

Nos. _____, _____, _____

Supreme Court of the United States

WES ALLEN, SEC'Y OF STATE, ET AL., *Appellants*,

v.

BOBBY SINGLETON, ET AL., *Appellees*.

WES ALLEN, SEC'Y OF STATE, ET AL., *Appellants*,

v.

EVAN MILLIGAN, ET AL., *Appellees*.

WES ALLEN, SEC'Y OF STATE, ET AL., *Petitioners*,

v.

MARCUS CASTER, ET AL., *Respondents*.

**APPENDIX TO JURISDICTIONAL STATEMENTS
AND PETITION FOR WRIT OF CERTIORARI
BEFORE JUDGMENT (VOLUME II OF II)**

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App. 559
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No.: 2:21-cv-1536-AMM

MARCUS CASTER, *et al.*,
Plaintiffs,

v.

WES ALLEN, in his official capacity as
Alabama Secretary of State, *et al.*,
Defendants.

ORDER

This redistricting case is one of three cases currently pending in the Northern District of Alabama that allege that Alabama's congressional 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. Allen*, Case No. 2:21-cv-1291-AMM (challenges the map on constitutional grounds only), *Milligan v. Allen*, Case No. 2:21-cv-1530-AMM (challenges the map on constitutional and statutory grounds), and this case, which challenges the map on statutory grounds only.

These cases have returned to this Court after the Supreme Court of the United States affirmed in all respects a preliminary injunction this Court entered

on January 24, 2022. *See Allen v. Milligan*, 143 S. Ct. 1487, 1501 (2023); *Caster* Doc. 101. *Singleton* and *Milligan* are before a three-judge court that includes the undersigned judge, and *Caster* is before the undersigned sitting alone, for remedial proceedings. The map this Court enjoined (the “2021 Plan”) included one majority-Black district: District 7. District 7 became a majority-Black district in 1992 when a federal court drew it that way in a ruling that was summarily affirmed by the Supreme Court. *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).

After a hearing, this Court concluded that the 2021 Plan likely violated Section Two and thus enjoined the State from using that plan in the 2022 election. *Caster* Doc. 101; *Allen*, 143 S. Ct. at 1501. Based on controlling precedent, this Court held that “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.” *Caster* Doc. 101 at 6, 15. The Court observed that “[a]s the Legislature consider[ed remedial] 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.” *Caster* Doc. 101 at 6.

On June 8, 2023, the Supreme Court affirmed the preliminary injunction. *See Allen*, 143 S. Ct. at 1501. The State then requested that this Court allow the Legislature approximately five weeks — until July 21,

2023 — to enact a new plan. *Caster* Doc. 154 at 2. On July 21, 2023, the Legislature enacted and Governor Ivey signed into law a new congressional map (the “2023 Plan”). Just like the 2021 Plan enjoined by this Court, the 2023 Plan includes only one majority-Black district: District 7. *See Caster* Doc. 165.

The *Caster* Plaintiffs timely objected to the 2023 Plan and requested another preliminary injunction barring Alabama Secretary of State Wes Allen from conducting congressional elections according to Alabama’s 2023 redistricting plan for its seven seats in the United States House of Representatives. *Caster* Doc. 179.

The remedial proceedings are highly time-sensitive because of state-law deadlines applicable to Alabama’s next congressional election. This Court has the benefit of an extensive record that includes not only the materials submitted during the preliminary injunction proceedings, but also briefs as well as expert reports, deposition transcripts, and other evidence submitted during this remedial phase. *See Caster* Docs. 179, 191, 195, Aug. 14 Tr. At 92-93. The Court also has the benefit of a remedial hearing.

On July 31, 2023, the three-judge court in *Singleton* and *Milligan* and this Court held a status conference to discuss the remedial hearing. At that conference, all counsel agreed that all evidence admitted in any case, including evidence adduced in the original preliminary injunction proceedings conducted, was admitted in all three cases unless counsel raised a specific objection. *See Caster* Doc. 182. Accordingly, the Court has considered all evidence adduced in *Singleton*, *Milligan* and *Caster*.

The Court adopts the recitation of the evidence, legal analysis, findings of fact and conclusions of law explained in the injunction, memorandum opinion and order entered contemporaneously in *Milligan* (attached to this Order as Exhibit A), including that Court's assessments of the credibility of expert witnesses, as though they were set forth in full herein. The Court concludes that the *Caster* plaintiffs are substantially likely to establish that (1) the 2023 Plan does not remedy the likely Section Two violation the Court found and the Supreme Court affirmed, and (2) in the alternative, the *Caster* Plaintiffs have carried their burden to establish that the 2023 Plan likely violates Section Two.

Accordingly, under Federal Rule of Civil Procedure 65(d) the Court PRELIMINARILY ENJOINS Secretary Allen from conducting any elections according to the 2023 Plan, and the Special Master and cartographer are DIRECTED to commence work on a remedial map forthwith. Instructions will follow by separate order.

Compliance with the preliminary injunction in *Milligan* constitutes compliance with this preliminary injunction.

DONE and ORDERED this 5th day of September, 2023.

/s/ Anna M. Manasco
ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE

App. 563
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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

BOBBY SINGLETON, *et al.*,
Plaintiffs,

v.

WES ALLEN, in his official capacity as
Alabama Secretary of State, *et al.*,
Defendants.

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

EVAN MILLIGAN, *et al.*,
Plaintiffs,

v.

WES ALLEN, in his official capacity as
Alabama Secretary of State, *et al.*,
Defendants.

THREE-JUDGE COURT

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

PER CURIAM:

INJUNCTION, OPINION, AND ORDER

These congressional redistricting cases have returned to this Court after the Supreme Court of the United States affirmed in all respects a preliminary injunction this Court entered on January 24, 2022. *See Allen v. Milligan*, 143 S. Ct. 1487, 1498, 1502 (2023).

These cases allege that Alabama’s congressional electoral map is racially gerrymandered in violation of the United States Constitution and/or dilutes the votes of Black Alabamians in violation of Section Two of the Voting Rights Act of 1965, 52 U.S.C. § 10301 (“Section Two”). *See Singleton v. Allen*, No. 2:21-cv-1291-AMM (asserting only constitutional challenges); *Milligan v. Allen*, No. 2:21-cv-1530 AMM (asserting both constitutional and statutory challenges); *Caster v. Allen*, No. 2:21-cv-1536-AMM (asserting only statutory challenges).

Milligan is now before this three-judge Court, and *Caster* is before Judge Manasco alone, for remedial proceedings.¹ The map this Court enjoined (“the 2021 Plan”) included one majority-Black district: District 7. District 7 became a majority-Black district in 1992 when a federal court drew it that way in a ruling that was summarily affirmed by the Supreme Court. *Wesch v. Hunt*, 785 F. Supp. 1491, 1497–1500 (S.D. Ala. 1992) (three-judge court), *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).

After an extensive seven-day hearing, this Court concluded that the 2021 Plan likely violated Section

¹ *Singleton* remains before this three-judge Court but is not a part of the Section Two remedial proceedings. *See infra* at Part I.C.5.

Two and thus enjoined the State from using that plan in the 2022 election. *See Milligan* Doc. 107; *Allen*, 143 S. Ct. at 1502.²

Based on controlling precedent, we held that “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.” *Milligan* Doc. 107 at 5.³ We observed that “[a]s the Legislature consider[ed remedial] 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.” *Id.* at 6.

Because federal law dictates that the Alabama Legislature should have the first opportunity to draw a remedial plan, we gave the Legislature that opportunity. *See id.* The Secretary of State and legislative defendants (“the Legislators” and collectively, “the State”) appealed. *Allen*, 143 S. Ct. at 1502.

On June 8, 2023, the Supreme Court affirmed the preliminary injunction. *See id.* The Supreme Court “s[aw] no reason to disturb th[is] Court’s careful factual findings, which are subject to clear error review and have gone unchallenged by Alabama in any

² When we cite an order or other filing that appears in more than one of these cases, for the reader’s ease we cite only the document filed in the *Milligan* case.

³ 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.

event.” *Id.* at 1506. Likewise, the Supreme Court concluded there was no “basis to upset th[is] Court’s legal conclusions” because we “faithfully applied [Supreme Court] precedents and correctly determined that, under existing law, [the 2021 Plan] violated” Section Two. *Id.*

The State then requested that this Court allow the Legislature approximately five weeks — until July 21, 2023 — to enact a new plan. *Milligan* Doc. 166. All parties understood the urgency of remedial proceedings: the State previously advised this Court that because of pressing state-law deadlines, Secretary Allen needs a final congressional districting map by “early October” for the 2024 election. *Milligan* Doc. 147 at 3.⁴ In the light of that urgency, and to balance the deference given to the Legislature to reapportion the state with the limitations set by *Purcell v. Gonzalez*, 549 U.S. 1, 4–8 (2006), we delayed remedial proceedings to accommodate the Legislature’s efforts, entered a scheduling order, and alerted the parties that any remedial hearing would commence on the date they proposed: August 14, 2023. *Milligan* Doc. 168.

On July 21, 2023, the Legislature enacted and Governor Ivey signed into law a new congressional map (“the 2023 Plan”). Just like the 2021 Plan enjoined by this Court, the 2023 Plan includes only one majority-Black district: District 7. *Milligan* Doc. 186-1 at 2.

All Plaintiffs timely objected to the 2023 Plan and requested another injunction. *See Singleton* Doc. 147; *Milligan* Doc. 200; *Caster* Doc. 179. The *Milligan* and

⁴ In a later filing, the State advised the Court that Secretary Allen needs a final map by October 1, 2023. *Milligan* Doc. 162 at 7.

Caster Plaintiffs argue that the 2023 Plan did not cure the unlawful vote dilution we found because it did not create a second district in which Black voters have an opportunity to elect a candidate of their choice (an “opportunity district”). *Milligan* Doc. 200 at 16–23; *Caster* Doc. 179 at 8–11. Separately, the *Milligan* and *Singleton* Plaintiffs argue that the 2023 Plan runs afoul of the U.S. Constitution. The *Milligan* Plaintiffs contend that the State intentionally discriminated against Black Alabamians in drawing the 2023 Plan, in violation of the Equal Protection Clause of the Fourteenth Amendment. *Milligan* Doc. 200 at 23–26. And the *Singleton* Plaintiffs argue that the 2023 Plan is an impermissible racial gerrymander — indeed, just the latest in a string of racially gerrymandered plans the State has enacted, dating back to 1992. *Singleton* Doc. 147 at 13–27.

The record before us thus includes not only the evidentiary materials submitted during the preliminary injunction proceedings, but also expert reports, deposition transcripts, and other evidence submitted during this remedial phase. *See Singleton* Docs. 147, 162, 165; *Milligan* Docs. 200, 220, 225; *Caster* Docs. 179, 191, 195; Aug. 14 Tr. 92–93; Aug. 15 Tr. 24–25. We also have the benefit of the parties’ briefs, a hearing, three *amicus* briefs, and a statement of interest filed by the Attorney General of the United States. *Milligan* Docs. 199, 234, 236, 260.

The State concedes that the 2023 Plan does not include an additional opportunity district. Indeed, the State has explained that its position is that notwithstanding our order and the Supreme Court’s affirmance, the Legislature was not required to include an additional opportunity district in the 2023 Plan. Aug. 14 Tr. 159–64.

That concession controls this case. Because the 2023 Plan does not include an additional opportunity district, we conclude that the 2023 Plan does not remedy the likely Section Two violation that we found and the Supreme Court affirmed. We also conclude that under the controlling Supreme Court test, the *Milligan* Plaintiffs are substantially likely to establish that the 2023 Plan violates Section Two. As we explain below, our conclusions rest on facts the State does not dispute.

Because the record establishes the other requirements for relief — that the Plaintiffs will suffer irreparable injury if an injunction does not issue, the threatened injury to the Plaintiffs outweighs the damage an injunction may cause the State, and an injunction is not adverse to the public interest — under Federal Rule of Civil Procedure 65(d) we PRELIMINARILY ENJOIN Secretary Allen from conducting any elections with the 2023 Plan.

Under the Voting Rights Act, the statutory framework, and binding precedent, the appropriate remedy is, as we already said, a congressional districting plan that includes either an additional majority-Black 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) (plurality opinion); *Cooper v. Harris*, 581 U.S. 285, 306, (2017). We discern no basis in federal law to accept a map the State admits falls short of this required remedy.

“Redistricting is primarily the duty and responsibility of the State,” *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (internal quotation marks omitted), but this Court “ha[s] its own duty to cure” districts drawn in violation of federal law, *North Carolina v. Covington*,

138 S. Ct. 2548, 2553 (2018). We are three years into a ten-year redistricting cycle, and the Legislature has had ample opportunity to draw a lawful map.

Based on the evidence before us, including testimony from the Legislators, we have no reason to believe that allowing the Legislature still another opportunity to draw yet another map will yield a map that includes an additional opportunity district. Moreover, counsel for the State has informed the Court that, even if the Court were to grant the Legislature yet another opportunity to draw a map, it would be practically impossible for the Legislature to reconvene and do so in advance of the 2024 election cycle. Accordingly, the Special Master and cartographer are DIRECTED to commence work forthwith on a remedial map. Instructions shall follow by separate order.

Because we grant 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*, 548 U.S. 399, 442 (2006) (“*LULAC*”); *Thornburg v. Gingles*, 478 U.S. 30, 38 (1986), we again RESERVE RULING on the constitutional issues raised by the *Singleton* and the *Milligan* Plaintiffs, including the *Singleton* Plaintiffs’ motion for a preliminary injunction.

* * *

We have reached these conclusions only after conducting an exhaustive analysis of an extensive record under well-developed legal standards, as Supreme Court precedent instructs. We do not take lightly federal intrusion into a process ordinarily

reserved for the State Legislature. But we have now said twice that this Voting Rights Act case is not close. And we are deeply troubled that the State enacted a map that the State readily admits does not provide the remedy we said federal law requires.

We are disturbed by the evidence that the State delayed remedial proceedings but ultimately did not even nurture the ambition to provide the required remedy. And we are struck by the extraordinary circumstance we face. We are not aware of any other case in which a state legislature — faced with a federal court order declaring that its electoral plan unlawfully dilutes minority votes and requiring a plan that provides an additional opportunity district — responded with a plan that the state concedes does not provide that district. The law requires the creation of an additional district that affords Black Alabamians, like everyone else, a fair and reasonable opportunity to elect candidates of their choice. The 2023 Plan plainly fails to do so.

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I. BACKGROUND

A. Procedural Posture

1. Liability Proceedings

On September 27, 2021, after the results of the 2020 census were released, the *Singleton* Plaintiffs filed a complaint against John Merrill, the former Secretary of State of Alabama.⁵ *Singleton* Doc. 1. The *Singleton* Plaintiffs asserted that holding the 2022 election under Alabama’s old congressional map (“the 2011 Plan”) would violate the Equal Protection Clause of the Fourteenth Amendment because the districts were malapportioned and racially gerrymandered. *Id.* The Chief Judge of the Eleventh Circuit convened a three-judge court to adjudicate *Singleton*. *Singleton* Doc. 13.

On November 3, 2021, the Legislature passed the 2021 Plan. The next day, Governor Ivey signed the 2021 Plan into law, and the *Singleton* Plaintiffs amended their complaint to stake their claims on the 2021 Plan, asserting a racial gerrymandering claim under the Equal Protection Clause of the Fourteenth Amendment and an intentional discrimination claim under the Fourteenth and Fifteenth Amendments.

⁵ On January 16, 2023, Wes Allen became the Secretary of State of Alabama. Pursuant to Federal Rule of Civil Procedure 25(d), Secretary Allen was substituted for former Secretary Merrill as a defendant in these cases. *Milligan* Doc. 161.

Singleton Doc. 15 at 38–48. “The *Singleton* plaintiffs are registered voters in Alabama’s Second, Sixth, and Seventh Congressional Districts under the [2021] Plan; the lead plaintiff, Bobby Singleton, is a Black Senator in the Legislature.” *Singleton* Doc. 88 at 10.

On the same day the *Singleton* Plaintiffs filed their amended complaint, the *Caster* Plaintiffs filed a lawsuit against Secretary Merrill. *Caster* Doc. 3. *Caster* is pending before Judge Manasco sitting alone. The *Caster* Plaintiffs challenged the 2021 Plan only under Section Two and asserted a single claim of vote dilution. *Id.* at 29–31. “The *Caster* plaintiffs are citizens of Alabama’s First, Second, and Seventh Congressional Districts under the [2021] Plan.” *Caster* Doc. 101 at 20.

On November 16, 2021, the *Milligan* Plaintiffs filed suit against Secretary Merrill and the Legislators, who serve as co-chairs of the Legislature’s Committee on Reapportionment (“the Committee”).⁶ *Milligan* Doc. 1. The *Milligan* Plaintiffs asserted a vote dilution claim under Section Two, a racial gerrymandering claim under the Fourteenth Amendment, and an intentional discrimination claim under the Fourteenth Amendment. *Id.* at 48–52. “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

⁶ Former Senator Jim McClendon then served as co-chair of the Committee. Senator Steve Livingston has since become co-chair of the Committee. *See Milligan* Doc. 173. Pursuant to Federal Rule of Civil Procedure 25(d), Senator Livingston was substituted as a defendant in these cases. *Milligan* Doc. 269.

voters in those Congressional districts and the Third Congressional District.” *Milligan* Doc. 107 at 12–13. The Chief Judge of the Eleventh Circuit convened a three-judge court to hear *Milligan* that includes the same three judges who comprise the *Singleton* Court. *Milligan* Doc. 23.

The Legislators intervened as defendants in *Singleton* and *Caster*. See *Singleton* Doc. 32; *Caster* Doc. 69.

Each set of Plaintiffs requested that this Court enjoin Alabama from using the 2021 Plan for the 2022 election. *Singleton* Doc. 15 at 47; *Milligan* Doc. 1 at 52; *Caster* Doc. 3 at 30–31; see also *Singleton* Doc. 57; *Milligan* Doc. 69; *Caster* Doc. 56. The *Singleton* Court consolidated *Singleton* and *Milligan* “for the limited purposes” of preliminary injunction proceedings; set a hearing for January 4, 2022; and set prehearing deadlines. *Milligan* Doc. 40. 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. All parties agreed to a consolidated preliminary injunction proceeding which permitted consideration of evidence in a combined fashion.

A preliminary injunction hearing commenced on January 4 and concluded on January 12, 2022. *Allen*, 143 S. Ct. at 1502. During the hearing, this Court “received live testimony from 17 witnesses, reviewed more than 1000 pages of briefing and upwards of 350 exhibits, and considered arguments from the 43 different lawyers who had appeared in the litigation.” *Id.*

We evaluated the *Milligan* and *Caster* Plaintiffs’ statutory claims using the three-part test developed by

the Supreme Court in *Gingles*, 478 U.S. 30. And we preliminarily enjoined Alabama from using the 2021 Plan. *Milligan* Doc. 107. We held that under controlling 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.” *Id.* at 5. Because we issued an injunction on statutory grounds, we declined to decide the constitutional claims of the *Singleton* and *Milligan* Plaintiffs. *Id.* at 214–17.

Because “redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt,” we gave the Legislature the first opportunity to draw a new map. *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (White, J.); *Milligan* Doc. 107 at 6. The State appealed, and the Supreme Court stayed the injunction. *Allen*, 143 S. Ct. at 1502; *Merrill v. Milligan*, 142 S. Ct. 879 (2022).

On February 8, 2022, the *Singleton* Plaintiffs moved this Court for an expedited ruling on their constitutional claims. *Singleton* Doc. 104. All other parties opposed that motion, *see Singleton* Doc. 109; *Milligan* Doc. 135; *Caster* Doc. 127, and we denied it on the ground that we should not decide any constitutional claims prematurely, *Singleton* Doc. 114.

On April 14, 2022, we held a status conference. *See Milligan* Doc. 143. Mindful that under Alabama law, the last date candidates may qualify with major political parties to participate in the 2024 primary election is November 10, 2023, *see* Ala. Code § 17-13-5(a), we directed the State to identify the latest date by which the Secretary of State must have a final

congressional districting map to hold the 2024 election, *Milligan* Doc. 145. The State advised us that the Secretary needs the map “by early October.” *Milligan* Doc. 147 at 3.

On November 21, 2022, this Court ordered the parties to meet and confer and file a joint report of their positions on discovery, scheduling, and next steps. *Milligan* Doc. 153. The parties timely filed a joint report and proposed a scheduling order, which we entered. *Milligan* Docs. 156, 157.

On February 8, 2023, we held another status conference. *See Milligan* Doc. 153. We again directed the State to identify the latest date by which the Secretary required a map to hold the 2024 election. *Milligan* Doc. 161. The State responded that a new plan would need to be approved by October 1, 2023, to provide time for the Secretary to reassign voters, print and distribute ballots, and otherwise conduct the election. *Milligan* Doc. 162 at 7.

On June 8, 2023, the Supreme Court affirmed the preliminary injunction in all respects. *See generally Allen*, 143 S. Ct. 1487. The Supreme Court then vacated its stay. *Allen v. Milligan*, 143 S. Ct. 2607 (2023).

2. Remedial Proceedings

After the Supreme Court’s ruling, this Court immediately set a status conference. *Milligan* Doc. 165. Before the conference, the State advised us that “the . . . Legislature intend[ed] to enact a new congressional redistricting plan that will repeal and replace the 2021 Plan” and requested that we delay remedial proceedings until July 21, 2023. *Milligan* Doc. 166 at 2.

During the conference, the parties indicated substantial agreement on the appropriate next steps. *Milligan* Doc. 168 at 4. We delayed remedial proceedings until July 21, 2023 to accommodate the Legislature’s efforts; entered a briefing schedule for any objections if the Legislature enacted a new map; and alerted the parties that if a remedial hearing became necessary, it would commence on the date they suggested: August 14, 2023. *Id.* at 4–7.

On June 27, 2023, Governor Ivey issued a proclamation that a special session of the Legislature would convene to consider the congressional districting map. *Milligan* Doc. 173-1. That same day, the Committee met, elected its co-chairs, and held its first public hearing to receive comments on potential plans. *Milligan* Doc. 173 ¶ 2.

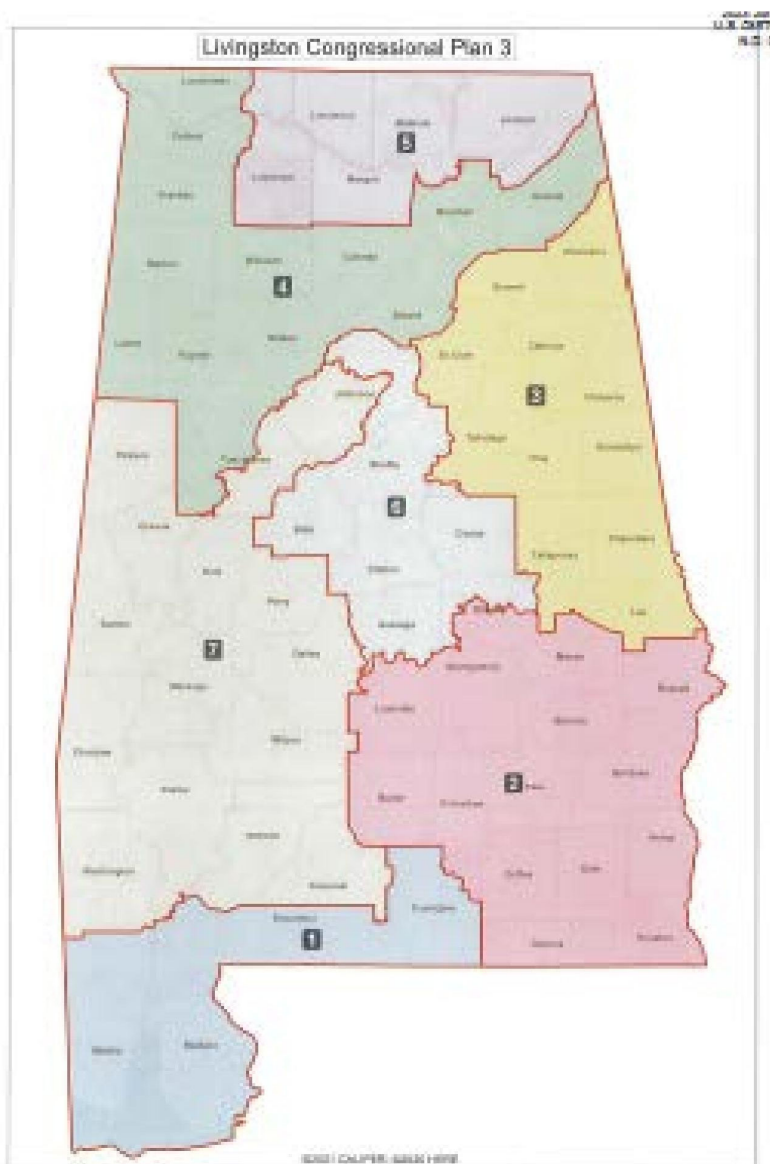
On July 13, 2023, the Committee met and re-adopted its previous redistricting guidelines (“the guidelines”). *Milligan* Doc. 180 ¶ 1; *Milligan* Doc. 107 app. A; *Milligan* Doc. 88-23. That day, the Committee held a second public hearing to receive comments on proposed remedial plans. *Milligan* Doc. 180 ¶ 1.

The special session of the Legislature commenced on July 17, 2023. *See Milligan* Doc. 173-1. On July 20, 2023, the Alabama House of Representatives passed a congressional districting plan titled the “Community of Interest Plan.” *Milligan* Doc. 251 ¶¶ 16, 22. That same day, the Alabama Senate passed a different plan, titled the “Opportunity Plan.” *Id.* ¶¶ 19, 22. The next day, a six-person bicameral Conference Committee passed the 2023 Plan, which was a modified version of the Opportunity Plan. *Id.* ¶ 23. Later that day, the Legislature enacted the 2023 Plan. *Milligan* Doc. 186.

Although neither the 2021 Plan, nor the Community of Interest Plan, nor the Opportunity Plan was accompanied by any legislative findings, when the Legislature enacted the 2023 Plan, it was accompanied by eight pages of legislative findings. We append the legislative findings to this order as Appendix A.

Governor Ivey signed the 2023 Plan into law the same day. *Milligan* Doc. 251 ¶ 26; Ala. Code § 17-14-70. It appears below. The 2023 Plan keeps Mobile and Baldwin counties together in District 1 and combines much of the Black Belt in Districts 2 and 7.⁷

⁷ The parties previously 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 brought there to work in the antebellum period. All the counties in the Black Belt are majority- or near majority-BVAP,” where “BVAP” means Black share of the voting-age population. *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 five other counties (Clarke, Conecuh, Escambia, Monroe, and Washington) are “sometimes included.” *Id.* ¶ 61.



Milligan Doc. 186-1 at 1.

The 2023 Plan, like the 2021 Plan enjoined by this Court, has only one majority-Black district. *Compare* *Milligan* Doc. 186-1 at 2, *with* *Milligan* Doc. 107 at 2–

3. In the 2023 Plan, the Black share of the voting-age population (“BVAP”) in District 7 is 50.65% (it was 55.3% in the 2021 Plan). *Compare Milligan* Doc. 186-1 at 2, *with Milligan* Doc. 53 ¶ 57. The district with the next largest BVAP is District 2. *Milligan* Doc. 251 ¶ 3. In District 2, Black Alabamians account for 39.93% of the voting age population (it was 30.6% in the 2021 Plan). *Compare Milligan* Doc. 186 1 at 2, *with Milligan* Doc. 53 ¶ 128.

On July 26, 2023, the parties jointly proposed a scheduling order for remedial proceedings. *Milligan* Doc. 193. We adopted it. *Milligan* Doc. 194.

On July 27, 2023, the *Singleton* Plaintiffs objected to the 2023 Plan. *Singleton* Doc. 147. The *Singleton* Plaintiffs assert that the 2023 Plan violates the Fourteenth Amendment because the districts are racially gerrymandered. *Id.* at 16–22. The *Singleton* Plaintiffs request that the Court enjoin Secretary Allen from using the 2023 Plan and order a remedy, such as their own plan, which plan they say is race-neutral, honors traditional districting principles, and gives Black voters an opportunity to elect candidates of their choice in two districts. *Id.* at 27–28.

Also on July 27, 2023, the United States filed a Statement of Interest “to assist th[is] Court in evaluating whether the 2023 Plan fully cures the likely Section 2 violation in the 2021 Plan.” *Milligan* Doc. 199 at 20. “The United States expresses no view on any factual disputes,” “nor on any legal questions other than those related to applying Section 2 to the proposed remedy in this case.” *Id.* at 5. The United States asserts that if this Court “conclude[s] that the 2023 Plan fails to completely remedy the likely Section 2 violation in the 2021 Plan, it must assume the

responsibility of devising and implementing a legally acceptable plan.” *Id.* at 19.

The *Milligan* and *Caster* Plaintiffs also timely objected to the 2023 Plan. *Milligan* Doc. 200; *Caster* Doc. 179. The *Milligan* Plaintiffs assert that the 2023 Plan offers no greater opportunity for Black Alabamians to elect a candidate of their choice than the 2021 Plan offered. *Milligan* Doc. 200 at 16–23. The *Milligan* Plaintiffs further say that the events giving rise to the 2023 Plan raise constitutional concerns because evidence suggests that the 2023 Plan was drawn to discriminate against Black Alabamians. *Id.* at 23–26. The *Milligan* Plaintiffs also ask us to enjoin Secretary Allen from conducting the 2024 election based on the 2023 Plan and order the Court-appointed Special Master to devise a new plan. *Id.* at 26.

The *Caster* Plaintiffs likewise assert that the 2023 Plan does not remedy the Section Two violation because it fails to create an additional district in which Black voters have an opportunity to elect a candidate of their choice. *Caster* Doc. 179 at 7–11. The *Caster* Plaintiffs also request that the Court enjoin the 2023 Plan and proceed to a court-driven remedial process to ensure relief for the 2024 election. *Id.* at 3, 11.

