

2024 Dec-17 PM 11:19
U.S. DISTRICT COURT
N.D. OF ALABAMA

**STEVE LIVINGSTON
EVAN MILLIGAN, et al. vs WES ALLEN, et al.**

**August 09, 2023
1-4**

<p style="text-align: right;">Page 1</p> <p>1 IN THE UNITED STATES DISTRICT COURT</p> <p>2 NORTHERN DISTRICT OF ALABAMA</p> <p>3 SOUTHERN DIVISION</p> <p>4</p> <p>5 NO. 2:21-CV-01530-AMM</p> <p>6</p> <p>7 EVAN MILLIGAN, et al.,</p> <p>8 Plaintiffs,</p> <p>9 Vs.</p> <p>10 WES ALLEN, et al.,</p> <p>11 Defendants.</p> <p>12</p> <p>13</p> <p>14 VIDEOTAPED REMOTE DEPOSITION OF:</p> <p>15 STEVE LIVINGSTON</p> <p>16 August 9, 2023</p> <p>17 11:43 A.M.</p> <p>18</p> <p>19</p> <p>20</p> <p>21 REPORTED BY:</p> <p>22 Cindy C. Jenkins, CCR</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 3</p> <p>1 STIPULATIONS</p> <p>2 (continued)</p> <p>3</p> <p>4 IT IS FURTHER STIPULATED AND AGREED</p> <p>5 that it shall not be necessary for any</p> <p>6 objections except as to form or leading</p> <p>7 questions, and that counsel for the parties</p> <p>8 may make objections and assign grounds at the</p> <p>9 time of the trial, or at the time said</p> <p>10 deposition is offered in evidence or prior</p> <p>11 thereto.</p> <p>12</p> <p>13 IT IS FURTHER STIPULATED AND AGREED</p> <p>14 that the notice of filing of the deposition by</p> <p>15 the Commissioner is waived.</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 2</p> <p>1 STIPULATIONS</p> <p>2</p> <p>3 IT IS STIPULATED AND AGREED by and</p> <p>4 between the parties through their respective</p> <p>5 counsel, that the deposition of Steve</p> <p>6 Livingston may be taken before Cindy C.</p> <p>7 Jenkins, Commissioner, via Zoom Video</p> <p>8 Conference, on the 9th day of August, 2023.</p> <p>9</p> <p>10 IT IS FURTHER STIPULATED AND AGREED</p> <p>11 that the signature to and the reading of the</p> <p>12 deposition by the witness is waived, the</p> <p>13 deposition to have the same force and effect</p> <p>14 as if full compliance had been had with all</p> <p>15 laws and rules of Court relating to the taking</p> <p>16 of depositions.</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 4</p> <p>1 APPEARANCES</p> <p>2</p> <p>3 APPEARING ON BEHALF OF THE MILLIGAN</p> <p>4 PLAINTIFFS:</p> <p>5 NAACP LEGAL DEFENSE & EDUCATIONAL FUND</p> <p>6 Mr. Deuel Ross</p> <p>7 Mr. Tanner Lockhead</p> <p>8 700 14th Street, Northwest</p> <p>9 Suite 600</p> <p>10 Washington, DC 20005</p> <p>11 dross@naacpldf.org</p> <p>12</p> <p>13 NAACP LEGAL DEFENSE</p> <p>14 & EDUCATIONAL FUND, INC.</p> <p>15 Ms. Brittany Carter</p> <p>16 40 Rector Street, 5th Floor</p> <p>17 New York, New York 10006</p> <p>18 212-965-2200</p> <p>19 AMERICAN CIVIL LIBERTIES UNION FOUNDATION</p> <p>20 Mr. Davin M. Rosborough</p> <p>21 125 Broad Street</p> <p>22 New York, New York 10004</p> <p>23 drosborough@aclu.org</p> <p>24 APPEARING ON BEHALF OF THE CASTER PLAINTIFFS:</p> <p>25 ELIAS LAW GROUP LLP</p> <p>Mr. Joe Posimato</p> <p>250 Massachusetts Avenue, Northwest</p> <p>Suite 400</p> <p>Washington, D.C. 20001</p> <p>jposimato@elias.law</p> <p>APPEARING ON BEHALF OF THE COCHAIRS, RANDY</p> <p>HINAMAN, STEVE LIVINGSTON, and CHRIS PRINGLE:</p> <p>BALCH & BINGHAM</p> <p>Mr. Dorman Walker</p> <p>105 Tallapoosa Street</p> <p>Suite 200</p> <p>Montgomery, Alabama 36104</p> <p>dwalker@balch.com</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>



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21-cv-01530
2/10/2024 Trial
Milligan Plaintiffs' Exhibit No. 193

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<p>1 APPEARANCES (continued)</p> <p>2</p> <p>3 APPEARING ON BEHALF OF THE SECRETARY OF STATE, WES ALLEN:</p> <p>4 OFFICE OF THE ATTORNEY GENERAL Mr. Jim Davis 5 Assistant Attorney General 501 Washington Avenue 6 Montgomery, Alabama 36130 jim.davis@alabamaag.gov</p> <p>7</p> <p>8 VIDEOGRAPHER: 9 Mr. Bailey Diaz</p> <p>10</p> <p>11 ALSO PRESENT:</p> <p>12 Ms. Joelle Miller 13 Ms. Donna Loftin 14 Mr. Chris Pringle</p> <p>15 16 17 18 19 20 21 22 23 24 25</p>	<p>Page 5</p> <p>1 PROCEEDINGS</p> <p>2 AUGUST 9, 2023 11:43 A.M.</p> <p>3 THE VIDEOGRAPHER: Good morning.</p> <p>4 We're now on the record. The time is now is</p> <p>5 11:43 a.m. on Wednesday, August 9th, 2023.</p> <p>6 This begins the videotaped deposition of Steve</p> <p>7 Livingston taken in the matter of Evan</p> <p>8 Milligan, et al., vs. Wes Allen, et al., the</p> <p>9 case number of which is 2:21-CV-01530-AMM.</p> <p>10 The videographer today is Bailey Diaz. Our</p> <p>11 court reporter is Cindy Jenkins, both</p> <p>12 representing Esquire Deposition Solutions.</p> <p>13 Counsel, would you please announce</p> <p>14 your name for the record and whom you</p> <p>15 represent after which the court reporter will</p> <p>16 swear in the witness.</p> <p>17 MR. ROSBOROUGH: Sure. Good</p> <p>18 morning -- good morning there. Good afternoon</p> <p>19 where I am. This is Davin Rosborough</p> <p>20 representing the Milligan plaintiffs.</p> <p>21 MR. DAVIS: Jim Davis representing</p> <p>22 the defendant, Alabama Secretary of State, Wes</p> <p>23 Allen.</p> <p>24 MR. ROSS: Deuel Ross also for the</p> <p>25 Milligan plaintiffs.</p>
<p>Page 6</p> <p>1 I N D E X</p> <p>2 WITNESS PAGE</p> <p>3 STEVE LIVINGSTON</p> <p>4 Examination by Mr. Rosborough 9</p> <p>5</p> <p>6 INDEX OF EXHIBITS</p> <p>7 NUMBER PAGE</p> <p>8 Exhibit 1 12</p> <p>9 Exhibit 2 29</p> <p>10 Exhibit 3 37</p> <p>11 Exhibit 4 41</p> <p>12 Exhibit 5 49</p> <p>13 Exhibit 6 60</p> <p>14 Exhibit 7 63</p> <p>15 Exhibit 8 66</p> <p>16 Exhibit 9 72</p> <p>17 Exhibit 10 74</p> <p>18 Exhibit 11 79</p> <p>19 Exhibit 12 83</p> <p>20 Exhibit 13 89</p> <p>21 Exhibit 14 92</p> <p>22 Exhibit 15 100</p> <p>23 Exhibit 16 102</p> <p>24</p> <p>25</p>	<p>Page 8</p> <p>1 MR. WALKER: Dorman Walker</p> <p>2 representing Senator Steve Livingston.</p> <p>3 There's no one else in the room with us.</p> <p>4 MR. POSIMATO: Hi. This is Joe</p> <p>5 Posimato on behalf of the Caster plaintiffs.</p> <p>6 MR. LOCKHEAD: This is Tanner</p> <p>7 Lockheed also on behalf of the Milligan</p> <p>8 plaintiffs.</p> <p>9 MS. CARTER: This is Brittany</p> <p>10 Carter on behalf of the Milligan plaintiffs.</p> <p>11 MR. ROSBOROUGH: And, again, I'll</p> <p>12 note that Joelle Miller, who is an intern with</p> <p>13 our office is also on the line listening in.</p> <p>14 Also represent.</p> <p>15 COURT REPORTER: I'll also note</p> <p>16 that Mr. Pringle is also present; is that</p> <p>17 correct?</p> <p>18 MR. WALKER: I believe he is.</p> <p>19 COURT REPORTER: Okay. Thank you.</p> <p>20 STEVE LIVINGSTON</p> <p>21 being first duly sworn, was examined and</p> <p>22 testified as follows:</p> <p>23 MR. WALKER: Madam Court Reporter?</p> <p>24 COURT REPORTER: Yes, sir.</p> <p>25 MR. WALKER: It looks like</p>



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<p style="text-align: right;">Page 9</p> <p>1 Ms. Loftin is also present just for the 2 record. 3 COURT REPORTER: Yes, thank you. 4 I have her listed as also present. Thank you 5 so much. All set, Counsel, when you're ready 6 to go on the record. 7 EXAMINATION BY MR. ROSBOROUGH: 8 Q. Good morning, Senator Livingston, 9 how are you today? 10 A. Good morning, sir. How are you? 11 Q. Good. You understand that you're 12 testifying under oath right now; correct? 13 A. Yes, sir. 14 Q. Okay. Is there anything that 15 might prevent you from either understanding my 16 questions or answering truthfully today? 17 A. No, sir. 18 Q. Have you been deposed before? — 19 A. Yes, sir. 20 Q. And when was that? — 21 A. Business lawsuits in the past. 22 I don't remember the years or time frames. 23 Sorry. 24 Q. Okay. Have you ever been deposed 25 in relation to your duties as a senator?</p>	<p style="text-align: right;">Page 11</p> <p>1 discussions with your attorney, what did you 2 do to prepare for your deposition today? 3 A. We had a brief conversation this 4 morning. We had expected additional time. I 5 think it was a little time error or confusion 6 about what time we actually started this 7 morning, so... 8 Q. Okay. Did you meet with anyone 9 other than Mr. Walker in preparation for your 10 deposition? 11 A. No, sir. 12 Q. Did you discuss your testimony 13 today with anyone who was not an attorney? 14 A. No, sir. 15 Q. Okay. Did you review any 16 documents in preparation for your deposition 17 today? 18 A. Some, yes, sir. 19 Q. Do you recall which documents you 20 reviewed? 21 A. Most would have been the 22 interrogatories and the -- what's the word 23 I'm looking for? Requests for production the 24 last couple of days. 25 Q. Okay. And are you referring to</p>
<p style="text-align: right;">Page 10</p> <p>1 A. No, sir. 2 Q. Okay. I'm just going to make sure 3 we're in agreement on a few basic ground rules 4 today before we jump in. Obviously I'll be 5 asking you some questions. If you don't 6 understand a question, just let me know. If 7 I -- if you answer the question I'm going to 8 assume that you understood the question; is 9 that fair? 10 A. Yes, sir. 11 Q. Okay. And also Ms. Jenkins, the 12 court reporter, is here typing everything that 13 you and I are saying and will type anything 14 that anyone on the zoom conference says. So 15 it's important that only one person speaks at 16 a time; therefore, please allow me to finish 17 my questions and sentences even if you think 18 you anticipate what I might -- where I may be 19 going, and I will do the best -- do the best 20 to do the same with you before jumping into 21 the next question, if that sounds all right to 22 you? 23 A. Thank you. 24 Q. Okay. Okay. Senator Livingston, 25 without disclosing the content of any</p>	<p style="text-align: right;">Page 12</p> <p>1 the responses to the interrogatories that your 2 counsel produced to us on your behalf 3 yesterday? 4 A. Yes, sir. 5 Q. Okay. Did you do anything else to 6 prepare for your deposition that we haven't 7 covered? 8 A. No, sir. 9 Q. Okay. We just mentioned, I 10 believe, that you recently responded to 11 written questions known as interrogatories 12 from the plaintiffs in this case; is that 13 correct? 14 A. Yes, sir, I think so. 15 MR. ROSBOROUGH: Okay. Can we 16 please pull up Exhibit 1? 17 Q. Senator Livingston, are you able 18 to see the screen okay? 19 (Whereupon, Exhibit 1 was marked 20 for identification.) 21 THE WITNESS: Yes, sir. 22 Q. (By Mr. Rosborough) We'll just 23 sort of give you a bird's eye view. I'm not 24 going to ask you any particular question about 25 these at that time moment. But if we could</p>



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<p style="text-align: right;">Page 13</p> <p>1 just scroll down really quickly and see if you 2 can affirm that these are the interrogatory 3 responses to which you were referring? 4 A. They look so, yes. 5 Q. Okay. And is that your signature 6 on the bottom? 7 A. Yes, sir. 8 Q. Okay. And to the best of your 9 knowledge, these are still your true and 10 accurate responses? 11 A. Yes, sir. 12 MR. ROSBOROUGH: Okay. We can 13 take that down. Thank you. 14 Q. Senator, where are you from in 15 Alabama? 16 A. I reside in Scottsboro, Alabama, 17 which is the northeast corner of Alabama. 18 Q. All right. And you represent 19 Senate District 8; is that correct? 20 A. Yes, sir, I do. 21 Q. Have you lived in other parts of 22 Alabama before? 23 A. Some brief times in Huntsville, 24 Birmingham back in college days and 25 Tuscaloosa in college days.</p>	<p style="text-align: right;">Page 15</p> <p>1 I'm sorry. 2 Q. That's all right. You can only 3 testify to the best of your recollection. 4 How about this, were you a member 5 of the committee during the 2021 redistricting 6 process? 7 A. I was a member during that time 8 frame, yes, sir. 9 Q. Okay. Were you a member -- strike 10 that. We can move on from there. 11 When did you learn that you were 12 going to be appointed as cochair of the 13 committee? 14 A. Roughly the end of last year's 15 legislative session, 2022's legislative 16 session. 17 Q. Okay. Do you have any 18 understanding of why you were chosen to serve 19 as cochair? 20 A. No, sir. 21 Q. All right. I'd like to switch 22 gears and start talking about maps. That's 23 why we're here after all. 24 At what point after the Supreme -- 25 well, let me step back. If I refer to the</p>
<p style="text-align: right;">Page 14</p> <p>1 Q. Okay. Have you ever lived in the 2 Gulf Coast area? 3 A. No, sir, I have not. 4 Q. Okay. Have you ever lived in the 5 area you consider as being part of the Black 6 Belt of Alabama? 7 A. No, sir. 8 Q. Okay. Senator, when approximately 9 were you appointed as cochair of the joint 10 reapportionment committee? 11 A. I don't remember the date. It 12 would have been last year at the end of the 13 legislative session approximately. 14 Q. Okay. Just for our -- purposes of 15 brevity and mutual understanding, if I refer 16 to the committee, will you understand that 17 to -- me to be referring to the joint 18 reapportionment committee? 19 A. Yes, sir. 20 Q. Okay. Before your appointment as 21 cochair, did you serve on the committee? 22 A. I did, yes, sir. 23 Q. When were you initially appointed 24 to the committee? 25 A. I honestly don't remember, sir.</p>	<p style="text-align: right;">Page 16</p> <p>1 Supreme Court's decision generally, will you 2 understand me to be referring to the decision 3 in this case, the Allen v. Milligan case? 4 A. Yes, sir. 5 Q. Okay. So at what point did you 6 begin your work as cochair as -- looking at 7 the possibility of a new congressional 8 districting map after the Supreme Court's 9 decision? 10 A. I would assume it would have 11 been the week following the Court decision 12 that the chairs got together with the 13 attorneys and discussed what -- some decision 14 of a plan and how we needed to be prepared 15 going forward. 16 Q. Okay. And without asking you to 17 discuss the content of the conversation with 18 the attorneys, what attorneys are you 19 referring to? 20 A. It would have been -- Dorman 21 Walker would have been the attorney. That 22 would have been the only one present at that 23 meeting. 24 Q. Okay. After that initial meeting, 25 what were your next steps as -- in your role</p>



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<p style="text-align: right;">Page 17</p> <p>1 as cochair?</p> <p>2 A. We established a meeting of the</p> <p>3 cochaIRS, the attorney, I think Mr. Hinaman</p> <p>4 was in that room the next time. And then</p> <p>5 from there, we established the steps of</p> <p>6 moving forward until we knew what the dates</p> <p>7 were that we were given by the -- by the</p> <p>8 governor for the special session.</p> <p>9 Q. Okay. And when you say "we," who</p> <p>10 specifically are you referring to?</p> <p>11 A. So that would have Chairman</p> <p>12 Pringle, Dorman, and then probably Randy --</p> <p>13 Mr. Hinaman would have been at one of these</p> <p>14 meetings. Other than that -- it would have</p> <p>15 been that. And likely Donna Loftin would</p> <p>16 have been there also as supervisor of the</p> <p>17 reapportionment office.</p> <p>18 Q. Okay. Did you consult with anyone</p> <p>19 else about the process at that point who was</p> <p>20 not in the meeting?</p> <p>21 A. I'm sorry. You dropped a little</p> <p>22 bit. Can you repeat that?</p> <p>23 Q. Oh, I'm sorry. Sure. Sure.</p> <p>24 Other than the people who were in</p> <p>25 the meeting, do you recall consulting with</p>	<p style="text-align: right;">Page 19</p> <p>1 we were going to have as we moved in towards</p> <p>2 the special session date.</p> <p>3 Q. Do you recall from the meeting</p> <p>4 that you had with representative</p> <p>5 Representative Pringle and Mr. Walker and</p> <p>6 Mr. Hinaman if anyone gave Mr. Hinaman a</p> <p>7 charge leaving the meeting in terms of</p> <p>8 starting work on a new map?</p> <p>9 A. I don't remember exactly, no,</p> <p>10 sir.</p> <p>11 Q. Okay. Do you recall how the map</p> <p>12 drawing process itself got started?</p> <p>13 A. I do not, sir. I'm sorry.</p> <p>14 Q. Okay. Tell me about the first</p> <p>15 meeting that the full reconstituted</p> <p>16 reapportionment committee had to the best of</p> <p>17 your recollection.</p> <p>18 A. The meeting was called to order.</p> <p>19 We had to elect -- reelect cochaIRS, which</p> <p>20 Representative Pringle was elected, and I was</p> <p>21 elected as cochaIRS from that full</p> <p>22 membership. We had conversation about the,</p> <p>23 again, the public hearings that we wanted to</p> <p>24 have, the process of submitting maps to the</p> <p>25 reapportionment office so they could be</p>
<p style="text-align: right;">Page 18</p> <p>1 anyone else about the process moving forward?</p> <p>2 A. No, sir.</p> <p>3 Q. All right. What were your next</p> <p>4 steps in the process of looking at new maps</p> <p>5 after that -- after that meeting with you and</p> <p>6 Mr. Walker and Representative Pringle and</p> <p>7 Mr. Hinaman?</p> <p>8 A. I'm not sure I can recall that</p> <p>9 to be honest with you. It was a pressed time</p> <p>10 frame, and I just don't recall. I'm sorry.</p> <p>11 Q. From that first meeting, were</p> <p>12 there any specific next steps set out for any</p> <p>13 of the participants?</p> <p>14 A. So the legislature had gone down</p> <p>15 to a -- a term committee, which you remember</p> <p>16 would have been three members of the senate</p> <p>17 and then three members of the house with</p> <p>18 Chairman Pringle and I being cochair. I</p> <p>19 think we had a meeting of that and asked</p> <p>20 the -- it would have been the lieutenant</p> <p>21 governor and the speaker of the house to</p> <p>22 recreate the full standing committee back to</p> <p>23 the membership. And then we would have a</p> <p>24 meeting of that membership and discussed the</p> <p>25 guidelines there and the public hearings that</p>	<p style="text-align: right;">Page 20</p> <p>1 populated, the last date of what they could</p> <p>2 be submitted. I think it was a week or ten</p> <p>3 days prior, is that correct, Dorman? I</p> <p>4 forgotten. So a week or ten days prior to</p> <p>5 the start of the legislative session so they</p> <p>6 could be populated on the computer.</p> <p>7 Q. Okay. Did you discuss in</p> <p>8 enactment of redistricting guidelines at that</p> <p>9 meeting?</p> <p>10 A. Yes, we did. Yes, sir.</p> <p>11 Q. And what do you recall about that</p> <p>12 discussion?</p> <p>13 A. There was some conversation</p> <p>14 about whether they needed to changed or not.</p> <p>15 Ultimately the committee voted not to change</p> <p>16 them.</p> <p>17 Q. Okay. And what was your view in</p> <p>18 that regard as to whether or not the</p> <p>19 guidelines needed to be changed from the 2021</p> <p>20 guidelines?</p> <p>21 A. My view?</p> <p>22 Q. Yes, sir.</p> <p>23 A. I guess my view is a committee's</p> <p>24 view because they elected not to change them.</p> <p>25 Q. Okay. Did you have -- did you</p>



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<p style="text-align: right;">Page 21</p> <p>1 have another view other than the committee 2 view at that time? 3 A. No, sir. 4 Q. All right. At that point in 5 time -- well, let me step back. 6 How did Mr. Hinaman come to be 7 involved in the map drawing process? 8 A. He has been the demographer 9 for -- or I guess that's the terminology -- 10 for the state for some time and was brought 11 in to -- to help us with the maps as we moved 12 forward. 13 Q. At the point before any public 14 hearings started, was there anyone else 15 besides Mr. Hinaman brought in to help either 16 draw or evaluate maps? 17 A. Not that I'm aware of. 18 Q. Okay. When did -- let me ask. -- 19 Are you familiar with Dr. M.V. Hood, III, 20 better known as Trey Hood from the University 21 of Georgia? 22 A. Just that I understood he 23 provided performance analysis for us. 24 Q. Do you have an understanding of 25 when he became involved in the process?</p>	<p style="text-align: right;">Page 23</p> <p>1 A. I did not individually. I think 2 the committee may have offered some 3 guidelines or some guidance to him as maps 4 were being submitted. 5 Q. And do you recall what guidelines 6 or guidance were given to Mr. Hinaman at that 7 time? 8 A. I think they asked him to abide 9 by the guidelines that were adopted by the 10 committee and move forward from there. 11 Q. Okay. Do you recall if any 12 instructions were given to Mr. Hinaman in 13 regards to the -- either the District Court or 14 the Supreme Court's order in this case? 15 A. I think the word "opportunity" 16 was mentioned, yes. 17 Q. Okay. What do you recall about 18 the -- what was said to Mr. Hinaman regarding 19 the word opportunity? 20 A. I think that the -- it was 21 expressed to him that the Court's ordered us 22 to look at an opportunity district -- 23 districts. 24 Q. Okay. And at that point in time, 25 what was your understanding of what that</p>
<p style="text-align: right;">Page 22</p> <p>1 A. No, sir, I really don't know 2 when he got involved in the process. 3 Q. Do you recall a point in time when 4 any instructions were given to Mr. Hinaman to 5 start working on a map or maps? 6 A. I do not specifically, no, sir. 7 Q. Do you recall, putting aside any 8 particular time frame, any particular 9 instructions that were given to Mr. Hinaman 10 about drawing a new map? 11 A. I do not personally, no, sir. 12 Q. Okay. Were you involved in any 13 conversations with Mr. Hinaman about the 14 drawing of a new map or maps? 15 A. There was a lot of conversation 16 about a lot of different maps. And just to 17 be fair, they all kind of run together until 18 you sit down and look at them individually. 19 Q. Okay. And we will definitely do 20 that. Broadly, at this point in time, 21 before -- before the public hearings, do you 22 recall providing any input to Mr. Hinaman 23 about what you wanted to see in a map? 24 A. Individually or as a committee? 25 Q. Let's start with individually.</p>	<p style="text-align: right;">Page 24</p> <p>1 meant? 2 A. That's very vague. 3 Q. Okay. At this point in time, do 4 you have an understanding of what that term 5 means? 6 A. It's still very vague. 7 Q. All right. Despite the vagueness, 8 how -- what is -- even if vague, what is your 9 understanding of what the term "opportunity 10 district" means in this context? 11 A. Would you repeat that for me, 12 please? 13 Q. Sure. Sure. 14 Even if vague or uncertain, what 15 is your understanding of that term opportunity 16 district means in this context? 17 A. As I understand it, the Courts 18 have ordered us to provide two opportunity 19 districts, minority -- majority minority 20 opportunity districts. 21 Q. And what is your sense of what it 22 means to provide two minority opportunity 23 districts? 24 A. Again, that's very vague. And I 25 think it's to a matter of interpretation.</p>



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<p style="text-align: right;">Page 25</p> <p>1 Q. Do you have an interpretation?</p> <p>2 A. I do not, sir.</p> <p>3 Q. And let me go back. Okay.</p> <p>4 Do you -- without revealing any</p> <p>5 conversations with counsel, do you -- did you</p> <p>6 hear from others as to -- who were involved</p> <p>7 with the process as to where their conception</p> <p>8 of having two minority opportunity districts</p> <p>9 are?</p> <p>10 A. Are you in reference to</p> <p>11 committee members, sir, or outsiders or --</p> <p>12 Q. Let's start with committee</p> <p>13 members. That would be great.</p> <p>14 A. Our committee members expressed</p> <p>15 some interest and some, I think, again, they</p> <p>16 were very vague at the definition of what it</p> <p>17 was while our minority members were pretty</p> <p>18 specific about they thought it meant that we</p> <p>19 had to draw two majority minority districts,</p> <p>20 not opportunity districts.</p> <p>21 Q. Okay. Under your conception of</p> <p>22 opportunity districts, would having a second</p> <p>23 district where African American voters would</p> <p>24 not have won across a series of previous</p> <p>25 statewide elections qualify as an opportunity</p>	<p style="text-align: right;">Page 27</p> <p>1 Q. Okay. If there's a history of</p> <p>2 African American preferred congressional</p> <p>3 candidates not being well-funded, does that --</p> <p>4 did that factor into your decision at all?</p> <p>5 MR. WALKER: Objection to form.</p> <p>6 If you understand the question, you may answer</p> <p>7 it.</p> <p>8 THE WITNESS: I don't understand</p> <p>9 the question, so...</p> <p>10 Q. (By Mr. Rosborough) Let me</p> <p>11 actually ask something a little different. I</p> <p>12 think that wasn't a great question. Where did</p> <p>13 your belief come from that an opportunity</p> <p>14 district meant even if African American</p> <p>15 preferred candidates would have lost in all of</p> <p>16 the previous reconstituted race, if analyzed,</p> <p>17 if -- it was nonetheless an opportunity</p> <p>18 district if a black preferred candidate was</p> <p>19 well-funded and well-known? Where did that</p> <p>20 belief stem from?</p> <p>21 A. I'm going to tell you this came</p> <p>22 from back home. I live in a community of</p> <p>23 about 15,000 people with the African American</p> <p>24 population of less than 5 percent. And our</p> <p>25 election cycle there in the city, we -- we</p>
<p style="text-align: right;">Page 26</p> <p>1 district?</p> <p>2 A. Could I ask you to repeat that</p> <p>3 for me?</p> <p>4 Q. Sure. Let's say that there is</p> <p>5 analysis where the second district, which is</p> <p>6 supposed to be a minority opportunity</p> <p>7 district, that that -- that that is</p> <p>8 reconfigured to run past election results and</p> <p>9 those results show that in all, let's say,</p> <p>10 seven of the elections run, minority or</p> <p>11 African American particularly preferred</p> <p>12 candidates would have lost. Does that, in</p> <p>13 your definition, qualify as an opportunity</p> <p>14 district?</p> <p>15 A. If there were high enough</p> <p>16 percentages -- if they had been well-funded</p> <p>17 and a well-known candidate, in some</p> <p>18 instances, yes.</p> <p>19 Q. Is there a particular threshold</p> <p>20 for how close prior races would need to be</p> <p>21 such that you believed a well-funded and</p> <p>22 well-known candidate preferred by African</p> <p>23 American voters might make that a race that</p> <p>24 they could win?</p> <p>25 A. I do not have a number, no, sir.</p>	<p style="text-align: right;">Page 28</p> <p>1 had an African American female beat a sitting</p> <p>2 city council president handily, and we had an</p> <p>3 African American male beat a sitting school</p> <p>4 board candidate, not so handily, by one vote.</p> <p>5 I think it's about the person and the</p> <p>6 candidate.</p> <p>7 Q. Okay. And with these two African</p> <p>8 American candidates, do you have any idea</p> <p>9 whether those candidates were preferred by a</p> <p>10 majority of African American voters in the</p> <p>11 area?</p> <p>12 A. I think so and probably by white</p> <p>13 voters also.</p> <p>14 Q. Okay. And what's your basis of</p> <p>15 belief that these two African American</p> <p>16 candidates were also the candidates who were</p> <p>17 preferred by African American voters?</p> <p>18 A. Because they won pretty handily</p> <p>19 in a relatively small minority district, less</p> <p>20 than 5 percent.</p> <p>21 Q. Okay. Do you have any other basis</p> <p>22 for your belief about an opportunity district</p> <p>23 being one in which it would require an African</p> <p>24 American preferred candidate to be well-funded</p> <p>25 and well-known, any other sources for that</p>



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<p style="text-align: right;">Page 29</p> <p>1 belief?</p> <p>2 A. No, sir.</p> <p>3 MR. ROSBOROUGH: Okay. Can we</p> <p>4 pull up what we've marked as Exhibit No. 2,</p> <p>5 please.</p> <p>6 (Whereupon, Exhibit 2 was marked</p> <p>7 for identification.)</p> <p>8 MR. ROSBOROUGH: Yeah, if we</p> <p>9 can enlarge that a little maybe, the text.</p> <p>10 There we go. Perfect. Thank you.</p> <p>11 Q. Feel free to take a minute to look</p> <p>12 at that Senator Livingston. But once you've</p> <p>13 had chance to look at that, can you let me</p> <p>14 know if you recognize this what appears to be</p> <p>15 e-mail?</p> <p>16 A. Yes, sir.</p> <p>17 Q. Okay. And what is this e-mail?</p> <p>18 A. I think that was actually a text —</p> <p>19 message that came to me from State Party</p> <p>20 Chairman *John Waugh asking me to have a</p> <p>21 meeting with -- what's his name? Having a</p> <p>22 phone call, not a meeting, Dale Oldham is</p> <p>23 what that came from.</p> <p>24 Q. Okay. Do you remember when you</p> <p>25 got this message?</p>	<p style="text-align: right;">Page 31</p> <p>1 whether Mr. Oldham played any role in this</p> <p>2 redistricting process?</p> <p>3 A. No, sir, I am not.</p> <p>4 MR. ROSBOROUGH: Okay. We can</p> <p>5 take that down.</p> <p>6 Q. Before we move on, I want to</p> <p>7 ask -- come back and ask a couple of questions</p> <p>8 about the two races that you referred to where</p> <p>9 you said there had been two African American</p> <p>10 candidates who had won local races. What</p> <p>11 specific races are you referring to, Senator</p> <p>12 Livingston, just so the record is clear?</p> <p>13 A. City council race and a city</p> <p>14 school board race.</p> <p>15 Q. And this is in Scottsboro?</p> <p>16 A. Yes, sir.</p> <p>17 Q. Okay. And do you know if any</p> <p>18 statistical analysis of racially polarized</p> <p>19 voting or otherwise were performed to</p> <p>20 determine candidate of choice by race in</p> <p>21 either of those races?</p> <p>22 A. No, sir.</p> <p>23 Q. Okay. I'm sorry. Do you recall</p> <p>24 the names of those candidates who won?</p> <p>25 A. The candidates?</p>
<p style="text-align: right;">Page 30</p> <p>1 A. No, sir, I do not. It's been a</p> <p>2 few weeks ago.</p> <p>3 Q. Okay. Did you end up -- well, to</p> <p>4 the best of your understanding was Mr. Oldham</p> <p>5 retained as counsel to -- well, let me back</p> <p>6 up. To the best of your knowledge, is</p> <p>7 Mr. Oldham one of your counsel?</p> <p>8 A. No, sir.</p> <p>9 Q. Okay. Did you ever have a</p> <p>10 conversation with Mr. Oldham?</p> <p>11 A. No, sir, I did not.</p> <p>12 Q. And why not?</p> <p>13 MR. WALKER: I'm going to assert</p> <p>14 privilege here and instruct the witness not to</p> <p>15 answer to the extent that his response would</p> <p>16 include any advice that I gave him.</p> <p>17 Q. (By Mr. Rosborough) Okay.</p> <p>18 Let me revise that question then.</p> <p>19 So without revealing any conversations you had</p> <p>20 with Mr. Walker, are you able to say outside</p> <p>21 of any conversations why you chose not to meet</p> <p>22 with Mr. Oldham?</p> <p>23 A. I was advised by counsel not to</p> <p>24 meet with him.</p> <p>25 Q. Okay. And are you aware of</p>	<p style="text-align: right;">Page 32</p> <p>1 Q. Yes. Yes, sir.</p> <p>2 A. The city council was Nita</p> <p>3 Tolliver.</p> <p>4 Q. Okay.</p> <p>5 A. And the school board was Gary</p> <p>6 Speers, Dr. Gary Speers.</p> <p>7 Q. And do you know if these were</p> <p>8 partisan or nonpartisan races?</p> <p>9 A. Nonpartisan races.</p> <p>10 Q. Nonpartisan. Okay.</p> <p>11 And do you know the race of the --</p> <p>12 of their opponents?</p> <p>13 A. The two opponents?</p> <p>14 Q. Yes, sir.</p> <p>15 A. They were both white. They were</p> <p>16 both white; one male, one female.</p> <p>17 Q. Okay.</p> <p>18 A. The black female beat a white</p> <p>19 male and the black male beat a white female.</p> <p>20 Q. Okay. I'd like to switch gears</p> <p>21 and talk about the July 13th, 2023 committee</p> <p>22 meeting and public hearing. Just to help</p> <p>23 refresh your memory, this was the Thursday</p> <p>24 before the special session started. Do you</p> <p>25 recall that meeting generally?</p>



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<p style="text-align: right;">Page 33</p> <p>1 A. I recall it, yes, sir.</p> <p>2 Q. Okay. At that point during that</p> <p>3 meeting, the only maps that had been</p> <p>4 introduced publicly were maps that were</p> <p>5 submitted by members of the public and the</p> <p>6 plaintiffs in various cases. Is that your</p> <p>7 understanding?</p> <p>8 A. I don't recall, but likely, yes.</p> <p>9 Q. Okay. What was the status of the</p> <p>10 committee majorities map drawing efforts at</p> <p>11 that point in time?</p> <p>12 A. The committee majority?</p> <p>13 Q. Well, let's take a step back. At</p> <p>14 the point of that Thursday meeting, what was</p> <p>15 your involvement in any maps that were being</p> <p>16 drafted, whether or not they were finished?</p> <p>17 A. I don't think there were any</p> <p>18 maps finished on that Thursday. I think we—</p> <p>19 were waiting to take public input before we</p> <p>20 came through with a map and brought it —</p> <p>21 forward.</p> <p>22 Q. Was Mr. Hinaman working on drafts</p> <p>23 of maps at that point?</p> <p>24 A. I don't remember if Mr. Hinaman</p> <p>25 was there on that Thursday or not to be</p>	<p style="text-align: right;">Page 35</p> <p>1 at all, did Mr. Hinaman take account of public</p> <p>2 input that was received during those hearings?</p> <p>3 A. I can't answer that question.</p> <p>4 Q. How, if at all, did you take</p> <p>5 account for input received during those two</p> <p>6 public hearings?</p> <p>7 A. We had a court reporter -- a</p> <p>8 reporter there that was online taking all of</p> <p>9 the information down and providing that and</p> <p>10 provided it to the committee. It was taken.</p> <p>11 And we had conversations about it and --</p> <p>12 afterwards, but it was somewhat brief.</p> <p>13 Q. Okay. What do you recall about</p> <p>14 the conversation, the brief conversation you</p> <p>15 mentioned afterwards about the testimony?</p> <p>16 A. I think that was about the same</p> <p>17 time frame we had the large number of maps</p> <p>18 that had been submitted online because</p> <p>19 Thursday was the deadline -- I believe that</p> <p>20 Thursday was the deadline. I believe that's</p> <p>21 right. But we had had a large number of maps</p> <p>22 submitted online by any number of folks,</p> <p>23 including some from Paris, France. So I</p> <p>24 don't remember the conversation, I apologize.</p> <p>25 Q. That's all right.</p>
<p style="text-align: right;">Page 34</p> <p>1 honest.</p> <p>2 Q. Do you recall if anyone else --</p> <p>3 I'm sorry. Go ahead and finish.</p> <p>4 A. I don't -- I just don't recall</p> <p>5 if he was -- if he was in Montgomery on that</p> <p>6 date, I'm sorry.</p> <p>7 Q. That's all right.</p> <p>8 Are you aware of whether</p> <p>9 Mr. Hinaman was working on maps at that point</p> <p>10 in time, whether or not he was in Montgomery?</p> <p>11 A. I don't know whether he was in</p> <p>12 Montgomery or not. But I feel sure that he</p> <p>13 was trying to work on some maps, yes.</p> <p>14 Q. Okay. And at that point in time,</p> <p>15 do you know of any specific guidance he had</p> <p>16 been given on the maps he was drawing?</p> <p>17 A. The guidance he had given were</p> <p>18 the guidelines that we had adopted at the</p> <p>19 committee.</p> <p>20 Q. Okay. The Thursday, July 13th</p> <p>21 hearing was the second public hearing that had</p> <p>22 occurred; is that correct?</p> <p>23 A. I believe that's correct, yes,</p> <p>24 sir.</p> <p>25 Q. Okay. After that hearing, how, if</p>	<p style="text-align: right;">Page 36</p> <p>1 Did public input you received at</p> <p>2 either of those hearings change any of the</p> <p>3 guidance that were given to either Mr. Hinaman</p> <p>4 or anyone else working on a map?</p> <p>5 A. I don't think so, no, sir.</p> <p>6 Q. Do you recall at the beginning of</p> <p>7 the public portion of that hearing several</p> <p>8 individuals were called up to speak about</p> <p>9 communities of interest?</p> <p>10 A. Yes, sir.</p> <p>11 Q. And I think I'm speaking</p> <p>12 specifically, I believe the first few were</p> <p>13 Mike Schmitz, who is the former mayor of</p> <p>14 Dothan, and Jeff Brannon, the CEO of Flowers</p> <p>15 Hospital. Do you recall that?</p> <p>16 A. Yes, sir.</p> <p>17 Q. Did you have a role in calling</p> <p>18 those witnesses to come testify at the public</p> <p>19 hearing?</p> <p>20 A. I did not. I was told by a</p> <p>21 committee member that he wanted to have them</p> <p>22 come to testify, that they thought the</p> <p>23 Wiregrass was significant as a community of</p> <p>24 interest.</p> <p>25 Q. Okay.</p>



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<p style="text-align: right;">Page 37</p> <p>1 MR. ROSBOROUGH: Can we pull up 2 exhibit No. 3, please? 3 (Whereupon, Exhibit 3 was marked 4 for identification.) 5 Q. (By Mr. Rosborough) Is this a text 6 message you received, Senator Livingston? 7 A. Yes, sir, it is. 8 Q. And who is that text message from? 9 A. That's from committee member 10 Senator Chasteen. 11 Q. Okay. Was Senator Chasteen the 12 one who asked for Mr. Schmitz and Mr. Brannon 13 to be called as witnesses? 14 MR. WALKER: I'm going to assert 15 legislative privilege and immunity here. 16 Apparently this was an inadvertent disclosure 17 of a communication from Senator Chasteen which 18 we would ask to be returned. And I will 19 instruct the witness not the answer any 20 questions about what Senator Chasteen told 21 him. 22 MR. ROSBOROUGH: Okay. We can 23 pull that down for the moment then. Thank 24 you. 25 MR. WALKER: Thank you.</p>	<p style="text-align: right;">Page 39</p> <p>1 come and testify at the hearing? 2 A. No, sir. 3 Q. Are you aware of whether Cochair 4 Pringle had any role in having any specific 5 witnesses come and testify at that hearing? 6 A. I am not, sir. 7 Q. Okay. Let's move on and talk a 8 little bit about the committee guidelines I 9 think you referenced. Am I correct that at 10 the July 13th committee meeting that we've 11 been speaking about, the committee voted to 12 readopt the 2021 legislative redistricting 13 guidelines? 14 A. Yes, sir. 15 Q. Okay. Was there any prior 16 discussion that you were involved in whether 17 to readopt those guidelines or change the 18 guidelines? 19 A. No, sir. 20 Q. Why did you choose to readopt the 21 prior guidelines personally? 22 A. They seemed to serve us well. I 23 don't remember the conversation around it to 24 be honest. So... 25 Q. Okay. Do you recall that, I</p>
<p style="text-align: right;">Page 38</p> <p>1 MR. ROSBOROUGH: And obviously 2 we'll reserve our rights to challenge that 3 assertion of privilege. But we can -- we can 4 move past that for the moment. 5 MR. WALKER: Certainly. 6 MR. ROSBOROUGH: Okay. 7 Q. Senator Livingston, separate and 8 apart from any conversation you had with 9 Senator Chasteen, did you have any other 10 understanding of why Mr. Schmitz and 11 Mr. Brannon appeared to testify first and 12 second at the hearing? 13 A. Would you repeat that for me, 14 please? 15 Q. Sure. Separate and apart -- I'm 16 not asking you about you any conversations you 17 had Senator Chasteen. Separate and apart from 18 those, do you have any understanding of why 19 Mr. Schmitz and Mr. Brannon were called as 20 witnesses to testify first and second at that 21 hearing? 22 A. I do not, sir, I'm sorry. 23 Q. Separate and apart from 24 Mr. Schmitz and Mr. Brannon, did you have any 25 role in asking any other specific witnesses to</p>	<p style="text-align: right;">Page 40</p> <p>1 believe it was Representative England, offered 2 an amendment to the guidelines at that 3 meeting? 4 A. Yes, sir, he did. 5 Q. Okay. And does it sound correct 6 that the guidelines -- the amendment that he 7 offered specifically concerned instructions 8 about compliance with the Court's order and 9 Voting Rights Act? 10 A. I don't remember what it 11 contained, no, sir I'm sorry. 12 Q. Okay. 13 Did you vote against 14 Representative England's amendment? 15 A. Yes, sir. 16 Q. Why did you choose to vote against 17 that amendment? 18 A. It didn't feel like it was 19 necessary. 20 Q. And why was that? 21 A. We felt like the guidelines were 22 accurate as they were. 23 MR. ROSBOROUGH: Let's pull up 24 Exhibit 4, please. 25 (Whereupon, Exhibit 4 was marked</p>



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<p style="text-align: right;">Page 41</p> <p>1 for identification.)</p> <p>2 MR. ROSBOROUGH: Tanner, if you</p> <p>3 could slowly scroll down there.</p> <p>4 Q. (By Mr. Rosborough) So</p> <p>5 Representative -- I'm sorry, Senator</p> <p>6 Livingston, do those appear to be the 2021</p> <p>7 guidelines which the committee reenacted as</p> <p>8 guidelines for the 2023 process?</p> <p>9 A. It looks like that, yes, sir.</p> <p>10 Q. Okay.</p> <p>11 MR. ROSBOROUGH: Let's scroll down</p> <p>12 to page 3 of the guidelines if we can.</p> <p>13 Q. Okay. And can you see, Senator</p> <p>14 Livingston, the guideline on the -- toward the</p> <p>15 top half of the page that's marked with small</p> <p>16 Roman numeral 6 above G.</p> <p>17 A. Yes, sir.</p> <p>18 Q. Okay. And just so it's clear,</p> <p>19 that -- that guideline reads, In establishing</p> <p>20 legislative districts, the reapportionment</p> <p>21 committee shall give due consideration to all</p> <p>22 the criteria herein. However, priority is to</p> <p>23 be given to the compelling state interest</p> <p>24 requiring equality of population among</p> <p>25 districts and compliance with the Voting</p>	<p style="text-align: right;">Page 43</p> <p>1 provision suggests those as the three most</p> <p>2 important factors to you?</p> <p>3 A. I'm missing your question. I'm</p> <p>4 sorry.</p> <p>5 Q. Sure. Well, you referred to --</p> <p>6 you referred to three factors that I think you</p> <p>7 just confirmed, which were not pairing</p> <p>8 incumbents, communities of interest, and</p> <p>9 compactness. But I don't see any of those</p> <p>10 words in that paragraph. So my question to</p> <p>11 you is: What about that paragraph conveyed to</p> <p>12 you that those three considerations were the</p> <p>13 most important considerations?</p> <p>14 A. I'm still not following your</p> <p>15 question. My apologies.</p> <p>16 Q. Sure.</p> <p>17 Well, that paragraph that we just</p> <p>18 read states in part that priority is to be</p> <p>19 given to requiring equality of population and</p> <p>20 compliance with the Voting Rights Act should</p> <p>21 those requirements conflict with any other</p> <p>22 criteria. Am I correct in generally</p> <p>23 summarizing that paragraph?</p> <p>24 A. Okay. Yes, sir.</p> <p>25 Q. Okay. But then you referenced to</p>
<p style="text-align: right;">Page 42</p> <p>1 Rights Act of 1965 as amended should the</p> <p>2 requirements of those criteria conflict with</p> <p>3 any other criteria. Did I read that</p> <p>4 correctly?</p> <p>5 A. Yes, sir.</p> <p>6 Q. What is your understanding of that</p> <p>7 provision in the legislative guidelines?</p> <p>8 A. That we paid attention to</p> <p>9 compactness, communities of interest, not</p> <p>10 having candidates to challenge themselves --</p> <p>11 or challenge each other, as the case may be.</p> <p>12 Q. Okay. And what about that</p> <p>13 paragraph references to you communities of</p> <p>14 interest, compactness, and avoid pairing of</p> <p>15 incumbents?</p> <p>16 A. Would you repeat that again?</p> <p>17 Q. Sure. I believe that you said</p> <p>18 that -- and please correct me if I'm wrong --</p> <p>19 that you understood that paragraph to refer to</p> <p>20 the importance of compactness, respect for</p> <p>21 communities of interest, and not pairing</p> <p>22 incumbents. Did I get your prior statement</p> <p>23 correct there?</p> <p>24 A. Yes, sir.</p> <p>25 Q. Okay. So what about this</p>	<p style="text-align: right;">Page 44</p> <p>1 me several other criteria, I believe;</p> <p>2 communities of interest, compactness, and not</p> <p>3 pairing incumbents. And so I'm wondering -- I</p> <p>4 don't see those factors mentioned in that</p> <p>5 paragraph. So what about population equality</p> <p>6 and compliance with the Voting Rights Act to</p> <p>7 you suggest that compliance with those three</p> <p>8 factors you mentioned are most important?</p> <p>9 A. I'm not sure I know how to</p> <p>10 answer that question, sir. I'm sorry.</p> <p>11 Obviously, we were -- deviation was plus or</p> <p>12 minus one on the plans we had. The Voting</p> <p>13 Rights Act, I think it deals --</p> <p>14 Q. And I'm sorry.</p> <p>15 A. I'm not sure I know how to</p> <p>16 answer that.</p> <p>17 Q. Well, without revealing any</p> <p>18 conversations you had with counsel, how did</p> <p>19 you understand compliance with the voting</p> <p>20 rights of 1965 -- with the Voting Rights Act</p> <p>21 of 1965 in the context of --</p> <p>22 A. I haven't had that communication</p> <p>23 with counsel.</p> <p>24 Q. Okay. I just want to make sure I</p> <p>25 understand because I'm just -- I'm just</p>



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<p style="text-align: right;">Page 45</p> <p>1 following up here because I was a little -- 2 I'm a little confused by your answer. 3 In referencing population equality 4 and compliance with the Voting Rights Act, 5 you -- you know, and I asked you about how you 6 understood those -- how you understood this 7 passage, which said that those two factors 8 should take precedence if they conflict with 9 any other criteria. In response, you 10 mentioned communities of interest, 11 compactness, and not pairing incumbents. 12 And so what I'm trying to ask you 13 is: I'm not seeing the link between that 14 paragraph and those three factors. And -- 15 which you obviously believe is there, which is 16 fine. But I'm just trying to understand why 17 you believe there's a link between population 18 equality and Voting Rights Act compliance and 19 the factors of communities of interest, not 20 pairing incumbents, and compactness. 21 A. Well, the three things that were 22 mentioned were part of our plan or the 23 guidelines in addition to that. And I think 24 that says -- excuse me, compelling state 25 interest. So...</p>	<p style="text-align: right;">Page 47</p> <p>1 question because I don't mean to keep us on 2 this particular topic forever, and I do want 3 to talk about some of the plans in particular. 4 Is it your understanding that by 5 drawing a map that does not pair incumbents, 6 complies with communities of interest, and is 7 reasonably compact, that you are complying 8 with the Voting Rights Act? 9 A. We thought the plans that we did 10 put together using those provided that 11 compliance with the Voting Rights Act, yes. 12 Q. Okay. I think we're on the same 13 page. Let me just confirm. So it was your 14 understanding in using these guidelines that 15 so long as the plan enacted did not pair 16 incumbents, was reasonably compact, and 17 respected communities of interest, that it 18 would be compliant with the Voting Rights Act, 19 do I have that right? 20 A. Not totally. But, you know, I 21 would say that we -- by doing this, we 22 were -- we thought we were in compliance by 23 not discriminating or pushing or packing. 24 Q. What do you mean by pushing or 25 packing?</p>
<p style="text-align: right;">Page 46</p> <p>1 Q. Okay. So is it your understanding 2 that not pairing incumbents -- let's break the 3 three down. Is it your understanding that not 4 pairing incumbents is of co-equal or higher 5 importance than compliance with the Voting 6 Rights Act under your guidelines? 7 MR. WALKER: I'm sorry, Davin. 8 Would you -- would you repeat the question? 9 Q. (By Mr. Rosborough) Of course. 10 So I'm just going to go through 11 the three factors you mentioned, which you 12 said were the key factors in the plan, I 13 believe. Is it your understanding that under 14 these legislative guidelines not pairing 15 incumbents has either equal or greater 16 importance to complying with the Voting Rights 17 Act? 18 A. I think we thought we were 19 complying with the Voting Rights Act, sir. 20 Q. And why did you think you were 21 complying with the Voting Rights Act? 22 A. A lot has happened in a short 23 time frame, sir. And I can't remember 24 everything. And I just apologize. 25 Q. Well, let me ask you a different</p>	<p style="text-align: right;">Page 48</p> <p>1 A. Piling African Americans into a 2 district. 3 Q. Okay. What role did that in the 4 consideration of race play in drawing the 2023 5 plan? 6 A. I think we tried to draw it race 7 neutral. 8 Q. So is it correct that in drawing 9 the 2023 plan, you did not consider race? 10 A. I said we tried to draw it race 11 neutral, yes, sir. 12 Q. I'm just trying to make sure 13 because that term can mean different things to 14 different people. What do you mean by saying, 15 we tried to draw it race neutral? 16 A. When drawing the maps, we didn't 17 have that flag, whatever it is, turned on. 18 Q. Okay. So just to confirm, in 19 drawing the -- or let me put it this way. In 20 evaluating the plans that you wanted to put 21 forward for the 2023 map, you were not looking 22 at race as you evaluated those plans; is that 23 correct? 24 A. That's correct. 25 Q. Okay. I'd like to do maybe one</p>



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<p style="text-align: right;">Page 49</p> <p>1 more exhibit. Take a few more minutes and 2 then we can take a short break if that's a 3 good time. Does that work, maybe we go five 4 more minutes or so and take a break? 5 A. Yes, sir. 6 Q. Okay. 7 MR. ROSBOROUGH: All right. 8 Tanner, would you mind pulling up Exhibit 5, 9 please. 10 MR. LOCKHEAD: It's coming. One 11 second. 12 MR. ROSBOROUGH: No rush. I 13 appreciate it. No, I'm sorry. That's not 14 mine. My fault. Let's see. This is the PI 15 opinion and order. If you don't have it 16 ready, I can pull it up here. 17 MR. LOCKHEAD: I've got it. Sorry 18 about that. 19 MR. ROSBOROUGH: No. No problem. 20 (Whereupon, Exhibit 5 was marked 21 for identification.) 22 Q. (By Mr. Rosborough) Okay. 23 Senator Livingston, can you see 24 what's up there, what we'll mark as Exhibit 5? 25 A. Yes, sir.</p>	<p style="text-align: right;">Page 51</p> <p>1 Okay. So I'm looking at the first full 2 paragraph here. And I'm just going to read 3 this paragraph. And you can tell me if I read 4 it correctly. And then I've got a question 5 for you about it. "The legislature enjoys 6 broad discretion and may consider a wide range 7 of remedial plans. As the legislature 8 considers such plans, it should be mindful of 9 the practical reality based on the ample 10 evidence of intensely racially polarized 11 voting adduced during the preliminary 12 injunction proceedings that any remedial plan 13 will need to include two districts in which 14 black voting either comprise a voting age 15 majority or something quite close to it." Did 16 I read that correctly? 17 A. Yes, sir. 18 Q. Senator Livingston, are you 19 familiar with that guidance from the Court in 20 this case? 21 A. That's actually the first time 22 that's been pointed out to me in a paragraph. 23 Q. Okay. In more general terms, are 24 you familiar that the Court provided that 25 guidance?</p>
<p style="text-align: right;">Page 50</p> <p>1 Q. Okay. Do you recognize this 2 document? You can just pause there for one 3 second. 4 A. Yes, sir. 5 Q. Okay. And what do you understand 6 this to be? 7 A. It's the -- it's the Singleton 8 vs. Merrill which turned into cases -- is it 9 the three judge opinion? 10 Q. Sure. Sure. Yeah, I'm sorry. I 11 don't mean to make this a memory test. That's 12 not why we're here. 13 Do you recognize -- does it seem 14 correct to you that this is -- and it's quite 15 a long document. But this is the preliminary 16 injunction ordered by the three judge district 17 court in this case? 18 A. I would assume it is, yes, sir. 19 I don't know. 20 Q. Okay. I'll represent to you that 21 that's what that is for purposes of our 22 questioning. And I only have, I think, one 23 specific question about it. I'm not going to 24 take you through -- it's a 225-page document. 25 So if we could scroll down to page 6, please.</p>	<p style="text-align: right;">Page 52</p> <p>1 A. Yes, sir. 2 Q. Okay. How, if at all, did you or 3 the committee account for that guidance in 4 drawing the 2023 plan? 5 A. It would be something quite 6 close to it. 7 Q. Okay. So is it your testimony 8 that the enacted plan, SB-5, which has a 9 second congressional district approximately 10 under 40 percent black voting age population 11 qualifies as something quite close to a 12 majority of black voting age population? 13 A. It was the committee's -- the 14 committee that decided that, yes, sir. 15 Q. Okay. And how did the committee 16 make that decision? 17 A. This is -- this is the plan that 18 was brought forward in the end and was 19 compromised upon. 20 Q. And we'll talk a little bit more. 21 But what did you mean when you say that this 22 plan was a compromise? 23 A. Well, you had -- the house had a 24 plan, and the senate had a plan, and this was 25 a compromised plan that could be passed.</p>



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<p style="text-align: right;">Page 53</p> <p>1 Q. As you were considering these 2 different plans and ultimately coming to a 3 plan that passed, did you have an 4 understanding of what it means for black 5 voters to have an opportunity to elect a 6 candidate of -- a representative of their 7 choice in a district? 8 A. Yes, sir, I think. 9 Q. Okay. And what was your 10 understanding? 11 A. I'll go back to what we talked 12 about a little while ago about having a 13 quality candidate that's funded. 14 Q. Okay. All right. Give me one 15 second. I think this may be a good time to 16 take a break. But let me just -- so just to 17 clarify a couple of things, was it your 18 view -- when you said a quality candidate that 19 was funded, can you tell me what you -- what 20 you mean by that? 21 A. I'll go back to the incident in 22 my hometown where you have two candidates 23 that were, you know, African Americans that 24 defeated well-funded candidates that were in 25 place in front of them. So...</p>	<p style="text-align: right;">Page 55</p> <p>1 or do you want to do a longer break so you can 2 get some food? 3 MR. WALKER: Ten is fine for us. 4 MR. ROSBOROUGH: Ten. All right. 5 So I see that it's 12:47 central time. We'll 6 come back at 12:57 central, if that works. 7 MR. WALKER: Thank you. 8 THE VIDEOGRAPHER: The time is 9 12:47 p.m. We're going off the record. 10 (A short break was taken.) 11 THE VIDEOGRAPHER: The time is 12 1:13 p.m. We're back on the record. 13 Q. (By Mr. Rosborough) Okay. 14 Senator Livingston, I want to come 15 back quickly to a couple of things we were 16 discussing earlier before moving on and then 17 talking about some specific maps. 18 Am I correct that you said earlier 19 you understood the Court to require creation 20 of two opportunity districts for minority 21 voters; is that accurate? 22 A. Yes, sir. 23 Q. Okay. In your view, how did 24 consideration of communities of interest, 25 compactness, and not pairing incumbents ensure</p>
<p style="text-align: right;">Page 54</p> <p>1 Q. And how did you define -- in 2 your -- I think you said quality candidate. 3 What did you mean by that? 4 A. Somebody who has respect, I 5 would assume, and -- of his fellow peers. 6 Q. Okay. And what do -- and just you 7 what do you mean by that, has respect of their 8 peers? 9 A. I'm sorry? 10 Q. I'm sorry. Could you just clarify 11 what you mean by that, when you said someone 12 who has respect of their fellow peers? 13 A. Again, a quality candidate. 14 Somebody that has the respect of, not just 15 necessarily their peers, but their 16 constituents. 17 Q. Okay. So is it your understanding 18 that in the prior statewide races over the 19 past decade that there have not been black 20 preferred candidates who have funding and the 21 respect of their peers? 22 A. And several whites also. 23 MR. ROSBOROUGH: Okay. I think 24 now is a good time for us to take a break. 25 Should we do -- do you want to do ten minutes,</p>	<p style="text-align: right;">Page 56</p> <p>1 that you followed that guidance? 2 A. As we tried to develop a map 3 that was part of the committee, those played 4 a role in being able to develop what would 5 end up being two into one that was 6 competitive. 7 Q. And if I'm correct, you said that 8 race did not play a role in the development of 9 your plan; correct? 10 A. I think I stated that earlier. 11 And I was corrected when we off the role 12 (sic) a little bit that it was part of the -- 13 it was on -- it was on -- and that we weren't 14 paying attention to it, as the case may be. 15 But it was developed that way. 16 Q. Okay. So it would be accurate -- 17 would it be accurate to say that, while racial 18 figures may have been up on the screen as the 19 maps were drawn or shown, you were personally 20 not paying attention to race? 21 A. Yes, sir. 22 Q. Okay. Other than compactness, 23 communities of interest, and not pairing 24 incumbents, were there other considerations 25 you took account of in deciding on a new</p>



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<p style="text-align: right;">Page 57</p> <p>1 congressional districting plan?</p> <p>2 A. I would have to say committee</p> <p>3 members were offering advice.</p> <p>4 Q. Do you recall any specific advice?</p> <p>5 MR. WALKER: I'm going to assert</p> <p>6 privilege as to communications or statements</p> <p>7 made by members of the reapportionment</p> <p>8 committee that have not waived the privilege</p> <p>9 immunity and instruct the witness not to</p> <p>10 answer to that extent.</p> <p>11 Q. (By Mr. Rosborough) Okay.</p> <p>12 So Senator Livingston, if you can</p> <p>13 answer that question without divulging</p> <p>14 conversations you had other committee members,</p> <p>15 you can go ahead.</p> <p>16 A. I do not recall, sir.</p> <p>17 Q. Okay. Let's talk about the</p> <p>18 legislative special session. The committee</p> <p>19 had its first meeting during the special</p> <p>20 session on the first day of the session on</p> <p>21 Monday, July 17th; is that correct?</p> <p>22 A. I really -- I honestly don't</p> <p>23 remember. It was all a whirlwind.</p> <p>24 Q. All right. At the first meeting</p> <p>25 of the committee during this special session,</p>	<p style="text-align: right;">Page 59</p> <p>1 Q. Are you aware of who else was</p> <p>2 involved in developing that plan?</p> <p>3 A. There were several, I think that</p> <p>4 may have played a role. But I don't</p> <p>5 remember.</p> <p>6 Q. Are you aware of what instructions</p> <p>7 were given to Mr. Hinaman in the drawing the</p> <p>8 community of interest plan?</p> <p>9 A. No, sir.</p> <p>10 Q. Do you recall when a full draft of</p> <p>11 that plan was complete?</p> <p>12 A. I do not remember, no, sir.</p> <p>13 Q. Do you recall any feedback given</p> <p>14 to Mr. Hinaman after seeing an initial draft</p> <p>15 of that plan?</p> <p>16 A. I do not recall that, no, sir.</p> <p>17 Q. Do you recall if Mr. Hinaman made</p> <p>18 any changes to the community of interest plan</p> <p>19 after he first showed it to you or other</p> <p>20 committee members?</p> <p>21 A. I do not know that.</p> <p>22 MR. ROSBOROUGH: If we could pull</p> <p>23 up Exhibit 6, please.</p> <p>24 Q. Senator Livingston, you'll see</p> <p>25 this exhibit has two pages. There's a map and</p>
<p style="text-align: right;">Page 58</p> <p>1 do you recall that a number of new plans were</p> <p>2 introduced?</p> <p>3 A. I think there were several plans</p> <p>4 offered, yes, sir.</p> <p>5 Q. Okay. Does the community of</p> <p>6 interest plan ring a bell to you?</p> <p>7 A. I believe it was the one that</p> <p>8 was originally introduced, yes, sir.</p> <p>9 Q. Okay. And what about the</p> <p>10 opportunity plan, does that ring a bell to</p> <p>11 you?</p> <p>12 A. I remember it, yes.</p> <p>13 Q. Do you recall any other plans that</p> <p>14 were discussed at the hearing?</p> <p>15 A. Not the names, but I know there</p> <p>16 were several offered that same day.</p> <p>17 Q. Okay. Let's talk about the</p> <p>18 community of interest plan. What was --</p> <p>19 what's your understanding of the origin of the</p> <p>20 community of interest plan?</p> <p>21 A. I believe that was the map that</p> <p>22 was designed by Randy Hinaman.</p> <p>23 Q. And what was your involvement in</p> <p>24 the development of that plan, if any?</p> <p>25 A. Very little.</p>	<p style="text-align: right;">Page 60</p> <p>1 then there's some statistics at the bottom.</p> <p>2 Do you see that?</p> <p>3 A. Yes, sir.</p> <p>4 Q. Okay. Let's go up to the top at</p> <p>5 the moment, the first page. Does this appear</p> <p>6 to be the community of interest plan that we</p> <p>7 were just discussing?</p> <p>8 (Whereupon, Exhibit 6 was marked</p> <p>9 for identification.)</p> <p>10 THE WITNESS: That's the label,</p> <p>11 yes.</p> <p>12 Q. (By Mr. Rosborough) Okay. And is</p> <p>13 it correct that this plan was worked on by</p> <p>14 Mr. Hinaman, you, Mr. Pringle, Dr. Trey Hood,</p> <p>15 and a couple of attorneys?</p> <p>16 A. Yes, sir, that sounds familiar.</p> <p>17 Q. Okay. What were your priorities.</p> <p>18 You mentioned community of interest as one of</p> <p>19 the key priorities in developing a new plan.</p> <p>20 What particular communities of interest were</p> <p>21 you considering?</p> <p>22 A. We considered the three. One</p> <p>23 was going to be the Gulf Coast, one of the</p> <p>24 Wiregrass would be a community of interest,</p> <p>25 and one would be the Black Belt being</p>



