt*, 461 F.3d at 1019.

27. If the issue of whether a proposed majority-minority district will result in actual election of a candidate preferred by the minority group is at all relevant at the liability phase, it is an affirmative defense that must be proven by Defendant.

Bartlett, 556 U.S. at 19–20 (explaining that a Section 2 plaintiff need only show "that the minority population in the potential election district is greater than 50 percent").

DEFENDANT'S ADDITIONAL PRINCIPLES OF LAW

1. While the *Gingles* Court held that satisfying the three prerequisites are "generally necessary to prove a § 2 claim, it just as clearly declined to hold them sufficient in combination, either in the sense that a court's examination of relevant circumstances was complete once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution." *Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994).

2. "As part of any prima facie case under Section Two, a plaintiff must demonstrate the existence of a proper remedy." *Davis v. Chiles*, 139 F.3d 1414, 1419 (11th Cir. 1998).

3. "[I]nquiries into remedy and liability ... cannot be separated: A district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system." *Davis*, 139 F.3d at 1425, quoting *Nipper*, 39 F.3d at 1530-31 (plurality opinion).

4. When a Section 5 voting rights "case involves an examination of only one minority group's effective exercise of the electoral franchise[,] . . . it is proper to look at *all* individuals who identify themselves as black" when determining a district's black voting-age population ("BVAP"). *Georgia v. Ashcroft*, 539 U.S. 461, 474 n.1 (2003).

5. "[Section] 2 does not require a State to create, on predominantly racial lines, a district that is not 'reasonably compact.' And the § 2 compactness inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries." *Abrams v. Johnson*, 521 U.S. 74, 91-92 (1997).

6. A district that "reaches out to grab small and apparently isolated minority communities" is not reasonably compact. *Abrams*, 521 U.S. at 979, quoted in *Perry*, 548 U.S. at 433.

7. "Legitimate yet differing communities of interest should not be disregarded in the interest of race." *Perry*, 548 U.S. at 434.

8. "The recognition of nonracial communities of interest reflects the principle that a State may not assum[e] from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls. In the absence of this prohibited assumption, there is no basis to believe a district that combines two farflung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first Gingles condition contemplates." *Perry*, 548 U.S. at 433 (internal quotation marks and citations omitted).

9. "[T]o be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of a classification,

decision, or practice that depends on race or color, not on account of some other racially neutral cause." *Solomon v. Liberty Cty. Comm'rs*, 221 F.3d 1218, 1225 (quoting *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir.1994) (en banc) (Tjoflat, C.J., plurality opinion)).

10. The Supreme Court has assumed, but has never decided, that "the need to remedy a Section Two violation itself constitutes a compelling state interest.". *Davis*, 139 F.3d at 1425 n.23.

11. It is not necessary to show that a district conflicts with traditional districting criteria to prove that race predominated when drawing the district. *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S.Ct. 788, 798 (2017).

12. "[O]ur precedents *require* plaintiffs to show that it would be possible to design an electoral district, consistent with traditional districting principles, in which minority voters could successfully elect a minority candidate." *Davis*, 139

13. "Drawing lines for congressional districts is … primarily the duty and responsibility of the State." *Shelby County*, 570 U.S. at 543 (internal quotes and citation omitted).

14. "Race may predominate even when a reapportionment plan respects traditional principles … if race was the criterion that … could not be compromised, and race-neutral considerations came into play only after the race-based decision

had been made." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S.Ct. 788, 798 (U.S. 2017) (internal quotes and citation omitted).

15. "[C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 [of the Voting Rights Act] seem to be what save it under § 5." *Georgia v. Ashcroft*, 539 U.S. 461, 491 (Kennedy, J. concurring) as quoted in *Shelby Co.*, 570 U.S. at 550.

16. "[A] conflict or inconsistency between … [a] plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering." *Bethune-Hill*, 137 S.Ct. at 799.

17. "While no precise rule has emerged governing § 2 compactness, the 'inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries.'" *LULAC v. Perry*, 548 U.S. 399, 433 (2006), citing *Abrams v. Johnson*, 521 U.S. 74, 92 (1997).

Dated: October 21, 2019

Respectfully Submitted,

By */s/ James W. Davis*
James W. Davis (ASB-4063-I58J)
Deputy Attorney General
Winfield J. Sinclair (ASB-1750-S81W)
Misty S. Fairbanks Messick (ASB-1813-T71F)
Laura E. Howell (ASB-0551-A41H)
Brad A. Chynoweth (ASB-0030-S63K)
Assistant Attorneys General

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
Telephone: (334) 242-7300
Fax: (334) 353-8440
jimdavis@ago.state.al.us
wsinclair@ago.state.al.us
mmessick@ago.state.al.us
lhowell@ago.state.al.us
bchynoweth@ago.state.al.us

Dorman Walker (ASB-9154-R81J)
BALCH & BINGHAM LLP
Post Office Box 78
Montgomery, AL 36101-0078
Telephone: (334) 834-6500
Facsimile: (334) 269-3115
dwalker@balch.com

Counsel for the Defendant

Respectfully submitted,

By */s/ Bruce V. Spiva*
Marc Erik Elias (*admitted pro hac vice*)
Bruce V. Spiva (*admitted pro hac vice*)
Uzoma N. Nkwonta (*admitted pro hac vice*)
Aria C. Branch (*admitted pro hac vice*)
Lalitha D. Madduri (*admitted pro hac vice*)
Daniel C. Osher (*admitted pro hac vice*)
Perkins Coie, LLP
700 13th St. N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 654-6338
Fax: (202) 654-9106
Email: MElias@perkinscoie.com
Email: BSpiva@perkinscoie.com
Email: UNkwonta@perkinscoie.com
Email: ABranch@perkinscoie.com
Email: LMadduri@perkinscoie.com
Email: DOsher@perkinscoie.com

Abha Khanna (*admitted pro hac vice*)
Perkins Coie, LLP
1201 Third Avenue, Ste. 4900
Seattle, WA 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000
Email: AKhanna@perkinscoie.com

By: *Richard P. Rouco* (AL Bar. No. 6182-R76R)
Quinn, Connor, Weaver, Davies & Rouco LLP
Two North Twentieth
2-20th Street North, Suite 930
Birmingham, AL 35203
Phone: (205) 870-9989
Fax: (205) 803-4143

Email: rrouco@qcwdr.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2019, I filed a copy of the foregoing Parties' Proposed Principles of Law with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Bruce V. Spiva
Bruce V. Spiva
Perkins Coie LLP
700 13th St. N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 654-6338
Fax: (202) 654-9106
Email: BSpiva@perkinscoie.com