The Court held a status conference on July 31, 2023. *See Milligan* Doc. 194 at 3. Before that conference, the parties indicated substantial disagreement about the nature of remedial proceedings. *See Milligan* Docs. 188, 195, 196, 201. During the conference, the Court and the parties discussed (1) a motion filed by the *Milligan* and *Caster* Plaintiffs to clarify the role of the *Singleton* Plaintiffs, *Milligan* Doc. 188; *see also Milligan* Docs. 195, 196, 201; (2) the *Singleton* Plaintiffs’ motion for a preliminary injunction, *Singleton* Doc. 147; and (3) next steps.

After that conference, the Court clarified that remedial proceedings would be limited to whether the 2023 Plan complies with the order of this Court, affirmed by the Supreme Court, and Section Two. *Milligan* Doc. 203 at 4. The Court further clarified that because the scope of the remedial hearing would be limited, the constitutional claims of the *Singleton* Plaintiffs would not be at issue. *Id.* at 5. The Court then set a remedial hearing in *Milligan* and *Caster* for August 14, 2023, *id.* at 3, and a preliminary injunction hearing in *Singleton* to commence immediately after the remedial hearing, *id.* at 6.

On August 3, 2023, the State moved for clarification of the scope of remedial proceedings. *Milligan* Doc. 205. All Plaintiffs responded. *Milligan* Doc. 210; *Caster* Doc. 190; *Singleton* Doc. 160. Also on August 3, 2023, Congresswoman Terri Sewell (who represents District 7) and members of the Congressional Black Caucus of the United States Congress sought leave to file an *amici curiae* brief in support of the Plaintiffs, which we granted, *Milligan* Docs. 208, 232, 236. Congresswoman Sewell and members of the Congressional Black Caucus assert that the 2023 Plan is an insufficient remedy for the likely Section Two violation found by this Court. *Milligan* Doc. 236 at 5. They too assert that this Court “should enjoin [the 2023 Plan] and direct the Special Master to redraw a map that complies with the Voting Rights Act.” *Id.* at 10.

On August 4, 2023, the State responded to the Plaintiffs’ objections to the 2023 Plan. *See Milligan* Doc. 220. The State defends the 2023 Plan as prioritizing “to the fullest extent possible” three communities of interest: the Black Belt, the Gulf

Coast, and the Wiregrass.⁸ *Id.* at 9. The State further asserts that the 2023 Plan fairly applies traditional districting “principles of compactness, county lines, and communities of interest,” and because the *Caster* and *Milligan* Plaintiffs’ “alternative plans would violate the traditional redistricting principles given effect in the 2023 Plan, [their] § 2 claims fail.” *Id.* at 9–10.

On August 6, 2023, we again clarified the scope of the remedial proceedings in *Milligan* and *Caster*. *Milligan* Doc. 222. We explained that the purpose of those remedial proceedings would be to determine whether the 2023 Plan remedies the likely Section Two violation found by this Court and affirmed by the Supreme Court. *Id.* at 8–9. We reiterated that the remedial proceedings would not relitigate the findings made in connection with the previous liability determination. *Id.* at 11.

On August 7, 2023, all Plaintiffs replied in support of their objections to the 2023 Plan. *See Milligan* Doc. 225; *Caster* Doc. 195. The replies share a common premise: that any alleged reliance by the Legislature on traditional districting principles does not absolve the Legislature of its obligation to cure the Section Two violation found by this Court and affirmed by the Supreme Court. *See Milligan* Doc. 225 at 12; *Caster* Doc. 195 at 7–8.

⁸ We already have described the Black Belt. *See supra* at n.7. When the State refers to the “Gulf Coast,” it refers to Mobile and Baldwin counties. *See Milligan* Doc. 220-11 at 5. When the State refers to the “Wiregrass,” it refers to an area in the southeast part of the state that includes Barbour, Coffee, Covington, Crenshaw, Dale, Geneva, Henry, Houston, and Pike counties. *See id.* at 8.

On August 9, 2023, the National Republican Redistricting Trust (“the Trust”) moved for leave to file an *amicus curiae* brief in support of the 2023 Plan, which the Court granted. *See Milligan* Docs. 230, 232, 234. The Trust asserts that the “2023 Plan adheres to traditional districting principles better than any of the Plaintiffs’ plans, maintaining communities of interest that the 2021 Plan did not.” *Milligan* Doc. 234 at 7. The Trust urges this Court to reject the Plaintiffs’ remedial plans. *Id.* at 25.

Later that day, the *Milligan* and *Caster* Plaintiffs moved *in limine* to exclude testimony from certain experts and “any and all evidence, references to evidence, testimony, or argument relating to the 2023 Plan’s maintenance of communities of interest.” *Milligan* Doc. 233 at 1. The State responded. *Milligan* Doc. 245.

On August 11, 2023, certain state and local elected officials in Alabama moved for leave to file an *amici curiae* brief in support of the Plaintiffs, which the Court granted. *See Milligan* Docs. 255, 258, 260. The elected officials join in full the *Milligan* Plaintiffs’ objections and assert that this Court should enjoin Secretary Allen from using the 2023 Plan on the same grounds that we enjoined the 2021 Plan. *Milligan* Doc. 260 at 5, 14–15.

We held a remedial hearing in *Milligan* and *Caster* on August 14, 2023. *See Milligan* Doc. 203. Based on the agreement of all parties, the Court considered all evidence admitted in either *Milligan* or *Caster*, including evidence admitted during the preliminary injunction hearing, in both cases unless counsel raised a specific objection. *Id.* at 4; *Caster* Doc. 182; Aug. 14 Tr. 61. After the hearing, we directed the parties to submit proposed findings of fact and conclusions of law

on August 19, 2023, and they did so. *See Milligan Docs.* 267, 268; *Caster Docs.* 220, 221.

B. Factual and Legal Background

1. Constitutional and Statutory Provisions for Race In Redistricting

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 must comply with federal law. *Bartlett*, 556 U.S. at 7 (plurality opinion); *Reynolds v. Sims*, 377 U.S. 533, 554–60 (1964). At present, these cases concern a federal statutory requirement — Section Two, which 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.

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 (internal quotation marks omitted) (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. “Such a risk is greatest where minority and majority voters consistently prefer different candidates and where minority voters are submerged in a majority voting population that regularly defeats their choices.” *Allen*, 143 S. Ct. at 1503 (internal quotation marks omitted) (alterations accepted).

“[A] plaintiff may allege a § 2 violation in a single-member district if the manipulation of districting lines fragments [or 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*”).

“For the past forty years,” federal courts “have evaluated claims brought under § 2 using the three-part framework developed in [*Gingles*].” *Allen*, 143 S. Ct. at 1502–03. To prove a Section Two violation under *Gingles*, “plaintiffs must satisfy three preconditions.” *Id.* at 1503 (internal quotation marks omitted). “First, the minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district.” *Id.* (internal quotation marks omitted). “A district will be reasonably configured . . . if it comports with traditional districting criteria, such as being contiguous and reasonably compact.” *Id.* “Second, the minority group must be able to show that it is politically cohesive.” *Id.* (internal quotation marks omitted). “And third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority’s preferred candidate.” *Id.* (internal quotation marks omitted).

“Finally, a plaintiff who demonstrates the three preconditions must also show, under the totality of circumstances, that the political process is not equally open to minority voters.” *Id.* (internal quotation marks omitted). “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 County 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); *infra* at Part IV.B.4.

The Senate Factors include:

(1) the history of voting-related discrimination in the State or political subdivision; (2) the extent to which voting in the elections of the State or political subdivision is racially polarized; (3) the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; (4) the exclusion of members of the minority group from candidate slating processes; (5) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

De Grandy, 512 U.S. at 1010 n.9 (quoting *Gingles*, 478 U.S. at 44–45) (numerals added). Further, the Senate Factors include (8) “evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and (9) 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) (numeral added).

The Senate Factors are not exhaustive. “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. Although proportionality may be a “relevant consideration” under the controlling Supreme Court test, it cannot be dispositive. Section Two does not “establish[] a right to have members of a protected class elected in numbers equal to their proportion in the population,” 52 U.S.C. § 10301, and the Supreme Court has described at length the legislative history of that proportionality disclaimer. *See Allen*, 143 S. Ct. at 1500–01.

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*, 581 U.S. at 292.

2. Congressional Redistricting in Alabama

Since 1973, Alabama has been apportioned seven seats in the United States House of Representatives. *Milligan* Doc. 53 ¶ 28. In all House elections held after the 1970 census and the 1980 census, Alabama elected all-white delegations. *Id.* ¶ 44. After the 1990 census, the Legislature failed to enact a congressional

redistricting plan. *See Wesch*, 785 F. Supp. at 1494–95. Litigation ensued, and a federal court ultimately ordered elections held according to a plan that created one majority-Black district (District 7). *Wesch v. Folsom*, 6 F.3d 1465, 1467–68 (11th Cir. 1993); *Wesch*, 785 F. Supp. at 1498, 1581 app. A. In the 1992 election held using the court-ordered map, District 7 elected Alabama’s first Black Congressman in over 90 years. *Milligan* Doc. 53 ¶ 44. District 7 remains majority-Black and in every election since 1992 has elected a Black Democrat. *Id.* ¶¶ 44, 47, 49, 58. After 2020 census data was released, Mr. Randy Hinaman prepared the 2021 Plan:



Milligan Doc. 70-2 at 40; *Milligan* Doc. 88-19.

3. These Lawsuits

Three groups of plaintiffs sued to stop the State from conducting the 2022 elections with the 2021 Plan. *Allen*, 143 S. Ct. at 1502. As relevant here, we discuss the Section Two cases:

a. *Milligan*

The *Milligan* Plaintiffs alleged that Section Two now requires two majority-Black or Black-opportunity congressional districts in Alabama.⁹ The *Milligan* Plaintiffs asserted that the 2021 Plan reflected 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.

To satisfy the first *Gingles* requirement, that Black voters as a group are “sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district.” *Cooper*, 581 U.S. at 301 (internal quotation marks omitted). The *Milligan* Plaintiffs relied on the testimony of expert witness Dr. Moon Duchin. We found Dr. Duchin highly credible. *Milligan* Doc. 107 at 148–50.

Dr. Duchin opined in her report that because 27.16% of Alabama residents identified as Black on the 2020 Decennial Census, Black Alabamians are sufficiently numerous to constitute a majority in more than one congressional district. *Milligan* Doc. 68-5 at 5. Dr. Duchin testified that the 2021 Plan “pack[ed] Black population into District 7 at an elevated level of over 55% BVAP, then crack[ed] Black population in Mobile, Montgomery, and the rural Black Belt across Districts

⁹ When we use the phrase “opportunity district” or “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*, 581 U.S. at 303. We distinguish an 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 (plurality opinion). For additional discussion, see *infra* at Part III.

1, 2, and 3, so that none of them has more than about 30% BVAP.” *Id.* at 6 fig.1; Tr. 564.¹⁰

As for compactness, Dr. Duchin included in her report a map that reflects the geographic dispersion of Black residents across Alabama. *Milligan* Doc. 68-5 at 12 fig.3. She opined that it is possible to draw two contiguous and reasonably compact majority-Black congressional districts; and she offered four illustrative plans (“the Duchin plans”). *Id.* at 7 fig.2. Dr. Duchin offered extensive analysis in her report and testimony during the preliminary injunction hearing about how her plans satisfied the one-person-one-vote rule, included contiguous districts, respected existing political subdivisions, and attempted to minimize county splits. *Id.* at 8; Tr. 586–90, 599, 626; *Milligan* Doc. 92-1.

Dr. Duchin also offered exhaustive analysis and testimony about the compactness of the districts in her plans. She described how she computed compactness scores using three metrics that are commonly cited in professional redistricting analyses: the Polsby-Popper score, the Reock score, and the cut-edges score. *Milligan* Doc. 68-5 at 9; Tr. 590–94.¹¹ Dr. Duchin provided average compactness scores for each of her plans on each of these metrics, *Milligan* Doc. 68 5 at 9, and testified, among other things, that all four of her plans were “superior to” and “significantly more compact than” the 2021 Plan using an average Polsby-Popper metric, *id.*; Tr. 593.

¹⁰ When we cite to the transcript from the 2022 preliminary injunction hearing, pincites are to the numbered pages of the transcript, not the CM/ECF pagination. *See Milligan* Doc. 105.

¹¹ For an explanation of these metrics, *see Milligan* Doc. 107 at 61–62 n.9.

Dr. Duchin also testified that her plans respected the Black Belt as a community of interest as defined in the Legislature’s 2021 redistricting guidelines. *See Milligan* Doc. 68-5 at 13; *Milligan* Doc. 88-23 at 2–3. Dr. Duchin observed that in the 2021 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. Ultimately, Dr. Duchin opined that the districts in her plans were “reasonably” compact. Tr. 594.

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*, 581 U.S. at 302 (internal quotation marks omitted), the *Milligan* Plaintiffs relied on a racial polarization analysis conducted by expert witness Dr. Baodong Liu. We found Dr. Liu credible. *See Milligan* Doc. 107 at 174–175.

The *Milligan* Plaintiffs 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 studied thirteen elections and opined that he observed racially polarized voting in all of them, which resulted in the defeat of Black-preferred candidates in all of them except those in District 7. *Milligan* Doc. 68-1 at 9, 11, 18. At the preliminary injunction hearing, Dr. Liu emphasized the clarity and starkness of the pattern of racially polarized voting that he observed. *See* Tr. 1271–76. He testified that racially polarized voting in Alabama is “very clear.” Tr. 1293.

The *Milligan* Plaintiffs next argued that the Senate Factors “confirm[ed]” the Section Two violation. *Milligan* Doc. 69 at 16. The *Milligan* Plaintiffs emphasized Senate Factors 2 and 7 — racially polarized voting and a lack of Black electoral success — because in *Gingles* the Supreme Court flagged them as the “most important” factors, and because the parties’ stipulations of fact established that they were not in dispute. *See id.* (citing *Milligan* Doc. 53 ¶¶ 44, 121, 167–69). The *Milligan* Plaintiffs asserted 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.” *Id.* at 17–18. The *Milligan* Plaintiffs relied on numerous fact stipulations, which we laid out at length in the preliminary injunction. *See Milligan* Doc. 107 at 73–78 (quoting *Milligan* Doc. 53 ¶¶ 130–54, 157–65).

In addition to the stipulated facts, the *Milligan* Plaintiffs relied on the expert testimony of Dr. Joseph Bagley, whom we found credible. *See Milligan* Doc. 69 at 17–18; *Milligan* Doc. 107 at 185–187. Dr. Bagley opined about Senate Factors 1, 5, 6, 7, and 8, and he considered Factor 3 in connection with his discussion of Factor 1. *Milligan* Doc. 68-2 at 3–31. He opined that those Factors are present in Alabama and together mean that the 2021 Plan would “result in impairment of black voters’ ability to participate fully and equitably in the political process of electing candidates of their choice.” Tr. 1177.

For all these reasons, the *Milligan* Plaintiffs asserted that they were likely to prevail on their claim of vote dilution under the totality of circumstances.

b. *Caster*

The *Caster* Plaintiffs likewise alleged that the 2021 Plan violated Section Two because it “strategically cracks and packs Alabama’s Black communities.” *Caster* Doc. 3 ¶ 1. The *Caster* Plaintiffs also requested a remedy that includes two majority-Black or Black-opportunity districts. *Id.* at 31; *Caster* Doc. 97 ¶¶ 494–505.

To satisfy the first *Gingles* requirement, the *Caster* Plaintiffs relied on the expert testimony of Mr. Bill Cooper. *Caster* Docs. 48, 56, 65. We found Mr. Cooper highly credible. *See Milligan* Doc. 107 at 150–52. Mr. Cooper first opined that Black Alabamians are sufficiently numerous to constitute a majority in more than one congressional district; Mr. Cooper explained that according to 2020 census data, Alabama’s 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. *Caster* Doc. 48 at 6–7. Mr. Cooper explained that there was a loss of 33,051 white persons during this time frame, a 1.03% decrease. *Id.* at 6 fig.1.

Mr. Cooper also opined that it is possible to draw two contiguous and reasonably compact majority-Black congressional districts; and he offered seven illustrative plans (“the Cooper plans”). *Caster* Doc. 48 at 20–36; *Caster* Doc. 65 at 2–6. Mr. Cooper testified that when he began his work, 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 2021 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.

Like Dr. Duchin, Mr. Cooper offered extensive analysis and testimony about how his plans satisfied the one-person-one-vote rule, included contiguous districts, respected existing political subdivisions, and attempted to minimize county splits. Tr. 441–44, 446–47; *Caster* Doc. 48 at 22; *Caster* Doc. 65 at 5–6.

Also like Dr. Duchin, Mr. Cooper offered exhaustive analysis and testimony about the compactness of the districts in his plans. 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 2021 Plan, which he used as a “possible yardstick.” Tr. 444–46. He testified that all his plans either were at least as compact as the 2021 Plan, or they scored “slightly lower” than the 2021 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 further testified that he considered communities of interest in two ways: first, he considered “political subdivisions like counties and

towns and cities,” and second, he has “some knowledge of historical boundaries” and the Black Belt, so he considered the Black Belt. Tr. 447.

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*, 581 U.S. at 302 (internal quotation marks omitted), the *Caster* Plaintiffs relied on a racial polarization analysis conducted by Dr. Maxwell Palmer, whom we found credible. See *Milligan* Doc. 107 at 174–176.

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. *Caster* Doc. 49 ¶¶ 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).

Dr. Palmer opined that “Black voters are extremely cohesive,” *Caster* Doc. 49 ¶ 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. He 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. In his testimony, he characterized this evidence of racially polarized voting as “very strong.” Tr. 701.

The *Caster* Plaintiffs then analyzed the Senate Factors, and they relied on judicial authorities, stipulated facts, and the testimony of Dr. Bridgett King, whom we found credible, *Milligan* Doc. 107 at 185–87. *Caster* Doc. 56 at 19–38. Dr. King opined that racially polarized voting in Alabama is “severe and ongoing,” and “significantly and adversely impact[s] the ability of Black Alabamians to participate equally in the state’s political process.” *Caster* Doc. 50 at 4.

For all these reasons, the *Caster* Plaintiffs asserted that they were likely to prevail on their claim of vote dilution under the totality of circumstances.

c. The State

The State, in turn argued that the Committee properly started with the prior map and adjusted boundaries only as necessary to comply with the one-person, one-vote rule and serve traditional districting criteria. *See Milligan* Doc. 78 at 16. The State asserted that “nothing” in the Voting Rights Act “requires Alabama to draw two majority-black districts with slim black majorities as opposed to one majority-black district with a slightly larger majority.” *Id.* at 17. We first discuss the State’s position in *Milligan* during the preliminary injunction proceedings, and we then discuss the State’s position in *Caster*.

i. The State’s Arguments in *Milligan*

The State argued in *Milligan* 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.” *Id.* at 18. The State relied on the expert testimony of Mr. Thomas M. Bryan. After an exhaustive credibility determination, we assigned “very little weight” to Mr. Bryan’s testimony and found it “unreliable.” *Milligan* Doc. 107 at 152–156; *see also infra* at Part IV.B.2.a.

The State argued that the Duchin plans did not respect the communities of interest in Alabama’s Gulf Coast and the Wiregrass region. *Milligan* Doc. 78 at 82– 84. The State objected 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. The State asserted that the Duchin plans did not respect the Black Belt because they split it between two districts. *Id.* at 85–86 n.15.

Mr. Bryan opined about compactness. He first opined that in each Duchin plan “compactness [wa]s sacrificed.” *Milligan* Doc. 74-1 at 3. He later acknowledged and opined, however, that “Dr. Duchin’s plans perform generally better *on average* than the [2021 Plan], although some districts are significantly less compact than Alabama’s.” *Id.* at 19 (emphasis in original). And Mr. Bryan testified that he has “no opinion on what is reasonable and what is not reasonable” compactness. Tr. 979.

As for communities of interest, Mr. Bryan opined that Mobile and Baldwin counties are “inseparable.” Tr. 1006. And he testified that the Black Belt is a community of interest and ultimately conceded that the Duchin plans had fewer splits than the 2021 Plan in the Black Belt. Tr. 1063–65.

Mr. Bryan explained his overall opinion that Dr. Duchin was able to “achieve a black majority population in two districts” only by “sacrific[ing]” traditional districting criteria. Tr. 874. He explained further his concern about “cracking and packing of incumbents.” Tr. 874.

The State also offered testimony about the Gulf Coast community of interest from former Congressman Bradley Byrne, who testified that he did not want Mobile County to be split because he worried it would “lose[] its influence” politically. Tr. 1744.

The State briefly asserted that the *Milligan* Plaintiffs could not establish *Gingles* II and III because their racial polarization analysis was selective. *See Milligan* Doc. 78 at 97. But at the preliminary injunction hearing, the State offered the testimony of Dr. M.V. Hood, whom we found credible, *see Milligan* Doc. 107 at 176–77, and Dr. Hood testified that he and Dr. Liu “both found evidence of” racially polarized voting in Alabama. Tr. 1421.

The State then asserted that the “balance” of the Senate Factors favors the State because things in Alabama have “changed dramatically.” *Milligan* Doc. 78 at 101–02 (internal quotation marks omitted) (quoting *Shelby County v. Holder*, 570 U.S. 529, 547 (2013)). As for Factor 1, the State acknowledged Alabama’s “sordid history” and assert that it “should never be forgotten,” but said that Alabama has “[o]vercome [i]ts [h]istory.” *Id.* at 102. As for Factor 5, the State disputed 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 (internal quotation marks omitted) (quoting *Gingles*, 478 U.S. at 37). As for Factor 6, the State argued that historical evidence of racial

appeals in campaigns is not probative of current conditions. *Id.* at 113–14. As for Factor 7, the State argued that minorities “have achieved a great deal of electoral success in Alabama’s districted races for State offices.” *Id.* at 116. As for Factor 8, the State vehemently disputed that elected officials in Alabama are not responsive to the needs of the Black community. *Id.* at 117–19. And as for Factor 9, the State urged that a procedure is tenuous only if it “markedly departs from past practices” and argued that the 2021 Plan was not tenuous because it did not meaningfully depart from the 2011 Plan. *Id.* at 119–20 (quoting S. Rep. 97-417 at 29 n.117).

The State did not offer any expert testimony about the Senate Factors.

ii. The State’s Arguments in *Caster*

The State took much the same position in *Caster* that it took in *Milligan*, and Mr. Bryan attacked the Cooper plans for many of the same reasons he attacked the Duchin plans. We recite only a few relevant points.

First, with respect to *Gingles* I. On cross examination, Mr. Bryan conceded that he did not evaluate and had no opinion about whether the Cooper plans respected contiguity, or “the extent to which Mr. Cooper’s plan[s] split political subdivisions.” Tr. 931–32. 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.

After Mr. Bryan offered that testimony, 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 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." Tr. 973.

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

As for *Gingles* II and III, Dr. Hood testified at the hearing that he had not identified any errors in Dr. Palmer's work that would affect his analyses or conclusions. See *Caster* Doc. 66-2 at 2–34; Tr. 1407–11, 1449–50, 1456, 1459–61. Dr. Hood also testified that he did not dispute Dr. Palmer's conclusions that (1) "black voters in the areas he examined vote for the same candidates cohesively," (2) "black Alabamians and white Alabamians in the areas he examined consistently preferred different candidates," and (3) "the candidates preferred by white voters in the areas that he looked at regularly defeat the candidates preferred by black voters." Tr. 1445. Dr. Hood testified that he and Dr. Palmer both found a "substantive pattern" of racially polarized voting. Tr. 1448.

4. Our Findings and Conclusions on Liability

"After reviewing th[e] extensive record," we "concluded in a 227-page opinion that the question whether [the 2021 Plan] likely violated § 2 was not a close one." *Allen*, 143 S. Ct. at 1502 (internal quotation marks omitted); accord *Milligan* Doc. 107 at 195; *Caster* Doc. 101 at 204. "It did." *Allen*, 143 S. Ct. at 1502; accord *Milligan* Doc. 107 at 195; *Caster* Doc. 101 at 204.

The parties developed such an extensive record and offered such fulsome legal arguments that it took us nearly ninety pages to describe their evidence and

arguments. *See Milligan* Doc. 107 at 52–139. Our findings of fact and conclusions of law consumed eighty more pages. *See id.* at 139–210. They were exhaustive, and we do not repeat them here in full. We highlight those findings and conclusions that are particularly relevant to our remedial task.

In our *Gingles* I analysis, we first found that the Plaintiffs “established that Black voters as a group are sufficiently large . . . to constitute a majority in a second majority-minority legislative district.” *Id.* at 146 (internal quotation marks omitted). We then found that the Plaintiffs established that Black voters as a group are sufficiently geographically compact to constitute a majority in a second reasonably configured district. *Id.* at 147–74.

We began our compactness analysis with credibility determinations about the parties’ expert witnesses. We found the testimony of Dr. Duchin and Mr. Cooper “highly credible,” *id.* at 148–51, and we “assign[ed] very little weight to Mr. Bryan’s testimony,” *id.* at 152–56. We did not take lightly the decision not to credit Mr. Bryan. We based that decision on two evaluations — one that examined his credibility relative to that of Dr. Duchin and Mr. Cooper, and one that was not relative. *See id.* We expressed concern about instances in which Mr. Bryan “offered an opinion without a sufficient basis (or in some instances any basis),” enumerated seven examples, reviewed other “internal inconsistencies and vacillations,” and described a demeanor that “reflected a lack of concern for whether [his] opinion was well-founded.” *Id.* at 153–56.

We then reviewed “compactness scores” to assess whether the majority-Black congressional districts in the Duchin plans and the Cooper plans were “reasonably” compact. *Id.* at 157–59. We determined

that regardless of whether we relied strictly on the opinions of Dr. Duchin and Mr. Cooper about the reasonableness of the scores, or compared the scores for the illustrative plans to the scores for the 2021 Plan, the result was the same: the Plaintiffs' plans established that Black voters in Alabama could comprise a second reasonably configured majority-Black congressional district. *Id.* at 159.

Next, we considered the “eyeball” test for compactness. *See id.* at 159–62. Based on information in Dr. Duchin's report that the State did not dispute, we found 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.” *Id.* at 161. We then found that the majority-Black districts in the Duchin plans and the Cooper plans appeared reasonably compact because we did 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.” *Id.* at 162.

Next, we discussed 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.” *Id.* (internal quotation marks omitted); *accord id.* at 162–74. We found that the Duchin plans and the Cooper plans respected existing political subdivisions “at least as well as the [2021] Plan,” and in some instances better than the 2021 Plan. *See id.* at 163–64.

We then turned to communities of interest. Before making findings, we reiterated the rule “that a Section Two 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.” *Id.* at 165 (emphasis in original) (internal quotation marks omitted) (alterations accepted) (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion)). We were “careful to avoid the beauty contest that a great deal of testimony and argument seemed designed to try to win.” *Id.*

We found that the Black Belt is an important community of interest, and that it was split among four congressional districts in the 2021 Plan: “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.* at 167. In the Duchin plans and the Cooper plans, the “overwhelming majority of the Black Belt” was in “just two districts.” *Id.* at 168. We noted that Mr. Bryan conceded that the Duchin plans and Cooper plans performed better than the 2021 Plan for the Black Belt. *Id.*

We then found that “[t]ogether with our finding that the Duchin plans and the Cooper plans respect existing political subdivisions, our finding that [they] respect the Black Belt supports a conclusion that [they] establish reasonable compactness.” *Id.* at 169.

Although “we need not consider how . . . Districts 2 and 7 might perform in a beauty contest against other plans that also respect communities of interest,” we nevertheless discussed the State’s argument that the Duchin plans and Cooper plans ignored the Gulf Coast community of interest. *Id.* at 169–71. We found the “record about the Gulf Coast community of interest . . . less compelling,” and that the State “overstate[d] the point.” *Id.* at 169–70. Only two witnesses testified about the Gulf Coast. We discounted Mr. Bryan, and we found that the other witness did not support the

State’s “overdrawn argument that there can be no legitimate reason to split Mobile and Baldwin Counties consistent with traditional redistricting criteria.” *Id.* at 170. We noted that the Legislature split Mobile and Baldwin Counties in its districting plan for the State Board of Education. *Id.* at 171.

We found that the State “d[id] 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.” *Id.* at 173. We found that their illustrative plans satisfied the reasonable compactness requirement for *Gingles* I.

Our findings about *Gingles* II and III were comparatively brief because the underlying facts were not in dispute. *See id.* at 174–78. We credited the testimony of Doctors Liu (the *Milligan* Plaintiffs’ expert), Palmer (the *Caster* Plaintiffs’ expert), and Hood (the State’s expert). *See id.* All three experts found evidence of racially polarized voting in Alabama. Based on their testimony, we found that Black voters in Alabama “are politically cohesive,” that the challenged districts’ “white majority votes sufficiently as a bloc to usually defeat Black voters’ preferred candidate,” *id.* at 174 (internal quotation marks omitted) (alterations accepted), and that “voting in Alabama, and in the districts at issue in this litigation, is racially polarized” for purposes of *Gingles* II and III, *id.* at 177–78.

We then discussed the Senate Factors. We found that Senate Factors 2 (racially polarized voting) and 7 (the extent to which Black Alabamians have been elected to public office) “weigh[] heavily in favor of” the Plaintiffs. *Id.* at 178–81. We found that Factors 1, 3, and 5 (all of which relate to Alabama’s history of official discrimination against Black Alabamians)

“weigh against” the State. *Id.* at 182–88. And we found that Factor 6 (racial appeals in political campaigns) “weighs in favor of” the Plaintiffs but “to a lesser degree” than Senate Factors 2, 7, 1, 3, and 5. *Id.* at 188–92. We made no findings about Factors 8 and 9, *id.* at 192–93, and we found that no Factor weighed in favor of the State. *Id.* at 195.