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<p style="text-align: right;">Page 61</p> <p>1 consolidated into two districts rather than 2 three. 3 Q. Okay. And how did the committee 4 decide on prioritizing those three communities 5 of interest? 6 A. How did the committee? How did 7 the committee form that? 8 Q. Yes, sir. 9 A. It -- we had members of each of 10 the three areas that were a part of our 11 committee, and they all expressed interest. 12 Q. Okay. The community of interest 13 plan that you're seeing here was the first 14 plan passed out at the committee, is that 15 correct, to the best of your recollection? 16 A. The best of my recollection, 17 yes, sir. 18 Q. Okay. 19 A. I can't remember which one came 20 out first. 21 Q. And to the best of your 22 recollection, this community of interest plan 23 also passed the full house of representatives; 24 is that correct? 25 A. Yes, sir.</p>	<p style="text-align: right;">Page 63</p> <p>1 remember. 2 MR. ROSBOROUGH: Let's pull up 3 Exhibit 7, please. 4 (Whereupon, Exhibit 7 was marked 5 for identification.) 6 Q. (By Mr. ^ Attyname) All right. 7 Senator Livingston, does this look 8 familiar to you? 9 A. Yes, sir. 10 Q. And what do you recognize this as? 11 A. It's a different format. But it 12 seems like it might be the functionality or 13 whatever -- the performance test. 14 Q. Okay. And you were -- you 15 attended the deposition of Mr. Hinaman earlier 16 today? 17 A. Yes, sir. 18 Q. And do you recall this analysis 19 being discussed during that deposition? 20 A. Yes, sir. 21 Q. And you -- do you agree that in 22 the four races analyzed here, which are the 23 2020 presidential race, the 2020 U.S. Senate, 24 2018 governor, 2018 attorney general, that in 25 two of those four races black preferred</p>
<p style="text-align: right;">Page 62</p> <p>1 Q. Okay. In looking at the lines 2 here, does the community of interest plan keep 3 the Gulf Coast counties together in one 4 district? 5 A. Yes, sir. 6 Q. Does the community of interest 7 plan put the Black Belt in two districts 8 rather than three? 9 A. Yes, sir. 10 Q. And does the community of interest 11 plan keep together what you consider to be the 12 Wiregrass other than part of Covington County? 13 A. Yes, sir. 14 Q. Did you or do you consider this 15 plan to have met the committee's goals in 16 terms of communities of interest? 17 A. Initially, yes, sir. 18 Q. Okay. You said initially. Did 19 that change at any point in time? 20 A. I'm not sure. I don't -- I 21 don't think it has, no, sir. 22 Q. Okay. Dr. Hood performed a 23 performance or functionality analysis 24 regarding this plan; is that accurate? 25 A. I assume, yes, sir. I don't</p>	<p style="text-align: right;">Page 64</p> <p>1 candidates won, and in the other two, white 2 preferred candidates won; is that correct? 3 A. Yes, sir. 4 Q. Okay. Did you have any assessment 5 of how this plan performed in remedying the 6 likely Voting Rights Act violation identified 7 by the Court? 8 A. Would you repeat that for me, 9 please? 10 Q. Sure. Did you have any assessment 11 of how then this community of interest plan 12 performed in terms of remedying the likely 13 Voting Rights Act violation found by the 14 Court? 15 A. No, sir. 16 Q. Okay. Do you believe this plan 17 would have provided a fair opportunity for 18 African American voters to elect preferred 19 candidates in the second district? 20 A. It might have, yes, sir. 21 Q. Okay. And why is that in your 22 view? 23 A. I think it shows two of each 24 winning. 25 Q. And why, if at all, does that</p>



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<p style="text-align: right;">Page 65</p> <p>1 matter in your assessment?</p> <p>2 A. It's 50/50.</p> <p>3 Q. Okay. I'm sorry. Would</p> <p>4 somebody -- I thought I heard somebody else</p> <p>5 say something in the room. Can I -- was</p> <p>6 anything else just -- was there anyone in the</p> <p>7 room just trying to speak?</p> <p>8 MR. WALKER: Are you talking about</p> <p>9 in the room where we are?</p> <p>10 MS. ROSBOROUGH: Yes.</p> <p>11 MR. WALKER: No. No. Nobody -- I</p> <p>12 did not say anything.</p> <p>13 MR. ROSBOROUGH: Okay.</p> <p>14 MR. WALKER: And there's no one</p> <p>15 else -- Davin, there's no one else in the</p> <p>16 room.</p> <p>17 MR. ROSBOROUGH: Okay. I just</p> <p>18 wanted to make sure. All right. We can take--</p> <p>19 this down. Thank you.</p> <p>20 Q. (By Mr. Rosborough) So Senator</p> <p>21 Livingston, at some point, is it correct that</p> <p>22 you switched your focus from this community of</p> <p>23 interest plan to other plans?</p> <p>24 A. The committee members changed</p> <p>25 focus, yes, sir.</p>	<p style="text-align: right;">Page 67</p> <p>1 A. No, sir.</p> <p>2 Q. Okay. If we can scroll down in</p> <p>3 this article to another page, please. Okay.</p> <p>4 So in this third page -- this article is from</p> <p>5 July 20th. So this would have been, I think,</p> <p>6 the Thursday of the special session. The</p> <p>7 article says, "Livingston said senate</p> <p>8 republicans began working on their own map</p> <p>9 because the committee 'got some information'</p> <p>10 that led them to prioritize 'compactness and</p> <p>11 communities of interest being as important as</p> <p>12 the black voting age population.'" What did</p> <p>13 you mean by that, Senator Livingston?</p> <p>14 A. The committee members had</p> <p>15 received some additional information they</p> <p>16 thought they should go in the direction of</p> <p>17 compactness, communities of interest, and</p> <p>18 making sure that congressmen are not paired</p> <p>19 against each other, congressmen or women are</p> <p>20 not paired against each other.</p> <p>21 Q. And who did it receive that</p> <p>22 information from?</p> <p>23 A. I don't know that, sir.</p> <p>24 Q. How did you first learn about that</p> <p>25 information?</p>
<p style="text-align: right;">Page 66</p> <p>1 Q. Okay. And why, in your view, did</p> <p>2 committee members change focus from the</p> <p>3 community of interest plan to other plans?</p> <p>4 A. I can't answer what brought them</p> <p>5 to where they got to. I just know they</p> <p>6 moved, and when -- they moved.</p> <p>7 Q. And what about you personally, did</p> <p>8 anything in particular spark your decision to</p> <p>9 move your focus from the community of interest</p> <p>10 plan to other plans?</p> <p>11 A. The committee moved, and I was</p> <p>12 going to be left behind.</p> <p>13 Q. Okay. You didn't have any</p> <p>14 independent reason for switching your focus to</p> <p>15 other plans other than that's where the</p> <p>16 majority of the committee was?</p> <p>17 A. I did not, no, sir. I did not,</p> <p>18 no, sir.</p> <p>19 Q. Okay.</p> <p>20 MR. ROSBOROUGH: Can we pull up</p> <p>21 Exhibit 8, please?</p> <p>22 (Whereupon, Exhibit 8 was marked</p> <p>23 for identification.)</p> <p>24 Q. (By Mr. Rosborough) Have you seen</p> <p>25 this news article before?</p>	<p style="text-align: right;">Page 68</p> <p>1 A. When we got ready to pass the</p> <p>2 other plan, that -- it was a large hiccup.</p> <p>3 Q. Is it your understanding that this</p> <p>4 information came from people in Washington?</p> <p>5 A. I don't know where it came from.</p> <p>6 Q. Why did you find this information</p> <p>7 reliable?</p> <p>8 A. There were -- I was -- I was a</p> <p>9 single member left.</p> <p>10 Q. Do you know who received this</p> <p>11 information on the committee?</p> <p>12 A. I do not.</p> <p>13 Q. How did you first learn about this</p> <p>14 information then?</p> <p>15 A. It was a committee conversation.</p> <p>16 Q. Do you recall who mentioned it?</p> <p>17 A. I do not, no, sir.</p> <p>18 Q. Do you have any idea at all who or</p> <p>19 what type of figure was the source of this</p> <p>20 information, even if you're not certain?</p> <p>21 A. No, sir.</p> <p>22 MR. ROSBOROUGH: Okay. We can</p> <p>23 take this down.</p> <p>24 Q. Senator Singleton -- I'm sorry,</p> <p>25 Senator Livingston, do you recall</p>



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<p style="text-align: right;">Page 69</p> <p>1 the opportunity --</p> <p>2 A. We look a lot a like.</p> <p>3 Q. Do you recall the opportunity plan</p> <p>4 as another plan that was introduced in the</p> <p>5 committee during the special session?</p> <p>6 A. I remember it was submitted, I</p> <p>7 think, electronically. I don't remember who</p> <p>8 by.</p> <p>9 Q. Okay. Is it correct that Senator</p> <p>10 Dan Roberts mailed the plan in?</p> <p>11 A. It may have been, yes, sir.</p> <p>12 Q. Okay. Do you recall when you</p> <p>13 first saw this plan?</p> <p>14 A. I do not, no, sir.</p> <p>15 Q. Do you recall providing any</p> <p>16 feedback regarding this plan?</p> <p>17 A. I don't know. I do not, no,</p> <p>18 sir.</p> <p>19 MR. ROSBOROUGH: Okay. Can we</p> <p>20 pull back up Exhibit No. 1, which is Senator</p> <p>21 Livingston's interrogatory responses, please.</p> <p>22 And I'd like to -- if you could scroll down to</p> <p>23 No. 3, interrogatory No. 3 and the response.</p> <p>24 Q. So interrogatory No. 3 says,</p> <p>25 describe the role played with respect to</p>	<p style="text-align: right;">Page 71</p> <p>1 Chris Brown authored this plan?</p> <p>2 A. I think maybe Senator Roberts</p> <p>3 told us that.</p> <p>4 Q. Okay. Do you have any</p> <p>5 understanding of whether Mr. Brown was</p> <p>6 retained by any individual or entity to draw</p> <p>7 this plan?</p> <p>8 A. Not that I'm aware of, no, sir.</p> <p>9 Q. Do you have any understanding of</p> <p>10 any guidance or instructions given to</p> <p>11 Mr. Brown in drawing this plan?</p> <p>12 A. No, sir.</p> <p>13 Q. Did you have any belief one way or</p> <p>14 another about where this plan would provide a</p> <p>15 fair opportunity to black voters to elect a</p> <p>16 preferred candidate in the second district?</p> <p>17 A. I assume you're still on the</p> <p>18 opportunity plan?</p> <p>19 Q. Yes, sir. Thank you for</p> <p>20 clarifying.</p> <p>21 A. No, sir.</p> <p>22 Q. You had no view one way or the</p> <p>23 other?</p> <p>24 A. No, sir.</p> <p>25 Q. Okay.</p>
<p style="text-align: right;">Page 70</p> <p>1 legislative remedial plans -- to the</p> <p>2 legislative remedial plans by each individual</p> <p>3 and/or entity identified in interrogatories</p> <p>4 No. 1 or 2. Your response then lists the four</p> <p>5 different plans discussed. And under</p> <p>6 opportunity plan, it says, Chris Brown</p> <p>7 authored the plan and Senator Dan Roberts</p> <p>8 delivered it to the reapportionment office; is</p> <p>9 that correct?</p> <p>10 A. That's what it says, yes, sir.</p> <p>11 Q. Okay. And who is Chris Brown?</p> <p>12 A. Mr. Brown is a political</p> <p>13 consultant in Birmingham, Alabama.</p> <p>14 Q. Okay. Is he the owner of Red</p> <p>15 State Strategies?</p> <p>16 A. I believe that's the company,</p> <p>17 yes, sir.</p> <p>18 Q. How did he come -- how did</p> <p>19 Mr. Brown come to be involved in the map</p> <p>20 drawing process?</p> <p>21 A. I have no idea.</p> <p>22 Q. When did you first learn of</p> <p>23 Mr. Brown's involvement in the process?</p> <p>24 A. I don't remember, sir.</p> <p>25 Q. How did you come to learn that</p>	<p style="text-align: right;">Page 72</p> <p>1 MR. ROSBOROUGH: Can we put up</p> <p>2 Exhibit 9. Let's put back up Exhibit 9.</p> <p>3 Actually, no, I'm sorry. I'm sorry. We had</p> <p>4 that up already. Is that correct? Did we put</p> <p>5 up exhibit 9 yet? I lost track there.</p> <p>6 COURT REPORTER: I am going to</p> <p>7 verify.</p> <p>8 MR. ROSBOROUGH: I think maybe we</p> <p>9 didn't. So let's put it up. Let's go ahead</p> <p>10 and put it up as Exhibit 9.</p> <p>11 COURT REPORTER: We didn't.</p> <p>12 MR. ROSBOROUGH: Okay. Thank you.</p> <p>13 Sorry. I lost track there.</p> <p>14 (Whereupon, Exhibit 9 was marked</p> <p>15 for identification.)</p> <p>16 Q. Are Senator Livingston, do you</p> <p>17 recognize this as the opportunity plan that we</p> <p>18 were just discussing?</p> <p>19 A. That's the label I see at the</p> <p>20 top, yes, sir.</p> <p>21 Q. Okay. And do you recall how this</p> <p>22 plan differed from the community of interest</p> <p>23 plan?</p> <p>24 A. Not unless they're side by side,</p> <p>25 no, sir.</p>



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<p style="text-align: right;">Page 73</p> <p>1 Q. Okay. Does it sound correct to</p> <p>2 you that the black voting age population in</p> <p>3 the second congressional district in the</p> <p>4 opportunity plan was approximately 38 percent?</p> <p>5 A. I do not remember the numbers,</p> <p>6 no, sir.</p> <p>7 Q. Okay. You don't remember one way</p> <p>8 or the other, is that correct?</p> <p>9 A. No. I don't remember those</p> <p>10 numbers, no, sir.</p> <p>11 Q. Okay. All right.</p> <p>12 So if we take a look -- I don't</p> <p>13 know if you can zoom in at all more. If not,</p> <p>14 we'll live with it. Thank you.</p> <p>15 So let's look at the second</p> <p>16 congressional district in the opportunity</p> <p>17 plan. Am I correct that the second district</p> <p>18 in this plan includes the whole counties of --</p> <p>19 well, let me ask you: Can you identify for me</p> <p>20 which counties are listed -- are included in</p> <p>21 CD-2 under this plan in whole or part?</p> <p>22 A. It looks like Houston, Geneva,</p> <p>23 Coffee, Dale, Henry, Barber, Pike, Crenshaw,</p> <p>24 Montgomery, Bullock, Russell, Macon, and</p> <p>25 Elmore.</p>	<p style="text-align: right;">Page 75</p> <p>1 Q. Okay. Do you know why this is</p> <p>2 named Livingston congressional plan 2?</p> <p>3 A. Because I think I brought it to</p> <p>4 the floor.</p> <p>5 Q. Okay.</p> <p>6 A. Or committee. I don't remember</p> <p>7 which -- if it went to the committee first.</p> <p>8 Q. This plan was quite similar in a</p> <p>9 number of respects to the opportunity plan we</p> <p>10 just looked at; correct?</p> <p>11 A. I think you said that, yes, sir.</p> <p>12 Q. Okay. And specifically, if we can</p> <p>13 sort of zoom in to congressional district 2,</p> <p>14 congressional district 2 in the Livingston 2</p> <p>15 plan and the opportunity plan appear to be</p> <p>16 identical; is that correct?</p> <p>17 A. I assume you've seen them</p> <p>18 side-by-side. I haven't, so...</p> <p>19 Q. Well, if we go through, it has the</p> <p>20 full counties of Geneva, Houston, Coffee,</p> <p>21 Dale, Henry, Crenshaw, Pike, Barber,</p> <p>22 Montgomery, Bullock, Russell, Macon, and most</p> <p>23 of Elmore except that little piece there; is</p> <p>24 that accurate?</p> <p>25 A. Yes, sir.</p>
<p style="text-align: right;">Page 74</p> <p>1 Q. Okay. And does it appear there</p> <p>2 might be a little piece of Elmore that's</p> <p>3 included in congressional district 3?</p> <p>4 A. Yes, sir.</p> <p>5 Q. Okay.</p> <p>6 MR. ROSBOROUGH: All right. You</p> <p>7 can take that down. Thank you.</p> <p>8 Q. Senator Livingston, do you recall</p> <p>9 introducing a plan in the senate known as the</p> <p>10 Livingston 2 plan?</p> <p>11 A. Yes, sir.</p> <p>12 MR. ROSBOROUGH: Let's go ahead</p> <p>13 and bring up Exhibit 10.</p> <p>14 MR. WALKER: I'm sorry, Davin,</p> <p>15 what exhibit is this?</p> <p>16 MR. ROSBOROUGH: Oh, I'm sorry.</p> <p>17 This is Exhibit 10.</p> <p>18 MR. WALKER: 10. I just couldn't</p> <p>19 hear you.</p> <p>20 MR. ROSBOROUGH: Yes, no problem.</p> <p>21 (Whereupon, Exhibit 10 was marked</p> <p>22 for identification.)</p> <p>23 Q. Senator, do you recognize this as</p> <p>24 the Livingston plan 2?</p> <p>25 A. I think, yes, sir.</p>	<p style="text-align: right;">Page 76</p> <p>1 Q. And those -- that appears to be</p> <p>2 the same configuration of district 2 in the</p> <p>3 opportunity plan?</p> <p>4 A. Yes, sir, I think you are</p> <p>5 correct.</p> <p>6 MR. ROSBOROUGH: Okay. And if we</p> <p>7 scroll down to the second page. Thank you.</p> <p>8 Q. And we look at the black voting</p> <p>9 age population in that last column of</p> <p>10 district 2, we see it is 38.31 percent. Does</p> <p>11 that seem right?</p> <p>12 A. That's what it looks like, yes,</p> <p>13 sir.</p> <p>14 Q. Okay. What is the relationship --</p> <p>15 we just -- we just saw that congressional</p> <p>16 district 2 is identical between the</p> <p>17 opportunity plan and the Livingston 2. What</p> <p>18 is the relationship between those two plans?</p> <p>19 A. Again, I'd have to look at them</p> <p>20 side-by-side. I think there are some</p> <p>21 differences, but I just don't remember.</p> <p>22 Q. Is the Livingston 2 plan basically</p> <p>23 the opportunity plan with some certain changes</p> <p>24 made to it?</p> <p>25 A. I would say probably fairly</p>



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<p style="text-align: right;">Page 77</p> <p>1 similar, yes, sir.</p> <p>2 Q. Okay. Do you recall why changes</p> <p>3 were made to the opportunity plan such that it</p> <p>4 turned into Livingston 2?</p> <p>5 A. I don't really remember. I</p> <p>6 would say tweaks and compactness and</p> <p>7 communities of interest and zero deviation,</p> <p>8 making sure and less precincts being split.</p> <p>9 Q. Okay. I believe --</p> <p>10 MR. ROSBOROUGH: And you can take</p> <p>11 that down, Tanner. Thank you.</p> <p>12 Q. (By Mr. Rosborough) You testified</p> <p>13 a few minutes ago that you had no view one way</p> <p>14 or the other as to the opportunity plan, about</p> <p>15 whether it would allow black voters a fair</p> <p>16 opportunity to elect candidates of choice in a</p> <p>17 second district; correct?</p> <p>18 A. Was that a question? I'm sorry.</p> <p>19 Q. Oh, I'm sorry. Is that correct?</p> <p>20 A. Would you repeat your question</p> <p>21 if that was a question? I'm sorry.</p> <p>22 Q. I will. I will.</p> <p>23 Am I correct that a few minutes</p> <p>24 ago -- I'm sorry. I'm hearing an echo.</p> <p>25 Okay. Am I correct that a few</p>	<p style="text-align: right;">Page 79</p> <p>1 for identification.)</p> <p>2 Q. (By Mr. Rosborough) Okay. Senator</p> <p>3 Livingston, have you seen this article before?</p> <p>4 It is a July 18th article from 1819 News?</p> <p>5 A. I have -- I have not seen it,</p> <p>6 no, sir.</p> <p>7 Q. Okay. You are quoted in this</p> <p>8 article in a few places. And I want to ask</p> <p>9 you about those. So let's -- perfect. Stop</p> <p>10 right there.</p> <p>11 At the top of that page, you are</p> <p>12 quoted as saying -- well let's set some</p> <p>13 context first. So the title of this article</p> <p>14 is House and Senate Committee Narrow</p> <p>15 Redistricting Plans to Two. Do you recall</p> <p>16 that this is the point where the senate had</p> <p>17 passed the Livingston 2 plan, the house had</p> <p>18 passed the communities of interest plan, and</p> <p>19 there had not yet between a resolution between</p> <p>20 the two plans? Does that sound right to you?</p> <p>21 A. Yes, sir.</p> <p>22 Q. Okay. I believe in referring then</p> <p>23 to the Livingston plan 2, you say -- you're</p> <p>24 quoted as saying, "This plan is based on</p> <p>25 neutral principles promoting communities of</p>
<p style="text-align: right;">Page 78</p> <p>1 minutes ago, you testified that you did not</p> <p>2 know one way or the other about whether the</p> <p>3 opportunity plan would allow black voters a</p> <p>4 fair chance to elect candidates of choice in a</p> <p>5 second district; am I correct about that?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. So I posed the same</p> <p>8 question to you for this plan. Did you have a</p> <p>9 view one way or the other as to whether this</p> <p>10 plan would allow black voters a fair chance to</p> <p>11 elect candidates of choice in two districts?</p> <p>12 A. I think it provided a better</p> <p>13 opportunity than the opportunity plan.</p> <p>14 Q. And what is the basis of that</p> <p>15 belief?</p> <p>16 A. The tweaks that we made in</p> <p>17 areas.</p> <p>18 Q. Okay. What particular tweaks are</p> <p>19 you thinking of here?</p> <p>20 A. I saw so many maps, sir, I don't</p> <p>21 remember. I'm sorry.</p> <p>22 Q. Okay.</p> <p>23 MR. ROSBOROUGH: Let's pull up</p> <p>24 Exhibit 11, please.</p> <p>25 (Whereupon, Exhibit 11 was marked</p>	<p style="text-align: right;">Page 80</p> <p>1 interest in the Gulf, Black Belt and</p> <p>2 Wiregrass, ensuring that the state's</p> <p>3 long-terms principles of compact districts is</p> <p>4 given a fuller and fairer effect." Is that</p> <p>5 quote accurate to the best of your knowledge?</p> <p>6 A. Yes, sir, I think so.</p> <p>7 Q. Okay. What did you mean by that?</p> <p>8 A. I think it's self-explanatory.</p> <p>9 Q. Okay. So you say first that "The</p> <p>10 plan is based on neutral principles promoting</p> <p>11 communities of interest in the Gulf, Black</p> <p>12 Belt and Wiregrass." I think we've talked</p> <p>13 about that. But then you say, "Ensuring that</p> <p>14 the state's long-term principles of compact</p> <p>15 districts is given a fuller and fairer</p> <p>16 effect." What did you particularly mean by</p> <p>17 the compact districts giving a fuller and</p> <p>18 fairer effect?</p> <p>19 A. I think that in Livingston 2 we</p> <p>20 made the districts a little more compact,</p> <p>21 providing -- I've forgotten what the two</p> <p>22 categories are in compactness and communities</p> <p>23 of interest. But providing higher scores.</p> <p>24 Q. Okay. So to the best of your</p> <p>25 recollection, were the main differences</p>



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<p style="text-align: right;">Page 81</p> <p>1 between the opportunity plan and Livingston 2 2 improve compactness in the Livingston 2 plan? 3 A. I believe that's correct. 4 But I -- I believe that's correct. 5 Q. Okay. And then you go on to 6 say -- or I should say you're quoted as 7 saying, "While the plan is not graded based on 8 race, the result is fairly applied with these 9 neutral principles and the black voting age 10 population in district 2, which was in the 11 existing map" -- "which was in the existing 12 map was like around 30 percent, is now 38.8 13 percent in this plan. District 7 preserves a 14 core which is 50.43 percent black voting age 15 population. This plan complies with the 16 Voting Rights Act." Does that appear to be an 17 accurate quotation of what you said? 18 A. Yes, sir. 19 Q. Okay. What did you mean when you 20 said "The plan is not graded based on race"? 21 A. It goes back to we were looking 22 at the principles of compactness, communities 23 of interest, and not putting the 24 candidates -- competing candidates against 25 each other. And the benefit would be the --</p>	<p style="text-align: right;">Page 83</p> <p>1 A. I guess we started making 2 sausage at that point in time. 3 Q. Can you say a little bit more 4 about that? 5 A. Making sausage? That's what 6 they describe the legislative process as, as 7 making sausage. And we had two different 8 bills, and we had to come to some compromise 9 in between them to pass one. 10 Q. Okay. And was the result of that 11 sausage making the Livingston 3 plan which was 12 introduced and passed out of the conference 13 committee? 14 A. Yes, sir. 15 Q. Okay. 16 MR. ROSBOROUGH: Can we pull up 17 Exhibit 12, please. 18 (Whereupon, Exhibit 12 was marked 19 for identification.) 20 MR. ROSBOROUGH: Thank you. 21 Q. (By Mr. Rosborough) Okay. 22 Senator Livingston, does this 23 appear to be the Livingston congressional 24 plan 3 that passed out of the conference 25 committee?</p>
<p style="text-align: right;">Page 82</p> <p>1 the improvement in the BVAP. 2 Q. So when you say "this plan 3 complies with the Voting Rights Act," was 4 it -- was your understanding of that based on 5 those three principles you just discussed, 6 communities of interest, compactness, and no 7 pairing incumbents? 8 A. And the improvement of the BVAP. 9 Q. And improvement of the BVAP, okay. 10 Do you recall any sort of 11 performance or functionality analysis such as 12 the one that Mr. Hood performed on the 13 earlier -- Dr. Hood, I'm sorry, performed on 14 the earlier plan being run on this plan? 15 A. I think there was one run that 16 we were able to produce on Friday, yes, sir. 17 Q. Okay. Okay. So after this plan 18 passed the senate, Livingston 2 and 19 communities of interest passed the house, what 20 happened next in the legislative process? 21 MR. ROSBOROUGH: And I'm sorry. 22 You can pull that down. Thanks. 23 THE WITNESS: So what happened 24 next in the legislative process? 25 Q. (By Mr. Rosborough) Yes, sir.</p>	<p style="text-align: right;">Page 84</p> <p>1 A. Yes, sir. 2 Q. Okay. How would you characterize 3 this plan in contrast to Livingston 2? 4 A. The primary changes are down in 5 district 2. You added -- I can't really see 6 them. But you added two counties to the west 7 there. 8 Q. Would that be Lowndes and Butler? 9 A. I think that's correct, yes, 10 sir. It's awful small. And the district 3, 11 Etowah County was put back whole and added 12 into the third congressional district. The 13 remainder of Blount was put into the fourth 14 congressional district. And in the fifth 15 congressional district, Lawrence County was 16 added into the fifth congressional district. 17 Otherwise, it was just -- changes were made 18 in deviation to make it -- make it whole. 19 That brought back even higher scores in 20 compactness and communities of interest than 21 we had before. 22 Q. Okay. What were the reasons to 23 the best of your recollection for these 24 changes that you just described? 25 A. Again, I just stated, we brought</p>



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<p style="text-align: right;">Page 85</p> <p>1 back higher community of interest and 2 compactness scores than there was in the 3 Polsby-Popper and the Reock scores. 4 Q. Okay. I think I understand in 5 terms of compactness. How did this improve 6 off the previous maps in terms of communities 7 of interest? 8 A. We actually added what would be 9 considered one up in the fifth congressional 10 district between Lawrence and Morgan 11 Counties. Lawrence County being the old farm 12 belt there, and Morgan being the industrial 13 county where the gins used to be in the day, 14 so -- 15 Q. Okay. Any other -- I'm sorry 16 about that. I didn't mean to interrupt you. 17 A. That's all. 18 Q. Okay. Were there any other 19 changes made to improve the community of 20 interest configurations from previous plans? 21 A. We maintained the Black Belt in 22 two districts and obviously the Wiregrass and 23 the Gulf Coast community of interest. 24 Q. Did the -- did that initial plan, 25 the community of interest plan equally comply</p>	<p style="text-align: right;">Page 87</p> <p>1 role, Senator Livingston. 2 A. My role as chair was to get a 3 plan out that we thought was fair and did 4 what the Court said. We focused on 5 communities of interest, compactness, and not 6 putting incumbents against each other. 7 Q. Okay. Okay. 8 What were the areas, if you 9 recall, that you needed to compromise on with 10 the house plan? Was that primarily in the 11 north part of the state, or were there other 12 areas? 13 A. I apologize. But without 14 looking at both maps, I couldn't tell you. 15 So -- obviously one of the compromises we had 16 to have was in making Etowah County whole. 17 Past that, I don't remember. 18 Q. Okay. Do you remember any 19 differences of opinion between yourself and 20 Representative Pringle as to the boundaries of 21 a compliant plan? 22 A. Would you repeat that for me, 23 please? 24 Q. Sure. Obviously, there was a 25 house map that passed and a senate map that</p>
<p style="text-align: right;">Page 86</p> <p>1 in terms of those three communities of 2 interest? 3 A. I think the Gulf Coast did and 4 the Wiregrass did and the Black Belt, yes. 5 The north Alabama with Lawrence County and 6 Morgan County being similar -- did not -- was 7 not included in that. 8 Q. Okay. I believe in your 9 interrogatory response, you named a number of 10 different senators who contributed to the 11 input of the plan's design. Senator Barefoot, 12 Senator Bell, Senator Chasteen, yourself, 13 Senator Orr, Senator Roberts, Senator 14 Scofield, and Senator Williams. Do you recall 15 amongst all these different contributions what 16 your particular role was? 17 MR. WALKER: Let me caution the 18 witness that I have asserted the legislative 19 immunity and privilege on behalf of other 20 members of the reapportionment committee. And 21 in his answer, if he can answer the question 22 without saying what other members said. 23 Q. (By Mr. Rosborough) Right. 24 And just to be clear, my question 25 at the moment was just about your particular</p>	<p style="text-align: right;">Page 88</p> <p>1 passed. Do you recall what differences there 2 were between you and Representative Pringle 3 that needed to be resolved in a final plan? 4 A. Obviously Chairman Pringle was 5 very, very interested in his community of 6 interest map. I don't remember any -- the 7 differences, no. 8 Q. Okay. But you -- and I don't want 9 to put words your mouth, so tell me if I'm 10 incorrect on this. But I believe that you 11 testified that you had been supportive of the 12 community of interest map, but went along with 13 this other chain of maps, which was 14 opportunity to Livingston 2 to Livingston 3 15 because of outside input; is that correct? 16 A. I don't think I said outside 17 influence. I think I said my committee 18 members. 19 Q. Okay. So it was other committee 20 members that no longer were supportive of the 21 community of interest plan; is that correct? 22 A. Yes, sir. 23 Q. And your understanding is that 24 that was because of outside information they 25 received?</p>



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<p style="text-align: right;">Page 89</p> <p>1 A. I don't know what the 2 information they received. 3 Q. Okay. Do you understand -- 4 without revealing the contents of 5 conversations, do you have an understanding of 6 why the other senate members of the committee 7 no longer supported the community of interest 8 plan? 9 A. I don't know why -- why that 10 changed. 11 MR. ROSBOROUGH: All right. Can 12 we pull up Exhibit 13, please. 13 (Whereupon, Exhibit 13 was marked 14 for identification.) 15 Q. (By Mr. Rosborough) Senator 16 Livingston, do you recognize this document? 17 A. I have seen it before, yes, sir. 18 Q. Does this appear to be the 19 analysis Dr. Hood performed on the 20 Livingston 3 plan which was ultimately the 21 plan enacted in senate bill 5? 22 A. It doesn't identify itself as 23 that. But it looks familiar, yes, sir. 24 Q. Okay. And did you see Dr. Hood's 25 analysis before the plan passed the</p>	<p style="text-align: right;">Page 91</p> <p>1 plan, if at all? 2 A. Again, it's 46.6 percent 3 opportunity if you've got the right candidate 4 and the right funding. 5 Q. If this had been 43 percent 6 average, would that have been an opportunity 7 district in your mind? 8 A. If you're talking about CD-2, 9 average 43 percent? 10 Q. Yes. 11 A. I don't think so. 12 Q. Okay. Where do you sort of 13 draw -- where do you draw the line in 14 considering what average -- for a black 15 preferred candidate for prior elections, what 16 average would make this an opportunity 17 district? 18 A. I don't have a number for that, 19 sir. 20 Q. Nut somewhere above 43 percent, 21 but 46.6 percent qualifies; is that fair? 22 A. I think that would be fair, yes, 23 sir. 24 MR. ROSBOROUGH: Okay. All right. 25 We can take that down. Actually, can we pull</p>
<p style="text-align: right;">Page 90</p> <p>1 legislature during the special session? 2 A. Yes, sir. 3 Q. Okay. And under this analysis in 4 senate district -- I'm sorry -- in 5 congressional district 2 in the seven races 6 analyzed, black preferred candidates would 7 have lost all seven of those races; is that 8 correct? 9 A. I think that's what that shows, 10 yes, sir. 11 Q. Okay. And that also shows that 12 black preferred candidates would have lost by 13 an average of about a little under eight 14 points; is that correct? 15 A. I see on the percentage on 16 there. It's 46.6 out on the end of CD-2. 17 That's an average. 18 Q. Oh, I'm sorry. I think I meant to 19 say about seven points. It's 46.6 percent for 20 the black preferred candidate and 53.4 for the 21 white preferred candidate. Does that seem 22 accurate? 23 A. Yes, sir, I see that. 24 Q. Okay. How did this analysis 25 factor into your decision to support this</p>	<p style="text-align: right;">Page 92</p> <p>1 up Exhibit 14, please. 2 Q. Okay. Senator Livingston, this is 3 an article from the Alabama Reflector from 4 July 21st, 2023 with the title Alabama 5 Legislative Passes Controversial Congressional 6 Map. Have you seen this article before? 7 A. No, sir, I have not. 8 (Whereupon, Exhibit 14 was marked 9 for identification.) 10 Q. (By Mr. Rosborough) I'm asking 11 about this article because you are quoted in 12 it. If we could scroll down to, I believe, 13 page 3. There we go. 14 And you understand this article is 15 referring to the plan that ultimately passed, 16 which was Livingston 3 and ultimately passed 17 as senate bill 5? 18 A. Yes, sir. 19 Q. Okay. All right. 20 If you see, you are quoted in this 21 article as saying -- well, it refers to you, I 22 should say, as noting that republicans 23 prioritize compactness and communities of 24 interest which led to a 40 percent black 25 district. Livingston said there was not a</p>



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<p style="text-align: right;">Page 93</p> <p>1 conscious attempt to reach that number. And</p> <p>2 then you're specifically quoted as saying,</p> <p>3 There are three legs. And in the suit, the</p> <p>4 Court's order are -- those are two of the</p> <p>5 three legs. Does that appear to be an</p> <p>6 accurate quote?</p> <p>7 A. I don't remember saying that,</p> <p>8 but I'm sure they got it recorded.</p> <p>9 Q. Okay. Okay.</p> <p>10 What do you mean there were three</p> <p>11 legs, and in the suit, the Court's order and</p> <p>12 these are two of the three legs?</p> <p>13 A. I would assume that I'm talking</p> <p>14 about compactness and communities of</p> <p>15 interest.</p> <p>16 Q. Okay. And then what is the third</p> <p>17 leg, is that the Court's order?</p> <p>18 A. I would say that would be the --</p> <p>19 Q. Okay. And you talked a good</p> <p>20 amount about how compactness and communities.</p> <p>21 of interest played into the map, but what</p> <p>22 about the Court's order, what role did that</p> <p>23 play for you?</p> <p>24 A. So the Court's order was to</p> <p>25 give -- to create two opportunity districts.</p>	<p style="text-align: right;">Page 95</p> <p>1 A. I think -- I think we made a</p> <p>2 valid attempt at making it fair and equal for</p> <p>3 everybody.</p> <p>4 Q. Okay. And he said, "I'm</p> <p>5 interested in keeping my majority." When you</p> <p>6 said, "We did the best we could," are you</p> <p>7 referring to passing what you think is a fair</p> <p>8 map while keeping a republican majority?</p> <p>9 A. I think we passed a fair map</p> <p>10 that satisfied the Court's requirements of</p> <p>11 opportunity districts.</p> <p>12 Q. And I understand that. I'm just</p> <p>13 wondering what -- how your response, "We did</p> <p>14 the best we could" in response to Speaker</p> <p>15 McCarthy's statement, "I'm interested in</p> <p>16 keeping my majority," what the relationship</p> <p>17 between those two are?</p> <p>18 A. I think you'd have to go back</p> <p>19 and ask whoever the -- wrote the article.</p> <p>20 I'm not sure they were in the same sentence</p> <p>21 or even meant to be tied together. But they</p> <p>22 are tied together there.</p> <p>23 Q. Okay. How, if at all, did helping</p> <p>24 Speaker McCarthy keep a republican majority in</p> <p>25 the house, how, if at all, did that play into</p>
<p style="text-align: right;">Page 94</p> <p>1 And I think that's what we tried to do with</p> <p>2 this.</p> <p>3 MR. ROSBOROUGH: I'd like to</p> <p>4 scroll down toward the bottom. Further down.</p> <p>5 Keep going. Okay. There we go. All right.</p> <p>6 Q. So toward the bottom of the</p> <p>7 article, the last -- these -- the last couple</p> <p>8 paragraphs on the page shown says, they say,</p> <p>9 The week-long session drew national attention.</p> <p>10 Republicans have a slim majority in the U.S.</p> <p>11 House that could shift with the loss of five</p> <p>12 seats. Livingston said Friday he had spoken</p> <p>13 with U.S. House Speaker Kevin McCarthy, R.</p> <p>14 California. He said, "I'm interested in</p> <p>15 keeping my majority," Livingston said. "That</p> <p>16 was basically his conversation. He's just</p> <p>17 telling us to do what we can do. We did the</p> <p>18 best we could."</p> <p>19 What do you recall about your</p> <p>20 conversation with Speaker McCarthy?</p> <p>21 A. Just a brief conversation that</p> <p>22 he expressed exactly what I said there.</p> <p>23 Q. Okay. And when you said at the</p> <p>24 end, "We did the best we could," what did you</p> <p>25 mean by that?</p>	<p style="text-align: right;">Page 96</p> <p>1 your efforts here?</p> <p>2 A. They really didn't play into our</p> <p>3 efforts. You know, they really didn't.</p> <p>4 Q. Okay. Are you just speaking for</p> <p>5 yourself, or are you speaking to other</p> <p>6 committee members?</p> <p>7 A. I would speak for myself there.</p> <p>8 Q. Okay. Would you say that you</p> <p>9 consider it fair and equal for black preferred</p> <p>10 candidates to win zero elections in</p> <p>11 congressional district 2 as drawn in the new</p> <p>12 plan?</p> <p>13 A. Would you repeat the question</p> <p>14 for me, please?</p> <p>15 Q. Would you consider it fair and</p> <p>16 equal for black preferred candidates to win</p> <p>17 zero elections in the newly drawn</p> <p>18 congressional district 2?</p> <p>19 A. No, sir, I don't think. I think</p> <p>20 they have an opportunity to win there.</p> <p>21 Q. And you think they have an</p> <p>22 opportunity to win even though all of the</p> <p>23 analysis you saw showed that they would have</p> <p>24 not have won a single election had that</p> <p>25 district been drawn in the past?</p>



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<p style="text-align: right;">Page 97</p> <p>1 A. I think if you go back and look 2 at the numbers that were in there, some of 3 those candidates were very weak. 4 Q. Were there any candidates run in 5 those races that you did do not consider very 6 weak? 7 A. I'd have to look at it again to 8 be honest with you. But, yes, sir, I think 9 there were some that were not weak. 10 Q. But those candidates that were not 11 weak nonetheless would have lost in the second 12 district; correct? 13 A. I think that's correct, yes, 14 sir. Again, I'd have to look at it. 15 Q. Okay. Which of those prior 16 candidates do you think were weak? 17 A. I don't remember, sir. I don't 18 see that in front of me. So I don't know 19 who -- that was '20 and -- 2018 and 2020 20 data; right? 21 Q. 2018 and 2020 data. I think there 22 might have been some 2016 data in the 23 analysis. 24 A. You know, just to be perfectly 25 honest with you, this was three weeks of, you</p>	<p style="text-align: right;">Page 99</p> <p>1 A. I would have withheld that. I'm 2 sorry. 3 Q. No, that's all right. 4 So if we look at district 2 in the 5 Senate 2020 race, that was the Doug Jones 6 versus Tommy Tuberville race; correct? 7 A. Yes, sir, I think so. 8 Q. Okay. And that was in a 9 presidential year where there's generally 10 higher turnout; is that correct? 11 A. Yes, sir. 12 Q. And in that race in this new 13 congressional district 2 under the enacted 14 plan, Senator Tuberville would have beaten 15 Doug Jones -- former Senator Jones by 16 4 percentage points; is that accurate? 17 A. Yes, sir, that's what I see. 18 Q. Okay. Would you consider Senator 19 Jones a weak candidate? 20 A. No, sir, I would not. 21 Q. Would you consider him to be more 22 well-funded than most other democratic 23 candidates in recent years? 24 A. Yes, sir. 25 Q. So despite being well-known, a</p>
<p style="text-align: right;">Page 98</p> <p>1 know, trying to get this together and to get 2 it to the Court, so... 3 MR. ROSBOROUGH: Okay. We can 4 pull this down. We're getting close -- we're 5 getting close to wrapping up on my end. 6 Q. So let me just confirm then, you 7 didn't -- can you think of any candidates in 8 the past other than Doug Jones who you would 9 consider -- well, let me rephrase that. 10 One of those elections was Doug 11 Jones, correct, where he lost to Senator 12 Tuberville in 2020 and would have lost in that 13 second congressional district under the 14 analysis; is that correct? 15 A. Well, some of the analysis -- it 16 probably wasn't on this map, but some of the 17 analysis showed him winning the second 18 congressional district. 19 Q. Well, let's pull back up -- 20 A. Maybe not in that one. 21 Q. Yeah. Let's just go ahead and 22 pull back up really quickly Exhibit 13 if you 23 don't mind. It will be easy. Again, I'm 24 really not trying to do this as a memory test. 25 I know it was a fast session.</p>	<p style="text-align: right;">Page 100</p> <p>1 former incumbent, and well-funded, Senator 2 Jones would have lost to Senator Tuberville by 3 4 points in this district; correct? 4 A. Yes, sir. 5 MR. ROSBOROUGH: Okay. You can 6 take that down. Okay. Can we just -- I'm 7 getting close to wrapping up, Senator 8 Livingston. I appreciate your time. I've got 9 a few more minutes. 10 Can we please pull up Exhibit 15? 11 Q. Okay. Senator Livingston, do you 12 recognize this document? 13 (Whereupon, Exhibit 15 was marked 14 for identification.) 15 THE WITNESS: Yes, sir. 16 Q. (By Mr. Rosborough) And what is 17 it? 18 A. I think that's the final bill 19 that was passed SB-5 as enacted and stamped. 20 And think if I remember from earlier 21 conversation has got the governor's signature 22 on the bottom of the front page. 23 MR. ROSBOROUGH: Okay. All right. 24 And if we could scroll up to, I think it's 25 maybe the second page. Scroll up one page</p>



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<p style="text-align: right;">Page 101</p> <p>1 more. There we go.</p> <p>2 Q. Okay. So section one of the bill</p> <p>3 sets out a number of -- well, line 15 right</p> <p>4 there says, "The legislature finds and</p> <p>5 declares the following." And then it sets out</p> <p>6 a number of statements over the next several</p> <p>7 pages. If you scroll down all the way until</p> <p>8 we get to section 2, I believe, which is an</p> <p>9 actual description of the districts; is that</p> <p>10 correct?</p> <p>11 A. I'll take your word for it.</p> <p>12 It's very difficult to see here.</p> <p>13 Q. Okay. Are you generally familiar</p> <p>14 with the fact that there are what are titled</p> <p>15 legislative findings that take up about, you</p> <p>16 know, five or so pages in the bill?</p> <p>17 A. Yes, sir.</p> <p>18 Q. Okay. And do you recall in your --</p> <p>19 responses to the interrogatories that when you</p> <p>20 were asked to identify each individual and/or --</p> <p>21 entity who participated in the drafting of the</p> <p>22 statement of legislative intent accompanying</p> <p>23 the congressional districting map, you said</p> <p>24 all information and belief, Eddie LaCour, do</p> <p>25 you recall that?</p>	<p style="text-align: right;">Page 103</p> <p>1 over. I am happy to go slower if you need.</p> <p>2 Just let us know. But do these appear to be</p> <p>3 the talking points that you just mentioned?</p> <p>4 A. Yes, sir.</p> <p>5 Q. Okay. Who prepared these talking</p> <p>6 point?</p> <p>7 A. I think they came from Eddie</p> <p>8 LaCour.</p> <p>9 Q. Okay. And do you recall when you</p> <p>10 received them?</p> <p>11 A. That, I do not remember, no,</p> <p>12 sir.</p> <p>13 Q. Do you recall discussing these</p> <p>14 talking points with anyone?</p> <p>15 A. No, sir.</p> <p>16 Q. Did you rely on these talking</p> <p>17 point during legislative hearings?</p> <p>18 A. Some of them I did, yes, sir.</p> <p>19 MR. ROSBOROUGH: Okay. Okay.</p> <p>20 Give me one sec. I'm just going to take one</p> <p>21 sec if you don't mind the awkward the pause.</p> <p>22 Okay. We can take that down.</p> <p>23 If we can just take a five-minute</p> <p>24 break. I think that's probably all the</p> <p>25 questions I have. But I just want a second to</p>
<p style="text-align: right;">Page 102</p> <p>1 A. Yes, sir.</p> <p>2 Q. When -- are these sections of the</p> <p>3 bill what you were referring to in that</p> <p>4 answer?</p> <p>5 A. Yes, sir.</p> <p>6 MR. ROSBOROUGH: All right. We</p> <p>7 can -- well, let me just -- we can take that</p> <p>8 down. That's fine.</p> <p>9 Q. Do you -- without revealing any</p> <p>10 conversations with counsel, do you have any</p> <p>11 understanding of why those findings were</p> <p>12 included in the bill?</p> <p>13 A. I do not, sir.</p> <p>14 Q. Okay. Senator Livingston, did</p> <p>15 you -- do you recall preparing or receiving</p> <p>16 any talking points regarding the enacted plan</p> <p>17 or any draft plans during the special session?</p> <p>18 A. Yes, sir.</p> <p>19 MR. ROSBOROUGH: Okay. Can we</p> <p>20 pull up Exhibit 16, please?</p> <p>21 (Whereupon, Exhibit 16 was marked</p> <p>22 for identification.)</p> <p>23 Q. (By Mr. Rosborough) Okay.</p> <p>24 And if we can just sort of slowly</p> <p>25 scroll down and give you a chance to look</p>	<p style="text-align: right;">Page 104</p> <p>1 confer with my cocounsel. Does that work? We</p> <p>2 can take five and come back at 3:27.</p> <p>3 MR. WALKER: Davin, would you mind</p> <p>4 if we took a little bit longer than five, say</p> <p>5 maybe ten or so minutes?</p> <p>6 MR. ROSBOROUGH: Oh, sure, that's</p> <p>7 fine. We can take ten.</p> <p>8 MR. WALKER: Okay.</p> <p>9 MR. ROSBOROUGH: Well, actually,</p> <p>10 how about this? You know what, I feel pretty</p> <p>11 comfortable those are all of my questions. So</p> <p>12 let me see if Mr. Posimato from the Caster</p> <p>13 plaintiffs or anyone else wants to -- anyone</p> <p>14 else has any questions because it may be -- if</p> <p>15 not, we can just end this and take a longer</p> <p>16 break.</p> <p>17 MR. POSIMATO: This is Joe</p> <p>18 Posimato from the Caster plaintiffs. The</p> <p>19 Caster team doesn't have any further</p> <p>20 questions.</p> <p>21 MR. DAVIS: Nothing from the</p> <p>22 secretary of state.</p> <p>23 COURT REPORTER: Okay. No other</p> <p>24 questions, Counsel?</p> <p>25 MR. ROSBOROUGH: Nothing else from</p>



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1 me.
2 COURT REPORTER: Okay.
3 THE VIDEOGRAPHER: Counsel, is it
4 going to be the same orders for this witness?
5 MR. ROSS: Same orders for this
6 witness, yes, thank you.
7 MR. POSIMATO: For the Caster
8 plaintiffs, I think my colleague had ordered a
9 transcript, but not a rush transcript from the
10 last deposition. We would actually like to
11 amend that. Can we actually have rush
12 transcript for the Milligan plaintiffs for all
13 of these depositions?
14 COURT REPORTER: Yes, sir.
15 MR. POSIMATO: Thank you so much.
16 COURT REPORTER: Okay. You can
17 take us off, I believe, Bailey.
18 THE VIDEOGRAPHER: No further
19 questions. The time is 2:24 p.m. on August
20 9th, 2023. We are going off the record.
21 (The deposition concluded at 2:24 p.m.)
22
23
24
25

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1 C E R T I F I C A T E
2
3 STATE OF ALABAMA)
4 CALHOUN COUNTY)
5
6 I hereby certify that the above
7 proceedings were taken down by me and
8 transcribed by me using computer-aided
9 transcription, and that the above is a true
10 and correct transcript of the said proceedings
11 given by said witness.
12 I further certify that I am neither
13 of counsel nor of kin to the parties to the
14 action, nor am I in anywise interested in the
15 result of said cause.
16 I further certify that I am duly
17 licensed by the Alabama Board of Court
18 Reporting as a Certified Court Reporter as
19 evidenced by the ACCR number found below.
20
21 COMMISSIONER - NOTARY PUBLIC
22
23 *Cindy C. Jenkins, CCR*
24 CINDY C. JENKINS, CSR
25 ACCR #470 - Exp. 9/30/2023



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Exhibit 1 - Livingston Deposition

Exhibit

1

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

MARCUS CASTER, et al.,
Plaintiffs,

vs.

No. 2:21-cv-01536-AMM

WES ALLEN, et al.,
Defendants.

EVAN MILLIGAN, et al.,
Plaintiffs,

vs.

NO 2:21-cv-01530-AMM

WES ALLEN, et al.,
Defendants.

**DEFENDANT SEN. STEVE LIVINGSTON'S RESPONSE TO
PLAINTIFFS' THIRD SET OF INTERROGATORIES**

Comes now defendant Sen. Steve Livingston and says as follows in response to the *Caster* and *Milligan* plaintiffs' third set of interrogatories:

General Objections

1. Sen. Livingston objects to the interrogatories, including the instructions and definitions, to the extent they purport to impose upon him obligations different from, or greater than, those established or required by the Federal Rules of Civil Procedure, the Local Rules of the United States District Court for the Northern District of Alabama, or orders of this Court.
2. Sen. Livingston objects to the interrogatories, including the instructions and definitions, to the extent they seek to impose any meaning or interpretation and definitions, to the extent they seek to

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impose any meaning or interpretation onto the requests other than that evident from the plain and ordinary meaning of the word used therein.

3. Sen. Livingston objects to the interrogatories to the extent they seek information or documents protected by the attorney-client privilege, the work-product doctrine, the joint-defense or common-interest privilege, or any other applicable privilege, exemption, or immunity.
4. Sen. Livingston objects to the interrogatories to the extent they seek to discover the mental impressions, conclusions, opinions, legal strategies, or legal theories of attorneys for or his non-attorney employees working under their supervision. Such information is privileged as attorney work-product. See *Hickman v. Taylor*, 329 U.S. 495 (1947).
5. Sen. Livingston objects to the interrogatories to the extent they seek information already in the possession, custody, or control of the Plaintiffs, or otherwise equally available to the Plaintiffs.
6. Sen. Livingston objects to the interrogatories to the extent they seek information that is not relevant to any claim or defense presently before the Court and thus are not reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)
7. By answering or otherwise responding to these discovery requests, Rep. Pringle or Sen. Livingston do not concede the relevance or materiality of the information requested or the subject matter to which the request for production refers. Rather, the responses are made expressly subject to, and without in any way waiving or intending to waive, any question or objection as to the competency, relevance, privilege, or admissibility as evidence, of any of the matters referred to in the responses.
8. This production is being made to the *Milligan* and *Caster* Plaintiffs.

Reservation of Rights

Sen. Livingston's responses to these interrogatories are subject to the foregoing general objections and without waiving or intending to waive, but, on the contrary, intending to preserve an preserving:

1. All questions as to the competency, relevance, materiality, privilege, and admissibility of any response, evidence, information, or document for any purpose at any hearing in this matter or any other proceedings;
2. The right to object on any grounds to the use of information provided in any hearing in this matter or in any other proceeding;
3. The right to object on any grounds at any time to other discovery requests or other discovery, including but not limited to demands for further responses to the interrogatories; and,
4. The right to revise, correct, supplement, clarify, and amend the responses set forth herein consistent with the Federal Rules of Civil Procedure.

INTERROGATORY NO. 1: Identify each individual and/or entity—including but not limited to other state legislators or their staffs, members of Congress or their staffs, consultants, attorneys, experts, political party entities or officials (including from the Alabama Republican Party), and/or interest group agents or employees (including anyone associated with the National Republican Redistricting Trust)—who drew any portion of each of the Legislative Remedial Plans.

RESPONSE:

Sen. Livingston objects that the phrase "were considered" is too vague to allow him to know who the subject is. Sen. Livingston understands the phrase "drew any portion of" to mean the primary author or authors of a plan. With that understating:

1. Community of Interest Plan--Randy Hinaman
2. Opportunity Plan--Sen. Dan Roberts emailed it in.
3. Livingston 2 Plan--This plan was drafted by Sen. Dan Roberts and Sen. Will Barfoot.
4. SB5 Plan-- I do not know who drafts this plan; it was delivered to the Reapportionment office by Sen. Arthur Orr.

INTERROGATORY NO. 2: Identify each individual and/or entity—including but not limited to other state legislators or their staffs, members of Congress or their staffs, consultants, attorneys, experts, political party entities or officials (including from the Alabama Republican Party), and/or interest group agents or employees (including anyone associated with the National Republican Redistricting Trust)—whose input, feedback, or advice were considered in drawing, evaluating, or approving the Legislative Remedial Plans.

RESPONSE:

Sen. Livingston objects that the phrase “were considered” is too vague to allow him to know who the subject is, *i.e.*, who is doing the considering. Without knowing that, he cannot say who considered input, feedback, or advice, or how any such consideration by that person, or those persons, was applied when drawing, evaluating, or approving any plan. Subject to and without waiving this objection, Sen. Livingston identifies the following persons whom he believes played some role in the drawing, evaluating, or approving of each plan:

1. Community of Interest Plan—Eddie LaCour, Randy Hinaman, Dr. Trey Hood, Sen. Steve Livingston, Rep. Chris Pringle, and Dorman Walker.¹
2. Opportunity Plan—I do not recall where this plan came from—it may have come from Sen. Dan Roberts. Some members of the Redistricting Committee may have provided input, feedback, or guidance, but I do not recall which ones.
3. Livingston 2 Plan—Members of the Redistricting Committee including Sen. Will Barfoot, Sen. Lance Bell, Sen. Donnie Chesteen, Sen. Steve Livingston, Sen. Arthur Orr, Sen. Dan Roberts, Sen. Clay Scofield, and Sen. Jack Williams.
4. SB5 Plan—Members of the Redistricting Committee including Sen. Will Barfoot, Sen. Lance Bell, Sen. Donnie Chesteen, Sen. Steve Livingston, Sen. Arthur Orr, Sen. Dan Roberts, Sen. Clay Scofield, and Sen. Jack Williams.

¹ Each plan that was considered by a committee or chamber of the Legislature presumably would have been subject to the input, feedback, or advice of its members to the extent they participated in drawing, evaluating, or approving the plan.

INTERROGATORY NO. 3: Describe the role played with respect to the Legislative Remedial Plans by each individual and/or entity identified in Interrogatory Nos. 1 and 2.

RESPONSE:

1. Community of Interest Plan—Randy Hinaman was the primary author, Dr. Trey Hood provided a performance report, Eddie LaCour provided legal advice, Sen. Steve Livingston reviewed and approved the plan, Rep. Chris Pringle reviewed and approved the plan, and Dorman Walker provided legal advice.²

2. Opportunity Plan—Chris Brown authored the plan and Sen. Dan Roberts delivered it to the Reapportionment Office.

3. Livingston 2 Plan— Sen. Will Barfoot, Sen. Lance Bell, Sen. Donnie Chesteen, Sen. Steve Livingston, Sen. Arthur Orr, Sen. Dan Roberts, Sen. Clay Scofield, and Sen. Jack Williams all contributed input to the plan's design.

4. SB5 Plan— Sen. Will Barfoot, Sen. Lance Bell, Sen. Donnie Chesteen, Sen. Steve Livingston, Sen. Arthur Orr, Sen. Dan Roberts, Sen. Clay Scofield, and Sen. Jack Williams all contributed input to the plan's design.

INTERROGATORY NO. 4: Identify and describe any and all instructions provided to individuals or entities who drafted or were in any way involved in the drafting of each of the Legislative Remedial Plans, including who drafted, provided, and/or conveyed those instructions.

RESPONSE:

Objection to “any and all” and “in any way” as overbroad and literally impossible to comply with. Subject to and without waiving this objection:

1. Community of Interest Plan—I do not recall, other than the Guidelines. This plan was in large part drawn before I saw it.

2. Opportunity Plan— I do not know.

3. Livingston 2 Plan—I do not recall, other than the Guidelines, and in particular making districts compact and respecting communities of interest.

² Each plan that was considered by a committee or chamber of the Legislature presumably would have been evaluated or approved by the leadership and members of the committee or chamber.

4. SB5 Plan—I do not recall, other than the Guidelines, and in particular making districts compact and respecting communities of interest.

INTERROGATORY NO. 5: Identify and describe any and all criteria, constraints, and considerations that were considered, adopted, or otherwise reflected in the creation of any of the Legislative Remedial Plans, and describe how these criteria, constraints, and considerations were prioritized.

RESPONSE:

1. Community of Interest Plan—See the response to Interrogatory 4.
2. Opportunity Plan— I do not know.
3. Livingston 2 Plan—There were conversations about the plan as it evolved, but I do not recall exactly what was said.
4. SB5 Plan— There were conversations about the plan as it evolved, but I do not recall exactly what was said.

INTERROGATORY NO. 6: Identify each individual and/or entity who participated in the drafting of the statement of legislative intent accompanying the congressional districting map enacted and signed by the Governor as SB 5.

RESPONSE:

On information and belief, Eddie LaCour.

INTERROGATORY NO. 7: Identify all memoranda, reports, analyses, evaluations, or other documents, relied upon in evaluating the Legislative Remedial Plans and the VRA Plaintiffs' Remedial Plan considered by Joint Legislative Reapportionment Committee, including but not limited to the extent to which the plans provide Black voters the opportunity to elect their preferred candidates, and any performance, functionality, or racially polarized voting analysis.

RESPONSE:

Objection to the phrase “relied on” and other documents” as too vague and general to allow me to know how to reasonably respond. Objection to the extent the phrase “considered by the Joint Legislative Reapportionment Committee” requires a response for members of the Committee other than myself; I do not know what information other members of the Committee had at their disposal and what use they made of it. Subject to and without waiving these objections:

1. Community of Interest Plan— I considered the map, the related population report, and the performance report from Dr. Trey Hood.
2. Opportunity Plan—I considered the map, related population data, and the performance report for Dr. Hood.
3. Livingston 2 Plan—I considered the map and related population data.
4. SB5 Plan—I considered the map, the related population report, and the performance report of Dr. Hood.
5. VRA Plaintiffs' Remedial Plan—I considered the map, the related population data, the letters received from the VRA Plaintiffs' counsel, and comments received at the meetings of the Reapportionment Committee and at the public hearing.

VERIFICATION

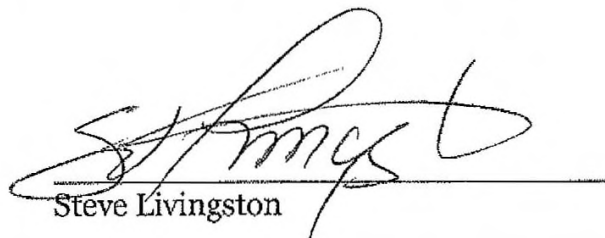
STATE OF ALABAMA)

COUNTY _____)

I, **Steve Livingston**, verify that I have reviewed the foregoing responses to interrogatories and know the contents thereof; that these responses were prepared with the assistance and advice of counsel; that the responses set forth herein, subject to inadvertent or undiscovered errors, are based on and therefore necessarily are limited by the records and information still in existence, presently recollected and thus far discovered in the course of preparation of these responses; that consequently, I reserve the right to make any changes in the responses if it appears at any time that omissions or errors have been made therein or that more accurate information is available; and that subject to the limitations set forth herein, the said answers are true to the best of my knowledge, information and belief.

Sworn to and subscribed before me on this the ____ day of August,

2023.


 Steve Livingston

Notary Public

My Commission Expires: _____

Respectfully submitted this this 9th day of August, 2023.

s/ Dorman Walker
Dorman Walker (ASB-9154-R81J)
BALCH & BINGHAM LLP
Post Office Box 78 (36101)
455 Dexter Avenue
Montgomery, AL 36104
Telephone: (334) 269-3138
Email: dwalker@balch.com

***Counsel for Sen. Livingston and
Rep. Pringle***

CERTIFICATE OF SERVICE

I certify that on August 9th, 2023, I served the foregoing on all counsel
of record by email.

/s/Dorman Walker

Exhibit 2 - Livingston Deposition

Exhibit

2

REDACTED

I am sorry for the delay getting this to you, but just got back in state from RNC Meetings. Here is the contact and bio for Dale. The party has retained him for council to us, and all Republican caucus members. He is considered one of the most experienced redistricting attorneys in the country. Please feel free to contact him if he can be useful in any way.

Dale Oldham is currently counsel to Fairlines America & the NRRT and the Redistricting Counsel for the Republican National Committee during the 2000 & 2010 redistricting cycles. Dale was Associate Counsel to the RNC during the 1990 redistricting cycle. Mr. Oldham was Counsel to FEC Commissioner Don McGahn and was the former Counsel for the Congressionally appointed Members of the Census Monitoring Board. He has been involved in nearly all of the critical redistricting cases of the last three redistricting cycles. He also represented the first charter school applicant in South Carolina, as well as other conservative and Republican organizations. Mr. Oldham has spoken at numerous seminars and symposiums on redistricting, census, free speech, campaign finance and election law as well as school choice issues. Including a paper for the ABA which was published in The Census, the Court, and Redistricting, in Census 2000: Considerations and Strategies for State and Local Government (Benjamin E. Griffith ed., American Bar Association 2000). Mr. Oldham is native South Carolinian and a graduate of the University of South Carolina School of Law.

