

EXHIBIT A

Messages - Steve Livingston

iMessage
6/11/2023 11:42:56 AM

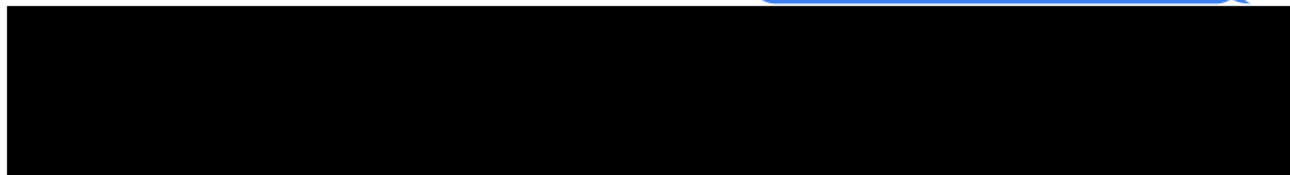
I've got 8 different maps. The performance #s are being run on all. Will let you know what I discover

Ty

6/12/2023 3:38:38 PM

<https://1819news.com/news/item/house-pro-tem-pringle-on-givans-racist-jay-z-tirade-some-days-her-medication-is-not-quite-working>

Another reason he needs to be reigned in



6/14/2023 3:54:31 PM

Coming through? I'm clear the rest of the day

Still monkey town

Dan and I are free anytime this evening

6/17/2023 8:48:01 AM

Can I call you later?

Of course

6/17/2023 4:57:06 PM

I have workable map with 4 split counties. Jefferson, St. Clair, Autauga and Clarke

K

Also think it mostly protects what Randy is wanting in CD 1

Be good to see

Tuesday



6/21/2023 3:01:45 PM

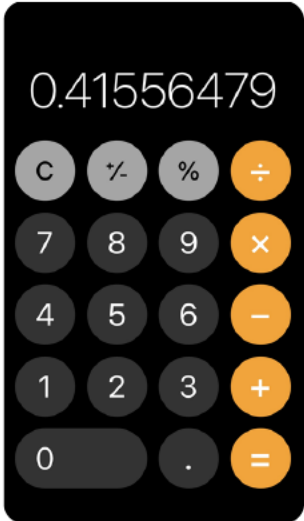
Can I call you later?

Call when free

Still in Montgomery?

Messages - Steve Livingston

6/27/2023 8:22:29 PM



I've worked out a map with CD2 with this percent BVAP. Running the performance now

6/28/2023 9:04:12 AM

This map is workable. Not ideal for Moore. But winable

Thanks

If you want to see a map, let me know. Would 41.6 BVAP work?

7/20/2023 8:51:04 AM

I'm planning to spent today with [REDACTED] since I've been ignoring him for weeks. If YOU need me, please call. Otherwise, I will not be available until tonight



7/21/2023 2:35:32 PM

Thank you for being a strong leader. Very proud of you, sir

8/5/2023 10:17:15 AM

I know you are here somewhere like to at least say hello

Where are you

Back left side

9/12/2023 1:56:16 PM

<https://aldailynews.com/map-update-pringle-submits-communities-of-interest-plan-to-special-master/>

Not a team player

Yea I saw that

I read this article as an attack on you and the Senate

You think

Messages - Steve Livingston

9/13/2023 10:55:50 AM

I'm about to have the document in my hand. Dorman submitted the pringle plan to the case

Umh



6M - Submission of Proposed Remedial Plan (09-11).pdf

9/19/2023 5:38:13 PM



Members of Congress _23A231 Amicus Brief.pdf

Not sure if you have seen this by our congressional delegation. Very well thought out brief in support of the 2023 map

9/20/2023 8:26:43 AM

Thanks



_Singleton - Opposition to Application for Stay.pdf

9/22/2023 11:23:11 AM



Nat GOP Trust Amicus Brief.pdf

Another supporting amicus brief written by a former Thomas Clerk. Good stuff

Thanks

9/25/2023 5:39:55 PM

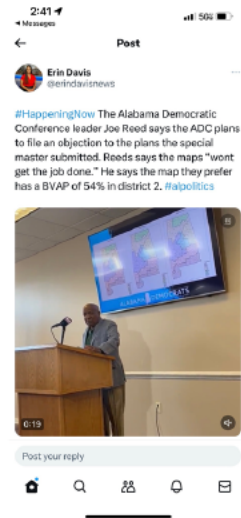
Last page...

"The Pringle Plan also followed the 2021 Plan, but nonetheless had a high overall core retention compared to the 2023 Plan. The Pringle Plan, however, did not remedy the likely Section Two violation"

I saw. :)

Messages - Steve Livingston

9/26/2023 2:43:24 PM



Really

Power grab

10/3/2023 2:06:38 PM

He can't let it go. Can he?

10/12/2023 6:18:20 AM

<https://www.cnn.com/2023/10/11/politics/supreme-court-south-carolina-nancy-mace-republicans-gerrymandering/index.html>

10/12/2023 9:38:48 AM

Thanks, interesting article

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

IN RE REDISTICTING 2023

SPECIAL MASTER

No 2:20-mc-01181-AMM

NOTICE OF SUBMISSION OF PROPOSED REMEDIAL PLAN

Comes now defendant Rep. Chris Pringle, House Chair of the Alabama Legislature's Reapportionment Committee, and in accordance with the September 7, 2023 Amended Order, *e.g. Milligan* ECF 284, gives notice gives of the submission of a proposed remedial plan, the Community of Interest Plan. Attached are the block equivalency files for the Community of Interest Plan, a map of the plan, and a population summary for the plan. Following is an explanation of the plan.

Explanation of the Community of Interest Plan

The Community of Interest Plan was approved by the Reapportionment Committee and passed by the House of Representatives but not by the Senate. The Community of Interest Plan complies with the Reapportionment Committee's Guidelines, preserves important communities of interest identified by the Legislature, complies with the United States and Alabama constitutions and the Voting Rights Act, and has one majority-Black district

and one opportunity district in which Black voters have an equal opportunity to elect their candidate of choice. The Community of Interest Plan complies with the requirement for a remedial plan that includes “two districts in which Black voters either compromise a voting-age majority or something quite close to it.” *Milligan* ECF 107, p. 213.

Respectfully submitted this this 11th day of September, 2023.

/s/ Dorman Walker
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CERTIFICATE OF SERVICE

I hereby certify that this the 11th day of September 2023 I electronically filed the foregoing notice with the clerk of the Court using the CM/ECF system, which will send notice to all counsel of record.

/s/Dorman Walker

No. 23A231

In The Supreme Court of the United States

WES ALLEN,
IN HIS OFFICIAL CAPACITY AS THE ALABAMA SECRETARY OF STATE,
Applicant,

v.

EVAN MILLIGAN, ET AL.,
Respondents.

**BRIEF OF *AMICI CURIAE*
MEMBERS OF THE ALABAMA CONGRESSIONAL DELEGATION
IN SUPPORT OF APPLICANT**

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September 19, 2023

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RULE 29.6 STATEMENT

Amici Curiae, Jerry Carl, Barry Moore, Mike Rogers, Robert Aderholt, Dale Strong, and Gary Palmer, do not constitute a corporation for purposes of Rule 29.6.

IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

Jerry Carl, Barry Moore, Mike Rogers, Robert Aderholt, Dale Strong, and Gary Palmer, all Members of Congress representing districts in Alabama, submit this Amicus Brief in support of the Appellant. *Amici* have a vital interest in redistricting generally and this appeal specifically. As Members of the U.S. House of Representatives, the way congressional districts are drawn impacts *Amici*'s constituents, their campaigns, and the character of federal elections in Alabama. More importantly, *Amici* represent the very districts at issue, and any change to these districts will affect their ability to represent their constituencies. The district court's imposition of a preliminary injunction, and any subsequent decision from this Court, will have widespread implication for *Amici*.

¹ No counsel for any party authored this brief in whole or in part. The National Republican Congressional Committee provided funding for this brief, but no other entity or person, other than *Amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The district court’s reversible error in this Section 2 case has commanded this Court’s attention for the second time in as many years. This time, the district court started by bungling its own subject-matter jurisdiction when it examined a new redistricting law, passed by the Alabama Legislature, as if it were a court-ordered remedial map. In so doing, the court below took the entirety of its conclusions about the 2021 Plan, bolted them to the 2023 Plan, and then called it a day without actually assessing whether the 2023 Plan survived Section 2 scrutiny by, among other things, conducting a *Gingles* analysis. Not only does this mean that the district court ordered a remedy without determining whether the 2023 Plan violated Section 2, it also flipped the presumption of legislative good faith on its head.

More errors followed. All the evidence before the district court demonstrated that this case is about *partisan* gerrymandering—*not* racial gerrymandering—which means that the Plaintiffs’ claims never belonged in federal court. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019). Specifically, Alabamians elect Republicans because the Democratic Party has failed to persuade Alabamians to vote for Democrats. That these partisan voting trends correlate with some racial voting trends isn’t enough. Section 2 requires causation (vote-dilution “on account of race,” 52 U.S.C. § 10301(a)) rather than correlation, and the district court’s failure to grasp this point led it to flout Section 2’s text, as well as precedent not only from this Court but also from most of the Circuits that have addressed the issue. Reversal is warranted.

ARGUMENT

I. BECAUSE ALABAMA’S 2023 PLAN WAS NEVER FOUND TO VIOLATE SECTION 2, THE DISTRICT COURT HAD NO JURISDICTION TO ORDER A REMEDIAL MAP.

The district court’s first, and most fundamental, error strikes at the heart of its own power to adjudicate the Plaintiffs’ Section 2 claims. A court may not issue a remedy before determining whether a litigant has a right to that remedy. But that is exactly what the district court did when it ordered a remedial map without assessing whether the 2023 Plan violated the Voting Rights Act. Even more, the district court added federalism insult to subject-matter jurisdiction injury by inverting the presumption of good faith that must be afforded to the Alabama Legislature.

At a previous stage in this very case, this Court instructed the district court to “conduct ‘an intensely local appraisal’ of the electoral mechanism at issue, as well as a ‘searching practical evaluation of the ‘past and present reality.’” *Allen v. Milligan*, 143 S. Ct. 1487, 1503 (2023) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986)). This means that the district court had an obligation to examine the 2023 Plan closely and individually, and then compare it to a “reasonably configured” illustrative plan. *Id.* Only then would the district court have the moment to assess whether “[d]eviation from that [illustrative] map” demonstrates that the 2023 Plan “has a disparate effect on account of race.” *Id.* at 1507.

The district court elided this Court’s mandate. Doing so was error and requires correction.