Finally, we discussed proportionality. We explained our understanding that under the Voting Rights Act and binding Supreme Court precedent, it is relevant, but not dispositive. *Id.* at 193. We rejected the State’s argument that the Plaintiffs’ arguments were “naked attempts to extract from Section 2 a non-existent right to proportional . . . racial representation in Congress.” *Id.* at 195 (internal quotation marks omitted). And we stated that we did not resolve the motion for preliminary injunctive relief “solely (or even in the main) by conducting a proportionality analysis” because, consistent with precedent, we conducted a thorough *Gingles* analysis and considered proportionality only as “part and parcel of the totality of the circumstances.” *Id.*

Ultimately, we explained five reasons why we did not regard the liability question as “a close one”:

- (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.

Id. at 195–96. “Put differently,” we said, “because of the posture of these consolidated cases, the record before us has not only once, but twice, established that the [2021] Plan substantially likely violates Section Two.” *Id.* at 196.

5. Supreme Court Affirmance

The Supreme Court affirmed the preliminary injunction in a 5-4 decision. We discuss that decision in three parts. We first discuss the part of the opinion that is binding precedent because it was joined by a majority of the Justices (“the Opinion of the Supreme Court”); we then discuss the portion of the Chief

Justice’s opinion that is the opinion of four Justices; we then discuss Justice Kavanaugh’s concurrence.

a. Controlling Precedent

The Supreme Court began by directly stating the ruling:

In January 2022, a three-judge District Court sitting in Alabama preliminarily enjoined the State from using the districting plan it had recently adopted for the 2022 congressional elections, finding that the plan likely violated Section 2 of the Voting Rights Act. This Court stayed the District Court’s order pending further review. After conducting that review, we now affirm.

Allen, 143 S. Ct. at 1498 (internal citations omitted). Next, the Supreme Court recited relevant portions of the history of the Voting Rights Act, redistricting in Alabama, and these cases. *Id.* at 1498–1502. The Supreme Court then reiterated its ruling: “The District Court found that plaintiffs demonstrated a reasonable likelihood of success on their claim that [the 2021 Plan] violates § 2. We affirm that determination.” *Id.* at 1502.

Next, the Supreme Court restated the controlling legal standards, as set forth in *Gingles* and applied by federal courts “[f]or the past forty years.” *Id.* at 1502–04. The majority opinion then again restated the ruling: “[a]s noted, the District Court concluded that plaintiffs’ § 2 claim was likely to succeed under *Gingles*. Based on our review of the record, we agree.” *Id.* at 1504 (internal citations omitted).

The Supreme Court then reviewed our analysis of each *Gingles* requirement. *Id.* at 1504–06. The

Supreme Court agreed with our analysis as to each requirement. It did not hold, suggest, or even hint that any aspect of our *Gingles* analysis was erroneous. *See id.*

“With respect to the first *Gingles* precondition,” the Supreme Court held that we “correctly found that black voters could constitute a majority in a second district that was reasonably configured.” *Id.* at 1504 (internal quotation marks omitted). The Supreme Court ruled that “[t]he plaintiffs adduced eleven illustrative maps—that is, example districting maps that Alabama could enact—each of which contained two majority-black districts that comported with traditional districting criteria.” *Id.*

The Supreme Court then considered the Duchin plans. It observed that we “explained that the maps submitted by [Dr. Duchin] performed generally better on average than did [the 2021 Plan].” *Id.* (internal quotation marks omitted) (alterations accepted). Likewise, the Supreme Court considered the Cooper plans. The Supreme Court observed that Mr. Cooper “produced districts roughly as compact as the existing plan.” *Id.* And that “none of plaintiffs’ maps contained any tentacles, appendages, bizarre shapes, or any other obvious irregularities that would make it difficult to find them sufficiently compact.” *Id.* (internal quotation marks omitted).

Next, the Supreme Court held that the “Plaintiffs’ maps also satisfied other traditional districting criteria. They contained equal populations, were contiguous, and respected existing political subdivisions Indeed, some of plaintiffs’ proposed maps split the same number of county lines as (or even *fewer* county lines than) the State’s map.” *Id.* (emphasis in original). Accordingly, the Supreme Court “agree[d] with” us

that “plaintiffs’ illustrative maps strongly suggested that Black voters in Alabama could constitute a majority in a second, reasonably configured, district.” *Id.* (internal quotation marks omitted) (alterations accepted).

Next, the Supreme Court turned to the State’s argument “that plaintiffs’ maps were not reasonably configured because they failed to keep together a traditional community of interest within Alabama.” *Id.* The Supreme Court recited the State’s definition of “community of interest,” as well as its argument that “the Gulf Coast region . . . is such a community of interest, and that plaintiffs’ maps erred by separating it into two different districts.” *Id.*

The Supreme Court “d[id] not find the State’s argument persuasive.” *Id.* at 1505. The Supreme Court reasoned that “[o]nly two witnesses testified that the Gulf Coast was a community of interest,” that “testimony provided by one of those witnesses was partial, selectively informed, and poorly supported,” and that “[t]he other witness, meanwhile, justified keeping the Gulf Coast together simply to preserve political advantage.” *Id.* (internal quotation marks omitted) (alterations accepted). The Supreme Court concluded that we “understandably found this testimony insufficient to sustain Alabama’s overdrawn argument that there can be no legitimate reason to split the Gulf Coast region.” *Id.* (internal quotation marks omitted).

Next, the Supreme Court considered an alternative basis for its agreement with our *Gingles* I analysis: that “[e]ven if the Gulf Coast did constitute a community of interest . . . [we] found that plaintiffs’ maps would still be reasonably configured because they joined together a different community of interest

called the Black Belt.” *Id.* The Supreme Court then described the reasons why the Black Belt is a community of interest — its “high proportion of black voters, who share a rural geography, concentrated poverty, unequal access to government services, . . . lack of adequate healthcare, and a lineal connection to the many enslaved people brought there to work in the antebellum period.” *Id.* (internal quotation marks omitted).

The Supreme Court agreed with us again, ruling that we “concluded—correctly, under [Supreme Court] precedent—that [we] did not have to conduct a beauty contest between plaintiffs’ maps and the State’s. There would be a split community of interest in both.” *Id.* (internal quotation marks omitted) (alterations accepted) (quoting *Vera*, 517 U.S. at 977 (plurality opinion)).

The Supreme Court then rejected the State’s argument that the 2021 Plan satisfied Section Two because it performed better than Plaintiffs’ illustrative plans on a core retention metric — “a term that refers to the proportion of districts that remain when a State transitions from one districting plan to another.” *Id.* The Supreme Court rejected that metric on the ground that the Supreme Court “has never held that a State’s adherence to a previously used districting plan can defeat a § 2 claim” because “[i]f that were the rule, a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan.” *Id.* “That is not the law,” the Supreme Court made clear: Section Two “does not permit a State to provide some voters less opportunity . . . to participate in the political process just because

the State has done it before.” *Id.* (internal quotation marks omitted).

The Supreme Court next discussed the second and third *Gingles* requirements. The Supreme Court accepted our determination that “there was 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.” *Id.* (internal quotation marks omitted). The Supreme Court recited the relevant racial polarization statistics and noted that the State’s expert “conceded that the candidates preferred by white voters in the areas that he looked at regularly defeat the candidates preferred by Black voters.” *Id.* (internal quotation marks omitted).

In the last step of its review of our analysis, the Supreme Court concluded that the Plaintiffs “had carried their burden at the totality of circumstances stage.” *Id.* at 1505–06. The Supreme Court upheld our findings that “elections in Alabama were racially polarized; that Black Alabamians enjoy virtually zero success in statewide elections; that political campaigns in Alabama had been characterized by overt or subtle racial appeals; and that Alabama’s extensive history of repugnant racial and voting-related discrimination is undeniable and well documented.” *Id.* at 1506 (internal quotation marks omitted).

The Supreme Court concluded its review of our analysis by again stating its ruling: “We see no reason to disturb the District Court’s careful factual findings, which are subject to clear error review and have gone unchallenged by Alabama in any event. Nor is there a basis to upset the District Court’s legal conclusions. The Court faithfully applied our precedents and

correctly determined that, under existing law, [the 2021 Plan] violated § 2.” *Id.* (internal quotation marks and citation omitted).

We have carefully reviewed the Opinion of the Supreme Court and discern no basis to conclude that any aspect of our Section Two analysis was erroneous.

Next, the Supreme Court turned to arguments by the State urging the Supreme Court to “remake [its] § 2 jurisprudence anew,” which the Supreme Court described as “[t]he heart of these cases.” *Id.* The Supreme Court explained that the “centerpiece of the State’s effort is what it calls the ‘race-neutral benchmark.’” *Id.* The Supreme Court then described the benchmark, found the argument “compelling neither in theory nor in practice,” and discussed problems with the argument. *Id.* at 1507–10.

Of special importance to these remedial proceedings, the Supreme Court rejected the State’s assertion that “existing § 2 jurisprudence inevitably demands racial proportionality in districting, contrary to” Section Two. *Id.* at 1508. “[P]roperly applied,” the Supreme Court explained, “the *Gingles* framework itself imposes meaningful constraints on proportionality, as [Supreme Court] decisions have frequently demonstrated.” *Id.* The Supreme Court then discussed three cases to illustrate how *Gingles* constrains rather than requires proportionality: *Shaw v. Reno*, 509 U.S. 630, 633–34 (1993); *Miller v. Johnson*, 515 U.S. 900, 906, 910–11 (1995); and *Vera*, 517 U.S. at 957 (plurality opinion). *Allen*, 143 S. Ct. at 1508–09.

“Forcing proportional representation is unlawful,” the Supreme Court reiterated, and Section Two “never requires adoption of districts that violate traditional redistricting principles.” *Id.* at 1509–10 (internal

quotation marks omitted) (alterations accepted). Rather, its “exacting requirements . . . limit judicial intervention to those instances of intensive racial politics where the excessive role of race in the electoral process . . . denies minority voters equal opportunity to participate.” *Id.* at 1510 (internal quotation marks omitted) (alterations accepted).

In Part III-B-1 of the opinion, the Supreme Court then discussed “how the race-neutral benchmark would operate in practice.” *Id.* Justice Kavanaugh did not join Part III-B-1. *See id.* at 1497. Part III-B-1 is the only part of the Chief Justice’s opinion that Justice Kavanaugh did not join. *See id.* We discuss it separately in the next segment of our analysis. *See infra* at Part I.B.5.b.

Finally, the Supreme Court rejected the State’s arguments that the Supreme Court “should outright stop applying § 2 in cases like these” because it does not apply to single-member redistricting and is unconstitutional as we applied it. *Allen*, 143 S. Ct. at 1514. The Supreme Court observed that it has “applied § 2 to States’ districting maps in an unbroken line of decisions stretching four decades” and has “unanimously held that § 2 and *Gingles* certainly . . . apply to claims challenging single-member districts.” *Id.* at 1515 (internal quotation marks omitted) (alterations accepted) (quoting *Grove v. Emison*, 507 U.S. 25, 40 (1993)). The Supreme Court reasoned that adopting the State’s approach would require it to abandon this precedent. The Supreme Court explained its refusal to do so: “Congress is undoubtedly aware of our construing § 2 to apply to districting challenges. It can change that if it likes. But until and unless it does, statutory *stare decisis* counsels our staying the course.” *Id.*

The Supreme Court then rejected as foreclosed by longstanding precedent the State’s argument that Section Two is unconstitutional as we applied it. *Id.* at 1516– 17. The Court affirmed our judgments in *Caster* and *Milligan*. *Id.* at 1517.

b. Part III-B-1 of the Chief Justice’s Opinion

In Part III-B-1, the Chief Justice, in an opinion joined by three other Justices, explained why the State’s race-neutral benchmark approach would “fare[] poorly” in practice.¹² *Id.* at 1510 (Roberts, C.J.). The four justices explained that Alabama’s benchmark would “change existing law” by “prohibiting the illustrative maps that plaintiffs submit to satisfy the first *Gingles* precondition from being based on race.” *Id.* (internal quotation marks omitted). The four justices then explained why they saw “no reason to impose such a new rule.” *Id.* The four justices acknowledged that the “line between racial predominance and racial consciousness can be difficult to discern,” and explained their view that “it was not breached here.” *Id.* at 1510–11.

We have considered Part III-B-1 carefully, and we do not discern anything about it that undermines our conclusion that the 2023 Plan does not remedy the

¹² We distinguish Part III-B-1, the opinion of four justices, from a “plurality opinion.” “A plurality opinion is one that doesn’t garner enough appellate judges’ votes to constitute a majority, but has received the greatest number of votes of any of the opinions filed, among those opinions supporting the mandate.” Bryan A. Garner, et al, *The Law of Judicial Precedent* 195 (2016) (internal quotation marks and footnote omitted) (alterations accepted). All the other parts of the Chief Justice’s opinion garnered five votes.

Section Two violation that we found and the Supreme Court affirmed.

c. Justice Kavanaugh's Concurrence

Justice Kavanaugh “agree[d] with the [Supreme] Court that Alabama’s redistricting plan violates § 2 of the Voting Rights Act.” *Allen*, 143 S. Ct. at 1517 (Kavanaugh, J., concurring). He “wr[ote] separately to emphasize four points.” *Id.* (Kavanaugh, J., concurring). *First*, Justice Kavanaugh emphasized that “the upshot of Alabama’s argument is that the Court should overrule *Gingles*,” “[b]ut the *stare decisis* standard for this Court to overrule a statutory precedent, as distinct from a constitutional precedent, is comparatively strict.” *Id.* (Kavanaugh, J., concurring). Justice Kavanaugh observed that “[i]n the past 37 years . . . Congress and the President have not disturbed *Gingles*, even as they have made other changes to the Voting Rights Act.” *Id.* (Kavanaugh, J., concurring).

“*Second*,” Justice Kavanaugh emphasized, “Alabama contends that *Gingles* inevitably requires a proportional number of majority-minority districts, which in turn contravenes the proportionality disclaimer” in Section Two, but “Alabama’s premise is wrong.” *Id.* at 1517–18 (Kavanaugh, J., concurring). “*Gingles* does not mandate a proportional number of majority-minority districts.” *Id.* at 1518 (Kavanaugh, J., concurring). Rather, “*Gingles* requires the creation of a majority-minority district only when, among other things, (i) a State’s redistricting map cracks or packs a large and ‘geographically compact’ minority population and (ii) a plaintiff’s proposed alternative map and proposed majority-minority district are ‘reasonably configured’—namely, by respecting compactness principles and other traditional districting criteria such as

county, city, and town lines.” *Id.* (Kavanaugh, J., concurring).

Justice Kavanaugh explained further that if “*Gingles* demanded a proportional number of majority-minority districts, States would be forced to group together geographically dispersed minority voters into unusually shaped districts, without concern for traditional districting criteria such as county, city, and town lines,” but “*Gingles* and [the Supreme] Court’s later decisions have flatly rejected that approach.” *Id.* (Kavanaugh, J., concurring).

“*Third*,” Justice Kavanaugh explained, “Alabama argues that courts should rely on race-blind computer simulations of redistricting maps to assess whether a State’s plan abridges the right to vote on account of race,” but as the Supreme Court “has long recognized—and as all Members of [the Supreme] Court . . . agree[d in *Allen*—the text of § 2 establishes an effects test, not an intent test.” *Id.* (Kavanaugh, J., concurring).

“*Fourth*,” Justice Kavanaugh emphasized, “Alabama asserts that § 2, as construed by *Gingles* to require race-based redistricting in certain circumstances, exceeds Congress’s remedial or preventive authority,” but “the constitutional argument presented by Alabama is not persuasive in light of the Court’s precedents.” *Id.* at 1519 (Kavanaugh, J., concurring).

Justice Kavanaugh reiterated that he “vote[d] to affirm” and “concur[red] in all but Part III–B–1 of the Court’s opinion.” *Id.* (Kavanaugh, J., concurring).

The State argues that Part III-B-1 tells us that only a plurality of Justices “concluded that at least some of the plans drawn by Bill Cooper did not breach the line between racial consciousness and racial predominance.”

Milligan Doc. 267 ¶ 39 (internal quotation marks omitted) (alterations accepted). The State overreads Part III-B-1 as leaving open for relitigation the question whether the Plaintiffs submitted at least one illustrative remedial plan in which race did not play an improper role.

The affirmance tells us that a majority of the Supreme Court concluded that the Plaintiffs satisfied their burden under *Gingles* I. This necessarily reflects a conclusion that the Plaintiffs submitted at least one illustrative map in which race did not play an improper role. Justice Kavanaugh’s concurrence is to the same effect — Justice Kavanaugh did not suggest, let alone say, that he “vote[d] to affirm” despite finding that the Plaintiffs submitted no illustrative map that properly considered race. What Part III-B-1 tells us — and no more — is that only four Justices agreed with every statement in that Part.

C. Remedial Proceedings

We first discuss the Plaintiffs’ objections to the 2023 Plan and the State’s defense. We then discuss the parties’ stipulations of fact and the remedial hearing.

1. The *Milligan* Plaintiffs’ Objections

The *Milligan* Plaintiffs object to the 2023 Plan on the ground that it “ignores this Court’s preliminary injunction order and instead perpetuates the Voting Rights Act violation that was the very reason that the Legislature redrew the map.” *Milligan* Doc. 200 at 6. The *Milligan* Plaintiffs assert that the 2023 Plan does not remedy the Section Two violation we found because it does not include an additional opportunity district. *Id.* They argue that District 2 is not an opportunity district because the performance analyses prepared by Dr. Liu and the State indicate that “Black-

preferred candidates in the new CD2 will continue to lose 100% of biracial elections . . . by 10%-points on average.” *Id.* at 6–7 (citing *Milligan* Doc. 200-2 at 4 tbl.2).

The *Milligan* Plaintiffs make three arguments to support their objection. *First*, the *Milligan* Plaintiffs argue that the 2023 Plan fails to remedy the Section Two violation we found because the 2023 Plan itself violates Section Two and dilutes Black votes. *Id.* at 16–19. The *Milligan* Plaintiffs contend that the 2023 Plan “fails th[e] § 2 remedial analysis for the same reasons its 2021 Plan did,” because it “permit[s] the white majority voting as a bloc in the new CD2 to easily and consistently defeat Black-preferred candidates.” *Id.* at 17.

The *Milligan* Plaintiffs first rely on the State’s evidence to make their point. The Alabama Performance Analysis “found that *not once* in seven elections from 2018 to 2020 would Black voters’ candidates overcome white bloc voting to win in CD2.” *Id.* at 18. And Dr. Liu’s¹³ analysis of 11 biracial elections in District 2 between 2014 and 2022 “shows zero Black electoral successes, with an average margin of defeat of over 10 percentage points,” *id.*, because “voting is highly racially polarized,” *Milligan* Doc. 200-2 at 1. Thus, the *Milligan* Plaintiffs say, “the new CD2 offers no more opportunity than did the old CD2.” *Milligan* Doc. 200 at 19.

Second, the *Milligan* Plaintiffs argue that the legislative findings that accompany the 2023 Plan perpetuate the Section Two violation and contradict

¹³ The *Milligan* Plaintiffs relied on testimony from Dr. Liu during the preliminary injunction proceedings, and we found him credible. *Milligan* Doc. 107 at 174–75.

conclusions that we and the Supreme Court drew based on the evidence. *See id.* at 20–23. The *Milligan* Plaintiffs offer evidence to rebut the State’s suggestion that there can be no legitimate reason to split Mobile and Baldwin counties: (1) a declaration by Alabama Representative Sam Jones, the first Black Mayor of Mobile, who “explains the many economic, cultural, religious, and social ties between much of Mobile and the Black Belt, in contrast to Baldwin County, which shares ‘little of these cultural or community ties’ with Mobile,” *id.* at 22 (quoting *Milligan* Doc. 200-9 ¶ 15); and (2) an expert report prepared by Dr. Bagley,¹⁴ who contrasts the “‘intimate historical and socioeconomic ties’ that the ‘City of Mobile and the northern portion of Mobile County, including Prichard, have . . . with the Black Belt,’” with the “‘ahistorical’ effort to treat the Wiregrass or ‘Mobile and Baldwin Counties as an inviolable’” community of interest, *id.* (quoting *Milligan* Doc. 200- 15 at 1).

Further, the *Milligan* Plaintiffs urge that under binding precedent, we cannot defer to a redistricting policy of a state if it perpetuates vote dilution. *See id.* at 20 (citing *Allen*, 143 S. Ct. at 1505, and *LULAC*, 548 U.S. at 440–41).

The *Milligan* Plaintiffs assail the legislative findings on the grounds that they “contradict the Committee’s own recently readopted guidelines, were never the subject of debate or public scrutiny, ignored input from Black Alabamians and legislators, and simply parroted attorney arguments already rejected

¹⁴ The *Milligan* Plaintiffs relied on expert testimony from Dr. Bagley about the Senate Factors during the preliminary injunction proceedings, and we found him credible. *See Milligan* Doc. 107 at 78–81 and 185–87.

by this Court and the Supreme Court.” *Id.* at 20. The *Milligan* Plaintiffs observe that although the legislative findings prioritize as “non-negotiable” rules that there cannot be “more than six splits of county lines” and that the Black Belt, Gulf Coast, and Wiregrass be kept together “to the fullest extent possible,” the guidelines prioritize compliance with Section Two over those rules. *Id.* at 20–21 (citing *Milligan* Doc. 200-4, Section 1, Findings 3(d), 3(e), 3(g)(4)(d), and *Milligan* Doc. 107 at 31) (internal quotation marks omitted). The *Milligan* Plaintiffs also observe that the guidelines did not set an “arbitrary ceiling” on the number of county splits and that the legislative findings “redefine[] ‘community of interest.’” *Id.* at 21.

The *Milligan* Plaintiffs argue that the State ignores the Supreme Court’s finding that the Duchin and Cooper plans “comported with traditional districting criteria” even though they split Mobile and Baldwin counties. *Id.* at 21 (internal quotation marks omitted). And the *Milligan* Plaintiffs argue that in any event, the 2023 Plan does not satisfy the legislative finding that the specified communities must be kept together “to the fullest extent possible” because only the Gulf Coast is kept together, while the Black Belt remains split in a way that dilutes Black votes in District 2. *Id.* at 22 (internal quotation marks omitted).

Third, the *Milligan* Plaintiffs argue that the 2023 Plan raises constitutional concerns because it “may be” the product of intentional discrimination. *Id.* at 23–26. The *Milligan* Plaintiffs rest this argument on the “deliberate failure to remedy the identified [Section Two] violations”; white legislators’ efforts to “cut out Black members on the Reapportionment Committee” from meaningful deliberation on the Committee’s

maps; public statements by legislators about their efforts to draw the 2023 Plan to maintain the Republican majority in the United States House of Representatives and convince one Supreme Court Justice to “see something different”; and the established availability of “less discriminatory alternative maps.” *Id.* at 24–25 (internal quotation marks omitted).

The *Milligan* Plaintiffs ask that the Court enjoin Secretary Allen from using the 2023 Plan and direct the Special Master to draw a remedial map. *Id.* at 26.

2. The *Caster* Plaintiffs’ Objections

The *Caster* Plaintiffs assert that “Alabama is in open defiance of the federal courts.” *Caster* Doc. 179 at 2. They argue that the 2023 Plan “does not even come close to giving Black voters an additional opportunity to elect a candidate of their choice” because, like the 2021 Plan, it contains just one majority-Black district and “fails to provide an opportunity for Black voters to elect their preferred candidates in a second congressional district.” *Id.* at 2, 8–9.

The *Caster* Plaintiffs rely on a performance analysis Dr. Palmer¹⁵ prepared to examine District 2 in the 2023 Plan. *See id.* at 9–10; *Caster* Doc. 179-2. Dr. Palmer analyzed 17 statewide elections between 2016 and 2022 to evaluate the performance of Black-preferred candidates in District 2; he found “strong evidence of racially polarized voting” and concluded that Black-preferred candidates would have been defeated in 16 out of 17 races (approximately 94% of

¹⁵ The *Caster* Plaintiffs relied on testimony from Dr. Palmer during the preliminary injunction proceedings, and we found him credible. *See Milligan* Doc. 174–76.

the time) in the new District 2. *Caster* Doc. 179-2 at 3, 6.

The *Caster* Plaintiffs urge us to ignore as irrelevant the discussion in the legislative findings about communities of interest. They contend that we and the Supreme Court already have found the State's arguments about communities of interest "insufficient to sustain' Alabama's failure to provide an additional minority opportunity district." *Caster* Doc. 179 at 10 (quoting *Allen*, 143 S. Ct. at 1504–05).

If we consider the legislative findings, the *Caster* Plaintiffs identify a "glaringly absent" omission: "any discussion of the extent to which [the 2023 Plan] provides Black voters an opportunity to elect in a second congressional district." *Id.* at 11 (emphasis in original). According to the *Caster* Plaintiffs, the failure of the Legislature to explain how the 2023 Plan "actually complies with" Section Two is telling. *Id.* (emphasis in original).

The *Caster* Plaintiffs, like the *Milligan* Plaintiffs, ask us to enjoin Secretary Allen from using the 2023 Plan and "proceed to a judicial remedial process to ensure . . . relief in time for the 2024 election." *Id.*

3. The State's Defense of the 2023 Plan

At its core, the State's position is that even though the 2023 Plan does not contain an additional opportunity district, the Plaintiffs' objections fail under *Allen* because the 2023 Plan "cures the purported discrimination identified by Plaintiffs" by "prioritiz[ing] the Black Belt to the fullest extent possible . . . while still managing to preserve long-recognized communities of interest in the Gulf and Wiregrass." *Milligan* Doc. 220 at 9. The State contends that the "2023 Plan improves on the 2021 Plan and all

of Plaintiffs' alternative plans by unifying the Black Belt while also respecting the Gulf and Wiregrass communities of interest." *Id.* at 27.

According to the State, "Plaintiffs cannot produce an alternative map with a second majority-Black district without splitting at least two of those communities of interest," so their Section Two challenge fails. *Id.* at 9. The State leans heavily on the statement in *Allen* that Section Two "never require[s] adoption of districts that violate traditional redistricting principles." 143 S. Ct. at 1510 (internal quotation marks omitted).

The State argues that it is not in "defiance" of a court order because "[t]here are many ways for a State to satisfy § 2's demand of 'equally open' districts." *Milligan* Doc. 220 at 9. The State contends that the Plaintiffs "now argue that § 2 requires this Court to adopt a plan that divides communities of interest in the Gulf and Wiregrass to advance racial quotas in districting, but *Allen* forecloses that position." *Id.* at 10.

The State makes four arguments in defense of the 2023 Plan. *First*, the State argues that the 2023 Plan remedies the Section Two violation we found because the 2023 Plan complies with Section Two. *Id.* at 29. The State begins with the premise that it "completely remedies a Section 2 violation . . . by enacting *any* new redistricting legislation that complies with Section 2." *Id.* (emphasis in original). The State then reasons that the Plaintiffs must prove that the 2023 Plan is not "equally open." *Id.* at 31 (internal quotation marks omitted). The State argues that our "assessment," *id.* at 32, 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. 107 at 6, was "based on the [2021]

Legislature’s redistricting guidelines” and “choices that the [2021] Plan made,’ all of which came *before*” the 2023 Plan, *Milligan* Doc. 220 at 32 (emphasis in original) (quoting *Milligan* Doc. 7 at 149, 151).

The States cites *Dillard v. Crenshaw County*, 831 F.2d 246, 250 (11th Cir. 1987), to say that we cannot focus exclusively on evidence about the 2021 Plan to evaluate whether the 2023 Plan is a sufficient remedy. *Milligan* Doc. 220 at 34–35 (“The evidence showing a violation in an *existing* election scheme may not be completely coextensive with a *proposed* alternative.” (emphasis in original)).

The State contends that the 2023 Plan remedied the discriminatory effects of the 2021 Plan by applying traditional redistricting principles “as fairly” to majority-Black communities in the Black Belt and Montgomery “as to the Gulf and the Wiregrass.” *Id.* at 33. The State claims that the 2023 Plan is “entitled to the presumption of legality” and “the presumption of good faith,” and is governing law unless it is found to violate federal law. *Id.* at 36–37.

Second, the State asserts that the 2023 Plan complies with Section Two, and Plaintiffs cannot produce a reasonably configured alternative map. *See id.* at 37–60. The State urges that neither we nor the Supreme Court “ever said that § 2 requires the State to subordinate ‘nonracial communities of interest’ in the Gulf and Wiregrass to Plaintiffs’ racial goals.” *Id.* at 38. The State contends that the Plaintiffs cannot satisfy *Gingles* I because they did not offer a plan that “meet[s] or beat[s]” the 2023 Plan “on the traditional principles of compactness, maintaining communities of interest, and maintaining political subdivisions that are adhered to in the State’s plan.” *Id.* at 38–39 (internal quotation marks omitted). “The focus now is

on the 2023 Plan,” the State says, and the Plaintiffs cannot lawfully surpass it. *Id.* at 40–41.

As for communities of interest, the State asserts that the 2023 Plan “resolves the concerns about communities of interest that Plaintiffs said was ‘the heart’ of their challenge to the 2021 Plan.” *Id.* at 41. The State says that the Supreme Court’s ruling that it was “not persuaded that the Gulf was a community of interest” would “surprise Alabamians and has been answered by the legislative record for the 2023 Plan.” *Id.* at 41–42. The State claims that its argument on this issue is beyond dispute because the 2023 Plan “answers Plaintiffs’ call to unify the Black Belt into two districts, without sacrificing indisputable communities of interest in the Gulf and Wiregrass regions.” *Id.* at 42. The State contends that “[t]here can be no dispute that the 2023 Plan’s stated goal of keeping the Gulf Coast together and the Wiregrass region together is a legitimate one, and § 2 does not (and cannot) require the State to disregard that legitimate race-neutral purpose in redistricting.” *Id.* at 43. And the State contends, quoting the principal dissent in *Allen*, that the Gulf Coast is “indisputably a community of interest.” *Id.* at 44 (internal quotation marks omitted) (alterations accepted).