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Exhibit 3 - Livingston Deposition

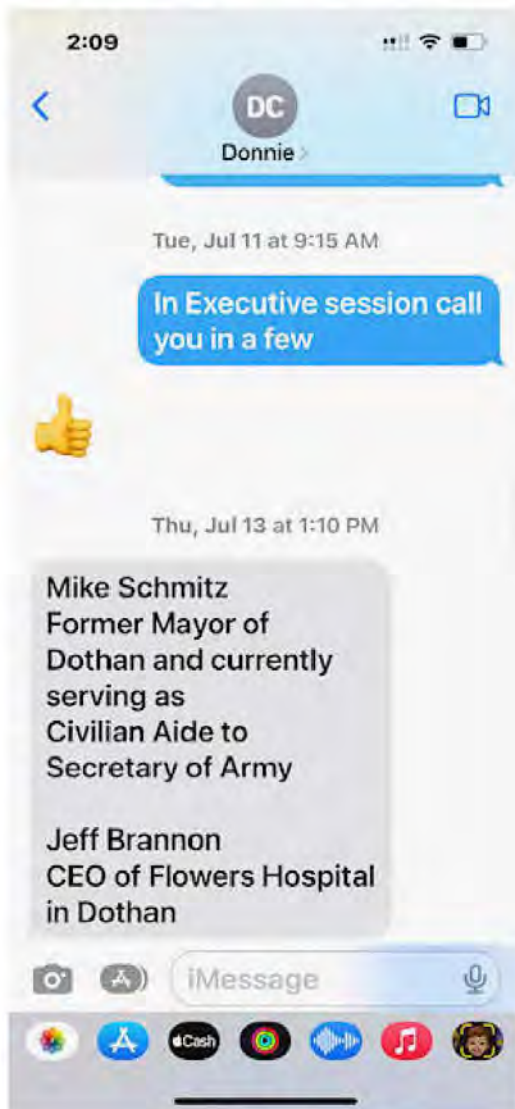


Exhibit
3

RC 049605

Exhibit 4 - Livingston Deposition**Exhibit****4****1 REAPPORTIONMENT COMMITTEE REDISTRICTING GUIDELINES****2 May 5, 2021****3 I. POPULATION**

4 The total Alabama state population, and the population of defined subunits
5 thereof, as reported by the 2020 Census, shall be the permissible data base used
6 for the development, evaluation, and analysis of proposed redistricting plans. It is
7 the intention of this provision to exclude from use any census data, for the purpose
8 of determining compliance with the one person, one vote requirement, other than
9 that provided by the United States Census Bureau.

10 II. CRITERIA FOR REDISTRICTING

11 a. Districts shall comply with the United States Constitution, including the
12 requirement that they equalize total population.

13 b. Congressional districts shall have minimal population deviation.

14 c. Legislative and state board of education districts shall be drawn to achieve
15 substantial equality of population among the districts and shall not exceed an
16 overall population deviation range of $\pm 5\%$.

17 d. A redistricting plan considered by the Reapportionment Committee shall
18 comply with the one person, one vote principle of the Equal Protection Clause of
19 the 14th Amendment of the United States Constitution.

20 e. The Reapportionment Committee shall not approve a redistricting plan that
21 does not comply with these population requirements.

22 f. Districts shall be drawn in compliance with the Voting Rights Act of 1965, as
23 amended. A redistricting plan shall have neither the purpose nor the effect of
24 diluting minority voting strength, and shall comply with Section 2 of the Voting
25 Rights Act and the United States Constitution.

26 g. No district will be drawn in a manner that subordinates race-neutral
27 districting criteria to considerations of race, color, or membership in a language-
28 minority group, except that race, color, or membership in a language-minority
29 group may predominate over race-neutral districting criteria to comply with
30 Section 2 of the Voting Rights Act, provided there is a strong basis in evidence in
31 support of such a race-based choice. A strong basis in evidence exists when there
32 is good reason to believe that race must be used in order to satisfy the Voting Rights
33 Act.

10213405.2

1 h. Districts will be composed of contiguous and reasonably compact
2 geography.

3 i. The following requirements of the Alabama Constitution shall be complied
4 with:

5 (i) Sovereignty resides in the people of Alabama, and all districts should be
6 drawn to reflect the democratic will of all the people concerning how their
7 governments should be restructured.

8 (ii) Districts shall be drawn on the basis of total population, except that voting
9 age population may be considered, as necessary to comply with Section 2 of the
10 Voting Rights Act or other federal or state law.

11 (iii) The number of Alabama Senate districts is set by statute at 35 and, under
12 the Alabama Constitution, may not exceed 35.

13 (iv) The number of Alabama Senate districts shall be not less than one-fourth or
14 more than one-third of the number of House districts.

15 (v) The number of Alabama House districts is set by statute at 105 and, under
16 the Alabama Constitution, may not exceed 106.

17 (vi) The number of Alabama House districts shall not be less than 67.

18 (vii) All districts will be single-member districts.

19 (viii) Every part of every district shall be contiguous with every other part of the
20 district.

21 j. The following redistricting policies are embedded in the political values,
22 traditions, customs, and usages of the State of Alabama and shall be observed to
23 the extent that they do not violate or subordinate the foregoing policies prescribed
24 by the Constitution and laws of the United States and of the State of Alabama:

25 (i) Contests between incumbents will be avoided whenever possible.

26 (ii) Contiguity by water is allowed, but point-to-point contiguity and long-lasso
27 contiguity is not.

28 (iii) Districts shall respect communities of interest, neighborhoods, and political
29 subdivisions to the extent practicable and in compliance with paragraphs a
30 through i. A community of interest is defined as an area with recognized
31 similarities of interests, including but not limited to ethnic, racial, economic, tribal,
32 social, geographic, or historical identities. The term communities of interest may,
33 in certain circumstances, include political subdivisions such as counties, voting

1 precincts, municipalities, tribal lands and reservations, or school districts. The
 2 discernment, weighing, and balancing of the varied factors that contribute to
 3 communities of interest is an intensely political process best carried out by elected
 4 representatives of the people.

5 (iv) The Legislature shall try to minimize the number of counties in each district.

6 (v) The Legislature shall try to preserve the cores of existing districts.

7 (vi) In establishing legislative districts, the Reapportionment Committee shall
 8 give due consideration to all the criteria herein. However, priority is to be given to
 9 the compelling State interests requiring equality of population among districts and
 10 compliance with the Voting Rights Act of 1965, as amended, should the
 11 requirements of those criteria conflict with any other criteria.

12 g. The criteria identified in paragraphs j(i)-(vi) are not listed in order of
 13 precedence, and in each instance where they conflict, the Legislature shall at its
 14 discretion determine which takes priority.

15 **III. PLANS PRODUCED BY LEGISLATORS**

16 1. The confidentiality of any Legislator developing plans or portions thereof
 17 will be respected. The Reapportionment Office staff will not release any
 18 information on any Legislator's work without written permission of the Legislator
 19 developing the plan, subject to paragraph two below.

20 2. A proposed redistricting plan will become public information upon its
 21 introduction as a bill in the legislative process, or upon presentation for
 22 consideration by the Reapportionment Committee.

23 3. Access to the Legislative Reapportionment Office Computer System, census
 24 population data, and redistricting work maps will be available to all members of
 25 the Legislature upon request. Reapportionment Office staff will provide technical
 26 assistance to all Legislators who wish to develop proposals.

27 4. In accordance with Rule 23 of the Joint Rules of the Alabama Legislature
 28 “[a]ll amendments or revisions to redistricting plans, following introduction as a
 29 bill, shall be drafted by the Reapportionment Office.” Amendments or revisions
 30 must be part of a whole plan. Partial plans are not allowed.

31 5. In accordance with Rule 24 of the Joint Rules of the Alabama Legislature,
 32 “[d]rafts of all redistricting plans which are for introduction at any session of the
 33 Legislature, and which are not prepared by the Reapportionment Office, shall be
 34 presented to the Reapportionment Office for review of proper form and for entry
 35 into the Legislative Data System at least ten (10) days prior to introduction.”

1 **IV. REAPPORTIONMENT COMMITTEE MEETINGS AND PUBLIC**
2 **HEARINGS**

3 1. All meetings of the Reapportionment Committee and its sub-committees
4 will be open to the public and all plans presented at committee meetings will be
5 made available to the public.

6 2. Minutes of all Reapportionment Committee meetings shall be taken and
7 maintained as part of the public record. Copies of all minutes shall be made
8 available to the public.

9 3. Transcripts of any public hearings shall be made and maintained as part of
10 the public record, and shall be available to the public.

11 4. All interested persons are encouraged to appear before the
12 Reapportionment Committee and to give their comments and input regarding
13 legislative redistricting. Reasonable opportunity will be given to such persons,
14 consistent with the criteria herein established, to present plans or amendments
15 redistricting plans to the Reapportionment Committee, if desired, unless such
16 plans or amendments fail to meet the minimal criteria herein established.

17 5. Notice of all Reapportionment Committee meetings will be posted on
18 monitors throughout the Alabama State House, the Reapportionment Committee's
19 website, and on the Secretary of State's website. Individual notice of
20 Reapportionment Committee meetings will be sent by email to any citizen or
21 organization who requests individual notice and provides the necessary
22 information to the Reapportionment Committee staff. Persons or organizations
23 who want to receive this information should contact the Reapportionment Office.

24 **V. PUBLIC ACCESS**

25 1. The Reapportionment Committee seeks active and informed public
26 participation in all activities of the Committee and the widest range of public
27 information and citizen input into its deliberations. Public access to the
28 Reapportionment Office computer system is available every Friday from 8:30 a.m.
29 to 4:30 p.m. Please contact the Reapportionment Office to schedule an
30 appointment.

31 2. A redistricting plan may be presented to the Reapportionment Committee
32 by any individual citizen or organization by written presentation at a public
33 meeting or by submission in writing to the Committee. All plans submitted to the
34 Reapportionment Committee will be made part of the public record and made
35 available in the same manner as other public records of the Committee.

- 1 3. Any proposed redistricting plan drafted into legislation must be offered by a
2 member of the Legislature for introduction into the legislative process.
- 3 4. A redistricting plan developed outside the Legislature or a redistricting plan
4 developed without Reapportionment Office assistance which is to be presented for
5 consideration by the Reapportionment Committee must:
 - 6 a. Be clearly depicted on maps which follow 2020 Census geographic
7 boundaries;
 - 8 b. Be accompanied by a statistical sheet listing total population for each district
9 and listing the census geography making up each proposed district;
 - 10 c. Stand as a complete statewide plan for redistricting.
 - 11 d. Comply with the guidelines adopted by the Reapportionment Committee.
- 12 5. Electronic Submissions
 - 13 a. Electronic submissions of redistricting plans will be accepted by the
14 Reapportionment Committee.
 - 15 b. Plans submitted electronically must also be accompanied by the paper
16 materials referenced in this section.
 - 17 c. See the Appendix for the technical documentation for the electronic
18 submission of redistricting plans.
- 19 6. Census Data and Redistricting Materials
 - 20 a. Census population data and census maps will be made available through the
21 Reapportionment Office at a cost determined by the Permanent Legislative
22 Committee on Reapportionment.
 - 23 b. Summary population data at the precinct level and a statewide work maps
24 will be made available to the public through the Reapportionment Office at a cost
25 determined by the Permanent Legislative Committee on Reapportionment.
 - 26 c. All such fees shall be deposited in the state treasury to the credit of the
27 general fund and shall be used to cover the expenses of the Legislature.

28 **Appendix.**

29 **ELECTRONIC SUBMISSION OF REDISTRICTING PLANS**

30 **REAPPORTIONMENT COMMITTEE - STATE OF ALABAMA**

1

2 The Legislative Reapportionment Computer System supports the electronic
3 submission of redistricting plans. The electronic submission of these plans must
4 be via email or a flash drive. The software used by the Reapportionment Office is
5 Maptitude.

6 The electronic file should be in DOJ format (Block, district # or district #,
7 Block). This should be a two column, comma delimited file containing the FIPS
8 code for each block, and the district number. Maptitude has an automated plan
9 import that creates a new plan from the block/district assignment list.

10 Web services that can be accessed directly with a URL and ArcView
11 Shapefiles can be viewed as overlays. A new plan would have to be built using this
12 overlay as a guide to assign units into a blank Maptitude plan. In order to analyze
13 the plans with our attribute data, edit, and report on, a new plan will have to be
14 built in Maptitude.

15 In order for plans to be analyzed with our attribute data, to be able to edit,
16 report on, and produce maps in the most efficient, accurate and time saving
17 procedure, electronic submissions are REQUIRED to be in DOJ format.

18 Example: (DOJ FORMAT BLOCK, DISTRICT #)

19 SSCCCTTTTTTBBBBDDDD

20 SS is the 2 digit state FIPS code

21 CCC is the 3 digit county FIPS code

22 TTTTTT is the 6 digit census tract code

23 BBBB is the 4 digit census block code

24 DDDD is the district number, right adjusted

25 **Contact Information:**

26 Legislative Reapportionment Office

27 Room 317, State House

28 11 South Union Street

29 Montgomery, Alabama 36130

30 (334) 261-0706

1 For questions relating to reapportionment and redistricting, please contact:

2 Donna Overton Loftin, Supervisor

3 Legislative Reapportionment Office

4 donna.overton@alsenate.gov

5 Please Note: The above e-mail address is to be used only for the purposes of
6 obtaining information regarding redistricting. Political messages, including those
7 relative to specific legislation or other political matters, cannot be answered or
8 disseminated via this email to members of the Legislature. Members of the
9 Permanent Legislative Committee on Reapportionment may be contacted through
10 information contained on their Member pages of the Official Website of the
11 Alabama Legislature, legislature.state.al.us/aliswww/default.aspx.

Exhibit 5 - Livingston Deposition

FILED

2022 Jan-24 PM 06:35
U.S. DISTRICT COURT
N.D. OF ALABAMA

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

Exhibit

5

BOBBY SINGLETON, et al.,

Plaintiffs,

v.

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

Defendants.

Case No.: 2:21-cv-1291-AMM

THREE-JUDGE COURT

EVAN MILLIGAN, et al.,

Plaintiffs,

v.

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

Defendants.

Case No.: 2:21-cv-1530-AMM

THREE-JUDGE COURT

Before MARCUS, Circuit Judge, MANASCO and MOORER, District Judges.

PER CURIAM:

PRELIMINARY INJUNCTION
MEMORANDUM OPINION AND ORDER

These redistricting cases, which have been consolidated for the limited

purpose of expedited preliminary injunction proceedings, are two of four cases currently pending in the Northern District of Alabama that allege that Alabama's electoral maps are racially gerrymandered in violation of the United States Constitution and/or dilute the votes of Black Alabamians in violation of the Voting Rights Act of 1965, 52 U.S.C. § 10301: *Singleton v. Merrill*, Case No. 2:21-cv-1291-AMM (challenges the congressional map on constitutional grounds only), *Milligan v. Merrill*, Case No. 2:21-cv-1530-AMM (challenges the congressional map on constitutional and statutory grounds), *Thomas v. Merrill*, Case No. 2:21-cv-1531-AMM (challenges the state legislative map on constitutional grounds only), and *Caster v. Merrill*, Case No. 2:21-cv-1536-AMM (challenges the congressional map on statutory grounds only).

Singleton and *Milligan* are before this three-judge court, and *Caster* is before Judge Manasco sitting alone, on separate motions for preliminary injunctive relief. Although each set of plaintiffs asserts a different theory of liability and requests a different remedy, all plaintiffs request a preliminary injunction barring one of the Defendants, Alabama Secretary of State John H. Merrill, from conducting congressional elections according to Alabama's 2021 redistricting plan for its seven seats in the United States House of Representatives ("the Plan," or "HB1").

The Plan includes one majority-Black congressional district, District 7, which has been represented by a Black Democrat since its inception as a majority-Black

district in 1992: first Congressman Earl Hilliard, then Congressman Artur Davis, and now Congresswoman Terri Sewell. District 7 became a majority-Black district when a three-judge federal court drew it that way in a ruling that was summarily affirmed by the Supreme Court of the United States. *Wesch v. Hunt*, 785 F. Supp. 1491, 1497–1500 (S.D. Ala. 1992), *aff'd sub nom. Camp v. Wesch*, 504 U.S. 902 (1992), and *aff'd sub nom. Figures v. Hunt*, 507 U.S. 901 (1993).

The *Milligan* and *Caster* plaintiffs now request a declaration that the Plan violates federal law; a preliminary injunction barring Secretary Merrill from conducting any elections pursuant to the Plan; and a preliminary injunction under the Voting Rights Act ordering Secretary Merrill to conduct Alabama's congressional elections according to a map that includes either two majority-Black districts, or two districts in which Black voters otherwise have an opportunity to elect a representative of their choice, or a combination of two such districts. *Milligan* Doc. 1 ¶ 211; *Milligan* Doc. 69 at 36; *Milligan* Doc. 103 ¶¶ 576–84; *Caster* Doc. 3 at 30–31; *Caster* Doc. 56 at 8, 40; *Caster* Doc. 97 ¶¶ 493–97.

The preliminary injunction proceedings are highly time-sensitive because of state-law deadlines applicable to Alabama's next congressional election. The Plan became law on November 4, 2021, and Alabama Code Section 17-13-5(a) effectively establishes a deadline of January 28, 2022 for candidates to qualify with major political parties to participate in the 2022 primary election for the United

States House of Representatives and Senate. Alabama Code Section 17-13-3(a) establishes the date of that election as May 24, 2022. The general election will occur on November 8, 2022, approximately one year after these lawsuits were commenced.

The parties and their counsel have developed an extremely extensive record on an extremely expedited basis. The court has had the benefit of a seven-day preliminary injunction hearing that covered *Singleton*, *Milligan*, and *Caster* and included live testimony from seventeen witnesses (eleven experts and six other fact witnesses); more than 400 pages of prehearing briefing and 600 pages of post-hearing briefing; reports and rebuttal reports from every expert witness; more than 350 hearing exhibits; joint stipulations of fact that span seventy-five pages; and able argument by the forty-three lawyers who have appeared in the litigation. The transcript of the preliminary injunction hearing spans nearly 2,000 pages.

Based on the findings of fact and conclusions of law explained below, including our assessments of the credibility of expert witnesses, we conclude that the *Milligan* plaintiffs are substantially likely to establish that the Plan violates Section Two of the Voting Rights Act. More particularly, we conclude that the *Milligan* plaintiffs are substantially likely to establish each part of the controlling Supreme Court test, including: (1) that Black Alabamians are sufficiently numerous to constitute a voting-age majority in a second congressional district (Black Alabamians comprise approximately 27% of the State's population, and Alabama

has seven congressional seats); (2) that Alabama's Black population in the challenged districts is sufficiently geographically compact to constitute a voting-age majority in a second reasonably configured district (the *Milligan* plaintiffs and the *Caster* plaintiffs submitted many illustrative plans that include a second majority-Black district and respect Alabama's traditional redistricting principles); (3) that voting in the challenged districts is intensely racially polarized (this is not genuinely in dispute); and (4) that under the totality of the circumstances, including the factors that the Supreme Court has instructed us to consider, Black voters have less opportunity than other Alabamians to elect candidates of their choice to Congress.

Because we also conclude that the *Milligan* plaintiffs have established the other requirements for preliminary injunctive relief, we **GRANT IN PART** the *Milligan* plaintiffs' motion for a preliminary injunction, and under Federal Rule of Civil Procedure 65(d) we **PRELIMINARILY ENJOIN** Secretary Merrill from conducting any congressional elections according to the Plan.

Because the *Milligan* plaintiffs are substantially likely to prevail on their claim under the Voting Rights Act, under the statutory framework, Supreme Court precedent, and Eleventh Circuit precedent, the appropriate remedy is a congressional redistricting plan that includes 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. *See, e.g., Bartlett v. Strickland*, 556 U.S. 1,

24 (2009); *Cooper v. Harris*, 137 S. Ct. 1455, 1470, 1472 (2017). Supreme Court precedent also dictates that the Alabama Legislature (“the Legislature”) should have the first opportunity to draw that plan. *See, e.g., North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018); *White v. Weiser*, 412 U.S. 783, 794–95 (1973).

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.

We **STAY** the January 28, 2022 qualification deadline for 14 days, through February 11, 2022, to allow the Legislature the opportunity to enact a remedial plan. Based on the evidentiary record before us, we are confident that the Legislature can accomplish its task: the Legislature enacted the Plan in a matter of days last fall; the Legislature has been on notice since at least the time that this litigation was commenced months ago (and arguably earlier) that a new map might be required; the Legislature already has access to an experienced cartographer; and the Legislature has not just one or two, but at least eleven illustrative remedial plans to consult, one of which pairs no incumbents. Nevertheless, if the Legislature is unable to pass a remedial plan in 14 days, we **ORDER** two other Defendants, Senator Jim

McClendon and Representative Chris Pringle, who co-chair Alabama’s Permanent Legislative Committee on Reapportionment (“the Legislators”) to advise the court so that the court may retain (at the expense of the Defendants) an eminently qualified expert to draw on an expedited basis a map that complies with federal law for use in Alabama’s 2022 congressional elections.

We further **ORDER** Secretary Merrill to advise the political parties participating in the 2022 congressional elections of this order.

Because we grant partial relief on statutory grounds, and “[a] fundamental and longstanding principle of judicial restraint requires that [we] avoid reaching constitutional questions in advance of the necessity of deciding them,” *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988); *see also League of United Latin Am. Citizens v. Perry* (“*LULAC*”), 548 U.S. 399, 442 (2006), *Thornburg v. Gingles*, 478 U.S. 30, 38 (1986), we **RESERVE RULING** on the constitutional issues raised in the *Singleton* and *Milligan* plaintiffs’ motions for preliminary injunctive relief.

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I. BACKGROUND

A. Procedural Posture

On September 27, 2021, after the results of the 2020 census were released, the *Singleton* plaintiffs filed a complaint against Secretary Merrill. *Singleton* Doc. 1. The *Singleton* plaintiffs are registered voters in Alabama's Second, Sixth, and Seventh Congressional Districts under the Plan; the lead plaintiff, Bobby Singleton, is a Black Senator in the Legislature. *Id.* at 3–4; *Singleton* Doc. 47 ¶ 26; Tr. 36.¹ The *Singleton* plaintiffs asserted that holding the 2022 election under Alabama's old congressional map ("the 2011 congressional map") would violate the Equal Protection Clause of the Fourteenth Amendment because the districts were malapportioned and racially gerrymandered. *Singleton* Doc. 1 at 30–36. On October 29, 2021, the Chief Judge of the Eleventh Circuit convened a three-judge court to adjudicate *Singleton*. *Singleton* Doc. 13.

The Secretary moved to dismiss on the ground that the case was moot and unripe because Alabama would not use the 2011 congressional map for the 2022 congressional election. *Singleton* Doc. 11. Before the motion to dismiss was fully

¹ Page number pincites in this order are to the CM/ECF page number that appears in the top right-hand corner of each page, if such a page number is available. Citations to the transcript from the preliminary injunction hearing are identified by page number. Any other transcripts referenced are identified by the date of the hearing that they recorded. The transcript for the preliminary injunction hearing may be found at *Singleton* Doc. 86, *Milligan* Doc. 105, and *Caster* Doc. 99.

briefed, Alabama enacted the Plan. On the day that Alabama Governor Kay Ivey signed the Plan into law (November 4, 2021), the *Singleton* plaintiffs amended their complaint to stake their claims on the Plan and assert a claim of racial gerrymandering under the Equal Protection Clause of the Fourteenth Amendment and a claim of intentional discrimination under the Fourteenth and Fifteenth Amendments. *Singleton* Doc. 15 at 38–48. The *Singleton* plaintiffs requested, among other things, a declaratory judgment, permanent injunction, and trial on the merits in December 2021. *Id.* at 46–47. The *Singleton* plaintiffs did not then request preliminary injunctive relief. The court denied as moot Secretary Merrill’s motion to dismiss. *Singleton* Doc. 21.

On the same day that the *Singleton* plaintiffs filed their amended complaint, the *Caster* plaintiffs filed a lawsuit against Secretary Merrill in the Middle District of Alabama. *Caster* Doc. 3. The *Caster* plaintiffs are citizens of Alabama’s First, Second, and Seventh Congressional Districts under the Plan. *Id.* at 4–6. The *Caster* plaintiffs challenge the Plan only under Section Two of the Voting Rights Act of 1965, 52 U.S.C. § 10301 (“Section Two”). *Id.* at 29–31. The *Caster* action was transferred to the Northern District of Alabama, *Caster* Doc. 30, and is pending before Judge Manasco sitting alone.

On November 8, 2021, the Legislators filed an unopposed motion to intervene as defendants in *Singleton*. *Singleton* Doc. 25. The Legislators asserted that they

must be allowed to intervene as of right because “[t]he relief sought by [Plaintiffs] . . . would necessarily impair and impede the [Legislators’] ability to protect the Reapportionment Committee’s interest in conducting Congressional redistricting,” Secretary Merrill “has no authority to conduct redistricting,” and “[t]he Reapportionment Committee . . . [is] the real party in interest” in the case. *Id.* ¶¶ 8–9. In the alternative, the Legislators asserted that they should be permitted to intervene “to assert both factual and legal defenses in support of the constitutionality and lawfulness” of the Plan and that they are “uniquely positioned to present such . . . defenses because of their leadership of the Reapportionment Committee.” *Id.* ¶¶ 12–13. “Without intervention,” the Legislators argued, “Sen. McClendon and Rep. Pringle will not be able to protect their interests as Chairs of the Committee and state legislators.” *Id.* ¶ 18.

On November 9, 2021, the court held a Rule 16 conference in *Singleton*. Counsel appeared for the plaintiffs, Secretary Merrill, and the Legislators as putative intervenor-defendants. At that hearing, counsel for the *Singleton* plaintiffs advised the court that they would move for a preliminary injunction. Later that day, the court set a preliminary injunction hearing for January 4, 2022 and set prehearing deadlines, including a discovery cutoff. *Singleton* Doc. 29.

On November 16, 2021, the *Milligan* plaintiffs filed their lawsuit against Secretary Merrill and the Legislators. *Milligan* Doc. 1. The *Milligan* plaintiffs are

Black registered voters in Alabama’s First, Second, and Seventh Congressional Districts and two organizational plaintiffs — Greater Birmingham Ministries and the Alabama State Conference of the National Association for the Advancement of Colored People, Inc. (“NAACP”) — with members who are registered voters in those Congressional districts and the Third Congressional District. *Id.* at 6–9. The *Milligan* plaintiffs assert a claim of vote dilution under Section Two, a claim of racial gerrymandering under the Fourteenth Amendment, and a claim of intentional discrimination under the Fourteenth Amendment. *Id.* at 48–52. The *Milligan* plaintiffs request, among other things, a declaratory judgment and preliminary and permanent injunctive relief. *Id.* at 52–53.

On the day *Milligan* was filed, the district judge to whom the case was assigned ordered the parties to simultaneously file briefs that explained and supported their positions on the questions whether (1) a three-judge panel appointed under 28 U.S.C. § 2284 has jurisdiction to hear both the Voting Rights Act claims and the constitutional claims asserted in *Milligan*, and (2) *Milligan* should be consolidated with *Singleton*, in whole or in part. *Milligan* Doc. 2.

On November 17, 2021, this court granted the Legislators’ unopposed motion to intervene in *Singleton*. *Singleton* Doc. 32.

On November 18, 2021, the *Milligan* plaintiffs advised the district judge of their position that (1) a three-judge court had jurisdiction to hear statutory claims

asserted in a case that also asserted constitutional claims, and (2) *Singleton* and *Milligan* should be consolidated only for the limited purpose of some aspects of preliminary injunction proceedings. *Milligan* Docs. 16, 18.

That same day, Secretary Merrill moved (in *Singleton* and *Milligan*) to dismiss or join in the *Singleton* action both the *Milligan* plaintiffs and the *Caster* plaintiffs under Federal Rule of Civil Procedure 19. *Singleton* Doc. 33; *Milligan* Docs. 17, 21. Secretary Merrill also moved (in *Singleton* only) to consolidate all three actions under Rule 42. *Singleton* Doc. 36.

Later that day, the district judge to whom *Milligan* was assigned entered an order finding that *Milligan* was required to be heard by a district court of three judges, *Milligan* Doc. 22, and a three-judge court was convened by the Chief Judge of the Eleventh Circuit that was composed of the same three judges that comprised the *Singleton* court. *Milligan* Doc. 23.

That evening, each three-judge court ordered the parties in all three cases to meet and confer immediately; set a Rule 16 conference to include all parties in all three cases for November 23, 2021; ordered the parties to file ahead of that conference a joint status report explaining their positions on (1) the question whether *Milligan* and/or *Caster* should be consolidated with *Singleton* for the limited purpose of preliminary injunction proceedings, and (2) whether the expedited schedule previously entered in *Singleton* would be suitable for consolidated preliminary

injunction proceedings; and set a deadline for responses to the Secretary's motions to dismiss or join, and to consolidate. *Singleton* Docs. 40, 41; *Milligan* Doc. 31.

Also on that evening, the *Caster* court set a deadline for the *Caster* plaintiffs to file objections to the Secretary's motions to dismiss or join, and to consolidate, *Caster* Doc. 36, and entered an order directing the same meet-and-confer and joint status report, and setting the same Rule 16 conference, that the three-judge courts directed and set in *Singleton* and *Milligan*. *Caster* Doc. 37.

On November 19, 2021, the *Singleton* plaintiffs filed a motion for preliminary injunction requesting, *inter alia*, that the court enjoin the state from using the Plan for the 2022 election and adopt one of their plans "on January 28, 2022 if the State does not adopt its own constitutional plan by that date." *Singleton* Doc. 42 at 31–32.

In advance of the Rule 16 conference on November 23, 2021, the *Singleton* plaintiffs and *Caster* plaintiffs filed documents expressing their concern that neither the *Singleton* three-judge court nor the *Milligan* three-judge court had jurisdiction to consolidate all three cases. *Singleton* Docs. 43, 44; *Caster* Docs. 28, 38, 39.

Before and at the November 23, 2021 conference, the *Singleton* plaintiffs and *Milligan* plaintiffs indicated that they had no objection to consolidating *Singleton* and *Milligan* only for the limited purposes of preliminary injunction discovery and a preliminary injunction hearing, *Singleton* Doc. 43 ¶ 1; *Milligan* Doc. 39 ¶ 1, and the *Caster* plaintiffs indicated that they had no objection to participating in the

preliminary injunction hearing(s) that would occur in *Singleton* and *Milligan* and coordinating discovery with the parties in those cases, *Caster* Doc. 38 at 14 n.4; *Caster* Doc. 39 ¶ 1.

Accordingly, the *Singleton* court consolidated *Singleton* and *Milligan* “for the limited purposes of preliminary injunction discovery and a preliminary injunction hearing”; set a consolidated preliminary injunction hearing for January 4, 2022; and set prehearing deadlines for discovery, motions, and briefs. *Singleton* Doc. 45; *Milligan* Doc. 40. That court reserved ruling on the motion for further consolidation of *Singleton* and *Milligan*, denied the motion to consolidate *Caster*, and denied the motion for joinder. *Singleton* Doc. 45 at 3–9; *Milligan* Doc. 40 at 3–9. The *Caster* court then set a preliminary injunction hearing for January 4, 2022 and set the same prehearing deadlines that were set in *Singleton* and *Milligan*. *Caster* Doc. 40.

The *Milligan* plaintiffs noticed the depositions of the Legislators and served them with requests for production. *Milligan* Doc. 48-1 at 1–18. On December 6, 2021, the Legislators filed in *Milligan* only a motion for a protective order “forbidding their depositions and production of documents in violation of their legislative immunity and privilege.” *Milligan* Doc. 55 at 2.² The Legislators requested an “order that Sen. McClendon and Rep. Pringle not be deposed and that

² The Legislators later amended their motion for a protective order, so citations are to their Second Amended Motion.

written discovery not be had.” *Id.* at 10.

The next day, the Legislators filed answers in both *Singleton* and *Milligan*. *Singleton* Doc. 48; *Milligan* Doc. 51. (Secretary Merrill also answered in all three cases. *Singleton* Doc. 49; *Milligan* Doc. 52; *Caster* Doc. 42.) The Legislators asserted in those answers numerous factual and legal defenses involving their work on the Plan and the Committee’s intent when drawing the electoral map that the plaintiffs challenge. *See, e.g., Singleton* Doc. 48 ¶¶ 3, 65, 8 (p.10); *Milligan* Doc. 51 ¶¶ 3, 5, 56–57, 60, 62–66, 176, 182, 184, 187, 208, 9 (p.33), 24 (p.35). The Legislators asserted legislative immunity and privilege in a single sentence at the end of each answer. *Singleton* Doc. 48 ¶ 13 (p.11); *Milligan* Doc. 51 ¶ 25 (p.35).

On December 7, 2021, the parties in all three cases filed joint stipulations of fact applicable to the preliminary injunction proceedings. *Singleton* Doc. 47; *Milligan* Doc. 53; *Caster* Doc. 44.

On December 13, 2021, after the *Milligan* plaintiffs filed an opposition to the Legislators’ motion for a protective order, *Milligan* Doc. 56, the court issued a short order denying the Legislators’ motion on the ground that the Legislators waived their legislative immunity and privilege when they put in issue their work as legislators by taking various steps in the litigation, including but not limited to failing to move to dismiss *Singleton* or *Milligan* on the basis of legislative immunity; intervening in *Singleton* “to assert both factual and legal defenses in support of the constitutionality

and lawfulness” of the electoral map that is the subject of this action, which intervention was sought before *Milligan* was filed naming them as defendants and was not for the limited purpose of asserting their legislative immunity or privilege, *Singleton* Doc. 25 ¶ 12; and filing answers in both *Singleton* and *Milligan* that assert numerous factual and legal defenses, many of which concern their “intent,” “motive[s],” and “motivations behind” their work as legislators on the electoral map, *see, e.g., Singleton* Doc. 48 ¶¶ 3, 65, 8 (p.10); *Milligan* Doc. 51 ¶¶ 56, 182, 208. *Milligan* Doc. 59.

In that order, the court also set a deadline for the Legislators to file any other discovery objections. *Id.* at 3. The next day, the Legislators filed additional discovery objections. *Milligan* Doc. 63. That same day, the court issued a work-it-out order finding that the additional objections were boilerplate and directing counsel to meet and confer forthwith and make every attempt to resolve the Legislators’ additional discovery objections. *Milligan* Doc. 64. The Legislators did not renew any objections after the meet-and-confer.

On December 15, 2021, the plaintiffs in *Milligan* and *Caster* timely filed their respective motions for preliminary injunctive relief, *Milligan* Doc. 69; *Caster* Doc. 56, and the *Singleton* plaintiffs renewed their earlier motion, *Singleton* Doc. 57. The defendants later timely filed responses. *Singleton* Doc. 67; *Milligan* Doc. 78; *Caster* Doc. 71.

All parties timely filed their initial expert reports (which were simultaneously exchanged) and expert rebuttal reports.³ *Singleton* Docs. 54, 56, 60–62; *Milligan* Docs. 66, 68, 74, 76; *Caster* Docs. 48–51, 64–66. The expert witnesses were not deposed before the preliminary injunction hearing, so the first time they were cross-examined about their opinions in this case was during their live testimony before the court. *See* Tr. of Nov. 23, 2021 Hrg. at 31–34.

On December 16, 2021, the court issued a longer order explaining why it concluded that the Legislators' litigation conduct waived their legislative immunity and privilege. *Milligan* Doc. 71.

On December 20, 2021, at the request of the parties, the court held a Rule 16 conference in all three cases to discuss the logistics for the hearing. At that hearing, the *Caster* and *Milligan* parties alerted the court of their intention to coordinate their presentations of their statutory claims at the preliminary injunction hearing, and all counsel in both of those cases agreed that all evidence admitted in either case was admitted in both cases unless counsel raised a specific objection. *See Singleton* Doc. 72-1; *Caster* Doc. 74; Tr. Dec. 20, 2021 Hrg. at 14–17.⁴

³ For good cause, the court allowed Dr. Duchin to submit a short supplemental report on December 27, 2021. *Milligan* Doc. 92-1; Tr. 604–08.

⁴ At the preliminary injunction hearing, counsel for the State repeated his understanding that any evidence admitted for purposes of one case could be used in any other case. Tr. 29.

Also on December 20, 2021, the Legislators filed an unopposed motion to intervene in *Caster* that made no mention of legislative immunity or privilege. *Caster* Doc. 60. The *Caster* court later granted that motion. *Caster* Doc. 69.

On December 22, 2021, the three-judge court and the *Caster* court issued an order that the January 4 preliminary injunction hearings would occur by Zoom on account of the rising level of COVID-19 infections throughout the country. *Singleton* Doc. 66; *Milligan* Doc. 77; *Caster* Doc. 70. At that time, approximately forty-one lawyers had appeared in the three cases, and if consolidated hearings were to occur in person in Birmingham, Alabama, those attorneys, along with lay and expert witnesses, would have traveled from various locations nationwide, including New Hampshire, Maryland, Texas, New York, the District of Columbia, California, and Washington, as well as from various locations in Alabama. The court provided public access to the Zoom proceedings by livestream. *Singleton* Doc. 78; *Milligan* Doc. 98; *Caster* Doc. 91. No party objected to the virtual nature of the hearing.

On December 23, 2021, after the close of preliminary injunction discovery, the parties in *Singleton* filed a second joint stipulation of fact for the purposes of the preliminary injunction proceedings. *Singleton* Doc. 70. Also on that date, the parties in all three cases filed joint pretrial reports that included a witness list, exhibit list, and extensive exhibits, *Singleton* Doc. 71; *Milligan* Doc. 80; *Caster* Doc. 73, and a joint submission explaining their preferred order of proceedings during the

coordinated preliminary injunction hearing, *Singleton* Doc. 72; *Caster* Doc. 74. We accepted without modification the order of proceedings that the parties proposed for the preliminary injunction hearing.

A hearing on all three motions for preliminary injunctive relief commenced on January 4, 2022 and concluded on January 12, 2022. The relevant testimony is described in the appropriate section below.

B. Factual and Legal Background

Article I, § 2, of the United States Constitution requires that Members of the House of Representatives “be apportioned among the several States . . . according to their respective Numbers” and “chosen every second Year by the People of the several States.” U.S. CONST. art. I, § 2. Each state’s population is counted every ten years in a national census, and state legislatures rely on census data to apportion each state’s congressional seats into districts.

“Redistricting is never easy,” *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018), and is “primarily and foremost a state legislative responsibility.” *Wesch*, 785 F. Supp. at 1497. “[F]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions,” and when “assessing the sufficiency of a challenge to a districting plan, a court must be sensitive to the complex interplay of forces that enter a legislature’s redistricting calculus.” *Abbott*, 138 S. Ct. at 2324 (quoting *Miller v. Johnson*, 515 U.S. 900, 915–16 (1995)) (internal quotation marks

omitted). In this instance, an already difficult task became even more difficult due to the delayed release of the census data as a result of pandemic-related challenges for the Census Bureau.

Redistricting must comply with federal constitutional and statutory requirements. *Bartlett*, 556 U.S. at 7; *Reynolds v. Sims*, 377 U.S. 533, 554–60 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964). Two such requirements are relevant here.

First, the “one person, one vote” rule requires a state to make one person’s “vote in a congressional election” as “nearly as is practicable . . . worth as much as another’s.” *Wesberry*, 376 U.S. at 7–8, 18 (internal quotation marks omitted). This standard “does not require that congressional districts be drawn with precise mathematical equality,” but states must “justify population differences between districts that could have been avoided by a good-faith effort to achieve absolute equality.” *Tennant v. Jefferson Cnty. Comm’n*, 567 U.S. 758, 759 (2012) (internal quotation marks omitted).

Second, “federal law impose[s] complex and delicately balanced requirements regarding the consideration of race” in congressional redistricting. *Abbott*, 138 S. Ct. at 2314. On the one hand, the Equal Protection Clause “restrict[s] the use of race in making districting decisions.” *Id.* More particularly, “[t]he Equal Protection Clause forbids ‘racial gerrymandering,’ that is, intentionally assigning citizens to a district

on the basis of race without sufficient justification.” *Id.* (quoting *Shaw v. Reno*, 509 U.S. 630, 641 (1993)). The Equal Protection Clause “also prohibits intentional ‘vote dilution,’” which is “invidiously . . . minimiz[ing] or cancel[ing] out the voting potential of racial or ethnic minorities.” *Abbott*, 138 S. Ct. at 2314 (quoting *Mobile v. Bolden*, 446 U.S. 55, 66–67 (1980) (plurality opinion)).

“When a voter sues state officials for drawing . . . race-based lines, [Supreme Court precedents] call for a two-step analysis. *First*, the plaintiff must prove that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.” *Cooper*, 137 S. Ct. at 1463 (emphasis added) (internal quotation marks omitted). “The racial predominance inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality did not.” *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). Although “a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition” to establish racial predominance, such “conflict or inconsistency may be persuasive circumstantial evidence” of it. *Id.* Traditional redistricting principles “includ[e] compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political

affiliation.” *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 272 (2015) (citation and internal quotation marks omitted).

“[U]ntil a claimant makes a showing sufficient to support th[e] allegation” of “race-based decisionmaking,” “the good faith of a state legislature must be presumed.” *Miller*, 515 U.S. at 915. “[T]he burden of proof lies with the challenger, not the State.” *Abbott*, 138 S. Ct. at 2324.

“*Second*, if racial considerations predominated over others, the design of the district must withstand strict scrutiny. The burden thus shifts to the State to prove that its race-based sorting of voters serves a compelling interest and is narrowly tailored to that end.” *Cooper*, 137 S. Ct. at 1464 (emphasis added) (citation and internal quotation marks omitted).

Application of the restrictions imposed by the Equal Protection Clause is “complicated.” *Abbott*, 138 S. Ct. at 2314. For example, “because a voter’s race sometimes correlates closely with political party preference, it may be very difficult for a court to determine whether a districting decision was based on race or party preference.” *Id.* (citations omitted).

On the other hand, while “the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the Voting Rights Act of 1965 . . . pulls in the opposite direction: It often insists that districts be created precisely because of race.” *Id.* Section Two provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301.

As relevant here, a state violates Section Two “if its districting plan provides ‘less opportunity’ for racial minorities [than for other members of the electorate] ‘to elect representatives of their choice.’” *Abbott*, 138 S. Ct. at 2315 (quoting *LULAC*, 548 U.S. at 425). “The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” *Gingles*, 478 U.S. at 47.

“[A] plaintiff may allege a § 2 violation in a single-member district if the manipulation of districting lines fragments [cracks] politically cohesive minority

voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population.” *Shaw v. Hunt*, 517 U.S. 899, 914 (1996) (“*Shaw II*”).

Under *Gingles*, a plaintiff asserting a claim of vote dilution under Section Two “must prove three threshold conditions”: “first, that the minority group is sufficiently large and geographically compact to constitute a majority in a . . . district; second, that [the minority group] is politically cohesive; and third, that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority’s preferred candidate [(“the *Gingles* requirements”).” *Grove v. Emison*, 507 U.S. 25, 40 (1993) (internal quotation marks omitted) (alterations accepted).

“In a § 2 case, only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances.” *Bartlett*, 556 U.S. at 11–12. “Courts use factors drawn from a report of the Senate Judiciary Committee accompanying the 1982 amendments to the [Voting Rights Act] (the Senate [F]actors) to make the totality-of-the-circumstances determination.” *Georgia State Conf. of NAACP v. Fayette Cnty. Bd. of Comm’rs*, 775 F.3d 1336, 1342 (11th Cir. 2015); accord *Johnson v. De Grandy*, 512 U.S. 997, 1010 n.9 (1994) (quoting *Gingles*, 478 U.S. at 44–45); see also *infra* at Part III (enumerating and analyzing Senate Factors). “Another relevant consideration is whether the number of districts in which the minority group forms

an effective majority is roughly proportional to its share of the population in the relevant area.” *LULAC*, 548 U.S. at 426; *accord De Grandy*, 512 U.S. at 1000. When a plaintiff alleges vote dilution “based on a statewide plan,” the proportionality analysis ordinarily is statewide. *LULAC*, 548 U.S. at 437–38.

Intent is not an element of a Section Two violation, and “proof that a contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters, is not required under Section 2 of the Voting Rights Act.” *City of Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1553 (11th Cir. 1987).

Because “the Equal Protection Clause restricts consideration of race and the [Voting Rights Act] demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to competing hazards of liability.” *Abbott*, 138 S. Ct. at 2315 (internal quotation marks omitted). “In an effort to harmonize these conflicting demands, [the Supreme Court has] assumed that compliance with the [Voting Rights Act] may justify the consideration of race in a way that would not otherwise be allowed.” *Id.*; *accord Cooper*, 137 S. Ct. at 1464.

More specifically, the Court has “assumed that complying with the [Voting Rights Act] is a compelling state interest, and that a State’s consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the State has good reasons for believing that its decision is necessary in order to

comply with the [Voting Rights Act].” *Abbott*, 138 S. Ct. at 2315 (internal quotation marks and citations omitted).

A basic history of redistricting in Alabama is crucial to a complete understanding of the claims raised in *Singleton*, *Milligan*, and *Caster*. Since 1973, Alabama has been apportioned seven seats in the United States House of Representatives. *See Milligan* Doc. 53 (joint stipulations of fact) ¶ 28. In all the congressional elections held under the maps drawn after the 1970 census and the 1980 census, Alabama elected all-white delegations to the House. *See id.* ¶ 44.

After the 1990 census, the Legislature initially failed to enact a new congressional redistricting plan. *See Wesch*, 785 F. Supp. at 1494–95. A voter in Alabama’s First Congressional District sued the state and asserted that holding the 1992 election under the old map would violate the one person, one vote rule. *Id.* at 1492–93. Several Black voters intervened in the action as plaintiffs to assert a Section Two claim. *Id.* at 1493. The parties submitted various redistricting plans for the court’s consideration, and the court retained its own expert. *Id.* at 1493, 1495.

The district court ultimately ordered that congressional elections be held according to a plan that closely tracked the original plaintiff’s proposed plan. *See Wesch v. Folsom*, 6 F.3d 1465, 1467–68 (11th Cir. 1993). That plan created one “significant majority African–American district with an African–American population of 67.53%.” *Id.* at 1468; *Wesch*, 785 F. Supp. at 1498, 1581 app. A. That

district, the Seventh Congressional District (“District 7”), included Black communities in Jefferson, Tuscaloosa, and Montgomery counties. *Wesch*, 785 F. Supp. at 1509, 1569 app. A (Jefferson County); *id.* at 1510, 1581 app. A (Tuscaloosa County); *id.* at 1510, 1575 app. A (Montgomery County).

The *Wesch* court did not decide whether Section Two “require[d] the creation of such a district under the circumstances” because the parties stipulated that according to the 1990 census data, “the African American population in the State of Alabama is sufficiently compact and contiguous to comprise a single member significant majority (65% or more) African American Congressional district,” and that “a significant majority African American Congressional district should be created.” *Id.* at 1498–99. The court found that the new plan “create[d] a majority African–American district that provide[d] African–Americans a reasonable opportunity to elect a candidate of their choice, and d[id] so without the need for extensive gerrymandering.” *Id.* at 1499. The map for the new plan was drawn in large part by cartographer Randy Hinaman. *Milligan* Doc. 70-2 at 35–36.

In the 1992 election held using the court-ordered map, voters in District 7 elected Alabama’s first Black Congressman (Earl Hilliard) in over 90 years. *See Milligan* Doc. 53 ¶ 44. District 7 remains a majority-Black district to this day and in every election since 1992 has elected a Black Democrat. *See id.* ¶¶ 44, 47, 49, 58.

After the 2000 census, Alabama enacted a congressional districting plan that took Montgomery County out of District 7 and divided that county between Districts 2 and 3. *Id.* ¶ 65. After the 2010 census, Alabama enacted a congressional districting plan that added parts of Montgomery County back to District 7 and divided the rest of Montgomery County between Districts 2 and 3. *Id.* That map was drawn by Mr. Hinaman as well. *See Milligan* Doc. 70-2 at 23. According to the 2010 census data, in District 7 the Black voting-age population (“BVAP”) comprised 60.91% of the total voting-age population.⁵ *Milligan* Doc. 53 ¶ 52.

The Legislators and Committee began the congressional redistricting process in May 2021 using population estimates from the Census Bureau. *Id.* ¶ 80. As part of that work, the Committee enacted guidelines for the 2021 redistricting cycle (“the Legislature’s redistricting guidelines”). *Milligan* Doc. 88-23 (Ex. M28).⁶ For the convenience of the reader, because the parties have relied extensively on the

⁵ As explained *infra* at Part V.A, unless we state otherwise, when we recite statistics about Black Alabamians from census data collected in or after the 2000 census, we are referring to any census respondent who identified themselves as Black, regardless whether that respondent also identified as a member of another race or other races. To use the labels that the parties and their experts have supplied, we employ the “any-part Black” metric rather than the “single-race Black” metric, unless we state otherwise.

⁶ Exhibits that are identified by a combination of a letter and a number in this manner are preliminary injunction hearing exhibits.

Legislature's redistricting guidelines, they are reproduced in relevant part below and attached in full to this Order as Appendix A.

10 **II. CRITERIA FOR REDISTRICTING**

11 a. Districts shall comply with the United States Constitution, including the
12 requirement that they equalize total population.

13 b. Congressional districts shall have minimal population deviation.

14 c. Legislative and state board of education districts shall be drawn to achieve
15 substantial equality of population among the districts and shall not exceed an
16 overall population deviation range of $\pm 5\%$.

17 d. A redistricting plan considered by the Reapportionment Committee shall
18 comply with the one person, one vote principle of the Equal Protection Clause of
19 the 14th Amendment of the United States Constitution.

20 e. The Reapportionment Committee shall not approve a redistricting plan that
21 does not comply with these population requirements.

22 f. Districts shall be drawn in compliance with the Voting Rights Act of 1965, as
23 amended. A redistricting plan shall have neither the purpose nor the effect of
24 diluting minority voting strength, and shall comply with Section 2 of the Voting
25 Rights Act and the United States Constitution.

26 g. No district will be drawn in a manner that subordinates race-neutral
27 districting criteria to considerations of race, color, or membership in a language-
28 minority group, except that race, color, or membership in a language-minority
29 group may predominate over race-neutral districting criteria to comply with
30 Section 2 of the Voting Rights Act, provided there is a strong basis in evidence in
31 support of such a race-based choice. A strong basis in evidence exists when there
32 is good reason to believe that race must be used in order to satisfy the Voting Rights
33 Act.

1 h. Districts will be composed of contiguous and reasonably compact
2 geography.

21 j. The following redistricting policies are embedded in the political values,
22 traditions, customs, and usages of the State of Alabama and shall be observed to
23 the extent that they do not violate or subordinate the foregoing policies prescribed
24 by the Constitution and laws of the United States and of the State of Alabama:

25 (i) Contests between incumbents will be avoided whenever possible.

26 (ii) Contiguity by water is allowed, but point-to-point contiguity and long-lasso
27 contiguity is not.

28 (iii) Districts shall respect communities of interest, neighborhoods, and political
29 subdivisions to the extent practicable and in compliance with paragraphs a
30 through i. A community of interest is defined as an area with recognized
31 similarities of interests, including but not limited to ethnic, racial, economic, tribal,
32 social, geographic, or historical identities. The term communities of interest may,
33 in certain circumstances, include political subdivisions such as counties, voting

1 preeincts, municipalities, tribal lands and reservations, or school districts. The
 2 discernment, weighing, and balancing of the varied factors that contribute to
 3 communities of interest is an intensely political process best carried out by elected
 4 representatives of the people.

5 (iv) The Legislature shall try to minimize the number of counties in each district.

6 (v) The Legislature shall try to preserve the cores of existing districts.

7 (vi) In establishing legislative districts, the Reapportionment Committee shall
 8 give due consideration to all the criteria herein. However, priority is to be given to
 9 the compelling State interests requiring equality of population among districts and
 10 compliance with the Voting Rights Act of 1965, as amended, should the
 11 requirements of those criteria conflict with any other criteria.

12 g. The criteria identified in paragraphs j(i)-(vi) are not listed in order of
 13 precedence, and in each instance where they conflict, the Legislature shall at its
 14 discretion determine which takes priority.

Milligan Doc. 88-23 at 1-3.

The 2020 census data was released in August 2021, and the Committee continued its redistricting work. *Milligan* Doc. 53 ¶ 80. Mr. Hinaman (who drew the 1992 map and the 2011 map) prepared the map that ultimately became the Plan, and he testified that it “can be traced back to the 2011 map, the 2001 map, and the 1992 map in that order.” *Milligan* Doc. 70-2 at 37, 39. Mr. Hinaman testified that when he prepared the Plan he was focused on the preservation of the cores of previous districts, and he “turned race on” only at the end of the process to facilitate an evaluation whether the Plan complies with Section Two. *Id.* at 39–40, 142–44, 222–23. He also testified, however, that when he initially crafted the plan in 1992 race was “a major factor.” *Id.* at 35–36

Governor Ivey called a Special Legislative Session on redistricting to begin on October 28, 2021, *Milligan* Doc. 53 ¶ 88, the Legislature passed the Plan in both houses on November 3, 2021, and the Plan became law with Governor Ivey’s

signature on November 4, 2021, *id.* ¶ 182. The Plan map appears below.



Milligan Doc. 88-19.

C. Claims and Defenses

1. *Singleton*

The *Singleton* plaintiffs allege that the Plan “intentionally perpetuated the unconstitutional racial gerrymandering” that occurred when the *Wesch* court created District 7 and again after the 2000 and 2010 censuses when the racial composition of that district was materially unchanged. *Singleton* Doc. 15 ¶¶ 1–2. The *Singleton* plaintiffs allege that Section Two “no longer requires maintenance of a majority-[B]lack Congressional District in Alabama,” and that “the State cannot rely on [Section Two] to justify splitting county boundaries when Districts drawn without racial gerrymandering provide [B]lack voters constituting less than a majority, combined with reliably supportive white voters, an opportunity to elect candidates of their choice.” *Id.* ¶ 3.

The *Singleton* plaintiffs assert that new congressional districts must be drawn without splitting counties, which was the “race-neutral” way that Alabama drew Congressional maps from 1822 until 1964. *Id.* ¶¶ 6, 20, 35. The *Singleton* plaintiffs propose a congressional districting plan for the 2022 election that they allege “eliminates these racial gerrymanders” by drawing district lines solely on county lines without diminishing Black voters’ “opportunity to elect the candidates of their choice.” *Id.* ¶¶ 42–43, 53. The *Singleton* plaintiffs call their proposed map the

“Whole County Plan.” *Id.* at 31. Senator Singleton sponsored the Whole County Plan in the Legislature, which rejected it. *Id.* ¶¶ 47–48.

The *Singleton* plaintiffs assert claims in two counts. In Count I, they allege that the Plan “is racially gerrymandered, in violation of the Equal Protection Clause of the Fourteenth Amendment and Article I, § 2 of the Constitution of the United States.” *Id.* ¶ 56. In Count II, they assert that the state violated the Fourteenth and Fifteenth Amendments because the districts in the Plan were drawn (and the Whole County Plan was rejected) to intentionally discriminate against Black voters. *Id.* ¶¶ 75–79. The *Singleton* plaintiffs’ motion for preliminary injunctive relief pertains only to Count I. *Singleton* Doc. 57 at 8. We were not asked to address the claim Singleton asserted in Count II at this stage of these proceedings.

The *Singleton* plaintiffs assert that their Whole County Plan “end[s] the 1992 racial gerrymander . . . without splitting a single county and with only slight population deviations.” *Singleton* Doc. 15 ¶ 41. In the Whole County Plan, the Seventh Congressional District would contain 49.9% Black registered voters, and the Sixth Congressional District would contain 42.3% registered Black voters. *Id.* ¶ 42. The *Singleton* plaintiffs say that Black voters would “have an opportunity to elect the candidate of their choice in both districts” because recent election returns reflect “dependable biracial coalition voting” in both proposed districts. *Id.*

2. *Milligan*

The *Milligan* plaintiffs allege that the Voting Rights Act now requires two majority-Black or Black-opportunity congressional districts in Alabama.⁷ The *Milligan* plaintiffs assert that Alabama’s consideration of race in the Plan “was not narrowly tailored to comply with” the Voting Rights Act, and that the Plan reflects the Legislature’s “desire to use . . . race to maintain power by packing one-third of Black Alabamians into [District 7] and cracking the remaining Black community.” *Milligan* Doc. 1 ¶ 4.

The *Milligan* plaintiffs rely on several statistics to support these allegations: The 2020 census data establish that 26.9% of Alabamians identify as any-part Black and 63.1% identify as non-Hispanic white. *Id.* ¶ 42. A significant number of Black Alabamians live in an area that begins in Jefferson County and extends south- and west-ward to Mobile County and then east- and north-ward to Montgomery and Macon counties. *Id.* ¶¶ 87–89, 165–68.

Much of that area is known as the Black Belt. *Id.* ¶ 8 & n.1. The *Milligan* parties stipulated that the Black Belt “is named for the region’s fertile black soil. The region has a substantial Black population because of the many enslaved people

⁷ When we use the phrase “Black-opportunity,” we mean a district in which a “meaningful number” of non-Black voters often “join[] a politically cohesive black community to elect” the Black-preferred candidate, *Cooper*, 137 S. Ct. at 1470. We distinguish a Black-opportunity district from a majority-Black district, in which Black people comprise “50 percent or more of the voting population and . . . constitute a compact voting majority” in the district, *Bartlett*, 556 U.S. at 19.

brought there to work in the antebellum period. All the counties in the Black Belt are majority- or near majority-BVAP.” *Milligan* Doc. 53 ¶ 60. They further stipulated that the Black Belt includes eighteen “core counties” (Barbour, Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery, Perry, Pickens, Pike, Russell, Sumter, and Wilcox), and that an additional five counties (Clarke, Conecuh, Escambia, Monroe, and Washington) are “sometimes included within the definition of the Black Belt.” *Id.* ¶ 61.

According to the *Milligan* plaintiffs, Black voters in the Black Belt tend to share common “political beliefs, cultural values, and economic interests.” *Milligan* Doc. 1 ¶ 89. Under the Plan, those Black voters are placed into four Congressional districts: Districts 1, 2, and 3, where the *Milligan* plaintiffs assert that their votes are diluted, and District 7, which the *Milligan* plaintiffs assert is packed. *Id.* ¶¶ 165–69.

The *Milligan* plaintiffs contend that the Legislature could have “more naturally drawn a second majority-Black Congressional District that complies with traditional redistricting principles, like maintaining whole counties, and respects the contiguity and communities of actual interest in the Black Belt counties.” *Id.* ¶ 8. The *Milligan* plaintiffs allege that “(1) voting-age Black Alabamians are sufficiently numerous and geographically compact to be a majority of the voting-age population in two single member U.S. Congressional districts in Alabama; (2) the voting patterns of Black voters are politically cohesive; and (3) white voters in Alabama

vote sufficiently as a bloc to typically defeat the candidates preferred by Black voters.” *Id.* ¶ 9 (footnote omitted). The *Milligan* plaintiffs assert that “[v]oting in Alabama has historically been and remains extremely racially polarized across the state” and that one indicator of the Legislature’s improper consideration of race in enacting the Plan was its failure to conduct a racial-polarization analysis. *Id.* ¶¶ 5, 9.

The *Milligan* plaintiffs assert claims in three counts. In Count One, which asserts a claim of vote dilution, the *Milligan* plaintiffs say that the Plan violates Section Two because voting in Alabama is racially polarized, “Black voters in Alabama are sufficiently numerous and geographically compact enough” to draw two majority-Black congressional districts, and under “the totality of the circumstances,” Black voters “have less opportunity” than other Alabamians “to elect representatives of their choice to Congress.” *Id.* ¶¶ 191–95.

In Count Two, the *Milligan* plaintiffs assert a claim of racial gerrymandering under the Fourteenth Amendment and 42 U.S.C. § 1983. *Id.* at 49–50. In Count Three, they assert that the Plan was enacted to intentionally discriminate against Black people in violation of the Fourteenth Amendment, 42 U.S.C. § 1983, and Section Two. *Id.* at 50–52. To support Counts Two and Three, the *Milligan* plaintiffs use building blocks similar to the ones the *Singleton* plaintiffs use to support their constitutional challenge, including: (1) the court-ordered plan in *Wesch*; (2) the *Wesch* court’s decision not to conduct its own Section Two analysis; (3) the

Legislature's subsequent maintenance of that court-ordered plan; and (4) the Seventh Congressional District's Black voting age population of 55.3%, which is allegedly greater than is necessary to comply with Section 2. *Id.* at 40–48.

The *Milligan* plaintiffs claim that the only proper remedy is a plan that contains two majority-Black congressional districts. *Milligan* Doc. 69 at 36. The *Milligan* plaintiffs offered as a remedy in their complaint a congressional districting plan with the Second and Seventh Congressional Districts as majority-Black districts, but asserted that alternative plans could address their claims, *Milligan* Doc. 1 ¶¶ 89–90. The remedial map offered in the *Milligan* plaintiffs' complaint was introduced in the Alabama Senate by Senator Kirk Hatcher, a Black legislator, and is sometimes referred to in the pleadings as “the Hatcher plan.” *See Milligan* Doc. 1 ¶¶ 82, 185; *Milligan* Doc. 53 ¶ 113. In their motion for a preliminary injunction, the *Milligan* plaintiffs offered four additional illustrative remedial maps prepared by Dr. Moon Duchin, one of their expert witnesses. *See Milligan* Doc. 68-5 at 7, 11 (“the Duchin plans”).

3. *Caster*

The *Caster* plaintiffs, in turn, argue that the Plan violates Section Two because it “strategically cracks and packs Alabama’s Black communities,” which the *Caster* plaintiffs say are “sufficiently numerous and geographically compact to support two majority-Black congressional districts.” *Caster* Doc. 3 ¶¶ 1, 2. The *Caster* plaintiffs

assert that the Plan cracks Black voters between the First, Second, and Third Congressional Districts and packs Black voters into the Seventh Congressional District. *Id.* ¶ 4. The *Caster* plaintiffs argue that each of the congressional districts “among which the Black population is significantly cracked . . . includes at least one significant Black population center in an otherwise overwhelmingly white district” *id.* ¶ 39, and that cracking is “exemplified by the splitting of the state’s historical Black Belt,” *id.* ¶ 40. (The parties in *Caster* stipulated to the same facts about the Black Belt to which the parties in *Milligan* stipulated. *See Caster* Doc. 44 ¶¶ 33, 34.)

The *Caster* plaintiffs assert that “there is widespread racially polarized voting in Alabama, and when considered against the totality of the circumstances,” including Alabama’s long history of discrimination, unlawful redistricting, and racial appeals in political campaigns, the Plan’s “failure to create two majority-Black districts dilutes the Black vote in violation of Section 2.” *Caster* Doc. 3 ¶ 4; *id.* ¶¶ 39–40, 52–82. The *Caster* plaintiffs assert their claims in a single count, which is a claim of vote dilution under Section Two. *Id.* ¶¶ 90–95.

The *Caster* plaintiffs urge the court to adopt any remedy that includes two majority-Black or Black-opportunity congressional districts. *Id.* at 31; *Caster* Doc. 97 ¶¶ 494–505. In connection with their motion for a preliminary injunction, the *Caster* plaintiffs offer seven illustrative remedial maps prepared by their expert

witness, Mr. Bill Cooper. *See Caster* Doc. 48 at 23–37; Tr. 437, 450–52 (“the Cooper plans”).

4. Secretary Merrill and the Legislators

Secretary Merrill and the Legislators (collectively, “the Defendants”) argue that all the plaintiffs’ claims fail because the Committee followed the common and acceptable practice of starting with the prior map and adjusting the district boundaries only as necessary to comply with the one-person, one-vote rule and serve traditional redistricting criteria such as preserving the cores of existing districts and drawing compact districts. *See Milligan* Doc. 78 at 16. As for the prior map, the Defendants argue that “[f]or nearly 50 years, Alabama’s congressional districts have remained remarkably similar,” that “[n]either the 2001 Map nor the 2011 Map were ever declared unlawful by a court and both were precleared by the Department of Justice[]” under Section 5 of the Voting Rights Act, which applied to all congressional districting plans in Alabama from 1965 to 2013. *Id.* at 20, 58.

The Defendants argue that the Plan is race-neutral because the State cartographer “adjusted the districts’ population without examining racial demography” when he drew the Plan and that there is no evidence that the Legislature adopted the Plan for racially discriminatory reasons. *Id.* at 16.

The Defendants say that “[n]othing” in the Voting Rights Act “entitles Plaintiffs to court-ordered districts of their preferred racial composition—especially

not at the preliminary injunction stage with election deadlines just weeks away.” *Id.* More particularly, the Defendants argue that “nothing” in the Voting Rights Act “requires Alabama to draw two majority-[B]lack districts with slim [B]lack majorities as opposed to one majority-[B]lack district with a slightly larger majority.” *Id.* at 17.