A. The district court overstepped its Article III authority by failing to conduct a local assessment of the 2023 Plan.

For nearly thirty years, the Court has made crystal clear that every challenged legislative act, especially those establishing voting-district boundaries, must be assessed on their own terms. Indeed, “the burden of proof lies with the challenger, not the State,” *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (citing *Reno v. Bossier Par. School Bd.*, 520 U.S. 471, 481 (1997)), and “the good faith of [the] state legislature *must* be presumed.” *Id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 915 (1995)) (emphasis added). For this reason, a finding of earlier alleged bad acts cannot be used to circumvent the intensely local Section 2 assessment. *Id.* “[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.” *Id.* (quoting *Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion)).

To be certain, the past is relevant. But because it is only “one evidentiary source,”² it cannot be dispositive. And as a matter of fundamental fairness, the past can never be used to by-pass answering the necessary questions that this Court has established for determining whether Section 2 liability arises. In other words, the question remains whether the legislative act subject to challenge—here, the 2023 Plan—violates the Voting Rights Act in its own right. *See Abbott*, 138 S. Ct., at 2324.

The district court skirted its obligation to answer the Section 2 liability question. Instead, it reasoned that the 2023 Plan was enacted to remedy the 2021

² *Id.* (citing *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)); *see also Covington v. North Carolina*, 283 F. Supp. 3d 410, 431 (M.D.N.C. 2018), *aff’d in relevant part*, *North Carolina v. Covington*, 138 S. Ct. 2548 (2018).

Plan, which the district court had enjoined. And its expectation that the 2023 Plan must absolve the taint of the 2021 Plan meant that it declined to assess whether the 2023 Plan itself transgressed the Voting Rights Act. App. 116-129. Indeed, the district court chose not to conduct a new *Gingles* Analysis for the 2023 Plan, and instead used arguments, expert testimony, and illustrative plans keyed into the 2021 Plan to reject the 2023 Plan. *Id.*

That was error. The 2023 Plan is a new map, and the Legislature enacted it on its own accord—not because the district court ordered it to do so. For that reason, the district court had an obligation to assess the 2023 Plan on its own merits, and not to transpose its earlier indictment of the 2021 Plan onto a wholly different legislative enactment.

Article III authority “amounts to little more than the negative power to disregard an [unlawful] enactment.” *Barr v. Am. Ass’n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2351 n.8 (2020) (plurality opinion) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)). Once the State enacted the 2023 Plan, the injunction directed to the 2021 Plan lost all legal effect. Challenges to an “old rule” become “moot” when a new rule takes its place. *See New York State Rifle & Pistol Ass’n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020). And although a “plaintiff may have some residual claim under the new framework,” any earlier order should be vacated and so that the parties, “if necessary,” can “amend their pleadings or develop the record more fully” in connection with the new, separate legislative enactment. *Id.* (quoting *Lewis v. Cont’l Bank Corp.*, 494 U. S. 472, 482-483 (1990)).

Simply put, because the State passed a new law, the district court had to assess that new law from the ground up. Article III does not allow federal courts to sit as permanent “councils of revision.” *United States v. Rutherford*, 442 U.S. 544, 555 (1979); *see also United States v. Richardson*, 418 U.S. 166, 189 (1974) (Powell, J., concurring) (explaining that under the Council of Revision, “every law passed by the legislature automatically would have been previewed by the Judiciary before the law could take effect”). Courts decide cases or controversies, and until the 2023 Plan was enacted, it did not, and could not, give rise to a case or controversy that the district court had any power to adjudicate. The 2023 Plan was not a subject of any complaint, it was not ordered as a remedy to any final judgment, and it was not examined in a way that provided the adversarial assessment necessary for the district court to issue a remedy. Simply put, the district court lacked jurisdiction to rule as it did on the 2023 Plan.

B. The district court improperly inverted the presumption of constitutionality afforded to the Legislature.

The district court did not merely transgress its Article III power when it tossed the 2023 Plan without conducting a new Voting Rights Act analysis. It also dispensed with the presumption of constitutionality and good faith to which the Alabama Legislature was entitled. In other words, the district court presumed racial discrimination and asked the State to disprove it. And by burdening the State to prove Section 2 compliance, rather than placing the burden on the Plaintiffs to prove their Section 2 claims, the district court aggravated its error.

The district court’s analysis shows that it presumed that the 2023 Plan was unconstitutional. Rather than begin with the *Gingles* preconditions, the district court queried whether “the 2023 Plan *completely remedies* the likely Section Two violation that [it] found” App.134 (emphasis added). After concluding that the 2023 Plan did not do so, the district court enjoined it because it contained one, and not two, majority-minority districts. App.135. By construing the 2023 Plan as a remedial map and conditioning its imprimatur on hitting a majority-minority-district quota, the district court inverted the burden of proof. That error demands reversal.

II. PARTISAN POLITICS, NOT RACE, HAS DRIVEN THE VOTING PATTERNS OF ALABAMIANS, AND THAT DOOMS THE PLAINTIFFS’ SECTION 2 CLAIMS.

Beyond skipping the *Gingles* preconditions, the district court also disregarded a critical aspect of the totality-of-circumstances analysis: Senate Factor 2—i.e., “the extent to which voting in the elections of the state or political subdivision is racially polarized.” S. Rep. No. 97-417, at 29. Unlike *Gingles* Steps 2 and 3 (where a court must ask *how* Black and White voters cast their ballots), Senate Factor 2 looks at *why* voters cast their ballots for certain candidates. That is to say, “what appears to be bloc voting on account of race [which is the inevitable result of satisfying the three *Gingles* preconditions], may, instead, be the result of political or personal affiliation of different racial groups with different candidates.” *Solomon v. Liberty Cnty. Comm’rs*, 221 F.3d 1218, 1225 (11th Cir. 2000).

In other words, causation matters. The district court, however, declined to independently analyze whether Alabama’s voting trends are polarized “on account of race,” or instead on account of the State’s partisan (i.e., Republican) culture. In

deciding that it must be the former, the district court avoided considering the colossal evidentiary proof that Democrats have consistently lost in Alabama not because they are Black, but because the Democratic Party has failed to appeal to Alabama voters for quite some time.

A. Section 2’s totality-of-circumstances analysis requires a showing that racially polarized voting occurs on account of (rather than in correlation with) race.

Section 2 forbids “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) (emphasis added). The totality-of-circumstances analysis in subsection (b) requires courts to assess the “equa[l] open[ness]” of a state’s political process, and whether minority voters have “less opportunity” to “participate in the political process and to elect representatives of their choice.” *Id.* § 10301(b). Moreover, Section 2’s “on account of race” language mirrors and gives effect to the nearly identical language found in the Fifteenth Amendment. *See Mobile*, 446 U.S., at 60–61; *see also* U.S. Const. amend. XV, § 1.

It is “a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute.” *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 304 (2017) (citation omitted). And so, the phrase “on account of race” must be construed as a prerequisite to a finding of Section 2 liability. Race—not party preference or some other variable—must cause the purported injury if Section 2 liability is to arise. *See Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2337 (2021).

Congress enacted Section 2 to address the specific problem of discrimination against racial minorities in state voting processes. *See Mobile*, 446 U.S., at 60–61. Although Section 2 was later amended to eliminate the intent requirement, the class of individuals protected by the statute—minority voters whose rights have been abridged or denied “on account of race or color”—has not changed. After Section 2(a) clearly established *whose* rights the statute was intended to protect, the 1982 amendment (codified as Section 2(b)) explained *how* a violation of those rights could be established: the totality-of-circumstances test.

Section 2(b) requires the Plaintiffs to prove that “political processes . . . are not equally open to participation by members of a class of citizens protected by subsection (a).” 52 U.S.C. § 10301(b). In other words, the statute requires that minority voters prove that they have been impacted *because of their race or color*. And the statute is crystal clear about how the Plaintiffs must carry this burden. They must do so by showing that they “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *Id.*

Voters, including minority voters, may have “less opportunity” to elect the representative they would prefer for any number of non-race-related reasons. The most obvious is partisanship; because of how voting works, if a person of one political persuasion lives in an area with an overabundance of voters who associate with a different political party, that former necessarily has “less opportunity” to elect his or her candidate of choice. Democrats who live in Wyoming (the most Republican state)

and Republicans who live in Vermont (the most Democratic state) experience this with every election.

If this is why a racial group has not successfully elected their candidate of choice (i.e., if that racial group prefers Democrat candidates in an overwhelmingly Republican state), their inability to elect their candidates of choice is *not* “on account of [their] race.” And if it is not, then Section 2 provides no remedy. The Voting Rights Act was never intended to guarantee the success of one political party given the coincidence that a minority group prefers that political party. *See Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014); *see also Gingles*, 478 U.S., at 83 (White, J., concurring) (“Justice Brennan states . . . that the crucial factor in identifying polarized voting is the race of the voter and that the race of the candidate is irrelevant. Under this test, there is polarized voting if most white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates. I do not agree.”).

B. The Court’s post-*Gingles* jurisprudence has clarified that correlation alone cannot establish a Section 2 violation.

In *Thornburg v. Gingles*, this Court’s splintered opinion appeared to create a conditional guarantee of proportional representation while diminishing the effect of the “on account of race or color” qualifier in Section 2. 478 U.S. at 63. The second and third preconditions that emanated from that decision focus solely on the political cohesiveness of a given minority group and their White counterparts, but they do not require the reviewing court to investigate the necessary cause of any disparate effect on racial minorities. *Id.* In fact, the Justice Brennan’s plurality opinion expressly

disclaimed causation as relevant for purposes of the preconditions (even though Senate Factor 2 plainly requires it). *See id.* (“[T]he reasons black and white voters vote differently have no relevance to the central inquiry of § 2.”). Others disagreed. *See id.* at 83 (White, J., concurring) (disagreeing with Justice Brennan on this point).

Despite Justice Brennan’s preferred *Gingles* free-for-all, the Court soon began clarifying that not all voting laws affecting a minority community give rise to Section 2 liability. *See, e.g., Chisom v. Roemer*, 501 U.S. 380, 383–84 (1991) (noting that the 1982 Voting Rights Act amendments “make clear that *certain* practices and procedures that result in the denial or abridgment of the right to vote are forbidden” (emphasis removed)). Most recently, the Court reviewed a Section 2 challenge to Arizona’s precinct-voting rule and ballot-harvesting restrictions in *Brnovich*, 141 S. Ct., at 2330. The *Brnovich* majority confirmed that the Court’s “statutory interpretation cases almost always start with a careful consideration of the text, and there is no reason to do otherwise” when analyzing Section 2. *Id.* at 2337. The Court then quoted the “on account of race or color” language in Section 2(a), and it noted that it “need not decide what this text would mean if it stood alone because §2(b), which was added to win Senate approval, explains what must be shown to establish a §2 violation.” *Id.* This confirms that Section 2(b)’s totality-of-the-circumstances test must be read *in pari materia* with Section 2(a)’s condition that Section 2 liability does not arise unless an injury occurs on account of the voter’s race.

