No. 21A375

In The

Supreme Court of the United States

JOHN H. MERRILL,
IN HIS OFFICIAL CAPACITY AS THE ALABAMA SECRETARY OF STATE, ET AL.

Applicants,

v.

EVAN MILLIGAN, ET AL.

Respondents.

On Application for a Stay of the Preliminary Injunction Issued by the United States District Court for the Northern District of Alabama

To the Honorable Clarence Thomas
Associate Justice of the United States and
Circuit Justice for the Eleventh Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE NATIONAL REPUBLICAN REDISTRICTING TRUST IN SUPPORT OF APPLICANTS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The National Republican Redistricting Trust respectfully moves under Supreme Court Rule 37.2(b) for leave to file a brief as Amicus Curiae in support of Applicant Secretary of State John H. Merrill.

IDENTITY AND INTERESTS OF MOVANT[1]

The National Republican Redistricting Trust, or NRRT, is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on a fifty-state congressional and state legislative redistricting effort that is currently underway.

NRRT's mission is threefold. First, it aims to ensure that redistricting faithfully follows all federal constitutional and statutory mandates. Under Article I, Section 4 of the Constitution, it is the States, subject to congressional supervision, that are entrusted with the responsibility of redrawing the States' congressional districts. Every citizen should have an equal voice, and the Voting Rights Act and other federal laws must be followed in a way that protects the constitutional rights of individuals, not political parties or other groups.

Second, NRRT believes redistricting should be clean, a requirement best fulfilled by the traditional redistricting criteria States have applied for centuries.

[1] Consistent with Federal Rule of Appellate Procedure 29(a)(4)(E) and this Court's Rule 37.6, counsel for Movant and Amicus Curiae authored these motions and brief in whole, and no counsel for a party authored the motions and brief in whole or in part, nor did any person or entity, other than the Movant/Amicus and its counsel, make a monetary contribution to preparation or submission of the motions and brief. Counsel for Applicants and Respondents have consented to the filing of this brief.

This means districts should be sufficiently compact and preserve communities of interest by respecting municipal and county boundaries, avoiding the forced combination of disparate populations to the extent possible. Such clean districts are consistent with the principle that legislators represent individuals living within identifiable communities.

Legislators represent communities, not political parties, and we do not have a system of proportional representation. Article I, Section 4 of the Constitution tells courts that any change in our community-based system of districts is exclusively a matter for deliberation and decision by our political branches, the state legislatures, and Congress.

Third, NRRT believes redistricting should make sense to voters. All Americans should be able to look at their district and understand why it was drawn the way it was.

REASONS TO GRANT LEAVE TO FILE *AMICUS CURIAE BRIEF*

This case presents issues of critical constitutional importance to proposed Amicus. Amicus believes that the three-judge panel's order gravely misapplies the Voting Rights Act, the Equal Protection Clause, and this Court's jurisprudence interpreting both. In the absence of an emergency stay from this Court, the State of Alabama will be forced to adopt congressional voting maps drawn in a way that offends the Equal Protection Clause and distorts beyond recognition the Voting Rights Act.

Amicus represents the view that, under Article I, Section 4 of the Constitution, it is the States, subject to congressional supervision, that are entrusted with the responsibility of redrawing the States' congressional districts. The unwarranted intrusion of the lower court into this process threatens to topple this constitutionally imposed order of responsibility. Because Amicus can provide a unique vantage point into the redistricting process underway throughout the Nation, its submission will materially help the Court as it decides how to resolve this application for an emergency stay.

For the foregoing reasons, the motion should be granted.

January 31, 2022

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* THE NATIONAL REPUBLICAN REDISTRICTING TRUST IN SUPPORT OF APPLICANTS

INTEREST OF *AMICUS CURIAE*[1]

The National Republican Redistricting Trust, or NRRT, is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on a fifty-state congressional and state legislative redistricting effort that is currently underway.

NRRT's mission is threefold. First, it aims to ensure that redistricting faithfully follows all federal constitutional and statutory mandates. Under Article I, Section 4 of the Constitution, it is the States, subject to congressional supervision, that are entrusted with the responsibility of redrawing the States' congressional districts. Every citizen should have an equal voice, and the Voting Rights Act and other federal laws must be followed in a way that protects the constitutional rights of individuals, not political parties or other groups.

Second, NRRT believes redistricting should follow the traditional redistricting criteria that States have applied for centuries. This means districts should avoid the forced combination of disparate populations to the extent possible. Legislators represent communities, not political parties, and we do not have a system of proportional representation.

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[1] Consistent with Federal Rule of Appellate Procedure 29(a)(4)(E) and this Court's Rule 37.6, counsel for Movant/Amicus Curiae authored these motions and brief in whole, and no counsel for a party authored the motions and brief in whole or in part, nor did any person or entity, other than the Movant/Amicus and its counsel, make a monetary contribution to preparation or submission of the motions and brief. Counsel for Applicants and Respondents have consented to the filing of this brief.

Third, NRRT believes redistricting should make sense to voters. All Americans should be able to look at their district and understand why it was drawn the way it was.