The Defendants contend that every remedial map proposed by the *Milligan* and *Caster* plaintiffs “fail[s] the Supreme Court’s test for vote dilution” because the plaintiffs “are unable to produce maps with a second majority-black district unless they completely ignore traditional districting criteria such as compactness and maintaining communities of interest,” “eviscerate the State’s political geography,” and “subjugat[e] traditional districting criteria to race.” *Id.* at 17–18. The Defendants assert that the plaintiffs’ remedial maps “carv[e] up Alabama’s longstanding existing districts,” include an “unprecedented” split of Mobile County, “splic[e] together areas with no common interests (such as the shipyards of Mobile and the peanut farms of Dothan),” and “pit[] incumbents against each other.” *Id.* at 18.

II. STANDARD OF REVIEW

“[A] preliminary injunction is an extraordinary remedy never awarded as of right.” *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (internal quotation marks omitted). “A party seeking a preliminary injunction must establish that (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered

unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.” *Vital Pharms., Inc. v. Alfieri*, No. 20-14217, 2022 WL 179337, at *5 (11th Cir. Jan. 20, 2022) (published citation forthcoming) (internal quotation marks and citation omitted). “[T]he burdens at the preliminary injunction stage track the burdens at trial.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006).

III. APPLICABLE LAW

Because we do not now decide the constitutional claims before us, we discuss in this section only the law applicable to the *Milligan* plaintiffs’ claims under the Voting Rights Act. Our analysis proceeds in the two steps that Supreme Court precedent requires. We first consider whether the *Milligan* plaintiffs have established the three *Gingles* requirements: (1) that as a group, Black voters in Alabama are “sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district”; (2) that Black voters are “politically cohesive”; and (3) that each challenged district’s white majority votes “sufficiently as a bloc to usually defeat [Black voters’] preferred candidate.” *Cooper*, 137 S. Ct. at 1470 (internal quotation marks omitted).

“The ‘geographically compact majority’ and ‘minority political cohesion’ showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district. And the ‘minority political cohesion’ and ‘majority bloc voting’ showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population.” *Grove*, 507 U.S. at 40 (citations omitted).

“Unless these points are established, there neither has been a wrong nor can be a remedy.” *Id.* at 40–41. Accordingly, if the *Milligan* plaintiffs fail to establish any one of these three conditions, we need not consider the other two. *See Voinovich v. Quilter*, 507 U.S. 146, 158 (1993).

As to the first *Gingles* requirement, “a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent.” *Bartlett*, 556 U.S. at 19–20. As the Supreme Court has explained, “it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district.” *Id.* at 19. The unit of analysis is the Black voting-age population (again, “BVAP”): “[O]nly eligible voters affect a group’s opportunity to elect candidates.” *LULAC*, 548 U.S. at 429; *see also Bartlett*, 556 U.S. at 19 (referring to 50% or more of the “voting population”).

Even if a group is sufficiently large, “there is no § 2 right to a district that is not reasonably compact.” *LULAC*, 548 U.S. at 430 (citing *Abrams v. Johnson*, 521 U.S. 74, 91–92 (1997)). Because the injury in a Section Two claim is vote dilution, the compactness analysis “refers to the compactness of the minority population, not to the compactness of the contested district.” *Id.* at 433 (quoting *Bush v. Vera*, 517 U.S. 952, 997 (1996) (Kennedy, J., concurring)) (internal quotation marks omitted). “If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district” *Vera*, 517 U.S. at 979.

Compactness analysis is concerned less with aesthetics and more with functionality: compactness “is critical to advancing the ultimate purposes of § 2, ensuring minority groups equal ‘opportunity . . . to participate in the political process and to elect representatives of their choice.’” *LULAC*, 548 U.S. at 434 (alteration in original) (quoting 42 U.S.C. § 1973(b)). A “minority group [that] is spread evenly throughout” the relevant geographic area (*i.e.*, “substantially integrated throughout” that area), is not compact enough to “maintain that they would have been able to elect representatives of their choice” in a single district. *Gingles*, 478 U.S. at 51 n.17.

“While no precise rule has emerged governing § 2 compactness, the inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries.” *LULAC*, 548 U.S. at 433

(internal quotation marks omitted). “A district that reaches out to grab small and apparently isolated minority communities is not reasonably compact.” *Id.* (quoting *Vera*, 517 U.S. at 979) (internal quotation marks omitted). “[B]izarre shaping of” a district that, for example, “cut[s] across pre-existing precinct lines and other natural or traditional divisions,” suggests “a level of racial manipulation that exceeds what § 2 could justify.” *Vera*, 517 U.S. at 980–81.

The term “community of interest” is a term of art. Under the Legislature’s redistricting guidelines, a “community of interest” is “defined as an area with recognized similarities of interests, including but not limited to ethnic, racial, economic, tribal, social, geographic, or historical identities.” *Milligan* Doc. 88-23 (Ex. M28) at 2. The term “may, in certain circumstances, include political subdivisions such as counties, voting precincts, municipalities, tribal lands and reservations, or school districts.” *Id.* at 2–3. The Legislature’s redistricting guidelines provide that the “discernment” of a “communit[y] of interest” is “best carried out by elected representatives of the people.” *Id.* at 3.

Controlling precedents offer relatively little guidance about the meaning of “community of interest” in the redistricting context. The Supreme Court has held that residents of a Hasidic Jewish community may have a community of interest. *See United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 153–54 (1977). In *LULAC*, the Supreme Court held that a district court erred when it “did not make

any finding about compactness,” and despite finding that “[t]he Latinos in the Rio Grande Valley and those in Central Texas” 300 miles away were “‘disparate communities of interest,’ with ‘differences in socio-economic status, education, employment, health, and other characteristics,’” “ruled . . . that . . . [the district combining the two communities] would be an effective Latino opportunity district.” *LULAC*, 548 U.S. at 432 (quoting the district court’s decision). The Court reasoned that the bare “mathematical possibility of a racial bloc does not make a district compact.” *Id.* at 435. And another three-judge court has held that residents of a district combining people with disparate “economic conditions, educational backgrounds, media concentrations, commuting habits, and other aspects of life” do not share a “tangible communit[y] of interest,” *Johnson v. Miller*, 864 F. Supp. 1354, 1389–90 (S.D. Ga. 1994), *aff’d and remanded*, 515 U.S. 900 (1995).

“[T]he first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice.” *De Grandy*, 512 U.S. at 1008. Accordingly, to establish the first *Gingles* condition, the *Milligan* plaintiffs must establish that Black voters are sufficiently numerous and geographically compact to support at least two reasonably configured majority-Black districts. *See id.*; accord *Voinovich*, 507 U.S. at 153. This requirement “relates to the availability of a remedy,” *Nipper v. Smith*, 39 F.3d 1494, 1526 (11th Cir. 1994), so the *Milligan*

plaintiffs must “demonstrate the existence of a proper remedy,” *Burton v. City of Belle Glade*, 178 F.3d 1175, 1199 (11th Cir. 1999) (collecting cases).

To determine whether the *Milligan* plaintiffs satisfy this requirement, we compare the Plan with each of the four Duchin plans and each of the seven Cooper plans. *See LULAC*, 548 U.S. at 430 (quoting *De Grandy*, 512 U.S. at 1008) (stating requirement of “a comparison between a challenger’s proposal and the ‘existing number of reasonably compact districts’”).

Critically, our comparison is for the limited purpose of evaluating whether the plaintiffs have satisfied the first *Gingles* requirement: “[a] § 2 district that is **reasonably** compact and regular, taking into account traditional districting principles,” need not also “defeat [a] rival compact district[]” in a “beauty contest[].” *Vera*, 517 U.S. at 977 (emphasis in original) (internal quotation marks omitted).

The second and third *Gingles* requirements rise and fall on whether the *Milligan* plaintiffs establish that voting in the challenged districts is racially polarized. *See, e.g., LULAC*, 548 U.S. at 427. As the Supreme Court has explained, “in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters.” *Voinovich*, 507 U.S. at 158 (quoting *Gingles*, 478 U.S. at 49 n.15).

If the *Milligan* plaintiffs establish all three *Gingles* requirements, we must then analyze whether a Section Two violation has occurred based on “the totality of

the circumstances.” *Bartlett*, 556 U.S. at 11–12. In this step, we consider the Senate

Factors, which include:

the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

De Grandy, 512 U.S. at 1010 n.9 (quoting *Gingles*, 478 U.S. at 44–45). “[E]vidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State’s or the political subdivision’s use of the contested practice or structure is tenuous may have probative value.” *Id.* (quoting *Gingles*, 478 U.S. at 45).

The Senate Factors are not exhaustive. Under controlling Supreme Court precedent, we must also consider whether the number of Black-majority districts in the Plan is roughly proportional to the Black share of the population in Alabama. *See LULAC*, 548 U.S. at 426; *accord De Grandy*, 512 U.S. at 1000. Although Section Two expressly provides that “nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the

population,” 52 U.S.C. § 10301(b), the Supreme Court has held that “whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area” is a “relevant consideration” in the totality-of-the-circumstances analysis. *LULAC*, 548 U.S. at 426; *accord De Grandy*, 512 U.S. at 1000. “[P]roportionality . . . is obviously an indication that minority voters have an equal opportunity, in spite of racial polarization to participate in the political process and to elect representatives of their choice” *De Grandy*, 512 U.S. at 1020 (internal quotation marks omitted); *accord Alabama Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1286–87 (2013) (concluding that the totality of the circumstances weighed against a finding that the state legislative map violated Section Two in part because the number of majority-Black districts in the Legislature is “roughly proportional to the [B]lack voting-age population”), *vacated on other grounds*, 575 U.S. 254 (2015).

We may also consider “any circumstance that has a logical bearing on whether” the challenged structure and its interaction with local social and historical conditions “affords equal ‘opportunity.’” *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2338 (2021); *see also District of Columbia v. Wesby*, 138 S. Ct. 577, 588 (2018) (observing that a “totality of the circumstances” test “requires courts to consider the whole picture” and “recognize[s] that the whole is often greater than the sum of its parts” and “precludes [a] sort of divide-and-conquer analysis” in which

each factor is “viewed in isolation”) (internal quotation marks omitted).

Our Section Two analysis “assess[es] the impact of the contested structure or practice on minority electoral opportunities on the basis of objective factors.” *Gingles*, 478 U.S. at 44 (internal quotation marks omitted). Whether the legislature intended that impact is “the wrong question.” *Id.* (internal quotation marks omitted). This means that “proof that a contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters, is not required under Section 2 of the Voting Rights Act.” *City of Carrollton Branch of NAACP*, 829 F.2d at 1553. Accordingly, we neither consider nor decide whether the Legislature intended to dilute the votes of Black Alabamians.

If we determine that the Plan violates Section Two, controlling precedent makes clear both that the Legislature should get the first cut at drawing a new map, and that we must not restrict that work any more than is necessary to ensure compliance with Section Two. *See, e.g., North Carolina*, 138 S. Ct. at 2554. Further, if we determine that the Plan violates Section Two, that would not be a determination that the *Milligan* plaintiffs are entitled to a map of their choice, or to one of the remedial maps submitted to establish the first *Gingles* requirement: those maps are illustrative maps submitted for the purposes of establishing liability under Section Two. The Legislature retains “flexibility” in their work, subject to the rule that a “district drawn in order to satisfy § 2 must not subordinate traditional districting

principles to race substantially more than is reasonably necessary to avoid § 2 liability.” *Vera*, 517 U.S. at 978–79 (internal quotation marks omitted).

Only if the Legislature fails promptly to draw a new map that complies with Section Two would it “become[] the unwelcome obligation of the federal court to devise and impose a reapportionment plan pending later legislative action.” *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (internal citation and quotation marks omitted).

IV. ANALYSIS – VOTING RIGHTS ACT

A. The Milligan Plaintiffs’ Arguments

The *Milligan* plaintiffs first argue that they are substantially likely to succeed on their Section Two claim because they satisfy each of the *Gingles* requirements and prevail on an analysis of the totality of the circumstances.

1. Gingles I – Numerosity and Reasonable Compactness

To satisfy the first *Gingles* requirement, the *Milligan* plaintiffs must establish that Black voters as a group are “sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district.” *Cooper*, 137 S. Ct. at 1470 (internal quotation marks omitted); *accord Grove*, 507 U.S. at 40. To establish that, the *Milligan* plaintiffs rely on the testimony of expert witness Dr. Moon Duchin.

Dr. Duchin’s credentials include an undergraduate mathematics degree from Harvard University and two graduate mathematics degrees from the University of Chicago. *Milligan* Doc. 68-5 at 1. Dr. Duchin is a Professor of Mathematics at Tufts

University, where she runs a redistricting research lab known as the Metric Geometry and Gerrymandering Group; there she uses her mathematical specialty, metric geometry, to understand redistricting. *Id.* at 1, 18; Tr. 550–51. She has published more than a dozen peer-reviewed papers focused on redistricting issues in various journals that include the Election Law Journal, Political Analysis, Foundations of Data Science, the Notices of the American Mathematical Society, Statistics and Public Policy, the Virginia Policy Review, the Harvard Data Science Review, Foundations of Responsible Computing, and the Yale Law Journal Forum. *Milligan* Doc. 68-5 at 4; Tr. 552. She has researched and taught courses about the history of the census and focused on the United States Census Bureau, and her redistricting research is supported by the National Science Foundation. Tr. 552–53. She was elected as a Fellow of the American Mathematical Society four years ago and has been both a Radcliffe Fellow and a Guggenheim Fellow. *Milligan* Doc. 68-5 at 4. At the preliminary injunction hearing, Dr. Duchin was qualified as an expert in redistricting, applied mathematics, quantitative redistricting analysis, and demography and use of census data, with no objection from any party. Tr. 554–55. For the reasons explained in our findings of fact and conclusions of law (*see infra* Part V.B.2.a), we find Dr. Duchin’s testimony highly credible.

Dr. Duchin opined in her report that because 27.16% of Alabama residents identified as any-part Black on the 2020 Decennial Census (1,364,736 residents out

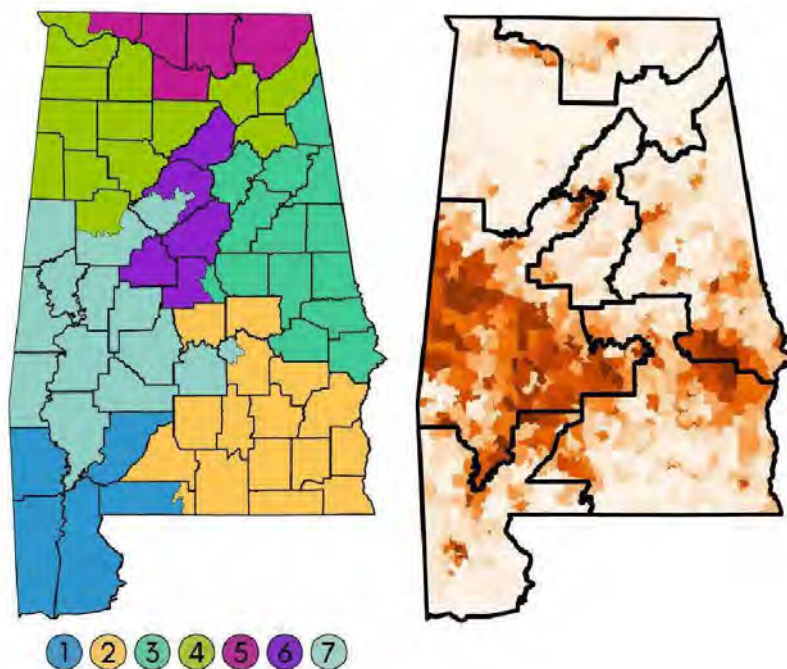
of 5,024,279 total residents), Black Alabamians are sufficiently numerous to constitute majorities of three out of seven congressional districts. *Milligan* Doc. 68-5 at 5. Dr. Duchin reasoned that because each congressional district will contain approximately one-seventh, or 14.3% of Alabama's population, 7.2% of the population is sufficient to constitute a majority in a district. *Id.* at n.2.

At the preliminary injunction hearing, Dr. Duchin testified that her opinion about numerosity also is based on her illustrative plans (discussed in detail below), each of which includes two congressional districts with a BVAP over 50% using the any-part Black metric to measure BVAP. Tr. 585; *see also Milligan* Doc. 68-5 at 10–12 & n.4. Dr. Duchin also testified that her opinion about numerosity is based on the analysis she performed using the mathematical algorithms that she developed, which demonstrated that there are “literally thousands of different ways” to create plans with two majority-Black districts. Tr. 565.

Dr. Duchin's testimony on compactness is that although the “constraints of geography,” meaning the location of Black voters throughout the state, “make it impossible to create three” majority-Black congressional districts, “it is readily possible to create two” such districts “without sacrificing traditional districting principles like population balance, contiguity, respect for political subdivisions like counties, cities, and towns, or the compactness of the districts, and with heightened respect for communities of interest.” *Milligan* Doc. 68-5 at 5 (internal citations

omitted); *see also id.* at 5–10; Tr. 556.

Dr. Duchin opined that the Plan “packs Black population into District 7 at an elevated level of over 55% BVAP, then cracks Black population in Mobile, Montgomery, and the rural Black Belt across Districts 1, 2, and 3, so that none of them has more than about 30% BVAP.” *Milligan* Doc. 68-5 at 6 fig.1; Tr. 564. She illustrated this point with a side-by-side comparison of the Plan and a demographic map in which “[d]arker shading indicates precincts with a higher share of BVAP”:



Milligan Doc. 68-5 at 6 fig.1.

Dr. Duchin testified at the preliminary injunction hearing that her “main

question was whether [she] could make plans that had two majority-[B]lack districts while showing great respect for the other additional districting principles.” Tr. 570–71. She testified that she began to consider whether it was possible to draw a second majority-Black congressional district in Alabama by using computer algorithms to generate large numbers of drawings, and those algorithms “found plans with two majority-[B]lack districts in literally thousands of ways.” Tr. 565. Using some of those plans as inspiration, she then began to draw by hand using other computer programs associated with her lab that are publicly available. Tr. 565–66. As she drew by hand, she relied on census data (both voting precinct-level data and more granular census block-level data) and she considered the Plan, previous Alabama plans, the plan that Alabama uses to elect its eight-member State Board of Education (which includes two majority-Black districts),⁸ and the Legislature’s redistricting guidelines. Tr. 566–70, 622, 657–60, 673–74, 690.

Dr. Duchin explained her understanding of traditional redistricting principles

⁸ The *Milligan* parties stipulated that “[t]he Alabama [State Board of Education] is a nine-member body that sets education policy for Alabama’s K-12 schools. The Governor serves as the president of the SBOE, and the remaining eight members are elected to the Board from single-member districts. In 2021, Alabama adopted an eight-district SBOE Plan (the “2021 SBOE Plan”) with two majority-Black districts, Districts 4 and 5. According to 2020 Census data, District 4 is 51% BVAP, and District 5 is 51% BVAP. In each election since 2011, a Black Democrat won a majority of Black voters and the election in Districts 4 and 5 of the SBOE. District 5 of the SBOE Plan connects the City of Mobile to the Black Belt Counties.” *Milligan* Doc. 53 ¶¶ 66–69.

and the Legislature's redistricting guidelines, testified about the priority she assigned to various such principles in her work on this case, and explained how she resolved conflicts among such principles when they arose. Tr. 573–76, 621–30, 635, 657–60. In Dr. Duchin's view, it is "common" for traditional redistricting principles to conflict during the map-drawing process, and "redistricting is all about th[e] tradeoffs" that must occur when conflicts arise. Tr. 576.

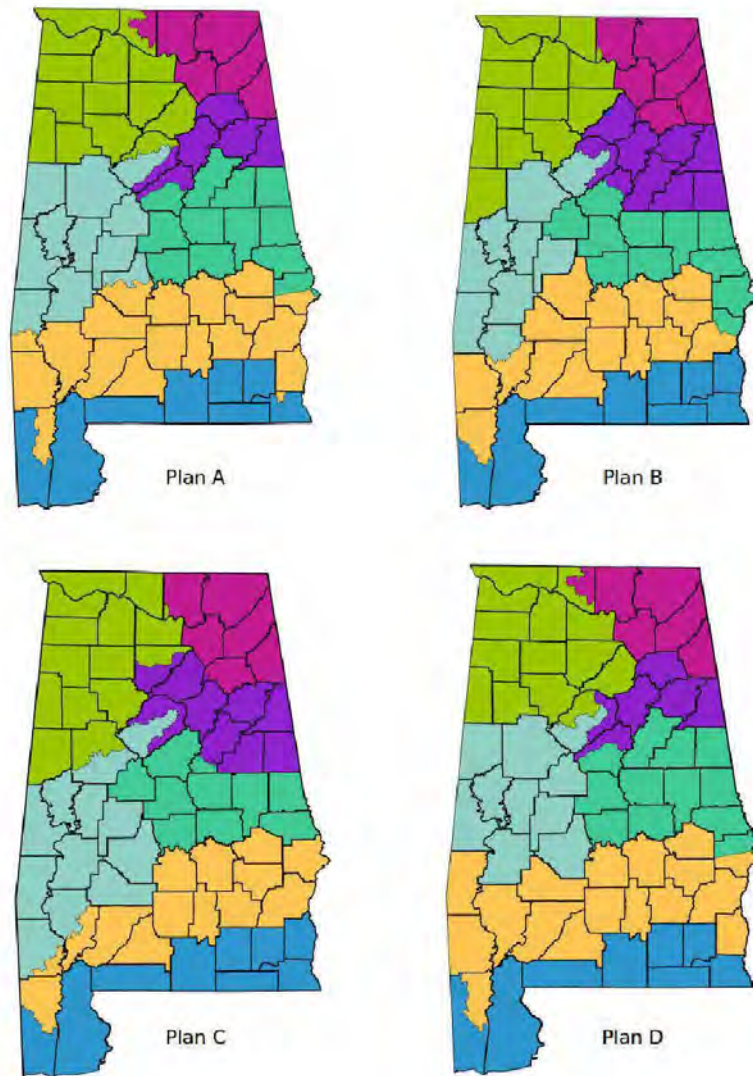
More particularly, Dr. Duchin testified that she relied heavily on the Legislature's redistricting guidelines, and she took the creation of two majority-Black districts, which she was asked to try to draw, as a "nonnegotiable principle" sought in her illustrative plan, along with equal population among districts. Tr. 622, 647, 657–60, 690. Dr. Duchin labeled this principle "minority opportunity to elect," based on the provision in the Legislature's redistricting guidelines that "Districts shall be drawn in compliance with the Voting Rights Act of 1965, as amended. A redistricting plan shall have neither the purpose nor the effect of diluting minority voting strength, and shall comply with Section 2 of the Voting Rights Act and the Constitution." Tr. 574, 682-83; *see also* Ex. M28 (available at *Milligan* Doc. 88-23). She further testified that "after" population balance and minority opportunity to elect, she "took contiguity and compactness to be highest ranked following the Alabama guidelines" based on the way that those principles are expressed in those guidelines. Tr. 577, 622.

Dr. Duchin repeatedly testified that she focused on race **only** to the extent that was necessary to be sure that she maintained two districts with BVAPs of greater than 50% to satisfy *Gingles* I. She “describe[d] the priority order this way: When you have to split a [voting tabulation district] looking to balance population, as I just said, by far, the first thing that I look at is the total population of the [census] blocks. After that, the next consideration I had was compactness, trying to make kind of less eccentric and more regular boundaries between districts. I – over the course of the many draft maps made, I did sometimes look at race of those blocks, but really, only to make sure that I was creating two districts over 50 percent. Beyond ensuring crossing that 50 percent line, there was no further consideration of race in choosing blocks within the split [voting tabulation districts].” Tr. 572–73.

Relatedly, Dr. Duchin emphasized that it was “simply not [her] goal” to “maximize” the BVAP in the two majority-Black districts in her plans. Tr. 578. She testified that “[w]e’ve seen from the state that it’s possible to have a substantially higher BVAP in a district, and I can tell you that it’s possible, while having two districts to still have a substantially higher BVAP in a district.” Tr. 578. She further testified that when she prepared her illustrative plans, there were times when she made decisions “that had the effect of reducing the Black Voting Age Population in one of the minority-majority [B]lack districts in order to satisfy other redistricting principles.” Tr. 578. She gave as an example that she “took . . . county integrity to

take precedence over the level of BVAP once that level was past 50 percent.” Tr. 578.

Dr. Duchin offered four plans to illustrate her point that it is possible to draw two contiguous and reasonably compact majority-Black congressional districts, and she testified at the preliminary injunction hearing that her four illustrative plans are “far from the only plans” that could be drawn with two such districts. Tr. 577. She supplied the following maps in her report:



Milligan Doc. 68-5 at 7 fig.2.

Dr. Duchin testified that like the Plan, each of her plans nearly perfectly distributes Alabama's population into contiguous districts: each district in each plan is within a one-person deviation of the baseline of 717,754 people per district, and

each district in each plan is contiguous. *Id.* at 8; Tr. 586–90; *see also* *Milligan* Doc. 92-1 (Ex. M48) (supplemental report correcting previous mistake in contiguity analysis without consequence to mathematical analysis or substantive conclusions).

Dr. Duchin also testified that like the Plan, each of her plans respects existing political subdivisions in the state. Tr. 599. Her opinion is that “to make seven finely population-tuned districts, it is necessary to split at least six of Alabama’s 67 counties into two pieces, or to split some counties into more than two pieces.” *Milligan* Doc. 68-5 at 8; Tr. 626. She opined that both the Plan and all four of her plans “split nine counties or fewer, giving them high marks for respecting these major political subdivisions,” and one of her plans has the same number of county splits (the Plan splits six counties once, and Duchin Plan D splits four counties once and Jefferson County twice). *Milligan* Doc. 68-5 at 8. She also opined that all of her plans “are comparable to the State’s plan on locality splits, with [Duchin] Plan B splitting fewer localities” than the Plan. *Id.*

Dr. Duchin testified that she considered compactness when she drew each of her plans by computing compactness scores for those plans using three metrics that are commonly cited in professional redistricting analyses: the Polsby-Popper score, the Reock score, and the cut-edges score. *Id.* at 9; Tr. 590–94.⁹ Dr. Duchin provided

⁹ Dr. Duchin explained the Polsby-Popper and Reock metrics as follows: “Polsby-Popper is the name given in this setting to a metric from ancient mathematics: the isoperimetric ratio comparing a region’s area to its perimeter via the formula $4\pi A/P^2$.

average compactness scores for each of her plans on each of these metrics, *Milligan* Doc. 68-5 at 9, and testified that all four of her plans “are superior to” and “significantly more compact than” the Plan using an average Polsby-Popper metric. *Id.*; Tr. 593. More particularly, she testified that the least compact districts in her plans – Districts 1 and 2 – were “comparable to or better than the least compact districts” in both the Plan and the 2011 Congressional map. Tr. 594; *accord* Tr. 655–56. Dr. Duchin testified that in her opinion, she was able to “maintain reasonable compactness by Alabama standards in [her] entire plan” because “[a]ll of [her]

Higher scores are considered more compact, with circles uniquely achieving the optimum score of 1. Political scientist Ernest Reock created a different score based on the premise that circles were ideal: it is computed as the ratio of a region’s area to that of its circumcircle, where the circumcircle is defined as the smallest circle in which the region can be circumscribed. Polsby-Popper is thought to be relevant as a measure of how erratically the geographical boundaries divide the districts, but this sometimes penalizes districts for natural features like coastlines of bays and rivers. Reock has a much weaker justification, since the primacy of circles is the goal rather than the consequence of the definition.” *Milligan* Doc. 68-5 at 9. Dr. Duchin further explained that, as with the Polsby-Popper metric, a higher Reock score is better than a lower Reock score. *Id.* Dr. Duchin also explained the cut-edges score as follows: “Recently, some mathematicians have argued for using discrete compactness scores, taking into account the units of Census geography from which the district is built. The most commonly cited discrete score for districts is the *cut edges* score, which counts how many adjacent pairs of geographical units receive different district assignments. In other words, cut edges measures the ‘scissors complexity’ of the districting plan: how much work would have to be done to separate the districts from each other? Plans with a very intricate boundary would require many separations. Relative to the contour-based scores, this better controls for factors like coastline and other natural boundaries, and focuses on the units actually available to redistricters rather than treating districts like free-form Rorschach blots.” *Id.*

districts are more compact” on a Polsby-Popper metric than “the least compact district from 10 years ago” in Alabama. Tr. 665.

Dr. Duchin testified that her plans also respect the Black Belt as a community of interest as that term is defined by the Legislature’s redistricting guidelines. *See Milligan* Doc. 68-5 at 13; *Milligan* Doc. 88-23 (Ex. M28) at 2–3 (“A community of interest is defined as an area with recognized similarities of interests, including but not limited to ethnic, racial, economic, tribal, social, geographic, or historical identities.”). Dr. Duchin observed that in the Plan, eight of the eighteen core Black Belt counties are “partially or fully excluded from majority-Black districts,” while “[e]ach of the 18 Black Belt counties is contained in majority-Black districts in at least some” of her alternative plans. *Milligan* Doc. 68-5 at 13; *see also* Tr. 666–68.

Dr. Duchin opined in her report that because her plans were designed to include two majority-Black districts, “it should be expected” that they “would disrupt the structure of the prior plans” and would not retain the cores of prior districts to the same extent that the Plan does. *Milligan* Doc. 68-5. at 10. At the preliminary injunction hearing, she testified that she “judge[s] it to be impossible to have as high of a core preservation as, for instance, you see in the newly enacted plans, while also having two majority-[B]lack districts.” Tr. 600.

Dr. Duchin testified at the preliminary injunction hearing that although her plans pair incumbents, that circumstance is the result of her focus on principles that

are assigned greater priority in the Legislature's redistricting guidelines. Tr. 669–70. She explained that fewer pairings were possible, but would come at the expense of compactness and keeping counties whole. Tr. 669–70. She observed that because two paired incumbents live in the same county just miles apart, a plan would have to split that county to avoid pairing those incumbents. Tr. 671.

The *Milligan* plaintiffs argue that each of Dr. Duchin's plans "retain most of Birmingham in District 7," "keep the Black Belt and Montgomery county together," do not split Montgomery County, and "are more compact than HB1." *Milligan* Doc. 69 at 12–13.

At the preliminary injunction hearing, the *Milligan* plaintiffs also offered testimony from two of the individual plaintiffs. Plaintiff Evan Milligan is Black and lives in Montgomery in District 7. Mr. Milligan works as the Executive Director of Alabama Forward, a coalition of non-profit groups that works on voting issues in Alabama. Tr. 127. Mr. Milligan testified about the Black community in Montgomery County as well as what he believes the Black community in Montgomery has in common with the Black Belt. Tr. 137–44. Plaintiff Shalela Dowdy is Black and currently lives in Mobile in District 1. Captain Dowdy is an Army Veteran and currently works as a community organizer. Tr. 365–66. Captain Dowdy testified about the Black community in Mobile County as well as what she believes the Black community in Mobile has in common with the Black Belt. Tr. 370–76.

2. *Gingles* II and III – Racially Polarized Voting

To satisfy the second and third *Gingles* requirements, that Black voters are “politically cohesive,” and that each challenged district’s white majority votes “sufficiently as a bloc to usually defeat [Black voters’] preferred candidate,” *Cooper*, 137 S. Ct. at 1470 (internal quotation marks omitted), the *Milligan* plaintiffs first rely on a racial polarization analysis conducted by expert witness Dr. Baodong Liu.

Dr. Liu is a tenured professor of political science at the University of Utah, where he focuses on the “relationship between election systems and the ability of minority voters to participate fully in the political process and to elect representatives of their choice.” *Milligan* Doc. 68-1 at 2. Dr. Liu has written or edited eight books and published more than thirty articles in peer-reviewed journals such as *Social Science Quarterly*, *American Politics Research*, *Sociological Methods and Research*, *Political Behavior*, and the *American Review of Politics*. *Id.*; Tr. 1255. He has served as an expert witness in vote dilution cases in six states and has advised the United States Department of Justice on methodological issues concerning racially polarized voting. *Milligan* Doc. 68-1 at 2. At the preliminary injunction hearing, he was qualified as an expert in racial-polarization analysis and American political behavior without objection from any party. Tr. 1255. For the reasons explained in our findings of fact and conclusions of law (*see infra* Part V.B.3), we find that Dr. Liu is a credible expert witness.

The *Milligan* plaintiffs first asked Dr. Liu to opine (1) whether racially polarized voting occurs in Alabama, and (2) whether such voting has resulted in the defeat of Black-preferred candidates in Alabama congressional elections. *Milligan* Doc. 68-1 at 1. Dr. Liu first examined seven biracial endogenous elections – congressional elections in the districts at issue in this litigation that provided a choice between a Black candidate and a white candidate – based on case law indicating that evidence about biracial elections and endogenous elections is more probative of racially polarized voting than is evidence about other kinds of elections. *See Milligan* Doc. 68-1 at 3–4 & n.1; *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1301 (11th Cir. 2020); *Davis v. Chiles*, 139 F.3d 1414, 1417–18 & n.3 (11th Cir. 1998); *Clark v. Calhoun Cnty.*, 88 F.3d 1393, 1397 (5th Cir. 1996). Dr. Liu also considered six biracial exogenous elections – in this case, elections for statewide offices that provided a choice between a Black candidate and a white candidate. *See Milligan* Doc. 68-1 at 4.

Dr. Liu studied racially polarized voting in these thirteen elections by using a statistical procedure known as ecological inference, which he opines “has been widely used as the most-advanced and reliable statistical procedure for [racially polarized voting] estimates in not only academic research but also voting rights cases in the last two decades.” *Id.* at 5. Dr. Liu used both the any-part Black metric and the single-race Black metric to study the endogenous elections, and the single-race

Black metric to study the exogenous elections. Tr. 1338–39. Dr. Liu’s order of analysis was first to “evaluate whether or not the preferred candidate of [B]lack voters received majority support from the [B]lack group. And then . . . to look at whether the majority voters do not share that preference, that is to say, only a minority of the white majority group voted for the same candidate, and if so, then [to] look at whether the [B]lack-preferred candidate is defeated.” Tr. 1257.

In his report, Dr. Liu opined that “in 13 out of the 13 elections (100%) in which Black voters expressed a preference for Black candidates, that preference was not shared by white majority voters,” and “the white majority voted sufficiently as a bloc to typically defeat all the Black candidates in those elections.” *Milligan* Doc. 68-1 at 18. In the general elections in the challenged districts Dr. Liu studied (excepting District 7), Black support for the Black-preferred candidate always exceeded 90% and white support for the Black-preferred candidate never exceeded 12.6%. *Id.* at 9. Dr. Liu observed that the “only Black success in winning a biracial endogenous election since the 2008 elections was Terri Sewell[,] who ran in a Black-majority congressional district,” District 7. *Id.* at 18. Dr. Liu provided a table of his results to demonstrate both the existence and the extent of the racially polarized voting that he observed:

Table 1: Estimated Racial Support for Black Candidate in Endogenous Elections

Election	Black Candidate(s)	White Candidate(s)	% vote cast for Black Cand	Black Support for Black Cand (95% CI) ¹³	White Support for Black Cand (95% CI)	Black-Cand Won?	RPV?
2020 CD1, primary	James Averhart	Kiani Gardner and Frederick Collins	40.2%	53.8% (.52-.56)	16.7% (.13-.20)	Into Runoff	Yes
2020 CD1, general	James Averhart	Jerry Carl	35.6%	93.3% (.88-.96)	12.6% (.09, .17)	No	Yes
2020 CD2, general	Phyllis Harvey-Hall	Barry Moore	34.5%	93.4% (.88-.96)	5.2% (.04-.1)	No	Yes
2020 CD3, general	Adia Winfrey	Mike Rogers	32.4%	92.6% (.88-.95)	6.6% (.03-.12)	No	Yes
2018 CD1, general	Robert Kennedy, Jr.	Bradley Byrne	36.8%	94.6% (.92-.96)	8.1% (.08-.13)	No	Yes
2012 CD7, general	Terri Sewell	Don Chamberlain	75.8%	96.3% (.94-.98)	26.1% (.20-.36)	Yes	Yes
2010 CD7, general	Terri Sewell	Don Chamberlain	72.5%	95.5% (.93-.97)	19.3% (.16-.23)	Yes	Yes

Milligan Doc. 68-1 at 9.

In his rebuttal report, Dr. Liu responded to the report of one of the Defendants' experts, Dr. M.V. Hood. *See infra* Part IV.C.2 & Part IV.D.2. Dr. Liu opined that the recent election of a Black Republican, Kenneth Paschal, to represent Alabama House District 73, is "an unreliable election to estimate white support for a Black Republican candidate" because the turnout for that election (a special election) was so low that it suggests that "white voters were not highly interested in this election

featuring a Black Republican candidate.” *Milligan* Doc. 76-1 at 3 (discussing “low overall” turnout of 5.3% of the voting age population, and only 1.7% of the white voting age population). Dr. Liu further opined that the 2016 Republican presidential primary in Alabama offers a better election to estimate white support for a Black Republican candidate, and it indicates low support because the Black Republican candidate, Ben Carson, received far less support than the white Republican candidate, Donald Trump. *Id.* at 3–4. Based on Dr. Liu’s expertise and our observation of this testimony, we credit the testimony and find it particularly helpful.

At the preliminary injunction hearing, Dr. Liu’s testimony emphasized the clarity and starkness of the pattern of racially polarized voting that he observed, particularly in the highest-value data set – the biracial endogenous elections. *See* Tr. 1271–75 (Liu testimony about Table 1 in his report, which reflects evidence of racially polarized voting in biracial endogenous elections). Dr. Liu explained that in those elections, “Black support for [B]lack candidates was almost universal” and “overwhelmingly in the 90[%] range,” Tr. 1271, that Black voters were “super cohesive in choosing the same candidate from their own racial group,” Tr. 1274, and that the Black-preferred candidate was defeated in every election except the one in District 7, which is majority-Black, Tr. 1275. Dr. Liu testified that he observed a similar pattern in the exogenous elections he studied, Tr. 1275–76, which provides a “supplemental piece of evidence” of racially polarized voting, Tr. 1276, and

ultimately that racially polarized voting in Alabama is “very clear,” Tr. 1293.

At the preliminary injunction hearing, Dr. Liu testified that after he submitted his report, he was made aware of an eighth biracial endogenous election since 2008. Tr. 1268–69. Dr. Liu further testified that he analyzed that election after he submitted his report, and “[t]he result turned out to be racially polarized just as [he] found in [his] report for other elections.” *Id.* at 1269.

The *Milligan* plaintiffs also asked Dr. Liu to perform an effectiveness analysis, in which he evaluated “the levels of opportunities for minority voters to elect candidate[s] of their choice” in four plans – the Plan, Duchin Plan A, Duchin Plan B, and Duchin Plan D. *See Milligan* Doc. 68-1 at 14–18; Tr. 1259, 1312–13. Dr. Liu first concluded that Duchin Plans B and D “clearly offer Black voters in Alabama more opportunities to elect candidates of their choice than does” the Plan, and when he later analyzed Duchin Plan A, he reached the same conclusion as to that plan, Tr. 1312–13.

The *Milligan* plaintiffs also rely on several federal court decisions to establish that voting is racially polarized in Alabama. More particularly, the *Milligan* parties stipulated that “[n]umerous federal courts in Alabama have found that the state’s elections were racially polarized at the time and locations at issue in their respective cases. *See, e.g., Ala. State Conf. of NAACP v. Alabama*, No. 2:16-CV-731-WKW, 2020 WL 583803, at *17 (M.D. Ala. Feb. 5, 2020) (accepting the undisputed

statistical evidence proving the existence of racially polarized voting statewide); *Jones v. Jefferson Cnty. Bd. of Educ.*, No. 2:19-cv-01821-MHH, 2019 WL 7500528, at *2 (N.D. Ala. Dec. 16, 2019) (finding that voting is racially polarized in Jefferson County elections); *United States v. McGregor*, 824 F. Supp. 2d 1339, 1345–46 & n.3 (M.D. Ala. 2011) (finding that voting is racially polarized across Alabama).” *Milligan* Doc. 53 at ¶ 118.

3. The Senate Factors and Proportionality

Next, the *Milligan* plaintiffs turn to an analysis of the totality of the circumstances. They begin with the nine Senate Factors, which they number as follows:

1. “the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process”;
2. “the extent to which voting in the elections of the state or political subdivision is racially polarized”;
3. “the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group”;
4. “if there is a candidate slating process, whether the members of the minority group have been denied access to that process”;
5. “the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process”;

6. “whether political campaigns have been characterized by overt or subtle racial appeals”;
7. “the extent to which members of the minority group have been elected to public office in the jurisdiction”;
8. “whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group”; and
9. “whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.”

Gingles, 478 U.S. at 36–37 (quoting S. Rep. No. 97-417 at 28–29).

The *Milligan* plaintiffs observe that “[i]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances,” *Georgia State Conf. of NAACP*, 775 F.3d at 1342, and they argue that in this case the Senate Factors “confirm” the Section Two violation. *Milligan* Doc. 69 at 16.

The *Milligan* plaintiffs emphasize Senate Factors Two and Seven – racially polarized voting and a lack of Black electoral success – because in *Gingles* the Supreme Court flagged them as the “most important” factors. *Id.* The *Milligan* plaintiffs assert that it is “essentially undisputed that voting is racially polarized.” *Id.*; *Milligan* Doc. 94 at 19 (citing *Milligan* Doc. 66-4 at 13); *see also infra* at Part IV.C.2 (explaining that Defendants’ expert agreed that voting in Alabama is racially polarized). The *Milligan* parties jointly stipulated as fact that (1) “no Black candidate has ever won in a majority-white congressional district” in Alabama, *Milligan* Doc.

53 ¶¶ 44, 121, (2) “no Black person has won a statewide race in a generation,” *id.* ¶¶ 167–68, and (3) “nearly all other Black legislators in Alabama are elected from majority-Black districts created to comply” with the Voting Rights Act or the Constitution, *Milligan* Doc. 69 at 16 (citing *Milligan* Doc. 53 ¶ 169).

The *Milligan* plaintiffs assert that Factors 1, 3, and 5 also are present because “Alabama has an undisputed and ongoing history of discrimination against Black people in voting, education, employment, health, and other areas.” *Milligan* Doc. 69 at 17–18. The *Milligan* plaintiffs rely on the following facts jointly stipulated by the Defendants, *see id.*:

- Prior to 1960, the Legislature failed to reapportion for 50 years. As a result, Alabama’s entire legislative apportionment scheme was struck down for violating the principle of one person, one vote. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). On remand, a three-judge court found that, in devising remedial maps to correct the malapportionment, the “Legislature intentionally aggregated predominantly Negro counties with predominantly white counties for the sole purpose of preventing the election of Negroes to [State] House membership.” *Sims v. Baggett*, 247 F. Supp. 96, 108-109 (M.D. Ala. 1965).
- Following *Reynolds* and the 1970 Census, the Legislature again failed to redistrict and a three-judge federal court was forced to draw new district lines. *Sims v. Amos*, 336 F. Supp. 924, 940 (M.D. Ala. 1972). The court rejected the Alabama Secretary of State’s proposed map because of its racially “discriminatory effect” on Black voters. *Id.* at 936.
- In the 1980s, the United States Attorney General denied preclearance under the Voting Rights Act to maps drawn by the Legislature to redistrict State House and Senate maps because of their discriminatory effect on Black voters in Jefferson County and the Black Belt. U.S. Dep’t of Justice Ltr. to Ala. Attorney General Graddick, May 6, 1982, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/AL-1520.pdf>. Shortly thereafter, a three-judge court rejected Alabama’s proposed

interim remedial state maps in part because Alabama's maps "had the effect of reducing the number of 'safe' black districts" in and near Jefferson County. *Burton v. Hobbie*, 543 F. Supp. 235, 238 (M.D. Ala. 1982).

- After the 1990 census, the State entered a consent decree to resolve a Voting Rights Act lawsuit filed on behalf of Black voters. *See Brooks v. Hobbie*, 631 So. 2d 883, 884 (Ala. 1993).
- Most recently, after the 2010 census, Black voters and legislators successfully challenged 12 state legislative districts as unconstitutional racial gerrymanders. *See Alabama Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026, 1348-49 (M.D. Ala. 2017).
- Today, Alabama has a majority-vote requirement in all primary elections.
- Before the Civil War, Black people were barred from voting in the state. After the passage of the Reconstruction Acts and Amendments, Alabama was forced to allow Black men access to the franchise, and the 1867 Alabama Constitution granted every male person over the age of 21—who satisfied the citizenship and residency requirements—the right to vote. This meant that for the first time in Alabama's history, Black people voted and held public office. In response, white leaders reformed the Democratic party with the intent of "redeeming" the State and re-establishing white supremacy. This was accomplished by using violence to deter Black people from political participation and, once the Redeemers returned to political office, to pass racially discriminatory laws to cement their control.
- In 1874, Democratic candidates were elected to public office in large numbers. On election day, in Eufaula, Alabama, members of a white paramilitary group known as the White League, killed several unarmed Black Republican voters and turned away thousands of voters from the polls.
- The following year, in 1875, the Alabama legislature adopted a new state constitution and passed a series of local laws and ordinances designed to strip Black Americans of the civil rights they enjoyed briefly during Reconstruction.
- At the 1901 Constitutional Convention, 155 white male delegates gathered in Montgomery with the express intention "to establish white supremacy in the State." The Convention ratified changes to the constitution that required literacy tests as a prerequisite to register to vote and mandated payment of an

annual \$1.50 poll tax, which was intended to and had the effect of disenfranchising Black voters. *United States v. Alabama*, 252 F. Supp. 95, 99 (M.D. Ala. 1966).

- After the United States Supreme Court invalidated white-only primaries in 1944, Alabama passed the “Boswell Amendment” to its Constitution in 1946, adding an “understanding requirement” meant to give registrars broad discretion to deny African Americans the ability to register to vote.
- After a federal court invalidated the Boswell Amendment in 1949, Alabama replaced its understanding requirement with a literacy test, again with the purpose of preventing African Americans from registering to vote.
- After the Supreme Court outlawed the white primary in 1944, many Alabama counties shifted to at-large elections, the intent of which was to prevent African Americans from electing their candidates of choice.
- In 1951, Alabama enacted a law prohibiting single-shot voting in municipal elections, the intent of which was to prevent African Americans from electing their candidates of choice.
- In 1957, Alabama transformed the boundaries of the city of Tuskegee into a twenty-eight-sided figure designed to fence out African Americans from the city limits and ensure that only white residents could elect city officials. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).
- In 1964 and 1965, Dallas County Sheriff Jim Clark, Alabama state troopers, and vigilantes violently assaulted peaceful Black protesters attempting to gain access to the franchise.
- On March 7, 1965, in what became known as Bloody Sunday, state troopers viciously attacked and brutally beat unarmed peaceful civil rights activists crossing the Edmund Pettus Bridge in Selma, where less than 5 percent of Black voters were registered to vote. Bloody Sunday helped pave the way for the passage of the Voting Rights Act in 1965 and Alabama was declared a “covered” state under Section 4(b) of the Act.
- Between 1965 and 2013, at least 100 voting changes proposed by Alabama state, county or city officials were either blocked or altered pursuant to Section 5 of the Voting Rights Act. No objection was raised after 2008. The objections include at least 16 objections between 1969 and 2008 in cases where a

proposed state or local redistricting plan had the purpose or would have the effect of diminishing the ability of Black voters to elect their candidates of choice. The last sustained objection to an Alabama state law occurred in 1994.

- In 1986, a court found that the state laws requiring numbered posts for nearly every at-large voting system in Alabama had been intentionally enacted to dilute Black voting strength, and that numbered posts had the effect of diluting Black voting strength in at-large elections. *Dillard v. Crenshaw Cty.*, 640 F. Supp. 1347, 1357 (1986). The court also found that from the late 1800s to the 1980s, Alabama had purposefully manipulated the method of electing local governments as needed to prevent Black citizens from electing their preferred candidates. *Id.*
- Ultimately, a defendant class of 17 county commissions, 28 county school boards, and 144 municipalities were found to be employing at-large election systems designed and motivated by racial discrimination. These cases resulted in settlement agreements with about 180 Alabama jurisdictions that were required to adopt new election systems including single-member districts, limited voting, and cumulative voting systems, in an attempt to purge the state's election systems of intentional discrimination.
- Between 1965 and 2021, subdivisions in Alabama continued to use at-large elections with numbered posts.
- Federal courts recently ruled against or altered local at-large voting systems with numbered post created by the State Legislature to address their alleged racially discriminatory purpose or effect. *See, e.g., Jones*, 2019 WL 7500528, at *4; *Ala. State Conf. of the NAACP v. City of Pleasant Grove*, No. 2:18-cv-02056, 2019 WL 5172371, at *1 (N.D. Ala. Oct. 11, 2019).
- Black voters have challenged other Alabama voting laws under the Voting Rights Act and the Constitution in federal court. *See, e.g., People First of Alabama v. Merrill*, 491 F. Supp. 3d 1076, 1106-1107 (N.D. Ala. 2020); *Harris v. Siegelman*, 695 F. Supp. 517, 530 (M.D. Ala. 1988). For example, the Supreme Court struck down Alabama's discriminatory misdemeanor disfranchisement law, *Hunter v. Underwood*, 471 U.S. 222 (1985), and a state law permitting certain discriminatory annexations, *Pleasant Grove v. United States*, 479 U.S. 462, 466-67 (1987).
- Since the *Shelby County v. Holder* decision in 2013, federal courts have ordered more than one political subdivision in Alabama to be re-subjected to

preclearance review under Section 3(c) of the Voting Rights Act. *See Jones*, 2019 WL 7500528, at *4-5; *Allen v. City of Evergreen*, No. 13-0107, 2014 WL 12607819, at *2 (S.D. Ala. Jan. 13, 2014).

- Individuals with lower household incomes are less likely to vote.
- Alabama’s policy of denying Black people equal access to education persisted after the Supreme Court’s decision in *Brown v. Board of Education*. In 1956, after a federal court ordered the segregated University of Alabama to admit a Black woman named Autherine Lucy, white people gathered on campus, burned a cross, and marched through town chanting, “Hey, hey, ho, ho, Autherine has got to go!”
- In 2018, in a case challenging the attempt by the City of Gardendale, which is 85% white, to form a school district separate from Jefferson County’s more racially diverse district, the Eleventh Circuit affirmed a finding that “race was a motivating factor” in the city’s effort. *Stout v. Jefferson Cnty. Bd. of Ed.*, 882 F.3d 988, 1007-1009 (11th Cir. 2018).
- Alabama’s constitution still contains language that mandates separate schools for Black and white students after a majority of voters rejected repeal attempts in 2004 and 2012, although the provision has not been enforceable for decades.
- Alabama was the first state ever to be subjected to a statewide injunction prohibiting the state from failing to disestablish its racially dual school system. *Lee v. Macon Cty. Bd. of Ed.*, 267 F. Supp. 458 (M.D. Ala.), *aff’d* 389 U.S. 215 (1967). The order resulted from the court’s finding that the State Board of Education, through Governor George Wallace, had previously wielded its powers to maintain segregation across the state. *Id.*
- A trial court found that for decades, state officials ignored their duties under the statewide desegregation order. *See Lee v. Lee Cnty. Bd. of Educ.*, 963 F. Supp. 1122, 1128-30 (M.D. Ala. 1997). A court also found that the state did not satisfy its obligations to remedy the vestiges of segregation under this order until as late as 2007. *Lee v. Lee County Bd. of Educ.*, 476 F. Supp. 2d 1356 (M.D. Ala. 2007).
- In 1991, a trial court in *Knight v. Alabama*, 787 F. Supp. 1030 (N.D. Ala. 1991), found that Alabama had failed to eliminate the lingering and continued effects of segregation and discrimination in the University of Alabama and

Auburn University, and at the state's public Historically Black Colleges and Universities (HBCUs).

- In 1995, the trial court issued a remedial decree analogous to the statewide injunction issued in *Lee v. Macon*, and the court oversaw implementation of that order for over a decade. *Knight v. State of Ala.*, 900 F. Supp. 272 (N.D. Ala. 1995). Alabama did not satisfy its obligations under that order until 2006. *Knight v. Alabama*, 469 F. Supp. 2d 1016 (N.D. Ala. 2006).

Milligan Doc. 53 ¶¶ 130–54, 157–65.

In addition to the stipulated facts, the *Milligan* plaintiffs rely on the expert testimony of Dr. Joseph Bagley. *See Milligan* Doc. 69 at 17–18. Dr. Bagley is an Assistant Professor of History at Georgia State University, where he focuses on “United States constitutional and legal history, politics, and race relations, with a focus on Alabama and Georgia.” *Milligan* Doc. 68-2 at 1. He has published one book and been accepted as an expert in another voting rights case. *Id.* At the preliminary injunction hearing, he was qualified as an expert in Alabama political history and historical methodology without objection from any party. Tr. 1142. The *Milligan* plaintiffs asked Dr. Bagley to perform a Senate Factors analysis, which he did according to “common standards of historiography.” *Milligan* Doc. 68-2 at 1; Tr. 1143. For the reasons explained in our findings of fact and conclusions of law (*see infra* Part V.B.4.c), we find that Dr. Bagley is a credible expert witness.

At the preliminary injunction hearing, Dr. Bagley explained his understanding of the Senate Factors and the methods and sources he used to perform his analysis. Tr. 1143–46. Dr. Bagley opined about Senate Factors 1, 5, 6, 7, and 8, and he

considered Senate Factor 3 in connection with his discussion of Senate Factor 1. *Milligan* Doc. 68-2 at 3–31. His ultimate opinion is that each of those Senate Factors is present, and that together they mean that the Plan “will deny [B]lack Alabamians an equitable right to elect candidates of their choices.” Tr. 1177.

When Dr. Bagley explained his opinions at the preliminary injunction hearing, he began by testifying that the Alabama Constitution of 1901 remains in force today, explaining that the enactment of that constitution was explicitly for the purpose of “establish[ing] white supremacy” and “disenfranchis[ing] entirely [B]lack voters,” Tr. 1146, and explaining that although many provisions of that constitution have been invalidated, blocked, or nullified, “racist” and “discriminatory” language remains in force in that constitution to this day, Tr. 1146–47.

As to Senate Factor 1, Dr. Bagley testified that he focused his analysis on the redistricting context beginning in the 1960s and continuing to the present. Tr. 1148–55. He tracked the extensive history of federal judicial involvement in and supervision of Alabama redistricting efforts during that sixty-year period, *Milligan* Doc. 68-2 at 8–16; Tr. 1148–55, and he concluded that “Alabama has an undisputed history of discrimination against Black citizens, especially when it comes to registering to vote, voting, and enjoying an equitable chance to participate in the political process, and this has been recognized by numerous courts.” *Milligan* Doc. 68-2 at 3. “In particular,” he continued, “white legislators of both major political

parties have, in the last 50 years, manipulated the redistricting process to prevent Black citizens from electing members of Congress or, in the last 30 years, to limit Black voters' ability to elect members of Congress from more than one district." *Id.*

As to Senate Factor 5, Dr. Bagley opined in his report that "Black citizens in Alabama lag behind their white counterparts in nearly every statistical socioeconomic category, due largely to a history of discrimination," and that these disparities adversely affect Black voters' "ability to engage politically." *Milligan* Doc. 68-2 at 17–26. At the preliminary injunction hearing, Dr. Bagley explained at a high level the bases for the detailed opinions on these issues that appear in his report, Tr. 1155–58, which include federal court findings of workplace, educational, and other forms of discrimination against Black people by local governments and state entities, Tr. 1158–61, and active litigation in federal court concerning such matters. Dr. Bagley also testified about the historical and cultural significance of the Black Belt and the "extreme poverty" and environmental pollution there. Tr. 1161–65.

As to Senate Factor 6, Dr. Bagley testified that he considers a racial appeal in a political campaign to occur when "a candidate is making an appeal that would seem to be intended to encourage a racial group to vote bloc." Tr. 1169. Dr. Bagley opined in his report that white officials in Alabama "learned long ago to colormask their public statements," that his analysis of campaign ads, public speech, and

campaign appeals on social media “reveal that direct invocations of race still appeal to white voters,” and that “campaigns and politicians’ public statements have recently trended back towards more overt racial appeals,” *Milligan* Doc. 68-2 at 3, 26–27. Dr. Bagley gave in his report examples of racial appeals from former elected officials in Alabama (*e.g.*, former Alabama Supreme Court Chief Justice Roy Moore and former Congressman Bradley Byrne) as well as current officeholders (Alabama Supreme Court Chief Justice Tom Parker, Congressman Mo Brooks, Congressman Barry Moore, and Representative Chris Pringle), *id.* at 26–28, and he described some of these examples at the preliminary injunction hearing, Tr. 1169–71.

As to Senate Factor 7, Dr. Bagley opined in his report that “the ability of Black Alabamians to elect candidates from among their own to statewide offices has been almost nonexistent, while Black candidates have had some success at the local level, thanks to litigation and federal government intervention.” *Milligan* Doc. 68-2 at 3. Dr. Bagley pointed out that only three Black people have ever held any statewide office, and that none hold statewide office presently or have held such office in the last twenty years. *Id.* at 29; Tr. 1171–72.

As to Senate Factor 8, Dr. Bagley opined that Alabama’s lack of responsiveness to the needs of Black people is “exemplified” by the Legislature’s failure to draw a second majority-Black congressional district. *Milligan* Doc. 68-2 at 29; Tr. 1173. He also opined that the state’s response to the COVID-19 pandemic

reflected a lack of response to the particular needs of the Black community, and he referenced inequitable distribution of vaccines. *Milligan* Doc. 68-2 at 29. He argued that many of the discriminatory experiences that he identified as part of his analysis of Senate Factor 5 also evince Alabama's lack of responsiveness to the needs of Black Alabamians. *Id.* at 30–31; Tr. 1173–74.

Finally, the *Milligan* plaintiffs make a proportionality argument: that “[d]espite Black Alabamians constituting nearly 27% of the population, they only have meaningful influence in” 14% of congressional seats. *Milligan* Doc. 69 at 17; *see also* Tr. 609 (Dr. Duchin testimony that “majority-white districts are present in the enacted plan super proportionally with respect to population”); Tr. 1171 (Dr. Bagley testimony that “as 27 percent of the population, you have to compare that to one district out of seven being around, you know, 14 percent in terms of potential for representation”).

For all of these reasons, the *Milligan* plaintiffs assert that they will prevail on their claim of vote dilution under the totality of the circumstances.

4. Remaining Elements of Request for Preliminary Injunctive Relief

As to the remaining elements of their request for a preliminary injunction, the *Milligan* plaintiffs assert that they will suffer an irreparable harm absent a preliminary injunction because “[a]ny loss of constitutional rights is presumed to be an irreparable injury.” *Milligan* Doc. 69 at 37 (citing *Elrod v. Burns*, 427 U.S. 347,

373 (1976)). The *Milligan* plaintiffs argue that the equities favor them because they have a “particularly strong interest in exercising their right to vote free from a racially discriminatory districting scheme that dilutes their vote”; there is “no harm [to the Defendants] from the state’s nonenforcement of invalid legislation”; and in any event, because Alabama enacted the Plan in a five-day special session last year, Alabama could quickly enact a remedial map in January 2022 so that the 2022 congressional elections could go forward with a valid map, or the court could draw an interim map in that timeframe. *Id.* at 38–39 (quoting *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012)). The *Milligan* plaintiffs point out that the primary election is months away and contend that the injury they allege to their voting rights outweighs whatever administrative inconvenience might be caused by an injunction. *Id.* at 39–40. Finally, the *Milligan* plaintiffs argue that a preliminary injunction is in the public interest because protection of the franchise is in the public interest. *Id.* at 40.

B. The *Caster* Plaintiffs’ Arguments

In the light of the parties’ agreement that argument and evidence developed in *Caster* is admissible in *Milligan* absent a specific objection, *see Singleton* Doc. 72-1; *Caster* Doc. 74; Tr. of Dec. 20, 2021 Hrg. at 14–17, we next discuss the arguments and evidence developed by the *Caster* plaintiffs in support of their Section Two claim. The *Caster* plaintiffs first argue that they are substantially likely

to succeed on their Section Two claim because they satisfy each of the *Gingles* requirements and prevail on an analysis of the totality of the circumstances.

1. *Gingles* I – Numerosity and Reasonable Compactness

To establish the first *Gingles* requirement, the *Caster* plaintiffs rely on the expert testimony of Mr. Bill Cooper. *See Caster* Doc. 56 at 12; *Caster* Doc. 48 (original report); *Caster* Doc. 65 (rebuttal report). Mr. Cooper earned a bachelor's degree in economics from Davidson College and has earned his living for the last thirty years by drawing maps, both for electoral purposes and for demographic analysis. *Caster* Doc. 48 at 1; Tr. 418–19. He has extensive experience testifying in federal courts about redistricting issues and has been qualified in forty-five voting rights cases in nineteen states, including two recent cases in Alabama (*Alabama Legislative Black Caucus*, 231 F. Supp. 3d 1026 (M.D. Ala. 2017), and *Chestnut v. Merrill*, No. 2:18-CV-00907-KOB). *Caster* Doc. 48 at 1–2; Tr. 421. He reported that five of those lawsuits “resulted in changes to statewide legislative boundaries,” and “[a]pproximately 25 of the cases led to changes in local election district plans.” *Caster* Doc. 48 at 2. He has worked both on behalf of plaintiffs and on behalf of defendants in redistricting cases. Tr. 421–22. At the preliminary injunction hearing, he was qualified as an expert in redistricting, demographics, and census data without objection from any party. Tr. 422–23. For the reasons explained in our findings of

fact and conclusions of law (*see infra* Part V.B.2.a), we find Mr. Cooper's testimony highly credible.

In Mr. Cooper's initial report, he provided demographic statistics about Alabama and demographic changes that occurred in Alabama between the 2010 census and the 2020 census. *See Caster* Doc. 48 at 5–10. Mr. Cooper reported that according to 2020 census data, Alabama's any-part Black population increased by 83,618 residents, which constitutes a 6.53% increase in Alabama's Black population since 2010, which is 34% of the state's entire population increase since then. *Id.* at 6–7. In the same period, Alabama's white population shrunk from 67.04% of the state's total population to 63.12% of its total population. *Id.* at 6 (And in the 1990 census data, which were used in *Wesch*, Alabama's white population was 73.65% of its total population. *See Wesch*, 785 F. Supp. at 1503 app. B.)

Mr. Cooper also offered six illustrative plans in his initial report, each of which includes two congressional districts (Districts 2 and 7, located in southern and central Alabama) with a BVAP over 50% using the any-part Black metric. *Caster* Doc. 48 at 20–36 (initial report about Cooper plans 1–6). Mr. Cooper offered a seventh illustrative plan in his rebuttal report, which also includes two congressional districts with a BVAP over 50% using the any-part Black metric. *Caster* Doc. 65 at 2–6 (rebuttal report about Cooper plan 7). In all the majority-Black districts in all the Cooper plans, the BVAP is between 50% and 52%, except that in two plans, the

District 7 BVAP is between 53% and 54%. *See Caster* Doc. 48 at 23–35; *Caster* Doc. 65 at 2–5.

At the preliminary injunction hearing, Mr. Cooper testified that his opinions are based on these seven illustrative plans, Tr. 424, 426–28, and that even if the more restrictive single-race Black metric were used to measure BVAP, one of his plans (Cooper Plan 6) demonstrates that Black Alabamians are sufficiently numerous to comprise two majority-Black congressional districts in Alabama. Tr. 452–56, 475; *Caster* Doc. 65 at 5 n.2 (Cooper Rebuttal Report: “Under Illustrative Plan 6, District 2 and District 7 are also majority [single-race] BVAP – 50.19% and 50.05%, respectively.”).

Mr. Cooper testified that he expected to be able to draw illustrative plans with two reasonably compact majority-Black congressional districts because, at the same time the Legislature enacted the Plan, the Legislature also enacted a redistricting plan for the State Board of Education, which plan included two majority-Black districts. *Caster* Doc. 48 at 15–20; Tr. 433–37. Mr. Cooper testified that the Board of Education plan has included two Black-opportunity districts since 1996, and that continuously for those twenty-five years, more than half of Black voters in Alabama have lived in one of those two districts. *Caster* Doc. 48 at 16; Tr. 435. Mr. Cooper explained that the Board of Education plan splits Mobile County into two districts (with one district connecting Mobile County to Montgomery County, and another

connecting Mobile County to Baldwin County). Tr. 435–36; *Caster* Doc. 48 at 17 fig.8.