The State offers two bodies of evidence to support its assertions about communities of interest: (1) the legislative findings that accompanied the 2023 Plan, and (2) evidence about the Gulf Coast and the Wiregrass that the Legislature considered in 2023. *Id.* at 44–50. Based on this evidence, the State concludes that this is “no longer a case in which there would be a split community of interest in both the State’s plan and Plaintiffs’ alternatives,” and “Plaintiffs will not be able to show that there is a plan on par with the 2023

Plan that also creates an additional reasonably configured majority-Black district.” *Id.* at 51 (internal quotation marks omitted) (alterations accepted).

As for compactness and county splits, the State asserts that “each of Plaintiffs’ alternative maps fails to match the 2023 Plan on compactness, county splits, or both.” *Id.* at 56. The State argues that “a Plaintiff cannot advocate for a less compact plan for exclusively racial reasons.” *Id.* at 57. The State urges us to disregard our previous finding that the Plaintiffs adduced maps that respected the guidelines because “evidence about the 2021 Plan based on its 2021 principles does not shine light on whether the 2023 Plan has discriminatory effects.” *Id.*

The State relies on the expert report of Mr. Sean Trende, who “assessed the 2023 Plan and each of Plaintiffs’ alternative plans based on the three compactness measures Dr. Duchin used in her earlier report.” *Id.* Mr. Trende concluded that “the 2023 Plan measures as more compact” on all three scores “than Duchin Plans A, C, and D” and all the Cooper plans. *Id.*; see also *Milligan* Doc. 220-12 at 6–11. Mr. Trende concedes that on two of the measures (Polsby-Popper and Cut Edges), the Duchin Plan B ties or beats the 2023 Plan, and on one of the measures (Cut Edges), a map that the *Milligan* and *Caster* Plaintiffs submitted to the Committee during the 2023 legislative process (“the VRA Plan”)¹⁶ ties the 2023 Plan. See *Milligan*

¹⁶ The *Milligan* and *Caster* Plaintiffs do not offer the VRA Plan in this litigation as a remedial map for purposes of satisfying *Gingles* I or for any other purpose. See Aug. 14 Tr. 123. It is in the record only because they proposed it to the Committee and the State’s expert witness, Mr. Bryan, prepared a report that includes statements about it. See *Milligan* Doc. 220-10 at 53, discussed *infra* at Part IV.B.2.a.

Doc. 220 at 57. The State argues that Duchin Plan B and the VRA Plan “still fail under *Allen* because they have more county splits” (seven) than the 2023 Plan has (six). *Id.* at 58.

The State claims that if “Plaintiffs’ underperforming plans could be used to replace a 2023 Plan that more fully and fairly applies legitimate principles across the State, the result will be . . . affirmative action in redistricting,” which would be unconstitutional. *Id.* at 59–60.

Third, the State urges us to reject the Plaintiffs’ understanding of an opportunity district on constitutional avoidance grounds. *See id.* at 60–68. The State begins with the undisputed premise that under Section Two, a remedial district need not be majority-Black. *Id.* at 60. The State then argues that nothing in *Allen* could “justify . . . replacing the 2023 Plan with Plaintiffs’ preferred alternatives that elevate the Black Belt’s demographics over its historical boundaries.” *Id.* at 61. The State then argues that “*all* race-based government action must satisfy strict scrutiny,” that “[f]orcing proportional representation is not a compelling governmental interest,” and that “sacrificing neutral [redistricting] principles to race is unlawful.” *Id.* at 63 (emphasis in original) (internal quotation marks omitted).

The State argues that Plaintiffs’ interpretation of Section Two contravenes “two equal protection principles: the principle that race can never be used as a negative or operate as a stereotype and the principle that race-based action can’t extend indefinitely into the future.” *Id.* at 64–67. The State says that the Plaintiffs’ position “depends on stereotypes about how minority citizens vote as groups . . . and not on identified instances of past discrimination.” *Id.* at 68.

In their *fourth* argument, the State contends that we should reject the *Milligan* Plaintiffs’ intentional discrimination argument as cursory and because there is an “obvious alternative explanation for the 2023 Plan: respect for communities of interest.” *Id.* at 68–71 (internal quotation marks omitted). And the State says the *Milligan* Plaintiffs “rely on the complaints of Democrats in the Legislature.” *Id.* at 70.

The State submitted with its brief numerous exhibits, including the 2023 Plan, transcripts of the Committee’s public hearings, a supplemental report prepared by Mr. Bryan, Mr. Trende’s report, and materials from the legislative process about two of the three communities of interest they urge us to consider: the Gulf Coast and the Wiregrass. *See Milligan* Docs. 220-1–220-19.

The State cites Mr. Bryan’s 2023 report four times, and three of those are in reference to the VRA Plan. *See Milligan* Doc. 220 at 21 (in the “Background” section of the brief, to describe how the VRA Plan treats Houston County); *id.* (also in the “Background” section of the brief, to say that in the VRA Plan, the BVAP for District 2 is 50%, and the BVAP for District 7 is 54%); *id.* at 58 (in the constitutional avoidance argument, to assert that the VRA Plan splits counties “along racial lines, in service of hitting a racial target”). The fourth citation was as evidence that District 2 in the 2023 Plan has a BVAP of 39.93%, which is a stipulated fact. *See id.* at 28; *Milligan* Doc. 251 ¶ 4.

Nowhere does the State argue (or even suggest) that District 2 in the 2023 Plan is (or could be) an opportunity district.

4. The Plaintiffs' Replies

a. The *Milligan* Plaintiffs

The *Milligan* Plaintiffs reply that it is “undisputed and dispositive” that the 2023 Plan “offers no new opportunity district.” *Milligan* Doc. 225 at 2. The *Milligan* Plaintiffs accuse the State of ignoring the finding by us and the Supreme Court that they already have satisfied *Gingles* I, and of “try[ing] to justify the 2023 Plan through newly contrived [legislative] ‘findings’ that perpetuate the [Section Two] violation and contradict their own guidelines.” *Id.*

The *Milligan* Plaintiffs assert that the State “cannot . . . cite a single case in which a court has ruled that a remedial plan that fails to meaningfully increase the effective opportunity of minority voters to elect their preferred representatives is a valid [Section Two] remedy.” *Id.* at 2–3.

The *Milligan* Plaintiffs distinguish their claim of vote dilution, for which they say the remedy is an additional opportunity district, from a racial gerrymandering claim, for which the remedy is “merely to undo a specific, identified racial split regardless of electoral outcomes.” *Id.* at 4. The *Milligan* Plaintiffs say that the State’s arguments about unifying the Black Belt fail to appreciate this distinction. *Id.*

The *Milligan* Plaintiffs resist the State’s reliance on *Dillard* to reset the *Gingles* analysis. *Id.* at 5. They say the State misreads *Dillard*, which involved a complete reconfiguration of the electoral mechanism from an at-large system to a single-member system with an at-large chair. *See id.* (citing *Dillard*, 831 F.2d at 250). In that context, the *Milligan* Plaintiffs say, it “makes sense” for a court to “compare the differences between the new and old” maps with the understanding that

“evidence showing a violation in an existing [at-large] election scheme may not be completely coextensive with a proposed alternative election system.” *Id.* at 6 (internal quotation marks omitted). According to the *Milligan* Plaintiffs, that understanding does not foreclose, in a vote dilution case without an entirely new electoral mechanism, focusing the question on “whether the new map continues to dilute Black votes as the old map did or whether the new map creates an ‘opportunity in the real sense of that term.’” *Id.* (quoting *LULAC*, 548 U.S. at 429).

The *Milligan* Plaintiffs urge that if we reset the *Gingles* analysis, we will necessarily allow “infinite bites at the apple[:] Alabama would be permitted to simply designate new ‘significant’ communities of interest and anoint them *post hoc*, point to them as evidence of newfound compliance, and relitigate the merits again and again—all while refusing to remedy persistent vote dilution.” *Id.*

The *Milligan* Plaintiffs argue that the State’s defense of the 2023 Plan invites the very beauty contest that we must avoid, and that federal law does not require a Section Two plaintiff to “meet or beat each and every one of [a State’s] selected and curated districting principles” on remedy. *Id.* at 8. If that were the rule, the *Milligan* Plaintiffs say they would be required to “play a continuous game of whack-a-mole that would delay or prevent meaningful relief.” *Id.*

The *Milligan* Plaintiffs point out that the guidelines the Legislature used in 2023 were the exact same guidelines the Legislature used in 2021. *Id.* at 9. And the *Milligan* Plaintiffs say that if we pay as much attention to the legislative findings that accompanied the 2023 Plan as the State urges us to, we will run

afoul of the rule that legislative intent is not relevant in a Section Two analysis. *Id.*

Finally, the *Milligan* Plaintiffs say that the State badly misreads *Allen* as “authoriz[ing] states to reverse engineer redistricting factors that entrench vote dilution.” *Id.* at 11. The *Milligan* Plaintiffs argue that *Allen* “specifically *rejected* this theory when it held that a state may not deploy purportedly neutral redistricting criteria to provide some voters less opportunity . . . to participate in the political process.” *Id.* (emphasis in original) (internal quotation marks omitted).

b. The *Caster* Plaintiffs

The *Caster* Plaintiffs reply that “Alabama is fighting a battle it has already lost[]” and that “[s]o committed is the State to maintaining a racially dilutive map that it turns a deaf ear to the express rulings of this Court and the Supreme Court.” *Caster* Doc. 195 at 2. The *Caster* Plaintiffs urge us “not [to] countenance Alabama’s repeated contravention” of our instructions. *Id.*

The *Caster* Plaintiffs make three arguments on reply. *First*, they argue that Section Two liability can be remedied “only by a plan that cures the established vote dilution.” *Id.* at 3. They urge that the liability and remedy inquiries are inextricably intertwined, such that whether a map “is a Section 2 *remedy* is . . . a measure of whether it addresses the State’s Section 2 *liability*.” *Id.* (emphasis in original).

The *Caster* Plaintiffs attack the State’s attempt to “completely reset[] the State’s liability such that Plaintiffs must run the *Gingles* gauntlet anew” as unprecedented. *Id.* at 4. The *Caster* Plaintiffs assert that *Covington*, 138 S. Ct. at 2553, forecloses the State’s position, and they make the same argument

about *Dillard* that the *Milligan* Plaintiffs make. See *Caster* Doc. 195 at 4–6.

The *Caster* Plaintiffs criticize the State’s argument about legislative deference to the 2023 Plan as overdrawn, arguing that “deference does not mean that the Court abdicates its responsibility to determine whether the remedial plan in fact remedies the violation.” *Id.* at 8.

The *Caster* Plaintiffs expressly disclaim a beauty contest: “Plaintiffs do not ask the Court to reject the 2023 Plan in favor of a plan it finds preferable. They ask the Court to strike down the 2023 Plan because they have provided unrefuted evidence that it fails to provide the appropriate remedy this Court found was necessary to cure the Section 2 violation.” *Id.* at 9 (internal quotation marks omitted).

Second, the *Caster* Plaintiffs assert that the State misreads the Supreme Court’s affirmance of the preliminary injunction. *Id.* at 10–12. The *Caster* Plaintiffs argue that *Allen* did not require a “‘meet or beat’ standard for illustrative maps” and did not adopt a standard that “would allow the remedial process to continue ad infinitum—so long as one party could produce a new map that improved compactness scores or county splits.” *Id.* at 10–11.

The *Caster* Plaintiffs reply to the State’s argument about affirmative action in redistricting by directing us to the statement in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141, 2162 (2023), that “remediating specific, identified instances of past discrimination that violated the Constitution or a statute” is a “compelling interest[] that permit[s] resort to race-based government action”; and the holding in *Allen*, 143 S.

Ct. at 1516–17, that for the last forty years, “[the Supreme] Court and the lower federal courts have repeatedly applied” Section Two “and, under certain circumstances, have authorized race-based redistricting as a remedy” for discriminatory redistricting maps. *Caster* Doc. 195 at 12.

Third, the *Caster* Plaintiffs argue that the State concedes that the 2023 Plan does not provide Black voters an additional opportunity district. *Caster* Doc. 195 at 13–14. The *Caster* Plaintiffs urge us that this fact is dispositive. *See id.*

Ultimately, the *Caster* Plaintiffs contend that “[i]f there were any doubt that Section 2 remains essential to the protection of voting rights in America, Alabama’s brazen refusal to provide an equal opportunity for Black voters in opposition to multiple federal court opinions—six decades after the passage of the Voting Rights Act—silences it, resoundingly.” *Id.* at 15.

5. The Parties’ Motions for Clarification

While the parties were preparing their briefs, the *Milligan* and *Caster* Plaintiffs, as well as the State, each filed motions for clarification regarding the upcoming hearing. *See Milligan* Docs. 188, 205. The *Milligan* and *Caster* Plaintiffs sought to clarify the role of the *Singleton* Plaintiffs, *Milligan* Doc. 188 at 2, while the State asked for a ruling on whether the Court would “foreclose consideration” of evidence it intended to offer in support of their *Gingles* I argument, *Milligan* Doc. 205 at 4–5. The State advised us that it would offer evidence “on whether race would now predominate in Plaintiffs’ alternative approaches, as illuminated by new arguments in Plaintiffs’ objections and their plan presented to the 2023

Reapportionment Committee.” *Id.* at 5. And the State alerted us that it would not offer any evidence “challenging the demographic or election numbers in the performance reports” offered by the Plaintiffs (*i.e.*, the Palmer and Liu Reports). *Id.* at 6 (internal quotation marks omitted).

In response, the *Milligan* Plaintiffs asserted that “the sole objective of this remedial hearing is answering whether Alabama’s new map remedies the likely [Section Two] violation.” *Milligan* Doc. 210 at 1. “As such,” the *Milligan* Plaintiffs continued, the State is “bar[red] . . . from relitigating factual and legal issues that this Court and the Supreme Court resolved at the preliminary injunction liability stage including whether Mobile-Baldwin is an inviolable community of interest that may never be split, whether the legislature’s prioritizing particular communities of interest immunizes the 2021 Plan from Section 2 liability, and whether Plaintiffs’ illustrative maps are reasonably configured.” *Id.* at 2. The *Milligan* Plaintiffs asserted that “the undisputed evidence proves that [the 2023 Plan] does not satisfy the preliminary injunction.” *Id.* at 2–3.

The *Caster* Plaintiffs responded similarly. The *Caster* Plaintiffs argued that “the question of Alabama’s liability is not an open one for purposes of these preliminary injunction proceedings,” because “[t]hat is precisely what the Supreme Court decided when it affirmed this Court’s preliminary injunction just a few months ago.” *Caster* Doc. 190 at 2 & Part I. “Rather,” the *Caster* Plaintiffs argued, “the question before the Court is whether the 2023 Plan actually remedies the State’s likely violation.” *Id.* at 2, 7–8. The *Caster* Plaintiffs asserted that to answer that question, we needed only to determine “whether the

2023 Plan remedies the vote dilution identified during the liability phase by providing Black Alabamians with an additional opportunity district.” *Id.* at 8. Likewise, the *Caster* Plaintiffs asserted that we should exclude as irrelevant the State’s evidence that the 2023 Plan respects communities of interest. *Id.* at 12–13. The *Caster* Plaintiffs argued that on remedy, Section Two is not “a counting exercise of how many communities of interest can be kept whole.” *Id.* at 12. They urged that the Gulf Coast evidence was merely an attempt to relitigate our findings about that community, which should occur only during a trial on the merits, not during the remedial phase of preliminary injunction proceedings. *Id.* at 13–14.

We issued orders clarifying that the scope of the remedial hearing would be limited to “the essential question whether the 2023 Plan complies with the order of this Court, affirmed by the Supreme Court, and with Section Two.” *Milligan* Doc. 203 at 4; *see also* *Milligan* Doc. 222 at 9. We cited the rules that “any proposal to remedy a Section Two violation must itself conform with Section Two,” and that “[t]o find a violation of Section 2, there must be evidence that the remedial plan denies equal access to the political process.” *Milligan* Doc. 222 at 10 (alterations accepted) (quoting *Dillard*, 831 F.2d at 249–50).

Accordingly, we ruled that “[a]lthough the parties may rely on evidence adduced in the original preliminary injunction proceedings conducted in January 2022 to establish their assertions that the 2023 Plan is or is not a sufficient remedy for the Section Two violation found by this Court and affirmed by the Supreme Court, th[e] remedial hearing w[ould] not relitigate the issue of that likely Section Two violation.” *Milligan* Doc. 203 at 4. We reasoned that

this limitation “follow[ed] applicable binding Supreme Court precedent and [wa]s consistent with the nature of remedial proceedings in other redistricting cases.” *Id.* (citing *Covington*, 138 S. Ct. at 2348; and *Jacksonville Branch of the NAACP v. City of Jacksonville*, No. 3:22- cv-493-MMM-LLL, 2022 WL 17751416, 2022 U.S. Dist. LEXIS 227920 (M.D. Fla. Dec. 19, 2022)). We specifically noted that “[i]f the Defendants seek to answer the Plaintiffs’ objections that the 2023 Plan does not fully remediate the likely Section Two violation by offering evidence about ‘communities of interest,’ ‘compactness,’ and ‘county splits,’ they may do so.” *Milligan* Doc. 222 at 10. But we reserved ruling on the admissibility of any particular exhibits that the parties intended to offer at the hearing. *Id.* at 10–11.

We explained that “it would be unprecedented for this Court to relitigate the likely Section Two violation during these remedial proceedings,” and that we “w[ould] not do so” because “[w]e are not at square one in these cases.” *Milligan* Doc. 203 at 4. We observed that “this manner of proceeding [wa]s consistent with the [State’s] request that the Court conduct remedial proceedings at this time and delay any final trial on the merits . . . until after the 2024 election.” *Id.* at 5. And we explained why we would not require Plaintiffs to amend or supplement complaints, as the State suggested. *See id.* at 6–7.

6. The Plaintiffs’ Motion *in Limine*

The *Milligan* and *Caster* Plaintiffs also jointly filed a motion *in limine* in advance of the remedial hearing to exclude “the expert testimony of Mr. Thomas Bryan and Mr. Sean Trende, as well as any and all evidence, references to evidence, testimony, or argument relating to the 2023 Plan’s maintenance of communities of

interest.” *Milligan* Doc. 233 at 1. The Plaintiffs asserted that because of the limited scope of the hearing, this evidence was irrelevant and immaterial. *See id.* at 3–12.

As for Mr. Trende, the Plaintiffs asserted that his “analysis—which compares Plaintiffs’ illustrative plans, a plan Plaintiffs proposed to the Legislature, and the State’s 2021 and 2023 Plans under compactness metrics, county splits, and the degree to which they split three identified communities of interest—sheds no light on whether the 2023 Plan remedies this Court’s finding of vote dilution.” *Id.* at 4 (internal quotation marks omitted). And the Plaintiffs asserted that “Mr. Bryan’s analysis of a smaller subset of the same plans concerning the number of county splits and . . . the size and type of population that were impacted by them to offer opinions about whether there is evidence that race predominated in the design of the plans, similarly tilts at windmills.” *Id.* (internal quotation marks omitted).

The Plaintiffs further asserted that those experts’ “statistics regarding the 2023 Plan” are irrelevant in light of the State’s “conce[ssion] that the Black-preferred candidates would have lost” in District 2 in “every single election studied by their own expert.” *Id.* They urged us that “[t]he topics on which Mr. Trende and Mr. Bryan seek to testify have already been decided by this Court and affirmed by the Supreme Court.” *Id.*

Similarly, the Plaintiffs asserted that the State’s evidence about communities of interest is irrelevant. *Id.* at 7–12. The Plaintiffs argued that this evidence does not tend to make any fact of consequence more or less probable because it does not tell us anything about whether the State remedied the vote dilution we

found. Put differently, the Plaintiffs say this evidence tells us nothing about whether the 2023 Plan includes an additional opportunity district. *Id.* And because the State concedes that District 2 is not an opportunity district, the Plaintiffs assert the evidence about communities of interest is not relevant at all. *Id.* at 11–12.

Separately, the Plaintiffs attacked the reliability of Mr. Bryan’s testimony. *Id.* at 5–7.

In response to the motion, the State argued that its evidence is relevant to the question whether the 2023 Plan violates Section Two. *Milligan* Doc. 245 at 2–7. More particularly, the State argued that the evidence is relevant to the question whether the Plaintiffs can establish that the 2023 Plan violates Section Two “under the same *Gingles* standard applied at the merits stage.” *Id.* at 5 (internal quotation marks omitted). The State reasoned that “[n]o findings have been made (nor could have been made) regarding the 2023 Plan’s compliance with § 2.” *Id.* at 6. The State defended the reliability of Mr. Bryan’s analysis. *Id.* at 7–9.

D. Stipulated Facts

After they filed their briefs, the parties stipulated to the following facts for the remedial hearing. *See Milligan* Doc. 251; *Caster* Doc. 213. We recite their stipulations verbatim.

I. Demographics of 2023 Plan

1. The 2023 Plan contains one district that exceeds 50% Black Voting Age Population (“BVAP”).

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2. According to 2020 Census data, CD 7 in the 2023 Plan has a BVAP of 50.65% Any-Part Black.

3. Under the 2023 Plan, the district with the next-highest BVAP is CD 2.

4. According to 2020 Census data, CD 2 in the 2023 Plan has a BVAP of 39.93% Any-Part Black.

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%

II. General Election Voting Patterns in the 2023 Plan

5. Under the 2023 Plan, Black Alabamians in CD 2 and CD 7 have consistently preferred Democratic candidates in the general election contests Plaintiffs' experts analyzed for the 2016, 2018, 2020, and 2022 general elections, as well as the 2017 special election for U.S. Senate. In those same elections, white Alabamians in CD 2 and CD 7 consistently preferred Republican candidates over (Black-preferred) Democratic candidates. In CD 2, white-preferred candidates (who are Republicans) almost always defeated Black-preferred candidates (who are Democrats). In CD 2, white candidates (who were Republicans) always defeated Black candidates (who were Democrats).

III. Performance of CD 2 in the 2023 Plan

6. The *Caster* Plaintiffs' expert Dr. Maxwell Palmer analyzed the 2023 Plan using 17 contested statewide elections between 2016 and 2022. That analysis showed:

- a. Under the 2023 Plan, the average two-party vote-share for Black-preferred candidates in CD 2 is 44.5%.
- b. Under the 2023 Plan, the Black-preferred candidate in CD 2 would have been elected in 1 out of the 17 contests analyzed.

Table 4: Vote Share of Black-Preferred Candidates — SB 5 Plan

		CD 2	CD 7
2022	U.S. Senator*	38.6%	
	Governor*	37.5%	
	Attorney General*	39.1%	
	Sec. of State*	39.2%	
	Supreme Ct., Place 5*	39.7%	
2020	U.S. President	45.4%	61.4%
	U.S. Senator	47.7%	63.2%
2018	Governor	45.1%	63.7%
	Lt. Governor*	45.7%	62.7%
	Attorney General	48.3%	64.5%
	Sec. of State	45.8%	62.6%
	State Auditor*	46.6%	62.9%
	Supreme Ct., Chief	48.1%	65.5%
	Supreme Ct., Place 4	46.1%	63.2%
2017	U.S. Senator	55.8%	72.0%
2016	U.S. President	44.2%	60.3%
	U.S. Senator	43.9%	59.1%

* Indicates that the Black candidate of choice was Black.

7. The *Milligan* Plaintiffs' expert Dr. Baodong Liu completed a performance analysis of the 2023 Plan using 11 statewide biracial elections between 2014 and 2022. That analysis showed:

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a. Under the 2023 Plan, the average two-party vote-share for Black-preferred candidates in CD 2 is 42.2%.

b. Under the 2023 Plan, the Black-preferred candidate in CD 2 would have been elected in 0 out of the 11 contests analyzed.

Table 1: RPV in the 11 Biracial Elections based on the Livingston Plan, CD2

Election	Black Pref-Cand	White Pref-Cand	% vote cast for BPC in Livingston Plan	Black Support for Black Cand (95% CI)	White Support for Black Cand (95% CI)	BPC Won in Livingston Plan?	RPV?
2022 Governor	Yolanda Flowers	Kay Ivey	37.8%	94.0% (90-96)	4.9% (4-6)	No	Yes
2022 US Senate	Will Boyd	Katie Britt	38.8%	93.5% (89-96)	6.0% (4-9)	No	Yes
2022 Attorney General	Wendell Major	Steve Marshall	39.3%	94.3% (91-97)	6.3% (5-8)	No	Yes
2022 Secretary of State	Pamela Laffitte	Wes Allen	39.4%	94.2% (90-97)	6.0% (4-9)	No	Yes
2022 Supreme Court, Place 5	Anita Kelly	Bradley Byrne	39.9%	94.2% (91-97)	6.6% (5-10)	No	Yes
2018 Lt Governor	Will Boyd	Will Ainsworth	46.0%	93.6% (91-96)	6.3% (5-10)	No	Yes
2018 State Auditor	Miranda Joseph	Jim Zigler	46.9%	94.2% (90-97)	8.2 (6-13)	No	Yes
2018 Public Service Commission, Place 1	Cara McClure	Jeremy Oden	46.9%	95.7% (93-97)	6.5% (5-10)	No	Yes
2014 Secretary of State	Lula Albert-Kaigler	John Merrill	43.6%	91.5% (88-94)	6.2% (5-8)	No	Yes
2014 Lt Governor	James Fields	Kay Ivey	43.4%	91.3% (88-93)	6.3% (4-9)	No	Yes
2014 State Auditor	Miranda Joseph	Jim Zigler	41.7%	88.0% (81-91)	9.1% (6-14)	No	Yes

8. Dr. Liu also analyzed the 2020 presidential election between Biden-Harris and Trump-Pence. His analysis of both the 2020 presidential election and the 11 biracial elections between 2014 and 2022 showed:

- a. Under the 2023 Plan, the average two-party vote-share for Black-preferred candidates in CD 2 is 42.3%.
- b. Under the 2023 Plan, the Black-preferred candidate in CD 2 would have been elected in 0 out of the 12 contests analyzed.

9. The Alabama Legislature analyzed the 2023 Plan in seven election contests: 2018 Attorney General, 2018 Governor, 2018 Lieutenant Governor, 2018 Auditor, 2018 Secretary of State, 2020 Presidential, and 2020 Senate. That analysis showed:

- a. Under the 2023 Plan, the average two-party vote-share for Black-preferred candidates in CD 2 is 46.6%.
- b. Under the 2023 Plan, the Black-preferred candidate in CD 2 would have been elected in 0 out of the 7 contests analyzed.

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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%

IV. The 2023 Special Session

10. On June 27, 2023, Governor Kay Ivey called a special legislative session to begin on July 17, 2023 at 2:00 p.m. Her proclamation limited the Legislature to addressing: “*Redistricting*: The Legislature may consider legislation pertaining to the reapportionment of the State, based on the 2020 federal census, into districts for electing members of the United States House of Representatives.”

11. For the special session, Representative Chris Pringle and Senator Steve Livingston were the Co-Chairs of the Permanent Legislative Committee on Reapportionment (“the Committee”). The Committee had 22 members, including 7 Black legislators, who are all Democrats, and 15 white legislators, who are all Republicans.

12. Before the Special Session, the Committee held pre-session hearings on June 27 and July

13 to receive input from the public on redistricting plans.

13. At the Committee public hearing on July 13, Representative Pringle moved to re-adopt the 2021 Legislative Redistricting Guidelines (“Guidelines”).

14. The Committee voted to re-adopt the 2021 Guidelines.

15. The only plans proposed or available for public comment during the two pre-session hearings were the “VRA Plaintiffs’ Remedial Plan” from the *Milligan* and *Caster* Plaintiffs and the plans put forward by Senator Singleton and, Senator Hatcher.

16. On July 17, the first day of the Special Session, Representative Pringle introduced a plan he designated as the “Community of Interest” (“COI”) plan.

17. The COI plan had a BVAP of 42.45% in Congressional District 2 (“CD2”), and Representative Pringle said it maintained the core of existing congressional districts.

18. The COI plan passed out of the Committee on July 17 along party and racial lines, with all Democratic and all Black members voting against it. Under the COI plan, the Committee’s performance analysis showed that Black-preferred candidates would have won two of the four analyzed-statewide races from 2020 and 2022.

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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

19. The “Opportunity Plan” (or “Livingston 1”) was also introduced on July 17. Senator Livingston was the sponsor of the Opportunity Plan.

20. The Opportunity Plan had a BVAP of 38.31% in CD2.

21. Neither the COI Plan nor Opportunity Plan were presented at the public hearings on June 27 or July 13.

22. On July 20, the House passed the Representative Pringle sponsored COI Plan, and the Senate passed the Opportunity Plan. The votes were along party lines with all Democratic house members voting against the COI plan. The house vote was also almost entirely along racial lines, with all Black house members, except one, voting against the COI plan. All Democratic and all Black senators voted against the Opportunity Plan.

23. Afterwards, on Friday, July 21, a six-person bicameral Conference Committee passed Senate Bill 5 (“SB5”), which [is] a

modified-version of the Livingston plan (“Livingston 3” plan or the “2023 Plan”).

24. The 2023 Plan was approved along party and racial lines, with the two Democratic and Black Conference Committee members (Representative England and Representative Smitherman) voting against it, out of six total members including Representative Pringle and Senator Livingston.

25. Representative England, one of the two Democratic and Black legislators on the Conference Committee, stated that the 2023 Plan was noncompliant with the Court’s preliminary-injunction order and that the Court would reject it.

26. On July 21, SB5 was passed by both houses of the legislature and signed by Governor Ivey.

27. In the 2023 Plan enacted in SB5, the Black voting-age population (“BVAP”) is 39.9%.

28. The map contains one district, District 7, in which the BVAP exceeds 50%.

29. SB5 passed along party lines and almost entirely along racial lines. Out of all Black legislators, one Republican Black House member voted for SB5, and the remaining Black House members voted against.