INTRODUCTION & SUMMARY OF THE ARGUMENT

Since President Johnson signed into law the Voting Rights Act, this Court has been called on, time and again, to sort out the often-tense interplay between that watershed statute and the Fourteenth Amendment's Equal Protection guarantee. Despite the Court's commendable efforts and its rich jurisprudence, work remains to be done. Because the Voting Rights Act requires cognizance of race in redistricting while the Equal Protection Clause renders constitutionally suspect any instance in which race predominates in redistricting, difficult cases will inevitably arise.

This is not one of those tough cases. By forcing the State of Alabama to subordinate *every* traditional redistricting criterion below the goal of creating a second majority-minority congressional district in that State, the three-judge panel has transgressed both the plain letter and the clear spirit of several cases decided by this Court. Section 2 of the Voting Rights Act does not require the outcome below; rather, the Equal Protection Clause forbids it. The case currently under review cannot stand, and the Court should stay it on its way to reaching this conclusion.

That the three-judge panel erred in this fashion, however, was not due to happenstance. The navigational route between the Voting Rights Act and the Equal Protection Clause is often murky, and this shroud provides an opportunity for exploitation by those who never miss a chance to seize political advantage. This opportunity has, in turn, resulted in lawyers from the same Democratic Party-aligned law firm arguing simultaneously that the Voting Rights Act (1) *requires* additional majority-minority districts in, *e.g.*, Alabama, Georgia, and Louisiana, even though doing so means ignoring all other traditional redistricting criteria, yet (2) *does not* require *any* majority-minority congressional districts in, *e.g.*, Michigan, and far fewer than historically present in, *e.g.*, Virginia.

The antidote to the partisan gamesmanship infecting the current redistricting cycle can only come in the form of elucidation from this Court. For that reason, NRRT respectfully urges the Court to grant Applicants' emergency request to stay the constitutionally infirm preliminary injunction. Doing so, and then eventually resolving this case in favor of the Applicants, will ensure that Alabama is not forced to adopt congressional districts anathema to the Equal Protection Clause and will also provide guidance to federal courts and States alike as all work to ensure that the post-2020 decennial-census redistricting process runs as smoothly as the current political climate will allow it to.

ARGUMENT

I. THE STATES URGENTLY NEED THIS COURT'S CLARIFICATION REGARDING RACE-BASED CLAIMS UNDER SECTION 2 OF THE VOTING RIGHTS ACT.

For decades, this Court has not wavered from the principle that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body." *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975); *see also Growe* v. *Emison,* 507 U.S. 25, 34 (1993) (Article I, Section 2 "leaves with the States primary responsibility for apportionment of their federal congressional . . . districts"); *Smiley* v. *Holm*, 285 U.S. 355, 366–67 (1932) (noting that reapportionment implicates State's powers under Article I, § 4). "That the federal courts sometimes are required to order legislative redistricting . . . does not shift the primary locus of responsibility." *League of United Latin Am. Citizens* v. *Perry ("LULAC")*, 548 U.S. 399, 415 (2006). Indeed, "the obligation placed upon the Federal Judiciary is" particularly "unwelcome because drawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance." *Id*. at 416.

Although the Article III branch remains subordinate when States draw their voting-district boundaries, States nonetheless need to know the metes and bounds of the few critical federal parameters that guide the redistricting process. One is the Fourteenth Amendment's Equal Protection Clause, which, according to the Court, means that "[a] State may not use race as the predominant factor in drawing district lines unless it has a compelling reason." *Cooper* v. *Harris*, 137 S. Ct. 1455, 1463 (2017). Another is the Voting Rights Act, 52 U.S.C. §§ 10101 *et seq*., which, per

Section 2, forbids States from instituting any "voting qualification or prerequisite" that would "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," *id.* § 10301(a).

The calibration between the Equal Protection Clause and Section 2 of the Voting Rights Act remains a thicket. On the surface, the former renders constitutionally suspect (and subject to strict scrutiny) any redistricting plan that makes race a consideration when drawing district boundaries. The latter, however, presupposes that voting-district map drawers *must*, at a minimum, remain cognizant of race through Section 2's application while creating those same voting districts.

In 2006, the Court provided a touch of elucidation by warning lower courts that "there is no [Section] 2 right to a district that is not reasonably compact." *LULAC*, 548 U.S. at 430 (citing *Abrams* v. *Johnson*, 521 U.S. 74, 91–92 (1997)). At issue in *LULAC* was a Texas non-compact congressional district that connected portions of Austin with the Rio Grande Valley—and thus stretched roughly three-hundred miles—to merge two distinct Latino communities. *Id.* at 429–30. In rejecting these boundaries, the Court spurned any suggestion that a district can "satisfy [Section] 2 no matter how noncompact it [is], so long as all the members of a racial group, added together, could control election outcomes." *Id.* at 432.