The test that the *Brnovich* Court set forth recognizes the primacy of causation. The Court first explained that “equal opportunity helps to explain the meaning of

equal openness” in Section 2(b), which confirms that Section 2 is directed to ensuring equality of access, but not equality of electoral outcomes. *Id.* at 2338. It then identified five factors pertinent to the analysis, including the overall size of the burden imposed by the challenged law and the size of any disparities in the law’s impact on racial minority groups. *Id.* at 2339–40. The Court noted that, “[t]o the extent that minority and non-minority groups differ with respect to employment, wealth, and education, even neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting.” *Id.* at 2339. But it remains true that if the effect of a voting law merely correlates with race, it does not necessarily mean that the law operates “on account of race.” The *Brnovich* factors show that Section 2 hinges on something more than mere raw disparate impact, especially since a disparate impact might be no more than a mere coincidence tied to partisan preferences.

C. The Circuit Courts agree that causation matters.

In addition to this Court’s clarifying precedents, the Courts of Appeal are in virtual lockstep with each other that correlation is not causation, and the latter is needed for Section 2 liability to arise. Race, not some other variable, must be the cause of electoral failure for purposes of a Section 2 claim.

In *SCLC v. Sessions*, for example, the Eleventh Circuit held that “any evidence that explain[s] election results [i]s relevant,” especially where there is “ample evidence . . . to support the court’s conclusion that factors other than race, *such as party politics* and availability of qualified candidates, are driving the election results.” 56 F.3d 1281, 1293–94 (11th Cir. 1995) (emphasis added). The Court reaffirmed this

principle in *Solomon v. Liberty County Commissioners*: “what appears to be bloc voting on account of race may, instead, be the result of political or personal affiliation of different racial groups with different candidates.” 221 F.3d, at 1225. And in *Greater Birmingham Ministries v. Secretary of Ala.* (a Section 2 challenge to Alabama’s voter ID law), the Eleventh Circuit again emphasized that causation rather than correlation is what matters for Section 2 purposes. 992 F.3d 1299, 1329 (11th Cir. 2021). In that case, the court determined that “minority voters in Alabama are slightly more likely than white voters not to have compliant IDs,” but it nevertheless held that “the plain language of Section 2(a) requires more” than this showing of disparate impact. *Id.* at 1330.

The First, Second, Seventh, and Ninth Circuits have also adopted this same causation-not-correlation approach.³ Meanwhile, in upholding a Virginia voter ID law against a Section 2 challenge, the Fourth Circuit joined its sister courts in holding that a demonstration of disparate impact alone is insufficient when a plaintiff fails to establish the necessary causal link. *See Lee v. Va. State Bd. of Elections*, 843 F.3d

³ *See Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) (“Although proving a violation of § 2 does not require a showing of discriminatory intent, only discriminatory results, proof of ‘causal connection between the challenged voting practice and a prohibited discriminatory result’ is crucial.” (citations omitted)); *Goosby v. Town Bd. of Town of Hempstead*, 180 F.3d 476, 493 (2d Cir. 1999) (“We . . . ratify the approach taken by the district court to consider the political partisanship argument under the ‘totality of circumstances’ analysis”); *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997) (explaining that the reasons why candidates preferred by black voters lost should be considered in the totality-of-circumstances inquiry); *Vecinos De Barrio Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995) (holding that non-racial reasons for divergent voting patterns should be considered under the totality-of-circumstances test).

592, 601 (4th Cir. 2016) (“We conclude that § 2 does not sweep away all election rules that result in a disparity in the convenience of voting.”). Similarly, the Sixth Circuit—in upholding Ohio’s twenty-nine-day early-voting period against a Section 2 challenge—held that Section 2 plaintiffs must demonstrate that the specific law they are challenging, “as opposed to non-state created circumstances[,] *actually makes voting harder*” for minority voters. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 631 (6th Cir. 2016) (emphasis in original).

D. The district court ignored judicially recognized evidence that racially polarized voting in Alabama is driven by partisan politics.

Contrary to the Court’s jurisprudence and that of various Courts of Appeal, the district court ignored substantial evidence recognized by a sister court showing that racially polarized voting in Alabama arises from non-racial factors such as ideology and partisanship. Specifically, in *Alabama State Conference of the NAACP v. Alabama*, the Middle District of Alabama observed that the State is “one of the most Republican [jurisdictions] in the entire South,” a fact that “has made it virtually impossible for Democrats—of any race—to win statewide in Alabama in the past two decades.” 612 F. Supp. 3d 1232, 1291 (M.D. Ala. 2020). It noted that all Black candidates for statewide office since 2000 have run as Democrats and lost, while two Black-preferred (White) Democrat candidates during that same period have won three races (Sue Bell Cobb for Supreme Court Justice, and Doug Jones for U.S. Senate). *Id.* The court further commented that White Democratic primary voters in Alabama appear to give equal support to Black Democratic candidates in appellate

judicial elections. *Id.* The only logical conclusion is that Black candidates are not penalized at all by their race. *Id.* (citing *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 879 (5th Cir. 1993) and *Lopez v. Abbott*, 339 F. Supp. 3d 589, 613 (S.D. Tex. 2018)).

The court then explored the true cause behind racially polarized voting. It first observed that the Alabama Democratic Party is significantly weaker than its Republican counterpart. “One need look no further than the past four general elections, in which Democrats put up candidates for only twelve out of forty-six statewide offices, and the failure of any Democratic candidate to qualify to run in the March 3, 2020 primary for six open appellate judicial seats, to see that the Alabama Democratic Party is on life support.” *Id.* at 1293. Indeed, the fractured state of the Alabama Democratic Party led to a state-court action in which one faction of the party sued the other for party control. *See Verified Complaint, Ala. Democratic Party, et al. v. Gilbert, et al.*, No. CV-2019-000531.00 (Circuit Court of Montgomery Cty., Ala. Oct. 30, 2019). Considering that reality, the Middle District of Alabama found that, “without a viable party behind them, Democratic candidates of any race have an uphill battle.” *Id.*

The court next observed that straight-ticket voting in Alabama “only exacerbates the phenomenon of partisan-driven election results.” *Alabama State Conference of the NAACP*, 612 F. Supp. 3d, at 1296. Indeed, “[m]any voters are driven to the polls because of races at the top of the ticket, then end up voting for down-ballot candidates of the same party as their preferred top-of-the-ticket candidates.” *Id.* The

court noted that, between 2008 and 2014, “about a quarter of total ballots cast in Alabama were straight-ticket Democrat, and another quarter of total ballots in Alabama cast were straight-ticket Republican.” *Id.* It also found that “the most recent numbers show that straight-ticket voting is even more prevalent today and decisively in the Republican party column.” *Id.*

Beyond the fissured state of the Alabama Democratic Party and the robust practice of straight-ticket voting, the court also found that voters in Alabama grasp the political stances of each party (and are thus largely motivated by the ideological contrast between them). Specifically, “because voters must approve constitutional amendments on a statewide basis, the results of voting on those amendments provide a snapshot into Alabamians ideology.” *Id.* at 1300. And voters in Alabama consistently support Republican Party issues like (1) the pro-life movement, (2) the right to work, (3) the Second Amendment, and (4) traditional notions of marriage and the family. *Id.* at 1301. Relatedly, the court found that tort reform played a key role in the transition from an all-Democrat to an all-Republican Supreme Court of Alabama. *Id.* at 1302. It concluded that voters in Alabama were turned off by Democrat-backed excessive jury verdicts that gave the State a national reputation as “tort hell” in the 1980s and 1990s. *Id.* (citing *BMW of N. America, Inc. v. Gore*, 517 U.S. 559 (1996)).

At bottom, the court concluded that voters overwhelmingly expressed their conservative bona fides at the ballot box. *Id.* And for that reason, the court in

Alabama State Conference of the NAACP concluded that party, not race, drives election results in Alabama. *Id.* at 1306.

The district court here, however, declined to recognize any of these findings. In its decision on the 2021 Plan, it retorted: “read in context, that finding does not stand for the broad proposition that racially polarized voting in Alabama is simply party politics. Accordingly, we cannot independently reach the same conclusion that the *Alabama State Conference of the NAACP* court reached, and we cannot assign the weight to its conclusion that Defendants urge us to assign.” *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1019 (N.D. Ala. 2022). This was a plainly erroneous conclusion and contrary to a correct application of Section 2.

III. THE DISTRICT COURT’S ERROR HAS RESULTED IN A COURT-ORDERED PARTISAN GERRYMANDER.

The above shows that the district court willfully turned a blind eye to the fact that “what appears to be bloc voting on account of race may, instead, be the result of political or personal affiliation of different racial groups with different candidates.” *Solomon*, 221 F.3d, at 1225. This was improper since, as Justice O'Connor explained in her *Gingles* concurrence, Section 2 was not designed to proscribe redistricting schemes where there is “an underlying divergence in the interests of minority and white voters” that does not arise because of race. 478 U.S. at 100 (O'Connor, J., concurring in the judgment).

Had the district court considered the well-supported explanation that Black-preferred candidates in Alabama lose because they are running as Democrats in a Red State, it would have caught on that the Plaintiffs are actually interested in

expanding the political power of the Alabama Democratic Party through a Section 2 lawsuit. By acquiescing in this partisan power-grab, the district court exceeded its subject-matter jurisdiction and trampled the First Amendment rights of Republican voters and candidates in Alabama.

A. Ignoring non-racial explanations for racially polarized voting allows litigants to mask nonjusticiable partisan gripes as Section 2 vote-dilution claims.

Under Article III, courts may only decide cases “historically viewed as capable of resolution through the judicial process.” *Rucho*, 139 S. Ct., at 2493–94. Cases that lack judicially manageable standards constitute nonjusticiable political questions. *Id.* at 2494. For this reason, this Court recognizes only three types of redistricting claims as justiciable: (1) one-person, one-vote challenges; (2) racial gerrymandering claims; and (3) vote-dilution claims under Section 2 of the Voting Rights Act. *Id.* at 2495–96; *Gingles*, 478 U.S., at 70–71. Because there are no judicially manageable standards to adjudicate partisan-gerrymandering claims, and because partisanship is expected to happen in redistricting, partisan-gerrymandering claims are not justiciable. *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Were it otherwise, courts would “risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.” *Rucho*, 139 S. Ct., at 2498.

The problem with adjudicating partisan-gerrymandering claims is that they presume “that groups with a certain level of political support should enjoy a commensurate level of political power and influence.” *Id.* at 2499. But federal courts lack both the authority and competence to apportion political power. *Id.* They cannot

“vindicate[e] generalized partisan preferences.” *Id.* at 2501. In other words, the lack the ability or the authority to “allocate political power and influence.” *Id.* at 2508.