30. SB5 includes findings regarding the 2023 Plan. The findings purport to identify three specific communities of interest (the Black Belt, the Wiregrass, and the Gulf Coast).

V. Communities of Interest

31. The Black Belt is a community of interest.

32. The Black Belt includes the 18 core counties of Barbour, Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery, Perry, Pickens, Pike, Russell, Sumter, and Wilcox. In addition, Clarke, Conecuh, Escambia, Monroe, and Washington counties are sometimes but not always included within the definition of the Black Belt.

33. The 2023 Plan divides the 18 core Black Belt counties into two congressional districts (CD-2 and CD-7) and does not split any Black Belt counties.

34. The 2023 Plan keeps Montgomery County whole in District 2.

35. The 2023 Plan places Baldwin and Mobile Counties together in one congressional district.

36. Baldwin and Mobile Counties have been together in one congressional district since redistricting in 1972.

37. Alabama splits Mobile and Baldwin Counties in its current State Board of Education districts, as well as those in the 2011 redistricting cycle.

E. The Remedial Hearing

Before the remedial hearing, the *Milligan* and *Caster* parties agreed to present their evidence on paper, rather than calling witnesses to testify live. *See, e.g., Milligan* Doc. 233 at 1; Aug. 14 Tr. 92. Accordingly, no witnesses testified live at the hearing on August 14. Three events at the hearing further developed the

record before us: (1) the attorneys made arguments and answered our questions; (2) we received exhibits into evidence and reserved ruling on some objections (see *infra* at Part VII), and (3) the parties presented for the first time certain deposition transcripts that were filed the night before the hearing, see *Milligan* Doc. 261.¹⁷ We first discuss the deposition transcripts, and we then discuss the attorney arguments.

1. The Deposition Testimony

The *Milligan* Plaintiffs filed transcripts reflecting deposition testimony of seven witnesses: (1) Randy Hinaman, the State's longstanding cartographer, *Milligan* Doc. 261-1; (2) Brad Kimbro, a past Chairman of the Dothan Area Chamber of Commerce, *Milligan* Doc. 261-2, who also prepared a declaration the State submitted, *Milligan* Doc. 220-18; (3) Lee Lawson, current President & CEO of the Baldwin County Economic Development Alliance, *Milligan* Doc. 261-3, who also prepared a declaration, *Milligan* Doc. 220-13; (4) Senator Livingston, *Milligan* Doc. 261-4; (5) Representative Pringle, *Milligan* Doc. 261-5; (6) Mike Schmitz, a former mayor of Dothan, *Milligan* Doc. 261-6, who also prepared a declaration, *Milligan* Doc. 220-17; and (7) Jeff Williams, a banker in Dothan, *Milligan* Doc. 261-7, who also prepared a declaration, *Milligan* Doc. 227-1.

During the remedial hearing, the *Milligan* Plaintiffs played video clips from the depositions of Mr. Hinaman, Senator Livingston, and Representative

¹⁷ The depositions were taken after the briefing on the Plaintiffs' objections to the 2023 Plan was complete. See *Milligan* Doc. 261. The State did not raise a timeliness objection, and we discern no timeliness problem.

Pringle. (The Court later reviewed all seven depositions in their entirety.)

Mr. Hinaman testified that his understanding of the preliminary injunction was that the Legislature “needed to draw two districts that would give African Americans an opportunity to elect a candidate of their choice.” *Milligan* Doc. 261-1 at 20, 22.¹⁸ Mr. Hinaman testified that he drew the Community of Interest Plan that the Alabama House of Representatives passed. *Id.* at 23. He testified that of the maps that were sponsored by a member of either the Alabama House or the Alabama Senate, the Community of Interest Plan is the only one he drew. *Id.* at 24.

Mr. Hinaman testified that he did not know who drew the Opportunity Plan, which the Alabama Senate passed. *Id.* at 31–32. He testified that he “believe[d] it was given to Donna Loftin, who is . . . supervisor of the reapportionment office, on a thumb drive.” *Id.* at 32. Mr. Hinaman testified that he had no understanding of how the Opportunity Plan was drawn or why he did not draw it. *Id.* 32–34.

Mr. Hinaman testified that he had “numerous discussions with members of congress” and their staff during the special session. *Id.* at 45. Mr. Hinaman testified about the performance analyses he considered and that he was “more interested in performance than the raw BVAP number” because “not all 42 or 43 or 41 or 39 percent districts perform the same.” *Id.* at 65–66.

When Mr. Hinaman was asked about the legislative findings, he testified that he had not seen them before

¹⁸ When we cite a deposition transcript, pincites are to the numbered pages of the transcript, not the CM/ECF pagination.

his deposition, that no one told him about them, and that he was not instructed about them as he was preparing maps. *Id.* at 94.

Senator Livingston testified that he was “familiar” that the preliminary injunction ruled that a remedial map should include “two districts in which Black voters either comprise a voting-age majority or something quite close to it,” but that his deposition was the first time he had read that part of the injunction. *Milligan* Doc. 261-4 at 51–52. Senator Livingston testified that he was “personally not paying attention to race” as maps were drawn or shown to him. *Id.* at 56.

When Senator Livingston was asked why he changed his focus from the Community of Interest Plan to other plans, he said it was because “[t]he Committee moved, and [he] was going to be left behind.” *Id.* at 66. He testified that the Committee members “had received some additional information they thought they should go in the direction of compactness, communities of interest, and making sure that . . . congressmen or women are not paired against each other,” but he did not know the source of that information. *Id.* at 67–68.

Senator Livingston testified that a political consultant drew the Opportunity Plan, and Senator Roberts delivered it to the reapportionment office. *Id.* at 70. Senator Livingston testified that he did not have “any belief one way or another about where [the Opportunity Plan] would provide a fair opportunity to black voters to elect a preferred candidate in the second district.” *Id.* at 71. Senator Livingston testified that Black-preferred candidates “have an opportunity to win” in District 2 even if they actually won zero elections. *Id.* at 96–97.

When Senator Livingston was asked who prepared the legislative findings, he identified the Alabama Solicitor General and testified that he did not “have any understanding of why those findings were included in the bill.” *Id.* at 101–02.

Representative Pringle testified that he was familiar with the guidance from the Court about the required remedy for the Section Two violation. *Milligan* Doc. 261-5 at 17–18. Representative Pringle testified that he understood “opportunity to elect” to mean “a district which they have the ability to elect or defeat somebody of their choosing,” although he “ha[d] no magic number on that.” *Id.* at 19–20. Representative Pringle twice testified that his “overriding principle” is “what the United States Supreme Court told us to do.” *Id.* at 22– 23.

Representative Pringle testified that during the special session, he spoke with the Speaker of the United States House of Representatives, Mr. Kevin McCarthy. *Id.* He testified that Speaker McCarthy “was not asking us to do anything other than just keep in mind that he has a very tight majority.” *Id.* at 22. Representative Pringle testified that like Mr. Hinaman, he had conversations with members of Alabama’s congressional delegation and their staff. *Id.* at 23–24.

Representative Pringle testified that the only map drawer that he retained in connection with the special session was Mr. Hinaman. *Id.* at 25. Representative Pringle also testified that the Alabama Solicitor General “worked as a map drawer at some point in time.” *Id.* at 26–28. Like Senator Livingston, Representative Pringle testified that the Opportunity Plan was drawn by a political consultant and brought to the Committee by Senator Roberts. *Id.* at 72.

Unlike Senator Livingston, Representative Pringle testified that he did not know who drafted the legislative findings. *Id.* at 90. He testified that he did not know they would be in the bill; the Committee did not solicit anyone to draft them; he did not know why they were included; he had never seen a redistricting bill contain such findings; and he had not analyzed them. *Id.* at 91–94.

Representative Pringle testified repeatedly that he thought that his plan (the Community of Interest Plan) was a better plan because it complied with court orders, but that he could not get it passed in the Senate. *See, e.g., id.* at 99–102.

In heated testimony, Representative Pringle recounted that when he learned his plan would not pass the Senate, he told Senator Livingston that the plan that passed could not have a House bill number or Representative Pringle’s name on it. *Id.* at 101–02. When asked why he did not want his name on the plan that passed, Representative Pringle answered that his plan “was a better plan” “[i]n terms of its compliance with the Voting Rights Act.” *Id.* at 102.

Representative Pringle was asked about a newspaper article that he read that reported one of his colleagues’ public comments about the 2023 Plan. *See id.* at 109–10. Neither he nor his counsel objected to the question, nor to him being shown the article that he testified he had seen before. *Id.* The article reported that the Alabama Speaker of the House had commented: “If you think about where we were, the Supreme Court ruling was five to four. So there’s just one judge that needed to see something different. And I think the movement that we have and what we’ve come to compromise on today gives us a good shot” *Id.* at 109.

When Representative Pringle was asked whether he “agree[d] that the legislature is attempting to get a justice to see something differently,” he answered that he was not, that he was “trying to comply with what the Supreme Court ruled,” but that he did not “want to speak on behalf of 140 members of the legislature.” *Id.* at 109–10. Representative Pringle also testified that his colleague had never expressed that sentiment to him privately. *Id.* at 110.

2. Arguments and Concessions

During the opening statements at the remedial hearing, the *Milligan* Plaintiffs emphasized that there is “only one” question now before us: whether the 2023 Plan “remed[ies] the prior vote dilution, and does it provide black voters with an additional opportunity to elect the candidates of their choice.” Aug. 14 Tr. 10. Nevertheless, the *Milligan* Plaintiffs walked us through their *Gingles* analysis, in case we perform one. *See* Aug. 14 Tr. 10–23. The *Milligan* Plaintiffs asserted that we previously found and the Supreme Court affirmed that they satisfied *Gingles* I. Aug. 14 Tr. 10–11. The *Milligan* Plaintiffs said that we can rely on that finding even though the Legislature enacted the 2023 Plan because *Gingles* I does not “look at the compactness of plaintiffs’ map,” but “looks at the compactness of the minority community,” which we found and the Supreme Court affirmed. Aug. 14 Tr. 10–11. And the *Milligan* Plaintiffs assert that it is undisputed that they satisfy *Gingles* II and III because “there is serious racially polarized voting” in Alabama. Aug. 14 Tr. 11.

The *Milligan* Plaintiffs further urged that the key elements of the performance analysis are undisputed: “there is no dispute that the 2023 plan does not lead to the election of a . . . second African-American candidate

of choice,” Aug. 14 Tr. 11, and that the 2023 Plan, “like the old plan, also results in vote dilution” because “black candidates would lose every election” in District 2, Aug. 14 Tr. 12.

The *Milligan* Plaintiffs accused the State of “rehash[ing] the arguments that both this Court and the Supreme Court have already rejected,” mainly that “there could be no legitimate reason to split Mobile and Baldwin counties,” “the Court should compare its allegedly neutral treatment of various communities in the 2023 plan to the treatment of the same alleged communities in” the illustrative plans, and “the use of race in devising a remedy is improper.” Aug. 14 Tr. 12–13.

The *Milligan* Plaintiffs said that if we reexamine any aspect of our *Gingles* analysis, we should come out differently than we did previously on Senate Factor 9 (which asks whether the State’s justification for its redistricting plan is tenuous). Aug. 14 Tr. 14–22. We made no finding about Factor 9 when we issued the preliminary injunction, but the *Milligan* Plaintiffs said that the depositions of Mr. Hinaman, Senator Livingston, and Representative Pringle support a finding now. *See* Aug. 14 Tr. 14–22.

During their opening statement, the *Caster* Plaintiffs argued that the State was in “defiance of the Court’s clear instructions,” because “[t]here is no dispute that the 2023 Plan . . . once again limits the state’s black citizens to a single opportunity district.” Aug. 14 Tr. 27–28. Based on stipulated facts alone, the *Caster* Plaintiffs urged this Court to enjoin the 2023 Plan because it “perpetuat[es] the same Section 2 violation as the map struck down by this Court last year.” Aug. 14 Tr. 28.

The *Caster* Plaintiffs argued that we should understand the State’s argument that we are back at square one in these cases as part and parcel of their continued defiance of federal court orders. Aug. 14 Tr. 29. The *Caster* Plaintiffs further argued that we should reject the State’s argument that the 2023 Plan remedies the “cracking” of the Black Belt because the 2023 Plan merely “reshuffled Black Belt counties to give the illusion of a remedy.” Aug. 14 Tr. 29–30. The *Caster* Plaintiffs reasoned that “Alabama gets no brownie points for uniting black voters and the Black Belt community of interest in a district in which they have no electoral power and in a map that continues to dilute the black vote.” Aug. 14 Tr. 30. Finally, the *Caster* Plaintiffs urged us to ignore all the new evidence about communities of interest, because “Section 2 is not a claim for better respect for communities of interest. It is a claim regarding minority vote dilution.” Aug. 14 Tr. 30.

In the State’s opening statement, it asserted that if the Plaintiffs cannot establish that the 2023 Plan violates federal law, then the 2023 Plan is “governing law.” Aug. 14 Tr. 33. The State assailed the Plaintiffs’ suggestion that the question is limited to the issue of whether the 2023 Plan includes an additional opportunity district as a “tool for demanding proportionality,” which is unlawful. Aug. 14 Tr. 36.

The State asserted that the Plaintiffs must come forward with new *Gingles* I evidence because under *Allen*, it “simply cannot be the case” that the Duchin plans and Cooper plans are “up to the task.” Aug. 14 Tr. 36. The State’s principal argument was that those plans were configured to compete with the 2021 Plan on traditional districting principles such as compactness and respect for communities of interest,

and they cannot outdo the 2023 Plan on those metrics. Aug. 14 Tr. 36–39. According to the State, the 2023 Plan “answers the plaintiffs’ challenge” with respect to the Black Belt because it “take[s] out . . . those purportedly discriminatory components of the 2021 plan.” Aug. 14 Tr. 39–41. Because “[t]hat cracking is gone,” the State said, “the 2023 plan does not produce discriminatory effects.” Aug. 14 Tr. 41.

Much of the State’s opening statement cautioned against an additional opportunity district on proportionality grounds and against “abandon[ing]” legitimate traditional districting principles. *See* Aug. 14 Tr. 39–47. According to the State, “now proportionality is all that you are hearing about.” Aug. 14 Tr. 47–48.

After opening statements, we took up the Plaintiffs’ motion *in limine*. The Plaintiffs emphasized that even if they are required to reprove compactness for *Gingles* I, they could rely on evidence from the preliminary injunction proceeding (and our findings) to do so, because all the law requires is a determination that the minority population is reasonably compact and that an additional opportunity district can be reasonably configured. The Plaintiffs emphasized that under this reasonableness standard, they need not outperform the 2023 Plan in a beauty contest by submitting yet another illustrative plan. Aug. 14 Tr. 50–51, 58–59. According to the Plaintiffs, “nothing can change the fact that” Black voters in Alabama “as a community are reasonably compact, and you can draw a reasonably configured district around them.” Aug. 14 Tr. 54. Indeed, the Plaintiffs say, “[t]he only thing that can substantially change” where Black voters are in Alabama for purposes of *Gingles* I “would be a new census.” Aug. 14 Tr. 55.

The Plaintiffs suggested that the State confused the compactness standards for a Section Two case, which focus on the compactness of the minority population, with the compactness standards for a racial gerrymandering case, which focus on the compactness of the challenged district. Aug. 14 Tr. 55, 57.

The State based its response to the motion *in limine* on arguments about the appropriate exercise of judicial power. *See* Aug. 14 Tr. 63. On the State’s reasoning, the Plaintiffs “have to relitigate and prove” the *Gingles* analysis because the Court cannot “just transcribe the findings from an old law onto a new law.” Aug. 14 Tr. 61, 63. Significantly, the State conceded that the Plaintiffs have met their burden in these remedial proceedings on the second and third *Gingles* requirements and the Senate Factors. Aug. 14 Tr. 64–65. So, according to the State, the only question the Court need answer is whether the Plaintiffs are required to reprove *Gingles* I. *See* Aug. 14 Tr. 64–66. The State said they must, because “it is [the State’s] reading of *Allen* that reasonably configured is not determined based on whatever a hired expert map drawer comes in and says, like, this is reasonable enough. It has to be tethered . . . to objective factors to a standard or rule that a Legislature can look at *ex ante* . . .” Aug. 14 Tr. 67.

The State answered several questions about whether the Plaintiffs now must offer a new illustrative map that outperforms the 2023 Plan with respect to compactness and communities of interest. In one such exchange, we asked whether the State was “essentially arguing [that] whatever the state does, we can just say they shot a bullet, and we have now drawn a bull’s eye where that bullet hit, and so it’s good?” Aug. 14 Tr. 72. We followed up: “It’s just some veneer to

justify whatever the state wanted to do that was short of the [Voting Rights Act?]" Aug. 14 Tr. 72. The State responded that precedent "makes clear that the state does have a legitimate interest in promoting these three principles of compactness, counties, and communities of interest." Aug. 14 Tr. 72.

Again, we asked the State whether the Duchin plans and Cooper plans were subject to attack now even though we found (and the Supreme Court affirmed) that the additional opportunity districts they illustrated were reasonably configured. Aug. 14 Tr. 67. The State answered that because the comparator is now the 2023 Plan, the Duchin plans and Cooper plans could be attacked once again, this time for failing to outperform the 2023 Plan even though we found they outperformed the 2021 Plan. Aug. 14 Tr. 67–70.

We further asked the State whether "our statement that the appropriate remedy for the . . . likely violation that we found would be an additional opportunity district ha[s] any relevance to what we're doing now?" Aug. 14 Tr. 75. "I don't think so," the State said. Aug. 14 Tr. 75. We pressed the point: "it is the state's position that the Legislature could . . . enact a new map that was consistent with those findings and conclusions [by this Court and the Supreme Court] without adding a second opportunity district?" Aug. 14 Tr. 75. "Yes," the State replied. Aug. 14 Tr. 75.

Moreover, the *Caster* Plaintiffs argued (in connection with the State's isolation of the dispute to *Gingles* I) that under applicable law, the *Gingles* I inquiry already has occurred. According to the *Caster* Plaintiffs, "[n]either the size of the black population nor its location throughout the state is a moving target[]" between 2021 and 2023. Aug. 14 Tr. 88. Likewise, they say, "[n]othing about the 2023 map,

nothing about the evidence that the defendants can now present . . . can go back in time” to undermine maps drawn “two years ago.” Aug. 14 Tr. 88. They add that “[n]othing about the tradition of Alabama’s redistricting criteria has changed[]” since 2021, and that “[i]f anything, it is Alabama that has broken with its own tradition . . . in creating these brand new findings out of nowhere, unbeknownst to the actual committee chairs who were in charge of the process.” Aug. 14 Tr. 89.

We carried the motion *in limine* with the case and received exhibits into evidence (we rule on remaining objections *infra* at Part VII).

We then asked for the State’s position if we were to order (again) that an additional opportunity district is required, and the State replied that such an order would be unlawful under *Allen* because it would require the State to adopt a map that violates traditional principles. Aug. 14 Tr. 157. When asked “at what point the federal court . . . ha[s] the ability to comment on whether the appropriate remedy includes an additional opportunity district” — “[o]n liability,” “[o]n remedy,” “[b]oth,” “or [n]ever” — the State said there is not “any prohibition on the Court commenting on what it thinks an appropriate remedy would be.” Aug. 14 Tr. 157– 58.

The State then answered questions regarding its argument about traditional districting principles and the 2023 Plan. The Court asked the State whether it “acknowledge[d] any point during the ten-year [census] cycle where the [Legislature’s] ability to redefine the principles cuts off and the Court’s ability to order an additional opportunity district attaches.” Aug. 14 Tr. 159. The State responded that that “sounds a lot like a preclearance regime.” Aug. 14 Tr. 159.

Ultimately, the State offered a practical limitation on the Legislature's ability to redefine traditional districting principles: if the Court rules that "there is a problem with this map," then the State's "time has run out," and "we will have a court drawn map for the 2024 election barring appellate review." Aug. 14 Tr. 159–60.

We continued to try to understand how, in the State's view, a court making a liability finding has any remedial authority. We asked: "[W]hen we made the liability finding, is it the state's position that at that time this Court had no authority to comment on what the appropriate remedy would be because at that time the Legislature was free to redefine traditional districting principles?" Aug. 14 Tr. 160. "Of course, the Court could comment on it[.]" the State responded. Aug. 14 Tr. 160.

Next, we queried the State whether Representative Pringle's testimony about the legislative findings should affect the weight we assign the findings. Aug. 14 Tr. 161–62. The State said no, because Representative Pringle is only one legislator out of 140, there is a presumption of regularity that attaches to the 2023 Plan, and the findings simply describe what we could see for ourselves by looking at the map. Aug. 14 Tr. 162. The State admonished us that "it's somewhat troubling for a federal court to say that they know Alabama's communities of interest better than Alabama's representatives know them." Aug. 14 Tr. 163.

Ultimately, we asked the State whether it "deliberately chose to disregard [the Court's] instructions to draw two majority-black districts or one where minority candidates could be chosen." Aug. 14 Tr. 163. The State reiterated that District 2 is "as close as you

are going to get to a second majority-black district without violating *Allen*” and the Constitution. Aug. 14 Tr. 164. Finally, we pressed the question this way: “Can you draw a map that maintains three communities of interest, splits six or fewer counties, but that most likely if not almost certainly fails to create an opportunity district and still comply with Section 2?” Aug. 14 Tr. 164. “Yes. Absolutely,” the State said. Aug. 14 Tr. 164; *see also* Aug. 14 Tr. 76.

F. The Preliminary Injunction Hearing

The next day, the Court heard argument on the *Singleton* Plaintiffs’ motion for a preliminary injunction. The *Singleton* Plaintiffs walked the Court through the claim that the 2023 Plan “preserves” and “carries forward” a racial gerrymander that has persisted in Alabama’s congressional districting plan since 1992, when the State enacted a plan guaranteeing Black voters a majority in District 7 pursuant to a stipulated injunction entered to resolve claims that Alabama had violated Section Two of the Voting Rights Act, *see Wesch*, 785 F. Supp. At 1493, *aff’d sub nom. Camp*, 504 U.S. 902, and *aff’d sub nom. Figures*, 507 U.S. 901. August 15 Tr. 8, 10–15. The State disputed that race predominated in the drawing of the 2023 Plan, but made clear that, if the Court disagreed, the State did not contest the *Singleton* Plaintiffs’ argument that the 2023 Plan could not satisfy strict scrutiny. Aug. 15 Tr. 82. The Court received some exhibits into evidence and reserved ruling on some objections. Aug. 15 Tr. 25–31, 59–60. We heard live testimony from one of the Plaintiffs, Senator Singleton; the State had the opportunity to cross-examine him. Aug. 15 Tr. 32–58. And we took closing arguments. Aug. 15 Tr. 61–85.

II. STANDARD OF REVIEW

As the foregoing discussion previewed, the parties dispute the standard of review that applies to the Plaintiffs' objections. We first discuss the standard that applies to requests for preliminary injunctive relief. We then discuss the parties' disagreement over the standard that applies in remedial proceedings, the proper standard we must apply, and the alternative.

A. Preliminary Injunctive Relief

"[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*, 23 F.4th 1282, 1290–91 (11th Cir. 2022) (internal quotation marks and citation omitted).

B. The Limited Scope of the Parties' Disagreement

The Plaintiffs' position is that the liability phase of this litigation has concluded, and we are now in the remedial phase. On the Plaintiffs' logic, the enactment of the 2023 Plan does not require us to revisit any aspect of our liability findings underlying the preliminary injunction. The question now, they say, is only whether the 2023 Plan provides Black voters an additional opportunity district.

The State’s position is that the enactment of the 2023 Plan reset this litigation to square one, and the Plaintiffs must prove a new Section Two violation. “Only if the Legislature failed to enact a new plan,” the State says, “would we move to a purely remedial process, rather than a preliminary injunction hearing related to a new law.” *Milligan* Doc. 205 at 3; *Milligan* Doc. 172 at 45–46. On the State’s logic, the Plaintiffs must reprove their entitlement to injunctive relief under *Gingles*, and some (but not all) of the evidence developed during the preliminary injunction proceedings may be relevant for this purpose.

As a practical matter, the parties’ dispute is limited in scope: it concerns whether the Plaintiffs must submit additional illustrative maps to establish the compactness part of *Gingles* I, and the related question whether any such maps must “meet or beat” the 2023 Plan on traditional districting principles. This limitation necessarily follows from the fact that the State concedes for purposes of these proceedings that the Plaintiffs have established the numerosity component of *Gingles* I, all of *Gingles* II and III, and the Senate Factors. Aug. 14 Tr. 64–65.

The parties agree that in any event, the Plaintiffs carry the burden of proof and persuasion. *Milligan* Doc. 203 at 4.

C. The Remedial Standard We Apply

When, as here, a district court finds itself in a remedial posture, tasked with designing and implementing equitable relief, “the scope of a district court’s equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies.” *Brown v. Plata*, 563 U.S. 493, 538 (2011) (internal quotation marks omitted). But this power is not unlimited. The

Supreme Court has long instructed that the “essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case.” *Swann v. Charlotte-Mecklenburg Bd. Of Ed.*, 402 U.S. 1, 15 (1971) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944)). The court “must tailor the scope of injunctive relief to fit the nature and extent of the . . . violation established.” *Haitian Refugee Ctr. V. Smith*, 676 F.2d 1023, 1041 (5th Cir. 1982). In other words, the nature and scope of the review at the remedial phase is bound up with the nature of the violation the district court sets out to remedy. *See id.*; *Wright v. Sumter Cnty. Bd. Of Elections & Registration*, 979 F.3d 1282, 1302–03 (11th Cir. 2020) (“[A] district court’s remedial proceedings bear directly on and are inextricably bound up in its liability findings.”).

The Voting Rights Act context is no exception. Following a finding of liability under Section Two, the “[r]emedial posture impacts the nature of [a court’s] review.” *Covington v. North Carolina*, 283 F. Supp. 3d 410, 431 (M.D.N.C.), *aff’d in relevant part, rev’d in part*, 138 S. Ct. 2548 (2018). “In the remedial posture, courts must ensure that a proposed^[19] remedial districting plan completely corrects—rather than perpetuates—the defects that rendered the original districts unconstitutional or unlawful.” *Id.* Accordingly, the “issue before this Court is whether” the 2023 Plan, “in combination with the racial facts and history” of

¹⁹ We understand that the 2023 Plan is enacted, not merely proposed. *Covington* used “proposed” to describe a remedial plan that had been passed by both houses of the North Carolina General Assembly after the previous maps were ruled unconstitutional. *See* 283 F. Supp. 3d at 413–14, 419; *see also infra* at 121–23.

Alabama, completely corrects, or “fails to correct the original violation” of Section Two. *Dillard*, 831 F.2d at 248 (Johnson, J.).

When, as here, a jurisdiction enacts a remedial plan after a liability finding, “it [i]s correct for the court to ask whether the replacement system . . . would remedy the violation.” *Harper v. City of Chicago Heights*, 223 F.3d 593, 599 (7th Cir. 2000) (citing *Harvell v. Blytheville Sch. Dist. # 5*, 71 F.3d 1382, 1386 (8th Cir. 1995)). In a Section Two case such as this, that challenges the State’s drawing of single-member district lines in congressional reapportionment, the injury that gives rise to the violation is vote dilution — “that members of a protected class ‘have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.’” *Shaw II*, 517 U.S. at 914. At the remedy phase, the district court therefore properly asks whether the remedial plan “completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.” *United States v. Dall. Cnty. Comm’n*, 850 F.2d 1433, 1438 (11th Cir. 1988).

Evidence drawn from the liability phase and the Court’s prior findings “form[] the ‘backdrop’ for the Court’s determination of whether the Remedial Plan ‘so far as possible eliminate[d] the discriminatory effects’” of the original plan. *Cf. Jacksonville Branch of NAACP*, 2022 WL 17751416, at *13, 2022 U.S. Dist. LEXIS 227920, at *33 (rejecting city’s invitation to conduct analysis of its remedial plan “on a clean slate” because “the remedial posture impacts the nature of the review” (internal quotation marks omitted) (alterations accepted) (quoting *Covington*, 283 F. Supp.

3d at 431)). “[T]here [i]s no need for the court to view [the remedial plan] as if it had emerged from thin air.” *Harper*, 223 F.3d at 599; *accord Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1115–16 (3d Cir. 1993)).

That said, a federal court cannot accept an unlawful map on the ground that it corrects a Section Two violation in an earlier plan. “[A]ny proposal to remedy a Section 2 violation must itself conform with Section 2.” *Dillard*, 831 F.2d at 249. So if the 2023 Plan corrects the original violation of Section Two we found, but violates Section Two in a new way or otherwise is unlawful, we may not accept it.

Accordingly, we limit our analysis in the first instance to the question whether the 2023 Plan corrects the likely Section Two violation that we found and the Supreme Court affirmed: the dilution of Black votes in Alabama congressional districts. Because we find that the 2023 Plan perpetuates rather than corrects that violation, *see infra* at Part IV.A, we enjoin it on that ground. If we had found that the 2023 Plan corrected that violation, we then would have considered any claims the Plaintiffs raised that the 2023 Plan violates federal law anew.

For seven separate and independent reasons, we reject the assertion that the Plaintiffs must reprove Section Two liability under *Gingles*.

First, the State has identified no controlling precedent, and we have found none, that instructs us to proceed in that manner. We said in one of our clarification orders that it would be unprecedented for us to relitigate the Section Two violation during remedial proceedings, *see Milligan* Doc. 203 at 4, and

the State has not since identified any precedent that provides otherwise.

Second, the main precedent the State cites, *Dillard*, aligns with our approach. *See* 831 F.2d at 247–48. In *Dillard*, Calhoun County stipulated that its at-large system of electing commissioners diluted Black votes in violation of Section Two. *Id.* The County prepared a remedial plan that altered the electoral mechanism to elect commissioners using single-member districts and retained the position of an at-large chair. *Id.* at 248. The plaintiffs objected on the ground that the remedial plan did not correct the Section Two violation. *Id.* The district court agreed that under the totality of the circumstances, the use of at-large elections for the chairperson would dilute Black voting strength. *Id.* at 249.