Mr. Cooper also testified about his understanding of traditional districting criteria, how he considered them in his work, and the role that he assigned to race. Tr. 437–41. He explained:

Q. So what specific traditional districting principles did you consider in drawing the illustrative plans in this case?

A. Well, I took all of them into consideration. I examined the document produced back in May by the Alabama Legislature outlining the guidelines for redistricting. But a lot of that just incorporates the general concept of traditional redistricting principles. So I didn't prioritize any of them. I tried to balance them.

...

Q. So was any one factor of the ones we just mentioned predominant, the predominant factor when you were preparing your illustrative plans in this case?

A. Not really. I feel like I gave them equal weighting. It would be possible to prioritize others and come up with different configurations, but perhaps at the expense of one of the key redistricting principles. So you could draw very compact districts, but they might split numerous counties because they're perfect squares. Or you draw a district that is – two districts that are maybe 60 percent [B]lack, but they wouldn't be contiguous. That, you know, so you have to balance it.

Q. And did race predominate in your development of any of the illustrative plans?

A. No. It was a consideration. This is a Section 2 lawsuit, after all. But it did not predominate or dominate.

Tr. 439–41.

Mr. Cooper testified that it was “necessary” for him to consider race to opine whether “the [B]lack population is sufficiently large and geographically compact to allow for the creation of an additional majority-[B]lack district,” and that “[o]ne of the traditional redistricting principles is to be aware” that “you are not diluting minority voting strengths when you are developing a voting plan and the underlying districts.” Tr. 437; *accord* Tr. 478–49 (cross).

Mr. Cooper further testified that if he had wanted to assign race a greater role, he could have:

But I did not try to maximize Black Voting Age Population. You know, my plans were intended to balance those. If I had just wanted to go in there willy-nilly and create two majority-[B]lack districts without paying attention to county lines, without paying attention to precinct lines, without paying attention to municipal lines, I could have drawn a fairly compact looking district that would have been higher in Black VAP for both District 7[] and District 2. I’m balancing things, and I’m not trying to take things to extreme, so I can’t give you a really good – I can’t give you a really good example of what extreme I might have been able to hit. But these plans in no way maximize Black Voting [A]ge Population in District 2 and 7.

Tr. 503.

Mr. Cooper testified that all his plans reflect population equality across districts, within a one-person margin of deviation for all districts except two districts, which deviate by two people. Tr. 441, 443.

When Mr. Cooper was asked how his illustrative plans show “respect for political subdivision boundaries,” he replied that he “felt like it was important to

either meet or beat the county split achievement of [the Plan],” which splits six counties, and that each of his illustrative plans splits between five and seven counties. Tr. 441–42; *Caster* Doc. 48 at 22; *Caster* Doc. 65 at 5. Mr. Cooper further testified that if he had to split a county, he then tried to minimize precinct splits, and if he had to split a precinct to get to zero population deviation, he then tried to rely on “municipal lines, primary roads, [and] waterways.” Tr. 443–44.

Mr. Cooper testified that he considered geographic compactness by “eyeballing” as he drew his plans, obtaining readouts of the Reock and Polsby-Popper compactness scores from the software program he was using as he drew, and trying to “make sure that [his] score was sort of in the ballpark of” the score for the Plan, which he used as a “possible yardstick.” Tr. 444–46. He explained the meaning of both scores and that it was possible to be “really obsessive about [them].” Tr. 444. Both in his expert report and at the preliminary injunction hearing, he testified that all of his plans either are at least as compact as the Plan (Cooper Plan 7 has a slightly higher Reock score, Tr. 460), or they scored “slightly lower” than the Plan; he opined that all of his plans are “certainly within the normal range if you look at districts around the country.” Tr. 446, 458; *accord Caster* Doc. 48 at 35–37. Mr. Cooper’s rebuttal report offered Cooper plan 7 specifically in response to criticism from the Defendants’ expert, Thomas Bryan, that the first six Cooper plans were insufficiently compact. *See Caster* Doc. 65 at 2 (Cooper rebuttal report).

Mr. Cooper testified that his software allowed him to have an “instant readout as to whether the district” he was drawing was contiguous, and he “took that into account.” Tr. 446. In his report, he testified that all of his illustrative plans comply with the requirement of contiguity. *Caster* Doc. 48 at 21.

Mr. Cooper further testified that he considered communities of interest in two ways: first, he considered “political subdivisions like counties and towns and cities,” and second, that he has “some knowledge of historical boundaries” and the Black Belt, and he considered the Black Belt. Tr. 447.

At the preliminary injunction hearing, Mr. Cooper testified in detail about how each of his illustrative plans configures Districts 2 and 7 as majority-Black districts, as well about other key features of his plans – namely, that Cooper Plan 5 includes two majority-Black districts and protects all incumbents, Tr. 468, and that Cooper Plan 7 includes two majority-Black districts and is at least as compact, if not more compact, than the Plan, Tr. 472. Ultimately, Mr. Cooper opined that each of his illustrative plans “achieves the goals of population equality, contiguity, compactness, respect for political subdivision boundaries, communities of interest, and non[-]dilution of minority voting strength.” Tr. 474.

At the conclusion of his testimony about the *Caster* plaintiffs’ claims, Mr. Cooper was called by the State to testify about matters relevant to the *Singleton* action. Tr. 525–26. During that examination, Mr. Cooper testified that before he was

engaged by the *Caster* plaintiffs, counsel for the *Singleton* plaintiffs asked him to draw a draft plan that ultimately became the Whole County Plan. Tr. 527–28. Mr. Cooper further testified that he drew that draft plan and that he did so in “half of an afternoon,” and “[n]ot for pay.” Tr. 527–28.

At the preliminary injunction hearing, the *Caster* plaintiffs also relied on the testimony of two of the named plaintiffs. Plaintiff Benjamin Jones is Black and lives in Montgomery in District 2. Mr. Jones works as the CEO of a community action agency in Montgomery and pastors a church in nearby Pike Road, Alabama. Tr. 1343–44. Mr. Jones testified about the unique needs of the Black community in Montgomery and what he believes the Black community in Montgomery has in common with the Black Belt. Tr. 1348–56, 1359. Plaintiff Marcus Caster is Black and lives in McIntosh, Alabama, which is in Washington County in District 1. Dr. Caster works as a teacher in the Clarke County school system and as an adjunct professor of business. Tr. 1620–21. In 2018, Dr. Caster was a candidate for a state legislative seat. Tr. 1622–23. Dr. Caster testified about the needs of the Black community in his area and what he believes the Black community in his area shares in common with the Black Belt. Tr. 1636–38. Dr. Caster specifically testified that “[B]lack residents of [his] area [and] the city of Mobile have more in common with the Black Belt region . . . than they do with Baldwin County,” and that “[B]lack

residents of Washington and Mobile County would be better served if they were a part of the congressional district that covered the Black Belt.” Tr. 1636–38.

2. *Gingles* II and III – Racially Polarized Voting

To satisfy the second and third *Gingles* requirements, that Black voters are “politically cohesive,” and that each challenged district’s white majority votes “sufficiently as a bloc to usually defeat [Black voters’] preferred candidate.” *Cooper*, 137 S. Ct. at 1470 (internal quotation marks omitted), the *Caster* plaintiffs rely on a racial polarization analysis conducted by Dr. Maxwell Palmer as well as numerous federal court decisions.

Dr. Palmer is a tenured Associate Professor of Political Science at Boston University, where he has been on the faculty since he earned his doctorate in political science at Harvard University in 2014. *Caster* Doc. 49 at 1. His work focuses on American politics and political methodology. *Id.* He has published one book and numerous articles in peer-reviewed journals, including the American Political Science Review, Journal of Politics, British Journal of Political Science, Journal of Empirical Legal Studies, and Political Science Research and Methods. *Id.* He has extensive experience as an expert witness and litigation consultant in redistricting cases, and he served as an independent racially polarized voting analyst for the Virginia Redistricting Commission in 2021. *Id.* At the preliminary injunction hearing, Dr. Palmer was qualified as an expert in redistricting and data analysis with

no objection from any party. Tr. 700–01. For the reasons explained in our findings of fact and conclusions of law (*see infra* Part V.B.3), we find that Dr. Palmer is a credible expert witness.

Dr. Palmer analyzed the extent to which voting is racially polarized in Congressional Districts 1, 2, 3, 6, and 7 because he was told that the proposed Black-opportunity districts would include voters from those districts. *Caster* Doc. 49 ¶ 9; Tr. 704. He examined how voters in those districts voted in the 2012, 2014, 2016, 2018, and 2020 general elections, as well as the 2017 special election for the United States Senate, and statewide elections for President, the United States Senate, Governor, Lieutenant Governor, Secretary of State, Attorney General, and several other offices. *Id.* ¶¶ 6–7, 10; *see also* Tr. 707–13 (explaining how he used precinct-level data and analyzed the results on a district-by-district basis).

He used publicly available data, including census data, that he ordinarily uses in research of this nature, and he relied on the ecological inference statistical procedure that “estimates group-level preferences based on aggregate data.” *Id.* ¶¶ 11–13.

Dr. Palmer opined in his report that “Black voters are extremely cohesive,” *id.* ¶ 16, “[w]hite voters are highly cohesive,” *id.* ¶ 17, and “[i]n every election, Black voters have a clear candidate of choice, and [w]hite voters are strongly opposed to this candidate,” *id.* ¶ 18. Dr. Palmer concluded that “[o]n average, Black voters

supported their candidates of choice with 92.3% of the vote[,]” and “[o]n average, [w]hite voters supported Black-preferred candidates with 15.4% of the vote, and in no election did this estimate exceed 26%.” *Id.* ¶¶ 16–17. He further opined that there is “strong evidence of racially polarized voting in each of the five congressional districts.” *Id.* ¶ 21. He found “strong evidence of racially polarized voting across [his] focus area,” as well as “strong evidence of racially polarized voting in each of the five individual congressional districts.” *Id.* ¶ 6.

At the preliminary injunction hearing, Dr. Palmer testified about the ecological inference method that he used, Tr. 703–05, and explained that he selected that methodology because in his opinion it is “the best available method for assessing racially polarized voting” and his “understanding is that ecological inference is the [method] currently preferred by courts,” Tr. 705–06. He described his analysis step-by-step, Tr. 706–716, and characterized the evidence of racially polarized voting across the five districts he studied as “very strong,” Tr. 701.

He testified that he next examined whether the Black-preferred candidates were able to win elections in the districts that he studied. Tr. 716. Dr. Palmer testified that in his examination of statewide elections, he considered the share of the vote that the Black-preferred candidate was able to win in the districts that he was focused on, Tr. 717, and that the Black-preferred candidate was able to win only one out of twelve elections that he studied (when Doug Jones, a white Democrat, beat Roy

Moore, a controversial Republican accused of sexual misconduct, in the special election for the United States Senate in 2017). Tr. 717–18. Dr. Palmer testified that in his examination of elections in congressional districts, the Black-preferred candidate won only those elections that occurred in District 7, the majority-Black congressional district. Tr. 718. Accordingly, Dr. Palmer testified that his conclusion was that “Black-preferred candidates are largely unable to win elections in the focus area with the exception of” District 7. Tr. 719.

In addition to his analysis of racially polarized voting, Dr. Palmer also performed a functionality analysis to analyze the performance of the majority-Black districts in the Cooper plans. *See Caster* Doc. 49 at 9–11, figs.6–7, tabs.10–15; Tr. 720–22. At the preliminary injunction hearing, Dr. Palmer explained his analysis and the results that appear in his report, Tr. 720–22, and he concluded that across the six Cooper Plans, “[B]lack-preferred candidates are able to win every election in both the Second and Seventh Congressional District,” Tr. 721.

The *Caster* plaintiffs argue that Dr. Palmer’s conclusions fit with a “long line of federal courts that have concluded that Black voters in various parts of Alabama vote cohesively,” and that because of the confluence of Dr. Palmer’s analysis and these authorities, “cohesion among Black voters in Alabama remains beyond dispute.” *Caster* Doc. 56 at 14–15 (citing *Ala. State Conf. of NAACP*, 2020 WL 583803, at *35; *Ala. State Conf. of NAACP v. City of Pleasant Grove*, 372 F. Supp.

3d 1333, 1340 (N.D. Ala. 2019); *Jones v. Jefferson Cnty. Bd. of Educ.*, No. 2:19-cv-1821-MHH, 2019 WL 7500528, at *2 (N.D. Ala. Dec. 16, 2019); *Dillard v. City of Greensboro*, 946 F. Supp. 946, 952–53 (M.D. Ala. 1996); *Dillard v. Baldwin Cnty. Bd. Of Educ.*, 686 F. Supp. 1459, 1465 (M.D. Ala. 1988)). The *Caster* plaintiffs also argue that several of these authorities conclude that Black-preferred candidates are consistently defeated by white bloc voting, except when Black voters make up a majority of eligible voters. *See Caster* Doc. 56 at 16.

3. The Senate Factors and Proportionality

Next, the *Caster* plaintiffs turn to the totality of the circumstances. They begin with several proportionality arguments. *See id.* at 19–20. *First*, they argue that Black Alabamians are disproportionately under-represented in the Plan, because they comprise 27% of the population of the state but have an opportunity to elect a representative of their choice in only 14% of the congressional districts. *See id.* at 19; Tr. 432. *Second*, they argue that white Alabamians are over-represented because 86% of congressional districts are majority-white, but white Alabamians comprise only 63% of the population; they also argue that even if Alabama were to draw a second majority-Black congressional district, this circumstance would persist, because 71.5% of congressional districts would be majority-white. *See Caster* Doc. 56 at 19–20; Tr. 432–33. And *third*, they argue that under the Plan, less than one-third of Alabama’s Black population resides in a majority-Black district, while 92%

of Alabama's non-Hispanic white population resides in a majority-white district. *See Caster Doc.* 48 ¶ 28; Tr. 431.

The *Caster* plaintiffs then analyze the Senate Factors, and they rely on three sources of support: judicial authorities, facts stipulated by the parties, and the testimony of political scientist Dr. Bridgett King. Dr. King is a tenured Associate Professor of Political Science at Auburn University in Auburn, Alabama, where she joined the faculty in 2014 and her research focuses on election administration, public policy, citizen voting experiences, and race/ethnicity. *Caster Doc.* 50 at 1–3. Her research on election administration is supported by the National Science Foundation. *Id.* at 3. She has edited four books, authored eight book chapters, and published ten articles in peer-reviewed journals that include the Election Law Journal, Journal of Black Studies, and Social Science Quarterly. *Id.* at 4. At the hearing, Dr. King was qualified as an expert in political science, research methodology, history of voting, and elections in the United States and Alabama, voting behavior, and the matters discussed in her reports without objection from any party. Tr. 1506–07. For the reasons explained in our findings of fact and conclusions of law (*see infra* Part V.B.4.c), we find that Dr. King is a credible expert witness.

Dr. King submitted a fifty-six-page report setting forth her opinion as to each Senate Factor. *Caster Doc.* 50. She “reviewed Alabama’s well-documented, pervasive, and sordid history of racial discrimination in the context of voting and

political participation” and opined that “the continuing effects of this discrimination . . . , the persistence of severe and ongoing racially polarized voting, and the state’s racialized politics significantly and adversely impact the ability of Black Alabamians to participate equally in the state’s political process.” *Caster* Doc. 50 at 4.

As to Senate Factor 1, the *Caster* plaintiffs observe that numerous federal courts have recognized Alabama’s history of official discrimination and that multiple federal courts have recognized Alabama’s history of official discrimination in voting. *See Caster* Doc. 56 at 20–22 (collecting cases between 1963 and *Alabama Legislative Black Caucus* in 2017, in which the court invalidated twelve state legislative districts as racial gerrymanders).

The *Caster* plaintiffs assert that the passage of the Voting Rights Act “did not, and has not, stopped Alabama from continuing to try to reduce and dilute the Black vote.” *Id.* at 21. As support, the *Caster* plaintiff rely on the facts, jointly stipulated by the parties, that (1) since the passage of the Voting Rights Act, the Justice Department has sent election observers to Alabama nearly 200 different times, and (2) that between 1965 and 2013, more than 100 voting changes proposed by the State or its local jurisdictions were blocked or altered under Section 5 of the Voting Rights Act. *Id.* at 21–22 (citing *Caster* Doc. 44 ¶¶ 117–18).

As to Senate Factor 2, the *Caster* plaintiffs rely on the evidence of racially polarized voting and lack of success for Black-preferred candidates that they

submitted to establish the second and third *Gingles* requirements. *See Caster Doc.* 56 at 26. As to Senate Factor 3, the *Caster* plaintiffs argue that Alabama “has employed a variety of voting practices designed to discriminate against Black voters.” *Id.* at 26. They rely on testimony from Dr. King about Alabama’s reliance on at-large elections, anti-single shot voting laws, majority-vote requirements, and numbered-place requirements. *See id.* The *Caster* plaintiffs do not analyze Senate Factor 4 because Alabama’s congressional elections do not use a slating process. *Id.* at 27.

As to Senate Factor 5, the *Caster* plaintiffs argue that “[t]here can be no question that the wellbeing of Alabama’s Black community continues to suffer as a result of the State’s history of discrimination” because “Black Alabamians lag behind their white counterparts on nearly every socioeconomic indicator.” *Id.* Here they rely on demographic statistics supplied by Mr. Cooper, who opined about substantial lags on several socioeconomic indicators: rates of poverty and child poverty, reliance on food stamps, levels of educational attainment, rates of unemployment, participation in professional occupations, homeownership, home value, and access to transportation. *See Caster Doc.* 48 at 37–39. At the preliminary injunction hearing, Mr. Cooper testified that these disparities are “just clearly apparent . . . to most anyone, and data really brings it out.” Tr. 424.

The *Caster* plaintiffs further argue that although they are not required to establish that these disparities depress Black political participation, Dr. King's opinion is that they do. *Caster* Doc. 56 at 18, 27–31. The *Caster* plaintiffs offered as additional evidence testimony in another redistricting case (*Chestnut*) from a county commissioner, state representative, and one of the named plaintiffs in *Caster* to the effect that these socioeconomic disparities compromise Black Alabamians' "faith in the system." *Id.* at 27–28 (internal quotation marks omitted).

As to Senate Factor 6, the *Caster* plaintiffs argue that "Alabama politicians have consistently utilized racial appeals to influence voter behavior." *Id.* at 31. The *Caster* plaintiffs' examples of recent racial appeals include (1) Representative Mo Brooks' 2014 assertion that Democrats are "waging a war on whites," (2) former Supreme Court Chief Justice Roy Moore's 2017 assertion that the federal government "started [to] create new rights in 1965, and today we've got a problem," (3) State Representative Will Dismukes' 2020 speech in front of a Confederate flag in Selma honoring Confederate General Nathan Bedford Forrest, who became the first Grand Wizard of the Ku Klux Klan, and (4) Congressman Bradley Byrne's ad "showing Congresswomen Ilhan Omar, Alexandria Ocasio-Cortez, Ayanna Pressley, and Rashida Talib, and former NFL quarterback Colin Kaepernick—all people of color—burning in a fire juxtaposed against references to the 9/11 terrorist attacks." *Id.* at 32–33 (internal quotation marks omitted).

As to Senate Factor 7, the *Caster* plaintiffs argue that there can be no question that Black Alabamians are underrepresented in public office. The *Caster* plaintiffs point out that the parties have stipulated that Earl Hilliard, who was elected to Congress in 1992, was the first Black person to represent Alabama there since the 19th century; that only two Black candidates have been elected to statewide office in Alabama, both of whom ran as incumbents after being first appointed; that no Black person has won statewide office in twenty-five years; and that only one Black member of the Legislature is not elected from a majority-Black district. *Id.* at 34.

As to Senate Factor 8, the *Caster* plaintiffs argue that the clearest indicator that Alabama is not responsive to its Black voters is its failure to remedy the socioeconomic disparities that established Senate Factor 5. *Id.* at 35. And like the *Milligan* plaintiffs, the *Caster* plaintiffs argue that the state's response to the COVID-19 pandemic "has exemplified and exacerbated its historic neglect of Black residents," and the *Caster* plaintiffs describe race-based disparities in access to testing and vaccines. *Id.* at 36–37.

Finally, as to Senate Factor 9, the *Caster* plaintiffs argue that the justification for the Plan is tenuous at best, and that the Legislators' failure to conduct a racial-polarization analysis before refusing to draw a second majority-Black congressional district undermines whatever justification may exist. *Id.* at 38.

4. Remaining Elements of Request for Preliminary Injunctive Relief

The *Caster* plaintiffs argue that Black voters in Alabama will suffer irreparable harm incapable of redress if the election occurs and we later determine that the Plan diluted their votes. *Id.* at 38–39. And the *Caster* plaintiffs urge that a preliminary injunction is in the public interest and the equities favor an injunction because protection of the franchise is in the public interest. *Id.* at 39–40.

C. Defendants’ Arguments - *Milligan*

Defendants’ position is that “[n]othing in Section 2 supports Plaintiffs’ extraordinary request that this Court impose districts with Plaintiffs’ surgically targeted racial compositions while jettisoning numerous traditional districting criteria.” *Milligan* Doc. 78 at 18. More particularly, Defendants assert that the *Milligan* plaintiffs are unlikely to prevail on their Section Two claim for four reasons. Defendants first argue that the *Milligan* plaintiffs cannot establish any of the *Gingles* requirements and that even if they could, they are unlikely to prevail in an analysis of the totality of the circumstances. *Id.* at 63–124. We consider that argument in this part, and Defendants’ other three arguments in Part IV.E.

1. *Gingles* I – Numerosity and Reasonable Compactness

Defendants assert that the *Milligan* plaintiffs are unlikely to succeed on their Section Two claim because the Duchin plans do not satisfy the first *Gingles* requirement. Defendants assert that using the single-race Black metric, only Duchin

plan A includes a second majority-Black congressional district, and that the majority-Black congressional districts in all the Duchin plans are not reasonably compact because those plans “completely ignore traditional districting criteria,” “eviscerate the State’s political geography by carving up Alabama’s longstanding existing districts . . . splicing together areas with no common interests . . . and consequently pitting incumbents against each other,” and “subjugat[e] traditional districting criteria to race.” *Milligan* Doc. 78 at 18, 41. Defendants rely on the testimony of their *Gingles* I expert, Mr. Thomas M. Bryan.

Mr. Bryan’s credentials include an undergraduate degree in history and a graduate degree in urban studies from Portland State University, and a graduate degree in management and information systems from George Washington University. *Milligan* Doc. 66-2 at 2. Mr. Bryan formerly worked as an analyst for the Oregon State Data Center and as a statistician for the U.S. Census Bureau. *Id.* For the past twenty years, Mr. Bryan has owned a demographic consultancy and has “been involved with over 40 significant redistricting projects, serving roles of increasing responsibility.” *Id.* at 2–3. At the preliminary injunction hearing, Mr. Bryan was qualified as an expert in redistricting, demography, statistical transformation, and predicting population shifts, without objection from any party. Tr. 772–74. For the reasons explained in our findings of fact and conclusions of law (*see infra* Part V.B.2.a), we assign very little weight to Mr. Bryan’s testimony.

In their opposition to the *Milligan* plaintiffs' motion for a preliminary injunction, Defendants speculate that the *Milligan* plaintiffs may have cherry-picked different definitions for their arguments about numerosity and racially polarized voting: Defendants suggests that the *Milligan* plaintiffs' *Gingles* II and III experts may have relied on the single-race Black metric to assess racially polarized voting, while the *Gingles* I expert relied on the any-part Black metric to assess numerosity. *Milligan* Doc. 78 at 67–69. Defendants further argue that Dr. Duchin “did not try to preserve the cores of prior districts,” *id.* at 40, and did not “even consider the State’s traditional interests in avoiding contests between incumbents,” *id.* at 71. Defendants emphasize that incumbents may achieve seniority in Congress and develop longstanding relationships with constituents, and that the cores of Alabama’s congressional districts have been stable for approximately fifty years (with the exception of the 1992 map, which was “a substantial change”). *See id.* at 76–78.

Defendants also argue that the *Milligan* plaintiffs cannot establish reasonable compactness because their remedial maps do not respect communities of interest—namely, Alabama’s Gulf Coast region, including Mobile and Baldwin Counties, which the Plan includes in District 1, and Alabama’s Wiregrass region, which the Plan includes with the Montgomery metropolitan area in District 2. *Id.* at 82–83. Defendants contend that the Gulf Coast region is a “discrete community of interest with unique cultural, economic, and historical traits not shared by the rest of the

State. The communities in District 1 share a highway and river system; Mobile Bay and the Gulf of Mexico; and employers whose work centers around the Port of Mobile. The people of District 1 also share a unique history, including heavy Spanish and French influence, the origination of Mardi Gras in the New World, and all the attributes that come from being Alabama's only coastal region." *Id.* at 82 (internal citations omitted). Defendants further contend that District 2 "respects" a different "communit[y] of interest" that "revolves around agricultural and military concerns." *Id.* at 83. Defendants object to the Duchin plans on the ground that they "break up the Gulf Coast and scramble it with the Wiregrass," "separate Mobile and Baldwin Counties for the first time in half a century," and "split Mobile County for the first time in the State's history." *Id.* at 85. Defendants further assert that the Duchin plans do not respect the Black Belt as a community of interest because they split it between two districts. *Id.* at 85–86 n.15.

In his initial report, Mr. Bryan (1) opined that the single-race Black metric "has been most defensible from a political science/*Gingles* 2 voting behavior perspective," (2) explained his understanding of traditional redistricting principles, and (3) compared the performance of the Plan with the remedial plan offered in the *Milligan* plaintiffs' complaint (sometimes called the "Hatcher plan") on the basis of four traditional redistricting principles: communities of interest, core retention,

incumbency, and compactness. *See Milligan* Doc. 66-2 at 5, 9–32.¹⁰

Mr. Bryan did not cite any sources to support his opinion that the single-race Black metric was “most defensible.” *See id.* at 11. In the section of his opinion addressing the metrics, Mr. Bryan cited (1) a set of redistricting guidelines recently published by the United States Department of Justice (“the Justice Department Guidelines”) that the Justice Department will use to evaluate whether plans enacted after the 2020 census violate Section Two, *see id.* at 11 & n.12, and (2) a Supreme Court case, *Georgia v. Ashcroft*, 539 U.S. 461, 473 n.1 (2003), *see id.* at 11 & n.13. Because the Justice Department Guidelines indicate that the Justice Department will rely on the any-part Black metric, Mr. Bryan included statistics computed on both metrics in his report. *Milligan* Doc. 66-2 at 11.

To support his understanding of traditional redistricting principles, Mr. Bryan cited a report prepared by the Congressional Research Service. *Id.* at 9. Earlier in his report, Mr. Bryan described some of the Legislature’s redistricting guidelines and opined without citation that “[p]lans were drawn in compliance with the published criteria for redistricting.” *Id.* at 6, 9 & n.7.

¹⁰ The *Milligan* plaintiffs offered the Hatcher plan in their complaint and the Duchin plans in their expert reports. *See Milligan* Doc. 1, *Milligan* Doc. 68-5. And the Duchin plans (and Cooper plans) are significantly different from the Hatcher plan. Compare *Milligan* Doc. 1 ¶ 89, with *Milligan* Doc. 68-5 at 7, *Caster* Doc. 48 at 23–33, and *Caster* Doc. 65 at 2–3.

Next Mr. Bryan compared the Plan to the Hatcher plan. *See id.* at 15–32. When Mr. Bryan considered communities of interest, he cited a definition from the University of Michigan and did not cite the one in the Legislature’s redistricting guidelines. *Id.* at 15. Mr. Bryan focused on the split of Mobile and Baldwin counties in the Hatcher plan, and he reviewed testimony on this issue from two former Congressmen from that area (former Congressman Jo Bonner and former Congressman Bradley Byrne) in *Chestnut*. *See Milligan* Doc. 66-2 at 17. Based on this testimony, he opined that “[a]side from racial differences, the entire southwest corner of Alabama represents a significant Alabamian community of interest.” *Id.*; *accord* Tr. 1008. He further opined that “Mobile and Baldwin counties are an inseparable [community of interest].” *Milligan* Doc. 66-2 at 18.

Mr. Bryan opined that the Plan “registers consistently and significantly higher levels of core retention for both total and Black population than the Hatcher plan.” *Id.* at 25. Mr. Bryan then concluded that the Plan “respects incumbents,” but the Hatcher plan does not because it pairs them in two districts. *Id.* at 28. Mr. Bryan also opined that the Hatcher plan “scores worse” than the Plan on four “of the most common statistical measures” of compactness. *Id.* at 29, 32. Mr. Bryan ended that report with the opinion that the Hatcher plan “performs more poorly than the 2021 enacted plan with respect to all traditional districting criteria.” *Id.*

In Mr. Bryan’s rebuttal report, he provided opinions about the Duchin plans

on the basis of three traditional redistricting principles: core retention, protection of incumbents, and compactness. *See Milligan* Doc. 74-1 at 11. Mr. Bryan first opined that the Duchin plans “break up a strong community of interest in Mobile, Baldwin, and surrounding counties.” *Id.* at 3. Mr. Bryan identified in his rebuttal report a mistake in Dr. Duchin’s analysis that resulted in “islands” from one district appearing in another (a circumstance also described as a “stray census block[]”). *See id.* at 7; Tr. 587. Dr. Duchin submitted corrected plans, and Mr. Bryan’s analyses reflect the corrected plans. *See Milligan* Doc. 74-1 at 7.

Mr. Bryan confirmed in his rebuttal report that Duchin Plan C contains two majority-Black districts regardless whether they are measured using the single-race Black or any-part Black metric. *Id.* at 8. He opined that the Plan “performs substantially better” than any Duchin plan in terms of core retention, and that the Duchin plans “pack incumbents,” while the Plan “respects” them. *Id.* at 12, 15, 16.

Mr. Bryan offered two opinions about compactness. He first opined that in each Duchin plan “compactness is sacrificed.” *Id.* at 3. He later opined that “Dr. Duchin’s plans perform generally better *on average* than the enacted State of Alabama plans, although some districts are significantly less compact than Alabama’s.” *Id.* at 19 (emphasis in original). He offered an ultimate opinion that “[i]n the hierarchy of redistricting criteria priorities, [he] assess[ed] the benefit of this accomplishment as being more than offset by the significant detrimental impact

to the continuity of representation.” *Id.*

At the preliminary injunction hearing, Mr. Bryan identified the source for his opinion about the single-race Black metric – he testified that the “political scientists that [he] ha[s] worked with have told [him] that it is easier to defend the political performance, the political voting behavior of the more homogenous, smallest, most cohesive [B]lack population.” Tr. 841–42. Mr. Bryan testified that he is not a political scientist, that he cited no political science literature or particular political scientist for this opinion, and that this opinion was based on information that he did not cite in his report. Tr. 896–98. He further described the opinion as “a secondary passing comment” and testified that he is “definitely not making a judgment that one [metric] is right or wrong or better or worse.” Tr. 898–99; *see also* Tr. 1038–39. He further testified that he had not read during the preparation of his report the Supreme Court case that he cited in this portion of his report (*Georgia*, 539 U.S. at 473 & n.1). Tr. 903–06. Mr. Bryan read into the record the passage from *Georgia* that he cited, Tr. 907, and he conceded that *Georgia* indicates that “it is proper to look at all individuals who identify themselves as [B]lack.” Tr. 909.

During Mr. Bryan’s direct examination, he testified that it was “[his] understanding that race . . . wasn’t even looked at as part of the process” of drawing the Plan. Tr. 783. On cross examination, he clarified that he did not know who drew the Plan, had not communicated with that person, and had been told by Defendants’

counsel that “race was not looked at in drawing the legislature’s plan.” Tr. 1027.

Mr. Bryan testified extensively about his understanding of traditional redistricting principles. During his direct examination, Mr. Bryan testified that he had “not ever heard” that “minority opportunity to elect” was a “traditional or contemporary redistricting principle,” and “would not agree with that.” Tr. 868. On cross-examination, he conceded that the Congressional Research Service report that he cited “specifically includes as the second criterion protecting . . . minorities from vote dilution.” Tr. 926–28 (testimony about *Milligan* Doc. 74-1 at 4).

Mr. Bryan testified that he was familiar with the Legislature’s redistricting guidelines. Tr. 935. He testified during his first cross examination (by counsel for Caster) that he could not agree that those guidelines expressed a “hierarchy” for redistricting principles, except that the top priority is to “equalize population.” Tr. 942–43; *see also* Tr. 939. When that counsel asked him whether the Legislature’s redistricting guidelines indicated that compliance with the Voting Rights Act was more important than retaining the cores of previous districts, he testified that he did not understand the guidelines to say that. Tr. 941. During his second cross-examination (by counsel for Milligan), he explained that he understood the Legislature’s redistricting guidelines to prioritize contiguity and compactness above communities of interest and protection of incumbents. Tr. 1043–44.

Mr. Bryan also testified that he personally could not assign an order of

importance to redistricting criteria because he is “not an authority to prioritize or offer an opinion on which traditional redistricting criteria are more important than the other.” Tr. 940. After cross examination, the court asked him whether he adhered to the opinion in his rebuttal report about the “hierarchy of redistricting criteria priorities,” *Milligan* Doc. 74-1 at 19, and if so, what his hierarchy was and where he got it. Tr. 1110–11. Mr. Bryan testified that “there’s no fixed hierarchy” but that his “professional assessment” is that improved compactness “is not worth the tradeoff [to] the significant damage to continuity of representation.” Tr. 1111–13.

Mr. Bryan further testified that he was not asked to assess and did not assess whether the Plan or the Duchin plans comply with Section Two, and that it was his “understanding” that “any regard for the Voting Rights Act compliance was accommodated and taken care of and considered in the drawing of the [P]lan.” Tr. 939; *see also* Tr. 1026.

Mr. Bryan conceded that “if a plan adds a majority-minority district that wasn’t there before, the core retention of that plan will be less than a plan that retains the same number of majority-minority districts as the previous plan.” Tr. 946–47; *see also* Tr. 1066–67 (similar).

During his direct examination, Mr. Bryan testified that he regards the communities of interest principle as a “leading criteria,” Tr. 842, and that the former Congressmen’s testimony that he reviewed “was as good of information as you could

possibly get,” and that he was “hard pressed to think of another document or testimony that [he] could refer to that would be any more enlightening than what the Byrne and Bonner testimony provided,” Tr. 844. On cross-examination, Mr. Bryan testified that there “certainly would be” demographic statistics that “one looks at to determine communities of interest,” Tr. 1058–59; that such statistics could include “age groups, income groups, employment groups, different types of family structure,” and “[r]acial composition,” Tr. 1059–60; and that there is nothing “in any of [his] reports that talks at all about [his] use of any statistical analysis in connection with communities of interest,” Tr. 1061.

Further, when Mr. Bryan initially was asked about his opinion that Mobile and Baldwin counties comprise an “inseparable” community of interest, Tr. 1006, he confirmed that he had not reviewed any other testimony from the *Chestnut* litigation. Tr. 1008–11. Mr. Bryan asserted that his failure to review the other *Chestnut* testimony was due to time constraints, but conceded that he “had plenty of time to read Bonner and Byrne, but [he] didn’t have any time to read” testimony from other witnesses to the opposite effect. Tr. 1061–62. Mr. Bryan acknowledged that his opinion about Mobile and Baldwin counties was based largely on their “coastal nature” and the port, but indicated that he was aware that healthcare is the largest industry employer in Mobile, followed by retail. Tr. 1070–71.

On cross examination, Mr. Bryan conceded that the Black Belt is a community

of interest, but would not opine whether the Plan or any Duchin plan is “better” for the Black Belt as a community of interest. Tr. 1063–65, 1109.

Also at the preliminary injunction hearing, when Mr. Bryan testified about whether the Duchin plans protect incumbents, he testified that he did not investigate or know when he prepared his report that the incumbents in Districts 1 and 2 have each served less than one year in office. Tr. 965–67.

When Mr. Bryan testified about the aggregate measures of compactness in Dr. Duchin’s report, he testified that he understood that Dr. Duchin may have presented compactness scores disaggregated to the district level in a subsequent report, but he “did not see that report or those findings.” Tr. 869. Mr. Bryan further testified that when he assessed the compactness of a proposed district, he relied exclusively on the statistical scores. Tr. 971–72. He further testified that he has “no opinion on what is reasonable and what is not reasonable” compactness. Tr. 979.

Mr. Bryan explained his overall opinion that Dr. Duchin was able to “achieve a [B]lack majority population in two districts” and “a balanced population” only by “sacrific[ing]” traditional districting criteria. Tr. 874. He explained further:

And by that, I mean there were cases where there is less compactness, the core retention is sacrificed significantly. So, therefore, the continuity of representation because of the cracking and packing of the incumbents and then the -- mostly based on the -- mostly based on the incumbents, but also based on the core retention analysis, there is a significant impact to the continuity of representation in these plans.

Tr. 874.

Also at the preliminary injunction hearing, Defendants offered testimony from former Congressman Bradley Byrne. Tr. 1656. Mr. Byrne has served on the State Board of Education and in the State Senate, and he represented District 1 in the United States House of Representatives from December 2013 to January 2021. Tr. 1656–57. He testified about the community of interest in the Gulf Coast and some Senate Factors. *See infra* Part IV.C.3. Mr. Byrne has extensive experience in and knowledge of Alabama’s Gulf Coast region, and his testimony was helpful to the court.

Mr. Byrne testified that water “defines” District 1 “very much.” Tr. 1658. He described Mobile Bay, Perdido Bay, and “[a] number of rivers [and] sounds,” and explained that District 1 has a “major deep water port” and a “major ship building industry,” “major tourism industry,” and “major seafood industry,” and that those things are “unique to this part of the state.” Tr. 1658. Mr. Byrne described the industries and jobs that are related to these attributes of District 1, as well as the racial diversity of the district. Tr. 1658–65. Mr. Byrne also described the French and Spanish colonial history of the area and how that impacts the culture of the area; he offered the example of Mardi Gras. Tr. 1660–61. Mr. Byrne testified about how these attributes of District 1 shaped his work in Congress, Tr. 1665–68, and how difficult it would be, in his estimation, for one member of Congress to represent portions of both the Gulf Coast and the Wiregrass, Tr. 1669–75. Mr. Byrne also

testified about the possibility, if the City of Mobile and/or Mobile County are split between two congressional districts, that “you [could] ha[ve] no one in Congress from the Mobile region” because “you dilute the vote in Mobile County.” Tr. 1676. Mr. Byrne discussed the electoral map for the State Board of Education and explained reasons why he thought “even if you assumed it made sense to split Mobile County in a school board map,” “[i]t would not make sense” to split Mobile County in a congressional map. Tr. 1681. Mr. Byrne described his experiences working with Congresswoman Sewell, testified that they worked together “all the time,” and gave examples of that effort; he also described his time as co-chair of the HBCU Congressional Caucus and his work with community health centers. Tr. 1685–89.

On cross-examination, Mr. Byrne was asked about other representatives who represent districts that span multiple counties and include both rural and urban areas – Congresswoman Sewell and Congressman Palmer – and he replied that he has “never heard anybody criticize either one of them for what they do for their district.” Tr. 1700; *see also* Tr. 1717 (describing Congresswoman Sewell as “[v]ery effective”). Mr. Byrne was asked about his testimony that it would be “a tragedy if we didn’t have somebody from Mobile representing the Mobile area” in Congress, and he conceded that currently, none of Alabama’s congressional delegation lives in Montgomery, which he described as a “very important city.” Tr. 1720–21. Later, Mr. Byrne explained: “You start splitting counties like that, and that county loses its

influence. That's why I don't want Mobile County to be split." Tr. 1744.

2. *Gingles* II and III – Racially Polarized Voting

Defendants first contend that the *Milligan* plaintiffs cannot establish that voting in Alabama is racially polarized because their racial-polarization analysis “selectively highlights Alabama’s recent electoral history, leaving out necessary context and election results that do not fit their narrative.” *Milligan* Doc. 78 at 97. Defendants offer as examples (1) that Dr. Liu failed to consider the 2020 Democratic primary in District 2, in which a Black woman defeated a white man, (2) that the *Milligan* plaintiffs do not mention that the Alabama Democratic Conference (the Black caucus of the Alabama Democratic Party) supported a non-Black woman in the 2020 Democratic primary in District 1, and (3) that the Alabama Democratic Conference endorsed Doug Jones, a non-Black man, over a Black man in the 2017 Democratic primary for election to the United States Senate. *Id.* at 97–98. Defendants next contend that the *Milligan* plaintiffs cannot establish racially polarized voting if they “mix and match their preferred minority groups” by using any-part Black statistics to satisfy *Gingles* I and single-race Black statistics to satisfy *Gingles* II and III. *Id.* at 96–97.

At the preliminary injunction hearing, Defendants offered the testimony of Dr. M.V. Hood on this and other issues. Dr. Hood is a tenured professor in the Department of Political Science at the University of Georgia, where he has served

on the faculty for more than twenty years. *Milligan* Doc. 66-4 at 4. Dr. Hood's work focuses on electoral politics, racial politics, election administration, and Southern politics, and his research is supported by the National Science Foundation. *Id.* He has published numerous articles in peer-reviewed journals, currently serves on the editorial board for two such journals, and has extensive experience testifying as an expert witness in redistricting cases. *See id.* Dr. Hood was qualified at the hearing as an expert in political science, empirical social science research, and the matters discussed in his reports, without objection from any party. Tr. 1382–83. For the reasons explained in our findings of fact and conclusions of law (*see infra* Part V.B.3), we find that Dr. Hood is a credible expert witness.

Dr. Hood offered two relevant opinions in his initial report. *First*, he was asked to prepare a functionality analysis of Districts 6 and 7 (the minority-influence districts) in the *Singleton* plaintiffs' Whole County Plan, and as part of that analysis he opined that voting is racially polarized in those districts and in District 7 in the Plan. *Milligan* Doc. 66-4 at 14. And *second*, he was asked by Defendants to consider whether white voters vote for minority Republican candidates, and he opined that "ideology trumps race in the case of white Republicans and their support for GOP minority nominees." *Id.* at 16. He described a recent special primary election for a vacancy in the Legislature in which a Black Republican, Kenneth Paschal, won in a district with an 84.1% white voting-age population. *Id.*

At the preliminary injunction hearing, Dr. Hood acknowledged that he did not perform a functionality analysis for the maps proposed by the *Milligan* plaintiffs. Tr. 1417. He testified about his finding that voting is racially polarized in District 7 in the Plan and would be polarized in the Districts 6 and 7 proposed in the Whole County Plan. Tr. 1420–21. He explained that he used the ecological inference method and agreed with Dr. Liu that it is an appropriate way to analyze racially polarized voting. Tr. 1422. He further testified that he and Dr. Liu “both found evidence of” racially polarized voting in Alabama. Tr. 1421. He also testified, as he did in *Chestnut*, that “an interest in core preservation as a redistricting consideration does not trump compliance with Section 2 of the Voting Rights Act.” Tr. 1436.

3. The Senate Factors and Proportionality

Defendants assert that the “balance” of the Senate Factors favors the State because things in Alabama have “changed dramatically.” *Milligan* Doc. 78 at 101–02 (quoting *Shelby Cnty. v. Holder*, 570 U.S. 529, 547 (2013)) (internal quotation marks omitted). As to Senate Factor 1, Defendants acknowledge Alabama’s “sordid history” and assert that it “should never be forgotten,” but that Alabama has “[o]vercome [i]ts [h]istory.” *Milligan* Doc. 78 at 102. Defendants also argue that the *Milligan* plaintiffs fail to tie many of their assertions about discrimination in Alabama to Black Alabamians’ ability to vote. *Id.* at 103. Defendants assert that several of the *Milligan* plaintiffs’ assertions about discrimination in Alabama are

misleading – namely, the assertions that Alabama employers account for a disproportionate number of racial discrimination claims, “that Alabama has a recent history of discrimination in state public employment,” and that a number of Alabama school districts are resistant to desegregation. *See id.* at 103–05 (internal quotation marks omitted).

As to Senate Factor 2, Defendants argue that what the *Milligan* plaintiffs “characterize as racial bloc voting is more readily explained as the result of politics, not race.” *Id.* at 106. Defendants assert that Black-preferred candidates lose statewide elections in Alabama not because they are Black or Black-preferred, but because they are Democrats and Alabama is a “ruby red” state. *Id.* (quoting *Ala. State Conf. of NAACP*, 2020 WL 583803, at *42) (internal quotation marks omitted). Defendants point to the recent election of a Black Republican, Kenneth Paschal, in a state legislative district. *Id.* at 107–08.

As to Senate Factor 3, Defendants assert that the *Milligan* plaintiffs erroneously focus on the majority-vote requirements in Alabama primary elections, without arguing that Alabama adopted or maintains that requirement for a nefarious reason. *Id.* at 109. Defendants do not analyze Senate Factor 4 because it is not relevant. *Id.* at 110.

As to Senate Factor 5, Defendants do not contest that past discrimination existed, but dispute that Black Alabamians still “bear the effects of discrimination,”

and that those effects “hinder their ability to participate effectively in the political process.” *Id.* at 112 (quoting *Gingles*, 478 U.S. at 37) (internal quotation marks omitted). Defendants assert that the *Milligan* plaintiffs have failed to “connect the dots” from historical discrimination to current outcomes, and Defendants challenge the *Milligan* plaintiffs’ assertions about current outcomes. *See id.* (asserting that racial disparities in poverty rates are lower in Alabama than in Connecticut).

As to Senate Factor 6, Defendants argue that another federal court in Alabama has recently held that “there is no evidence that Alabama political campaigns generally . . . are characterized by racial appeals.” *Id.* at 113 (quoting *Ala. State Conf. of NAACP*, 2020 WL 583803, at *58) (internal quotation marks omitted). Defendants also argue that historical evidence of racial appeals in campaigns is not probative of current conditions, and that the recent evidence the *Milligan* plaintiffs offer “reach[es] too far.” *Id.* at 113–14.

As to Senate Factor 7, Defendants argue that minorities “have achieved a great deal of electoral success in Alabama’s districted races for State offices.” *Id.* at 116. Defendants point out that 27 of the 105 (25.7%) members of the Alabama House of Representatives are Black, 7 of the 35 (20%) Alabama State Senators are Black, and 25% of the members of the State Board of Education are Black. *Id.*

As to Senate Factor 8, Defendants vehemently contest the *Milligan* plaintiffs’ argument that elected officials in Alabama are not responsive to the needs of the

Black community. *Id.* at 117. Defendants submit testimony from the Chief Medical Officer of the Alabama Department of Public Health about the State's outreach to the Black community in response to the COVID-19 pandemic, *id.* & *Milligan* Doc. 79-15, and argue that the other instances of an alleged lack of responsiveness (such as the failure to expand Medicaid) reflect political decisions by state leadership, not racial ones, *Milligan* Doc. 78 at 119.

As to Senate Factor 9, Defendants urge that a procedure is tenuous only if it "markedly departs from past practices or from practices elsewhere in the jurisdiction," so the Plan cannot be tenuous, because it does not meaningfully depart from the 2011 congressional map. *Id.* at 119–20 (quoting S. Rep. 97-417, 29 n.117).

Finally, Defendants argue that when we consider the totality of the circumstances, we should consider that compared to national rates, Alabama's rates of Black voter registration and Black voter turnout are high, and that as a result, both major political parties "actively court [B]lack support." *Id.* at 121–22.

At the preliminary injunction hearing, Defendants did not offer any expert testimony about the Senate Factors. Former Congressman Bradley Byrne testified about the campaign ad that both the *Milligan* plaintiffs and the *Caster* plaintiffs assert was an overt racial appeal. Mr. Byrne testified that the ad was about his brother, not about race; more particularly, Mr. Byrne testified that he was trying to contrast his brother's sacrifice for his country (his brother died as a result of a disease

he contracted while deployed with the Special Forces) with Mr. Kaepernick's refusal to stand during the national anthem. Tr. 1690–92. On cross examination, Mr. Byrne testified that he did not recall ever having a discussion with a Black person about the campaign ad and that, although he was aware of the “history of bombing and burning down houses occupied by [B]lack Alabamians,” and of the use of “burning crosses to terrorize Black individuals,” he did not understand that “images of [B]lack people in a fire could trigger a connection in the minds of some to the more horrific eras of racial discrimination in Alabama.” Tr. 1732–33.

Mr. Byrne also was asked about socioeconomic disparities between Black Alabamians and white Alabamians, and he testified that he “think[s] the problems that are facing the [B]lack community with regard to all these issues is a function of the failure of the state of Alabama to provide a quality education to them.” Tr. 1730. He further testified that he does not think that failure is “rooted in . . . discrimination,” but it is an “overall failure” in the Alabama public education system which affects Black people more than white people. Tr. 1730.

D. Defendants' Arguments - *Caster*

Defendants take the same basic position in *Caster* that they took in *Milligan*.

1. *Gingles* I – Numerosity and Reasonable Compactness

Defendants first assert that the *Caster* plaintiffs are unlikely to succeed on their Section Two claim because the Cooper plans do not satisfy the first *Gingles*

requirement, and Defendants rely on the expert testimony of Mr. Bryan.

In their opposition to the *Caster* plaintiffs' motion for preliminary injunctive relief, Defendants assert that using the single-race Black metric, no Cooper plan includes a second majority-Black congressional district. *Caster* Doc. 71 at 67. Defendants also assert that the Cooper plans "conflat[e] *Gingles*'s compactness inquiry with mere geographic compactness," *id.* at 72, and prioritize race above traditional redistricting principles, *id.* at 73–94. Defendants contend that the Cooper plans "do strange things in their search for" a second majority-Black district, *id.* at 75, and they argue that the Cooper plans (like the Duchin plans) do not respect the communities of interest that are protected by the Plan in Districts 1 (the Gulf Coast) and 2 (Montgomery and the Wiregrass), "dividing some of the State's most historic and economically important regions," *id.* at 82–85. Defendants object to what they call the "laser precision with which [the *Caster* plaintiffs] attempt to comply with *Gingles*'s 50-percent-plus-one requirement" as evidence that the Cooper plans subordinate traditional redistricting principles to considerations of race. *Id.* at 89.

In their opposition to the *Caster* plaintiffs' motion for a preliminary injunction, Defendants acknowledged that the Cooper plans "match" the Plan in terms of the number of county splits – the Plan splits six counties, and the Cooper plans split six counties. *Id.* at 92. Defendants also acknowledged that one of the Cooper plans pairs no incumbents. *Id.* at 93.

In his rebuttal report, Mr. Bryan provided his opinions about the then-six Cooper plans, this time on the basis of three traditional redistricting principles that he selected: core retention, protection of incumbents, and compactness. *See Caster* Doc. 66-1 at 1. Mr. Bryan opined that the Cooper plans “run[] afoul of traditional redistricting principles” and “break up a strong community of interest in Mobile, Baldwin, and surrounding counties.” *Id.* at 3. Mr. Bryan also opined that the Plan “registers consistently and significantly higher levels of core retention for both total and Black population than” the Cooper plans, and that this “superior record” shows “the significant incremental loss of the continuity of representation borne disproportionately by Alabama’s Black population” in the Cooper plans. *Id.* at 15. Mr. Bryan also opined in his rebuttal report that the Cooper plans “pack incumbents,” while the Plan “respects” them. *Id.* at 16.

Mr. Bryan offered two opinions about compactness in his rebuttal report. He first opined that in each Cooper plan “compactness is sacrificed.” *Id.* at 3. He later opined that with the exception of Cooper plan 4, which “has comparable scores” to the Duchin plans and the Plan, “the remaining Cooper Plans all have inferior compactness scores to the Duchin Plans” and the Plan. *Id.* at 18.

At the preliminary injunction hearing, Mr. Bryan testified that none of the Cooper Plans contains two majority-Black districts using the single-race Black metric. Tr. 864–66. Mr. Bryan further testified that he did not review any of the

exhibits to Mr. Cooper's report, which included charts, tables, census data, and maps with information to support the opinions in the report, and he did not review Mr. Cooper's supplemental report offering Cooper plan 7 and "ha[s] not analyzed" that report. Tr. 871, 885–86. Mr. Bryan conceded that using the any-part Black metric, all Cooper plans 1-6 include two majority-Black congressional districts. Tr. 914–15.

During his direct examination, Mr. Bryan testified that he did not "see anything that would lead a map drawer to draw" any of the Cooper plans 1-6 "other than a desire to divide voters by race in order to draw two majority-[B]lack districts." Tr. 875–76. Mr. Bryan also acknowledged that the low core retention scores for Cooper plans 1-6 "just reflect . . . rearranging of the [B]lack population for the effort to create two [B]lack majority districts." Tr. 866.

On cross examination, Mr. Bryan conceded that "it is evident" that Cooper 1-6 plans equalize population across districts, Tr. 930, and that he did not evaluate and offered no opinion about whether Cooper plans 1-6 "failed to abide by the principle of non-dilution of minority voting strength," Tr. 931, contiguity, Tr. 931, or "the extent to which Mr. Cooper's plan[s] split political subdivisions," Tr. 931–32.

Mr. Bryan further testified on cross examination that his opinion that Cooper plans 1-6 "pack incumbents" did not rely on the word "pack" "as a precise scientific term," but rather as "convenient language" referring to "pairing incumbents." Tr. 955. He conceded that it "may not have been appropriate to use that [in the]

redistricting context.” Tr. 955.

When Mr. Bryan was asked about his opinion with respect to each Cooper plan and incumbents, he could not recall why he did not offer an opinion about Cooper plan 5 on that issue. Tr. 960–62. He testified that it might have been because Mr. Cooper did not provide a shapefile for Plan 5, but then testified that he never asked Mr. Cooper to provide the shapefile because “[t]here was no time for that[,]” and instead that his team built it from other data that Mr. Cooper supplied. Tr. 960–61. When asked whether he “had an opportunity to evaluate” Cooper plan 5 in preparing his rebuttal report, Mr. Bryan replied that he did. Tr. 961. In response to the question, “Isn’t it true . . . that Mr. Cooper’s Illustrative Plan 5 does not pair any incumbents?,” Mr. Bryan testified that he did not know. Tr. 962.

Mr. Bryan further testified that all other Cooper plans 1-6 “pair just one set of incumbents,” the incumbents in Districts 1 and 2, and that he did not know who those incumbents were. Tr. 962–66. When he was told that both of those incumbents had been in office for less than a year, he testified that “any amount of experience is valuable and important.” Tr. 967.

When Mr. Bryan testified about compactness, he explained that he relied on compactness scores alone and did not “analyze any of the specific contours of the districts.” Tr. 971. He further explained that he “provide[d] no analysis to the extent to which county or city or [voting tabulation district] boundaries informs the

compactness of a given district” in the Cooper plans. Tr. 971–72.

After Mr. Bryan offered that testimony, counsel for the *Caster* plaintiffs recalled his earlier testimony about how the Cooper plans “draw lines that appear to [him] to be based on race” and asked him where in his rebuttal report he offered any analysis “of the way in which specific districts in Mr. Cooper’s illustrative plans are configured outside of their objective compactness scores.” Tr. 972–73. Mr. Bryan testified that it “appears [he] may not have written text about that,” “that part of the report and the analysis was pretty light,” and he “refer[red] to the map of . . . Cooper’s plans to support [his] observation.” Tr. 973–75. Later during the same examination, he returned to the point and testified that “the Cooper plans in my analysis do not make [—] appear to make [—] any effort to conform to any other administrative geography, rather only to try and capture the most densely [B]lack population of Mobile.” Tr. 988. A few minutes later, when shown a map of Cooper plan 6 and asked whether he understood that the city of Mobile had been kept whole in that map, he was “not able to say with certainty whether” the district lines of District 2 conform with the boundaries of the city of Mobile. Tr. 989–92. He later opined that the district lines “appear[ed]” to have been drawn on the basis of race – to “grab this [B]lack population” – and acknowledged both that he was “drawing inferences of an effort based on the appearance of the district,” Tr. 995–96, and that he was offering an opinion that he had not expressed in his report, Tr. 996–97.

As for the compactness scores, Mr. Bryan testified that the compactness scores for Cooper plan 4 are comparable to the compactness scores for the Plan, Tr. 976–77, and that he offered “no opinion on what is reasonable and what is not reasonable” in terms of compactness, Tr. 979.

When Mr. Bryan was asked about his opinions about communities of interest, he acknowledged that his rebuttal report did not analyze the Cooper plans based on communities of interest. Tr. 979–80.

When Mr. Bryan was asked whether he had any opinions about Cooper plan 7, he testified that he did not review Cooper plan 7, that it was “in [his] e-mail somewhere,” but that if “there is significant evidence of a revelatory or new different plan that is a breakthrough in this case, then [he] probably would have been alerted to that and [he] was not.” Tr. 976.

At the conclusion of the examinations of Mr. Bryan, the court asked him about his testimony concerning the protection of incumbents. *See* Tr. 1114–16. In response, Mr. Bryan testified that “when two incumbents are pitted in the same district because of redistricting,” that is “something that incumbents can solve themselves if they want to,” and “there’s no rule that other people who are not incumbents cannot run and win against incumbents.” Tr. 1114–15.

Also at the hearing, Defendants offered testimony from former Congressman Bradley Byrne, which we already have described. *See supra* Part IV.C.1.

2. *Gingles* II and III – Racially Polarized Voting

As with *Gingles* I, Defendants take the same basic position on *Gingles* II and III in *Caster* that they took in *Milligan*. At the preliminary injunction hearing, Defendants offered the testimony of Dr. Hood on this and other issues. *See supra* at Part IV.C.2 (discussing Dr. Hood’s testimony with respect to *Milligan*). In Dr. Hood’s rebuttal report, he considered the testimony of Dr. Palmer, the *Caster* plaintiffs’ *Gingles* II and III expert. *See Caster* Doc. 66-2. As Dr. Hood explained at the hearing, his rebuttal report raised three questions about the data on which Dr. Palmer relied, but he did not identify any errors that would affect Dr. Palmer’s analyses or conclusions. *See id.* at 2–4; Tr. 1407–11, 1449–50, 1456, 1459–61.

On cross-examination, Dr. Hood testified that he does not dispute Dr. Palmer’s conclusions that (1) “[B]lack voters in the areas he examined [Districts 1, 2, 3, 6, and 7] vote for the same candidates cohesively,” (2) “[B]lack Alabamians and white Alabamians in the areas he examined consistently preferred different candidates,” and (3) “that the candidates preferred by white voters in the areas that he looked at regularly defeat the candidates preferred by [B]lack voters.” Tr. 1445. Dr. Hood also testified that he does not “offer anything to dispute Dr. Palmer’s conclusions on the functionality of plaintiffs’ illustrative [B]lack majority districts,” Tr. 1446, and that he and Dr. Palmer both found evidence of a “substantive pattern” of racially polarized voting in District 7, Tr. 1448.

3. The Senate Factors and Proportionality

Defendants' arguments about the Senate Factors in *Caster* are mostly identical to their arguments about the Senate Factors in *Milligan*, so we here describe only their arguments that are unique to *Caster*. As to Senate Factor 1, Defendants argue that one of the *Caster* plaintiffs' assertions about discrimination in Alabama is misleading (the assertion about two municipalities that were "bailed-in" under the preclearance provisions of the Voting Rights Act). *Caster* Doc. 71 at 105–06.

As to Senate Factor 3, Defendants assert that Alabama "does not use practices or procedures that enhance the potential for discrimination." *Id.* at 109. Defendants argue that we should reject the *Caster* plaintiffs' assertions about numbered-place requirements and at-large judicial elections because the *Alabama State Conference of the NAACP* court considered those issues and found insufficient evidence that "any current procedures were adopted or maintained for discriminatory reasons." *Id.* at 109–10 (citing *Ala. State Conf. of NAACP*, 2020 WL 583803, at *55). As to Senate Factor 5, Defendants challenge Mr. Cooper's assertions about current outcomes. *See id.* at 112 (asserting that racial disparities in poverty rates are relatively lower in Alabama than in Connecticut).

As to Senate Factor 6, Defendants assert that the *Caster* plaintiffs overreach when they describe a campaign ad for former Congressman Bradley Byrne that involved a campfire; Defendants assert that the images of minority congresswomen

and Colin Kaepernick were not “burning” in the fire, but “appear[ed] in overlays,” “just as an image of 9/11 does.” *Id.* at 114 (internal quotation marks omitted).

At the preliminary injunction hearing, Defendants did not offer expert testimony about the Senate Factors. Mr. Bryan was asked whether he disputed Mr. Cooper’s statistics about socioeconomic disparities, and he testified that he does not. Tr. 879. Mr. Bryan also was asked whether he addressed any of the conclusions in Dr. King’s report relating to the history of discrimination in Alabama, and he replied that he did not. Tr. 879. Defendants offered testimony from former Congressman Bradley Byrne, which we already have described. *See supra* at Part IV.C.3.

E. Defendants’ Further Attacks on Relief Sought in *Milligan* and *Caster*

1. Remaining Elements of Request for Preliminary Injunctive Relief

In their opposition to the motions for preliminary injunctive relief, Defendants assert that even if a set of plaintiffs is substantially likely to prevail on its Section Two claim, we should deny preliminary injunctive relief because “it is far too late in the day to grant the preliminary relief that Plaintiffs seek” and a preliminary injunction would “inflict[] grave harm on the public interest.” *Milligan* Doc. 78 at 135–45.

Defendants first argue that a preliminary injunction would “throw the current election into chaos and leave insufficient time for maps to be redrawn, hundreds of

thousands of voters to be reassigned to new districts, and thousands of new signatures to be obtained by candidates and political parties seeking ballot access.” *Id.* Defendants next argue that under these circumstances, courts “often” reject requests for preliminary injunctive relief, and they cite one decision by a three-judge court, which in turn cites another such decision and statements by the Supreme Court in the 1960s that injunctive relief may be inappropriate when there is “great difficulty” of “reworking a state’s entire electoral process.” *Id.* at 136 (citing *Favors v. Cuomo*, 881 F. Supp. 2d 356, 371 (E.D.N.Y. 2012), which in turn cites *Diaz v. Silver*, 932 F. Supp. 462, 466-68 (E.D.N.Y. 1996); *Reynolds*, 377 U.S. at 585; and *Roman v. Sincock*, 377 U.S. 695, 709–10 (1964)) (internal quotation marks omitted).

Defendants then argue that we should follow the path charted by several federal courts that have “withheld the granting of relief, and even dismissed actions, where an election was imminent and the election process had already begun.” *Id.* at 137–38 (quoting *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 593 (E.D. Pa. 2012) (collecting cases)) (internal quotation marks omitted). To support this argument, Defendants offer a declaration prepared by Clay Helms, the Alabama Director of Elections. *Milligan* Doc. 79-7.

Mr. Helms attested that “[t]here are substantial obstacles to changing the Congressional districts at this late date,” that “local election officials are already under time pressures created by the fact that the maps were adopted in November,

2021,” and that “[c]andidates and their supporters would also be impacted by changing the lines.” *Id.* ¶ 2.

Mr. Helms explained how each county’s Board of Registrars reassigns registered voters to the correct precincts and districts, *id.* ¶¶ 6-9, that in forty-five of Alabama’s sixty-seven counties, this is a manual process, *id.* ¶¶ 7-10, and that “[c]ompleting the reassignment process before the next election,” not the upcoming one, “provides time for notifying voters of any changes, which both reduces voter confusion and improves turnout.” *Id.* ¶ 11. Mr. Helms also attested that under Alabama law, absentee voting for the May 24, 2022 primary will begin on March 30, 2022. *Id.* ¶ 12; *see also* Ala. Code §§ 17-11-5(b), 17-11-12. Mr. Helms also attested that federal law requires Alabama to send “‘a validly requested absentee ballot to an absent uniformed services voter or overseas voter . . . [if] the request is received at least 45 days before an election for Federal office, not later than 45 days before the election,’ unless an exemption is obtained.” *Id.* ¶ 13 (quoting 52 U.S.C. § 20302(a)(8)(A)). This federal deadline for the 2022 congressional primary election is Saturday, April 9, 2022. *Id.*

Mr. Helms further attested that “[i]f the Boards of Registrars and county commissions have to redo the reassignment process on an abbreviated schedule the likely result is one or more of the following: (1) thousands of dollars in unexpected costs incurred by the Boards of Registrars to contract with an entity to assist them in

the process; (2) a rushed reassignment process, potentially increasing the likelihood of mistaken reassignments; and (3) less time to notify voters about changes, potentially increasing the likelihood of voter, political party, and candidate confusion.” *Id.* ¶ 18. Finally, Mr. Helms described potential impacts of a preliminary injunction on candidates, political parties, and independent candidates, and about the potential costs of a special election, if one were ordered. *Id.* ¶¶ 20–25.