LULAC built on this Court's 1995 *Miller* v. *Johnson* decision. 515 U.S. 900 (1995).[2] *Miller*, at the outset, reiterated that "'redistricting legislation that is so bizarre on its face that it is unexplainable on grounds other than race, . . . demands the same close scrutiny that we give other state laws that classify citizens by race.'" *Id.* at 905 (quoting *Shaw* v. *Reno*, 509 U.S. 630, 644 (1993) (quoting, in turn, *Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977))). It then addressed a Georgia congressional district "connecting the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County," even though the two communities were "260 miles apart in distance and worlds apart in culture." *Id.* at 908. This district, drawn to achieve preclearance under Section 5 of the Voting Rights Act, nonetheless told "a tale of disparity, not community" from a "social, political and economic" perspective. *Id.*

Relying on the principle that, "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class," *id.* at 911 (quoting *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 602 (O'Connor, J., dissenting)), the Court held that a race-based gerrymandering claim arises whenever "the legislature subordinate[s] traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect

[2] The lower court opinion in *Miller* v. *Johnson* squarely rejected the notion that the Voting Rights Act requires proportional representation by race. 864 F. Supp. 1354, 1379 (S.D. Ga. 1994) (three-judge court) (citing *Shaw* v. *Reno*, 509 U.S. 630, 652 (1993); *Johnson* v. *De Grandy*, 512 U.S. 997 (1994)). That portion of the lower court opinion was not overturned by this Court on appeal in *Miller*, 515 U.S. 900 (1995).

for political subdivisions or communities defined by actual shared interests, to racial considerations," *id.* at 916. Applying this standard to the Georgia congressional map at issue, it first agreed with the lower court that the Georgia legislature (prompted by the U.S. Department of Justice) "was motivated by a predominant, overriding desire to assign black populations to" a voting district so that the State would have three, instead of two, "majority-black district[s]." *Id.* at 917. For this reason, it then held that "Georgia's congressional redistricting plan cannot be upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." *Id.* at 920. And because "[t]he congressional plan challenged [t]here was not required by the Voting Rights Act under a correct reading of the statute," *id.* at 921, the Court agreed that the Georgia map violated the Equal Protection Clause, *id.* at 928.

Critical to the Court's *Miller* decision was its conclusion that, although the Voting Rights Act (in that case, Section 5) prohibits retrogression, it does not give States license to dispense with "adher[ence] to other districting principles" to "creat[e] as many majority-minority districts as possible." *Id.* at 924. According to the *Miller* Court, "utilizing [Section] 5 to require States to create majority-minority districts wherever possible" would augment federal authority "beyond what Congress intended" and what this Court has "upheld." *Id.* at 925. The Court declined the invitation to construe the Voting Rights Act in that fashion; in so declining, it sought to, among other things, "avoid the constitutional problems" that interpreting the Act that way would trigger. *Id.* at 927.

The three-judge decision at issue here cannot be squared with *LULAC* or *Miller*. The three-judge court below decided that Section 2 requires the creation of a second Alabama majority-minority district. *See Caster* v. *Merrill*, No. 2:21-cv-1536-AMM, ECF No. 101, at 5 (N.D. Ala. Jan. 24, 2022) (three-judge court). In so doing, it not only crammed the consideration of race back into the Alabama district-drawing calculus (which, if the Alabama legislature had done in the first instance, would have rendered its work constitutionally suspect); it also necessarily ratcheted the consideration of race to the pole position. And because Alabama demographic patterns make it virtually impossible to create two majority-minority, yet compact, congressional voting districts, the three-judge panel simply dispensed with the compactness requirement—in direct contravention of this Court's admonition that "there is no [Section] 2 right to a district that is not reasonably compact." *LULAC*, 548 U.S. at 430 (citing *Abrams*, 521 U.S. at 91–92), and this Court's earlier reproach that "[i]t takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids," *Miller*, 515 U.S. at 927–28.

The decision by the lower court seems to rely heavily on a misunderstanding of this Court's discussion of proportionality in *Miller* and the three-judge district court's opinion that led to it. The three-judge panel in this case said, for example:

> [D]espite Black Alabamians constituting nearly 27% of the population, they only have meaningful influence in 14% of congressional seats. . . . And as the *Caster* plaintiffs correctly add, white Alabamians are over-represented because 86% of congressional districts are

> majority-white, but white Alabamians comprise over 63% of the population; they also point out that even if Alabama were to draw a second majority-Black congressional district, this circumstance would persist, because 71.5% of congressional districts would be majority white.

Caster, No. 2:21-cv-1536-AMM, ECF No. 101, at 194 (internal citations and quotations omitted). This simply cannot be squared with the Court's admonition in *Miller*:

> Only if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race. As a Nation we share both the obligation and the aspiration of working toward this end. The end is neither assured nor well served, however, by carving electorates into racial blocs . . . . It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.

Miller, 515 U.S. at 927–28.

The three-judge court indisputably erred; that much is certain from even a cursory read of *LULAC* and *Miller*. Its blunder, however, accentuates the more fundamental issue. There is very real, and very knotty, tension between the text of the Equal Protection Clause, the text of the Voting Rights Act, and this Court's jurisprudence regarding each.[3] The three-judge court's bungle provides an avenue

[3] *See Miller*, 515 U.S. at 915–16 ("The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. . . . The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments,

for this Court to cut away some of the weeds that are causing Article III tribunals across the Country to arrive at the sort of distorted conclusions that the Applicants here are pleading for the Court to correct.