A necessary corollary to these premises is that federal courts have the responsibility *not* to confuse partisan gerrymandering with race-based claims—no matter the guise under which the plaintiffs may bring them. And the district court failed to live up to this duty. It accepted without any scrutiny the Plaintiffs’ argument that the 2023 Plan pre-determines racial gains and losses, when in reality the map reflects the partisan reality of Alabama. Black voters in Alabama are cohesive because they vote for Democrats, and under the 2023 Plan, Democrats will likely not win elected positions because Alabama voters overwhelmingly favor Republican candidates. Using the Voting Rights Act to allocate political power proportionally means that the partisan wolf has arrived in the garb of a racial sheep. *Cf. Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). This Court has a duty to stop this subterfuge in its tracks.

B. The district court’s failure to require a showing of causation resulted in an application of Section 2 that abridges the First Amendment rights of non-Democrat Alabamians.

By enjoining the 2023 Plan, district court has not only allowed a partisan-gerrymandering claim to proceed. It has also invited the Plaintiffs to wield Section 2 as a cudgel against any state law that fails to advance the institutional interests of the Alabama Democratic Party. The Plaintiffs have prevailed on the district court their theory that Black cohesion for Democrat candidates prevents the State from enacting measures that hurt that party because racial and partisan preferences are

(in their view) inseparable. But as discussed above, the inability of Democratic candidates to win elections results from the decline of the Democratic Party in Alabama. It is not about race, and it hasn't been for years. *See Alabama State Conference of the NAACP* 612 F. Supp. 3d, at 1292–96.

The district court should have disentangled the threads linking the race of Alabama voters to their preference for a certain party's candidates. Had it done so, it would have been compelled to conclude that the 2023 Plan does not dilute minority votes “on account of race.” By leaving intertwined those threads, the district court allowed the Voting Rights Act to shield the Democratic Party from fair competition with their partisan opponents (and, by extension, unfairly enshrined the Democratic Party's ideas above those held by Republicans and others). This partisan protectionism violates core First Amendment rights, especially the principle against viewpoint discrimination. *See Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) (“The independent expression of a political party's views is ‘core’ First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees.” (citations omitted)); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1127 (2022) (“In prohibiting only one perspective, [the government] targets ‘particular views taken by’ students, and thereby chooses winners and losers in the marketplace of ideas—which it may not do” (citations omitted)).

This means that, by applying Section 2 without considering the cause of racially polarized voting in Alabama, the district court provoked an avoidable

question about the Voting Rights Act's consonance with the First Amendment. Because "[i]t is a long-standing rule of statutory interpretation that federal courts should not construe a statute to create a constitutional question unless there is a clear statement from Congress endorsing this understanding," the district court was wrong to do so. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1229 (11th Cir. 2005). Court must "first address whether one interpretation presents grave constitutional questions whereas another interpretation would not, and then examine whether the latter interpretation is clearly contrary to Congressional intent." *Id.* The district court's failure to conduct this analysis warrants reversal.

As explained in Part II, *supra*, Congress intended that Section 2 claims must include proof of causation. 52 U.S.C. § 10301(a)). Applying Section 2 in the way Congress intended it would have avoided the constitutional conflict that the district court has triggered. That the district court opted for the path of greatest constitutional resistance justifies the grant of the State's emergency request.

CONCLUSION

For all these reasons, the Court should grant applications.

September 19, 2023

Respectfully submitted,

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No. 23A231

IN THE

SUPREME COURT OF THE UNITED STATES

HON. WES ALLEN, in his official capacity as the Alabama Secretary of State,
Applicant.

v.

EVAN MILLIGAN, ET AL.,
Respondents.

**SINGLETON RESPONDENTS' OPPOSITION TO EMERGENCY
APPLICATION FOR STAY PENDING APPEAL TO THE SUPREME COURT
OF THE UNITED STATES**

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

In addition to the parties and related cases identified in the Application, Respondents include Bobby Singleton, Rodger Smitherman, Eddie Billingsley, Leonette Slay, Darryl Andrews, and Andrew Walker, who were plaintiffs in *Bobby Singleton et al. v. Wes Allen et al.*, No. 2:21-cv-1291-AMM (N.D. Ala.).

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, there are no parent entities or entities that issue stock at issue in this response and appeal.

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TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

In his first appeal, the Secretary asked this Court to rule that drawing racially targeted, majority-Black districts to comply with *Gingles* I is unconstitutional. This Court rejected that argument and held that Alabama’s 2021 plan likely violated Section 2 of the Voting Rights Act. Now, in his second appeal, the Secretary asks this Court to rule that it is unconstitutional to use racially targeted, majority-Black districts to remedy the Section 2 violation affirmed by this Court. But that issue cannot be addressed on this record.

The Secretary does not bring this second appeal with clean hands. The 2023 plan, which Alabama’s Solicitor General helped craft, retains one racially targeted, majority-Black district. That district, which splits voters in Jefferson County by race, derives from a district created in 1992, which the Secretary’s predecessor argued in prior litigation was a racial gerrymander. *Singleton v. Allen*, No. 21-cv-1291-AMM (N.D. Ala.), ECF No. 189 at 5–6. Nevertheless, Alabama’s Legislature has taken a “least change” approach to drafting that district ever since, and it pursued an explicit goal of creating a majority-Black district at least through 2021. *Id.* at 6–13.

The *Singleton* Respondents contend that District 7 in the 2023 plan, which continues to divide Jefferson County along racial lines to produce a majority-BVAP district, is an unconstitutional racial gerrymander because it was drawn without first conducting the careful inquiry required by *Cooper v. Harris*, 581 U.S. 285 (2017), to see if districts drawn without this focus on race would satisfy both the Equal

Protection Clause and the VRA. The District Court reserved ruling on the *Singleton* Respondents' constitutional claim, but it gave them the right to participate fully in the pending Section 2 remedial proceedings. In those proceedings, they have submitted a race-neutral plan that includes two opportunity districts, and they expect the District Court itself to conduct the *Cooper v. Harris* inquiry before adopting any remedial plan that contains majority-Black districts.

Given this posture, the question Alabama is attempting to raise in its second appeal is not ripe. This Court has held that majority-Black districts can be adopted by a state or by a court to comply with the VRA, but only if a *Cooper v. Harris* inquiry shows they are necessary to provide the protected minority an equal opportunity to elect candidates of their choice. *E.g., Wisconsin Legislature v. Wisconsin Elections Commission*, 595 U.S. 398 (2022).¹ If the District Court agrees with the *Singleton* Respondents that in Alabama, two race-neutral crossover districts can satisfy Section 2, and it adopts something like the *Singleton* Plan as the remedy for the Section 2 violation, there will be no majority-Black districts Alabama can challenge.

¹ The *Milligan* and *Caster* Respondents challenge the *Singleton* Respondents' standing on the ground that *Singleton* involves only a constitutional claim, and the District Court decided *Milligan* and *Caster*'s claim under the VRA. As this Court has noted, in redistricting cases, constitutional and statutory issues are interrelated: "The question that our VRA precedents ask and the court failed to answer is whether a race-neutral alternative that did not add a seventh majority-black district would deny black voters equal political opportunity. ... When the Wisconsin Supreme Court endeavored to undertake a full strict-scrutiny analysis, it did not do so properly under our precedents, and its judgment cannot stand." *Wisconsin Legislature*, 595 U.S. at 406. In any event, the *Singleton* Respondents explain below why the District Court's orders make them "parties to the proceeding" in the District Court.

COUNTERSTATEMENT OF THE CASE

Because the Secretary did not name the plaintiffs in *Singleton v. Allen* as Respondents, the *Singleton* Respondents offer a brief explanation of their role as parties to the proceedings below.

In September 2021, the *Singleton* Respondents filed the first challenge to Alabama's congressional districts during this districting cycle, alleging that the districts enacted in 2011 were malapportioned and racially gerrymandered in violation of the Fourteenth Amendment. *Singleton*, ECF No. 1. A three-judge District Court was assigned to hear the case. Following the State's enactment of a new congressional plan in November 2021, the *Singleton* Respondents immediately amended their complaint to remove the claim of malapportionment and add a claim that the enacted 2021 plan perpetuated the unconstitutional racial gerrymander of Jefferson County. *Singleton*, ECF No. 15.

After the *Singleton* Respondents amended their complaint, the Respondents in *Milligan* and *Caster* filed their cases. *Milligan* asserted a claim under Section 2 of the Voting Rights Act, and claims for racial gerrymandering and intentional discrimination in violation of the Fourteenth Amendment. *Caster* asserted a claim under Section 2. *Milligan* was consolidated with *Singleton* for preliminary injunction proceedings. *Caster*, which was a single-judge case because it did not involve constitutional claims, was coordinated with *Singleton* and *Milligan*. In January 2022, the Respondents in *Singleton*, *Milligan*, and *Caster* presented evidence at a seven-day hearing. The three-judge District Court in *Singleton* and *Milligan*, and the single

judge in *Caster*, enjoined the Secretary of State from using the State’s 2021 plan in future elections. *Singleton v. Merrill*, 582 F. Supp. 3d 924 (N.D. Ala. 2022). The District Court held that the 2021 plan likely violated Section 2, and it reserved judgment on the gerrymandering claims in *Singleton* and *Milligan*. *Id.* at 1004, 1034–35. This Court stayed that injunction but ultimately affirmed the District Court’s decision. *Allen v. Milligan*, 599 U.S. 1 (2023).

On remand, the District Court gave the Alabama Legislature an opportunity to enact a new plan that complied with Section 2, but it also provided that any party, including the *Singleton* Respondents, could file an objection to that plan. *Singleton*, ECF No. 135 at 5. After a new plan was enacted in July 2023, the *Singleton*, *Milligan*, and *Caster* Respondents timely filed objections. The District Court then entered an order setting a hearing in *Milligan* and *Caster* on claims under Section 2, and a hearing the next day in *Singleton* on the racial gerrymandering claim. *Singleton*, ECF No. 154 at 3, 6. (On remand, the *Milligan* Respondents did not actively pursue their gerrymandering claim.) The Court’s order also provided that if “the Court determines that the 2023 plan does not remedy the likely Section Two violation the Court previously identified, then the *Singleton* Plaintiffs will be afforded the opportunity to submit remedial maps for a Special Master to consider and to otherwise participate in proceedings before the Special Master to the same degree as the *Milligan* and *Caster* Plaintiffs.” *Id.* at 5.

Following the hearings in *Milligan* and *Caster*, and then in *Singleton*, the three-judge District Court entered an order under the *Singleton* and *Milligan*

captions in which it held that the State's 2023 plan failed to remedy the Section 2 violation, and it enjoined the Secretary from using that plan in future elections. The Court again reserved ruling on the *Singleton* gerrymandering claim on the grounds of constitutional avoidance, stating that "Alabama's upcoming congressional elections will not occur on the basis of the map that is allegedly unconstitutional" due to the injunction. App.194. The Court then entered another order under the *Singleton*, *Milligan*, and *Caster* captions in which it directed the Special Master to begin his work. The Court ordered the Special Master to file his proposed maps and report and recommendations on the *Singleton* docket, and it allowed the *Singleton* Respondents to object to the report and recommendations and appear at the same hearing as the *Milligan* and *Caster* Respondents. App.230.