The Eleventh Circuit reversed on the ground that the district court failed to conduct a fact-specific inquiry into the proposed remedy. *Id.* at 249–50. The appeals court ruled that when the district court simply “transferred the historical record” from the liability phase of proceedings to the remedial phase, it “incompletely assessed the differences between the new and old proposals.” *Id.* at 250. The appeals court observed that in the light of the new structure of the commission, the nature of the chairperson’s duties and responsibilities, powers, and authority would necessarily differ from those of the commissioners in the old, unlawful system. *See id.* at 250–52. Accordingly, the appeals court held that the district court could not simply rely on the old evidence to establish a continuing violation. *Id.* at 250.

The State overreads *Dillard*. The reason that new factual findings were necessary in *Dillard* was because, as the Eleventh Circuit observed, “procedures

that are discriminatory in the context of one election scheme are not necessarily discriminatory under another scheme.” *Id.* at 250. If the new system diluted votes, the method by which that could or would occur might be different, so the court needed to assess it. *See id.* at 250–52. Those concerns are not salient here: there is no difference in electoral mechanism. In 2023, the State just placed district lines in different locations than it did in 2021.

Accordingly, we do not read *Dillard* to support the *Gingles* reset that the State requests. When the entire electoral mechanism changes, it makes little sense not to examine the new system. But this reality does not establish an inviolable requirement that every court faced with a remedial task in a redistricting case must begin its review of a remedial map with a blank slate.

Even if we are wrong that this case is unlike *Dillard*, what the State urges us to do is not what the Eleventh Circuit said or did in *Dillard*. After the appeals court held that the “transcription [of old evidence] does not end the evaluation,” it said that it “must evaluate the new system in part measured by the historical record, in part measured by difference from the old system, and in part measured by prediction,” and it faulted the district court for “incompletely assess[ing] the differences between the new and old proposals.” *Id.* at 249–50.

We discern no dispute among the parties that a proper performance analysis of the 2023 Plan evaluates it “in part measured by the historical record, in part measured by difference from the old system, and in part measured by prediction.” *Id.* at 250; *see Milligan* Doc. 251 at 2–6. Indeed, every performance analysis that we have — the State’s, the *Milligan* Plaintiffs’, and the *Caster* Plaintiffs’ — does just that.

Milligan Doc. 251 at 2–6. This understanding of a performance analysis is consistent with the analytical approach that the United States urges us to take in its Statement of Interest. *Milligan* Doc. 199 at 9–15.

Accordingly, we understand *Dillard* as guiding us to determine whether District 2 in the 2023 Plan performs as an additional opportunity district, not as directing us to reset the *Gingles* liability determination to ground zero.

Third, Covington, cited by both the State and the Plaintiffs, aligns with our approach. In *Covington*, the North Carolina General Assembly redrew its state legislative electoral maps after a three-judge court enjoined the previous maps as unconstitutional in a ruling that the Supreme Court summarily affirmed. 283 F. Supp. 3d at 413–14, 419. The plaintiffs objected to the remedial map, and the legislative defendants raised jurisdictional objections, including that “the enactment of the [remedial p]lans rendered th[e] action moot.” *Id.* at 419, 423–24.

The district court rejected the mootness challenge on the ground that after finding a map unlawful, a district court “has a duty to ensure that any remedy so far as possible eliminate[s] the discriminatory effects of the past as well as bar[s] like discrimination in the future.” *Id.* at 424 (internal quotation marks omitted) (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)). The district court cited circuit precedent for the proposition that “federal courts *must* review a state’s proposed remedial districting plan to ensure it completely remedies the identified constitutional violation and is not otherwise legally unacceptable.” *Id.* (emphasis in original) (collecting cases, including Section Two cases).

Further, the district court emphasized that its injunction was the only reason the General Assembly redrew the districts that it did. *Id.* at 425. (In *Covington*, the State itself was a party to the case.) The court reasoned that “[i]t is axiomatic that this Court has the inherent authority to enforce its own orders,” so the case could not be moot. *Id.* (also describing the court’s “strong interest in ensuring that the legislature complied with, but did not exceed, the authority conferred by” the injunction). The Supreme Court affirmed this ruling by the district court. *Covington*, 138 S. Ct. at 2553 (concluding that the plaintiffs’ claims “did not become moot simply because the General Assembly drew new district lines around them”).

We do not decide the constitutional issues before us and the State has not formally raised a mootness challenge, but those distinctions do not make *Covington* irrelevant.²⁰ Both parties have cited it, *see*

²⁰ Notwithstanding that the issue was never formally presented to us by motion, federal courts have an “independent obligation to ensure that jurisdiction exists before federal judicial power is exercised over the merits” of a case, *see Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1275 (11th Cir. 2000), so we have carefully considered the mootness issue. It is clear to us that under *Covington* this case is not moot. Just as the district court in *Covington* (1) “ha[d] a duty to ensure that any remedy so far as possible eliminate[s] the discriminatory effects of the past as well as bar[s] like discrimination in the future,” and (2) “ha[d] the inherent authority to enforce its own orders,” 283 F. Supp. 3d at 424–25, so too do we (1) have a duty to ensure that the State’s proposed remedy completely cures the Section Two violation we have already found, and (2) have the inherent authority to enforce our preliminary injunction order. Moreover, we are acutely aware of the fact that Black Alabamians will be forced, if we do not address the matter, to continue to vote under a map that we have

Caster Docs. 191, 195; *Milligan* Docs. 220, 225, and we understand it to mean that on remedy, we must (1) ensure that any remedial plan corrects the violation that we found, and (2) reject any proposed remedy that is otherwise unlawful. We do not discern anything in *Covington* to suggest that if we do those two things, we fall short of our remedial task.

None of the other cases the State has cited compel a different conclusion. For instance, in *McGhee v. Granville County*, the County responded to a Section Two liability determination by drawing a remedial plan that switched the underlying electoral mechanism from an at-large method to single-member districts in which Black voters would have an increased opportunity to elect candidates of their choice. 860 F.2d 110, 113 (4th Cir. 1988). The district court rejected the remedial plan as failing to completely remedy the violation, but the Fourth Circuit reversed, holding that the district court was bound to accept this remedial plan because once “a vote dilution violation is established, the appropriate remedy is to restructure the districting system to eradicate, to the maximum extent possible *by that means*, the dilution proximately caused by that system.” *Id.* at 118 (emphasis in original). The district court was not free to try to eradicate the dilution by altering other “electoral laws, practices, and structures” not actually challenged by the claim; instead, the district court had to evaluate the extent to which the remedial plan eradicated the dilution in the light of the electoral mechanism utilized by the State. *Id.* (internal quotation marks omitted).

found likely violates Section Two. That constitutes a live and ongoing injury.

The Fourth Circuit in *McGhee* did not hold that *Gingles* I compels a district court to accept a remedial map that provides *less* than a genuine opportunity for minority voters to elect a candidate of their choice. *See id.* To the contrary, the court emphasized that the “appropriate remedy” for a vote dilution claim is to “restructure the districting system to eradicate . . . the dilution proximately caused by that system” “to the maximum extent possible,” within the bounds of “the size, compactness, and cohesion elements of the dilution concept.” *Id.*

Fourth, consistent with the foregoing discussion and our understanding of our task, district courts regularly isolate the initial remedial determination to the question whether a replacement map corrects a violation found in an earlier map. *See, e.g., United States v. Osceola County*, 474 F. Supp. 2d 1254, 1256 (M.D. Fla. 2006); *GRACE, Inc. v. City of Miami*, --- F. Supp. 3d ---, No. 1:22-CV-24066, 2023 WL 4853635, at *7, 2023 U.S. Dist. LEXIS 134162, at *19–20 (S.D. Fla. July 30, 2023).

One three-judge court — in a ruling affirmed by the Supreme Court — has gone so far as to describe its task as “determining the meaning of the Voting Rights Act at the remedial stage of a case in which defendants are proven violators of the law.” *Jeffers v. Clinton*, 756 F. Supp. 1195, 1199 (E.D. Ark. 1990), *aff’d*, 498 U.S. 1019 (1991). We do not go that far: no part of our ruling rests on assigning lawbreaker status to the State. *Id.* We are ever mindful that we “must be sensitive to the complex interplay of forces that enter a legislature’s redistricting calculus,” and we generally presume the good faith of the Legislature. *Abbott*, 138 S. Ct. at 2324 (internal quotation marks omitted). And the Supreme Court has specifically held that the “allocation of the

burden of proof [to the plaintiffs] and the presumption of legislative good faith are not changed by a finding of past discrimination.” *Id.* This is because “past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.” *Id.* (internal quotation marks omitted) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 75 (1980) (plurality opinion)).

As we explain below, *see infra* at Part IV, we have afforded the 2023 Plan the deference to which it is entitled, we have applied the presumption of good faith, and we have measured it against the evidentiary record by performing the legal analysis that we understand binding precedent to require. Put simply, the 2023 Plan has received a fair shot. (Indeed, we have substantially relaxed the Federal Rules of Evidence to allow the State to submit, and we have admitted, virtually all of the materials that it believes support its defense of the 2023 Plan. *Infra* at Part VII; Aug. 14 Tr. 91–142.)

Fifth, resetting the *Gingles* analysis to ground zero following the enactment of the 2023 Plan is inconsistent with our understanding of this Court’s judicial power. At the remedial hearing, we queried the State about the relevance for these remedial proceedings of our statement in the preliminary injunction that the appropriate remedy was an additional opportunity district. *See supra* at Part I.E.2. According to the State, the statement has no legal force, Aug. 14 Tr. 74 — there is not any “prohibition on the Court commenting on what it thinks an appropriate remedy would be,” Aug. 14 Tr. 158, but such comments are limited to the context of the 2021 Plan, meaningless when the Legislature undertakes to enact a remedial map, and irrelevant when a court

assesses that map. The State did not use the word “advisory,” but in substance its argument was that the “comment” had no force or field of application and was merely our (erroneous) advice to the Legislature.

The State’s view cannot be squared with this Court’s judicial power in at least two ways. As an initial matter, it artificially divorces remedial proceedings in equity from liability proceedings in equity. As we already observed, federal courts must tailor injunctions to the specific violation that the injunction is meant to remedy; the idea is that the equitable powers of a federal court are among its broadest and must be exercised with great restraint, care, and particularity. *See, e.g., Haitian Refugee Ctr.*, 676 F.2d at 1041 (“Although a federal court has broad equitable powers to remedy constitutional violations, it must tailor the scope of injunctive relief to fit the nature and extent of the constitutional violation established.”).

In this way, a liability determination shapes the evaluation of potential remedies, and the determination of an appropriate remedy necessarily is informed by the nature of the conduct enjoined. *Id.*; *see also Covington*, 581 U.S. at 488 (citing *NAACP v. Hampton Cnty. Election Comm’n*, 470 U.S. 166, 183 n.36 (1985)). Again, redistricting cases are no exception. *See, e.g., Dillard*, 831 F.2d at 248. We cannot reconcile these basic principles with the State’s suggestion that after an exhaustive liability determination, we cannot make a relevant or meaningful statement about the proper remedy.

Separately, the State’s view is inconsistent with the Article III judicial power because it allows the State to constrain (indeed, to manipulate) the Court’s authority to grant equitable relief. The State agrees that if the Legislature had passed no map, it would

have fallen to us to draw a map. But the State argues that because the Legislature enacted a map, we have no authority to enjoin it on the ground that it does not provide what we said is the legally required remedy. Rather, the State says, we must perform a new liability analysis from ground zero. The State acknowledges that if we find liability, Alabama's 2024 congressional elections will occur according to a court-ordered map, but that's only because time will have run out for the Legislature to enact another remedial map before that election. Aug. 14 Tr. 159–60.

Put differently, the State's view is that so long as the Legislature enacts a remedial map, we have no authority to craft a remedy without first repeating the entire liability analysis. But at the end of each liability determination, the argument goes, we have no authority to order a remedy if the Legislature plans and has time to enact a new map. In essence, the State creates an endless paradox that only it can break, thereby depriving Plaintiffs of the ability to effectively challenge and the courts of the ability to remedy. It cannot be that the equitable authority of a federal district court to order full relief for violations of federal law is always entirely at the mercy of a State electoral and legislative calendar.

Sixth, we discern no limiting principle to the State's argument that we should reset the liability analysis to ground zero, and this causes us grave concern that accepting the argument would frustrate the purpose of Section Two. As the Plaintiffs have rightly pointed out and we have described, the State's view of remedial proceedings puts redistricting litigation in an infinity loop restricted only by the State's electoral calendar and terminated only by a new census. *See Milligan* Doc. 210 at 6. These are practical limitations, not

principled ones. The State has not identified, and we cannot identify, any limiting principle to a rule whereby redistricting litigation is reset to ground zero every time a legislature enacts a remedial plan following a liability determination. This is a significant reason not to accept such a rule; it would make it exceedingly difficult, if not impossible, for a district court ever to effectuate relief under Section Two.

It is as though we are three years into a ten-year baseball series. We've played the first game. The Plaintiffs won game one. The State had the opportunity to challenge some of the calls that the umpires made, and the replay officials affirmed those calls. Now, instead of playing game two, the State says that it has changed some circumstances that were important in game one, so we need to replay game one. If we agree, we will only ever play game one; we will play it over and over again, until the ten years end, with the State changing the circumstances every time to try to win a replay. We will never proceed to game two unless, after one of the replays, there is simply no time for the State to change the circumstances. Nothing about this litigation is a game, but to us the analogy otherwise illustrates how poorly the State's position fits with any reasonable effort to timely and finally dispose of redistricting litigation.

Seventh, the State's argument that we must reset the *Gingles* analysis to ground zero ignores the simple truth that the 2023 Plan exists only because this Court held — and the Supreme Court affirmed — that the 2021 Plan likely violated Section Two. If the State originally had enacted the 2023 Plan instead of the 2021 Plan, we would have analyzed the Plaintiffs' attacks on the 2023 Plan under *Gingles*. But that's not what happened, so we won't proceed as though it did.

Further, we reject the State's argument that by limiting our initial remedial determination to the question of whether the 2023 Plan provides an additional opportunity district, we violate the proportionality disclaimer in Section Two. The State argues that we have staked the fate of the 2023 Plan on whether it provides proportional representation, which is unlawful. *See Milligan* Doc. 220 at 60–68.

The State is swinging at a straw man: the Plaintiffs' analysis did not and does not rest on proportionality grounds, and neither does ours. As an initial matter, we did not enjoin the 2021 Plan on the ground that it failed to provide proportional representation. We performed a thorough *Gingles* analysis and expressly acknowledged a limited, non-dispositive role for evidence and arguments about proportionality. *See Milligan* Doc. 107 at 193–95. The Supreme Court affirmed our analysis, which we presume it would not have done were the analysis infected with a proportionality error. *See Allen*, 143 S. Ct. at 1502. Our remedial analysis cannot go back in time and taint our earlier ruling.

Likewise, the Plaintiffs do not urge us to enjoin the 2023 Plan on the ground that it fails to provide proportional representation. They urge us to enjoin it on the ground that it fails to provide the required remedy because District 2 is not an opportunity district. *See Milligan* Doc. 200 at 6–7; *Caster* Doc. 179 at 2–3. Federal law does not equate the provision of an additional opportunity district as a remedy for vote dilution with an entitlement to proportional representation; decades of jurisprudence so ensures. *Allen*, 143 S. Ct. at 1508–10. Any suggestion that the Plaintiffs urge us to reject the 2023 Plan because it

fails to provide proportional representation blinks reality.

And as we explain below, we do not enjoin the 2023 Plan on the ground that it fails to provide proportional representation. We enjoin it on two separate, independent, and alternative grounds, neither of which raises a proportionality problem. *See infra* at Parts IV.A & IV.B.

For all these reasons, it is not a proportionality fault that we limit our initial determination to whether the 2023 Plan provides the remedy the law requires.

D. In the Alternative

Out of an abundance of caution, we have carefully considered the possibility that the foregoing analysis on the standard of review is wrong. We have concluded that even if it is, after a fresh and new *Gingles* analysis the 2023 Plan still meets the same fate. As we explain in Part IV.B below, even if we reexamine *Gingles* I, II, and III, and all the Senate Factors, relying only on (1) relevant evidence from the preliminary injunction proceedings, (2) relevant and admissible evidence from the remedial proceedings, and (3) stipulations and concessions, we reach the same conclusion with respect to the 2023 Plan that we reached for the 2021 Plan: it likely violates Section Two by diluting Black votes.

III. APPLICABLE LAW

“This Court cannot authorize an element of an election proposal that will not with certitude *completely* remedy the Section 2 violation.” *Dillard*, 831 F.2d at 252 (emphasis in original); *accord, e.g., Covington*, 283 F. Supp. 3d at 431. The requirement of a complete remedy means that we cannot accept a

remedial plan that (1) perpetuates the vote dilution we found, *see, e.g., Covington*, 283 F. Supp. 3d at 431; or (2) only partially remedies it, *see, e.g., White v. Alabama*, 74 F.3d 1058, 1069–70 (11th Cir. 1996).

The law does not require that a remedial district guarantee Black voters’ electoral success. “The circumstance that a group does not win elections does not resolve the issue of vote dilution.” *LULAC*, 548 U.S. at 428. Rather, the law requires that a remedial district guarantee Black voters an equal opportunity to achieve electoral success. “[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.” *De Grandy*, 512 U.S. at 1014 n.11.

Thus, as we said in the preliminary injunction, controlling precedent makes clear that the appropriate remedy for the vote dilution we found is an additional district in which Black voters either comprise a voting-age majority or otherwise have an opportunity to elect a representative of their choice. And as the Supreme Court explained in *Abbott*, this requirement is not new: “In a series of cases tracing back to [*Gingles*], [the Supreme Court has] interpreted [the Section Two] standard to mean that, under certain circumstance, States must draw ‘opportunity’ districts in which minority groups form ‘effective majorit[ies].’” 138 S. Ct. at 2315 (emphasis added) (quoting *LULAC*, 548 U.S. at 426).

Our ruling was consistent with others in which district courts required additional opportunity districts to remedy a vote-dilution violation of Section Two. *See, e.g., Perez v. Texas*, No. 11-CA-360-OLG-JES-XR, 2012 WL 13124275, at *5, 2012 U.S. Dist. LEXIS 190609 (W.D. Tex. Mar. 19, 2012) (on remand from the Supreme Court, ordering the “creation of a new Latino

district” to satisfy Section Two); *League of United Latin Am. Citizens v. Perry*, 457 F. Supp. 2d 716, 719 (E.D. Tex. 2006) (ordering, on remand from the Supreme Court, a remedial plan that restored an effective opportunity district); *accord, e.g., Baldus v. Members of Wis. Gov’t Accountability Bd.*, 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012) (rejecting a state’s remedial plan and adopting a Section Two plaintiff’s remedial proposal that increased a remedial district’s minority population to ensure an “effective majority-minority” district).

We have reviewed the relevant jurisprudence for guidance about how to determine whether the 2023 Plan includes an additional opportunity district. The State appears to have charted new waters: we found no other Section Two case in which a State conceded on remedy that a plan enacted after a liability finding did not include the additional opportunity district that the court said was required.

In any event, we discern from the case law two rules that guide our determination whether the 2023 Plan in fact includes an additional opportunity district. *First*, we need a performance analysis (sometimes called a functional analysis) to tell us whether a purportedly remedial district completely remedies the vote dilution found in the prior plan. A performance analysis predicts how a district will function based on statistical information about, among other things, demographics of the voting-age population in the district, patterns of racially polarized voting and bloc voting, and the interaction of those factors. *See generally Milligan* Doc. 199.

Appellate courts commonly rely on performance analyses to review district court decisions about remedial plans. *See, e.g., LULAC*, 548 U.S. at 427

(reviewing a district court’s evaluation of a proposed remedial district on the basis of a performance analysis that included evidence of the minority share of the population, racially polarized voting in past elections, and projected election results in the new district); *Dall. Cnty. Comm’n*, 850 F.2d at 1440 (rejecting a remedial plan because a performance analysis demonstrated that racially polarized voting would prevent the election of Black-preferred candidates in the proposed remedial district).

District courts also commonly rely on performance analyses to evaluate remedial plans in the first instance. *See, e.g., Osceola County*, 474 F. Supp. 2d at 1256 (rejecting a remedial proposal that, “given the high degree of historically polarized voting,” failed to remedy the VRA violation); *League of United Latin Am. Citizens*, 457 F. Supp. 2d at 721 (ordering remedial plan with three new “effective Latino opportunity districts” and basing determination that districts would “perform” on population demographics and statewide election data).

Second, the Supreme Court has not dictated a baseline level at which a district must perform to be considered an “opportunity” district. Nor has other precedent set algorithmic criteria for us to use to determine whether an alleged opportunity district will perform. But precedent does clearly tell us what criteria establish that a putative opportunity district will not perform. When a performance analysis shows that a cohesive majority will “often, if not always, prevent” minority voters from electing the candidate of their choice in the purportedly remedial district, there is a “denial of opportunity in the real sense of that term.” *LULAC*, 548 U.S. at 427, 429. And when voting is racially polarized to such a “high degree” that

electoral success in the alleged opportunity district is “completely out of the reach” of a minority community, the district is not an opportunity district. *Osceola County*, 474 F. Supp. 2d at 1256.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Our findings and conclusions proceed in two parts. We first consider whether, under the precedent we just described, the 2023 Plan completely remedies the likely Section Two violation that we found and the Supreme Court affirmed. We then consider whether, starting from square one, the Plaintiffs have established that the 2023 Plan likely violates Section Two.

A. The 2023 Plan Does Not Completely Remedy the Likely Section Two Violation We Found and the Supreme Court Affirmed.

The record establishes quite clearly that the 2023 Plan does not completely remedy the likely Section Two violation that we found and the Supreme Court affirmed. The 2021 Plan included one majority-Black congressional district, District 7. This Court concluded that the Plaintiffs were substantially likely to establish that the 2021 Plan violated Section Two by diluting Black votes. *See Milligan* Doc. 107. We determined that under binding precedent, the necessary remedy was either an additional majority-Black district or an additional Black-opportunity district. *Id.* at 5–6. We observed that as a “practical reality,” because voting in Alabama is intensely racially polarized, any such district would need to include a Black “voting-age majority or something quite close to it.” *Id.* at 6.

We explicitly explained that the need for two opportunity districts hinged on the evidence of racially polarized voting in Alabama — which the State concedes at this stage — and that our *Gingles* I analysis served only to determine whether it was reasonably practicable, based on the size and geography of the minority population, to create a reasonably configured map with two majority-minority districts.

The Supreme Court affirmed that order in all respects; it neither “disturb[ed]” our fact findings nor “upset” our legal conclusions. *Allen*, 143 S. Ct. at 1502, 1506. The Supreme Court did not issue any instructions for us to follow when the cases returned to our Court or warn us that we misstated the appropriate remedy. We discern nothing in the majority opinion to hold (or even to suggest) that we misunderstood what Section Two requires. We have carefully reviewed the portion of the Chief Justice’s opinion that received only four votes, as well as Justice Kavanaugh’s concurrence, and we discern nothing in either of those writings that adjusts our understanding of what Section Two requires in these cases. We do not understand either of those writings as undermining any aspect of the Supreme Court’s affirmance; if they did, the Court would not have affirmed the injunction.

We simply see no indication in *Allen* that we misapplied Section Two.

Because there is no dispute that the 2023 Plan does not have two majority-Black districts, *Milligan* Doc. 251 ¶ 1, the dispositive question is whether the 2023 Plan contains an additional Black-opportunity district. We find that it does not, for two separate and independent reasons.

First, we find that the 2023 Plan does not include an additional opportunity district because the State itself concedes that the 2023 Plan does not include an additional opportunity district. *See id.* ¶¶ 5–9; Aug. 14 Tr. 163–64. Indeed, the State’s position is that the Legislature was not required to include an additional opportunity district in the 2023 Plan. Aug. 14 Tr. 157–61, 163–64.

Second, we find that the 2023 Plan does not include an additional opportunity district because stipulated evidence establishes that fact. District 2 has the second-highest Black voting-age population after District 7, and District 2 is the district the Plaintiffs challenge. *See Milligan* Doc. 200 at 6–7; *Milligan* Doc. 251 ¶ 3. District 2 (with a Black voting-age population of 39.93%) is, according to the State, “as close as you are going to get” to a second majority-Black district. Aug. 14 Tr. 164.

Based on (1) expert opinions offered by the *Milligan* and *Caster* Plaintiffs and (2) the Legislature’s own performance analysis, the parties stipulated that in District 2 in the 2023 Plan, white-preferred candidates have “almost always defeated Black-preferred candidates.” *Milligan* Doc. 251 ¶ 5; *see also Milligan* Docs. 200-2, 200-3; *Caster* Doc. 179-2.

Standing alone, this stipulation supports a finding that the new District 2 is not an opportunity district. Because voting is so intensely racially polarized in District 2, a Black-voting age population of 39.93% is insufficient to give Black voters a fair and reasonable opportunity to elect a representative of their choice: it will either never happen, or it will happen so very rarely that it cannot fairly be described as realistic, let alone reasonable.

The evidence fully supports the parties' stipulation. The *Milligan* Plaintiffs' expert, Dr. Liu, examined the effectiveness of Districts 2 and 7 of the 2023 Plan in eleven biracial elections between 2014 and 2022. *Milligan* Doc. 200-2 at 1. Dr. Liu opined that in District 2, "[a]ll Black-preferred-candidates . . . in the 11 biracial elections were defeated." *Id.* at 2. Dr. Liu further opined that the District 2 races were not close: the average two-party vote share for the Black preferred candidates in District 2 was approximately 42%. *Id.* at 3; *Milligan* Doc. 251 ¶ 7. Accordingly, Dr. Liu concluded that "voting is highly racially polarized in [Districts 2] and [7] in the [2023] Plan," and the new District 2 "produces the same results for Black Preferred Candidates" that the 2021 Plan produced. *Milligan* Doc. 200-2 at 1.

The *Caster* Plaintiffs' expert, Dr. Palmer, reached the same conclusion using a different analysis. Dr. Palmer analyzed the 2023 Plan using seventeen contested statewide elections between 2016 and 2022. *Milligan* Doc. 251 ¶ 6; *Caster* Doc. 179-2. Dr. Palmer opined that "Black voters have a clear candidate of choice in each contest, and White voters are strongly opposed to this candidate." *Caster* Doc. 179-2 ¶¶ 8, 11–12. Dr. Palmer further opined that "Black-preferred candidates are almost never able to win elections in" District 2 because "[t]he Black-preferred candidate was defeated in 16 of the 17 elections [he] analyzed." *Id.* ¶¶ 8, 11–12, 18, 20; *accord* *Milligan* Doc. 251 ¶ 6. Dr. Palmer observed that Black preferred candidates regularly lost by a substantial margin: the two-party vote share for the Black preferred candidates in District 2 was 44.5%. *Caster* Doc. 179-2 ¶ 18; *see also* *Milligan* Doc. 213 ¶ 6. Accordingly, Dr. Palmer opined that the new District 2 does not allow Black voters to elect a candidate of their choice. *Caster* Doc. 179-2 ¶ 20.

We credited both Dr. Liu and Dr. Palmer in the preliminary injunction proceedings, *see Milligan* Doc. 107 at 174–76, and we credit them now for the same reasons we credited them then. Both experts used the same methodology to develop their opinions for these remedial proceedings that they used to develop their opinions on liability. *See Milligan* Doc. 200-2 at 2; *Caster* Doc. 179-2 ¶ 9 & n.1. And the State has not suggested that we should discredit either expert, or that we should discount their opinions for any reason.

Indeed, the Legislature’s analysis of the 2023 Plan materially matches Dr. Liu’s and Dr. Palmer’s. The Legislature analyzed the 2023 Plan in seven election contests. *Milligan* Doc. 251 ¶ 9. The Legislature’s analysis found that “[u]nder the 2023 Plan, the Black-preferred candidate in [District] 2 would have been elected in 0 out of the 7 contests analyzed.” *Id.* And it showed that the losses were by a substantial margin: “Under the 2023 Plan,” the Legislature’s analysis found, “the average two-party vote-share for Black preferred candidates in [District] 2 is 46.6%.” *Id.*

All the performance analyses support the same conclusion: the 2023 Plan provides no greater opportunity for Black Alabamians to elect a candidate of their choice than the 2021 Plan provided. District 2 is the closest the 2023 Plan comes to a second Black-opportunity district, and District 2 is not a Black-opportunity district. Accordingly, the 2023 Plan perpetuates, rather than completely remedies, the likely Section Two violation found by this Court.

B. Alternatively: Even If the Plaintiffs Must
Re-Establish Every

Element of *Gingles* Anew, They Have Carried that Burden and Established that the 2023 Plan Likely Violates Section Two.

Even if we reset the *Gingles* analysis to ground zero, the result is the same because the Plaintiffs have established that the 2023 Plan likely violates Section Two. We discuss each step of the *Gingles* analysis in turn.

1. *Gingles* I - Numerosity

The numerosity part of *Gingles* I considers whether Black voters as a group are “sufficiently large . . . to constitute a majority” in a second majority-Black congressional district in Alabama. *Cooper*, 581 U.S. at 301 (internal quotation marks omitted). This issue was undisputed during the preliminary injunction proceedings, *Milligan* Doc. 107 at 146, and the State offers no evidence to challenge our previous finding. Accordingly, we again find that Black voters, as a group, are “sufficiently large . . . to constitute a majority” in a second majority-Black congressional district in Alabama. *Cooper*, 581 U.S. at 301 (internal quotation marks omitted).