II. WITHOUT CLARIFICATION, PARTISAN MANIPULATION OF THE VOTING RIGHTS ACT WILL CONTINUE TO ESCALATE.

Jurisprudential fog not only escalates the risk of judicial mistakes. It also creates opportunities for exploitation, and this concern is neither abstract nor conjectural. Indeed, elements of the Democratic Party have snatched the opening created by this judicial haze to argue that Section 2 of the Voting Rights Act *requires* majority-minority districts (*e.g.*, in this case, as well as in Louisiana and Georgia), while simultaneously arguing that the Equal Protection Clause *does not* require, and States should therefore not prioritize creation of, majority-minority districts (*e.g.*, in Virginia and Michigan). Although each interpretation might be plausible, both cannot universally be true. That lawyers primarily aligned with one political party would advance, simultaneously, two entirely irreconcilable legal positions in different areas of the Country has one, and only one, explanation: The lack of clarity in the Section 2 arena has created an opening that these lawyers affiliated with the Democratic Party have exploited, and continues to exploit, in pursuit of their partisan goals.

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requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race.").

A. Lawyers aligned with the Democratic Party have a sophisticated legal strategy to "undo" majority-minority districts in select areas.

The saga of race-based redistricting litigation in Virginia is nearing its tenth year. In *Page* v. *Virginia State Board of Elections*, a three-judge panel of the Eastern District of Virginia struck down a majority-minority congressional district (initially created in 1991) after concluding that the district was drawn with race as the "predominant consideration." 58 F. Supp. 3d 533, 540 (E.D. Va. 2014) (three-judge court). A three-judge Eastern District of Virginia court recently ruled similarly in a challenge to the Commonwealth's legislative maps; specifically, in *Bethune-Hill* v. *Virginia State Board of Elections*, the lower court found that "race predominated over traditional districting factors" in eleven Commonwealth house districts, and, accordingly, struck them as violative of the Equal Protection Clause. 326 F. Supp. 3d 128, 137 (E.D. Va. 2018) (three-judge court).

In both cases, litigants affiliated with the Democratic Party argued that race must not predominate (notwithstanding Section 2 of the Voting Rights Act). As a result, the federal court ordered remedial districts that reduced the Black voting-age population below the majority-minority threshold in one district and dropped the black voting-age population from 56 to 53 percent in another. "Social scientists" had assured the court that these changes would nonetheless result in the election of Black members to the Virginia House of Delegates. Non-minorities, however, currently represent both seats. *Bethune-Hill* v. *Va. State Bd. of Elections*, 368 F. Supp. 3d 872, 882–83 (E.D. Va. 2019) (three-judge court).

At the aggregate level, majority Black districts in the Virginia House were reduced from twelve in 2011[4] to eight, following the Court's imposition of a map in *Bethune-Hill*. *Id*. at 882–83, 885, 887–88. Virginia's Senate has historically had five black majority seats, and these had not been challenged in court. After the 2020 Census, the maps imposed by Virginia's Supreme Court reduced the majority-Black Senate seats to two (out of forty) and reduced the majority-Black House seats to five (out of one hundred). The impact on Black representation in the Virginia legislature has already come to fruition. *See* Memorandum from Bernard Grofman, Ph.D. and Sean Trende, to the Chief Justices and Justices of the Supreme Court of Virginia re: Redistricting Maps, (Dec. 27, 2021), https://www.vacourts.gov/courts/scv/districting/2021_virginia_redistricting_memo.pdf. The federal court's redrawn districts have resulted in two fewer Black Delegates after the 2021 election cycle,[5]

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[4] *See* Ned Oliver, *Virginia's Legislative Black Caucus Swells to 23. "We Unleashed Some of Those Black Votes.",* Va. Mercury (Nov. 6, 2019), https://www.virginiamercury.com/blog-va/virginias-legislative-black-caucus-swells-to-23-we-unleashed-some-of-those-black-votes/ (last visited Jan. 31, 2022).

[5] In *Bethune-Hill*, an Eastern District of Virginia three-judge panel reduced the Black voting-age population in two House of Delegates districts—District 63 and District 75—after two political scientists (including one who even served as the court's special master) calculated that the districts with reduced Black voting-age populations would still allow Black voters to continue to elect their preferred candidates. 368 F. Supp. 3d at 882–83. In the following House of Delegates election, which was held under the new court-drawn plan, the incumbent black Delegates in District 63 and District 75 were defeated by white candidates. *See* Va. Dep't of Elections, Virginia 2021 Election Results, https://results.elections.virginia.gov/vaelections/2021%20November%20General/Site/GeneralAssembly.html (last visited Jan. 27, 2022). Once again, as this Court noted in *Rucho v. Common Cause*, "[e]xperience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time." 139 S. Ct. 2484, 2503 (2019).

and the new post-2020 map pairs two incumbent Black senators in the same district (both of whom are up for reelection in 2023).

Despite widespread objection by Virginia's Black community,[6] litigants affiliated with the Democratic Party writ large apparently have no similar concerns about this purge. In a letter submitted to the Virginia Supreme Court during pendency of the Commonwealth's redistricting process, a lead Democratic Party law firm maintained that Section 2 of the Voting Rights Act does not require majority-minority districts at all. Indeed, they (on behalf of some of the *Page* plaintiffs) described as "packed" two "minority opportunity" congressional districts that had a black voting-age population of 44.5 and 45.3 percent, respectively. They then argued that the court should further reduce them.