On the day the Court entered its orders, the Secretary moved for a stay pending appeal. Although the motion was filed only on the *Milligan* and *Caster* dockets, the Court ordered the *Singleton* Respondents to respond, which they did. *Singleton*, ECF Nos. 193, 199. The District Court denied the motion to stay in an order under the *Singleton* and *Milligan* captions and filed on the *Singleton* and *Milligan* dockets. App.623. When the Secretary applied to this Court for a stay, the Clerk's office conveyed Justice Thomas's request for a response to the counsel of record for the *Singleton* Respondents, along with the *Milligan* and *Caster* Respondents.

Meanwhile, the *Singleton* Respondents have participated fully in the proceedings before the Special Master. They have filed a proposed remedial plan and a brief supporting it, and they have filed comments on the other plans submitted to

the Special Master. In their capacity as parties, they will file objections to the Special Master's report and recommendations if they decide it is necessary, and they will appear at the District Court's hearing on the proposed remedial plans, which is scheduled for October 3. If the Secretary's application is granted, the proceedings before the Special Master will come to an immediate halt, and the *Singleton* Respondents will lose the opportunity to participate. Moreover, they will be harmed by the implementation of the 2023 plan to the same extent as the *Milligan* and *Caster* Respondents.

Given this history, the *Singleton* Respondents are "parties to the proceeding in the district court" under Supreme Court Rule 18.2, and they continue to have an interest in the outcome of this appeal.

ARGUMENT

The Secretary's application for a stay is dishonest. Over and over, the Secretary claims that the District Court will not accept a congressional plan that lacks two majority-Black districts. Application 2, 3, 4, 5, 17, 18, 19, 20, 22, 23, 24, 26, 27, 31, 32, 33, 34, 35, 36, 37, 38, 39. This is false. The District Court held that a plan enacted by the Alabama Legislature would satisfy Section 2 if it contained "either an additional majority-Black congressional district, *or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice.*" App.3 (emphasis added). The word "opportunity" appears 140 times in the District Court's order granting an injunction, but the Legislature's option to create an opportunity district, which need not have any particular racial composition, gets

treated in the Secretary's application as a demand for a majority-Black district. Likewise, when the District Court directed the Special Master to recommend remedial plans, it used the exact language quoted above, permitting him to draw a plan without respect to race as long as it creates two opportunity districts. App.224. Yet the Secretary asserts that the District Court has ordered the creation of a gerrymander that segregates Alabamians by race. Application 5, 26, 39, 40.

The Secretary's application is also unripe. It assumes a result—a court-ordered unconstitutional racial gerrymander—that not only has not happened yet, but that the District Court has indicated will not happen. The Court's directions to the Special Master do not require him to gerrymander districts by race, but they do require him to ensure that his recommended plans comply with the Constitution. App.224. In its order denying the Secretary's motion for a stay, the District Court reiterated this fact: "Nothing about our injunction applying [the Voting Rights Act] countenances, let alone demands, segregation, racial gerrymandering, or anything else improper. ... And we have not yet ordered the Secretary to use any specific map, so any suggestion that we are 'segregat[ing]' voters based on race is unfounded and premature." App.645. Because no remedial plan has been ordered, much less a racially gerrymandered remedial plan, and the District Court has indicated that no such plan will be implemented, the Secretary's claims rest on premature, counterfactual speculation.

The closest the Secretary comes to justifying his speculation and pervasive misstatements about the decisions below is to cite the following language, which first appeared in the District Court’s order granting an injunction in January 2022:

The Legislature enjoys broad discretion and may consider a wide range of remedial plans. As the Legislature considers such plans, it should be mindful of the practical reality, based on the ample evidence of intensely racially polarized voting adduced during the preliminary injunction proceedings, that any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close to it.

Singleton v. Merrill, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022); Application 5. The District Court’s reference to “a voting-age majority or something quite close to it” was not a command but a recognition of the “practical reality” of “intensely racially polarized voting in Alabama.” Nowhere did the District Court suggest that it would reject the Legislature’s plan based on BVAP statistics. Instead, the District Court required the creation of two opportunity districts, and it enjoined the Legislature’s plan for failing to meet that standard: “The State concedes that the 2023 plan does not include an additional opportunity district. ... That concession controls this case.” App.5–6. Moreover, the court-ordered process for drawing remedial plans includes no requirement that opportunity districts be majority-Black or “quite close to it.” The District Court’s instructions to the Special Master do not include this phrase at all. App.218–31.

In any event, there is a glaring exception to the “practical reality” of racially polarized voting in Alabama, which gives the Special Master wide leeway to draw opportunity districts without segregating voters by race. Jefferson County, the most populous county in the State and the home of Birmingham, has a tradition of

significant crossover voting. Although the county's BVAP is just 41.5%, Jefferson County voters have favored the preferred candidate of Black voters in each of the last 99 races for statewide and countywide office. *In re Redistricting 2023*, No. 23-mc-1181-AMM (N.D. Ala.), ECF No. 5 at 13. It is therefore possible to create an opportunity district containing an ideal population of 717,754 without racial gerrymandering by adding just 43,033 people to Jefferson County from nearby counties.

In the proceedings below, the *Singleton* Respondents submitted a remedial plan that does just this. It contains a district that includes Jefferson County and eight precincts in the Birmingham suburbs just over the border in Shelby County, and another district that includes nearly all of the Black Belt. Neither district is majority-Black, but the preferred candidates of Black voters—both Black and White—have usually won more votes than their opponents in these districts.² Thus, both districts are opportunity districts that comply with the Voting Rights Act. *See* 52. U.S.C. § 10301(b) (Voting Rights Act is violated if the members of the minority “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice”). And the *Singleton* Plan raises no equal-protection concerns because it does not separate voters by race.

² In the proceedings below, the Secretary admitted that in the *Singleton* Plan, the preferred candidates of Black voters received more votes than their opponents in 22 of the last 28 contested races in the Jefferson County district (79%), and in 28 of 28 races in the Black Belt district (100%). During that time, Black candidates received more votes in 8 of 12 races in the Jefferson County district (67%), and 12 of 12 in the Black Belt District (100%). *Singleton*, ECF No. 180-1 at 5.

If the District Court were to adopt the *Singleton* Plan or something like it, the Secretary would have no grounds to complain that Alabama is being “required to violate ‘traditional districting principles such as maintaining communities of interest’ to ‘create, on predominantly racial lines,’ a second majority-black district.” Application 26 (quoting *Abrams v. Johnson*, 521 U.S. 74, 91–92 (1997)). In fact, the *Singleton* Plan respects communities of interest better than the plan the State enacted in 2023. The *Singleton* Plan keeps 16 of the 18 “core” Black Belt counties together in a single district, while the State’s plan splits the Black Belt in half, forcing its residents to share representation in Congress with other regions.³ Application 1 n.2, 14. Although the *Singleton* Respondents take no position on whether the Gulf Coast and the Wiregrass are important communities of interest, the *Singleton* Plan outperforms the State’s plan here as well. Both plans keep the Gulf Coast counties together. But the *Singleton* Plan keeps all the Wiregrass counties together in a single district (except for two counties that are also part of the “core” Black Belt and are in the Black Belt district), while the State’s plan places most of Covington County, a Wiregrass county, in the Gulf Coast district. Application 14. Moreover, the *Singleton* Plan keeps the Jefferson County community of interest intact, while the State’s plan cuts it in two along racial lines. In sum, the *Singleton* Plan outperforms the State’s plan in three of the four communities of interest that have been identified in this case, and performs just as well in the fourth, without segregating voters by race. As long

³ As a matter of geography, no more than sixteen Black Belt counties can share the same district. If seventeen or eighteen counties were in a single district, they would cut off about a million people in southern Alabama, making it impossible to comply with the one-person, one-vote principle because an ideal district contains 717,754 people.

as the *Singleton* Plan is sitting on the Special Master's desk, the Secretary cannot argue that Alabama is being railroaded into a racial gerrymander that ignores traditional districting principles.

CONCLUSION

The Secretary's argument boils down to a counterfactual claim that the District Court rejected the State's congressional plan because it did not have two majority-Black districts, and that the remedial plan will be racially gerrymandered. But the *Singleton* Respondents have submitted a plan that demonstrates how two opportunity districts can be created without resorting to segregation. As long as the Court implements such a plan, the Secretary has no grounds to seek a stay.

Respectfully submitted,

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No. 23A231

In the Supreme Court of the United States

WES ALLEN,
IN HIS OFFICIAL CAPACITY AS THE ALABAMA SECRETARY OF STATE,

Applicant,

v.

EVAN MILLIGAN, ET AL.,

Respondents.

ON EMERGENCY APPLICATION FOR STAY PENDING APPEAL FROM THE
U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

**BRIEF FOR NATIONAL REPUBLICAN REDISTRICTING TRUST
AS AMICUS CURIAE IN SUPPORT OF APPLICANT**

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INTEREST OF *AMICUS CURIAE*

The National Republican Redistricting Trust (“NRRT”) is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on the fifty-state congressional and state legislative redistricting effort. NRRT’s mission is threefold.*

First, it aims to ensure that redistricting faithfully follows all federal constitutional and statutory mandates. Under Article I, § 4 of the U.S. Constitution, the State Legislatures are primarily entrusted with the responsibility of redrawing the States’ congressional districts. *See Growe v. Emison*, 507 U.S. 25, 34 (1993). Every citizen should have an equal voice, and laws must be followed to protect the constitutional rights of individual voters, not political parties or other groups.

Second, NRRT believes redistricting should be conducted primarily by applying the traditional redistricting criteria States have applied for centuries. 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 as much as possible. Such sensible districts follow the principle that legislators represent individuals living within identifiable communities. Legislators do not represent political parties, and we do not have a system of statewide proportional representation in any State. Article I, § 4 of the U.S. Constitution tells courts that any change in our community-based system of districts

* In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to its preparation or submission.

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. Each American should be able to look at their district and understand why it was drawn the way it was.

To advance these principles, NRRT regularly files *amicus* briefs in redistricting cases, including two briefs during this Court’s prior consideration of this case and a brief in the district court’s post-remand proceedings.

SUMMARY OF THE ARGUMENT

“Forcing proportional representation is unlawful and inconsistent with this Court’s approach to implementing § 2.” *Allen v. Milligan*, 143 S. Ct. 1487, 1509 (2023). That was the “simple” “point” emphasized by this Court a few months ago. *Id.* That point—and the corollary point that “§ 2 never requires adoption of districts that violate traditional redistricting principles” (*id.* at 1510 (cleaned up))—is “ma[d]e clear” by “the Court’s precedents.” *Id.* at 1518 (Kavanaugh, J., concurring in part). Alabama “could not create” districts that “flout[] traditional criteria.” *Id.* at 1509 (majority op.).