2. *Gingles* I - Compactness

We next consider whether the *Milligan* and *Caster* Plaintiffs have established that Black voters as a group are sufficiently geographically compact to constitute a majority in a second reasonably configured congressional district. We proceed in three steps: *first*, we explain our credibility determinations about the parties’ expert witnesses; *second*, we explain why the State’s premise that reasonable compactness

necessarily requires the Plaintiffs’ proposed plans to “meet or beat” the 2023 Plan on all available compactness metrics is wrong; and *third*, we consider the parties’ arguments about geographic compactness on the State’s own terms.

a. Credibility Determinations

In the preliminary injunction, we found Dr. Duchin and Mr. Cooper “highly credible.” *Milligan* Doc. 107 at 148–52. The State has not adduced any evidence or made any argument during remedial proceedings to disturb those findings. We also found credible Dr. Bagley, who earlier testified about the Senate Factors and now opines about communities of interest. *Id.* at 185–87. Likewise, the State has not adduced any evidence or made any argument during remedial proceedings to disturb our original credibility determination about Dr. Bagley. Accordingly, we find credible each of Plaintiffs’ *Gingles* I experts.

Although we “assign[ed] very little weight to Mr. Bryan’s testimony” in the preliminary injunction and explained at great length why we found it unreliable, *id.* at 152–56, the State again relies on Mr. Bryan as an expert on “race predominance,” this time through an unsworn report where he “assessed how county ‘splits differ by demographic characteristics when it comes to the division of counties’ in Plaintiffs’ alternative[]” plans. *See Milligan* Doc. 267 ¶ 156 (quoting *Milligan* Doc. 220-10 at 22). When we read the State’s defense of the 2023 Plan, it is as though our credibility determination never occurred: the State repeatedly cites Mr. Bryan’s opinions but makes no effort to rehabilitate his credibility. *See generally Milligan* Doc. 220.

Likewise, when we read Mr. Bryan's 2023 report, it is as though our credibility determination never occurred. Mr. Bryan makes no attempt to rehabilitate his own credibility or engage any of the many reasons we assigned little weight to his testimony and found it unreliable. *See generally Milligan* Doc. 220-10. Mr. Bryan even cites this case as one of two cases in which he has testified, without mentioning that we did not credit his testimony. *See id.* at 4. The district court in the other case found "his methodology to be poorly supported" and that his "conclusions carried little, if any, probative value on the question of racial predominance." *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 824 (M.D. La. 2022).

When we read the State's response to the Plaintiffs' motion to exclude Mr. Bryan's 2023 report as unreliable, it is again as though our credibility determination never occurred. The State does not acknowledge it or suggest that any of the problems we identified have been remedied (or at least not repeated). *See generally Milligan* Doc. 245.

Against this backdrop, it is especially remarkable that (1) the State did not call Mr. Bryan to testify live at the remedial hearing, and (2) Mr. Bryan's report is not sworn. *See Milligan* Doc. 220-10. "[C]ross-examination is the greatest legal engine ever invented for the discovery of truth." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987) (internal quotation marks omitted) (quoting 5 J. Wigmore, *Evidence* § 1367 at 29 (3d ed. 1940)). Cross-examination strikes us as especially important because this Court already has found this expert witness' testimony incredible and unreliable. It strikes us as even more valuable when, as here, a witness has not reduced his opinions to sworn testimony.

Standing alone, these circumstances preclude us from assigning any weight to Mr. Bryan's 2023 opinion. But these circumstances don't stand alone: even if we were to evaluate Mr. Bryan's 2023 opinion without reference to our earlier credibility determination, we would not admit it or assign any weight to it.

As the Supreme Court made clear in *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), Federal Rule of Evidence 702 requires this Court to “perform the critical ‘gatekeeping’ function concerning the admissibility” of expert evidence. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (*en banc*) (quoting *Daubert*, 509 U.S. at 589 n.7). That gatekeeping function involves a “rigorous three-part inquiry” into whether:

- (1) the expert is qualified to testify competently regarding the matters he intends to address;
- (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and
- (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Id. (quoting *City of Tuscaloosa v. Harcos Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998)). “The burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion.” *Id.*

The State has not met its burden on at least two of these three requirements. *First*, as explained above, this Court ruled that Mr. Bryan was not a credible witness in January 2021. *Milligan* Doc. 107 at 152. *Second*, Mr. Bryan's report is not reliable. For that, the

Court “assess[es] ‘whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue.’” *Frazier*, 387 F.3d at 1261–62 (quoting *Daubert*, 509 U.S. at 592–93). There are two parts to the methodology question: relevance and reliability. See *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310–12 (11th Cir. 1999). Under the relevance part, “the court must ensure that the proposed expert testimony is relevant to the task at hand, . . . i.e., that it logically advances a material aspect of the proposing party’s case.” *Id.* at 1312 (internal quotation marks omitted). “[T]he evidence must have a valid scientific connection to the disputed facts in the case.” *Id.*

Under the reliability part, courts consider “four noninclusive factors,” namely “(1) whether the theory or technique can be tested; (2) whether it has been subjected to peer review; (3) whether the technique has a high known or potential rate of error; and (4) whether the theory has attained general acceptance within the scientific community.” *Id.* The “primary focus” should “be solely on principles and methodology, not on the conclusions that they generate,” so “the proponent of the testimony does not have the burden of proving that it is scientifically correct, but that by a preponderance of the evidence, it is reliable.” *Id.* (internal quotation marks omitted). As explained below, Mr. Bryan’s report is neither relevant nor reliable.

Mr. Bryan’s 2023 opinion is that “race predominated in the drawing of both the [Districts 2] and [7] in the [VRA Plan] and the Cooper Plans.” *Milligan* Doc. 220-10 ¶ 7. That opinion rests on what Mr. Bryan calls a “[g]eographic [s]plits [a]nalysis of [c]ounties.” *Id.* at 22.

First, as to reliability, “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

The Plaintiffs attack Mr. Bryan’s 2023 opinion as *ipse dixit*, and we agree. Mr. Bryan’s report does not explain how his opinion about race predominance is connected to the geographic splits methodology that he used, or even why an evaluation of race predominance ordinarily might be based on geographic splits analysis. *See Milligan* Doc. 220-10 at 22–26. Mr. Bryan simply presents the results of his geographic splits analysis and then states in one sentence a cursory conclusion about race predominance. *Id.* The State’s response does nothing to solve this problem. *See Milligan* Doc. 245 at 7–10.

Second, as to helpfulness, the Plaintiffs have not offered the VRA Plan as an illustrative plan for *Gingles* I, so we have no need for Mr. Bryan’s opinion about that plan. The Plaintiffs did offer the Cooper plans, but we also have no need for his opinion about those: we presume the preliminary injunction would not have been affirmed if there were an open question whether race played an improper role in the preparation of all of them, given that the State squarely presented this argument to the Supreme Court. And even if we were to accept Mr. Bryan’s opinion about the Cooper plans (which we don’t), the State stakes no part of its defense of the 2023 Plan on arguments about that opinion: the State cites Mr. Bryan’s opinion only once in the argument section of its brief, and that is to make an argument about the

VRA Plan. *Milligan* Doc. 220 at 58. Accordingly, nothing in Mr. Bryan’s report is helpful to this Court’s decision whether the Plaintiffs have established that the 2023 Plan likely violates Section Two.

Because we again do not credit Mr. Bryan and we find his 2023 opinion unreliable and unhelpful, we GRANT IN PART the Plaintiffs’ motion *in limine* and EXCLUDE his opinion from our analysis. *See* Fed. R. Evid. 702; *Daubert*, 509 U.S. at 589–92. For those same reasons, even if we were to receive Mr. Bryan’s opinion into evidence, we would assign it no weight.

We turn next to Mr. Trende’s opinion. *See Milligan* Doc. 220-12. The State relies on Mr. Trende to “assess[] the 2023 Plan and each of Plaintiffs’ alternative plans based on the three compactness measures Dr. Duchin used in her earlier report.” *Milligan* Doc. 220 at 57–58. Mr. Trende is a Senior Elections Analyst at Real Clear Politics, he is a doctoral candidate at Ohio State University, and he has a master’s degree in applied statistics. *Milligan* Doc. 220-12 at 2–4.

The Plaintiffs do not contest Mr. Trende’s qualifications to testify as an expert. And because he uses the same common statistical measures of compactness that Dr. Duchin used, the Plaintiffs do not contest the reliability of his methods. Accordingly, we admit Mr. Trende’s report for the limited and alternative purpose of conducting a new *Gingles* analysis. We explain the weight we assign it in that analysis below.

b. The “Meet or Beat” Requirement

We now pause to correct a fundamental misunderstanding in the State’s view of step one of the *Gingles* analysis. Our task is not, as the State repeatedly suggests, to compare the Plaintiffs’ illustrative plans

with the 2023 Plan to determine which plan would prevail in a “beauty contest.” *Allen*, 143 S. Ct. at 1505 (internal quotation marks omitted) (alterations accepted). As the Supreme Court affirmed in this very case, “[t]he District Court . . . did not have to conduct a beauty contest between plaintiffs’ maps and the State’s.” *Id.* (internal quotation marks omitted) (alterations accepted); *see also Vera*, 517 U.S. at 977 (plurality opinion) (“A § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries” is not required “to defeat rival compact districts designed by [the State] in endless ‘beauty contests.’” (emphasis in original)).

Nevertheless, the State frames the “focus” of these proceedings as “whether Plaintiffs can produce an alternative map that equals the 2023 Plan on the traditional principles that *Allen* reaffirmed were the basis of the § 2 analysis.” *Milligan* Doc. 220 at 33. But neither *Allen* nor any other case law stands for that proposition. Our preliminary injunction order — affirmed by the Supreme Court — explained that “[c]ritically, 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[].’” *Milligan* Doc. 107 at 165 (emphasis in original) (quoting *Vera*, 517 U.S. at 977–78 (plurality opinion)).

Instead of the “meet-or-beat” requirement the State propounds, the essential question under *Gingles* I is

and has always been whether the minority group is “sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district.” *Cooper*, 581 U.S. at 301 (internal quotation marks omitted). This standard does not require that an illustrative plan outperform the 2023 Plan by a prescribed distance on a prescribed number of prescribed metrics. An illustrative plan may be reasonably configured even if it does not outperform the 2023 Plan on every (or any particular) metric. The standard does not require the Plaintiffs to offer the *best* map; it requires them to offer a reasonable one. Indeed, requiring a plaintiff to meet or beat an enacted plan on every redistricting principle a State selects would allow the State to immunize from challenge a racially discriminatory redistricting plan simply by claiming that it best satisfied a particular principle the State defined as non-negotiable.

Accordingly, that the 2023 Plan preserves communities of interest differently from the Plaintiffs’ illustrative maps, or splits counties differently from the illustrative maps, does not automatically make the illustrative maps unreasonable. As Mr. Cooper testified, different maps will necessarily prioritize traditional districting criteria in different ways. This is why the maps offered by a Section Two plaintiff are only ever *illustrative*; states are free to prioritize the districting criteria as they wish when they enact a remedial map, so long as they satisfy Section Two. The State has essentially conceded that it failed to do so here, maintaining that it can skirt Section Two by excelling at whatever traditional districting criteria the Legislature deems most pertinent in a redistricting cycle.

The bottom line is that the Plaintiffs' illustrative maps can still be "reasonably configured" even if they do not outperform the 2023 Plan on every (or any particular) metric. The premise that forms the backbone of the State's defense of the 2023 Plan therefore fails.

More fundamentally, even if we were to find that the 2023 Plan respects communities of interest better or is more compact than the 2021 Plan — that the 2023 Plan "beats" the 2021 Plan — that would not cure the likely violation we found because the violation was not that the 2021 Plan did not respect communities of interest, or that it was not compact enough. We found that the 2021 Plan likely diluted Black votes. The State cannot avoid the mandate of Section Two by improving its map on metrics other than compliance with Section Two. Otherwise, it could forever escape remediating a Section Two violation by making each remedial map slightly more compact, or slightly better for communities of interest, than the predecessor map. That is not the law: a Section Two remedy must be tailored to the specific finding of Section Two liability.

In any event, we do not find that the 2023 Plan respects communities of interest or county lines better than the Plaintiffs' illustrative maps. *See infra* at Part IV.B.2.d.

c. Geographic Compactness Scores

We next turn, as we did in the preliminary injunction, to the question whether the compactness scores for the Duchin plans and the Cooper plans indicate that the majority-Black congressional districts in those plans are reasonably compact. In the preliminary injunction, we based our reasonableness finding about the scores on (1) the testimony of

“eminently qualified experts in redistricting,” and (2) “the relative compactness of the districts in the [illustrative] plans compared to that of the districts in the [2021] Plan.” *See Milligan* Doc. 107 at 157.

The enactment of the 2023 Plan has not changed any aspect of Dr. Duchin and Mr. Cooper’s testimony that the compactness scores of the districts in their plans are reasonable. *See id.* (citing such testimony at Tr. 446, 471, 492–493, 590, 594). Because that testimony was not relative — it opined about the Duchin plans and Cooper plans standing alone, not compared to any other plan — the enactment of a new plan did not affect it.

Neither does Dr. Trende’s opinion affect the testimony of Dr. Duchin and Mr. Cooper about reasonableness. When we originally analyzed that testimony, we concluded that because Mr. Bryan “offered no opinion on what is reasonable and what is not reasonable in terms of compactness,” “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.” *Id.* at 157–58 (internal quotation marks omitted). Like Mr. Bryan then, Mr. Trende now offers no opinion on what is reasonable or what is not reasonable in terms of compactness. *See Milligan* Doc. 220-12 at 6–11 (“Analysis of Maps”). Accordingly, the State still has adduced no evidence to question, let alone disprove, the Plaintiffs’ evidence that the Black population in the majority-Black districts in the illustrative plans is reasonably compact.

When we examine the relative compactness of the districts in the Duchin plans and the Cooper plans compared to that of the districts in the 2023 Plan, the result remains the same. Mr. Trende acknowledges

that on an average Polsby-Popper metric, Duchin plan 2 is “marginally more compact” than the 2023 Plan, and that on a cut edges metric, Duchin plan 2 outperforms the 2023 Plan. *Id.* at 10. (Nevertheless, Mr. Trende opines that the 2023 Plan outperforms all illustrative plans when all three metrics are taken in account. *Id.*) And Mr. Trende does not opine that any of the Duchin plans or Cooper plans that received lower statistical scores received unreasonably lower scores or unreasonable scores. *See id.* at 8–10.

“[A]s far as compactness scores go, all the indicators [again] 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.” *Milligan* Doc. 107 at 159.

d. Reasonable Compactness and Traditional Redistricting Principles

As we said in the preliminary injunction, “[c]ompactness is about more than geography.” *Id.* If it is not possible to draw an additional opportunity district that is reasonably configured, Section Two does not require such a district. In the preliminary injunction, we began our analysis on this issue with two visual assessments: one of the Black population in Alabama, and one of the majority-Black districts in the Duchin and Cooper plans. *See id.* at 160–62.

Our first visual assessment led us to conclude that “[j]ust by looking at the population map [of the Black population in Alabama], we can see why Dr. Duchin

and Mr. Cooper expected that they could easily draw two reasonably configured majority-Black districts.” *Id.* at 161. The State suggests no reason why we should reconsider that finding now. And the enactment of the 2023 Plan does not change the map we visually assessed, or the conclusion that we drew from it.

Our second visual assessment led us to conclude that we “d[id] not see tentacles, appendages, bizarre shapes, or any other obvious irregularities [in the Duchin or Cooper plans] that would make it difficult to find that any District 2 could be considered reasonably compact.” *Id.* at 162. The enactment of the 2023 Plan does not change the maps that we visually assessed, nor the conclusion that we drew from them.

In the preliminary injunction, “we next turn[ed] 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.’” *Id.* (quoting *LULAC*, 548 U.S. at 433). We follow the same analytic path now.

This step of the analysis is at the heart of the State’s assertion that the 2023 Plan moved the needle on *Gingles* I. The State argues that “the lesson from *Allen* is that Section 2 requires Alabama to avoid discriminatory effects in how it treats communities of interest, even if that means sacrificing core retention,” and that neither we nor the Supreme Court have “ever said that [Section Two] requires the State to subordinate ‘nonracial communities of interest’ in the Gulf and Wiregrass to Plaintiffs’ racial goals.” *Milligan* Doc. 267 ¶¶ 215–16 (quoting *LULAC*, 548 U.S. at 433). The State contends that the Plaintiffs cannot “show that there is a reasonably configured alternative

remedy that would also maintain communities of interest in the Black Belt, Gulf, and Wiregrass, on par with the 2023 Plan.” *Milligan* Doc. 220 at 37 (internal quotation marks omitted).

At its core, the State’s position is that no Duchin plan or Cooper plan can “meet or beat” the 2023 Plan with respect to these three communities of interest and county splits. The State leans heavily on additional evidence about these communities of interest, the rule that Section Two “never require[s] adoption of districts that violate traditional redistricting principles,” *Allen*, 143 S. Ct. at 1510 (internal quotation marks omitted), and the legislative findings that accompany the 2023 Plan.

The State contends that “this is no longer a case in which there would be a split community of interest” in both the Plaintiffs’ plans and the enacted plan, because in the 2023 Plan, the “Black Belt, Gulf, and Wiregrass communities are maintained to the maximum extent possible.” *Milligan* Doc. 220 at 51 (internal quotation marks omitted) (alterations accepted). The State asserts that the 2023 Plan “rectifies what Plaintiffs said was wrong with the 2021 Plan” because it “puts all 18 counties that make up the Black Belt entirely within Districts 2 and 7” and keeps Montgomery whole in District 2. *Id.* at 42–43.

For their part, the *Milligan* Plaintiffs say that the 2023 Plan changed nothing. They attack the legislative findings about traditional districting principles — more particularly, the legislative findings about communities of interest, county splits, and protection of incumbents — as perpetuating the vote dilution we found because these findings were “tailored to disqualify” the Plaintiffs’ illustrative plans. *Milligan* Doc. 200 at 20. The *Milligan* Plaintiffs accuse the State

of “ignor[ing] that the Supreme Court recognized” that the Duchin plans and Cooper plans “comported with traditional districting criteria, even though they split Mobile and Baldwin counties”; they say that the record continues to support that conclusion; and they cite a declaration from the first Black Mayor of Mobile and a supplemental report prepared by Dr. Bagley. *Id.* at 21–22 (internal quotation marks omitted). The *Milligan* Plaintiffs assert that the 2023 Plan keeps together only the Gulf Coast while perpetuating vote dilution in the Black Belt and splitting the Wiregrass between Districts 1 and 2. *Id.* at 22–23.

Before we explain our findings and conclusions on these issues, we repeat the foundational observations that we made in the preliminary injunction: (1) these issues were “fervently disputed,” (2) the State continues to insist that “there is no legitimate reason to separate Mobile County and Baldwin County,” (3) our task is not to decide whether the majority-Black districts in the Duchin plans and Cooper plans are “better than” any other possible majority-Black district, and (4) “we are careful to avoid the beauty contest that a great deal of testimony and argument seemed designed to try to win.” *Milligan* Doc. 107 at 164–65.

i. Communities of Interest

As we previously found and the Supreme Court affirmed, the Black Belt “stands out to us as quite clearly a community of interest of substantial significance,” but the State “overstate[s] the point” about the Gulf Coast. *See Milligan* Doc. 107 at 165–71; *accord Allen*, 143 S. Ct. at 1505. The evidence about the Gulf Coast is now more substantial than it was before, but it is still considerably weaker than the record on the Black Belt, which rests on extensive stipulated

facts and includes extensive expert testimony, and which spanned a range of demographic, cultural, historical, and political issues. *See Milligan* Doc. 107 at 165–67.

As the Supreme Court recognized, in the preliminary injunction we found that, “[n]amed for its fertile soil, the Black Belt contains a high proportion of black voters, who share a rural geography, concentrated poverty, unequal access to government services, . . . lack of adequate healthcare, and a lineal connection to the many enslaved people brought there to work in the antebellum period.” *Allen*, 143 S. Ct. at 1505 (internal quotation marks omitted).

We now have the additional benefit of Dr. Bagley’s testimony about the Black Belt, Gulf Coast, and Wiregrass. *See Milligan* Doc. 200-15. We credit his testimony and find his opinions helpful, particularly (1) his opinion further describing the shared experience of Black Alabamians in the Black Belt; and (2) his opinion that “treating Mobile and Baldwin Counties as an inviolable” community of interest is “ahistorical” in light of the connections between Mobile and the Black Belt. *See id.* at 1.

Dr. Bagley’s testimony further describes the shared experiences of Alabamians in the Black Belt, which are “not only related to the fertility of the soil and the current poverty” there, but “are also characterized by” many shared racial experiences, including “Indian Removal, chattel slavery, cotton production, Reconstruction and Redemption, sharecropping, convict leasing, white supremacy, lynching, disenfranchisement, the birth of Historically Black Colleges and Universities . . . , struggles for civil and voting rights, Black political and economic organization, backlash in the form of violence and economic reprisal, repressive

forms of taxation, [and] white flight,” to name a few. *Id.* at 2.

Dr. Bagley opines that “many of these characteristics” also apply to “metropolitan Mobile,” which Dr. Bagley describes as “Black Mobile.” *Id.* at 2–3. Dr. Bagley explains that the Port of Mobile (a cornerstone of the State’s arguments about the Gulf Coast community of interest) “historically saw the importation and exportation of human chattel, up to the illegal importation of enslaved individuals by the crew of the *Clotilda* in 1860,” as well as “the export of the cotton grown by the enslaved people in the Black Belt.” *Id.* at 2. And Dr. Bagley explains that Black Alabamians living in modern Mobile share experiences of “concentrated poverty” and a “lack of access to healthcare” with Alabamians in the Black Belt, such that Black Alabamians in Mobile have more in common with people in the Black Belt than they do with people in whiter Baldwin County. *Id.* at 3–4.

Further, Dr. Bagley opines that treating Mobile and Baldwin Counties as an inseparable community of interest is “ahistorical.” *Id.* at 1, 4–7. His testimony is that the State overstates the evidence of “alleged connections” between Mobile and Baldwin Counties and fails to acknowledge the reality that “Black Mobile is geographically compact and impacted by poverty relative to Baldwin County, which is, by contrast, affluent and white.” *Id.* at 4.

The State does little to diminish Dr. Bagley’s testimony. *See Milligan* Doc. 220 at 44–49. *First*, the State disputes only a few of the many details he discusses, none of which undermines his substantive point. *See id.* *Second*, without engaging Dr. Bagley’s testimony about the connections between the Black Belt and Mobile, or his testimony that treating the

Gulf Coast as “inviolable” is “ahistorical,” the State reiterates its previous argument that the Gulf Coast is “indisputably” a community of interest that Plaintiffs would split along racial lines. *Id.* at 39–40. *Third*, without engaging Dr. Bagley’s point about the shared racial experiences of Alabamians living in the Black Belt (or the stipulated facts), the State asserts that the 2023 Plan successfully unites the Black Belt as a “nonracial community of interest.” *Id.* at 38. And *fourth*, the State urges us to assign Dr. Bagley’s opinion little weight because a “paid expert cannot supersede legislative findings, especially where, as here, the expert’s opinions are based on a selective retelling of facts.” *Id.* at 48–49. We discuss each argument in turn.

First, the State’s effort to refute specific details of Dr. Bagley’s testimony about the Black Belt is unpersuasive. Dr. Bagley’s report is well-supported and factually dense. *See Milligan* Doc. 200-15. Even if we accept *arguendo* the State’s isolated factual attacks, *see Milligan* Doc. 220 at 44–49, neither the basis for nor the force of the report is materially diminished.

Second, the State continues to insist that the Gulf Coast is “indisputably” a community of interest that cannot be separated, especially “along racial lines,” but the record does not bear this out, particularly in the light of the State’s failure to acknowledge, let alone rebut, much of Dr. Bagley’s testimony. The State says nothing about Dr. Bagley’s testimony that treating Mobile and Baldwin Counties as inseparable is ahistorical because those Counties were in separate congressional districts for almost all the period between 1876 and the 1970s. *Milligan* Doc. 200 15 at 7. The State ignores his testimony that Black

Alabamians living in poverty in Mobile don't have very much in common with white, affluent Alabamians living in Baldwin County. The State ignores his testimony that those Black Alabamians have more in common (both historically and to the present day) with Black Alabamians living in the Black Belt. Put simply, even if we accept all the new evidence about the Gulf Coast, it fails to establish that the Gulf Coast cannot be separated under any circumstance, let alone to avoid or remedy vote dilution.

Third, Dr. Bagley's report further disproves what the parties' fact stipulations already had precluded: the State's assertion that the Black Belt is merely one of three "nonracial" communities of interest that the 2023 Plan keeps together as much as possible. *Milligan* Doc. 220 at 38. The Plaintiffs have supported their claims with arguments and evidence about the cracking of Black voting strength in the Black Belt. *See, e.g., Milligan* Doc. 69 at 19, 29–30; *Caster* Doc. 56 at 7, 9–10. Extensive stipulations of fact and extensive expert testimony have described a wide range of demographic, cultural, historical, and political characteristics of the Black Belt, many of which relate to race. *See Milligan* Doc. 107 at 165–67.

On remedy, the Plaintiffs argue that the new District 2 perpetuates rather than remedies the dilution we found in the Black Belt. *Milligan* Doc. 200 at 19. And Dr. Bagley's testimony is that many of the shared experiences of Alabamians living in the Black Belt are steeped in race. *Milligan* Doc. 200-15 at 1–4. The State's failure to rebut Dr. Bagley's testimony undermines its insistence that the Black Belt is no longer at the heart of this case and is merely one of three nonracial communities of interest maintained in the 2023 Plan.

We already faulted the State once for pressing an overly simplistic view of the Black Belt. In the preliminary injunction, we relied on the substantial body of evidence about the Black Belt (much of it undisputed) to reject the State’s assertion 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. 107 at 168 (quoting *Milligan* Doc. 78 at 86). As we explained, “[t]he 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.” *Id.* at 169. The State’s assertion that the Black Belt is a “nonracial” community of interest now swings the pendulum to the opposite, equally inaccurate, end of the spectrum.

Fourth, the State argues that as between Dr. Bagley’s testimony about communities of interest and the legislative findings about communities of interest, we are required by law to defer to the legislative findings. *Milligan* Doc. 220 at 48– 49. But the State ignores the Plaintiffs’ argument that no deference is owed to a legislature’s redistricting policies that perpetuate rather than remedy vote dilution. *Compare Milligan* Doc. 200 at 20 (*Milligan* Plaintiffs’ objection to deference, citing discussions of core retention in *Allen* and incumbency protection and partisan political goals in *LULAC*), *with Milligan* Doc. 220 (State’s filing, making no response).

We regard it as beyond question that if we conclude that the 2023 Plan perpetuates vote dilution, we may not defer to the legislative findings in that Plan. Ordinarily, that rule would not matter for our present task: because the point of a *Gingles* I analysis is to

determine whether a challenged plan dilutes votes, we would not refuse deference to legislative findings for *Gingles* I purposes on the ground that the findings perpetuate vote dilution. It would be circular reasoning for us to assume the truth of our conclusion as a premise of our analysis.

This is not the ordinary case: we found that the Plaintiffs established that the 2021 Plan likely violated Section Two by diluting Black votes, and the State has conceded that District 2 in the 2023 Plan is not a Black-opportunity district. In this circumstance, we discern no basis in federal law for us to defer to the legislative findings.

The *Milligan* Plaintiffs impugn the findings on numerous other grounds — namely, that they were “after the fact ‘findings’ tailored to disqualify” the Plaintiffs’ illustrative plans; “contradict” the guidelines; “were never the subject of debate or public scrutiny”; “ignored input from Black Alabamians and legislators”; and “simply parroted attorney arguments already rejected by this Court and the Supreme Court.” *Milligan* Doc. 200 at 20. And the *Milligan* Plaintiffs urge us to reject the findings’ attempt to “enshrine as ‘non-negotiable’ certain supposed ‘traditional redistricting principles’” about communities of interest and county splits. *Id.* Ultimately, the *Milligan* Plaintiffs suggest that the legislative findings are not what they purport to be: the result of the deliberative legislative process. The testimony and evidence were that the findings were drafted by the Alabama Solicitor General, were adopted without review or debate by the Legislature or even really knowing why they were placed there, and included only at counsel’s instigation.

We have reviewed the legislative findings carefully and make three observations about them for present purposes. *First*, although the northern half of Alabama is home to numerous universities, a substantial military installation, various engines of economic growth, and two significant metropolitan areas (Huntsville and Birmingham), the legislative findings identify no communities of interest in that half of the state. *See* App. A. *Second*, the legislative findings, unlike the guidelines, give no indication that the Legislature considered whether the 2023 Plan dilutes minority voting strength. The guidelines set that as a priority consideration, but the legislative findings do not mention it and set other items as “non-negotiable” priorities (*i.e.*, keeping together communities of interest and not pairing incumbents).²¹ The only reason why the 2023 Plan exists is because we enjoined the 2021 Plan on the ground that it likely diluted minority voting strength. And *third*, there is a substantial difference between the definition of “community of interest” in the legislative findings and that definition in the guidelines: the legislative findings stripped race out of the list of “similarities” that are included in the guidelines definition. *Compare* App. A at 4, *with* App. B. In a case involving extensive expert testimony about a racial minority’s shared experience of a long and sordid history of race discrimination, this deletion caught our eye. We further observe that the legislative findings explicitly invoke the “French and Spanish colonial heritage” of the Gulf Coast region while remaining silent on the heritage of the Black Belt. App. A at 6.

²¹ To facilitate the reader’s opportunity to make this comparison conveniently, we attach the guidelines to this order as Appendix B. *Compare* App. B at 1, *with* App. A at 2.

In any event, we do not decline to defer to the legislative findings on the grounds the *Milligan* Plaintiffs suggest. We decline to defer to them because the State (1) concedes that District 2 in the 2023 Plan is not an opportunity district, and (2) fails to respond to the Plaintiffs’ (valid) point that we cannot readily defer to the legislative findings if we find that they perpetuate vote dilution.