Defendants next argue that the candidates seeking to run in the party primaries already “have expended significant time and money,” and they need to know “significantly in advance” of the qualifying deadline “who may run where.” *Milligan* Doc. 78 at 138–39 (quoting *Favors*, 881 F. Supp. 2d at 371) (internal quotation marks omitted). Defendants also argue that redrawing congressional district lines at this time may hamper the ability of candidates seeking to appear on the ballot as independent candidates to garner the required number of signatures on the petition that they must file under Alabama law. *See id.* at 140. Defendants further argue that based on how long it historically has taken to complete the district-assignment process following remedial redistricting, “there is no reason to believe that potentially hundreds of thousands of voters could be swapped among districts” after entry of a preliminary injunction and in time for the state to comply with the April 9, 2022 deadline for mailing some absentee ballots overseas. *Id.* 142–43.

Defendants next argue that based on *Favors*, if the court were to draw a

remedial map, it should have done so “no later than one month before” the qualification deadline. *Id.* at 143 (quoting *Favors*, 881 F. Supp. 2d at 364) (internal quotation marks omitted).

At the preliminary injunction hearing, Mr. Byrne testified about the potential impacts of a preliminary injunction on congressional campaigns. Mr. Byrne testified that changing the congressional map “a couple of weeks before the January 28th deadline” would cause issues with congressional campaigns, Tr. 1693; that at the beginning of an election year, “you have already set your campaign in place[,] . . . already have your plan in place[,] . . . already got volunteers set up ready to go[,] . . . got . . . the campaign ad messaging already worked out[, a]nd you are hitting the ground running,” Tr. 1693; and that “if you change [the] district on [a candidate] with that little time, it’s going to put a substantial burden on [their] ability to refocus [their] campaign, conduct [their] campaign, get volunteers, et cetera.” Tr. 1693.

Mr. Byrne further testified that, “if you give [a candidate] a new geographic area that [they] haven’t represented before, where [they] don’t have . . . the natural contacts, et cetera, that’s a huge problem for any community.” Tr. 1694. Mr. Byrne also testified that “[i]t could be a tremendous difficulty[.]” for “any candidate, Democrat, Republican, people that are long-time public office holders, people that are brand new.” Tr. 1694. Mr. Byrne further testified that “we are just a few months away from primaries[, a]nd it would be very difficult to start shifting this thing

around[]” when candidates are “right in the meat of these campaigns.” Tr. 1750. Mr. Byrne testified that it would have a “detrimental effect” on candidates “if all of a sudden these things are moved around some more.” Tr. 1750–51. Further, Mr. Byrne testified that he has “seen what it does to congressmen in other states when at the last minute, courts start moving things around,” and that he “think[s] it hurts the effectiveness of congressmen when that happens.” Tr. 1750. Mr. Byrne testified that he was “not saying [that] the Court may not have a good reason to do it.” Tr. 1750.

2. Constitutionality of Plaintiffs’ Proposed Maps

Defendants argue that the remedial maps offered by the *Milligan* plaintiffs and the *Caster* plaintiffs are unconstitutional because they discriminate on account of race and cannot satisfy strict scrutiny. *Milligan* Doc. 78 at 124–30. Defendants argue that the remedial maps prioritize race above all race-neutral traditional redistricting principles except for population balance. *Id.* at 126–27. Defendants accuse the plaintiffs of “subvert[ing] every race-neutral, traditional redistricting factor to ‘racial tinkering.’” *Id.* (quoting *Miller*, 515 U.S. at 919).

Defendants rest this argument on two grounds. *First*, they contend that “[a]ll traditional criteria would lead a map-drawer to keep Mobile whole and to keep it with the other Gulf Coast counties that share common interests, and Plaintiffs muster no race-neutral explanation for” “their universal decision to split Mobile County.” *Id.* at 127. *Second*, they argue that the statistical analysis prepared by Dr. Imai (which

they contend is “fundamentally flawed,” *id.* at 53) indicates that the Duchin plans and Cooper plans are extreme outliers because they did not appear in Dr. Imai’s 10,000 race-neutral simulated maps. *Id.* at 127–28.

Defendants further assert that plaintiffs’ remedial maps cannot satisfy strict scrutiny because they are not narrowly tailored to protect a compelling state interest. *Id.* at 128–32. Defendants argue that “[a] State’s interest in remedying the effects of past or present racial discrimination’ will only ‘rise to the level of a compelling state interest’ if the State ‘satisf[ies] two conditions,’” *id.* at 125 (quoting *Shaw II*, 517 U.S. at 909). First, “the discrimination must be identified discrimination.” *Id.* (quoting *Shaw II*, 517 U.S. at 909) (internal quotation marks omitted). Defendants say that “[t]his means that ‘[a] generalized assertion of past discrimination in a particular industry or region is not adequate,’ and, as a corollary, that ‘an effort to alleviate the effects of societal discrimination is not a compelling interest.’” *Id.* at 125–26 (quoting *Shaw II*, 517 U.S. at 909–10). The second condition is that a legislature “‘must have had a strong basis in evidence to conclude that remedial action was necessary, before it’ acts based on race.” *Id.* at 126 (quoting *Shaw II*, 517 U.S. at 910) (emphasis omitted).

Defendants urge us to find that, based on the plaintiffs’ analysis of the Senate Factors, their contention is that their remedial plans are necessary because of generalized assertions about past discrimination. *Id.* Defendants suggest that the

plaintiffs' remedies are "naked attempts to extract from Section 2 a non-existent right to proportional (indeed, maximal) racial representation in Congress." *Id.* at 129.

3. Constitutionality of Plaintiffs' Interpretation of Section Two

Separately, Defendants argue that the *Milligan* plaintiffs and the *Caster* plaintiffs rely on an interpretation of Section Two that "disproportionately construes the statute in relation to vote dilution, dragging it into unconstitutional waters." *Id.* at 130. Defendants argue that Section Two is constitutional only if it is construed and applied with geographic and temporal limitations to ensure that it is a "proportionate" remedy, and that this requires us to focus exclusively on "circumstances relevant to Alabama *today*." *Id.* at 130–31 (emphasis in original) (internal quotation marks omitted). Defendants then assert that both the plaintiffs do just the opposite: they "seek to mire the State – and the statute – in historical conditions that no longer pertain to [B]lack Alabamians' ability to participate in the political process." *Id.* at 131 (internal quotation marks omitted).

4. Whether Section Two Affords Plaintiffs a Private Right of Action

Finally, Defendants argue that Section Two does not establish a private right of action. *Milligan* Doc. 78 at 132–35. Defendants cite a concurring opinion in *Brnovich* for the proposition that this is an "open question," *id.* at 133; argue that Section Two does not provide a "clear expression of Congress's intent to provide a private right of action," *id.* at 133–34; and contend that other sections of the Voting

Rights Act indicate that if Congress had intended Section Two to provide a private right of action in Section Two, Congress knew how to do that, *id.* at 134–35.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW – VOTING RIGHTS ACT

We first consider whether the *Milligan* plaintiffs have established that they are substantially likely to succeed on their Section Two claim. In this analysis we rely on evidence adduced by both the *Milligan* plaintiffs and the *Caster* plaintiffs because all parties in both of those cases twice agreed that any evidence admitted in either case was admitted in both cases unless counsel raised a specific objection. *See Singleton* Doc. 72-1; *Caster* Doc. 74; Tr. of Dec. 20, 2021 Hrg. at 14–17.

We next discuss whether the *Milligan* plaintiffs have established the remaining elements of their request for preliminary injunctive relief. Finally, we address Defendants’ other arguments against preliminary injunctive relief.

A. How to measure the Black voting-age population

At the threshold, we decide which measure of the Black voting age population to employ in our *Gingles* analysis. Since 2000, the United States Census Bureau has allowed census respondents to identify themselves as members of a racial group by checking one or more boxes, so a Black Alabamian may identify as Black alone (which the parties and their witnesses sometimes refer to as “single-race Black”), or as both Black and another race or other races (which the parties and their witnesses sometimes refer to as “any-part Black.”) *See Milligan* Doc. 78 at 96; *Milligan* Doc.

94 at 12–13; *Milligan* Doc. 68-1 at 15; *Milligan* Doc. 68-5 at 10; *Milligan* Doc. 66-2 at 10–11; Tr. 558–60, 1262, 1312–15.

Defendants make three arguments about the single-race Black metric. *First*, Defendants argue that if we rely on the single-race Black metric, only one of the four Duchin plans offered by the *Milligan* plaintiffs “clears the numerosity threshold,” and the *Caster* plaintiffs have “failed to demonstrate that Alabama could create a second majority-minority district.” *Milligan* Doc. 78 at 67.

Second, Defendants argue that the *Milligan* and *Caster* plaintiffs “appear” to rely on the any-part Black metric for their numerosity analyses under *Gingles* I, but the Black-alone metric for their racial polarization analyses under *Gingles* II and III, and we should not allow metric cherry-picking. *Id.* at 67–69; Tr. 1890 (closing argument).

Third, Defendants argue that the single-race Black metric “has been most defensible from a political science / *Gingles* 2 voting behavior perspective.” *Milligan* Doc. 78 at 69 (citing supplemental expert report of Thomas M. Bryan, whose opinion includes that exact language). At the preliminary injunction hearing, Defendants adduced testimony from Mr. Bryan about that opinion, Tr. 841–42 (direct); Tr. 1039–40 (cross); 1101–02 (redirect); *see also supra* at Part IV.D.1 (describing Bryan testimony), as well as testimony from other witnesses about the single-race Black metric, Tr. 1412–14 (direct examination of Dr. Hood). In closing argument, counsel

for Defendants clarified that Defendants are not suggesting that “there’s one proper definition and another that’s not,” and that Defendants “don’t have a preferred definition of [B]lack.” Tr. 1890.

We reject all three arguments by Defendants. We reject the first argument because the *Milligan* plaintiffs and the *Caster* plaintiffs each have submitted one remedial map that includes two congressional districts with a BVAP of greater than 50% using the single-race Black metric: Duchin Plan A and Cooper Plan 6. *See Milligan* Doc. 76-4 at 3, Tab. 1 (Duchin Rebuttal Report, describing Duchin Plan A); Tr. 581–82 (Duchin testimony); *Caster* Doc. 65 at 5 n.2 (Cooper Rebuttal Report: “Under Illustrative Plan 6, District 2 and District 7 are also majority [single-race] BVAP – 50.19% and 50.05%, respectively.”); *Caster* Doc. 48-41 (Ex. L-1) (Cooper Report, providing additional statistics relating to Cooper Plan 6); Tr. 471–72, 475 (Cooper testimony). Mr. Bryan did not rebut this testimony by Dr. Duchin and Mr. Cooper. Accordingly, even if we agreed with the Defendants’ definitional choice (and we do not), the decision about which metric to use is not dispositive of the question whether the *Milligan* plaintiffs and/or *Caster* plaintiffs have satisfied their burden to establish numerosity.

We reject the second argument because the evidence adduced at the preliminary injunction hearing conclusively disproves Defendants’ suggestion that the *Milligan* plaintiffs’ experts may have cherry-picked different metrics for their

Gingles I analysis and their *Gingles* II and III analysis. *See Milligan* Doc. 94 at 21 (reply brief); *Milligan* Doc. 68-1 at 15 n.20 (Liu report, explaining metric underlying *Gingles* II and III opinion); Tr. 1338–39 (Liu testimony, explaining same); *Caster* Doc. 84 at 26–27 (reply brief); Tr. 744 (Palmer testimony, explaining same).

We reject the third argument, that the single-race Black metric is “more defensible” than the any-part Black metric, for five separate and independent reasons. *First*, the obvious one: the single-race Black metric cannot be the correct metric because it excludes some persons who identify as Black, and Defendants have not identified any legal basis for us to decide a case about Black Alabamians’ access to the franchise using a measure that excludes some Alabamians who identify as Black.

Second, Supreme Court precedent directs us to use the any-part Black metric. Although the Supreme Court has not directly decided this question in a case asserting the same claims we must decide, the Supreme Court has decided to rely on the any-part Black metric in a case about the Voting Rights Act. *See Georgia*, 539 U.S. at 473 n.1. In *Georgia*, the Supreme Court concluded that “it is proper to look at *all* individuals who identify themselves as [B]lack” in their census responses, even if they “self-identify as both [B]lack and a member of another minority group,” because the case involved “an examination of only one minority group’s effective exercise of the electoral franchise.” *Id.* at n.1 (emphasis in original). Because we also

must decide a case that involves claims about one minority group's effective exercise of the electoral franchise, we likewise rely on the any-part Black metric.

Our decision in this regard is consistent with the decisions of other district courts considering voting rights claims post-*Georgia*. *See, e.g., Covington v. North Carolina*, 316 F.R.D. 117, 125 n.2 (M.D.N.C. 2016), *aff'd* 137 S. Ct. 2211 (2017) (Mem.); *Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1020 n.4 (E.D. Mo. 2016); *Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1343 n.8 (N.D. Ga. 2015).

Third, during the preliminary injunction hearing, Mr. Bryan largely abandoned his opinion that the single-race Black metric was the “most defensible” metric. *See* Tr. 841–42 (direct); Tr. 1039–40 (cross); 1101–02 (redirect). He adhered to his original statement to the limited extent that “the [unnamed] political scientists that [he has] worked with have told [him] that it is easier to defend the political performance, the political voting behavior of the more homogenous, smallest, most cohesive black population,” *see* Tr. 841–42, but was adamant that he has “no opinion whether one is right or wrong or better or worse,” Tr. 842, 912–13, 1039, 1101–02. Under these circumstances, we cannot assign any weight to Mr. Bryan’s original opinion that the single-race Black metric is the “most defensible” metric for us to use.

Further, Mr. Bryan's testimony on this issue causes us to question his credibility as an expert witness. Although Mr. Bryan testified that his original opinion was based on what political scientists told him, Tr. 841–42, when Defendants' political science expert, Dr. M.V. Hood, was asked whether Mr. Bryan had consulted him about Mr. Bryan's opinion in this case, Dr. Hood testified that Mr. Bryan had not, Tr. 1424. Further, although Mr. Bryan cited *Georgia* in his expert report in connection with his opinion that the single-race Black metric was the “most defensible” metric for us to use, *see Milligan* Doc. 66-2 at 11 n.13, he testified that he did not read it in connection with his preparation of that report, Tr. 906. We explain below our full credibility determination with respect to Mr. Bryan. *See infra* at Part V.B.2.a.

Fourth, as Mr. Bryan expressly acknowledged – and included in his report – the Justice Department Guidelines indicate that based on *Georgia*, when the Justice Department reviews redistricting plans to ensure compliance with Section Two, the Justice Department will rely on the any-part Black metric rather than the single-race Black metric. *See* Ex. C105 (full text of Justice Department Guidelines); *Milligan* Doc. 66-2 at 11 (Bryan report quoting Justice Department Guidelines); Tr. 899–903 (Bryan testimony on cross examination admitting that Justice Department Guidelines indicate that Justice Department will rely on any-part Black metric). The passage of those guidelines that Mr. Bryan included in his report states:

The Department of Justice will follow both aggregation methods defined in Part II of the Bulletin. The Department's initial review will be based upon allocating any response that includes white and one of the five other race categories identified in the response. Thus, the total numbers for "Black/African American," "Asian," "American Indian/Alaska Native," "Native Hawaiian or Other Pacific Islander," and "Some other race" reflect the total of the single-race responses and the multiple responses in which an individual selected a minority race and white race.

The Department will then move to the second step in its application of the census data by reviewing the other multiple-race category, which is comprised of all multiple-race responses consisting of more than one minority race. Where there are significant numbers of such responses, the Department will, as

required by both the OMB guidance and judicial opinions, allocate these responses on an iterative basis to each of the component single-race categories for analysis. *Georgia v. Ashcroft*, 539 U.S. 461, 473, n.1 (2003).

Ex. C105 at 12–13.

And *fifth*, historical evidence about this issue that was not disputed (either in the expert rebuttal reports or at the preliminary injunction hearing) defeats Defendants' assertion that it would be "most defensible" for us to rely on the single-race Black metric. *Milligan* Doc. 78 at 69. Two expert witnesses described the "one drop rule," which asserted for centuries and for discriminatory purposes that "a single drop of Black blood makes a person Black." *Caster* Doc. 64 at 3 (King Rebuttal Report); *see also id.* at 2–5; *Milligan* Doc. 68-2 at 5 (Bagley Report). No defense expert, including Mr. Bryan, refuted (or even engaged) this point. Accordingly, we credit Dr. King's expert testimony that the any-part Black metric is the more "accurate" metric because it includes anyone who now identifies as Black

and historically would have been identified as Black, *see* Tr. 1529–31, and her testimony that the single-race Black metric is not the prevailing metric in political science, *see Caster* Doc. 64 at 5.

For each and all of these reasons, we decline to take the step — which we regard as odious — of deciding whether Alabama’s congressional redistricting plan dilutes the votes of Black Alabamians by marginalizing some of those persons based on their decision to identify both as Black and as part of another race or other races. The irony would be great if being considered only “part Black” subjected a person to an extensive pattern of historical discrimination but now prevented one from stating a claim under a statute designed in substantial part to remedy that discrimination. Unless we state otherwise, when we recite statistics about Black Alabamians from census data collected in or after the 2000 census, we are referring to any census respondent who identified themselves as Black, regardless whether that respondent also identified as a member of another race or other races.

B. The Milligan plaintiffs are substantially likely to establish a Section Two violation.

1. Gingles I – Numerosity

We first find that the *Milligan* plaintiffs have established that Black voters as a group are “sufficiently large . . . to constitute a majority” in a second majority-minority legislative district. *Cooper*, 137 S. Ct. at 1470 (internal quotation marks omitted). This issue is not disputed. Defendants do not make any arguments about

numerosity in their opposition to a preliminary injunction other than the argument about metric cherry picking that we have rejected. *Compare Milligan* Doc. 78 at 67–69, with Part V.A, *supra*. Further, Defendants do not dispute that using the any-part Black metric, the *Milligan* plaintiffs and the *Caster* plaintiffs have submitted a total of eleven remedial plans in which two congressional districts would have a BVAP of greater than 50%. *See Milligan* Doc. 78 at 67–69; *Milligan* Doc. 74-1 at 2, 8–10; Tr. 854, 862–66, 914–15. And Defendants acknowledge that even using their preferred single-race Black metric, the plaintiffs have submitted a remedial plan in which two congressional districts would have a BVAP of greater than 50%. *See Milligan* Doc. 78 at 67; *Milligan* Doc. 74-1 at 2, 8; Tr. 1040.

2. *Gingles I* – Compactness

We next find that the *Milligan* plaintiffs have established that Black voters as a group are sufficiently large “and geographically compact” to constitute a majority in a second congressional district. *Cooper*, 137 S. Ct. at 1470 (internal quotation marks omitted). We proceed in two steps: *first*, we repeat and explain our credibility determinations about the testimony of the parties’ three *Gingles I* expert witnesses: Dr. Duchin, Mr. Cooper, and Mr. Bryan; and *second*, we consider the parties’ arguments about geographic compactness. In the next section, we will consider the State’s argument that even if the Duchin plans or the Cooper plans perform reasonably well or as well as the Plan on measures of geographic compactness, the

Duchin plans and Cooper plans do not establish reasonable compactness for *Gingles* purposes because they do not otherwise adhere to traditional districting criteria, particularly with respect to communities of interest.

a. Credibility Determinations

First, we find Dr. Duchin's testimony highly credible. There can be no question that Dr. Duchin is an eminently qualified expert – she has earned relevant degrees from some of the world's finest educational institutions, her academic research focused on redistricting is regularly reviewed by her peers and selected for publication in leading journals, and her work on redistricting issues includes both academic and litigation work. *See supra* at Part IV.A.1.

Throughout Dr. Duchin's reports and her live testimony, her opinions were clear and consistent, and she was able to explain the basis for each step of her analysis and every conclusion she drew. *See Milligan* Doc. 68-5; *Milligan* Doc. 76-4; Tr. 549–695. Indeed, she was able to explain a complex analytic process in a manner that was sufficiently clear for non-mathematicians to understand it, evaluate it, and ask her questions about it. *See Milligan* Doc. 68-5; *Milligan* Doc. 76-4; Tr. 549–695.

In our observation, Dr. Duchin subjected her work to very high standards and rigorous quality control. Every time she was asked whether she had reviewed relevant materials, she had. *See, e.g.,* Tr. 636, 655, 661–62. She was careful not to

overstate her opinions and commonly refused to testify about matters outside the scope of her expertise or opinions. *See, e.g.*, Tr. 609, 614–15, 620, 637, 643–44, 660, 668, 674. The only mistake identified in her work, either in the filings or during the hearing, was a discrete mistake in her analysis of contiguity that Mr. Bryan identified after her initial report was filed; she immediately corrected the mistake so that Mr. Bryan’s rebuttal analysis could proceed on the basis of corrected information, and the correction had no impact on her substantive conclusions. *See Milligan Doc. 74-1 at 7; Milligan Doc. 92-1 (Ex. M48); Tr. 587–90.*

More particularly, we credit Dr. Duchin’s testimony that she carefully considered traditional redistricting criteria when she drew her illustrative plans. She was candid that she prioritized race only to the extent necessary to answer the essential question asked of her as a *Gingles* I expert (“Is it possible to draw a second, reasonably compact majority-Black district?”), and clearly explained, with concrete examples, that she did not prioritize it to any greater extent. *See supra* at Part IV.A.1. She acknowledged that tradeoffs between traditional districting criteria are necessary, and she did not ignore any criteria. Further, she articulated a reasonable explanation based on the Legislature’s redistricting guidelines why, when she was forced to choose between competing redistricting principles, she prioritized some principles over others. *See supra* at Part IV.A.1.

During Dr. Duchin's live testimony, we carefully observed her demeanor, particularly as she was cross-examined for the first time about her work on this case. She consistently defended her work with careful and deliberate explanations of the bases for her opinions. Her testimony was internally consistent and thorough and we observed no reason to question the veracity of her testimony. We find that her methods and conclusions are highly reliable, and ultimately that her work is helpful to the court.

Second, we find Mr. Cooper's testimony highly credible. Mr. Cooper has spent the majority of his professional life drawing maps for redistricting and demographic purposes, and he has accumulated extensive expertise (more so than any other *Gingles* I expert in the case) in redistricting cases, particularly in Alabama. *See supra* at Part IV.B.1. Indeed, his command of districting issues in Alabama is sufficiently strong that he was able to draw a draft remedial plan for Singleton's counsel in "half of an afternoon." Tr. 527–28 (testimony discussing that as a courtesy to counsel in *Singleton*, Mr. Cooper drew a draft Whole County Plan).

Throughout Mr. Cooper's reports and his live testimony, his opinions were clear and consistent, and he had no difficulty articulating his basis for them. *See Caster* Doc. 48; *Caster* Doc. 65; Tr. 417–531. But he was not dogmatic: he took seriously Mr. Bryan's criticism of the compactness of his first six plans and prepared

a seventh remedial plan that was responsive to that concern. *See Caster* Doc. 65 at 2 (Cooper rebuttal report).

As we did with Dr. Duchin, we particularly credit Mr. Cooper’s testimony that he worked hard to give “equal weighting” to all traditional redistricting criteria. Tr. 439–41. He was candid that he prioritized race only to the extent necessary to answer the essential question asked of him as a *Gingles* I expert (“Is it possible to draw a second, reasonably compact majority-Black district?”), and clearly explained that he did not prioritize it to any greater extent. *See supra* at Part IV.B.1. Indeed, he explained what his plans and opinions might have looked like if he had assigned it greater weight. Tr. 503. Like Dr. Duchin, Mr. Cooper acknowledged that tradeoffs between traditional districting criteria are necessary, and he did not ignore any criteria. He articulated a reasonable basis for the choices he made when he was forced to choose between competing redistricting principles – namely, the choices that the Plan made. *See supra* at Part IV.B.1 (testimony that he felt it was important to “meet or beat” the Plan’s performance with respect to some race-neutral redistricting criteria).

During Mr. Cooper’s live testimony, we carefully observed his demeanor, particularly as he was cross-examined for the first time about his work on this case. He consistently defended his work with careful and deliberate explanations of the bases for his opinions. We observed no internal inconsistencies in his testimony, no

appropriate question that he could not or would not answer, and no reason to question the veracity of his testimony. We find that his methods and conclusions are highly reliable, and ultimately that his work as a *Gingles* I expert is helpful to the court.

Third, we assign very little weight to Mr. Bryan’s testimony — the only *Gingles* I expert testimony offered by Defendants. We divide our credibility determination in two parts – one that is relative to Dr. Duchin and Mr. Cooper, and another that is not relative. Compared to Dr. Duchin and Mr. Cooper, Mr. Bryan’s work was considerably less thorough: Dr. Duchin and Mr. Cooper based their opinions on a wide-ranging consideration of the requirements of federal law and all or nearly all traditional redistricting criteria, but Mr. Bryan considered only three or four traditional redistricting criteria (depending on the report). *See Milligan* Doc. 74-1 at 11; *Caster* Doc. 66-1 at 1; Tr. 929–30. Further, Mr. Bryan volunteered on cross-examination that he did not review an authority cited in his report (which authority contravened the opinion he offered in the report), Tr. 903–07, 909; testified that he never reviewed the exhibits to Mr. Cooper’s report, Tr. 884–86, 976; testified that he never reviewed Cooper plan 7, which was prepared directly in response to a criticism that he had offered, but simply left it “in [his] e-mail somewhere” before he testified, Tr. 884–86, 976; and testified that he understood that Dr. Duchin may have presented compactness scores disaggregated to the district level in a subsequent

report (following his criticism of her aggregated scores), but he “did not see that report or those findings,” Tr. 869.

Additionally, Mr. Bryan’s credentials are considerably weaker than Dr. Duchin’s or Mr. Cooper’s: he does not have the academic record or the record of peer-reviewed publications that Dr. Duchin has, and he does not have the experience testifying as an expert witness in redistricting litigation (and particularly in such litigation in Alabama) that Mr. Cooper has.

Separate and apart from our relative evaluation, we question the basis for Mr. Bryan’s opinions. In addition to the concern that we already have articulated about the appropriate metric to use to measure the Black voting age population, *see supra* at Part V.A, we are concerned about numerous other instances in which Mr. Bryan offered an opinion without a sufficient basis (or in some instances any basis). For example:

- Mr. Bryan opined in his report that “[p]lans were drawn in compliance with the published criteria for redistricting,” *Milligan* Doc. 66-2 at 6 & n.7, but evaluated in that report only four of those criteria. *See id.* at 15–32.
- Although Mr. Bryan selected only four traditional redistricting principles to consider and evaluate in his initial report, he expressly opined in that report that the Hatcher plan “performs more poorly than the 2021 enacted plan with respect to **all** traditional districting criteria.” *Id.* at 32 (emphasis added).
- Mr. Bryan testified that he did not “see anything that would lead a map drawer” to split Mobile and Baldwin counties “other than a desire to divide voters by race in order to draw two majority-[B]lack districts,”

Tr. 875–76, but did not examine all of the traditional redistricting principles set forth in the Legislature’s guidelines. *See supra* at Part IV.C.1.

- Further on the above issue, Mr. Bryan conceded that the Black Belt is a community of interest, but would not opine whether the Plan or any Duchin plan is “better” for the Black Belt as a community of interest, Tr. 1063–65, 1109, meaning that he did not consider whether a possible explanation for splitting Mobile and Baldwin counties could be to keep together, as much as possible, a different community of interest.
- When Mr. Bryan testified about communities of interest during his cross examination, he testified that there “certainly would be” demographic statistics that “one looks at to determine communities of interest,” Tr. 1058–59; that such statistics could include “age groups, income groups, employment groups, different types of family structure,” and “[r]acial composition,” Tr. 1059–60; and that there is nothing “at all in any of [his] reports that talks at all about [his] use of any statistical analysis in connection with communities of interest,” Tr. 1061.
- When Mr. Bryan was asked about his opinion that Mobile and Baldwin counties comprise an “inseparable” community of interest, Tr. 1006, he confirmed that the testimony of former Congressmen Bonner and Byrne was the only basis for that opinion, and that he had not reviewed any other testimony from the *Chestnut* litigation. Tr. 1008–11.
- Relatedly, after Mr. Bryan testified on cross that his opinions about compactness relied on compactness scores alone and did not “analyze any of the specific contours of the districts” in the Cooper plans, Tr. 971, counsel for the *Caster* plaintiffs recalled his earlier testimony about how the Cooper plans “draw lines that appear to [him] to be based on race” and asked him where in his rebuttal report he offered any analysis “of the way in which specific districts in Mr. Cooper’s illustrative plans are configured outside of their objective compactness scores.” Tr. 972–73. Mr. Bryan testified that it “appears [he] may not have written text about that finding,” “that part of the report and the analysis was pretty light,” and he “refer[red] to the map of . . . Cooper’s plans to support [his] observation.” Tr. 973–75.

We are mindful of the serious time exigencies of this litigation and the

compressed schedule applied to Mr. Bryan's work as a result. Although the schedule might have limited Mr. Bryan's ability to perform some work that he otherwise might have performed, it did not cause him to overstate his opinions, offer testimony without a sufficient basis, cite material that he had not reviewed, or offer opinions at the preliminary injunction hearing that he had not offered in his reports.

Additionally, internal inconsistencies and vacillations in Mr. Bryan's testimony undermine Mr. Bryan's credibility as an expert witness. We describe one example here. One of the critical issues with respect to communities of interest is whether keeping the Black Belt together (*i.e.*, split between as few congressional districts as possible) is important and, if it is, whether that requires splitting Mobile County. When Mr. Bryan was asked whether he investigated any communities of interest besides the Gulf Coast, he indicated that he did not find any evidence that other communities of interest were split in the proposed plans:

Yes. I particularly [sic] in places where districts crossed administrative pieces of geography such as counties. I explored and investigated places where that happened to see if there were any significant communities of interest there. Cities, for example, that were going to get split by the boundaries. I didn't find any else where that seemed to be relevant.

Tr. 1062. He was then asked whether he gave any consideration to the Black Belt as a community of interest, and he testified that he did, but that the Duchin and Cooper plans do not protect it because they split it:

I did. I looked at that carefully. And it was notable and interesting to me that in those 18 -- I think there's different definitions, 18 or 19

counties that within the Black Belt many of the plaintiff plans seemed to cut the Black Belt into different pieces. Two pieces. I think there were some cases I saw it was cut into three pieces in different plaintiff plans, as well. So I acknowledged it as a community of interest, but it does not seem to be one that prevailed in the development of these plans.

Tr. 1063. Minutes later, Mr. Bryan was asked, “[O]ne of the things that Dr. Duchin’s models perform is to aggregate the Black Belt more than the existing plan or the 2011 plan, isn’t that correct?” Tr. 1064. And in direct contravention of his previous testimony, he replied: “It appears so.” *Id.*; *see also* Tr. 1065 (acknowledging that Duchin plans had “fewer splits” of the Black Belt than any other plan, and that “[f]ewer splits are generally better”).

During Mr. Bryan’s live testimony, we carefully observed his demeanor, particularly as he was cross-examined for the first time about his work on this case. On more than one occasion when a questioner asked a reasonable question about the basis for his opinions, he offered dogmatic and defensive answers that merely incanted his professional opinion and reflected a lack of concern for whether that opinion was well-founded. *See, e.g.*, Tr. 1111–13. Because Mr. Bryan consistently had difficulty defending both his methods and his conclusions, and repeatedly offered opinions without a sufficient basis, and because we observed internal inconsistencies in his testimony on important issues, we find that his testimony is unreliable.

b. Geographic Compactness Scores

We next consider the question whether the compactness scores for the Duchin plans and Cooper plans indicate that the majority-Black congressional districts in those plans are reasonably compact. The record supplies two metrics for us to use to assess what these scores say about reasonableness: the testimony of eminently qualified experts in redistricting, and the relative compactness of the districts in the remedial plans compared to that of the districts in the Plan.

We first consider the expert testimony. On the one hand, both Dr. Duchin and Mr. Cooper testified that the compactness scores for their remedial plans were reasonable. Dr. Duchin testified that measuring compactness “is one of the areas of [her] specialization,” Tr. 590, and that the majority-Black districts in her plans were reasonably compact, Tr. 594. And Mr. Cooper testified about this multiple times: he first said that all of his plans are “certainly within the normal range if you look at districts around the country,” Tr. 446; then that the compactness scores “match[] up fine if you look at districts around the country or even if you look at some of the legislative districts in Alabama,” Tr. 471; then that “if you look at congressional plans around the country, those scores are just fine,” Tr. 492; and then that “[the compactness scores] are absolutely within a normal range for congressional districts nationwide,” Tr. 493. On the other hand, Mr. Bryan testified that he offered “no opinion on what is reasonable and what is not reasonable” in terms of compactness,

Tr. 979. Accordingly, the corollary of our decision to credit Dr. Duchin and Mr. Cooper is a finding that the Black population in the majority-Black districts in the Duchin plans and the Cooper plans is reasonably compact.

We next consider the geographic compactness scores for the districts in the remedial plans as compared to scores for the districts in the Plan. Dr. Duchin testified that all four of her plans “are superior to” and “significantly more compact than” the Plan using an average Polsby-Popper metric, *Milligan* Doc. 68-5 at 9; Tr. 593, to which even Mr. Bryan largely agreed, *see Milligan* Doc. 741-1 at 19 (“My analysis of compactness shows that Dr. Duchin’s plans perform generally better on average than the enacted State of Alabama plans, although some districts are significantly less compact than Alabama’s, and significantly better than Bill Cooper’s plans.”) (emphasis omitted).

If we look at compactness scores disaggregated to the district level, we find that Dr. Duchin testified that the least compact districts in her plans – Districts 1 and 2 – were “comparable to or better than the least compact districts” in both the Plan and the 2011 Congressional map, Tr. 594; *accord* Tr. 655–56, and Mr. Bryan did not dispute this testimony. Further, Dr. Duchin testified that in her opinion, she was able to “maintain reasonable compactness by Alabama standards in [her] entire plan” because “[a]ll of [her] districts are more compact” on a Polsby-Popper metric than “the least compact district from 10 years ago” in Alabama, Tr. 665, and Mr. Bryan

again did not dispute this testimony.

As for the compactness scores of the Cooper plans, Mr. Bryan testified at the preliminary injunction hearing that the compactness scores for Cooper plan 4 are comparable to the compactness scores for the Plan, Tr. 976–77, and that he did not assess Cooper plan 7, which Mr. Cooper drew in response to Mr. Bryan’s criticism about the compactness scores of Cooper plans 1-6.

Ultimately, as far as compactness scores go, all the indicators point in the same direction. Regardless how we study this question, the answer is the same each time. We find that based on statistical scores of geographic compactness, each set of Section Two plaintiffs has submitted remedial plans that strongly suggest that Black voters in Alabama are sufficiently numerous and reasonably compact to comprise a second majority-Black congressional district.

c. Reasonable Compactness and Traditional Districting Principles

Compactness is about more than geography. It ultimately “refers to the compactness of the minority population, not to the compactness of the contested district.” *LULAC*, 548 U.S. at 430 at 433 (quoting *Vera*, 517 U.S. at 997 (Kennedy, J., concurring)) (internal quotation marks omitted). If the minority population is too dispersed to create a reasonably configured majority-minority district, Section Two does not require such a district. As Mr. Cooper explained:

Q. And, Mr. Cooper, in your experience, is there a bright line standard for when a district is considered compact?

A. No. No. And you really have to go beyond compactness scores and take into account other factors, like odd-shaped counties, odd-shaped cities, odd-shaped precincts. There just really is not a bright line rule, nor should there be.

Tr. 458.

Because Mr. Cooper testified that the “most common” compactness metric is “just eyeballing it as you draw the plan,” Tr. 444, we begin this analysis of reasonable compactness with two visual assessments. *First*, a visual assessment of the geographic concentration of the Black population in Alabama. Dr. Duchin included in her report a map that reflects the geographic dispersion of Black residents across Alabama:

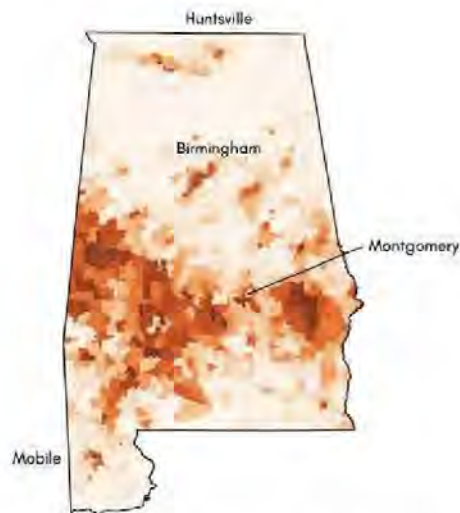


Figure 3: Black voting-age population share is shown by shading at the precinct level. The major cities have visible concentrations of Black population, and the Black Belt rural counties are clearly visible running East-West across the state.

Milligan Doc. 68-5 at 12 fig.3. Dr. Duchin described the centers of Black population in Alabama that are apparent on this map – both urban population centers and the Black Belt. *See id.* at 12–13. She reported that the Black population in the four largest cities (Birmingham, Huntsville, Montgomery, and Mobile) includes approximately 400,000 people and comprises approximately one-third of the Black population in Alabama. *Id.* at 12. And she reported that the Black population in the Black Belt, which stretches east to west across the state, includes approximately 300,000 people. *Id.* at 12–13. Dr. Duchin explained in her report that the Plan either partially or fully excludes eight of the eighteen Black Belt counties from majority-Black congressional districts, and that “[e]ach of the 18 Black Belt counties is contained in majority-Black districts in at least some of the alternative plans” that she presents. *Id.* at 13. These aspects of Dr. Duchin’s report are not in dispute.

Our visual assessment of the geographic dispersion of Black population in Alabama, together with statistics about Black population centers in the state, suggest to us that Black voters in Alabama are relatively geographically compact. The map reflects that there are areas of the state where much of Alabama’s Black population is concentrated, and that many of these areas are in close proximity to each other. Just by looking at the population map, we can see why Dr. Duchin and Mr. Cooper expected that they could easily draw two reasonably configured majority-Black districts.

Second, we consider our visual assessment of the majority-Black districts in the Duchin and Cooper plans. *See Milligan* Doc. 68-5 at 7 (Duchin plan maps) and *Caster* Doc. 48 at 23–33 and *Caster* Doc. 65 at 3 (Cooper plan maps). We do not see tentacles, appendages, bizarre shapes, or any other obvious irregularities that would make it difficult to find that any District 2 could be considered reasonably compact. We do see that District 7 in all the illustrative plans has what has been referred to as a “finger” that reaches into Jefferson County for the apparent purpose of capturing Black population from the Birmingham area. *Milligan* Doc. 70-2 at 170. But that finger has been there (in some form, and basically the same form) in every congressional map since *Wesch*, *see Singleton* Doc. 73-22 at 40–43, and it is still present, so it cannot mean that the illustrative plans are any less compact than the Plan.

We next turn to the question whether the Duchin plans and the Cooper plans reflect reasonable compactness when our inquiry takes into account, as it must, “traditional districting principles such as maintaining communities of interest and traditional boundaries.” *LULAC*, 548 U.S. at 433 (internal quotation marks omitted). We consider each traditional redistricting criterion in turn. We do not discuss the question whether the Duchin plans and the Cooper plans equalize population across districts because the parties agree and the evidence makes clear that they do, *see Milligan* Doc. 68-5 at 8, 13; *Caster* Doc. 48 at 21–34; *Caster* Doc. 65 at 2–6; Tr.

930, and we do not discuss the question whether the Duchin plans and the Cooper plans include contiguous districts because the parties agree and the evidence makes clear that they do that as well, *see Milligan* Doc. 68-5 at 8, 13; *Caster* Doc. 48 at 21–34; *Caster* Doc. 65 at 2–6; Tr. 931.

We first consider whether the Duchin plans and the Cooper plans respect existing political subdivisions, such as counties, cities, and towns. The Duchin plans perform at least as well as the Plan on this score, and some Duchin plans outperform the Plan. Both the Plan and all four Duchin plans “split nine counties or fewer, giving them high marks for respecting these major political subdivisions,” and one of her plans has the same number of county splits (the Plan splits six counties once, and Duchin Plan D splits four counties once and Jefferson County twice). *Milligan* Doc. 68-5 at 8. Further, all the Duchin plans “are comparable to the State’s plan on locality splits, with [Duchin] Plan B splitting fewer localities” than the Plan. *Id.*

Likewise, the Cooper plans perform at least as well as the Plan, and in some instances they perform better than the Plan. Mr. Cooper “felt like it was important to either meet or beat the county split achievement of [the Plan],” which splits six counties, and each of his illustrative plans splits between five and seven counties. Tr. 441–42; *Caster* Doc. 48 at 22; *Caster* Doc. 65 at 5. Mr. Cooper further testified that if he had to split a county, he then tried to minimize precinct splits, and if he had to split a precinct to get to zero population deviation, he then tried to rely on

“municipal lines, primary roads, [and] waterways.” Tr. 443–44. Mr. Bryan testified that he did not evaluate and offered no opinion on “the extent to which Mr. Cooper’s plan[s] split political subdivisions,” Tr. 931–32.

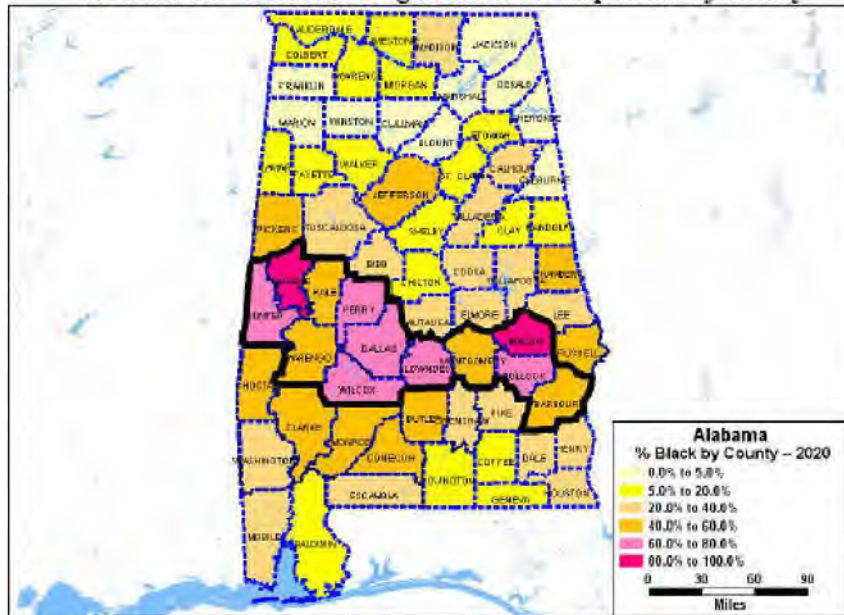
We next consider whether the Duchin plans and the Cooper plans respect communities of interest. Communities of interest are defined under the Legislature’s guidelines as areas “area with recognized similarities of interests, including but not limited to ethnic, racial, economic, tribal, social, geographic, or historical identities.” *Milligan* Doc. 88-23 (Ex. M28) at 2. The term “may, in certain circumstances, include political subdivisions such as counties, voting precincts, municipalities, tribal lands and reservations, or school districts.” *Id.* at 2–3. The Legislature has said that the “discernment” of a “communit[y] of interest” is “best carried out by elected representatives of the people.” *Id.* at 3.

Before we explain our findings and conclusions on this issue, we observe that this was fervently disputed during the preliminary injunction hearing, and all parties devoted significant time and argument to it. Defendants strongly object to Dr. Duchin and Mr. Cooper’s decisions to split Mobile County in every illustrative plan, and they insist that there is no legitimate reason to separate Mobile County and Baldwin County. The *Milligan* plaintiffs and the *Caster* plaintiffs urge us that the Black Belt better fits the Legislature’s definition of “community of interest,” so splitting it into as few districts as possible should be the priority over keeping the

Gulf Coast counties together, and one way to split the Black Belt less is to split the Gulf Coast counties and include some of the population of Mobile County with a district that also includes part of the Black Belt.

Critically, our task is not to decide whether the majority-Black districts in the Duchin plans and Cooper plans are “better than” or “preferable” to a majority-Black district drawn a different way. Rather, the rule is that “[a] § 2 district that is **reasonably** compact and regular, taking into account traditional districting principles,” need not also “defeat [a] rival compact district[]” in a “beauty contest[].” *Vera*, 517 U.S. at 977–78 (emphasis in original) (internal quotation marks omitted). In analyzing this issue, we are careful to avoid the beauty contest that a great deal of testimony and argument seemed designed to try to win.

The Black Belt stands out to us as quite clearly a community of interest of substantial significance. “The Black Belt is a collection of majority-Black counties that runs through the middle of Alabama. The Black voters in the Black Belt share a rural geography, concentrated poverty, unequal access to government services, and lack of adequate healthcare.” *Milligan* Doc. 70-4 ¶ 11. Mr. Cooper prepared a map that reflects the geographic dispersion of Alabama’s Black population and clearly demarcates the Black Belt:

Figure 2**2020 Census – Black Belt Region and Black Population by County**

Caster Doc. 48 at 8 fig.2.

That the Black Belt is an important community of interest is common knowledge in Alabama; has been acknowledged in other redistricting cases, *see Alabama Legislative Black Caucus*, 231 F. Supp. 3d at 1222 (Pryor, J.: “all parties have recognized [the Black Belt] as a community of interest”); and is clear from the record before us. The parties were able to stipulate what counties it includes, where it is located, and why it is described as the Black Belt. *See Milligan* Doc. 53 ¶¶ 60, 61. They further stipulated that the Black Belt “has a substantial Black population because of the many enslaved people brought there to work in the antebellum

period.” *Id.* ¶ 60. Dr. Bagley provided a fuller explanation of the sad role that slavery played in the demographic heritage of the Black Belt:

White settlers began to flood into the state of Alabama when most of the remaining Creek Indians were forced out via the Indian Removal Act of 1830. By then, the United States government had banned the importation of slaves from abroad, so many settlers brought enslaved Black people with them from the older plantation areas of the Upper South. Others purchased them from slave markets in Montgomery, Mobile, Jackson, and other cities. American chattel slavery expanded dramatically between that time and the Civil War, giving rise to the “Cotton Kingdom” of the antebellum era when cotton was America’s most valuable export and enslaved Black people were its most valuable commodity. The Black Belt of Alabama became home to not only the wealthiest white plantation owners in the state, but to some of the wealthiest individuals in the young nation, some of whom held hundreds of people in bondage.

Milligan Doc. 76-2 at 1. Most Section Two experts testified about the Black Belt, and their opinions addressed a range of demographic, cultural, historical, and political issues about how the Black Belt became the Black Belt, how it has changed over time, and what shared experiences and concerns there make it unique today. Every lay witness testified about their understanding of the Black Belt, their connections to it, and its significance to them and to Alabama politics.

Under the Plan, the Black Belt is split into four Congressional districts: Districts 1, 2, and 3, where the *Milligan* plaintiffs assert that their votes are diluted, and District 7, which the *Milligan* plaintiffs assert is packed. And eight of the eighteen core Black Belt counties are “partially or fully excluded from majority-Black districts.” *Milligan* Doc. 68-5 at 13; *see also* Tr. 666–68.

In contrast, the Duchin plans contain the overwhelming majority of the Black Belt in just two districts, and “[e]ach of the 18 Black Belt counties is contained in majority-Black districts in at least some” of her alternative plans. *Milligan* Doc. 68-5 at 13; *see also* Tr. 598–99. Likewise, the Cooper plans clearly assign substantial weight to the Black Belt: in all Cooper plans, the overwhelming majority of the Black Belt is in just two districts. *Caster* Doc. 48 at 22–35; *Caster* Doc. 65 at 3–4; Tr. 447, 450–51.

Accordingly, it is apparent that the remedial maps submitted by the *Milligan* plaintiffs and the *Caster* plaintiffs respect this important community of interest. Defendants do not dispute this obvious fact (and Mr. Bryan conceded it, Tr. 1063); instead, they say that the plaintiffs’ attempt to unite much of the Black Belt as a community of interest in a remedial District 2 is “merely a blunt proxy for skin color.” *Milligan* Doc. 78 at 86. To that end, at the preliminary injunction hearing, Defendants tried to adduce testimony that apart from race, a Black resident of Mobile County has more in common with her white neighbor than with a Black resident from the Black Belt. Tr. 156.

Defendants are swinging at a straw man. Each set of plaintiffs developed substantial argument and evidence, including expert evidence, about the shared history and common economy (or lack thereof) in the Black Belt; the overwhelmingly rural, agrarian experience; the unusual and extreme poverty there;

and major migrations and demographic shifts that impacted many Black Belt residents, just to name a few examples. *See, e.g.*, Tr. 138–44 (Mr. Milligan), 1064 (Mr. Bryan), 1161–65, 1239 (Dr. Bagley), 1358–59 (Mr. Jones), 1875 (counsel for the Secretary); *Milligan* Doc. 68-2 at 21. The Black Belt is overwhelmingly Black, but it blinks reality to say that it is a “blunt proxy” for race – on the record before us, the reasons why it is a community of interest have many, many more dimensions than skin color.

Because we find that the Black Belt is a community of interest, and because we find that the Duchin plans and the Cooper plans respect it at least as much as the Plan does, and likely more, we need not consider how the Districts 2 and 7 might perform in a beauty contest against other plans that also respect communities of interest. Together with our finding that the Duchin plans and the Cooper plans respect existing political subdivisions, our finding that the Duchin plans and the Cooper plans respect the Black Belt supports a conclusion that the Duchin plans and the Cooper plans establish reasonable compactness for purposes of the first *Gingles* requirement.

Nevertheless, we consider Defendants’ argument that Alabama’s Gulf Coast counties also comprise a community of interest, which the Duchin plans and the Cooper plans “completely ignore.” *Milligan* Doc. 78 at 18. As an initial matter, Defendants overstate the point. When Mr. Cooper was asked to explain the

configuration of Mobile County in his illustrative plans, his response reflected that he considered communities of interest there:

Well, in the illustrative plans, all of the illustrative plans include a significant portion of the city of Mobile, or in the case of District 6 and 7, all of Mobile. In illustrative plan 1, the only -- the primary area of Mobile that I excluded from District 2 is the waterfront area of Mobile, which is actually a grouping of precincts that are predominantly African-American and I put into District 1 so that there was a transportation route between District 1 and Mobile County and District 1 in Baldwin County. So you don't need to drive outside of District 1 to get from one part of District 1 to the other. You have a straight route going across U.S. 98 and Mobile Bay. And there are a few precincts that are split along that route I-10 area coming in to downtown Mobile. And that actually is a feature of most of my plans, except for illustrative Districts 6 and 7 -- illustrative plans 6 and 7, which keep all of Mobile whole, extending it right up to the waterfront.

Tr. 451-52.

Further, compared to the record about the Black Belt, the record about the Gulf Coast community of interest is less compelling. Only two witnesses testified about it: Mr. Bryan, who was forced to concede that his analysis was partial, selectively informed, and poorly supported, and Mr. Byrne, who was substantially more effective at describing what the areas have in common, but who also acknowledged the importance of the Black Belt, Tr. 1675, 1705. And ultimately, we do not find that Mr. Byrne's testimony supported Defendants' overdrawn argument that there can be no legitimate reason to split Mobile and Baldwin Counties consistent with traditional redistricting criteria. Rather, his testimony simply explained the political advantages that likely would accrue for those areas if they are

able to be kept together. And if those advantages really are as compelling as Defendants suggest, we expect that the Legislature will assign them great weight when it draws a replacement map. We also note in passing that the Legislature has repeatedly split Mobile and Baldwin Counties in creating maps for the State Board of Education districts in Alabama, and the Legislature did so at the very same time it drew the Plan. *See Caster* Doc. 48 ¶¶ 32–41.

Finally, we turn to the last two traditional redistricting criteria in play: incumbency protection and core retention. Dr. Duchin testified that she did not address incumbents anywhere in her report or her illustrative maps. Tr. 668. Mr. Cooper testified that he tried to protect incumbents where possible, paired as few incumbents as possible, paired only the most junior incumbents when pairings were necessary, and in Cooper plan 5 paired no incumbents. Tr. 468, 471, 483, 505; *see also* Tr. 964–67. Mr. Cooper also testified that it would be easy to protect more incumbents more often if an additional county split (or two) were tolerable. Tr. 483–84. This is enough. To demand more would be to require that every remedial plan invariably protect every incumbent, and that is too much. There is no legal basis for that rule, and we decline to adopt it. When the Legislature prepares a replacement map, it is well within its discretion to adopt a map that protects every incumbent; Cooper plan 5 is just such a map.

In any event, we note that under the Legislature's redistricting guidelines, the protection of incumbents is a decidedly lower-level criterion, *see Milligan* Doc. 88-23 (Ex. M28), and that this is consistent with the lower-level importance that criterion has been afforded in other redistricting cases. *See, e.g., Larios v. Cox*, 300 F. Supp. 2d 1320, 1348 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004).

As for core retention, there is no question that the Plan retains more of the cores of the 2011 congressional map than do the Duchin plans or the Cooper plans. But this is not the fatal flaw that Defendants suggest. The Legislature's redistricting guidelines do not establish that core retention must be the (or even a) priority among competing traditional redistricting principles, and expressly leave room for other principles to be assigned greater weight. *See Milligan* Doc. 88-23 (Ex. M28). Further, as Dr. Duchin explained, some core disruption – indeed, a significant level of core disruption – is to be expected when the entire reason for the remedial map is to draw a second majority-minority district that was not there before. Tr. 599–600. And finally, Defendants do not identify (and we have been unable to find) a single case in which core retention was assigned the great weight that they urge, and a proposed majority-Black district was rejected under *Gingles* I for inadequate core retention. This dearth makes sense: that finding would turn the law upside-down, immunizing states from liability under Section Two so long as they have a

longstanding, well-established map, even in the face of a significant demographic shift.

Ultimately, we find that Defendants do not give either the *Milligan* plaintiffs or the *Caster* plaintiffs enough credit for the attention Dr. Duchin and Mr. Cooper paid to traditional redistricting criteria. Defendants set a high bar for themselves when they asserted that the plaintiffs' remedial plans are not reasonably compact because they "completely ignore," "subjugat[e]," "jettison[]," *Milligan* Doc. 78 at 18, and "sacrifice[]" traditional districting criteria, Tr. 874, and they did not meet it. The evidence clearly establishes that Dr. Duchin and Mr. Cooper carefully studied the Legislature's redistricting guidelines, considered many traditional redistricting principles, made careful decisions about how to prioritize particular principles when circumstances forced tradeoffs, and illustrated what different remedial plans might look like if the principles were prioritized in a different order. As a result, they developed plans that have nearly zero population deviation, include only contiguous districts, include districts that are at least as geographically compact as those in the Plan, respect traditional boundaries and subdivisions at least as much as the Plan, protect important communities of interest, protect incumbents where possible, and provide a number of majority-Black districts that is roughly proportional to the Black percentage of the population. Accordingly, we find that the remedial plans

developed by those experts satisfy the reasonable compactness requirement of *Gingles* I.

3. *Gingles* II and III – Racially Polarized Voting

We discuss our *Gingles* II and III findings together. As explained below, following the preliminary injunction hearing, there is no serious dispute that Black voters are “politically cohesive,” nor that the challenged districts’ white majority votes “sufficiently as a bloc to usually defeat [Black voters’] preferred candidate.” *Cooper*, 137 S. Ct. at 1470 (internal quotation marks omitted).

As an initial matter, we credit the testimony of both the *Milligan* plaintiffs’ *Gingles* II and III expert, Dr. Liu, and the *Caster* plaintiffs’ *Gingles* II and III expert, Dr. Palmer. Both experts have credentials that include substantial academic work in electoral politics and significant experience testifying in redistricting cases in federal courts. *See supra* at Parts IV.A.2, IV.B.2. In our observation, both witnesses consistently and thoroughly explained the work they performed for this case and the bases for the conclusions they reached, and we discern no reason to question the reliability of their testimony.

Dr. Liu’s testimony emphasized the clarity and starkness of the pattern of racially polarized voting that he observed, particularly in the biracial endogenous elections that he considered. *See* Tr. 1271–76. Dr. Liu’s testimony about those elections indicates that voting in Alabama is clearly and intensely racially polarized:

he testified that “Black support for [B]lack candidates was almost universal” and “overwhelmingly in the 90[%] range,” Tr. 1271, that Black voters were “super cohesive,” Tr. 1274, and that the Black-preferred candidate was defeated in every election except the one in the majority-Black district he considered, Tr. 1275. This testimony leaves no doubt in our minds that voting in Alabama is racially polarized, but if it did, Dr. Liu’s confirmatory findings in the exogenous elections would resolve it. Tr. 1275–76. Put simply, the numbers do not lie: they tell us that racially polarized voting in Alabama, and particularly in the districts challenged here, is “very clear.” Tr. 1293.

Dr. Palmer reached the same conclusion that Dr. Liu reached, although he took a different analytic route to get there. *See Caster* Doc. 49. Like Dr. Liu, Dr. Palmer repeatedly invoked adjectives and adverbs that indicate to us that voting in Alabama is clearly and intensely racially polarized: he opined that “Black voters are extremely cohesive,” *id.* ¶ 16, “[w]hite voters are highly cohesive,” *id.* ¶ 17, and “[i]n every election, Black voters have a clear candidate of choice, and [w]hite voters are strongly opposed to this candidate,” *id.* ¶ 18. Here again, the numbers do not lie, and in Dr. Palmer’s analysis even the averages tell the story: Dr. Palmer concluded that “[o]n average, Black voters supported their candidates of choice with 92.3% of the vote,” and “[o]n average, [w]hite voters supported Black-preferred candidates with 15.4% of the vote, and in no election did this estimate exceed 26%.” *Id.* ¶¶ 16–

17. Dr. Palmer described the evidence of racially polarized voting across the five districts he studied as “very strong,” Tr. 701, and we agree.

Although Defendants made several arguments in their opposition to the motions for a preliminary injunction about why the *Milligan* plaintiffs and the *Caster* plaintiffs could not establish racially polarized voting, *see Milligan* Doc. 78 at 97–98, those arguments ignored that – and in our view were substantially undercut because – Defendants’ expert, Dr. Hood, opined in his report that he found evidence of racially polarized voting in Districts 6 and 7 in the Whole County Plan and District 7 in the Plan. *See Milligan* Doc. 66-4 at 14 (“For all of the functional analyses performed, racially polarized voting is present with black voters overwhelmingly supporting the Democratic candidate and more than a majority of white voters casting a ballot for the Republican candidate.”). Notably, Dr. Hood employed the same kinds of methods in his analysis that Drs. Liu and Palmer employed – namely, ecological inference methods. Tr. 1422; *Milligan* Doc. 68-1 at 5; *Caster* Doc. 49 ¶¶ 11–13.

As an initial matter, we credit Dr. Hood’s testimony. His credentials include substantial academic work in electoral politics and significant experience testifying in redistricting cases in federal courts. As his report and rebuttal report explained, his scope of work was quite limited, *see Milligan* Doc. 66-4 at 3 (explaining that he was asked to opine about only two issues); *Milligan* Doc. 74-2 at 3–4 (rebuttal report,

raising limited questions about work performed by plaintiffs' experts), and at the preliminary injunction hearing we observed that he was careful not to overstate his opinions based on his limited analysis, and he thoroughly explained the work that he performed and limited conclusions he reached.

At the preliminary injunction hearing, Dr. Hood repeatedly acknowledged that he either agrees with or does not dispute the critical findings of Drs. Liu and Palmer on the question whether voting in Alabama, and specifically in the districts at issue in this litigation, is racially polarized. More particularly, he testified that he and Dr. Liu "both found evidence of" racially polarized voting in Alabama, Tr. 1421; that he does not dispute "Dr. Palmer's conclusions that [B]lack voters in the areas he examined [Districts 1, 2, 3, 6, and 7] vote for the same candidates cohesively," Tr. 1445; that he does not dispute "Dr. Palmer's conclusion that [B]lack Alabamians and white Alabamians in the areas he examined consistently preferred different candidates," Tr. 1445; and that he does not dispute "Dr. Palmer's conclusion that the candidates preferred by white voters in the areas that he looked at regularly defeat the candidates preferred by [B]lack voters," Tr. 1445. Dr. Hood also testified that he and Dr. Palmer both found evidence of a "substantive pattern" of racially polarized voting in District 7. Tr. 1448.

This record supports only one finding: that voting in Alabama, and in the districts at issue in this litigation, is racially polarized for purposes of the second and

third *Gingles* requirements.

4. The Senate Factors and Proportionality

We begin our analysis of the totality of the circumstances aware that “it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances,” *Ga. State*, 775 F.3d at 1342 (internal quotation marks omitted). Consistent with this reality, we find that both the *Milligan* plaintiffs and the *Caster* plaintiffs have established that they are substantially likely to prevail on their argument that on balance, the totality of the circumstances weighs in favor of their request for relief. We first analyze the Senate Factors and we then consider the proportionality arguments that the plaintiffs have raised. We begin with Factors 2 and 7, which *Gingles* suggests are the “most important.” 478 U.S. at 48 n.15.

a. Senate Factor 2

“[T]he extent to which voting in the elections of the state or political subdivision is racially polarized.” *Gingles*, 478 U.S. at 36-37.

We have little difficulty finding that this factor weighs heavily in favor of the *Milligan* plaintiffs and *Caster* plaintiffs. We already have found that voting in the challenged districts is racially polarized, *see supra* at Part V.B.3, and that finding is based both on substantial evidence adduced by both the *Milligan* plaintiffs and the *Caster* plaintiffs, and the agreement of the Defendants’ expert witness. Further, that

evidence establishes a pattern of racially polarized voting that is clear, stark, and intense.

Defendants urge us to look deeper to determine whether that pattern is attributable to politics rather than race because “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 v. Liberty Cnty. Comm’rs*, 221 F.3d 1218, 1225 (11th Cir. 2000). But if we look deeper, we are looking at very little evidence. The only evidence Defendants offer to support their assertion that party, not race, may be the real issue is the recent election of a Black Republican, Kenneth Paschal, to the Alabama House from a majority-white district. *See Milligan* Doc. 78 at 107–09. One election of one Black Republican is hardly a sufficient basis for us to ignore (1) the veritable mountain of undisputed evidence that in all the districts at issue in this case, and in all statewide elections, voting in Alabama is polarized along racial lines, (2) the testimony of Dr. Liu that the election of Representative Paschal is “an unreliable election to estimate white support for a Black Republican candidate” because the turnout for that election (a special election) was so low that it suggests that “white voters were not highly interested in this election featuring a Black Republican candidate,” *Milligan* Doc. 76-1 at 3, and (3) the testimony of Dr. Liu, un rebutted by Dr. Hood, that the 2016 Republican presidential primary in Alabama offers a better election to estimate white support

for a Black Republican candidate, and it indicates low such support because the Black Republican candidate, Ben Carson, received far less support than the white Republican candidate, Donald Trump, *Milligan* Doc. 76-1 at 3–4. On cross examination, Dr. Hood indicated that he had not “looked at turnout specifically” with respect to the special election of Mr. Paschal. Tr. 1432–33.