With this guidance in hand, Alabama drew new maps in good faith. The State repealed its prior law and adopted a new one. Yet in the district court, the Plaintiffs then demanded what this Court said is “never require[d]” under the Voting Rights Act: proportional representation via remedial plans that subordinate traditional redistricting criteria to race. The district court acceded to this demand, treating

Alabama’s new enacted maps as part of some remedial phase for a trial that has never happened about a law that no longer exists. Calling “the dispositive question” “whether the 2023 Plan contains an additional Black-opportunity district,” App. 136, the court enjoined the new plan after a single-day hearing. For a “remedy,” it ordered its own maps with an overtly racial goal: “an additional majority-Black congressional district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice.” *Id.* at 224.

Every aspect of this process flouts this Court’s precedents. First, the Voting Rights Act does not require proportionality, much less super-proportionality. Nor does the VRA require districts that contain less than a majority of a minority group on some sort of crossover opportunity voting theory. This Court has repeatedly rejected reading § 2 to require such remedies. Alabama’s 2023 Plan adheres to traditional districting principles better than any of the Plaintiffs’ plans, maintaining communities of interest that the 2021 Plan did not. To reject this new Plan—with scant consideration of its merits—turns the Court’s VRA precedents on their head.

Second, any suggestion that Alabama is “defying” this Court’s opinion in *Allen* by passing a new law that follows traditional districting principles rather than racial proportionality makes no sense. To the contrary, the Plaintiffs’ plans, which “[f]orc[e] proportional representation,” defy that opinion and a long line of precedents. *Allen*, 143 S. Ct. at 1509. And the Plaintiffs affirmatively told this Court last time around that the district court “did not order Alabama to enact Plaintiffs’ plans or even to create a second majority-Black district.” Brief for *Milligan* Appellees 2, *Allen*, No. 21-

1086 (U.S. July 11, 2022), <https://tinyurl.com/2x45zehh>. Now, the district court asserts that “[it] said” a second district “is the legally required remedy,” App. 126, and the Plaintiffs claim defiance. The notion that Alabama “defied” an appellate affirmance of a preliminary injunction by passing a new law misunderstands: (1) the tentative nature of every preliminary injunction, (2) the parameters of this preliminary injunction, which merely enjoined enforcement of the old plan and did not require *any* new plan, (3) the limited scope of an appellate holding that a preliminary injunction was not an abuse of discretion, (4) *Allen*’s limitation to § 2 liability standards, and (5) how challenges to new laws are supposed to work—and who bears the burden on such challenges.

Hinging liability on plans that underperform the State’s own map on traditional criteria would turn § 2 into a pure proportionality regime in most cases. And forcing the State to adopt unlawful, race-based districts as a preliminary “remedy” to a non-existent law without adequate consideration of the operative law flouts Article III principles. An emergency stay is necessary.

ARGUMENT

I. *Allen* does not authorize novel, unlawful remedies.

In the district court’s view, § 2 plaintiffs can succeed under *Gingles* even if their proposed plans do not “meet-or-beat” the State’s plan on “*any*” traditional “metric.” App. 148 (emphasis added); *see id.* at 633 (“[T]he Plaintiffs are not required to produce a plan that ‘meets or beats’ the 2023 Plan on any particular traditional districting criteria.”). This holding led the court to dismiss the relevance of the fact that the State’s Plan preserves communities of interest better than any of the Plaintiffs’ plans.

Combining this holding with the realities of computerized mapmaking and the district court’s dismissal of the State’s redistricting guidelines would transform § 2 into a mandatory proportionality regime. That result contradicts this Court’s precedents, including *Allen*.

As Justice Kavanaugh explained in *Allen*, this Court’s decisions “have flatly rejected” requiring states to enact “a proportional number of majority-minority districts” by “group[ing] together geographically dispersed minority voters into unusually shaped districts, without concern for traditional districting criteria.” 143 S. Ct. at 1518 (opinion concurring in part). Analyzing these precedents, the majority in *Allen* agreed that § 2 “never require[s] adoption of districts that violate traditional redistricting principles” *Id.* at 1510; *see id.* at 1508–10 (collecting cases showing that “the *Gingles* framework itself imposes meaningful constraints on proportionality, as our decisions have frequently demonstrated”).

“To ensure that *Gingles* does not improperly morph into a proportionality mandate, courts must rigorously apply” its preconditions. *Id.* at 1518 n.2 (Kavanaugh, J., concurring in part). “[F]or example, it is important that” any remedial map follow traditional districting principles “at least as well as Alabama’s redistricting plan.” *Id.* Otherwise, § 2 liability would often “turn almost entirely on just one circumstance—disparate impact.” *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2341 (2021).¹

¹ Even if § 2 *were* a disparate-impact regime, plaintiffs who failed to produce a map that advanced legitimate redistricting criteria as well as the State’s map could not prove that the State’s law was “not needed to achieve a government’s legitimate goals.” *Brnovich*, 141 S. Ct. at 2361 (Kagan, J., dissenting).

If § 2 plaintiffs do not have to show that *any* of their maps adhere to traditional districting principles as well as the state’s single map, the state will practically always lose. In *Allen*, the Court quoted academic commentary suggesting that “the universe of all possible connected, population-balanced districting plans that satisfy the state’s requirements . . . is likely in the range of googols.” *Allen*, 143 S. Ct. at 1514. Especially if one combines that statement with the court below’s dismissal of any traditional requirements that the plaintiffs’ map flunk as “particular principle[s] the State defined as non-negotiable,” App. 148,² little is left of *Gingles*. Its preconditions can practically always be satisfied. And states will almost always lose, substituting permanent judicial redistricting for rule by the people’s representatives.

That cannot be the law. This Court has “repeatedly observed” that redistricting “is primarily the duty and responsibility of the States,’ not the federal courts,” and “the *Gingles* factors help ensure that remains the case.” *Allen*, 143 S. Ct. at 1510 (brackets omitted) (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)). To protect this balance, a plaintiff must show that its proposed maps outperform the state’s map when it comes to traditional districting criteria.

Here, given the nature of Alabama’s population and geographic dispersion—only 11 of 67 counties are majority black—it would be surprising to see proportional representation *without* a violation of traditional districting principles. It is therefore unsurprising that the Plaintiffs’ proposed remedial plans significantly underperform the State’s 2023 Plan when it comes to traditional districting principles, particularly

² See also App. 633 (“The Secretary cannot avoid Section Two liability merely by devising a plan that excels at the traditional criteria the Legislature deems most pertinent.”).

keeping communities of interest together. Under the Court’s precedents, reiterated in *Allen*, one of the Plaintiffs’ super-proportional remedial plans cannot be substituted for a state plan that adheres to traditional districting principles.

A. Section 2 does not require proportional or super-proportional representation.

The Plaintiffs’ proposed remedial plans cannot be substituted for the State’s 2023 Plan because § 2 does not guarantee equality through proportional representation. “[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority candidates.” *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994). Section 2 is violated only if “the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens.” 52 U.S.C. § 10301(b). Section 2 specifically disclaims that it “establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” *Id.*; see also *Brnovich*, 141 S. Ct. at 2342 n.14 (noting this disclaimer as “a signal that § 2 imposes something other than a pure disparate-impact regime”).

Thus, “[f]ailure to maximize [minority representation] cannot be the measure of § 2.” *De Grandy*, 512 U.S. at 1017. In *De Grandy*, the Court examined proportionality only as potentially relevant in the “totality of circumstances” analysis. *Id.* at 1011. But the Court cautioned that “the degree of probative value assigned to disproportionality, in a case where it is shown, will vary not only with the degree of disproportionality but with other factors as well.” *Id.* at 1021 n.17. “[L]ocal conditions” matter. *Id.* (cleaned up). And even purported proportionality is not “a safe harbor for any districting scheme.” *Id.* at 1018. The “totality-of-circumstances

analysis” cannot be “reduced” to the “single factor” of “proportionality.” *Wisconsin Legislature v. Wisconsin Elections Comm’n*, 142 S. Ct. 1245, 1250 (2022). In particular, as *Allen* reiterated, proportionality cannot be substituted for traditional districting principles.

Miller v. Johnson provides a good example of how this analysis works in practice. There, the Court explained that to establish a racial gerrymandering claim, “a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations.” 515 U.S. 900, 916 (1995) (cleaned up). “Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can defeat a claim that a district has been gerrymandered on racial lines.” *Id.* (cleaned up).

In *Miller*, the Court invalidated congressional maps drawn in Georgia that sought proportional representation. At the insistence of the U.S. Department of Justice, the state legislature had drawn three of 11 districts as majority-minority to mirror the State’s black population (27%). *Id.* at 906–07, 927–28. The Court rejected those maps because, as the State had all but conceded, “race was the predominant factor in drawing” the new majority-minority district. *Id.* at 918. “[E]very objective districting factor that could realistically be subordinated to racial tinkering in fact suffered that fate.” *Id.* at 919 (cleaned up). Even where “the boundaries” of the new district “follow[ed]” existing divisions like precinct lines, those choices were themselves the product of “design[] . . . along racial lines.” *Id.* (cleaned up).

The Court rejected this racial gerrymander, specifically holding that “there was no reasonable basis to believe that Georgia’s earlier [non-proportional] plans violated” the VRA. *Id.* at 923. “The State’s policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan . . . discriminates on the basis of race or color.” *Id.* at 924. Because engaging in “presumptively unconstitutional race-based districting” would have brought the VRA “into tension with the Fourteenth Amendment,” the Court rejected the State’s maps, even though those maps provided proportional representation. *Id.* at 927. As the Court explained, “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.” *Id.* at 927–28.

The Court thus remanded the case, and after the state legislature failed to act, the district court drew maps with only one majority-minority district (9%)—meaning representation that fell far below black Georgians’ 27% share of the population. *Abrams v. Johnson*, 521 U.S. 74, 78 (1997); *see id.* at 103 (Breyer, J., dissenting). “The absence of a second, if not a third, majority-black district” was “the principal point of contention” in the second appeal to this Court. *Id.* at 78 (majority opinion). Yet the Court upheld the district court’s maps, which focused on “Georgia’s traditional redistricting principles.” *Id.* at 84. The district court had “considered the possibility of creating a second majority-black district but decided doing so would require it to

subordinate Georgia’s traditional districting policies and consider race predominantly.” *Id.* (cleaned up).

This Court agreed with that conclusion, explaining “that the black population was not sufficiently compact” for even “a *second* majority-black district.” *Id.* at 91 (emphasis added)). Thus, even getting to two majority-minority districts (18%) by focusing on race would have violated the Equal Protection Clause, and the Court rejected the use of DOJ’s proposed “plan as the basis for a remedy [that] would validate the very maneuvers that were a major cause of the unconstitutional districting” at issue in *Miller*. *Id.* at 86; *see id.* at 109 (Breyer, J., dissenting) (“The majority means that a two-district plan would be unlawful—that it would violate the Constitution.”).

