

**No. 22-10278**

**In the United States Court of Appeals for the Eleventh Circuit**

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EVAN MILLIGAN, et al.  
*Plaintiffs-Appellees*

v.

JOHN H. MERRILL,  
in his official capacity as Alabama Secretary of State, et al.  
*Defendants-Appellants*

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On Appeal from the U.S. District Court,  
Northern District of Alabama, No. 2:21-cv-1530-AMM

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**UNOPPOSED MOTION TO DISMISS NOTICE OF APPEAL**

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**CERTIFICATE OF INTERESTED PERSONS AND**  
**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 and 26.1-2, the Alabama State Conference of the NAACP and Greater Birmingham Ministries state that they have no parent corporations, nor have they issued shares or debt securities to the public. The organizations are not subsidiaries or affiliates of any publicly owned corporation, and no publicly held corporation holds ten percent of their stock.

I hereby certify that the disclosure of interested parties submitted by Defendants-Appellants the undersigned counsel certifies that the following listed persons and parties is complete and correct.

## INTRODUCTION

Plaintiffs-Appellees Evan Milligan, Shalela Dowdy, Letetia Jackson, Khadidah Stone, Greater Birmingham Ministries, and the Alabama State Conference of the NAACP (“Plaintiffs”) respectfully move to dismiss the present appeal because this Court lacks jurisdiction over it. The present appeal by Defendants-Appellants Secretary of State John H. Merrill, Alabama State Senator Jim McClendon, and Alabama State Representative Chris Pringle (“Defendants”) arises from a properly convened three-judge court’s issuance of a preliminary injunction against the State of Alabama’s 2021 congressional maps, House Bill 1, 2d Spec. Sess. (Ala. 2021) (“HB1”). Because the United States Supreme Court has exclusive jurisdiction over an appeal from an interlocutory order issued by a three-judge court, 28 U.S.C. § 1253, this Court should dismiss Defendants’ notice of appeal for lack of jurisdiction.

This motion is unopposed. Defendants have asked Plaintiffs to represent the following to this Court: “Defendants consent to Plaintiffs’ motion. Defendants filed this appeal as a purely protective appeal. As confirmed by the Supreme Court’s decision to note probable jurisdiction, the Supreme Court has now properly exercised its appellate jurisdiction over the injunction. *See* 28 U.S.C. § 1253.”

## ARGUMENT

Plaintiffs are challenging the constitutionality of HB1 and the legality of HB1 under Section 2 of the Voting Rights Act. Doc. 1 ¶¶ 197-210. Based on Plaintiffs’

allegations that HB1 violates the Fourteenth Amendment to the United States Constitution, Plaintiffs requested the convening of a three-judge district court. *Id.* ¶ 16.

Section 2284 requires that a “district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts.” 28 U.S.C. § 2284(a). Given Plaintiffs’ allegations, Chief Judge William Pryor convened a three-judge district court. Doc. 23. And Defendants admit that this case is properly before that court. Doc. 51 ¶ 16; Doc. 52 ¶ 16.

On January 24, 2022, following a seven-day hearing, the three-judge court granted a preliminary injunction enjoining HB1 for the 2022 elections and finding that Plaintiffs are substantially likely to succeed on their Voting Rights Act claim. Doc. 107. Shortly thereafter, Defendants filed notices of appeal to both the Supreme Court, Doc. 108, and this Court, Doc. 109. Defendants also filed a motion to stay the district court’s preliminary injunction order, which the court then denied. Doc. 120. Defendants then applied for a stay in the Supreme Court, which the Court granted on February 7. *See Merrill v. Milligan*, No. 21-1086, \_\_ U.S. \_\_, 2022 WL 354467 (U.S. Feb. 7, 2022). The Court has also noted probable jurisdiction in this case. *Id.*

A three-judge court’s preliminary injunction is an interlocutory order reviewable exclusively by the Supreme Court under Section 1253, which provides that “any party may appeal to the Supreme Court from an order granting . . . an

interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.” 28 U.S.C. § 1253. Given the unambiguous statutory text, this Court should dismiss the present appeal because it lacks appellate jurisdiction over a preliminary injunction issued by a three-judge panel. *See McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 196 (2014) (explaining that, under 28 U.S.C. § 1253, the Court has “no discretion to refuse adjudication of the case on its merits”) (quoting *Hicks v. Miranda*, 422 U.S. 332, 344 (1975)); *Dothard v. Rawlinson*, 433 U.S. 321, 324 n.5 (1977) (“When a three-judge court enjoins the operation of a state law on federal statutory grounds, an appeal to this Court from that judgment lies under 28 U.S.C. § 1253”); *Southway Discount Ctr, Inc. v. City of Birmingham*, 568 F.2d 456, 456-57 (5th Cir. 1978) (dismissing, based on 28 U.S.C. § 1253, an appeal from a three-judge court). If Defendants had any doubt about the appropriate venue for their appeal, the Supreme Court’s noting of probable jurisdiction in this case has now fully resolved such doubt. *See Milligan*, 2022 WL 354467 (“The application for a stay or injunctive relief presented to Justice THOMAS and by him referred to the Court in [the present case] is treated as a jurisdictional statement, and probable jurisdiction is noted.”).

### CONCLUSION

For the foregoing reasons, Defendants’ notice of appeal should be dismissed for lack of jurisdiction.

Respectfully submitted this 9th day of February 2022.

/s/ Deuel Ross

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### **CERTIFICATE OF CONFERENCE**

I certify that on February 9, 2022, Deuel Ross, counsel for Plaintiffs, contacted Edmond LaCour, Jim Davis, and Dorman Walker, counsel for Defendants. Mr. LaCour indicated that Defendants consent to Plaintiffs' motion. Defendants filed this appeal as a purely protective appeal. As confirmed by the Supreme Court's decision to note probable jurisdiction, the Supreme Court has now properly exercised its appellate jurisdiction over the injunction. *See* 28 U.S.C. § 1253.

/s/ Deuel Ross  
Deuel Ross  
Attorney for Plaintiffs-Appellees  
February 9, 2022

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that:

This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 709 words.

This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman, 14-point font.

/s/ Deuel Ross

Deuel Ross

Attorney for Plaintiffs-Appellees

February 9, 2022

**CERTIFICATE OF SERVICE**

I certify that on February 9, 2022, I filed the foregoing Motion to Dismiss Notice of Appeal with the Court's CM/ECF system, thereby serving all counsel of record.

/s/ Deuel Ross

Deuel Ross

Attorney for Plaintiffs-Appellees

February 9, 2022