The Democratic Party's newfound emphasis on "minority-opportunity," as opposed to majority-minority, districts in Virginia represents a shift in emphasis. Roughly five years ago, the National Democratic Redistricting Trust and a lead Democratic Party lawyer issued a joint press release after this Court's *Bethune-Hill* decision. In it, they praised the Court's decision as one that would help rectify a problem of "minority voter underrepresentat[ion] in government":

[6] *See, e.g.*, Letter to Virginia Supreme Court from the Hampton Roads Black Caucus, https://www.vacourts.gov/courts/scv/districting/public_comments.pdf (page 1396 of the PDF) (last visited Jan. 31, 2022).

← PRESS RELEASES

Holder, Elias Statement on Supreme Court's Virginia Redistricting Ruling

March 2, 2017

The National Democratic Redistricting Committee released the following statements in response to the Supreme Court's ruling in *Bethune-Hill v. Virginia State Board of Elections*:

"This is a major victory in the fight to overturn gerrymandering in Virginia and around the country. Racial gerrymandering in Virginia has left minority voters underrepresented in government. This ruling opens the door for the National Democratic Redistricting Committee to take proactive legal action against the gerrymandering that has rigged the American political system." – NDRC Chairman Eric Holder

"The ruling in Bethune Hill overturns a lower court decision and sends a clear warning ahead of the 2020 Census to Republicans who engage in illegal racial gerrymandering. This significant step forward will lead to more racial gerrymandering litigation in other states. Bethune Hill sets important legal precedent and will lead to fairer maps for the voters of Virginia." – NDRC General Counsel and Senior Advisor Marc Elias

Holder, the former U.S. Attorney General, made voting rights a hallmark of his tenure as Attorney General. Elias, chair of Perkins Coie's Political Law Practice, argued the case before the Supreme Court on December 5.

Rather than increasing minority representation (as the authors of the press release claimed it would), this legal strategy has already reduced the number of Black legislators in the Virginia House of Delegates. The Republican Party now controls the Virginia House of Delegates by two seats—the seats that the Democratic Party's counsel convinced a federal court to redraw in 2019.

B. These same Democrat-affiliated Lawyers support the elimination of majority-minority districts in Michigan.

Democrats in Michigan have fallen into lockstep with their Virginia brethren. After the Michigan Independent Citizens Redistricting Commission proposed a slate of maps for comment, some of which wiped out *every* majority-Black congressional district, the Michigan Department of Civil Rights issued a resolution urging the Commission to "use statistical data . . . to determine whether" the proposed maps "comply with" this Court's decision in *Thornburg*.[7] A few weeks later, the

[7] *See* Resolution In Support of Fair Maps And In Opposition to Minority Vote Dilution, Mich. Dep't of Civil Rights (Nov. 22, 2021), https://www.michigan.gov/mdcr/commission/documents/resolutions-statements (last visited Jan. 31, 2022).

Department of Civil Rights escalated their alarm by issuing a memorandum warning that the Commissions' maps, if imposed, "may lead to forbidden retrogression in minority voting strength."[8]

National Democrats, in contrast, seem entirely at ease with the erasure of all majority-Black congressional voting districts in Michigan:

[8] *See* Memorandum from John E. Johnson, Jr., to Mich. Independent Citizens Redistricting Comm'n, (Dec. 9, 2021), https://redistrictingonline.org/wp-content/uploads/2021/03/MDCRAnalysisofMICRCProposedMaps-dec092021.pdf (last visited Jan. 31, 2022).

After Michigan finalized its maps, individual Black members of the Michigan House, the Romulus City Council, and a group of Black Michiganders filed an original action in the Michigan Supreme Court. *See Detroit Caucus* v. *Mich. Indep. Citizens Redistricting Comm'n*, No. 163926 (Mich. Sup. Ct. 2022). The plaintiffs have alleged that the new voting maps dilute the strength of Black voters, particularly those in and around Detroit, in violation of the State Constitution and Section 2 of the Voting Rights Act. The case remains pending before the Michigan Supreme Court as of the date of this filing.

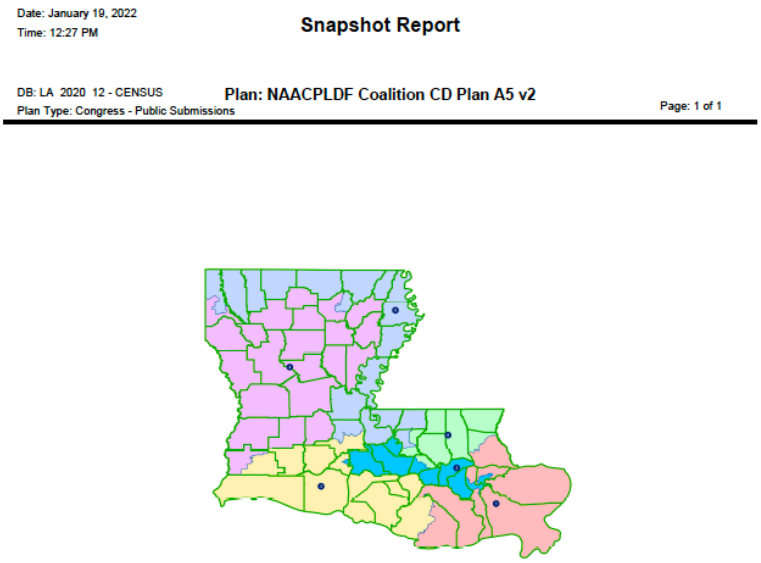
C. In contrast, the same Democrat-affiliated lawyers have argued that majority-minority districts are *required* in Alabama, Georgia, and Louisiana.