In *Allen*, this Court highlighted *Miller* and several other precedents, including *Shaw v. Reno* and *Bush v. Vera*, in explaining that “traditional districting criteria limit[s] any tendency of the VRA to compel proportionality.” 143 S. Ct. at 1509. Here, nearly every county in Alabama is majority white; only 11 of 67 are majority black. The share of any black voting-age population in Alabama (the most Plaintiff-favorable metric) is 25.9%—lower than the Plaintiffs’ and the district court’s rounded 27% figure (which the court below used to justify its conclusion in the previous preliminary injunction proceeding that 28.57% representation would be proportional). *See Singleton v. Merrill*, 582 F. Supp. 3d 924, 1025 (N.D. Ala. 2022). This corrected BVAP shows that the Plaintiffs are seeking super-proportional representation. *Amicus* is unaware of any case since the enactment of the Voting

Rights Act in which a federal court’s mandate of a maximization plan providing for super-proportional representation was affirmed by this Court.³

Tellingly, the “race-neutral plan” demanded by the Plaintiffs on their racial gerrymandering claim was a “decrease [in] the BVAP in District 7 to around 50%” and a redrawn District 2 “with [a] BVAP[]” of “almost 40% as opposed to the current 30%.” *Milligan* D. Ct. Dkt. 69, at 31. That is exactly what the State’s 2023 Plan provides: by the parties’ stipulations, District 7 “has a BVAP of 50.65%,” and District 2 “has a BVAP of 39.93%.” App. 88. Neither the Plaintiffs nor the district court explained why a § 2 remedy would look so different—or how judicially-imposed intentional discrimination to overcome the Plaintiffs’ own race-neutral ideal could coexist with the Equal Protection Clause. On that point, even as two sets of Plaintiffs here demanded super-proportional remedies, the *Singleton* Plaintiffs doubted whether that plan “could satisfy strict scrutiny under the Constitution because of the way it splits Mobile and Jefferson County along racial lines.” *Milligan* D. Ct. Dkt. 220-1, at 71–72; *see Singleton* D. Ct. Dkt. 147, at 1 (arguing that the 2023 Plan’s one majority-minority district makes it “a racial gerrymander that violates the Fourteenth Amendment”).

³ *See United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 165 (1977) (suggesting that super-proportional plans would exclude the majority “from participation in the political processes” and amount to “discrimination violative of the Fourteenth Amendment”); *see also id.* at 173 (Brennan, J., concurring in part) (“[W]hat is presented as an instance of benign race assignment in fact may prove to be otherwise,” which “suggest[s] the need for careful consideration of the operation of any racial device, even one cloaked in preferential garb. And if judicial detection of truly benign policies proves impossible or excessively crude, that alone might warrant invalidating any race-drawn line.”). As this Court recently reiterated: “Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies without regard to any differences of race, of color, or of nationality—it is universal in its application.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2161–62 (2023) (cleaned up).

The way to avoid these lose-lose situations for states is for them to be able to rely on neutral principles. Under *Allen* and the established precedents discussed above, a federal court may not mandate even a proportional representation plan in derogation of traditional districting principles. This Court has warned that if a state uses different “line-drawing standards in minority neighborhoods as it used elsewhere in the jurisdiction, the inconsistent treatment might be significant evidence of a § 2 violation, even in the face of proportionality.” *De Grandy*, 512 U.S. at 1015. As to Alabama’s 2021 Plan, the Plaintiffs repeatedly argued that the neutral districting principle was keeping communities together, and “HB1 fragments two significant majority-Black communities of interest—the Black Belt and the City of Montgomery—while maintaining in a single district the majority-White, ‘French and Spanish’-ethnic population of Baldwin and Mobile Counties.” Brief for *Milligan* Appellees, *supra*, at 20–21.

Yet now, faced with the 2023 Plan that keeps the Black Belt together better than the Plaintiffs’ plans *and* maintains communities in the Gulf Coast and Wiregrass, the Plaintiffs demand the inconsistent treatment they had decried by calling for a split of the latter communities. Using the myopic goal of proportionality to excuse this violation of traditional districting principles “would be in derogation of the statutory text and its considered purpose, . . . and of the ideal that the Voting Rights Act of 1965 attempts to foster”: “equal political and electoral opportunity.” *De Grandy*, 512 U.S. at 1018, 1020.

The district court did not explain how its approach to *Gingles* would not impose liability writ large on state plans. Instead, echoing this Court, the district court said that it “did not have to conduct a beauty contest between plaintiffs’ maps and the State’s.” App. 147 (quoting *Allen*, 143 S. Ct. at 1505). Put aside that beauty contests are more administrable than *Gingles*. See *Merrill v. Milligan*, 142 S. Ct. 879, 882–83 (2022) (Roberts, C.J., dissenting) (collecting authorities and noting “the wide range of uncertainties arising under *Gingles*”).⁴ This Court made the “beauty contest” comment about maps that “both” had “a split community of interest.” *Allen*, 143 S. Ct. at 1505. That is no longer the case. See Application 29–31 & n.51. More generally, it is one thing to say, as the three-Justice plurality “precedent” quoted by *Allen* (143 S. Ct. at 1505) did, that *states* “may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs’ experts in endless ‘beauty contests.’” *Bush v. Vera*, 517 U.S. 952, 977 (1996). It is something quite different to say that the state can be liable based on plaintiffs’ plans that underperform on traditional criteria.

Underscoring the problems with this plaintiffs-always-win approach, the Plaintiffs’ counsel recently insisted in another redistricting case pending before this Court that “splitting” counties and “disregarding communities of interest” proves a “subordinat[ion]” of “traditional districting principles” to a “racial target.” Appellees’ Brief 26, *Alexander v. S.C. Conf. of the NAACP*, No. 22-807 (U.S. Aug. 11, 2023). They attacked South Carolina’s plan because its split of Charleston County purportedly

⁴ “The eyeball test,” for instance, is a creature of *Gingles*, not beauty contests. *Alpha Phi Alpha Fraternity, Inc. v. Raffensperger*, No. 1:21-cv-5337, 2023 WL 5674599, at *11 (N.D. Ga. July 17, 2023) (citing *Allen*, 143 S. Ct. at 1528 n.10); see also *Singleton*, 582 F. Supp. 3d at 1010.

“exil[es]” “residents—particularly in heavily Black North Charleston—from their economically integrated coastal community,” placing “Black Charlestonians” in “a district anchored more than 100 miles away in Columbia.” *Id.* at 16–17. Yet here, the Plaintiffs *demand* that Alabama divide the coastal community of Mobile County to place thousands of black residents—“Black Mobile,” per the Plaintiffs’ expert (App. 158)—in a district anchored more than 160 miles away in Montgomery. And the court below accepted that demand, on the rationale that “there remains a need to split the Gulf Coast” to increase “Black voting strength.” *Id.* at 166. The logic of the decision below puts states in an impossible position.

In sum, under *Allen* and this Court’s longstanding precedents, the Plaintiffs’ super-proportionality-focused plans may not be substituted for the State’s Plan that better satisfies traditional districting principles.

B. Section 2 does not require the creation of opportunity districts.

The Plaintiffs and the district court previously suggested plans that “include two districts in which Black voters either comprise a voting-age majority *or something quite close to it.*” App. 3 (emphasis added). Under established precedent, a remedy of a district that is less than majority black is also unavailable. In *Bartlett v. Strickland*, this Court held “that § 2 does not require crossover districts”—*i.e.*, “one[s] in which minority voters make up less than a majority of the voting-age population.” 556 U.S. 1, 13, 23 (2009) (plurality opinion). That is because § 2 “requires a showing that minorities ‘have less opportunity than other members of the electorate to . . . elect representatives of their choice,’” and in crossover districts, minorities “have no better or worse opportunity to elect a candidate than does any other group of voters with

the same relative voting strength.” *Id.* at 14. If such districts could be judicially imposed, courts would be placed “in the untenable position of predicting many political variables and tying them to race-based assumptions.” *Id.* at 17. But courts are inherently ill-equipped to “make decisions based on highly political judgments of th[ese] sort[s].” *Id.* at 17 (cleaned up); *accord Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019) (explaining that “how close does the split need to be for the district to be considered competitive” is an unanswerable political question). Plus, “[i]f § 2 were interpreted to require crossover districts,” “it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.” *Bartlett*, 556 U.S. at 21 (cleaned up).

Of course, “§ 2 allows States to choose their own method of complying with the Voting Rights Act,” and “that may include drawing crossover districts.” *Id.* at 23. But “there is no support for the claim that § 2 can require the creation of crossover districts in the first instance” by a federal court. *Id.* at 24; *accord Caster D. Ct. Dkt.* 179, at 7 (“Plaintiffs are not aware of any case in which a court has approved a Section 2 remedial district with less than a majority-minority voting-age population.”). Nor may a state attempt compliance with § 2 of the Voting Rights Act by using a crossover district when a crossover district violates the state’s own criteria.

In sum, none of the Plaintiffs’ plans provides an appropriate § 2 remedy against the State’s superior 2023 Plan, and the district court had no warrant to order a judicially-created remedial plan.

II. Alabama must have a full opportunity to defend its 2023 Plan.

The district court considered itself “deeply troubled that the State enacted a map that the State readily admits does not provide the remedy we said federal law requires,” adding that it was “disturbed” that Alabama did not have “the ambition to provide the required remedy.” App. 8. The court even said that it was “not aware of any other case in which a state legislature—faced with a federal court order . . . requiring a plan that provides an additional opportunity district—responded with a plan that” “does not provide that district.” *Id.* at 8–9. Likewise, the Plaintiffs have proclaimed that Alabama is somehow “defying” the Supreme Court’s opinion by declining to adopt a proportional representation plan. *See Caster* D. Ct. Dkt. 179, at 1 (“Alabama is in open defiance of the federal courts.”).

All this is quite wrong. Far from being contrary to *Allen*, Alabama’s 2023 Plan faithfully follows it—and the Plaintiffs’ plans disregard it. As shown, Alabama’s 2023 Plan is consistent with a long line of this Court’s precedents holding that states must not subordinate traditional districting principles to race. The Plaintiffs’ remedial plans, on the other hand, perform worse when it comes to those traditional principles because they prioritize super-proportional racial representation. Only the Plaintiffs’ plans depend on splitting up communities of interest into sprawling districts. It is *their* prioritization of proportional representation over neutral districting principles that not only defies this Court but also contradicts their prior arguments.