Defendants also point us to the decision of the court in the *Alabama State Conference of the NAACP* case, which involved a Section Two challenge to Alabama’s at-large process for electing appellate judges. *Ala. State Conf. of NAACP v. Alabama*, 2020 WL 583803 (M.D. Ala. Feb. 5, 2020). That court found that Alabama is a “ruby red” state, which has made it “virtually impossible for Democrats – of any race – to win statewide in Alabama in the past two decades.” *Id.* at *42. But that finding was based on an evidentiary record – trial testimony from two expert witnesses, one of whom conducted a multivariate regression statistical analysis – that is absent here. And read in context, that finding does not stand for the broad proposition that racially polarized voting in Alabama is simply party politics. *See id.* 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.

b. Senate Factor 7

“The extent to which members of the minority group have been elected to public office in the jurisdiction.” *Gingles*, 478 U.S. at 37.

Likewise, we have little difficulty finding that Senate Factor 7 weighs heavily in favor of the *Milligan* plaintiffs and *Caster* plaintiffs. Three jointly stipulated facts do most of the heavy lifting here: (1) “[i]n congressional races in the . . . majority-white CDs 1, 2, and 3, Black candidates have never won election to Congress,” *Milligan* Doc. 53 ¶ 126; (2) “[n]o Black person has won statewide office in Alabama since 1996” and “[t]here are currently no African-American statewide officials in Alabama,” *id.* ¶¶ 167–68, and (3) “[t]he overwhelming majority of African-American representatives in the Alabama Legislature come from majority-minority districts,” *id.* ¶ 169, which districts were created to comply with the Voting Rights Act or the Constitution, *Milligan* Doc. 69 at 16.

Defendants do not dispute that Black Alabamians enjoy virtually zero success in statewide elections, but they urge us that Black candidates have enjoyed “a great deal of electoral success” in “elections statewide,” by which they mean “Alabama’s districted races for State offices,” including the Legislature and the State Board of Education. *See Milligan* Doc. 78 at 116. But Defendants do not engage the *Milligan* plaintiffs’ point that nearly all of that success is attributable to the creation of majority-Black districts to comply with federal law. This silence makes sense: Defendants stipulated that “[t]he overwhelming majority of African-American representatives in the Alabama Legislature come from majority-minority districts.” *Milligan* Doc. 53 ¶ 169.

c. Senate Factors 1, 3, and 5

Senate Factor 1: “The extent of any history of official discrimination in the state ... that touched the right of the members of minority group to register, to vote, or otherwise to participate in the democratic process.” *Gingles*, 478 U.S. at 36-37.

Senate Factor 3: “The extent to which the state ... has used ... voting practices or procedures that may enhance the opportunity for discrimination against the minority group.” *Id.* at 37.

Senate Factor 5: “The extent to which members of the minority group in the state ... bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process.” *Id.*

We analyze these three Senate Factors together because much of the evidence that is probative of one of them is probative of more than one of them. Alabama’s extensive history of repugnant racial and voting-related discrimination is undeniable and well documented. Defendants argue that Alabama has come a long way, but the question for us is more pointed: has it come far enough for these factors to be neutral or to weigh in favor of Defendants?

Defendants urge us to focus our analysis exclusively on the recent evidence on these factors submitted by the *Milligan* plaintiffs and the *Caster* plaintiffs. We are aware of the instruction that “past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.” *Abbott*, 138 S. Ct. at 2324 (internal quotation marks omitted). But that instruction was issued in a different context (that did not involve the Senate Factors, which expressly include an historical focus), so we do not conclude that it requires us to fully discount

Alabama's shameful history. And testimony from one of the *Caster* plaintiffs at the preliminary injunction hearing provided a powerful reminder of the palpable recency of discrimination that is a generation distant: Benjamin Jones testified that his parents were active in civil rights marches in the 1960s, that "they went to jail on a number of occasions for voting," and that he can recall his parents' strategy that they did not go to marches together because one of them had to be reliably out of jail to parent him and his fifteen siblings. Tr. 1345. If Alabama's history of jailing Black persons for voting and marching in support of their voting rights is sufficiently recent for a plaintiff to recall firsthand how that history impacted his childhood, then it seems insufficiently distant for us to completely disregard it in a step of our analysis that commands us to consider history.

Nevertheless, even if we focus primarily on the more recent evidence, we find that these Senate Factors still weigh against Defendants. The *Milligan* parties stipulated to at least two recent instances of official discrimination that bear on Senate Factors 1 and 3: (1) "[A]fter the 2010 census, Black voters and legislators successfully challenged 12 state legislative districts as unconstitutional racial gerrymanders. *See Alabama Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026, 1348-49 (M.D. Ala. 2017)." *Milligan* Doc. 53 ¶ 134; and (2) "Federal courts recently ruled against or altered local at-large voting systems with numbered post created by the State Legislature to address their alleged racially discriminatory

purpose or effect. *See, e.g., Jones*, 2019 WL 7500528, at *4; *Ala. State Conf. of the NAACP v. City of Pleasant Grove*, No. 2:18-cv-02056, 2019 WL 5172371, at *1 (N.D. Ala. Oct. 11, 2019).” *Milligan* Doc. 53 ¶ 153.

Further, the *Caster* parties stipulated to two probative facts that post-date the passage of the Voting Rights Act that also bear on Senate Factors 1 and 3 – namely, that “(1) since the passage of the Voting Rights Act, the Justice Department has sent election observers to Alabama nearly 200 different times, and (2) that between 1965 and 2013, more than 100 voting changes proposed by the State or its local jurisdictions were blocked or altered under Section 5 of the Voting Rights Act. *Caster* Doc. 44 ¶¶ 117–18.

Additionally, we are mindful of the many federal judicial rulings involving official voting-related discrimination to which the *Caster* plaintiffs direct our attention. *Caster* Doc. 56 at 22–23. Two of those cases are relatively recent: *Alabama Legislative Black Caucus*, 231 F. Supp. 3d 1026 (M.D. Ala. 2017), in which the court invalidated twelve state legislative districts as racial gerrymanders; and *United States v. McGregor*, 824 F. Supp. 2d 1339, 1345–47 (M.D. Ala. 2011), in which the court found that Alabama State Senators conspired to depress Black voter turnout by keeping a referendum issue popular among Black voters (whom the Senators called “Aborigines”) off the ballot.

In addition to stipulated facts and judicial precedents, we have the benefit of testimony from two expert witnesses for the plaintiffs – Dr. Bagley and Dr. King – about these Senate Factors. As an initial matter, we repeat our findings that both Dr. Bagley and Dr. King are credible expert witnesses. Both of them prepared lengthy, detailed reports that set forth substantial evidentiary bases for their opinions in a manner that is consistent with their expertise and applicable professional methods and standards. *Milligan* Doc. 68-2; *Caster* Doc. 50. During their cross examinations, both of them offered careful explanations for their opinions, and we observed no internal inconsistencies, overstatements, or other reasons to question the reliability of their testimony.

Although Dr. Bagley and Dr. King were cross-examined at the preliminary injunction hearing, *see* Tr. 1175, 1533, and Defendants challenged some of their assertions in opposition to the plaintiffs’ motions for preliminary injunctive relief, Doc. 78 at 103–05, 112–13, Defendants did not offer any expert testimony to rebut their opinions. Accordingly, only lawyer argument sits on the opposite side of the scale from the evidentiary showing by these expert witnesses.

Both Dr. Bagley and Dr. King opined at some length about current socioeconomic disparities between Black Alabamians and white Alabamians on several dimensions: education, economics, housing, and health. *See Milligan* Doc. 68-2 at 17–26; *Caster* Doc. 50 at 30–45. They are substantial and undeniable. As

one example, Dr. Bagley opined that “Black communities in the Black Belt continue to struggle in primitive conditions and suffer unusual health difficulties and lack of even the most basic services.” *Milligan* Doc. 68-2 at 21. More particularly, Dr. Bagley described a 2019 United Nations report that found that extreme poverty conditions in the Black Belt were “very uncommon in the First World,” reported that Black residents “lacked proper sewage and drinking water systems and had unreliable electricity,” and described instances in which households fell ill due to E.coli and hookworm infections as a result of drinking water contaminated with raw sewage. *See Milligan* Doc. 68-2 at 21.

As another example, Dr. Bagley reported that Black Alabamians are less likely to have access to a vehicle than are white Alabamians, *id.* at 17, and Mr. Cooper reported that the proportion of Black Alabamians who lack access to a vehicle (11.7%) is more than triple the proportion of white Alabamians who lack such access (3.8%), *Caster* Doc. 73-1 at 39; *accord* Tr. 1629–30 (testimony of Dr. Caster about lack of access to personal transportation in the Black Belt).

Dr. King’s report identified many similarly substantial disparities. As she explained, the unemployment rate for Black workers in Alabama (4.6%) is nearly twice that of white workers (2.5%); the child poverty rate for Black Alabamians is 34.1%, while the same rate for white children is 13.2%; the median household income of Black Alabamians is \$35,900, nearly half the white median household

income of \$59,966; 19% of Black Alabamians have no health insurance, compared to 12.9% of white Alabamians; the infant mortality rate is more than two times higher among Black infants in Alabama than white infants; and a quarter of Black households in Alabama rely on food stamps, compared to 8.2% of white households. *See Caster* Doc. 50 at 30–45.

Both Dr. Bagley and Dr. King also opined that these disparities are inseparable from and (at least in part) the result of, the state’s history of official discrimination. *See, e.g., Milligan* Doc. 68-2 at 17; *Caster* Doc. 50 at 30. Both experts also opine that these disparities hinder Black Alabamians’ opportunity to participate in the political process today. *See, e.g., Milligan* Doc. 68-2 at 17; *Caster* Doc. 50 at 30. Dr. Bagley explained two ways how: (1) that because white Alabamians tend to have “more education and therefore higher income” than Black Alabamians, they tend to be better able than Black Alabamians to “afford a car, internet service, a personal computer, or a smart phone; . . . take time off from work; . . . afford to contribute to political campaigns; . . . afford to run for office; . . . [and to] have access to better healthcare,” and (2) that “[e]ducation has repeatedly been found to correlate with income [and] independently affects citizens’ ability to engage politically.” *Milligan* Doc. 68-2 at 17. We credit this testimony.

In the light of this testimony, we reject Defendants’ arguments that the *Milligan* plaintiffs and the *Caster* plaintiffs cannot demonstrate a causal connection

between the disparate socio-economic status and depressed political participation of Black Alabamians, and that racial parity in rates of voter registration and turnout means that those plaintiffs cannot demonstrate depressed political participation. *Milligan* Doc. 78 at 110–12. We regard those arguments as too formulaic – the point of Factor 5 is for us to consider whether the lasting effects of official discrimination “hinder” the ability of Black Alabamians to participate in the political process, *Gingles*, 478 U.S. at 37, and a laser focus on parity in registration and turnout rates would overlook (1) other aspects of political participation, and (2) the question whether the lasting effects of discrimination make it harder for Black Alabamians to participate at the levels that they do, even if those levels are nearly on par or on par with the levels of white participation.

d. Senate Factor 6

Senate Factor 6: “Whether political campaigns have been characterized by overt or subtle racial appeals.” *Gingles*, 478 U.S. at 37.¹¹

We find that Senate Factor 6 weighs in favor of the *Milligan* plaintiffs and the *Caster* plaintiffs, but to a lesser degree than do Senate Factors 2, 7, 1, 3, and 5. Dr. Bagley and Dr. King offered several examples of racial campaign appeals in their expert reports, *see Milligan* Doc. 68-2 at 26–28; *Caster* Doc. 50 at 45–49, some of

¹¹ We agree with the parties that because there is not a slating process for Alabama’s congressional elections, Senate Factor 4 is not relevant. *Caster* Doc. 44 ¶ 120; *Milligan* Doc. 78 at 110.

which they testified about at the preliminary injunction hearing. We do not need to decide whether every example reflected a racial appeal, but at least three of them did, and all three were in recent congressional elections.

First, when a former Chief Justice of the Alabama Supreme Court, Roy Moore, ran for Senate in 2017, he won the Republican Party nomination. In 2011, the year before he was elected to the Alabama Supreme Court, he said during a radio interview that the amendments to the Constitution that follow the Tenth Amendment (including the Thirteenth Amendment, which abolished slavery, the Fourteenth Amendment, which requires States to provide equal protection under the law to all persons, and the Fifteenth Amendment, which provides that the right to vote shall not be denied or abridged on the basis of color or previous enslavement) have “completely tried to wreck the form of government that our forefathers intended.” *See Milligan* Doc. 68-2 at 27. During his 2017 Senate campaign, Mr. Moore acclaimed the antebellum period in the South: “I think it was great at the time when families were united – even though we had slavery. They cared for one another. People were strong in the families. Our families were strong. Our country had a direction.” *See id.*

Second, Congressman Mo Brooks, who currently represents District 5 and is now running for the open Senate seat, has repeatedly claimed that Democrats are waging a “war on whites.” *See id.* at 27–28 & n.94. Although Defendants suggest

that the plaintiffs have misunderstood other campaign ads that they claim are racial appeals, Defendants do not contest these two examples, which we find are obvious and overt appeals to race.

Third, even if Mr. Byrne did not intend his campfire commercial to be a racial appeal (a question that we need not and do not decide), a reasonable viewer might have perceived it as one. We have reviewed the ad.¹² It opens with two images superimposed onto one another: one of then-Congressman Byrne seated in darkness at a campfire, and another of a plane crashing into the World Trade Center and exploding. Mr. Byrne says: “When the towers fell, I knew my brother would be going to war. Dale was a true patriot. I can’t bring him back. I miss him every day.” The next image is of Mr. Byrne’s face, the one after that is of him holding a snapshot of a decorated military serviceman photographed in front of an American flag, and the one after that is of him sitting by the campfire and speaking. He next says: “It hurts me to hear Ilhan Omar cheapening 9/11, entitled athletes dishonoring our flag, the Squad attacking America.” While he speaks that sentence, the shot transitions several times: it first shows a close-up of glowing embers with the face of Congresswoman Omar, who is a person of color and is wearing a hijab,

¹² Defendants supplied a link to the ad in their opposition to the motions for preliminary injunctive relief. *See Milligan* Doc. 78 at 114 (providing this link: <https://www.youtube.com/watch?v=31HHFy8JkoU>).

superimposed onto the embers; it then transitions to an image of professional football player Colin Kaepernick, who is a person of color and is wearing his hair in an Afro, superimposed onto darkness with a billow of smoke; and it finally transitions to an image of four women of color, including Congresswoman Omar, Congresswoman Alexandria Ocasio-Cortez and two other congresswomen superimposed onto the darkness just above the campfire. Next, Mr. Byrne appears in front of the campfire and states: “Dale fought for that right, but I will not let them tear our country apart. That’s why I’m running for Senate.” We do not disagree with the *Milligan* plaintiffs and the *Caster* plaintiffs that the video of a white man narrating as images of prominent persons of color (and only persons of color) are juxtaposed with images of the 9/11 terrorist attacks, in or on or hovering above a crackling fire, could be understood as a racial appeal.

Accordingly, we cannot accept Defendants’ argument that we should find, as the *Alabama State Conference of the NAACP* court found, that “[t]here is no evidence that Alabama political campaigns generally ... are characterized by racial appeals.” *Milligan* Doc. 78 at 113 (quoting *Ala. State Conf. of NAACP*, 2020 WL 583803, at *58). That was a statement about a different record – one that did not include testimony from Dr. Bagley or Dr. King, one that made no mention of Roy Moore’s affection for slavery or a “war on whites,” and one that primarily was focused on Alabama judicial elections – more particularly, 128 statewide judicial

racess over a period of thirty-eight years. *See Ala. State Conf. of NAACP*, 2020 WL 583803, at *58.

But at the same time, we cannot find that this factor weighs as heavily in favor of the *Milligan* plaintiffs as do the other factors that we already have discussed. Although the three examples we just described are prominent and recent, the record does not contain any systematic or statistical evaluation of the extent to which political campaigns are characterized by racial appeals, so we cannot determine whether these examples indicate that racial appeals occur frequently, regularly, occasionally, or rarely. Accordingly, we find that there is some evidence that political campaigns (more particularly, congressional campaigns) in Alabama are characterized by overt or subtle racial appeals.

e. Senate Factor 8

Senate Factor 8: “Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.” *Gingles*, 478 U.S. at 37.

We make no finding about Senate Factor 8. The parties vehemently dispute whether the decisions that form the basis for the arguments of the *Milligan* plaintiffs and the *Caster* plaintiffs about this factor are political or race-based. And Defendants have submitted testimony on at least one of these issues (the state’s response to the COVID-19 pandemic) that the *Milligan* plaintiffs and the *Caster* plaintiffs have not directly engaged. On this record, we cannot make a well-reasoned finding whether

there is a lack of responsiveness on the part of elected officials in Alabama to the needs of the Black community, nor whether such lack of responsiveness (if it exists) is significant.

f. Senate Factor 9

Senate Factor 9: Whether the policy underlying the Plan is “tenuous.”

Likewise, we make no finding about Senate Factor 9.

g. Proportionality

Finally, we turn to the proportionality arguments made by the *Milligan* plaintiffs and the *Caster* plaintiffs. Although Section Two expressly provides that “nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population,” 52 U.S.C. § 10301(b), the Supreme Court has held that “whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area” is a “relevant consideration” in the totality-of-the-circumstances analysis. *LULAC*, 548 U.S. at 426; *accord De Grandy*, 512 U.S. at 1000.

More particularly, “proportionality . . . is obviously an indication that minority voters have an equal opportunity, in spite of racial polarization, to participate in the political process and to elect representatives of their choice.” *De Grandy*, 512 U.S. at 1020 (internal quotation marks omitted); *accord Alabama Legislative Black Caucus*, 989 F. Supp. 2d at 1286–87 (concluding that the totality of the

circumstances weighed against a finding that the state legislative map violated Section Two in part because the number of majority-Black districts in the Legislature is “roughly proportional to the [B]lack voting-age population”), *vacated on other grounds*, 575 U.S. 254 (2015).

We have no such indication here. As the *Milligan* plaintiffs correctly observe, “[d]espite Black Alabamians constituting nearly 27% of the population, they only have meaningful influence in” 14% of congressional seats. *Milligan* Doc. 69 at 17. And as the *Caster* plaintiffs correctly add, white Alabamians are over-represented because 86% of congressional districts are majority-white, but white Alabamians comprise only 63% of the population; they also point out that even if Alabama were to draw a second majority-Black congressional district, this circumstance would persist, because 71.5% of congressional districts would be majority-white. *See Caster* Doc. 56 at 19–20; Tr. 432–33. Further, the share of Alabama’s population that is white according to the 2020 census data (63.12%) has decreased substantially in the nearly thirty years since *Wesch* ordered one majority-Black district (according to the 1990 census data, Alabama’s white population was 73.65% of its total population. *See Wesch*, 785 F. Supp. at 1503 app. B.)

Further, the *Caster* plaintiffs offer a view from a different angle: they observe that under the Plan, less than one-third of Alabama’s Black population resides in a majority-Black district, while 92% of Alabama’s non-Hispanic white population

resides in a majority-white district. *See Caster* Doc. 48 ¶ 28; Tr. 431.

These statistics are not in dispute, and Defendants' only answer is to remind us that the text of Section Two "expressly repudiates any claim for proportional representation." *Milligan* Doc. 78 at 65 (emphasis omitted); *id.* at 129 (asserting that plaintiffs' remedial plans are "naked attempts to extract from Section 2 a non-existent right to proportional (indeed, maximal) racial representation in Congress"). In the light of *LULAC* and *De Grandy*, this is a non-answer. We do not resolve the *Milligan* plaintiffs' motion for a preliminary injunction solely (or even in the main) by conducting a proportionality analysis; rather, consistent with *LULAC* and *De Grandy*, we consider the proportionality arguments of the plaintiffs as part and parcel of the totality of the circumstances, and we draw the limited and obvious conclusion that this consideration weighs decidedly in favor of the plaintiffs.

Ultimately, we find that every Senate Factor we were able to make a finding about, along with proportionality, weighs in favor of the *Milligan* plaintiffs and the *Caster* plaintiffs, and that no Senate Factors or other circumstances we consider at this stage weigh in favor of Defendants.

As the foregoing analysis makes clear, we do not regard the question whether the *Milligan* plaintiffs are substantially likely to prevail on the merits of their Section Two claim as a close one. This is for several reasons: (1) We have considered a

record that is extensive by any measure, and particularly extensive for a preliminary injunction proceeding, and the *Milligan* plaintiffs have adduced substantial evidence in support of their claim. (2) There is no serious dispute that the plaintiffs have established numerosity for purposes of *Gingles* I, nor that they have established sharply racially polarized voting for purposes of *Gingles* II and III, leaving only conclusions about reasonable compactness and the totality of the circumstances dependent upon our findings. (3) In our analysis of compactness, we have credited the *Milligan* plaintiffs' principal expert witness, Dr. Duchin, after a careful review of her reports and observation of her live testimony (which included the first cross-examination of her that occurred in this case). (4) Separately, we have discounted the testimony of Defendants' principal expert witness, Mr. Bryan, after a careful review of his reports and observation of his live testimony (which included the first cross-examination of him that occurred in this case). (5) If the *Milligan* record were insufficient on any issue (and it is not), the *Caster* record, which is equally fulsome, would fill in the gaps: the *Caster* record (which by the parties' agreement also is admitted in *Milligan*), compels the same conclusion that we have reached in *Milligan*, both to this three-judge court and to Judge Manasco sitting alone. Put differently, because of the posture of these consolidated cases, the record before us has not only once, but twice, established that the Plan substantially likely violates Section Two.

C. The *Milligan* plaintiffs have established the remaining elements of their request for preliminary injunctive relief.

We find that the *Milligan* plaintiffs have established the remaining elements of their request for preliminary injunctive relief. Our finding proceeds in two parts: we first discuss whether the *Milligan* and the *Caster* plaintiffs have established that they will suffer an irreparable harm absent preliminary injunctive relief, and we then discuss Defendants' assertion that a preliminary injunction will harm the public interest because the timing of such an injunction will precipitate political and administrative chaos.

1. Irreparable Harm

We find that the plaintiffs will suffer an irreparable harm if they must vote in the 2022 congressional elections based on a redistricting plan that violates federal law. "Courts routinely deem restrictions on fundamental voting rights irreparable injury. And discriminatory voting procedures in particular are the kind of serious violation of the Constitution and the Voting Rights Act for which courts have granted immediate relief." *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (citing *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Alternative Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997); *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986)).

This rule makes sense. “Voting is the beating heart of democracy,” and a “fundamental political right, because it is preservative of all rights.” *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1315 (11th Cir. 2019) (internal quotation marks omitted) (alterations accepted). And “once the election occurs, there can be no do-over and no redress” for voters whose rights were violated and votes were diluted. *League of Women Voters of N.C.*, 769 F.3d at 247.

Defendants minimize but do not dispute plaintiffs’ arguments about irreparable injury. *See Milligan* Doc. 78 at 144 (“Plaintiffs assert irreparable harm from purportedly having to vote in a district that they feel should have a different racial makeup.”). At the preliminary injunction hearing, Defendants adduced no testimony and made no argument that the plaintiffs’ injuries would not be irreparable.

Accordingly, we find that the plaintiffs will suffer an irreparable harm absent a preliminary injunction. Further, we observe that absent preliminary relief, the *Milligan* plaintiffs will suffer this irreparable injury until 2024, which is nearly halfway through this census cycle. Weighed against the harm that Defendants assert they will suffer — the administrative burden of drawing and implementing a new map, and upsetting candidates’ campaigns, discussed fully below — the irreparable harm to the *Milligan* plaintiffs’ voting rights is greater.

2. Equities and Timing

We next find that a preliminary injunction is in the public interest, and we reject Defendants' argument that such relief will harm the public interest because the timing of an injunction will precipitate political and administrative chaos.

The principal Supreme Court precedent that addresses the timing issue is older than the Voting Rights Act. In *Reynolds*, which involved a constitutional challenge, the Court explained "once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." 377 U.S. at 585. "However," the Court acknowledged, "under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid." *Id.* The Court explained that "[i]n awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Id.*

More recently, the Supreme Court has held that district courts should apply a necessity standard when deciding whether to award or withhold immediate relief. In

Upham v. Seamon, the Court explained: “[W]e have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. Necessity has been the motivating factor in these situations.” 456 U.S. 37, 44 (1982) (citations omitted).

We conclude that under these precedents, we should not withhold immediate relief for two reasons: *first*, Alabama’s congressional elections are not imminent, and *second*, even if those elections were nearly imminent, it is not necessary that we allow those elections to proceed on the basis of an unlawful plan.

As our discussion of the various deadlines makes clear, *see supra* Part IV.E.1, Alabama’s 2022 congressional elections are not imminent. We are not on the eve of the general election (it is some ten months away), nor on the eve of the primary election (it is some two and a half months away), nor on the eve of a deadline to mail some absentee ballots for the primary election. We are on the eve of the qualifying deadline, which is set by state law as 116 days before the date of the primary election. Ala. Code § 17-13-5(a). Even if we consider the start date of the primary election as April 9, 2022, when some absentee ballots must be mailed, we are still months, not weeks or days, away from the beginning of that election.

We discern no legal basis to conclude that “imminent” means “months away.” Defendants urge us to consider *Favors*, 881 F. Supp. 2d 356, *see supra* at Part

IV.E.1, but that case was fundamentally unlike this one. In *Favors*, the plaintiffs' claims were based on "novel, contested" legal grounds, and the plaintiffs had adduced "virtually no" evidence to support them. 881 F. Supp. 2d at 370–71. Here, the primary election is not set to begin for more than two months, the plaintiffs' claims are based on a statute enacted decades ago and a substantial body of case law that has developed as a result, and both the *Milligan* plaintiffs and the *Caster* plaintiffs have developed an extremely robust evidentiary record to afford us the opportunity confidently to decide their motion for preliminary injunctive relief.

Further, both the *Milligan* plaintiffs and the *Caster* plaintiffs argue that if we hold that the primary elections are "imminent" and withhold preliminary relief on that ground, we would essentially be ruling that "the redistricting process is above the law." *Milligan* Doc. 94 at 46; Tr. 1920 (*Caster* closing argument: "It can't always be too late or too soon."). We agree, and absent controlling case law directing us to do so, we are not inclined to take that step.

Even if we were worried that the elections are coming too soon (which we are not), we have no evidence from which we could find (or even infer) that it is necessary that we allow those elections to proceed on the basis of an unlawful plan. Mr. Helms has identified several administrative challenges of complying with a preliminary injunction, but he has not testified that it is undoable. *See Milligan* Doc. 79-7. And much of the remainder of his testimony (and Mr. Byrne's testimony) on

this issue indicates that compliance could be expensive for candidates and result in confusion for some voters, *see id.* & Tr. 1693–94, 1750–51, but campaign expense and potential confusion are not the standard we are bound to apply. Necessity is.

Further, Mr. Helms’s declaration is only part of the story. The rest of it already has unfolded and suggests that it is not necessary for us to allow the congressional elections to proceed on the basis of an unlawful plan. Defendants have known since at least 2018 that persons and organizations such as the *Milligan* plaintiffs and *Caster* plaintiffs would likely assert a Section Two challenge to any 2021 congressional redistricting plan that did not include two majority-Black districts or districts in which Black voters otherwise have an opportunity to elect a representative of their choice. Indeed, *Chestnut* raised many of the same issues that these cases raise, and the plaintiffs’ *Gingles* I expert there opined that two reasonably compact majority-Black districts could be drawn in Alabama based on the 2010 census data. *Caster* Doc. 48 at 20. The 2020 census data then reflected an increase in the any-part Black population in Alabama, potentially making a Section Two claim even stronger. *Id.* at 6. Later, but before the Plan was enacted, Senator Hatcher presented in the Legislature a plan that contained two majority-Black districts. *Milligan* Doc. 53 ¶ 113. The Legislature then passed the Plan, taking a mere five days in legislative session to do so. The *Caster* and *Milligan* plaintiffs then

commenced their lawsuits within hours or days of the enactment of the Plan,¹³ and the court held a Rule 16 conference involving all parties in *Singleton*, *Milligan*, and *Caster* on November 23, 2021. One of the things that the parties and court discussed at that conference was that if a preliminary injunction were ordered, the Legislature wanted the first cut at drawing a new map. The court immediately expedited the preliminary injunction proceedings, although the proceedings were held in January 2022 instead of December 2021 at the request of the Defendants to allow the parties to develop the record. *See* Tr. of Nov. 9, 2021 Hrg. at 3; Tr. of Nov. 23, 2021 Hrg. at 25–26.

Put simply, Defendants have been on notice for a long while that, depending on how any given Section Two challenge played out, they could be required to conduct the 2022 congressional elections on the basis of a map that includes two majority-Black districts or districts in which Black voters otherwise have an opportunity to elect a representative of their choice. And the Legislature already has demonstrated just how quickly it can prepare a map.

Both the law and the facts are clear. If a plaintiff asserts a meritorious claim of vote dilution under Section Two, the plaintiff should be forced to cast a vote based

¹³ The *Singleton* plaintiffs already had filed their lawsuit, but within hours of the Plan being signed by the Governor filed the amended complaint to address the enacted 2021 Plan. *Singleton* Doc. 15.

on the unlawful plan only if absolutely necessary. We have no convincing evidence that it is necessary for us to withhold relief and a substantial basis to conclude that it is not. We have proceeded with all deliberate speed so as not to deprive plaintiffs of an opportunity for a timely remedy, and now the state must do the same.

D. We reject Defendants' argument that plaintiffs' remedial plans are unconstitutional.

We next consider Defendants' argument that the Duchin plans and Cooper plans are unconstitutional because they discriminate on account of race and cannot satisfy strict scrutiny. *Milligan* Doc. 78 at 124–30. Based on the testimony at the preliminary injunction hearing, we reject this argument because it is based on the flawed factual premise that the Duchin plans and Cooper plans prioritize race above all race-neutral traditional redistricting principles except for population balance, and the flawed legal premise that the role Dr. Duchin and Mr. Cooper assigned to race is unconstitutional. *Id.* at 126–27.

First, the flawed factual premise. Both Dr. Duchin and Mr. Cooper consistently and repeatedly refuted the accusation that when they prepared their illustrative plans, they prioritized race above everything else. They explained that they prioritized race only as necessary to answer the essential question asked of them as *Gingles* I experts: Is it possible to draw two reasonably compact majority-Black congressional districts? *See supra* at Part V.B.2. More particularly, Dr. Duchin and Mr. Cooper testified that they prioritized race only for the purpose of determining

and to the extent necessary to determine whether it was possible for the *Milligan* plaintiffs and the *Caster* plaintiffs to state a Section Two claim. As soon as they determined the answer to that question, they assigned greater weight to other traditional redistricting criteria. Indeed, Dr. Duchin and Mr. Cooper testified about how the maps might have looked if they had prioritized race above everything else.

Dr. Duchin's testimony that she considered two majority-Black districts as "non-negotiable" does not change this analysis. All that means is that Dr. Duchin did not allow a minimum level of compliance with that criterion to yield to other considerations. It does not mean that she tried to maximize the number of majority-Black districts, or the BVAP in any particular majority-Black district, which she would have done if race were her predominant consideration.

Second, the flawed legal premise. This strikes us as obvious: a rule that rejects as unconstitutional a remedial plan for attempting to satisfy *Gingles* I would preclude any plaintiff from ever stating a Section Two claim. *See Davis*, 139 F.3d at 1424–25 (“To penalize Davis, as the district court has done, for attempting to make the very showing that *Gingles* [and other precedents] demand would be to make it impossible, as a matter of law, for any plaintiff to bring a successful Section Two action.”); *see also Clark v. Calhoun Cnty.*, 88 F.3d 1393, 1406–07 (5th Cir. 1996) (“[T]he first *Gingles* factor is an inquiry into causation that necessarily classifies voters by their race.”).

Indeed, a rule that strikes down a remedial plan the moment the plan proposes two districts with a BVAP that exceeds 50% would render superfluous all *Gingles* analysis past numerosity: if satisfying numerosity is an immediate constitutional dead end, there would be no need to consider compactness, racially polarized voting, or the totality of the circumstances. If Section Two is to have any meaning, it cannot require a showing that is necessarily unconstitutional. Defendants have identified no precedent that ever has taken such a senseless step, and we will not be the first.

Even if we were to subject the Duchin maps and Cooper maps to strict scrutiny, we would need to determine whether they are narrowly tailored to protect a compelling state interest. *See, e.g., Alabama Legislative Black Caucus*, 231 F. Supp. 3d at 1061–64. In this context, narrow tailoring does not “require an exact connection between the means and ends of redistricting” but rather just “good reasons to draft a district in which race predominated over traditional districting criteria.” *Id.* at 1064 (internal quotation marks and emphasis omitted). Based on the case law assuming that compliance with the Voting Rights Act is a sufficient reason, the “laser precision” BVAPs that Defendants deride, *see Milligan* Doc. 102 ¶ 475, the testimony of Dr. Duchin and Mr. Cooper about when and how and how much they considered race, and our finding that the Duchin plans and Cooper plans respect traditional redistricting principles, we do not see “a level of racial manipulation that exceeds what § 2 could justify,” *Vera*, 517 U.S. at 980–81.

E. We reject Defendants’ argument that plaintiffs’ interpretation of Section Two is unconstitutional.

We next consider the Defendants’ argument that the plaintiffs’ interpretation of Section Two is unconstitutional because it focuses too much on history, which severs the statute from the geographic and temporal limitations that make it a proportional remedy. *Milligan* Doc. 78 at 130–31. We have little difficulty rejecting this argument. We cannot agree with the overly simplistic accusation that the *Milligan* plaintiffs and the *Caster* plaintiffs “seek to mire the State – and the statute – in historical conditions that no longer pertain to [B]lack Alabamians’ ability to participate in the political process.” *Id.* at 131 (internal quotation marks omitted). Both sets of plaintiffs have followed a well settled series of steps to establish a Section Two violation, *see supra* Part III, and Supreme Court precedents dictate that some of those steps are focused on history, and others are focused on the present day. If we focus exclusively on the present day, we surely will run afoul of the instructions about history. And in any event, as we already have explained, we disagree with Defendants that the history has been fully overcome and is so distant that it may be ignored, discounted, or set aside to the extent that they suggest.

F. We reject Defendants’ argument that the Voting Rights Act does not provide a private right of action.

Since the passage of the Voting Rights Act, federal courts across the country, including both the Supreme Court and the Eleventh Circuit, have considered

numerous Section Two cases brought by private plaintiffs. *See, e.g., Brnovich*, 141 S. Ct. 2321; *Bartlett*, 556 U.S. 1; *LULAC*, 548 U.S. 399; *Voinovich*, 507 U.S. 146; *Chisom v. Roemer*, 501 U.S. 380 (1991); *Hous. Lawyers' Ass'n v. Att'y Gen.*, 501 U.S. 419 (1991); *Gingles*, 478 U.S. 30; *Wright*, 979 F.3d 1282. And on the other side of the scale, no federal court anywhere ever has held that Section Two does not provide a private right of action.

Moreover, although the Supreme Court has not directly decided this question, it has decided a close cousin of a question, and that precedent strongly suggests that Section Two provides a private right of action. In *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), the Supreme Court held that Section Ten of the Voting Rights Act authorizes private actions. After comparing the text of Sections Two, Five, and Ten of the Voting Rights Act, the Court reasoned:

Although § 2, like § 5, provides no right to sue on its face, “the existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965.” S. Rep. No. 97–417, at 30. We, in turn, have entertained cases brought by private litigants to enforce § 2. It would be anomalous, to say the least, to hold that both § 2 and § 5 are enforceable by private action but § 10 is not, when all lack the same express authorizing language.

Id. at 232 (opinion of Stevens, J., with one justice joining) (some internal citations omitted); *accord id.* at 240 (opinion of Breyer, J., with two justices joining). On this reasoning, the understanding that Section Two provides a private right of action was necessary to reach the judgment that Section Ten provides a private right of action.

Five justices concurred in that reasoning and judgment. A ruling that Section Two does not provide a private right of action would badly undermine the rationale offered by the Court in *Morse*.

When Defendants first explained in their opposition to the motions for preliminary injunctive relief this argument about Section Two, they did not mention or discuss *Morse*. See *Milligan* Doc. 78. After the *Milligan* plaintiffs relied on *Morse* in their reply brief, *Milligan* Doc. 94 at 28, Defendants addressed it in their post-hearing brief — in one paragraph out of 231 pages — by implying that *Morse* was “fractured” on the relevant issue and dismissing the passage about that issue as dicta. *Milligan* Doc. 102 ¶ 686. As the Eleventh Circuit has explained, “there is dicta and then there is dicta, and then there is Supreme Court dicta. This is not subordinate clause, negative pregnant, devoid-of-analysis, throw-away kind of dicta. It is well thought out, thoroughly reasoned, and carefully articulated analysis by the Supreme Court describing the scope of one of its own decisions.” *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006); see also *Henderson v. McMurray*, 987 F.3d 997, 1006 (11th Cir. 2021) (Pryor, J.). Even if the Supreme Court’s statements in *Morse* about Section Two are technically dicta, they deserve greater respect than Defendants would have us give.

Holding that Section Two does not provide a private right of action would work a major upheaval in the law, and we are not prepared to step down that road

today.

VI. REMEDY

“Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that ‘reapportionment is primarily the duty and responsibility of the State.’” *Miller*, 515 U.S. at 915 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). Indeed, “[f]ederal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place.” *Voinovich*, 507 U.S. at 156. Put differently, each State has a “sovereign interest in implementing its redistricting plan.” *Vera*, 517 U.S. at 978.

Even when a federal court finds that a redistricting plan violates federal law, the Supreme Court “has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt.” *Wise*, 437 U.S. at 539–40 (opinion of White, J.) (collecting cases). Upon such a finding, “it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet [applicable federal legal] requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming,

will then be the governing law unless it, too, is challenged and found to violate” federal law. *Id.* at 540.

Just as a state’s “freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause,” *id.* (internal quotation marks omitted), a state’s freedom of choice to devise substitutes for a plan found to violate Section Two should not be restricted beyond the clear commands of the Constitution and the Voting Rights Act.

Accordingly, following a determination that a redistricting plan violates Section Two, “[s]tates retain broad discretion in drawing districts to comply with the mandate of § 2.” *Shaw II*, 517 U.S. at 917 n.9. A state may rely on a Section 2 plaintiff’s remedial plan, but is not required to do so, nor to “draw the precise compact district that a court would impose in a successful § 2 challenge,” *Vera*, 517 U.S. at 978 (internal quotation marks omitted). Instead, “the States retain a flexibility that federal courts enforcing § 2 lack, both insofar as they may avoid strict scrutiny altogether by respecting their own traditional districting principles, and insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid, § 2 liability.” *Id.*

If — and only if — the state legislature cannot or will not adopt a remedial map that complies with federal law in time for use in an upcoming election does the

job of drawing an interim map fall to the courts. “Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the unwelcome obligation of the federal court to devise and impose a reapportionment plan pending later legislative action.” *Wise*, 437 U.S. at 540 (opinion of White, J.) (internal quotation marks and citation omitted); *accord Grove*, 507 U.S. at 36-37.

“Quite apart from the risk of acting without a legislature’s expertise, and quite apart from the difficulties a court faces in drawing a map that is fair and rational, the obligation placed upon the Federal Judiciary is unwelcome because drawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance.” *LULAC*, 548 U.S. at 415–16 (citation omitted). “That Congress is the federal body explicitly given constitutional power over elections is also a noteworthy statement of preference for the democratic process. As the Constitution vests redistricting responsibilities foremost in the legislatures of the States and in Congress, a lawful, legislatively enacted plan should be preferable to one drawn by the courts.” *Id.* at 416.

The *Milligan* plaintiffs and *Caster* plaintiffs agree on the legal requirements applicable to the appropriate remedy for the Section Two violation they have established. Both sets of plaintiffs appreciate that “the Court must give the

Legislature the first opportunity to suggest a legally acceptable plan to remedy the Section 2 violation.” *Milligan* Doc. 103 ¶ 574; *Caster* Doc. 97 ¶ 501. And both sets of plaintiffs concede that the Legislature has discretion to decide whether to enact a remedial plan that contains two majority-Black districts, or two districts in which Black voters otherwise have an opportunity to elect a representative of their choice, or a combination of such districts. *Milligan* Doc. 103 ¶¶ 577, 582; *Caster* Doc. 97 ¶¶ 494–96, 505.

Both sets of plaintiffs also suggest, and we agree, 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. *Milligan* Doc. 103 ¶ 583; *Caster* Doc. 97 ¶ 497.

Defendants express some doubt as to whether the state will be able to “draw a map that can garner sufficient support in two legislative chambers and secure the governor’s signature” given the time exigencies, but they assert that “the court should not deprive Alabama’s Legislature of that prerogative.” *Milligan* Doc. 102 ¶¶ 709, 711.

Accordingly, the preliminary injunction that we issue affords the State a limited opportunity to enact a new map. We already have concluded that under applicable precedent, the timing of the election does not foreclose preliminary

injunctive relief, *see supra* Part V.C.2, but there can be no doubt that there is a limited window in which the Legislature may adopt a new map. To facilitate the timely development of a remedial map, we have stayed the qualification deadline for a brief period that we believe is sufficient but not longer than necessary.

We are confident that the Legislature can accomplish its task: the Legislature enacted the Plan in a matter of days last fall; the Legislature has been on notice since at least the time that this litigation was commenced months ago (and arguably earlier) that a new map might be necessary; the Legislature already has access to an experienced cartographer; the Legislature has not just one or two, but at least eleven illustrative remedial plans to consult, one of which pairs no incumbents; and Mr. Cooper demonstrated that he can draw a draft plan in part of an afternoon. Indeed, there is a plethora of experts in these very cases whom the Legislature could consult. Further, there is precedent for such a schedule. *See Larios*, 300 F. Supp. 2d at 1356–57.

VII. ANALYSIS – CONSTITUTIONAL CLAIMS

The *Singleton* plaintiffs’ motion for a preliminary injunction asserts that those plaintiffs are substantially likely to succeed on their claims because recent Supreme Court precedents, including *Cooper*, *Covington*, and *Abbott*, “hold that Section 2 of the Voting Rights Act cannot justify the perpetuation of a racially gerrymandered, majority-Black Congressional district when a legislature had no reason to believe

that such a district was necessary to give Black voters the opportunity to elect the candidate of their choice.” *Singleton* Doc. 57 at 9.

The *Singleton* plaintiffs assert that because District 7 was and is a racial gerrymander, it is subject to strict scrutiny and is not narrowly tailored to further a compelling government interest because the Legislature “not only failed to perform any analysis that would have indicated that a single majority-Black district was necessary, but also absolved itself of any substantial involvement in the drawing of the plan, which it left to Mr. Hinaman [the state cartographer] and Alabama’s Congressional delegation.” *Id.* at 9, 25–29.

The *Singleton* plaintiffs assert that Secretary Merrill has stipulated that race was the predominant factor when District 7 was drawn in 1992 and has conceded in an earlier lawsuit that because District 7 is racially gerrymandered, it would not be constitutional if drawn for the first time today. *Id.* at 13, 22.

The *Milligan* plaintiffs’ motion for a preliminary injunction makes some arguments in support of their constitutional claims that are similar to the *Singleton* plaintiffs’ arguments about the origins of District 7, *see Milligan* Doc. 69 at 20–26, and other arguments in support of their constitutional claims that are unique to the *Milligan* action and depend on the testimony of two expert witnesses: Dr. Kosuke Imai and Dr. Ryan Williamson, *see id.* at 26–31. Dr. Imai used simulation algorithms to generate 10,000 congressional maps and argued that District 7 is an “extreme

outlier in terms of its consideration of race” because not a single District 7 out of the 10,000 had a BVAP as high as the actual District 7. *Id.* at 26–27. Dr. Williamson used different methods of statistical analysis to argue that race played a predominant role in the Legislature’s decision to split each of the three counties that the Plan splits between District 7 and other districts. *Id.* at 27–28. The *Milligan* plaintiffs also rely on work performed by Drs. Imai and Williamson to support their arguments that race predominated in the Legislature’s decisions about Districts 1, 2, and 3. *See id.* at 28–31.

Although the parties in *Singleton* and *Milligan* filed extensive stipulations of fact for purposes of the preliminary injunction proceedings, *Singleton* Docs. 47, 70, *Milligan* Doc. 53, numerous facts remain in dispute, Defendants vehemently contest the opinions of Drs. Imai and Williamson, *see, e.g.*, Tr. 206–70, 301–04, 337–61, and the constitutional issues are “complicated,” *Abbott*, 138 S. Ct. at 2314.

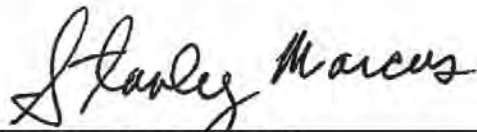
For these reasons, in the light of our decision to issue a preliminary injunction on statutory grounds, and because Alabama’s upcoming congressional elections will not occur on the basis of the map that is allegedly unconstitutional, we decline to decide the constitutional claims asserted by the *Singleton* and *Milligan* plaintiffs at this time. This restraint is consistent with the longstanding canon of constitutional avoidance, *see Lyng*, 485 U.S. at 445 (collecting cases dating back to *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring)), which

has particular salience when a court considers (as we do here) a request for equitable relief, *see id.*, and which is commonly applied by three-judge courts in redistricting cases that involve both constitutional and statutory claims, *see, e.g., LULAC*, 548 U.S. at 442; *Gingles*, 478 U.S. at 38.

VIII. EVIDENTIARY RULINGS

During the preliminary injunction hearing, the court accepted into evidence the overwhelming majority of the exhibits that the parties offered; most were stipulated, and the court ruled on some evidentiary objections and reserved ruling on others. All pending objections are **SUSTAINED**.


DONE and **ORDERED** this 24th day of January, 2022.



STANLEY MARCUS
UNITED STATES CIRCUIT JUDGE



ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE



TERRY F. MOORER
UNITED STATES DISTRICT JUDGE

APPENDIX A

1 REAPPORTIONMENT COMMITTEE REDISTRICTING GUIDELINES**2** May 5, 2021**3 I. POPULATION**

4 The total Alabama state population, and the population of defined subunits
5 thereof, as reported by the 2020 Census, shall be the permissible data base used
6 for the development, evaluation, and analysis of proposed redistricting plans. It is
7 the intention of this provision to exclude from use any census data, for the purpose
8 of determining compliance with the one person, one vote requirement, other than
9 that provided by the United States Census Bureau.

10 II. CRITERIA FOR REDISTRICTING

11 a. Districts shall comply with the United States Constitution, including the
12 requirement that they equalize total population.

13 b. Congressional districts shall have minimal population deviation.

14 c. Legislative and state board of education districts shall be drawn to achieve
15 substantial equality of population among the districts and shall not exceed an
16 overall population deviation range of $\pm 5\%$.

17 d. A redistricting plan considered by the Reapportionment Committee shall
18 comply with the one person, one vote principle of the Equal Protection Clause of
19 the 14th Amendment of the United States Constitution.

20 e. The Reapportionment Committee shall not approve a redistricting plan that
21 does not comply with these population requirements.

22 f. Districts shall be drawn in compliance with the Voting Rights Act of 1965, as
23 amended. A redistricting plan shall have neither the purpose nor the effect of
24 diluting minority voting strength, and shall comply with Section 2 of the Voting
25 Rights Act and the United States Constitution.

26 g. No district will be drawn in a manner that subordinates race-neutral
27 districting criteria to considerations of race, color, or membership in a language-
28 minority group, except that race, color, or membership in a language-minority
29 group may predominate over race-neutral districting criteria to comply with
30 Section 2 of the Voting Rights Act, provided there is a strong basis in evidence in
31 support of such a race-based choice. A strong basis in evidence exists when there
32 is good reason to believe that race must be used in order to satisfy the Voting Rights
33 Act.

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1 h. Districts will be composed of contiguous and reasonably compact
2 geography.

3 i. The following requirements of the Alabama Constitution shall be complied
4 with:

5 (i) Sovereignty resides in the people of Alabama, and all districts should be
6 drawn to reflect the democratic will of all the people concerning how their
7 governments should be restructured.

8 (ii) Districts shall be drawn on the basis of total population, except that voting
9 age population may be considered, as necessary to comply with Section 2 of the
10 Voting Rights Act or other federal or state law.

11 (iii) The number of Alabama Senate districts is set by statute at 35 and, under
12 the Alabama Constitution, may not exceed 35.

13 (iv) The number of Alabama Senate districts shall be not less than one-fourth or
14 more than one-third of the number of House districts.

15 (v) The number of Alabama House districts is set by statute at 105 and, under
16 the Alabama Constitution, may not exceed 106.

17 (vi) The number of Alabama House districts shall not be less than 67.

18 (vii) All districts will be single-member districts.

19 (viii) Every part of every district shall be contiguous with every other part of the
20 district.

21 j. The following redistricting policies are embedded in the political values,
22 traditions, customs, and usages of the State of Alabama and shall be observed to
23 the extent that they do not violate or subordinate the foregoing policies prescribed
24 by the Constitution and laws of the United States and of the State of Alabama:

25 (i) Contests between incumbents will be avoided whenever possible.

26 (ii) Contiguity by water is allowed, but point-to-point contiguity and long-lasso
27 contiguity is not.

28 (iii) Districts shall respect communities of interest, neighborhoods, and political
29 subdivisions to the extent practicable and in compliance with paragraphs a
30 through i. A community of interest is defined as an area with recognized
31 similarities of interests, including but not limited to ethnic, racial, economic, tribal,
32 social, geographic, or historical identities. The term communities of interest may,
33 in certain circumstances, include political subdivisions such as counties, voting

1 precincts, municipalities, tribal lands and reservations, or school districts. The
2 discernment, weighing, and balancing of the varied factors that contribute to
3 communities of interest is an intensely political process best carried out by elected
4 representatives of the people.

5 (iv) The Legislature shall try to minimize the number of counties in each district.

6 (v) The Legislature shall try to preserve the cores of existing districts.

7 (vi) In establishing legislative districts, the Reapportionment Committee shall
8 give due consideration to all the criteria herein. However, priority is to be given to
9 the compelling State interests requiring equality of population among districts and
10 compliance with the Voting Rights Act of 1965, as amended, should the
11 requirements of those criteria conflict with any other criteria.

12 g. The criteria identified in paragraphs j(i)-(vi) are not listed in order of
13 precedence, and in each instance where they conflict, the Legislature shall at its
14 discretion determine which takes priority.

15 **III. PLANS PRODUCED BY LEGISLATORS**

16 1. The confidentiality of any Legislator developing plans or portions thereof
17 will be respected. The Reapportionment Office staff will not release any
18 information on any Legislator's work without written permission of the Legislator
19 developing the plan, subject to paragraph two below.

20 2. A proposed redistricting plan will become public information upon its
21 introduction as a bill in the legislative process, or upon presentation for
22 consideration by the Reapportionment Committee.

23 3. Access to the Legislative Reapportionment Office Computer System, census
24 population data, and redistricting work maps will be available to all members of
25 the Legislature upon request. Reapportionment Office staff will provide technical
26 assistance to all Legislators who wish to develop proposals.

27 4. In accordance with Rule 23 of the Joint Rules of the Alabama Legislature
28 "[a]ll amendments or revisions to redistricting plans, following introduction as a
29 bill, shall be drafted by the Reapportionment Office." Amendments or revisions
30 must be part of a whole plan. Partial plans are not allowed.

31 5. In accordance with Rule 24 of the Joint Rules of the Alabama Legislature,
32 "[d]rafts of all redistricting plans which are for introduction at any session of the
33 Legislature, and which are not prepared by the Reapportionment Office, shall be
34 presented to the Reapportionment Office for review of proper form and for entry
35 into the Legislative Data System at least ten (10) days prior to introduction."

1 **IV. REAPPORTIONMENT COMMITTEE MEETINGS AND PUBLIC**
2 **HEARINGS**

3 1. All meetings of the Reapportionment Committee and its sub-committees
4 will be open to the public and all plans presented at committee meetings will be
5 made available to the public.

6 2. Minutes of all Reapportionment Committee meetings shall be taken and
7 maintained as part of the public record. Copies of all minutes shall be made
8 available to the public.

9 3. Transcripts of any public hearings shall be made and maintained as part of
10 the public record, and shall be available to the public.

11 4. All interested persons are encouraged to appear before the
12 Reapportionment Committee and to give their comments and input regarding
13 legislative redistricting. Reasonable opportunity will be given to such persons,
14 consistent with the criteria herein established, to present plans or amendments
15 redistricting plans to the Reapportionment Committee, if desired, unless such
16 plans or amendments fail to meet the minimal criteria herein established.

17 5. Notice of all Reapportionment Committee meetings will be posted on
18 monitors throughout the Alabama State House, the Reapportionment Committee's
19 website, and on the Secretary of State's website. Individual notice of
20 Reapportionment Committee meetings will be sent by email to any citizen or
21 organization who requests individual notice and provides the necessary
22 information to the Reapportionment Committee staff. Persons or organizations
23 who want to receive this information should contact the Reapportionment Office.

24 **V. PUBLIC ACCESS**

25 1. The Reapportionment Committee seeks active and informed public
26 participation in all activities of the Committee and the widest range of public
27 information and citizen input into its deliberations. Public access to the
28 Reapportionment Office computer system is available every Friday from 8:30 a.m.
29 to 4:30 p.m. Please contact the Reapportionment Office to schedule an
30 appointment.

31 2. A redistricting plan may be presented to the Reapportionment Committee
32 by any individual citizen or organization by written presentation at a public
33 meeting or by submission in writing to the Committee. All plans submitted to the
34 Reapportionment Committee will be made part of the public record and made
35 available in the same manner as other public records of the Committee.

1 3. Any proposed redistricting plan drafted into legislation must be offered by a
2 member of the Legislature for introduction into the legislative process.

3 4. A redistricting plan developed outside the Legislature or a redistricting plan
4 developed without Reapportionment Office assistance which is to be presented for
5 consideration by the Reapportionment Committee must:

6 a. Be clearly depicted on maps which follow 2020 Census geographic
7 boundaries;

8 b. Be accompanied by a statistical sheet listing total population for each district
9 and listing the census geography making up each proposed district;

10 c. Stand as a complete statewide plan for redistricting.

11 d. Comply with the guidelines adopted by the Reapportionment Committee.

12 5. Electronic Submissions

13 a. Electronic submissions of redistricting plans will be accepted by the
14 Reapportionment Committee.

15 b. Plans submitted electronically must also be accompanied by the paper
16 materials referenced in this section.

17 c. See the Appendix for the technical documentation for the electronic
18 submission of redistricting plans.

19 6. Census Data and Redistricting Materials

20 a. Census population data and census maps will be made available through the
21 Reapportionment Office at a cost determined by the Permanent Legislative
22 Committee on Reapportionment.

23 b. Summary population data at the precinct level and a statewide work maps
24 will be made available to the public through the Reapportionment Office at a cost
25 determined by the Permanent Legislative Committee on Reapportionment.

26 c. All such fees shall be deposited in the state treasury to the credit of the
27 general fund and shall be used to cover the expenses of the Legislature.

28 **Appendix.**

29 **ELECTRONIC SUBMISSION OF REDISTRICTING PLANS**

30 **REAPPORTIONMENT COMMITTEE - STATE OF ALABAMA**

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2 The Legislative Reapportionment Computer System supports the electronic
3 submission of redistricting plans. The electronic submission of these plans must
4 be via email or a flash drive. The software used by the Reapportionment Office is
5 Maptitude.

6 The electronic file should be in DOJ format (Block, district # or district #,
7 Block). This should be a two column, comma delimited file containing the FIPS
8 code for each block, and the district number. Maptitude has an automated plan
9 import that creates a new plan from the block/district assignment list.

10 Web services that can be accessed directly with a URL and ArcView
11 Shapefiles can be viewed as overlays. A new plan would have to be built using this
12 overlay as a guide to assign units into a blank Maptitude plan. In order to analyze
13 the plans with our attribute data, edit, and report on, a new plan will have to be
14 built in Maptitude.

15 In order for plans to be analyzed with our attribute data, to be able to edit,
16 report on, and produce maps in the most efficient, accurate and time saving
17 procedure, electronic submissions are REQUIRED to be in DOJ format.

18 Example: (DOJ FORMAT BLOCK, DISTRICT #)

19 SSCCCTTTTTTBBBBDDDD

20 SS is the 2 digit state FIPS code

21 CCC is the 3 digit county FIPS code

22 TTTTTT is the 6 digit census tract code

23 BBBB is the 4 digit census block code

24 DDDD is the district number, right adjusted

25 **Contact Information:**

26 Legislative Reapportionment Office

27 Room 317, State House

28 11 South Union Street

29 Montgomery, Alabama 36130

30 (334) 261-0706

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1 For questions relating to reapportionment and redistricting, please contact:

2 Donna Overton Loftin, Supervisor

3 Legislative Reapportionment Office

4 donna.overton@alsenate.gov

5 Please Note: The above e-mail address is to be used only for the purposes of
6 obtaining information regarding redistricting. Political messages, including those
7 relative to specific legislation or other political matters, cannot be answered or
8 disseminated via this email to members of the Legislature. Members of the
9 Permanent Legislative Committee on Reapportionment may be contacted through
10 information contained on their Member pages of the Official Website of the
11 Alabama Legislature, legislature.state.al.us/aliswww/default.aspx.

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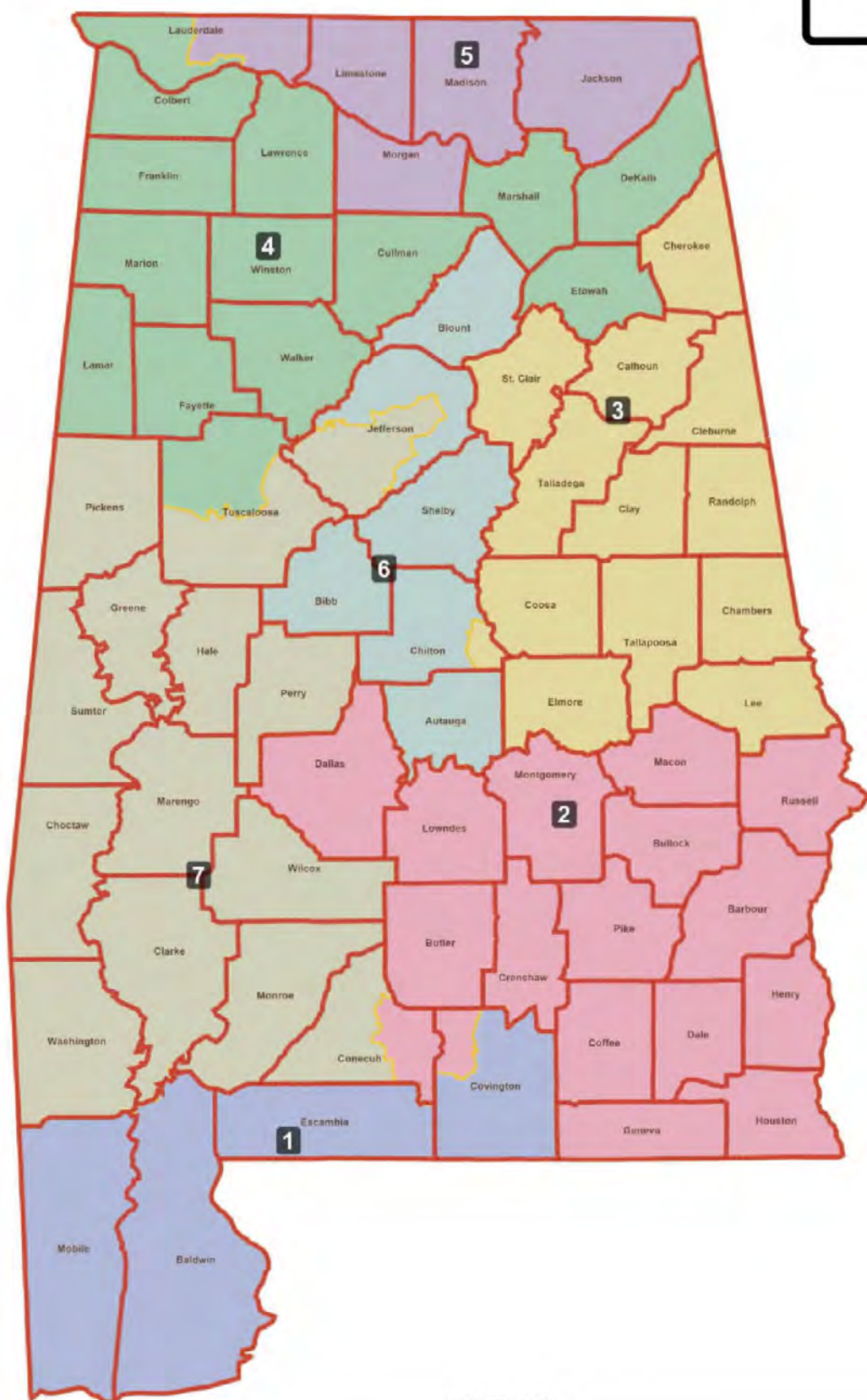
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**Exhibit 6 - Livingston
Deposition**

Community of Interest Plan

Exhibit

6



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User:

Plan Name: Community of Interest

Plan Type: congress

Population Summary

Thursday, July 13, 2023

7:17 PM

District	Population	Deviation	% Devn.	[% White]	[% Black]	[% AP_Wht]	[% AP_Blkl]	[% 18+_Pop]	[% 18+_AP_Blkl]
1	717,754	0	0.00%	65.39%	25.05%	70.33%	26.43%	77.66%	24.6%
2	717,754	0	0.00%	48.51%	42.53%	52.46%	44.24%	77.73%	42.45%
3	717,754	0	0.00%	70.21%	21.28%	74.52%	22.61%	78.73%	21.58%
4	717,754	0	0.00%	81.18%	7.23%	86.36%	8.31%	77.48%	7.7%
5	717,754	0	0.00%	69.62%	17.37%	76.12%	19.06%	78.19%	18.06%
6	717,755	1	0.00%	73.99%	14.98%	79.06%	16.05%	77.03%	14.88%
7	717,754	0	0.00%	39.79%	52.15%	43.05%	53.44%	78.93%	51.55%

Total Population:

5,024,279

Ideal District Population:

717,754

Summary Statistics:

Population Range: 717,754 to 717,755

Ratio Range:

0.00

Absolute Range:

0 to 1

Absolute Overall Range:

1

Relative Range: 0.00% to 0.00%

0.00%

Relative Overall Range:

0.14

Absolute Mean Deviation:

0.00%

Relative Mean Deviation:

0.35

Standard Deviation:

Mapitude
For Summarizing

Page 1 of 1

Exhibit 7 - Livingston Deposition**Exhibit****7****COMMUNITY OF INTEREST PLAN**

Year	Race	CD2		CD7	
		% Dem.	% Rep.	% Dem.	% Rep.
2020	Pres.	47.53	51.56	61.94	37.28
2020	U.S. Senate	50.23	49.77	64.19	35.81
2018	Gov.	47.77	52.23	63.89	36.11
2018	A.G.	50.97	49.03	64.34	35.66

23061073.1

RC 049518

Exhibit 8 - Livingston Deposition

Exhibit

8

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ALABAMA LEGISLATURE

Alabama House, Senate Approve Separate Congressional Maps

Jemma Stephenson and Alander Rocha, Alabama Reflector , July 20, 2023

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Sen. Livingston discusses his districting map, behind him, during a special session, Wednesday, July 19, 2023 in Montgomery, Ala. (Alabama Reflector Photo by Stew Milne)

Republican supermajorities in the Alabama House and Senate approved two separate congressional maps with a single majority-Black congressional district and one with a Black population ranging from 38% to 42%.

Democrats in both chambers, who support maps with two majority-Black districts, opposed both proposals and said they would not satisfy federal courts that ruled that the state's earlier congressional maps violate the Voting Rights Act.

"We were screaming this and screaming this last time we drew these districts," said Sen. Rodger Smitherman, D-Birmingham.