Despite their apparent agreement with the decreased number of majority-Black legislative districts in Virginia and the vanishing Michigan majority-Black districts, the Democratic Party's law firm of choice has insisted in this case that Section 2 of the Voting Rights Act "*entitle*[*s*]" "Black Alabamians" to "a second majority-minority congressional district." Reply Br. ISO of Mot. for a Preliminary Injunction at 1, *Caster* v. *Merrill*, No. 2:21-cv-1536, ECF No. 84 (N.D. Ala. Dec. 27, 2021) (emphasis added). In their view, "two majority-minority districts can be drawn consistent with traditional redistricting principles." *Id.* Testimony from one of the experts in this case belies this assertion. She generated *two-million* sample maps using traditional redistricting criteria and reported that not a single one of the samples included a second majority-Black congressional district. The *only* way to create a second majority-Black voting district in Alabama is to preference race first, and then fit every traditional redistricting criterion around the racially driven districts.

Alabama is not the only State where (in contrast to Virginia and Michigan) maximizing majority-minority voting districts through the subjugation of traditional redistricting criteria remains the aim of Democratic Party-affiliated litigators. In the early 1990s, a three-judge panel of the Western District of Louisiana struck, as violative of the Equal Protection Clause, a racially gerrymandered map with a majority-minority district that, "[l]ike the fictional swordsman Zorro, when making his signature mark . . . slashes a giant but

somewhat shaky 'Z' across the state, as it cuts a swath through much of Louisiana." *Hays* v. *Louisiana*, 839 F. Supp. 1188, 1199 (W.D. La. 1993), *vacated on other grounds*, *Louisiana* v. *Hays*, 512 U.S. 1230 (1994).

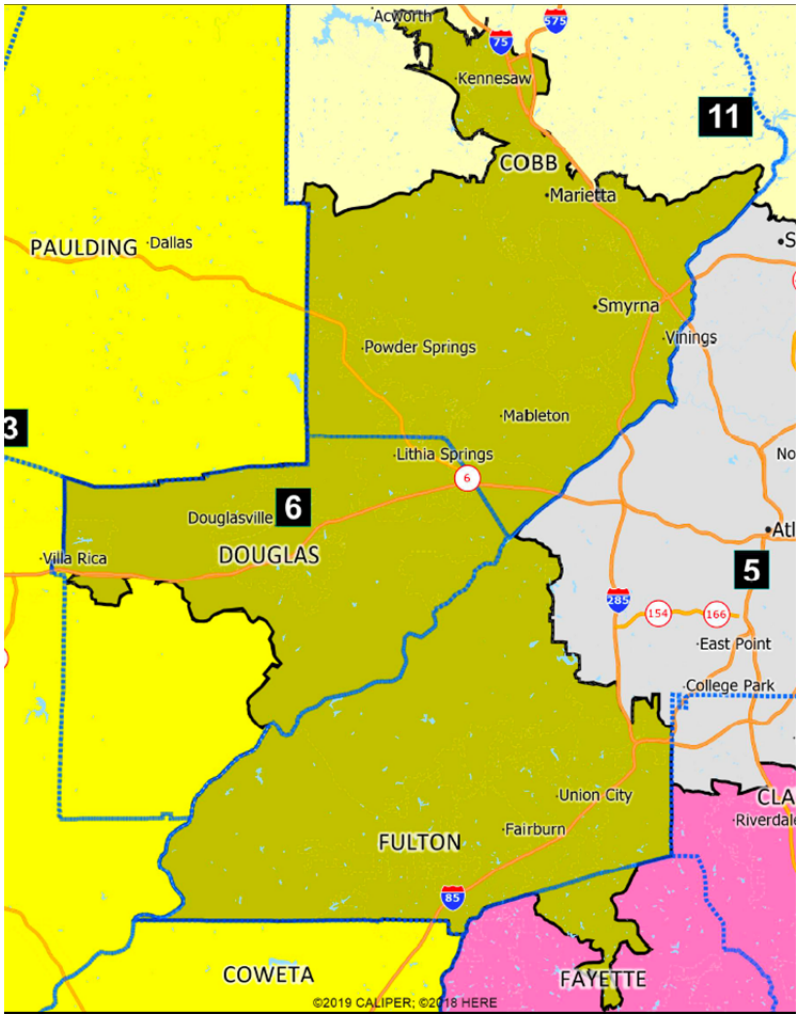
Despite this criticism, the Democratic Party litigators seem to think that the passage of roughly thirty years means they are at liberty to resurrect the constitutionally infirm "shaky Z." It appeared again in a submission offered by the NAACP Legal Defense Fund:



NAACP Legal Def. Fund Coal.'s Cong. Dist. Plan A5 v2, State of La. Redistricting, https://redist.legis.la.gov/2020_Files/PlanEvals/Congress/NAACPLDF_Coalition_CD_Plan_A5_v2_Combined.pdf (last visited Jan. 31, 2022).