More fundamentally, this criticism of Alabama ignores the limited nature of initial proceedings like the preliminary injunction affirmed by this Court. The Plaintiffs have never proved that any map violates § 2 on the merits. Alabama has never had

an opportunity to defend any map at trial. The district court never ordered the State to adopt a new map, much less one with an additional majority-minority district. Yet after the State chose to repeal its 2021 Plan and adopt a new plan—as was its prerogative, and without being “required” to do so by any court order—the court below forged ahead with an abbreviated “remedial” proceeding for a tentative injunction against a law that no longer exists. This approach impermissibly relieved the Plaintiffs of their burden in challenging the new plan and deprived Alabama of its right to defend its duly enacted laws.

A. Preliminary proceedings do not decide a case.

Neither the court below nor this Court has held that Alabama’s 2021 Plan violated § 2. That is because the prior proceedings merely involved a preliminary injunction. As this Court explained its holding, “the District Court concluded that plaintiffs’ § 2 claim was likely to succeed under *Gingles*,” and “[b]ased on our review of the record, we agree.” *Allen*, 143 S. Ct. at 1504. This holding does not establish that the 2021 Plan was unlawful. And the entirely different 2023 Plan could not somehow “defy” a non-existent holding.

“At the preliminary injunction stage, the court is called upon to assess the probability of the plaintiff’s ultimate success on the merits.” *Sole v. Wyner*, 551 U.S. 74, 84 (2007). It is “only the parties’ opening engagement,” and any “provisional relief granted” is “tentative” “in view of the continuation of the litigation to definitively resolve the controversy.” *Id.* “[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

The scope of an appellate affirmance of a preliminary injunction—like *Allen*—is similarly circumscribed. The issue before an appellate court considering a preliminary injunction is merely “whether the District Court had abused its discretion in issuing a preliminary injunction,” an inquiry that is “significantly different” from “a final resolution of the merits.” *Id.* at 393. Because of the limited “extent of [the] appellate inquiry,” *Allen* necessarily “intimate[d] no view as to the ultimate merits of [the Plaintiffs’] contentions.” *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 934 (1975) (cleaned up). To read the Court’s decision otherwise is to assign it authority it does not have.

If anything, *Allen* was even narrower than a typical decision of a preliminary injunction appeal. That is because this Court limited its consideration to one preliminary injunction factor: likelihood of success. And the Court merely “affirmed” the court below’s determination “that plaintiffs demonstrated a reasonable likelihood of success on their claim that HB1 violates § 2” and thus its preliminary injunction prohibiting “Alabama from using HB1 in forthcoming elections.” 143 S. Ct. at 1502.

Allen decided nothing more. It did not decide that the State *must* draw two majority-minority districts. The district court repeatedly noted its own prior statement that “as a practical reality, the evidence of racially polarized voting adduced during the preliminary injunction proceedings suggests that any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close to it.” *Singleton*, 582 F. Supp. 3d at 1033; *see* App. 135. According to the district court, that suggestion meant “the remedy” of “an

additional opportunity district” “was required.” *Id.* at 184; *see id.* at 6, 8, 99, 108–09, 126, 132 (all asserting that the court already required an additional district). Not only does that confuse dicta with judicial orders, but this Court’s opinion was to the opposite effect. And the question of an appropriate remedy was simply not before this Court. *Allen* focused on the *Gingles* factors and § 2 standards for liability, not any remedial question.

The State’s briefs in this Court did not address the district court’s “suggestion” of a remedial majority-minority district. As noted, the *Milligan* Plaintiffs affirmatively told this Court that the district court “did not order Alabama to enact Plaintiffs’ plans or even to create a second majority-Black district.” Brief for *Milligan* Appellees, *supra*, at 2; *see also* Oral Arg. Trans. 70:14–16, *Allen*, Nos. 21-1086, 21-1087 (U.S. Oct. 4, 2022) (*Milligan* counsel: “[W]hat plaintiffs are really looking for is not any sort of guarantee of a second majority-minority district.”), <https://tinyurl.com/j6bmknk8w>.

In light of these statements, it beggars belief for the district court and the Plaintiffs to now suggest that anything short of two majority-minority districts is “defying” any court. This Court did not consider that issue, and the Plaintiffs told the Court that the State need *not* draw two majority-minority districts. No one could pretend that *Allen* somehow held—either in its “result” or in “those portions of the opinion necessary to that result”—that the State had to do what the Plaintiffs told this Court it did not have to do. *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 67 (1996); *cf. Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (“Questions which merely lurk in the record, neither brought to the attention of the court nor

ruled upon, are not to be considered as having been so decided as to constitute precedents.” (cleaned up)); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (where an issue was neither “raised in briefs or argument nor discussed in the opinion of the [c]ourt,” there is no “binding precedent on th[e] point”). The district court says that “[t]he Supreme Court did not . . . warn us that we misstated the appropriate remedy,” App. 135, but silence is not an affirmation of an issue not before the Court—and, as explained below, that was a suggestion in dicta in the district court’s prior order.

Thus, neither the State nor the district court was “bound” to require two majority-minority districts. *Seminole*, 517 U.S. at 67. This Court made no such holding (as the issue was not raised or presented), it made no final determination on the merits of *any* issue here, and it *rejected* the proposition that § 2 requires proportionality. The State did not “defy” this Court; those who insist on two majority-minority districts are defying this Court’s repeated admonitions that § 2 is not a proportionality regime.

B. A new law is not a “remedy” subject to summary adjudication.

Based on its misunderstanding about the judicial process and power, the district court held an abbreviated “remedial” hearing about the preliminary injunction against enforcement of a non-existent law. Then it simply ordered the State to use a court-invented law. That approach misallocates the burden of proof and deprives the State of its right to defend its duly enacted laws.

“The States do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law.” *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) (cleaned up). “Districting involves myriad

considerations—compactness, contiguity, political subdivisions, natural geographic boundaries, county lines, pairing of incumbents, communities of interest, and population equality.” *Allen*, 143 S. Ct. at 1513. And “the federal courts are bound to respect the States’ apportionment choices unless those choices contravene federal requirements.” *Voinovich*, 507 U.S. at 156. The “burden of proving an apportionment’s invalidity squarely on the plaintiff’s shoulders.” *Id.* at 155. Conversely, a state is never required “to prove the [i]validity of its own apportionment scheme.” *Id.* at 156. “Of course, the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law.” *Id.*

Here, the preliminary injunction had nothing to do with the State’s 2023 Plan, which was not even enacted yet. The district court had “PRELIMINARILY ENJOIN[ED] Secretary Merrill from conducting any congressional elections according to the [2021] Plan.” *Singleton*, 582 F. Supp. 3d at 936. That injunction was stayed by this Court, and since the stay was lifted, no one contends that a congressional election has been held under the 2021 Plan. The preliminary injunction contained no other *order* requiring the State to do anything about a new plan. The State chose to enact a new map.

There was simply no “required remedy” in the preliminary injunction for the new law “to provide,” as the district court now says over and over. App. 8. This new law, then, cannot be characterized as a “remedy” for a non-existent order. The judicial authority under Article III “amounts to little more than the negative power to disregard an [unlawful] enactment.” *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140

S. Ct. 2335, 2351 n.8 (2020) (plurality opinion) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)). Now that the 2021 Plan has been repealed, any injunction as to that Plan's enforcement is simply inoperative.

The district court's objection to this conclusion underscores its confusion about the nature of Article III's judicial power. According to the district court, requiring Plaintiffs to show that a new law is unlawful would "create[] an endless paradox that only [the State] can break, thereby depriving Plaintiffs of the ability to effectively challenge and the courts of the ability to remedy." App. 126. But challenges to an "old rule" are often "moot." *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020). "[W]here the plaintiff may have some residual claim under the new framework," any prior judgment should be vacated, and "the parties may, if necessary, amend their pleadings or develop the record more fully." *Id.*

Here, of course, there was no final judgment to vacate. And if a state passes a new law that is unlawful, federal courts may intervene in a proper case or controversy if the plaintiff proves his case. If a state "simply re-enacted the same district lines," *Caster* D. Ct. Dkt. 190, at 8, a preliminary injunction would likely not be long in issuing. But federal courts do not sit as permanent "councils of revision." *United States v. Rutherford*, 442 U.S. 544, 555 (1979); see *United States v. Richardson*, 418 U.S. 166, 189 (1974) (Powell, J., concurring) (explaining that under the Council of Revision, "every law passed by the legislature automatically would have been previewed by the Judiciary before the law could take effect"). They decide cases or

controversies, and the 2023 Plan presents a new controversy. This is not “manipulat[ion],” App. 126; it is black-letter Article III law.⁵

Of more concern is what happened here: the court below used a preliminary proceeding against one law to prejudge a new law in an even more abbreviated preliminary proceeding, forcing the State to adopt a court-imposed map without ever allowing it the full opportunity to defend *any* of its plans. Even though the Plaintiffs have the burdens of production and persuasion, the district court did not require the Plaintiffs to prove much at all about the 2023 Plan. Though one section of its lengthy opinion purports to “reset the *Gingles* analysis to ground zero” (after claiming that a reset would be “inconsistent with our understanding of this Court’s judicial power”), that section does no such thing. App. 124, 139. It judges the State’s experts based on its prior “credibility determination[s],” complaining that the State “makes no effort to rehabilitate [one expert’s] credibility.” *Id.* at 141. It complains that “[t]he State does not acknowledge . . . or suggest that any of the problems we identified have been remedied.” *Id.* at 142. It refuses to “defer to the legislative findings” because of its prior finding of likely liability, even while acknowledging that “assum[ing] the truth of our conclusion as a premise of our analysis” was “circular reasoning.” *Id.* at 161–62; *see id.* at 164. The court’s only justification for all this? “This is not an ordinary

⁵ The Eleventh Circuit recently stayed a similar decision treating a new map as “remedial” and thus declining to “consider[] [it] anew.” *Grace, Inc. v. Miami*, No. 1:22-cv-24066, 2023 WL 4853635, at *8 (S.D. Fla. July 30, 2023); *see Grace, Inc. v. Miami*, No. 23-12472, 2023 WL 5286232, at *2 (11th Cir. Aug. 4, 2023). This Court declined to vacate that stay. *Grace, Inc. v. Miami*, No. 23A116, 2023 WL 5284458, at *1 (U.S. Aug. 17, 2023).

case.” *Id.* at 162. But standards and burdens of proving liability apply across Article III cases.

In no other area of law would such contortions be sanctioned in enjoining a state’s duly enacted law. As the district court conceded, if it approached the challenge to the 2023 Plan in an “ordinary” way, its reasoning would be “circular” and unsupportable. *Id.* The district court’s “departure from the statutorily required allocation of burdens” “was error.” *Voinovich*, 507 U.S. at 156. Alabama is due a full opportunity to defend its enacted law, which follows this Court’s opinion in *Allen*.

CONCLUSION

The application should be granted.

Respectfully submitted,

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[#HappeningNow](#) The Alabama Democratic Conference leader Joe Reed says the ADC plans to file an objection to the plans the special master submitted. Reeds says the maps “wont get the job done.” He says the map they prefer has a BVAP of 54% in district 2. [#alpolitics](#)



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