The House of Representatives voted 74-27, with two abstentions, for a map with a 51.55% Black district and a 42.45% Black district. The

ALABAMA REFLECTOR

Senate voted 24-8 for a map that established two Black districts of 38.31% and 50.43%. Sen. Andrew Jones, R-Centre, was the only Republican in either chamber to vote against the maps; the Republican Senate proposal splits Etowah County, part of Jones' district, between two congressional districts, which Jones said his constituents oppose.

The votes came about six weeks after the U.S. Supreme Court [upheld a 2022 lower court ruling](#) that Alabama's congressional maps violated the Voting Rights Act. The case, *Allen v. Milligan*, was brought by Black plaintiffs who said the map adopted in 2021 packed Black voters into the state's 7th Congressional District, making it harder for them to form alliances with white voters and elect the leaders of their choosing.

The three-judge panel ruled for the plaintiffs, citing the intense racial polarization of voting in Alabama, where white Alabamians tend to support Republicans and Black Alabamians tend to support Democrats. It ordered the state to draw new maps that at a minimum gave Black voters the opportunity to elect two representatives of their choice.

The Legislature must submit new congressional maps to the federal court by Friday. If it misses the deadline, or if the court considers the map unsatisfactory, it could order a third party, known as a special master, to draw maps for it.

The bills approved by the chambers Wednesday will likely not be the maps the court gets. Sen. Steve Livingston, R-Scottsboro, [who sponsored the Republican Senate proposal](#), said he expected work on a "new map" to begin on Thursday as a compromise between Republicans in the chamber.

“I don’t think it will be proposed tomorrow, but I think there will be a new map worked on tomorrow I would expect, yes,” Livingston said.

Livingston said Senate Republicans began working on their own map because the committee “got some information” that led them to prioritize “compactness and communities of interest being as important as the Black Voting Age Population.” Livingston, who did not say where the information came from, said he had not heard concerns from senators about districts being over 40% Black.

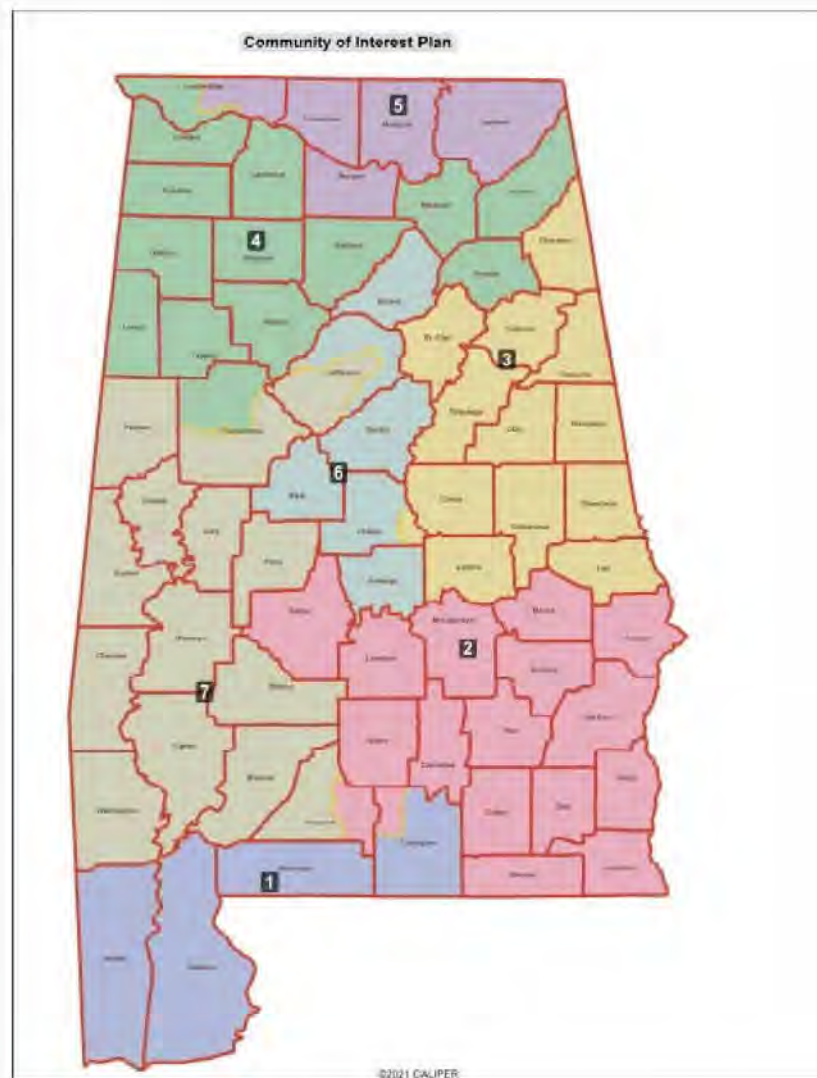
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Remedies

The “Community of Interest” plan, a proposed congressional map, was adopted by the Alabama House on July 19, 2023. (Alabama Legislature)

The maps, sponsored by Livingston and the reapportionment committees’ co-chair Rep. Chris Pringle, R-Mobile, mainly alter the boundaries of the 7th and 2nd Congressional Districts.

The House map adds heavily-Democratic Dallas and Lowndes counties to the 2nd Congressional District; puts all of Democratic-leaning Montgomery in the district and removes



heavily-Republican Autauga and Elmore counties. The Senate map keeps Elmore

The "Community of Interest" plan, a proposed congressional map, was adopted by the Alabama House on July 19, 2023. (Alabama Legislature)

County in the 2nd district and puts all of Montgomery in the district but does not add any other Democratic-leaning counties to the district.

Democrats and Republicans clashed Wednesday over what the court would consider an acceptable proposal. The three-judge panel wrote in January 2022 that the Legislature should "include 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."

Pringle and Livingston repeatedly cited that language during the debates on Wednesday, saying Black voters could elect their preferred candidates without constituting a majority.

"(The court ruling) clearly said we are either to draw another majority-minority district, or a district that provides the opportunity for the minority to elect the candidate of their choosing," Pringle said.

Livingston said he believed a Democrat could win a congressional district that is 38% Black.

"The question is, what is the opportunity there?" the senator said after the vote on Wednesday. "I think everybody has a different interpretation of what opportunity is."

The judges, however, went on to write in the January 2022 opinion that the "practical reality" was 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." House Democrats said 42% does not come close to that.

"You cannot be the minority in population and elect your person of choice," House Minority Leader Anthony Daniels, D-Huntsville, said after the vote on Wednesday. "You don't have the numbers to do that."

Senate Democrats were also skeptical. Senate Minority Leader Bobby Singleton, D-Greensboro, said that the 2nd Congressional District proposed by the Senate would have been carried by President Donald Trump by 12 points.



This proposed congressional map, sponsored by Sen. Steve Livingston, R-Scottsboro, would create a 7th congressional district that would be a little over 50% Black and a 2nd congressional district that would be about 38% Black. (Permanent Legislative Reapportionment Committee)

“I would say that the map that my colleague across the aisle has at 38% doesn’t meet that burden of ‘quote close’ to it,” said Sen. Merika Coleman, D-Pleasant Grove.

During the process, Democrats have criticized a lack of transparency in the process as the Republican maps were not offered during the public hearing, and the Livingston map was offered in committee. Senate Democrats said they were not given “functionality reports” on the proposed maps, which would show how Democrats might perform in elections in the proposed districts, and complained that they were not consulted in drawing the maps.

“That would have been easy, wouldn’t it?” Singleton asked.

“It would’ve been easy,” agreed Livingston.

Democratic Proposals

Democrats in both chambers supported a map developed by the Milligan plaintiffs. The map would create a 7th Congressional District with a Black population of 54.5% and a

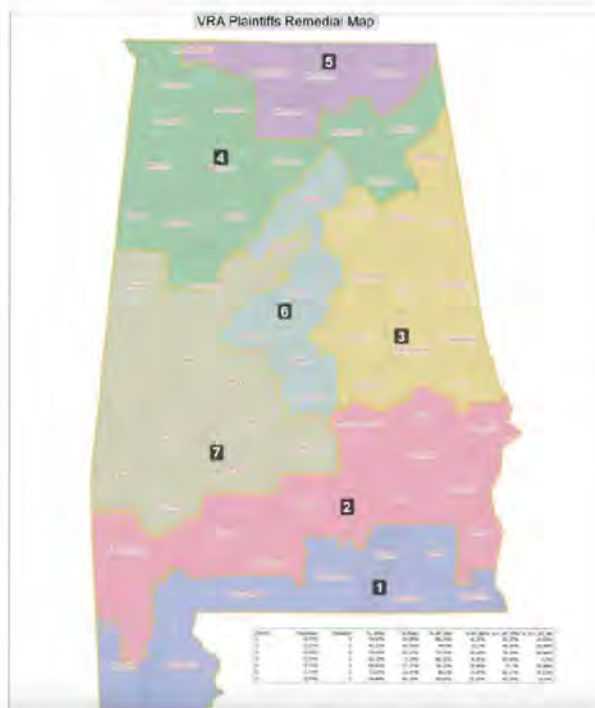
2nd Congressional District – taking in Montgomery; northern Mobile; the eastern Black Belt and several counties north of Mobile – with a Black population just over 50%

Republicans voted down both proposals.

Sen. Vivian Davis Figures, D-Mobile, who sponsored the proposal in the Senate, said that she prayed “that I live long enough to see the day when Alabama can elect officials to the Alabama State Legislature and to Congress that will vote with their hearts.”



Sen. Smitherman discusses an amendment during a special session, Wednesday, July 19, 2023 in Montgomery, Ala. (Alabama Reflector Photo by Stew Milne)



“If you all were the 28% of the population in this state of Alabama, and every constitutional officer in this state was Black and a Democrat, and every judge in the high courts of the state were Black and a Democrat, and you were not listened to nor respected or had your voice heard in this Legislature, how would you feel and what the hell would you do?” she said to her Republican colleagues. “You would raise hell.”

Several Democrats also accused Republicans of brazenly ignoring the court’s directions. Rep. Chris England, D-Tuscaloosa, who sponsored the Milligan plan in the House, sharply criticized Pringle and Livingston,

Sen. Rodger Smitherman, D-Birmingham, discusses a Democratic congressional map proposal during a special session on redistricting on Wednesday, July 19, 2023 in Montgomery, Ala. (Stew Milne for Alabama Reflector)

accusing them of supporting maps that had no public input and of using arguments that the U.S. Supreme Court had already rejected.

“Your map is the quintessential definition of noncompliance,” he said. “It takes rejected arguments and memorializes them in a map and (says) ‘we’re going to give it right back to you and tell you to take it or leave it.’”

Rep. Juandalynn Givan, D-Birmingham, was even more direct.

“I can’t say the word, but you all have basically dropped the F-bomb on the United States Supreme Court,” she said.

Pringle defended the percentages of Black voters, suggesting there was testimony from the Milligan plaintiffs that they would accept the Black population in the 2nd district.

“There are filings and sworn testimony that 40% BVAP (Black Voting Age Population) would perform well enough to elect the candidate of their choosing,” he said.

Democrats said afterward that those percentages would only potentially work in urban counties like Jefferson or Madison, where there is more racial crossover in voting, and not the rural Wiregrass, the heart of the 2nd Congressional District, where racial polarization is high.

“The Supreme Court’s decision was squarely that the state of Alabama had to redraw a map that gave two majority-minority districts or something close to it,” said Rep. Prince Chestnut, D-Selma. “So bringing in some extraneous statement that may or may not have taken place is irrelevant to the context for why we as a Legislature are here today.”

Senate Democrats proposed several different maps, some of which would have drawn Jefferson County, the home of Birmingham, into its own congressional district. Those proposals were also voted down.

“If you look at the map that we are to consider today, it busted up Jefferson County like one of those atomic bombs,” Smitherman said.

Both Pringle and Livingston's maps keep Mobile paired with Baldwin County, a deep red area with a Black population of under 8%. Democratic proposals put a portion of Mobile in the 7th Congressional District in the Black Belt. Rep. Barbara Drummond, D-Mobile, felt that her constituents have more in common with the Black Belt than the larger coastal area.

"Do [Black Alabamians in Mobile] have a lineage from Baldwin County?" she asked.

The Pringle map goes to the Senate committee Thursday, while the Livingston map goes to the House committee. The maps need to pass both chambers Friday. A conference committee would need to take place for a new map to be submitted to the Legislature by the deadline.

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JEFFERSON COUNTY COMMISSION

In Search of Midnight Oil: JeffCo County Manager Preparing for Annual Budget Hearings

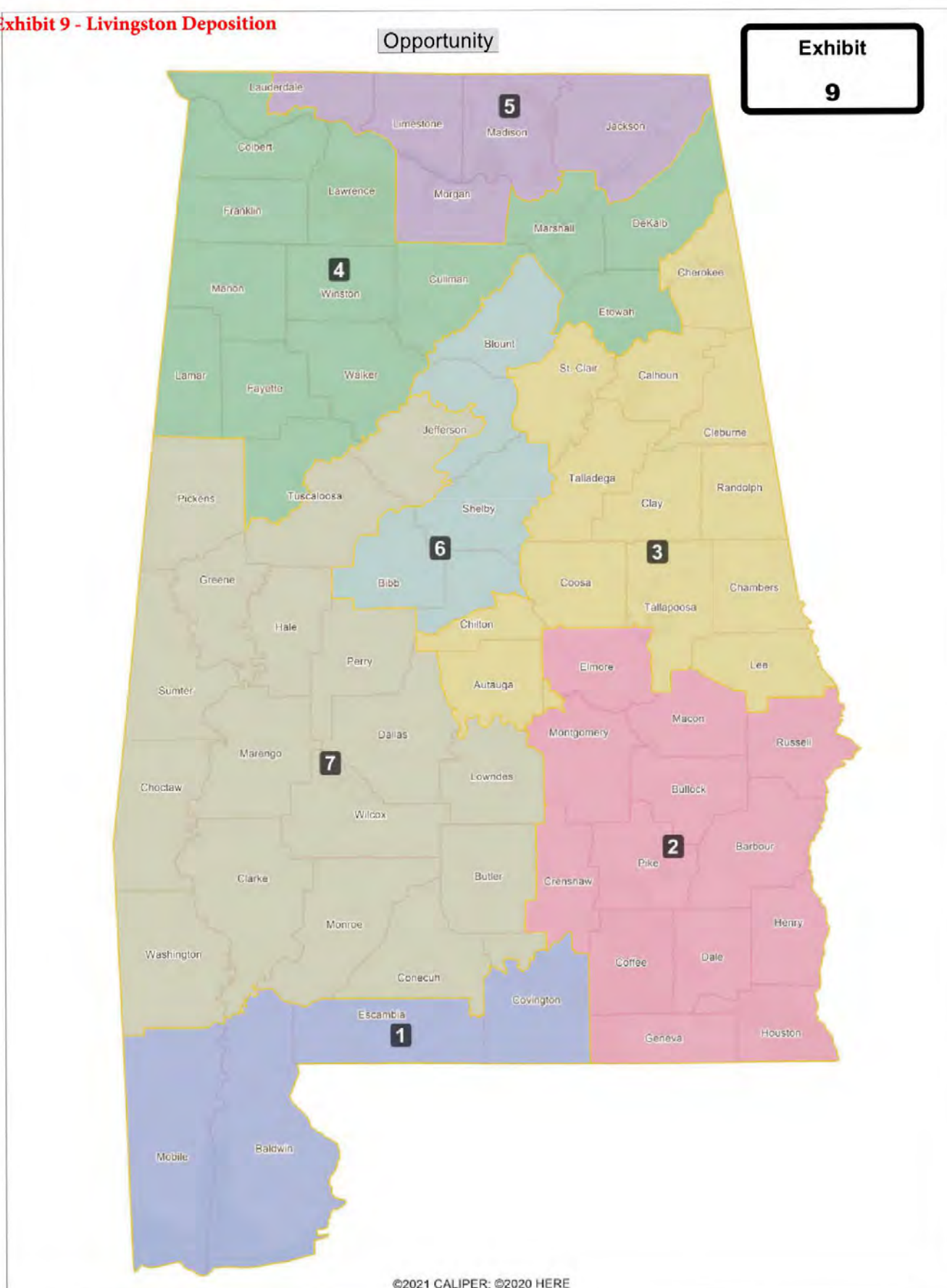
July 27, 2023

County Manager Cal Markert displayed a wry smile when asked if he is looking forward to budget hearings in August.

"I look forward to it being over and done, I guess," he said after the Jefferson County Commission's meeting today in Bessemer. "It's coming up and we've got to do it. It's just a lot of extra work. Not extra work but a lot of work."

Setting the county's budget is an annual balancing act of determining where funds can be allotted to accomplish needed projects, and it involves hearings during which department heads meet with Markert and county commissioners to make their case for requested funds during fiscal 2024. [Read more.](#)

Exhibit 9 - Livingston Deposition



**Exhibit 10 - Livingston
Deposition**

[Livingston Congressional Plan 2-2023]

Exhibit

10



©2021 CALIPER; ©2020 HERE

User:
Plan Name: livingston congressional plan 2 (compact 2)
Plan Type:

Population Summary

Tuesday, July 18, 2023

9:53 AM

District	Population	Devn.	% Devn.	[% White]	[% Black]	[% AP_Wht]	[% AP_Blk]	[% 18+ _AP_Wht]	[% 18+ _AP_Blk]
1	717,754	0	0.00%	65.36%	25.07%	70.31%	26.46%	71.9%	24.63%
2	717,754	0	0.00%	52.37%	38.31%	56.57%	39.99%	58.15%	38.31%
3	717,754	0	0.00%	70.42%	20.82%	74.76%	22.21%	75.59%	21.13%
4	717,754	0	0.00%	81.71%	6.38%	86.96%	7.34%	88.33%	6.74%
5	717,754	0	0.00%	69.62%	17.37%	76.12%	19.06%	77.1%	18.06%
6	717,754	0	0.00%	67.75%	21.54%	72.52%	22.7%	74%	21.34%
7	717,755	1	0.00%	41.46%	51.09%	44.66%	52.38%	46.68%	50.43%

Total Population: 5,024,279
Ideal District Population: 717,754

Summary Statistics:

Population Range: 717,754 to 717,755
Ratio Range: 0.00
Absolute Range: 0 to 1
Absolute Overall Range: 1
Relative Range: 0.00% to 0.00%
Relative Overall Range: 0.00%
Absolute Mean Deviation: 0.14
Relative Mean Deviation: 0.00%
Standard Deviation: 0.35

Mapitude

Page 1 of 1



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Exhibit 11 - Livingston Deposition

RISE TO THE MOMENT OF TRUTH
TUESDAY, AUGUST 1, 2023

Exhibit

11

News

House, Senate committees narrow redistricting plans down to two

[Caleb Taylor](#) | 07.18.23



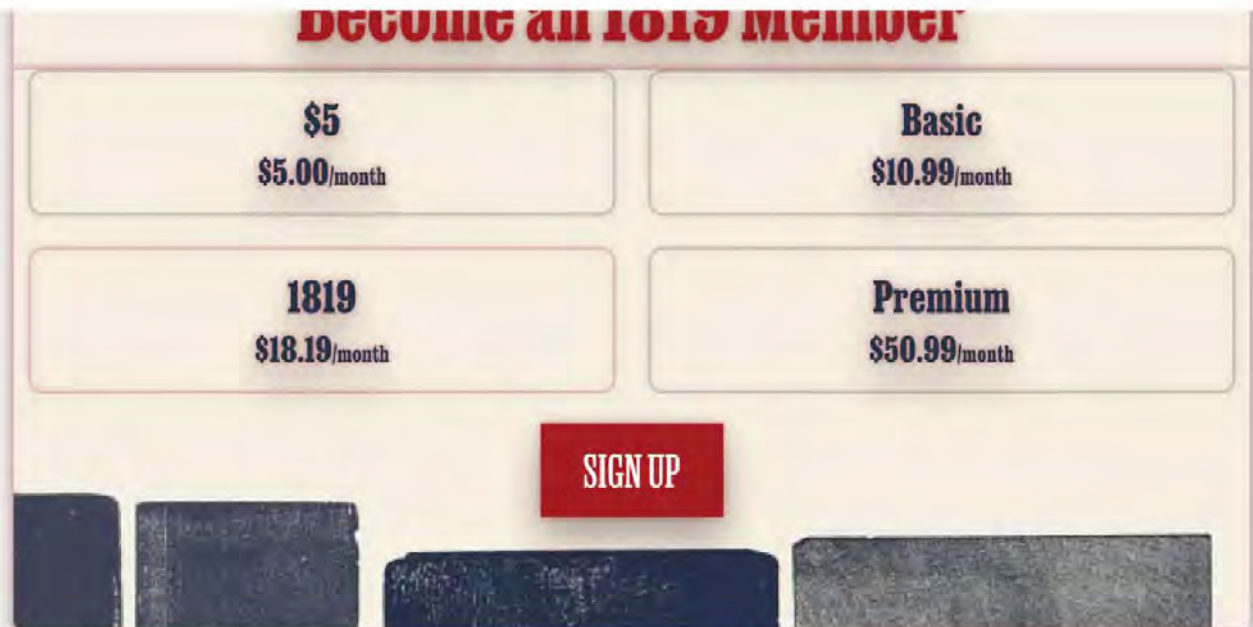
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MONTGOMERY — Members of House and Senate committees advanced two redistricting maps on Tuesday morning.

Members of the House State Government Committee passed the [Community of Interest Plan](#) by State Rep. Chris Pringle (R-Mobile) that the reapportionment committee passed on Monday.





The plan keeps all of Mobile and Baldwin Counties in the first congressional district.

Pringle said on Monday the plan increases the second congressional district's black voting age population from 31.86% to 42.45%.

Members of the Senate Confirmations Committee passed an amended version of the Community Interest Plan by State Sen. Steve Livingston (R-Scottsboro) by an 11-5 margin that features a second congressional district with an approximately 38% black voting age population.



"This plan is based on neutral principles promoting communities of interest in the gulf, Black Belt, and the Wiregrass ensuring that the state's long-term principles of compact districts is given a fuller and fairer effect," Livingston said at the meeting. "While the plan is not graded based on race, the result is fairly applied with these neutral principles and the (black voting age population) in district two, which was in the existing map was like around 30%, is now 38.8% in this plan. District seven preserves a core which is 50.43% (black voting age population). This plan complies with the Voting Rights Act."

The plan was supported by every Republican on the Senate committee besides State Sen. Andrew Jones (R-Centre).

"I've heard from my locals in Etowah County," Jones said. "I haven't looked at the data, but I imagine for over 50 years or better they've been whole. Not only in this map do they get a new Congressman, that's fine. My district certainly has two congressmen at the moment, but it splits looks to be maybe 10% of the population out of the county which has historically been whole. My folks have been very clear that they want to stick together because they're kind of a regional hub."

Democrats on the committee opposed the plan because they said a 38% black voting-age population in the second congressional district wasn't a high enough percentage to elect a minority congressman.

Multiple other maps filed by Democrats didn't advance in either committee.

The [U.S. Supreme Court](#) upheld with a 5-4 vote in June a lower court's decision to require the Alabama Legislature to redraw their congressional districts passed in 2021 to include a second largely or majority-black congressional district.

Alabama's seventh congressional district is currently the only majority-black congressional district in Alabama. It is held by U.S. Rep. Terri Sewell (D-Birmingham).

To connect with the author of this story or to comment, email caleb.taylor@1819News.com.

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Tags: [redistricting](#) [alabama news](#) [congressional districts](#)

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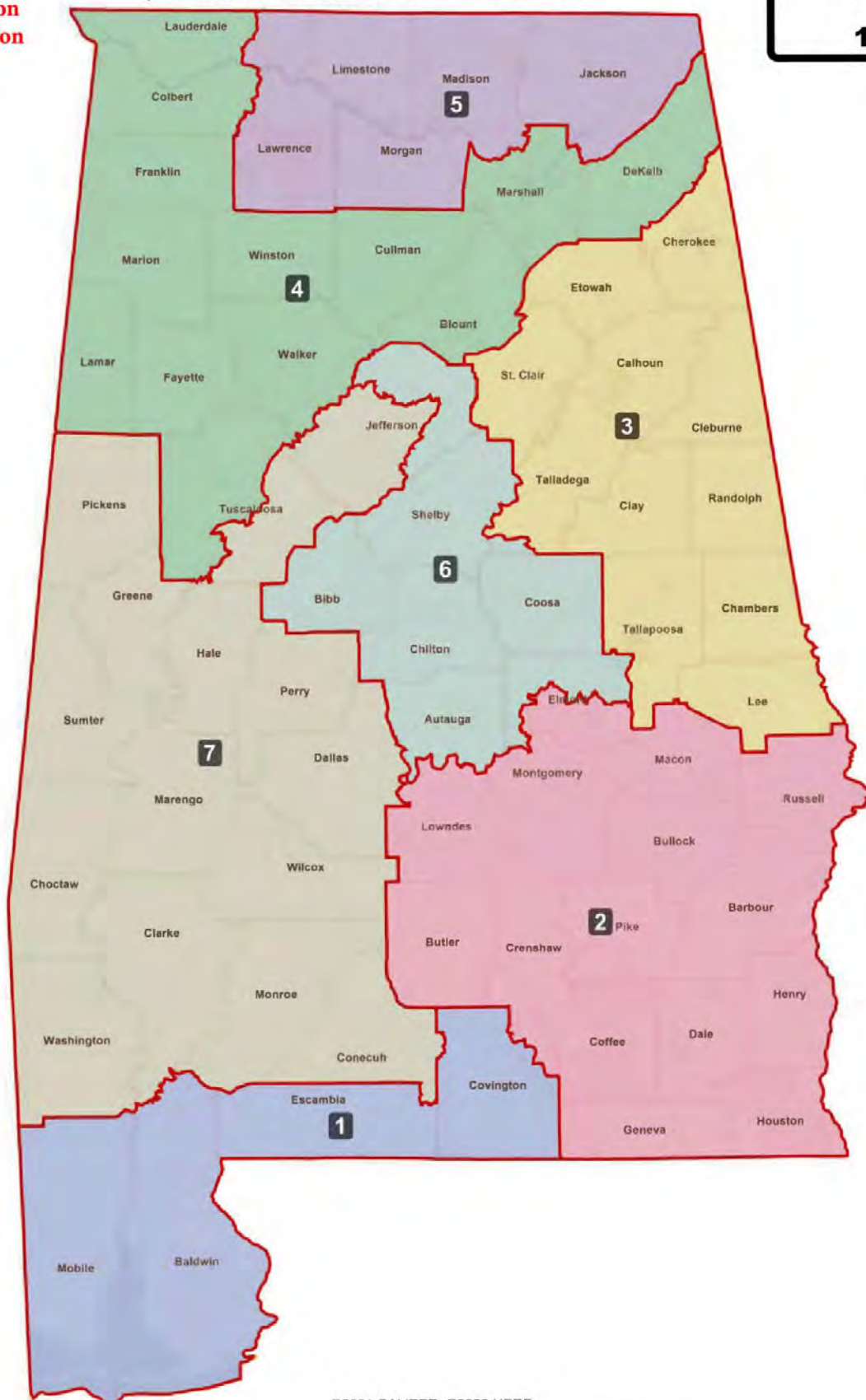
Featured Local Savings

**Exhibit 12 -
Livingston
Deposition**

Livingston Congressional Plan 3-2023

Exhibit

12



User:
Plan Name: Livingston Congressional Plan 3
Plan Type:

Population Summary

Thursday, July 20, 2023 7:14 PM

District	Population	Deviation	% Devn.	[% White]	[% Black]	[% AP_Wht]	[% AP_Blkl]	[% 18+ _Blkl]	[% 18+ _AP_Blkl]
1	717,754	0	0.00%	65.36%	25.07%	70.31%	26.46%	23.8%	24.63%
2	717,755	1	0.00%	50.86%	39.93%	54.97%	41.63%	38.83%	39.93%
3	717,754	0	0.00%	70.79%	20.39%	75.16%	21.76%	19.93%	20.7%
4	717,754	0	0.00%	81.53%	6.93%	86.55%	7.9%	6.74%	7.22%
5	717,754	0	0.00%	69.02%	17.59%	75.72%	19.29%	17.33%	18.33%
6	717,754	0	0.00%	70.23%	19.36%	75.03%	20.51%	18.58%	19.26%
7	717,754	0	0.00%	40.89%	51.32%	44.15%	52.59%	49.68%	50.65%

Total Population:

5,024,279

Ideal District Population:

717,754

Summary Statistics:

Population Range:

717,754 to 717,755

Ratio Range:

0.00

Absolute Range:

0 to 1

Absolute Overall Range:

1

Relative Range:

0.00% to 0.00%

Relative Overall Range:

0.00%

Absolute Mean Deviation:

0.14

Relative Mean Deviation:

0.00%

Standard Deviation:

0.35

Mapitude
For Ballotting

Page 1 of 1

Exhibit 13- Case 2:21-cv-01530-AMM Document 200-3 Filed 07/28/23 Page 1 of 1
Livingston Deposition**FILED**2023 Jul-28 PM 10:59
U.S. DISTRICT COURT
N.D. OF ALABAMA

Democrat CD	2018 AG	2018 GOV	2018 LTGOV	2018 AUD	2018 SOS	2020 PRES	2020 SEN	Average
1	39.2%	38.5%	36.7%	37.6%	36.9%	34.8%	38.2%	37.4%
2	48.5%	45.3%	46.0%	46.8%	46.0%	45.6%	48.0%	46.6%
3	33.3%	32.6%	31.2%	31.8%	31.5%	29.3%	31.9%	31.6%
4	24.8%	24.8%	21.7%	22.6%	21.7%	18.6%	21.9%	22.3%
5	39.2%	38.6%	36.8%	38.0%	37.4%	36.2%	39.5%	37.9%
6	35.6%	36.2%	32.8%	33.7%	33.2%	33.4%	35.9%	34.4%
7	64.7%	64.0%	62.9%	63.2%	62.9%	61.6%	63.4%	63.2%

Republican CD	2018 AG	2018 GOV	2018 LTGOV	2018 AUD	2018 SOS	2020 PRES	2020 SEN	Average
1	60.8%	61.5%	63.3%	62.4%	63.1%	65.2%	61.8%	62.6%
2	51.5%	54.7%	54.0%	53.2%	54.0%	54.4%	52.0%	53.4%
3	66.7%	67.4%	68.8%	68.2%	68.5%	70.7%	68.1%	68.4%
4	75.2%	75.2%	78.3%	77.4%	78.3%	81.4%	78.1%	77.7%
5	60.8%	61.4%	63.2%	62.0%	62.6%	63.8%	60.5%	62.1%
6	64.4%	63.8%	67.2%	66.3%	66.8%	66.6%	64.1%	65.6%
7	35.3%	36.0%	37.1%	36.8%	37.1%	38.4%	36.6%	36.8%

Exhibit**13**

Exhibit 14 - Livingston Deposition



ALABAMA REFLECTOR



GOVERNMENT & POLITICS

Exhibit

14

Alabama Legislature passes controversial congressional map

The approved map aims to address court ruling, but leads to tensions and claims of voter suppression

BY: **ALANDER ROCHA AND JEMMA STEPHENSON** - JULY 21, 2023 6:34 PM



📷 A group of House Republicans speak during a special session of the Alabama Legislature on July 21, 2023. Clockwise from left: Rep. Marcus Parramore, R-Troy; Rep. Steve Clouse, R-Geneva; Rep. Paul Lee, R-Dothan; Rep. Chris Pringle, R-Mobile. The fifth person is unknown. (Stew Milne for Alabama Reflector)

The Alabama Legislature Friday afternoon approved a congressional map that would lower the percentage of Alabama's current majority-Black district and create a district in southeast

Alabama that would be nearly 40% Black.

The proposed map passed the House on a 75-28 vote Friday after it passed the Senate 24-6. Alabama Gov. Kay Ivey signed the maps on Friday evening.

The new maps aim to address a federal court ruling early last year that Alabama's 2021 congressional map violated Section 2 of the Voting Rights Act by packing Black voters in a single district. The court called for the drawing of new maps that would give Black voters a chance to elect their preferred candidates.

But Democrats and Republicans clashed during a weeklong special session over the appropriate remedy. Nearly all Republicans in the Legislature voted for the proposed maps on Friday; all the Democrats present voted against them.



📷 From left, Rep. Chris Pringle, R-Mobile; Rep. Chris Sells, R-Greenville and Sen. Steve Livingston, R-Scottsboro listen during a special session on redistricting on Friday, July 21, 2023 in Montgomery, Alabama. (Stew Milne for Alabama Reflector)

The new map mainly changes the 2nd Congressional District in southeastern Alabama and the 7th Congressional District in western Alabama, currently the state's single majority-Black district.

Under the proposed map, the 2nd Congressional District will have a Black voting age population of 39.93%. The 7th Congressional District will have a Black voting age population of 50.65%, lower than the district's current Black voting age population.

A three-judge panel of the U.S. 11th Circuit Court of Appeals is scheduled to hold a hearing on the map on Aug. 14.

Sen. Steve Livingston, R-Scottsboro, the co-chair of the Permanent Legislative Reapportionment Committee and the sponsor of the map, said Friday that Republicans prioritized compactness and communities of interest, which led to a 40% Black district. Livingston said there was not a conscious attempt to reach that number.

“There are three legs and in the suit, the court’s order and those are two of the three legs,” he said to reporters.



📍 The Livingston Congressional Plan 3 map passed during a special session on redistricting on Friday, July 21, 2023 in Montgomery, Alabama. (Stew Milne for Alabama Reflector)

Democrats said that the map was pushed through without public input. Rep. Chris England, D-Tuscaloosa, said during the vote Friday that that was the first time many were seeing the proposed map, which was the third iteration of the Livingston map, and said it’s “one of the three maps that’s gone through the entire process, that has managed to avoid public scrutiny.”

“You are unfortunately going to be memorialized in history,” England said to Rep. Chris Pringle, R-Mobile, the other reapportionment committee co-chair.

The 40% represented a midway point between a Senate Republican-supported map that would have set the Black population in the 2nd Congressional District at 38%, and a House Republican proposal that would have set it at 42%. Democrats did not support a single plan, but most members wanted a map with two majority-Black districts, which they said would be the only way to satisfy the court.

“It’s like you were told to create an additional opportunity district, but you even lessen the opportunities in the other district, and I guess I don’t quite get that – I don’t quite understand

that – you got all the marbles, and you want even more marbles,” Rep. Prince Chestnut, D-Selma said.

Pringle said that was the best they could do.

“We do the very best we can in the bills we sponsor,” he said. “But oftentimes we have to work with the other body. The other body has as much say in what happens as we do. This is the best map we can negotiate with the other body.”

Redistricting principles

The bill also put redistricting principles into law.

Some require maps have no more than six county line splits, which the bill says is the minimum needed for minimal population deviation. In the map passed, the 2nd Congressional District has a deviation of “1.”

Maps are not to place incumbents in the same district, and they are not to split communities of interest, both of which appeared to be priorities for Republican lawmakers throughout the special session.



📷 Sen. Rodger Smitherman, D-Birmingham, discusses district maps during a special session on redistricting on Friday, July 21, 2023 in Montgomery, Alabama. (Stew Milne for Alabama Reflector)

"I bet you that when the election come if this plan is accepted, that it won't be a change and nobody in Congress," Sen. Rodger Smitherman, D-Birmingham, said.

Rep. Sam Jones, D-Mobile, said the Legislature chose to redefine what a community of interest is, because they think they can get away with it.

"But [community of interest] was actually defined by the state and recognize the similarities of interests, including and not limited to, ethnic, racial, economic, tribal, social, geographic or historical identities. That's what the state of Alabama and the courts have found," Jones said.



Rep. Sam Jones, D-Mobile, speaks during a special session on redistricting on Friday, July 21, 2023 in Montgomery, Alabama. (Stew Milne for Alabama Reflector)

The principles also include a list of "non-negotiable" provisions, including preserving cores of existing districts; minimizing numbers of counties of each districts; minimizing splits in neighborhoods and political subdivisions; keeping communities of interest together, defined by a list including transportation infrastructure and geographic features but not race; that the weighing of communities of interest is best decided by lawmakers; and it is best to split communities of interest into two rather than three districts.

In the list of "non-negotiable" provisions, the Black Belt, Wiregrass and Gulf Coast were defined as communities of interest. The Supreme Court, in the majority opinion, had included that keeping the Black Belt together took precedence over the Gulf Coast.

Livingston Plan 3 keeps the Gulf Coast together but not the Black Belt. The bill says that the Black Belt cannot be in one county, so the 18 counties should be split into two districts.

Chestnut said the state continues to do things differently from what is expected.

"Throughout history, it's as if the courts is always the only way that we as Black people are able to get gains in the state of Alabama," he said.

Approaches



Sen. Merika Coleman, D-Pleasant Grove (left, at podium) speaks in opposition to a Republican-supported congressional map as Senate Republicans (right) huddle in a corner on July 21, 2023 in Montgomery, Alabama. The Alabama Legislature was expected to approve GOP congressional maps, which Democrats say will not satisfy a federal court order. (Brian Lyman/Alabama Reflector)

Alabama was ordered to redraw its congressional districts after the U.S. Supreme Court upheld a lower court ruling in 2022, which found that the state's congressional maps violated the Voting Rights Act. The case, known as *Allen v. Milligan*, was brought by Black plaintiffs who argued that the 2021 adopted map unfairly concentrated Black voters in the 7th Congressional District, making it difficult for them to form alliances with white voters and elect their preferred representatives.

In January 2022, a three-judge panel ruled in favor of the plaintiffs. The judges cited the significant racial polarization in Alabama's voting patterns, with white voters largely supporting Republicans and Black voters tending to favor Democrats. As a remedy, the court ordered the state to create new congressional maps that would, at the very least, provide Black voters with the opportunity to elect two representatives of their choice.

The U.S. Supreme Court [upheld the lower court ruling in June](#). The Legislature had to approve the maps by Friday.

Republicans and Democrats clashed throughout the special session about what remedies would satisfy the court. Pringle and Livingston zeroed in on language in the 2022 ruling that said that a second district would need to give Black voters an “opportunity” to elect their preferred representatives. The legislators argue that a district would not need to have a majority-Black population to achieve that.



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“I know everybody seems to do it differently, but I wish they defined opportunity a lot better,” Livingston said after the Senate approved the proposal. “It would have helped everybody in this decision-making process.”

Democrats said racially-polarized voting in the state meant that a majority-Black district was critical for Black Alabamians to be able to select their preferred candidates. House Democrats said Wednesday that while a 38 to 42% Black district might be winnable for Democrats in urban counties like Jefferson or Madison, with more racial crossover in voting, it would be impossible in the rural Wiregrass, where they said such crossover voting is almost nonexistent.

The weeklong session drew national attention. Republicans have a slim majority in the U.S. House that could shift with the loss of five seats. Livingston said Friday he had spoken with U.S. House Speaker Kevin McCarthy, R-California.

“He said ‘I’m interested in keeping my majority,’” Livingston said. “That was basically his conversation ... he’s just telling us to do what we can do. We did the best we could.”



Alabama House Speaker Nathaniel Ledbetter, R-Rainsville, gavels the session back to order during a special session on redistricting on Friday, July 21, 2023 in Montgomery, Alabama. (Stew Milne for Alabama Reflector)

Alabama House Speaker Nathaniel Ledbetter, R-Rainsville, said that the increased minority population in the 2nd Congressional District and efforts to make districts more compact will help the state prevail in court.

“If you think about where we were, the Supreme Court ruling was 5-4. So, there’s just one judge needed to see something different,” Ledbetter said to reporters after the map’s passage.

“And I think the movement that we have and what we’ve come to compromise today is a good shot.”

In a news release from the NAACP Legal Defense Fund, the plaintiffs in the Milligan case said that they are not satisfied with the plan, and said they believe it violates the court order and the Voting Rights Act.

“Let’s be clear: The Alabama Legislature believes it is above the law,” the plaintiffs said in the statement. “What we are dealing with is a group of lawmakers who are blatantly disregarding not just the Voting Rights Act, but a decision from the U.S. Supreme Court and a court order from the three-judge district court.”

Implications

Several Democrats said during debates Friday that they believed Republicans were trying to get rid of the Voting Rights Act entirely.

“This is designed to protect a few people and ultimately trying to finish off the Voting Rights Act,” England said.

Senate Minority Leader Bobby Singleton, D-Greensboro, said that he thinks that the Republican supermajority Senate is trying to draw a map where there were no Black elected officials.

“I guess you made America great again when you’re making sure you silence the voice of Black folk in this state,” he said.



Senate Minority Leader Bobby Singleton, D-Greensboro, during a special session on redistricting on Friday, July 21, 2023 in Montgomery, Alabama. (Stew Milne for Alabama Reflector)

He said they never sat down with a demographer and legal team together. He said they could have rejected their feedback, but they were never allowed to give feedback.

Smitherman invoked Alabama’s Jim Crow era, when Black Alabamians were disenfranchised by white officials.

He suggested that the state could return to the literacy tests given to voters, which infamously included impossible or near impossible questions for Black would-be voters.

“Getting folks to count jelly beans in jars and being able to recite the Constitution,” he said.

England said that he will put his money and hope in the federal courts.

“Hopefully, they will save Alabama from themselves,” he said.

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ALANDER ROCHA  

Alander Rocha is a journalist based in Montgomery, and he reports on government, policy and healthcare. He previously worked for KFF Health News and the Red & Black, Georgia's student newspaper. He is a Tulane and Georgia alumnus with a two-year stint in the U.S. Peace Corps.

MORE FROM AUTHOR



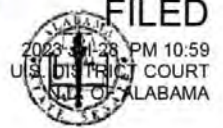
JEMMA STEPHENSON  

Jemma Stephenson covers education as a reporter for the Alabama Reflector. She previously worked at the Montgomery Advertiser and graduated from the Columbia University Graduate School of Journalism.

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RELATED NEWS

Exhibit 15- Case 2:21-cv-01530-AMM Document 200-4 Filed 07/28/23 Page 1 of 12
Livingston
Deposition SB5 ENROLLED



1 XBT977-3
2 By Senator Livingston
3 RFD: Conference Committee on SB5
4 First Read: 17-Jul-23
5 2023 Second Special Session

ACT #2023 - 563

Exhibit
15





SB5 Enrolled

1 Enrolled, An Act,

2
3
4 To amend Section 17-14-70, Code of Alabama 1975, to
5 provide for the reapportionment and redistricting of the
6 state's United States Congressional districts for the purpose
7 of electing members at the General Election in 2024 and
8 thereafter, until the release of the next federal census; and
9 to add Section 17-40-70.1 to the Code of Alabama 1975, to
10 provide legislative findings.

11 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

12 Section 1. Section 17-14-70.1 is added to the Code of
13 Alabama 1975, to read as follows.

14 §17-14-70.1

15 The Legislature finds and declares the following:

16 (1) The Legislature adheres to traditional
17 redistricting principles when adopting congressional
18 districts. Such principles are the product of history,
19 tradition, bipartisan consensus, and legal precedent. The
20 Supreme Court of the United States recently clarified that
21 Section 2 of the Voting Rights Act "never requires adoption of
22 districts that violate traditional redistricting principles."

23 (2) The Legislature's intent in adopting the
24 congressional plan in this act described in Section 17-14-70.1
25 is to comply with federal law, including the U.S. Constitution
26 and the Voting Rights Act of 1965, as amended.

27 (3) The Legislature's intent is also to promote the
28 following traditional redistricting principles, which are



SB5 Enrolled

29 given effect in the plan created by this act:

30 a. Districts shall be based on total population as
31 reported by the federal decennial census and shall have
32 minimal population deviation.

33 b. Districts shall be composed of contiguous geography,
34 meaning that every part of every district is contiguous with
35 every other part of the same district.

36 c. Districts shall be composed of reasonably compact
37 geography.

38 d. The congressional districting plan shall contain no
39 more than six splits of county lines, which is the minimum
40 number necessary to achieve minimal population deviation among
41 the districts. Two splits within one county is considered two
42 splits of county lines.

43 e. The congressional districting plan shall keep
44 together communities of interest, as further provided for in
45 subdivision (4).

46 f. The congressional districting plan shall not pair
47 incumbent members of Congress within the same district.

48 g. The principles described in this subdivision are
49 non-negotiable for the Legislature. To the extent the
50 following principles can be given effect consistent with the
51 principles above, the congressional districting plan shall
52 also do all of the following:

- 53 1. Preserve the cores of existing districts.
- 54 2. Minimize the number of counties in each district.
- 55 3. Minimize splits of neighborhoods and other political
56 subdivisions in addition to minimizing the splits of counties



SB5 Enrolled

57 and communities of interest.

58 (4)a. A community of interest is a defined area of the
59 state that may be characterized by, among other commonalities,
60 shared economic interests, geographic features, transportation
61 infrastructure, broadcast and print media, educational
62 institutions, and historical or cultural factors.

63 b. The discernment, weighing, and balancing of the
64 varied factors that contribute to communities of interest is
65 an intensely political process best carried out by elected
66 representatives of the people.

67 c. If it is necessary to divide a community of interest
68 between congressional districts to promote other traditional
69 districting principles like compactness, contiguity, or equal
70 population, division into two districts is preferable to
71 division into three or more districts. Because each community
72 of interest is different, the division of one community among
73 multiple districts may be more or less significant to the
74 community than the division of another community.

75 d. The Legislature declares that at least the three
76 following regions are communities of interest that shall be
77 kept together to the fullest extent possible in this
78 congressional redistricting plan: the Black Belt, the Gulf
79 Coast, and the Wiregrass.

80 e.1. Alabama's Black Belt region is a community of
81 interest composed of the following 18 core counties: Barbour,
82 Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale,
83 Lowndes, Macon, Marengo, Montgomery, Perry, Pickens, Pike,
84 Russell, Sumter, and Wilcox. Moreover, the following five



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85 counties are sometimes considered part of the Black Belt:

86 Clarke, Conecuh, Escambia, Monroe, and Washington.

87 2. The Black Belt is characterized by its rural
88 geography, fertile soil, and relative poverty, which have
89 shaped its unique history and culture.

90 3. The Black Belt region spans the width of Alabama
91 from the Mississippi boarder to the Georgia border.

92 4. Because the Black Belt counties cannot be combined
93 within one district without causing other districts to violate
94 the principle of equal population among districts, the 18 core
95 Black Belt counties shall be placed into two reasonably
96 compact districts, the fewest number of districts in which
97 this community of interest can be placed. Moreover, of the
98 five other counties sometimes considered part of the Black
99 Belt, four of those counties are included within the two Black
100 Belt districts - Districts 2 and 7.

101 f.1. Alabama's Gulf Coast region is a community of
102 interest composed of Mobile and Baldwin Counties.

103 2. Owing to Mobile Bay and the Gulf of Mexico
104 coastline, these counties also comprise a well-known and
105 well-defined community with a long history and unique
106 interests. Over the past half-century, Baldwin and Mobile
107 Counties have grown even more alike as the tourism industry
108 has grown and the development of highways and bay-crossing
109 bridges have made it easier to commute between the two
110 counties.

111 3. The Gulf Coast community has a shared interest in
112 tourism, which is a multi-billion-dollar industry and a

**SB5 Enrolled**

113 significant and unique economic driver for the region.

114 4. Unlike other regions in the state, the Gulf Coast
115 community is home to major fishing, port, and ship-building
116 industries. Mobile has a Navy shipyard and the only deep-water
117 port in the state. The port is essential for the international
118 export of goods produced in Alabama.

119 5. The Port of Mobile is the economic hub for the Gulf
120 counties. Its maintenance and further development are critical
121 for the Gulf counties in particular but also for many other
122 parts of the state. The Port of Mobile handles over 55 million
123 tons of international and domestic cargo for exporters and
124 importers, delivering eighty-five billion dollars
125 (\$85,000,000,000) in economic value to the state each year.
126 Activity at the port's public and private terminals directly
127 and indirectly generates nearly 313,000 jobs each year.

128 6. Among the over 21,000 direct jobs generated by the
129 Port of Mobile, about 42% of the direct jobholders reside in
130 the City of Mobile, another 39% reside in Mobile County but
131 outside of the City of Mobile, and another 13% reside in
132 Baldwin County.

133 7. The University of South Alabama serves the Gulf
134 Coast community of interest both through its flagship campus
135 in Mobile and its campus in Baldwin County.

136 8. Federal appropriations have been critical to
137 ensuring the port's continued growth and maintenance. In 2020,
138 the Army Corps of Engineers allocated over two hundred
139 seventy-four million dollars (\$274,000,000) for the Port of
140 Mobile to allow the dredging and expansion of the port.

**SB5 Enrolled**

141 Federal appropriations have also been critical for expanding
142 bridge projects to further benefit the shared interests of the
143 region.

144 9. The Gulf Coast community has a distinct culture
145 stemming from its French and Spanish colonial heritage. That
146 heritage is reflected in the celebration of shared social
147 occasions, such as Mardi Gras, which began in Mobile. This
148 shared culture is reflected in Section 1-3-8(c), Code of
149 Alabama 1975, which provides that "Mardi Gras shall be deemed
150 a holiday in Mobile and Baldwin Counties and all state offices
151 shall be closed in those counties on Mardi Gras." Mardi Gras
152 is observed as a state holiday only in Mobile and Baldwin
153 Counties.

154 10. Mobile and Baldwin Counties also work together as
155 part of the South Alabama Regional Planning Commission, a
156 regional planning commission recognized by the state for more
157 than 50 years. The local governments of Mobile, Baldwin, and
158 Escambia Counties, as well as 29 municipalities within those
159 counties, work together through the commission with the
160 Congressional Representative from District 1 to carry out
161 comprehensive economic development planning for the region in
162 conjunction with the U.S. Economic Development Administration.
163 Under Section 11-85-51(b), factors the Governor considers when
164 creating such a regional planning commission include
165 "community of interest and homogeneity; geographic features
166 and natural boundaries; patterns of communication and
167 transportation; patterns of urban development; total
168 population and population density; [and] similarity of social

**SB5 Enrolled**

169 and economic problems."

170 g.1. Alabama's Wiregrass region is a community of
171 interest composed of the following nine counties: Barbour,
172 Coffee, Covington, Crenshaw, Dale, Geneva, Henry, Houston, and
173 Pike.

174 2. The Wiregrass region is characterized by rural
175 geography, agriculture, and a major military base. The
176 Wiregrass region is home to Troy University's flagship campus
177 in Troy and its campus in Dothan.

178 3. All of the Wiregrass counties are included in
179 District 2, with the exception of Covington County, which is
180 placed in District 1 so that the maximum number of Black Belt
181 counties can be included within just two districts.

182 Section 2. Section 17-14-70, Code of Alabama 1975, is
183 amended to read as follows:

184 "§17-14-70

185 (a) The State of Alabama is divided into seven
186 congressional districts as provided in subsection (b).

187 (b) The numbers and boundaries of the districts are
188 designated and established by the map prepared by the
189 Permanent Legislative Committee on Reapportionment and
190 identified and labeled as ~~Pringle Congressional Plan 1~~
191 Livingston Congressional Plan 3-2023, including the
192 corresponding boundary description provided by the census
193 tracts, blocks, and counties, and are incorporated by
194 reference as part of this section.

195 (c) The Legislature shall post for viewing on its
196 public website the map referenced in subsection (b), including

**SB5 Enrolled**

197 the corresponding boundary description provided by the census
198 tracts, blocks, and counties, and any alternative map,
199 including the corresponding boundary description provided by
200 the census tracts, blocks, and counties, introduced by any
201 member of the Legislature during the legislative session in
202 which this section is added or amended.

203 (d) Upon enactment of ~~Act 2021-555, adding the act~~
204 amending this section and adopting the map identified in
205 subsection (b), the Clerk of the House of Representatives or
206 the Secretary of the Senate, as appropriate, shall transmit
207 the map and the corresponding boundary description provided by
208 the census tracts, blocks, and counties identified in
209 subsection (b) for certification and posting on the public
210 website of the Secretary of State.

211 (e) The boundary descriptions provided by the certified
212 map referenced in subsection (b) shall prevail over the
213 boundary descriptions provided by the census tracts, blocks,
214 and counties generated for the map."

215 Section 3. The provisions of this act are severable. If
216 any part of this act is declared invalid or unconstitutional,
217 that declaration shall not affect the part which remains.

218 Section 4. This act shall be effective for the election
219 of members of the state's U.S. Congressional districts at the
220 General Election of 2024 and thereafter, until the state's
221 U.S. Congressional districts are reapportioned and
222 redistricted after the 2030 decennial census.

223 Section 5. This act shall become effective immediately
224 upon its passage and approval by the Governor, or upon its



SB5 Enrolled

225 otherwise becoming law.



SB5 Enrolled

[Signature]

President and Presiding Officer of the Senate

[Signature]

Speaker of the House of Representatives

SB5

Senate 19-Jul-23

I hereby certify that the within Act originated in and passed the Senate, as amended.

Senate 21-Jul-23

I hereby certify that the within Act originated in and passed the Senate, as amended by Conference Committee Report.

Patrick Harris,
Secretary.

House of Representatives
Amended and passed: 21-Jul-23

House of Representatives
Passed 21-Jul-23, as amended by Conference Committee Report.

By: Senator Livingston

APPROVED July 21, 2023

TIME 5:28 PM

[Signature]
GOVERNOR

Alabama Secretary Of State

Act Num....: 2023-563
Bill Num....: S-5

Recv'd 07/21/23 05:41pmSLF

SOR

PONSORS

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SENATE ACTION

I hereby certify that the Resolution as required in Section C of Act No. 81-889 was adopted and is attached to the Bill, SB _____

yeas _____ nays _____ abstain _____

PATRICK HARRIS,
Secretary

I hereby certify that the notice & proof is attached to the Bill, SB _____ as required in the General Acts of Alabama, 1975 Act No. 919.

PATRICK HARRIS,
Secretary

CONFERENCE COMMITTEE

Senate Conferees _____

HOUSE ACTION

DATE: 7-19 2023

RD 1 RFD

REPORT OF STANDING COMMITTEE

This bill having been referred by the House to its standing committee on State Government was acted upon by such committee in session, and returned therefrom to the House with the recommendation that it be passed (amend(s) w/sub ✓ This 20 day of July, 2023.

Charles Bell, Chairperson

DATE: 7-20 2023

RF

RD 2 CAL

DATE: 20

RE-REFERRED ☐RE-COMMITTED ☐

Committee _____

I hereby certify that the Resolution as required in Section C of Act No. 81-889 was adopted and is attached to the Bill, SB _____

YEAS _____ NAYS _____

JOHN TREADWELL,
Clerk

FURTHER HOUSE ACTION (OVER)

Exhibit 16 - Livingston Deposition**Exhibit****16**

The Livingston Plan is a Compact, Communities of Interest Plan that applies the State's traditional districting principles fairly across the State.

- The 2023 Plan is a historic map that gives equal treatment to important communities of interest in the State, including three that have been the subject of litigation over the last several years—the Black Belt, the Gulf, and the Wiregrass.
- No map in the State's history, and no map proposed by any of the Plaintiffs who challenged the 2021 Plan, does better in promoting any one of these communities of interest, much less all three.

The Livingston Plan is based on neutral principles, especially (1) promoting communities of interest the Black Belt, the Gulf, and Wiregrass, and (2) ensuring that the State's longstanding principle of compact districts is given a fuller and fairer effect. While the plan is not based on race, the result of fairly applying these neutral principles is that the BVAP in District 2 has increased from **30.1%** under the 2021 Plan, to **38.3%** under the 2023 Plan.

- Meanwhile, District 7 preserves much of its core, while becoming more compact in Jefferson County, and closing off the split of Montgomery County to make that Black Belt County whole.
- These numbers are comparable to the numbers endorsed by the Milligan Plaintiffs. And District 2's demographics are right in line with what Plaintiffs' experts say you would expect if a plan were drawn based on neutral principles rather than race.

The Livingston Plan complies with the Voting Rights Act.

- The Supreme Court made clear in Alabama's case that "§ 2 never requires adoption of districts that violate traditional redistricting principles."¹
- The Court's ruling was based on the principles applied in the 2021 Plan and the limited record in that case. The 2021 Plan gave less weight to communities of interest and compactness—the Black Belt was divided among three districts and the districts as a whole were less compact than in my plan. Thus, under the 2021 principles, it was possible for plaintiffs to draw two reasonably configured majority-black districts.
- The Court concluded that the Plaintiffs' plans would not have violated the State's compactness principle because on average the Plaintiffs' plans were more compact than the 2021 Plan. And the Court concluded that the Plaintiffs' maps would not have violated the traditional principle of communities of interest

¹ *Allen v. Milligan*, 143 S. Ct. 1487, 1510 (2023)

because their maps did well on one community (the Black Belt) while the 2021 Plan did well on another (the Gulf).

- The Livingston Plan gives fuller and fairer weight to those important and long-recognized principles. Plaintiffs said that the “heart of their case” was the division of the Black Belt counties. This map gives full effect to that community of interest by placing all 18 core Black Belt counties into just two districts—the smallest number of districts in which they can fit.
- But doing so does not require us to split the Gulf or Wiregrass communities of interest. Thus, to the extent we can preserve those communities of interest without dividing the Black Belt, the Livingston Plan does so.
- The Voting Rights Act does not require States to violate those traditional districting principles—it just requires us to apply them fairly. And the Livingston Plan does that.

The Black Belt, Gulf, and Wiregrass can all be given effect.

- The 2023 Plan shows that none of these communities of interest has to be sacrificed in a congressional plan. The 2023 Plan unites the Black Belt within just two districts and keeps the Gulf together, as it has been for over 50 years.
- The Legislature has before it reams of evidence that the state litigants were not able to assemble in early 2022 during the few short weeks they were given before the emergency hearing in the redistricting cases. This additional evidence confirms that the Gulf is a strong community of interest.
- But keeping the Gulf together doesn’t mean the Black Belt needs to be divided. Because of their population and location, the 18 core Black Belt counties cannot all be placed in one district, but they can be and will be placed in just two districts. Plus, of the 5 additional counties that are sometimes considered part of the Black Belt, 4 of them are also within these two Black Belt districts. Finally, not a single Black Belt County is split between congressional districts.
- The Plaintiffs challenging the 2021 plan told the Supreme Court that “the heart” of their case was “Alabama’s treatment of the Black Belt” in its congressional maps. Indeed, they referenced the Black Belt more than **50 times** in their Supreme Court brief. We hope the Plaintiffs will support the 2023 Plan, which addresses any concerns about dividing the Black Belt.
- Many of the maps proposed to the Redistricting Committee would sacrifice the Gulf and Wiregrass communities of interest in favor of race. Section 2 does not require that result and the Constitution forbids it.

- Plus, favoring race over neutral principles would likely lead to more litigation over the Constitution's Equal Protection Clause. Senator Singleton's lawyer has basically promised as much, and they're not the only ones who might raise a racial gerrymandering claim
- Plaintiffs could note that just a few weeks ago, the Supreme Court declared Harvard's race-based admissions policy unconstitutional because "the core purpose of the Equal Protection Clause" is "doing away with all governmentally imposed discrimination based on race."² The Court was clear: "Eliminating racial discrimination means eliminating all of it."³
- The Court held that "race may never be used as a 'negative' and that it may not operate as a stereotype."⁴ But in Plaintiffs' Proposed Plans, voters in Mobile County are divided from voters in Mobile City because of their race and because of stereotypes about how voters of certain races will vote.
- During the Committee's public hearings on potential plans, we heard impassioned pleas from a diverse array of Alabamians who care about their State and this process. Among them were several black Alabamians who urged the Committee not to stereotype them by adopting a plan on the assumption that people who look a certain way are going to vote a certain way. Their request is also the Constitution's demand. The 2023 Plan unites the Black Belt, preserves the Gulf, and complies with the Voting Rights Act and the Constitution. The Plan heeds the Supreme Court's instruction and rejects divisive calls to "pick winners and losers based on the color of their skin."⁵

While some have asserted that the Voting Rights Act requires that two of Alabama's districts be composed of a majority of black voters, that's not the case.

- The Voting Rights Act requires that the State's traditional principles be applied fairly across the State.
- Indeed, for years, the Milligan Plaintiffs consistently supported a plan in which the two districts with the highest percentage of black voters were set at **40.5%** and **45.8%**.
- In September 2021, Plaintiffs Evan Milligan and Khadidah Stone, told the Redistricting Committee that the Legislature should adopt a plan with BVAPs of **40.5** and **45.8%**.

² *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, No. 20-1199 (U.S. June 29, 2023), Slip. Op. at 14.

³ *Id.* at 15.

⁴ *Id.* at 27.

⁵ *Id.* at 38.

- Then in 2022, before the U.S. Supreme Court, Milligan and his co-plaintiffs repeatedly endorsed that plan, stating that Alabama did **not** need to create two majority-minority districts.
- Instead, they pointed to the 40/45 plan as “one option” that kept “Mobile and Baldwin together, and raised no racial predominance concerns.”
- They argued that the plan looked like maps one of their experts drew “race-blind,” as opposed to the race-based maps their other expert drew.

And there’s a reason they praised that plan.

- Plaintiffs’ race-blind map drawing expert told the district court that if the State drew without accounting for the race of voters, most plans would not return any district with a BVAP of even **40%**.
- Plaintiffs said that any plan in which even one district was at 50% BVAP would be an “outlier” based heavily on race.
- And they further argued that if the plan had one district with a black voting age population of 50%, the district with the second highest black population would likely be **under 35%**, and certainly not as high as **40%**.
- The Livingston Plan, which is also based on race-neutral principles, includes a District 2 with very similar demographics.
- That makes sense. Black Alabamians make up 25.9% of Alabamians over the age of 18. Only 11 of Alabama’s 67 Counties are majority black, and not even 20% of black Alabamians live in those majority-black counties. It is unsurprising that districts drawn based on colorblind principles would not lead to anything like the two majority-minority districts pressed by the plaintiffs.

Responses to possible questions:

- The courts did not resolve which communities of interest can or cannot be kept together in Alabama's plan.
 - All the courts found was (1) that the evidence litigants assembled on a an expedited 6-week schedule was insufficient to support their argument that the Gulf Coast region was a community of interest, and (2) that Plaintiffs maps did as well on communities of interest because they better joined the Black Belt counties together into two districts.
 - The Court did *not* hold that on a different record the Gulf could not be considered a community of interest. And there are mounds of evidence supporting that determination.
 - Indeed, the district court's preliminary injunction order stated that if the advantages of keeping the Gulf together "really are as compelling as Defendants suggest, we expect that the Legislature will assign them great weight when it draws a replacement map."⁶
 - The interests are that compelling. As Rep. Adline Clarke, a Democrat from Mobile, said in 2021, "I consider Mobile and Baldwin counties one political subdivision and would prefer that these two Gulf Coast counties remain in the same congressional district because government, business and industry in the two counties work well together -- with our congressman -- for the common good of the two counties."

⁶ *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1015 (N.D. Ala. 2022).

Among Plaintiffs' maps attacking the 2021 Plan, the Milligan maps were generally more compact than the Caster maps. The compactness scores for the Milligan maps on Polsby-Popper and Reock are below. Higher is better. Highest scores are in **bold**.

	Reock	Polsby-Popper
Plan A:	0.378	0.256
Plan B:	0.365	0.282
Plan C:	0.338	0.255
Plan D:	0.399	0.249

Below are three of several potential maps that could be drawn that would (1) combine elements of the Pringle and Livingston Plans while (2) maintaining high scores for compactness. The scores are computed by Dave's Redistricting website. The Redistricting Office's Maptitude software will likely return the same scores, but the map would need to be input into that system to confirm.

For ease of reference, the top Reock and top Polsby-Popper scores for the Milligan Plaintiffs' maps are included in the header of each page.

RC 049613

Milligan Plaintiffs' Top Compactness Scores

Reock .399

Polsby-Popper .282

Option 1

Reock 0.4127

Polsby-Popper 0.2951



Milligan Plaintiffs' Top Compactness Scores

Reock .399

Polsby-Popper .282

Option 2

Reock 0.4146

Polsby-Popper 0.2901



Milligan Plaintiffs' Top Compactness Scores

Reock .399

Polsby-Popper .282

Option 3

Reock 0.4209

Polsby-Popper 0.2966