And in Georgia, the Democratic Party's law firm of choice offered a map with a district so misshapen that it would give rise to an immediate and obvious Equal

Protection violation if the State Legislature had drawn it, all in the name of creating an additional majority-minority district. Once again, Democratic-Party affiliated lawyers are arguing for the same types of "fingers" to the north and south of this proposed district for the sole purpose of including black population:



See Expert Report of William S. Cooper, *Pendergrass* v. *Raffensperger*, No. 1:21-cv-05339-SCJ, ECF No. 34-1 (N.D. Ga. Jan. 12, 2022).[9]

[9] Preliminary injunction briefing is currently underway in *Pendergrass*. *See* Order, *Pendergrass* v. *Raffensperger*, No. 1:21-cv-05339-SCJ, ECF No. 51 (hearing scheduled for Feb. 7 through 14, 2022). Once the three-judge Northern District of Georgia panel resolves that motion, it will likely proceed to this Court.

* * *

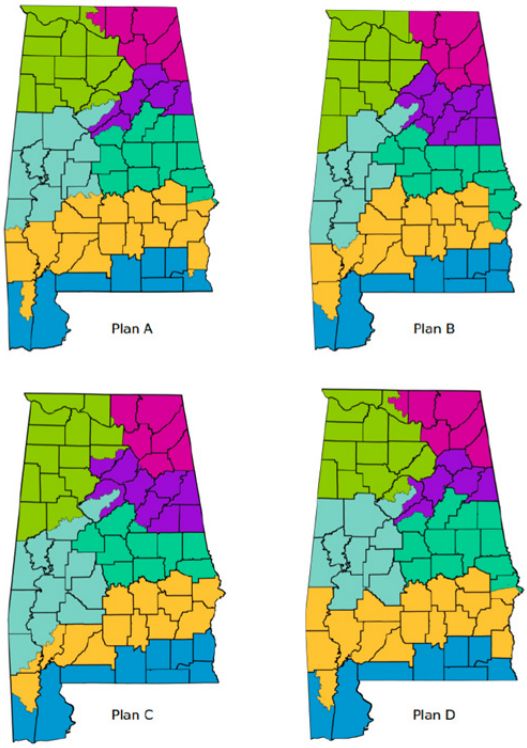
The right outcome in this case is quite apparent; lawyers affiliated with the Democratic Party have staked out a position here (and in both Louisiana and Georgia) entirely at odds with this Court's declarations in *LULAC*, *Cooper*, and *Miller* (and entirely irreconcilable with the positions they have advanced in, among other places, Virginia and Michigan). That they feel empowered to do so brings into stark clarity the fundamental and pressing reason for this Court to pump the breaks by issuing a stay, considering this case, and providing more fulsome guidance to the Southern District of Alabama (as well as the rest of the single judge and three-judge courts around the Nation preparing to resolve federal challenges to newly redrawn voting districts). Jurisprudential abstruseness allows exploitation first to arise, then to fester, and finally to metastasize. This case offers the Court a chance to snip off the sort of partisan manipulation arising throughout the Nation.

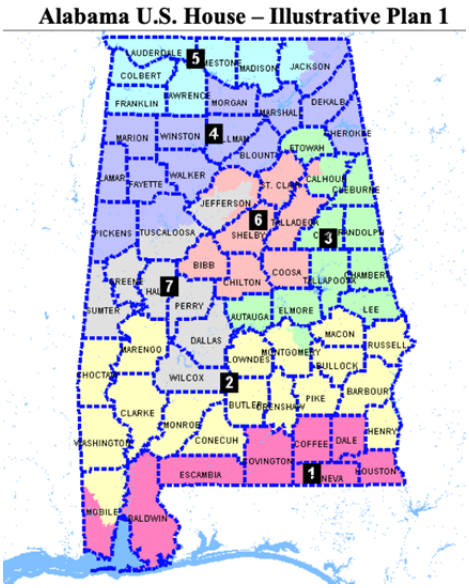
III. AT A MINIMUM, THE COURT CANNOT LET STAND THE ORDER UNDER REVIEW.

Although "[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make" in some cases, *Miller*, 515 U.S. at 916, this case is not one of them. If the decision below remains in effect, it will represent an order from a federal court mandating that Alabama do what this Court forbade Texas from doing in *LULAC*, what it prohibited Georgia from doing in *Miller*, and what it prohibited North Carolina from doing in *Cooper*.

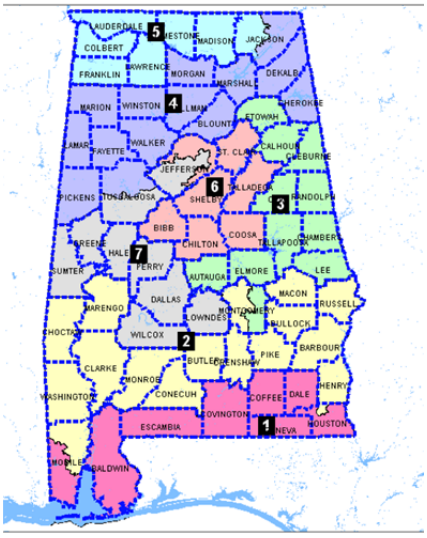
Each of the plans submitted by the Plaintiffs below cuts the compact Black population in the Western portion of the State in half and combines the Black

population in Mobile with the Black population in Dothan, communities that are separated by two-hundred miles. They appear as follows:

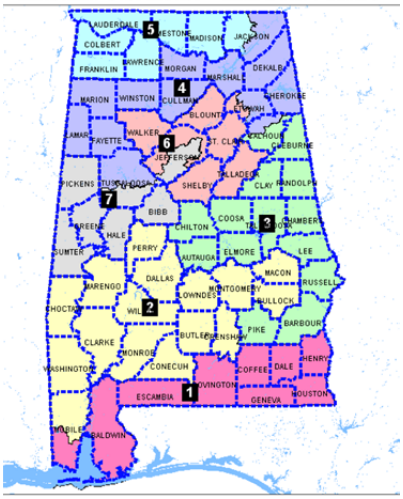


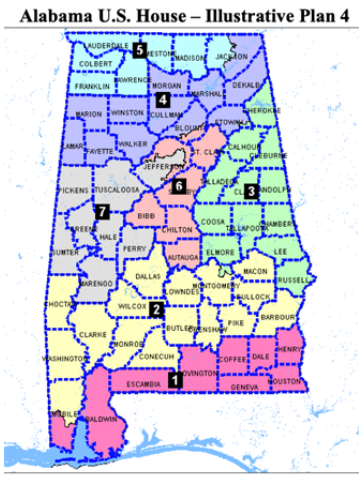


Alabama U.S. House – Illustrative Plan 2



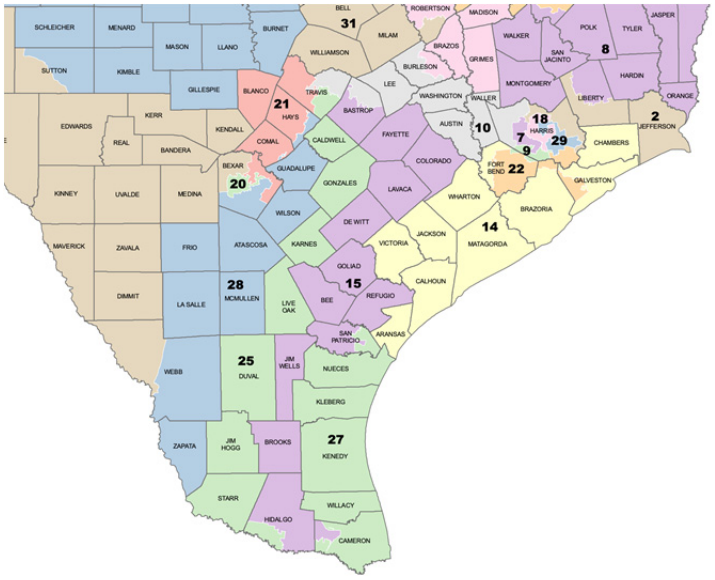
Alabama U.S. House – Illustrative Plan 3





District 1 cannot be described as compact under any conceivable definition of the word. But because Alabama cannot have two majority-Black congressional districts without it, and because the order below mandates two majority-Black congressional districts, this "[g]eographic[]. . . monstrosity" cannot be eliminated. *See Miller*, 515 U.S. at 909 (quotation omitted).

In *LULAC*, the Court struck as unconstitutional a voting district that merged separate Latino populations that shared no community of interest and were located three-hundred miles from each other. The long, spindly reach of the unconstitutional district at issue in *LULAC* (District 25) bears an uncanny resemblance to the district that must be created in Alabama if the decision below is allowed to stand:



At a minimum, Alabama must not, via federal-court decree, be forced to combine wholly dissimilar urban populations in industrial areas with rural populations in agricultural areas hundreds of miles apart—only because the two areas share a similar racial composition.[10] As the graphics demonstrate better than words, the court below has ordered Alabama to do what this Court forbade Texas in *LULAC,* Georgia in *Miller*, and North Carolina in *Cooper* from doing. At a minimum, then, the Court must swiftly correct the course of the Northern District of Alabama.

CONCLUSION

For the foregoing reasons, NRRT respectfully requests that the Court stay the preliminary injunction entered by the United States District Court for the Northern District of Alabama.

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[10] Compare the history and economy of Eufala, Alabama (https://www.britannica.com/place/Eufaula-Alabama (last visited Jan. 30, 2022)) with the history and economy of Mobile, Alabama (https://www.britannica.com/place/Mobile-Alabama (last visited Jan. 30, 2022)).

January 31, 2022

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