Ultimately, we find that the new evidence about the Gulf Coast does not establish that the Gulf Coast is the community of interest of primary importance, nor that the Gulf Coast is more important than the Black Belt, nor that there can be no legitimate reason to separate Mobile and Baldwin Counties.

And we repeat our earlier finding 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 same time it drew the 2021 Plan. *Milligan* Doc. 107 at 171 (citing *Caster* Doc. 48 ¶¶ 32–41).

We further find that the new evidence about the Gulf Coast does not establish that separating the Gulf Coast to avoid diluting Black votes in the Black Belt violates traditional districting principles. At most, while the State has developed evidence that better substantiates its argument that the Gulf Coast is or could be a community of interest, the State has not adduced evidence that the Gulf Coast is an inseparable one.

We specifically reject the State’s argument that the 2023 Plan “rectifies what Plaintiffs said was wrong with the 2021 Plan” by “unifying the Black Belt while also respecting the Gulf and Wiregrass communities of interest.” *Milligan* Doc. 220 at 27, 42; *accord* Aug. 14

Tr. 39 (arguing that the 2023 Plan “cures the cracking” of the Black Belt); July 31, 2023 Tr. 32 (arguing that “now there are three communities of interest that are at issue,” the State “cracked none of them,” and the Plaintiffs “cracked two of them”). On this reasoning, the State says that “there is no longer any need to split the Gulf” to respect the Black Belt, because the 2023 Plan keeps the Gulf Coast together and splits the Black Belt into only two districts. *Milligan* Doc. 267 at ¶ 225.

The problem with this argument is the faulty premise that splitting the Black Belt into only two districts remedies the cracking problem found in the 2021 Plan. “Cracking” does not mean “divided,” and the finding of vote dilution in the 2021 Plan rested on a thorough analysis, not the bare fact that the 2021 Plan divided the Black Belt into three districts. *See, e.g., Milligan* Doc. 107 at 55, 147–74. As the Supreme Court has explained, “cracking” refers to “the dispersal of blacks into districts in which they constitute an ineffective minority of voters.” *Bartlett*, 556 U.S. at 14 (plurality opinion) (quoting *Gingles*, 478 U.S. at 46 n.11).

The Plaintiffs have established — and the State concedes — that in the new District 2, Black voters remain an ineffective minority of voters. *Milligan* Doc. 251 ¶¶ 5–9. This evidence — and concession — undermines the State’s assertion that the 2023 Plan remedies the cracking of Black voting strength in the Black Belt simply by splitting the Black Belt into fewer districts. In turn, it explains the reason why there remains a need to split the Gulf Coast: splitting the Black Belt as the 2023 Plan does dilutes Black voting strength, while splitting the Gulf Coast precipitates no such racially discriminatory harm.

The long and the short of it is that the new evidence the State has offered on the Gulf Coast at most may show that the Black Belt and the Gulf Coast are geographically overlapping communities of interest that tend to pull in different directions. These communities of interest are not airtight. At best, the Defendants have established that there are two relevant communities of interest and the Plaintiffs' illustrative maps and the 2023 Plan each preserve a different community, suggesting a wash when measured against this metric. In other words, "[t]here would be a split community of interest in both." *Allen*, 143 S. Ct. at 1505. Thus, positing that there are two communities of interest does not undermine in any way the determination we already made that the eleven illustrative maps presented in the preliminary injunction are reasonably configured and are altogether consonant with traditional redistricting criteria.

In our view, the evidence about the community of interest in the Wiregrass is sparse in comparison to the extensive evidence about the Black Belt and the somewhat new evidence about the Gulf Coast. The basis for a community of interest in the Wiregrass — essentially in the southeastern corner of the State — is rural geography, a university (Troy), and a military installation (Fort Novosel). These few commonalities do not remotely approach the hundreds of years of shared and very similar demographic, cultural, historical, and political experiences of Alabamians living in the Black Belt. And they are considerably weaker than the common coastal influence and historical traditions for Alabamians living in the Gulf Coast. Not to mention that these commonalities could apply to other regions in Alabama that the State fails to mention as possible communities of interest.

Further, there is substantial overlap between the Black Belt and the Wiregrass. Three of the nine Wiregrass Counties (Barbour, Crenshaw, and Pike) are also in the Black Belt. Accordingly, any districting plan must make tradeoffs with these communities to meet equal population and contiguity requirements.

Finally, a careful review of the testimony about the Wiregrass reveals that the State makes the same error with its Wiregrass argument that we (and the Supreme Court) previously identified in its Gulf Coast argument. To support its assertions about the community of interest in the Wiregrass, the State relies on three witnesses: a former Mayor of Dothan, a past Chairman of the Dothan Area Chamber of Commerce, and a commercial banker in Dothan. *See Milligan* Doc. 261-2 (Kimbrow deposition); *Milligan* Doc. 220-18 (Kimbrow declaration); *Milligan* Doc. 261-6 (Schmitz deposition); *Milligan* Doc. 220-17 (Schmitz declaration); *Milligan* Doc. 261-7 (Williams deposition); *Milligan* Doc. 227-1 (Williams declaration). Much of their testimony focuses on the loss of political influence and efficacy that may occur if the Wiregrass region is not mostly kept together in a single congressional district. *See Milligan* Docs. 220-17 ¶¶ 3–5, 7, 9 (Schmitz Declaration); 220-18 ¶¶ 5–9 (Kimbrow Declaration); 224-1 ¶¶ 11–13 (Williams Declaration). But as we earlier found with respect to the Gulf Coast, testimony about keeping a community of interest together “simply to preserve political advantage” cannot support an argument that the community is inseparable. *See Allen*, 143 S. Ct. at 1505 (internal quotation marks omitted) (alterations accepted). Accordingly, we assign very little weight to the argument and evidence about a community of interest in the Wiregrass.

We do not reject only the State’s factual argument — that the Plaintiffs’ illustrative plans are not reasonably compact because they violate traditional redistricting principles related to communities of interest. More broadly, we also reject the State’s legal argument that communities of interest somehow are a dispositive factor in our analysis such that we must accept a remedial map that purports to respect communities of interest, but does not cure the vote dilution we found in the 2021 Plan.

Throughout remedial proceedings, the State has used arguments about communities of interest as the foundation of its defense of the 2023 Plan. The State starts with the premise that “[t]here are many ways for a plan to comply with” Section Two, *Milligan* Doc. 267 ¶ 179, *see also* Aug. 14 Tr. 46; cites the rule that Section Two “never require[s] adoption of districts that violate traditional redistricting principles,” *Milligan* Doc. 220 at 8, 10, 14, 34, 39, 60 (internal quotation marks omitted); says that the Legislature knows Alabama’s communities of interest better than federal courts, Aug. 14 Tr. 163; and extrapolates from these truths that any illustrative plan that splits an area the State defines as a community of interest does not satisfy *Gingles* because it “violates” communities of interest, *Milligan* Doc. 267 ¶¶ 158, 208; *see also* *Milligan* Doc. 220 at 40, 59. The State’s position is that if it can prove that the 2023 Plan serves communities of interest better than the Plaintiffs’ illustrative plans, the 2023 Plan survives a Section Two challenge on that ground regardless of whether it includes one or two Black-opportunity districts.

Indeed, on the State’s reasoning, because the 2023 Plan better serves communities of interest than do the Plaintiffs’ illustrative plans, an order requiring an

additional Black-opportunity district to cure vote dilution is unlawful. Aug. 14

Tr. 157. The State maintains that this is true even if we find (as we do) that the 2023 Plan perpetuates rather than remedies the vote dilution that we and the Supreme Court found in the 2021 Plan. Aug. 14 Tr. 157–60. Put differently, the State asserts that communities of interest are the ultimate trump card: because the 2023 Plan best serves communities of interest in southern Alabama, we must not enjoin it even if we find that it perpetuates vote dilution. *See* Aug. 14 Tr. 157–60.

We cannot reconcile the State’s position with any of the authorities that control our analysis. We cannot reconcile it with the text or purpose of Section Two, nor with the Supreme Court’s ruling in this case, nor with other controlling Supreme Court precedents. We discuss each authority in turn.

First, we cannot reconcile the State’s position that communities of interest work as a trump card with the text or purpose of Section Two. As the Supreme Court explained in this case, the Voting Rights Act “‘create[d] stringent new remedies for voting discrimination,’ attempting to forever ‘banish the blight of racial discrimination in voting.’” *Allen*, 143 S. Ct. at 1499 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). To that end, for more than forty years, Section Two has expressly provided that a violation is established based on the “totality of circumstances.” *Id.* at 1507 (internal quotation marks omitted) (quoting 52 U.S.C. § 10301(b)). Subsection (b) of Section Two of the Voting Rights Act provides, in pertinent part:

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.

52 U.S.C. § 10301(b).

Section Two does not mention, let alone elevate or emphasize, communities of interest as a particular circumstance. *See id.* If communities of interest really are (or even could be) the dispositive circumstance in a Section Two analysis (liability or remedy), the statute would not direct a reviewing court's attention to the totality of circumstances without saying a word about communities of interest.

Second, we cannot reconcile the State's position that communities of interest work as a trump card with the Supreme Court's ruling in this case. The Supreme Court "d[id] not find the State's argument persuasive" on communities of interest for two reasons: the evidence did not support the "overdrawn" assertion that "there can be no legitimate reason to split" the Gulf Coast, and even if the Gulf Coast is a community of interest, splitting it is not a fatal flaw in the Plaintiffs' illustrative plans because those plans better respect a different community of interest, the Black Belt. *See Allen*, 143 S. Ct. at 1505 (internal citations omitted). The Supreme Court then continued its analysis of the "totality of circumstances" and affirmed

our preliminary injunction on the ground that the 2021 Plan likely violated Section Two. *Id.* at 1506.

Nothing in the Court’s ruling says, let alone suggests, that a remedial plan would cure vote dilution if only the evidence were better on the Gulf Coast and the Black Belt were not split quite so much. The Supreme Court specifically ruled that we “did not have to conduct a beauty contest between plaintiffs’ maps and the State’s,” and the Supreme Court emphasized the importance of considering the “totality” of circumstances. *Id.* at 1505–07 (internal quotation marks omitted) (alterations accepted). Indeed, the Supreme Court rejected the State’s proposed “race-neutral benchmark” in part because that approach “suggest[ed] there is only one circumstance that matters,” and “[t]hat single-minded view of § 2 cannot be squared with the [statute’s] demand that courts employ a more refined approach.” *Id.* at 1506–08 (internal quotation marks omitted) (alterations accepted).

Third, we cannot reconcile the State’s position with other Supreme Court precedents. Our research has produced no Section Two precedent that rises and falls on how well a plan respects any particular community of interest.

Further, as Section Two precedents have tested the idea that one circumstance is particularly important in the *Gingles* analysis, the Supreme Court has time and again rejected the idea that any circumstance can be the circumstance that allows a plan to dilute votes. *See, e.g., id.* at 1505 (rejecting argument that core retention metric is dispositive and reasoning that Section Two “does not permit a State to provide some voters less opportunity . . . to participate in the

political process just because the State has done it before” (internal quotation marks omitted)); *Wis.*

Legislature v. Wis. Elections Comm’n, 142 S. Ct. 1245, 1250 (2022) (per curiam) (faulting district court for “focus[ing] exclusively on proportionality” instead of “totality of circumstances analysis”); *LULAC*, 548 U.S. at 440–41 (rejecting argument that incumbency protection can justify exclusion of voters from a district when exclusion has racially discriminatory effects). Indeed, we have been unable to locate any case where the Supreme Court has prioritized one traditional districting criterion above all others.

For each and all these reasons, we reject the State’s argument that because the 2023 Plan best serves communities of interest in southern Alabama, we cannot enjoin it even if we find that it perpetuates racially discriminatory vote dilution.

ii. County Splits

In the preliminary injunction, we found that the Plaintiffs’ illustrative plans “reflect reasonable compactness” because they respected county lines. *See Milligan* Doc. 107 at 162–63. When it affirmed this finding, the Supreme Court observed that “some of plaintiffs’ proposed maps split the same number of county lines as (or even *fewer* county lines than) the State’s map.” *Allen*, 143 S. Ct. at 1504 (emphasis in original).

By way of reference: the only applicable guideline when the 2021 Plan was passed was that “the Legislature shall try to minimize the number of counties in each district”; the 2021 Plan split six counties; and no illustrative plan splits more than nine counties. *See Milligan* Doc. 107 at 32, 61, 88–89.

When the Legislature passed the 2023 Plan, it enacted a “finding” that “the congressional districting plan shall contain no more than six splits of county lines, which is the minimum necessary to achieve minimal population deviation among the districts. Two splits within one county is considered two splits of county lines.” App. A at 3. Like the 2021 Plan, the 2023 Plan splits six counties.

The State now argues that because of the Legislature’s finding, we must discard any illustrative map that contains more than six county splits. *Milligan* Doc. 220 at 58–59. Based on the report of the State’s expert, Mr. Trende, this ceiling would disqualify five of the Plaintiffs’ illustrative maps: Cooper Plans 2 and 6, which split seven counties; Duchin Plan B, which splits seven counties; and Duchin Plans A and C, which split nine counties. *See Caster* Doc. 48 at 22; *Milligan* Doc. 220 at 58; *Milligan* Doc. 220-12 at 12. Most notably, this ceiling would disqualify Duchin Plan B, which is the only illustrative plan that the State concedes ties or beats the 2023 Plan on statistical measures of compactness (Polsby-Popper and Cut Edges). *See Milligan* Doc. 220 at 57–58. So when looking at the county splits metric alone, even on the State’s analysis, six of the Plaintiffs’ illustrative maps satisfy the ceiling the Legislature imposed: Cooper Plans 1, 3, 4, 5, and 7, and Duchin Plan D. Mr. Trende’s chart shows this clearly:

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Number of County Splits, by Map	
Map	County Splits
Illustrative 7	5
Duchin 4	6
Illustrative 1	6
Illustrative 3	6
Illustrative 4	6
Illustrative 5	6
2021 Map	6
2023 Map	6
Duchin 2	7
Illustrative 2	7
Illustrative 6	7
Ps Remedial	7
Duchin 1	9
Duchin 3	9

Milligan Doc. 220-12 at 12.

But the State would not have us look at the county splits metric alone. As we understand the State's argument about the legislative finding capping county splits at the stated minimum, the finding operates like the ace of spades: after ten of the eleven illustrative plans lose in a compactness beauty contest, the finding trumps the last illustrative plan left (Duchin Plan B). On the State's reasoning, the Plaintiffs have no plays left because the Legislature has decreed that the cap on county splits is "non-negotiable." App. A at 3.

But we already have refused to conduct the compactness beauty contest, so the legislative finding cannot work that way. If it guides our analysis, it must function differently. For all the same reasons we refused to conduct a compactness beauty contest, this legislative finding cannot demand that we conduct a county-split beauty contest. *See supra* at Part IV.B.2.b.

Nevertheless, in an abundance of caution, we measure all the illustrative maps against the legislative finding. As explained above, if we limit our analysis to the illustrative plans that comply with the finding, we consider six plans: Duchin Plan D and Cooper Plans 1, 3, 4, 5, and 7. *See Milligan* Doc. 220-12 at 12.

We first discuss Cooper Plan 7, because it is the only illustrative plan that outperforms the 2023 Plan on county splits. (Duchin Plan D and Cooper Plans 1, 3, 4, and 5 tie the 2023 Plan. *See id.*) Even if we were to indulge the idea that the legislative finding capping county splits works as an ace, it could not trump Cooper Plan 7. The State attacks Cooper Plan 7 on the ground that it does not minimize population deviation. *Milligan* Doc. 220 at 58 n.13.

The State’s argument about Cooper Plan 7 is an unwelcome surprise. We found in the preliminary injunction that all the illustrative maps “equalize population across districts.” *Milligan* Doc. 107 at 162–63. We based that finding on the agreement of the parties and the evidence. *See id.* (citing *Milligan* Doc. 68-5 at 8, 13; *Caster* Doc. 48 at 21–34; *Caster* Doc. 65 at 2–6; Tr. 930). And the Supreme Court affirmed that finding. *Allen*, 143 S. Ct. at 1504 (finding that the Plaintiffs’ maps “contained equal populations, were contiguous, and respected existing political subdivisions, such as counties, cities, and towns”).

We returned to Cooper Plan 7 to confirm that it minimizes population deviation. *See Caster* Doc. 65 at 5 fig.2. The least populated congressional district in Cooper Plan 7 includes 717,752 people; the most populated congressional district in Cooper Plan 7 includes 717,755 people. *Id.* We summarily reject the State’s cursory, unsupported suggestion in a footnote that a deviation of three humans (or 0.00000418%) precludes a finding that Cooper Plan 7 equalizes population across districts and disqualifies Cooper Plan 7 as a reasonably configured illustrative map under *Gingles* I.

Thus, even if we were to conduct the “meet or beat” beauty contest that the State asks us to, the undisputed evidence shows that the Plaintiffs have submitted at least one illustrative map that beats the 2023 Plan with respect to county splits. We also find that the Plaintiffs have submitted at least five illustrative maps (Duchin Plan D and Cooper Plans 1, 3, 4, and 5) that meet the 2023 Plan on this metric by splitting the same number of counties — six.

* * *

Accordingly, we again find that the Plaintiffs have established that an additional Black-opportunity district can be reasonably configured without violating traditional districting principles relating to communities of interest and county splits. This finding does not run afoul of the Supreme Court’s caution that Section Two never requires the adoption of districts that violate traditional redistricting principles.

It simply rejects as unsupported the State’s assertion that the Plaintiffs’ illustrative plans violate traditional redistricting principles relating to communities of interest and county splits.

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

During the preliminary injunction proceedings, “there [wa]s 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.” *Milligan* Doc. 107 at 174 (internal quotation marks omitted); *accord Allen*, 143 S. Ct. at 1505.

At the remedial hearing, the State stipulated that *Gingles* II and III are again satisfied. Aug. 14 Tr. 64–65 (“We will have no problem stipulating for these proceedings solely that they have met II and III.”).

The evidence fully supports the State’s stipulation: Dr. Liu opined “that voting is highly racially polarized in” District 2 and District 7 of the 2023 Plan “and that this racial polarization . . . produces the same results for Black Preferred Candidates in both [Districts 2] and [7] as the results in the 2021” Plan. *Milligan* Doc. 200-2 at 1. Dr. Palmer’s opinion is materially identical. *Caster* Doc. 179-2 ¶¶ 11–14, 16–20.

4. The Senate Factors

During the preliminary injunction proceedings, we found that Senate Factors 1, 2, 3, 5, 6, and 7 weighed in favor of the Plaintiffs. *Milligan* Doc. 107 at 178–92. We adopt those findings here. We made no finding about Senate Factors 8 and 9. *Id.* at 192–93.

During the remedial hearing, the State conceded that it has put forth no new evidence about the Senate Factors and the Plaintiffs have “met their burden” on the Factors for purposes of remedial proceedings. Aug. 14 Tr. 65.

The *Milligan* and *Caster* Plaintiffs now urge us, if we reset the *Gingles* analysis, to consider evidence adduced since we issued the preliminary injunction that bears on Factors 8 and 9. Aug. 14 Tr. 147–48. The State concedes that the evidence relevant to an analysis of these Factors is “exceedingly broad.” Aug. 15 Tr. 79. We consider each remaining Senate Factor in turn, and we limit our discussion to new evidence.

a. Senate Factor 8

Senate Factor 8: “[W]hether 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.

Senate Factor 8 considers “the political responsiveness of” elected officials. *United States v. Marengo County Comm’n*, 731 F.2d 1546, 1573 (11th Cir. 1984) (emphasis omitted). The Plaintiffs’ argument is that the political responsiveness of elected officials to this litigation — more particularly, to the Supreme Court’s affirmance of the preliminary injunction — weighs in favor of the Plaintiffs. Based on our review of undisputed evidence, we cannot help but find that the

circumstances surrounding the enactment of the 2023 Plan reflect “a significant lack of responsiveness on the part of elected officials to the particularized needs” of Black voters in Alabama. *Gingles*, 478 U.S. at 37. Our finding rests on three undisputed facts.

First, the process by which the Legislature considered potential remedies for the vote dilution that Black Alabamians experienced precludes a finding of responsiveness. The 2023 Plan was neither proposed nor available for comment during the two public hearings held by the Committee. *Milligan* Doc. 251 ¶ 15. Likewise, neither of the plans that originally passed the Alabama House (Representative Pringle’s plan, the Community of Interest Plan), and the Alabama Senate (Senator Livingston’s plan), was proposed or available for comment during the Committee’s public hearings. *See id.* ¶¶ 15–21.

The 2023 Plan was passed by the Conference Committee on the last day of the Special Session. *Id.* ¶ 23. Representative Pringle did not see the bill that became the 2023 Plan, including its legislative findings and the State’s performance analysis showing that Black voters would consistently lose in the new District 2, until that morning. *See Milligan* Doc. 261-5 at 92, 97. He first saw those documents that morning, and the 2023 Plan was Alabama law by that evening. As Representative Pringle testified, “[i]t all happened so fast.” *Id.* at 105.

The availability of the 2023 Plan is noteworthy not only because of its late timing, but also because of its apparently mysterious provenance: its original source and cartographer were unknown to one of the Committee chairs, Senator Livingston, when he voted on it. *See Milligan* Doc. 238-2 at 3. To this day, the

record before us does not make clear who prepared the 2023 Plan.

Representative Pringle testified about his frustration that his plan did not carry the day, and his reason is important: he thought his plan was the better plan for compliance with Section Two (based in part on a performance analysis that he considered), his plan was initially expected to pass both the House and the Senate, and he either did not understand or did not agree with the reason why support for it unraveled in the Senate the day it passed the House. *See Milligan* Doc. 261-5 at 22–23, 31–32, 41–42, 69–70, 75–76, 80–81, 98–102.

Representative Pringle testified that he was not a part of the discussions that led his Senate colleagues to reject his plan because those occurred behind closed doors. *Id.* at 28, 101. Although Representative Pringle ultimately voted for the 2023 Plan, he testified (testily) that he told Senator Livingston that he did not want his name or an Alabama House bill number on it. *Id.* at 101–02. When asked why the Alabama Senate insisted on leaving District 2 at a 39.93% Black voting-age population in the 2023 Plan, Representative Pringle directed the question to Senator Livingston or the Alabama Solicitor General. *Id.* When asked specifically about a media comment from Representative Ledbetter (the Speaker of the Alabama House) that the 2023 Plan gives the State “a good shot” at getting “just one judge” on the Supreme Court “to see something different,” Representative Pringle testified that he was not “attempting to get a justice to see something differently,” but he did not “want to speak on behalf of 140” Legislators. *Id.* at 109–10.

For his part, Senator Livingston testified that his focus shifted from Representative Pringle’s plan to a

new plan after other senators “received some additional information” which caused them to “go in [a different] direction” focused on “compactness, communities of interest, and making sure that” incumbents are not paired. *Milligan* Doc. 261–4 at 67–68. According to Senator Livingston, this “information” was a “large hiccup” — it was the reason why “the committee moved” and “changed focus” away from Representative Pringle’s plan. *Id.* at 65–68. But Senator Livingston testified that he did not know what this “information” was, where it had come from, or even who received it. *Id.* Senator Livingston recalled that he first learned of the “information” in a “committee conversation,” but he did not recall who told him about it and had no “idea at all” of its source. *Id.* at 68.

Second, the unprecedented legislative findings that accompany the 2023 Plan preclude a finding of responsiveness. *See* App. A. This is for two reasons. As an initial matter, as we have already previewed, a careful side-by-side review of the legislative findings and the guidelines (which were the same in 2021 and 2023) reveal that the findings excluded the statement in the guidelines that “[a] redistricting plan shall have neither the purpose nor the effect of diluting minority voting strength.” *Compare* App. B at 1, *with* App. A. at 2. Although the findings eliminated the requirement of nondilution, they prioritized as “non-negotiable” the principles that the 2023 Plan would “keep together communities of interest” and “not pair incumbent[s].” App. A at 3. Under this circumstance, we cannot find that the legislative findings support an inference that when the Legislature passed the 2023 Plan, it was trying to respond to the need that we identified for Black Alabamians not to have their voting strength diluted.

Separately, the undisputed testimony of members of the Legislature counsels against an inference in favor of the State based on the findings. Representative Pringle and Senator Livingston both testified that the Alabama Solicitor General drafted the findings, and they did not know why the findings were included in the 2023 Plan. *Milligan* Doc. 261-4 at 102 (Senator Livingston); *Milligan* Doc. 261-5 at 91 (Representative Pringle); *Milligan* Doc. 238-2 at 6 (joint interrogatory responses). Representative Pringle testified that he had not seen another redistricting bill contain similar (or any) findings. *Milligan* Doc. 261-5 at 91. And of the three members of the Legislature who testified during remedial proceedings, none had a role in drafting the findings. *Milligan* Doc. 261-4 at 101–03 (Senator Livingston); *Milligan* Doc. 261-5 at 90–91 (Representative Pringle); Aug. 15 Tr. 58 (Senator Singleton). In the light of this testimony, which we reiterate is not disputed (or even questioned), we cannot conclude that the findings weigh in favor of the 2023 Plan.

If we had any lingering doubt about whether the 2023 Plan reflects an attempt to respond to the needs of Black Alabamians that have been established in this litigation, that doubt was eliminated at the remedial hearing when the State explained that in its view, the Legislature could remedy the vote dilution we found without providing the remedy we said was required: an additional opportunity district. *See* Aug. 14 Tr. 163–64. For purposes of Factor 8, we are focused not on the tenuousness of the policy underlying that position, but on how clearly it illustrates the lack of political will to respond to the needs of Black voters in Alabama in the way that we ordered. We infer from the Legislature’s decision not to create an additional opportunity district that the Legislature was unwilling to respond

to the well-documented needs of Black Alabamians in that way.

Lest a straw man arise on appeal: we say clearly that in our analysis, we did not deprive the Legislature of the presumption of good faith. *See, e.g., Abbott*, 138 S. Ct. at 2324. We simply find that on the undisputed evidence, Factor 8, like the other Factors, weighs in favor of the Plaintiffs.

b. Senate Factor 9

Senate Factor 9: Whether the policy underlying the 2023 Plan “is tenuous.” *Gingles*, 478 U.S. at 37.

We again make no finding about Senate Factor 9.

C. We Reject the State’s Remaining Argument that Including an Additional Opportunity District in a Remedial Plan To Satisfy Section Two Is Unconstitutional Affirmative Action in Redistricting.

The State asserts that the Plaintiffs’ illustrative plans “sacrifice communities of interest, compactness, and county splits to hit predetermined racial targets”; that if those “underperforming plans could be used to replace a 2023 Plan that more fully and fairly applies legitimate principles across the State, the result will be court-ordered enforcement of a map that violates the 2023 Plan’s traditional redistricting principles in favor of race”; and that this would be “affirmative action in redistricting” that would be unconstitutional. *Milligan* Doc. 220 at 59–60; *see also id.* at 60–68.

As an initial matter, it is premature (and entirely unfounded) for the State to assail any plan we might order as a remedy as “violat[ing] the 2023 Plan’s traditional redistricting principles in favor of race.” *Milligan* Doc. 220 at 59. Moreover, we have rejected

based on the evidence before us every premise of the State's argument: that the Plaintiffs' plans "sacrifice" traditional redistricting principles, that their illustrative plans are "underperforming," and that the 2023 Plan "more fully and fairly applies legitimate principles across the State." *See supra* Parts IV.A & IV.B. We also have rejected the faulty premise that by accepting the Plaintiffs' illustrative plans for *Gingles* purposes, we improperly held that the Plaintiffs are entitled to "proportional . . . racial representation in Congress." *Milligan* Doc. 107 at 195 (internal quotation marks omitted).

This mistaken premise explains why affirmative action cases, like the principal case on which the State relies, *Harvard*, 143 S. Ct. 2141, are fundamentally unlike this case. In the *Harvard* case, the Supreme Court held that Harvard and the University of North Carolina's use of race in their admissions programs violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964. *Id.* at 2175. Based on the record before it, the Supreme Court found that the admissions programs were impermissibly aimed at achieving "proportional representation" of minority students among the overall student-body population, and that the universities had "promis[ed] to terminate their use of race only when some rough percentage of various racial groups is admitted." *Id.* at 2172. Based on these findings, the Court concluded that the admissions programs lacked any "logical end point" because they "effectively assure that race will always be relevant and that the ultimate goal of eliminating race as a criterion 'will never be achieved.'" *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989)).

In contrast, the Voting Rights Act and the *Gingles* analysis developed to guide application of the statute “do[] not mandate a proportional number of majority-minority districts.” *Allen*, 143 S. Ct. at 1518 (Kavanaugh, J., concurring). Section Two expressly disclaims any “right to have members of a protected class elected in numbers equal to their proportion in the population.” 52 U.S.C. § 10301(b). And “properly applied, the *Gingles* framework itself imposes meaningful constraints on proportionality, as [Supreme Court] decisions have frequently demonstrated.” *Id.* at 1508 (majority opinion). So unlike affirmative action in the admissions programs the Supreme Court analyzed in *Harvard*, which was expressly aimed at achieving balanced racial *outcomes* in the makeup of the universities’ student bodies, the Voting Rights Act guarantees only “equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.” *De Grandy*, 512 U.S. at 1014 n.11. The Voting Rights Act does not provide a leg up for Black voters — it merely prevents them from being kept down with regard to what is arguably the most “fundamental political right,” in that it is “preservative of all rights” — the right to vote. *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1315 (11th Cir. 2019).

But a faulty premise and prematurity are not the only problems with the State’s argument: it would fly in the face of forty years of Supreme Court precedent — including precedent *in this case* — for us to hold that it is unconstitutional to order a remedial districting plan to include an additional minority-opportunity district to satisfy Section Two. In the Supreme Court, the State argued that the Fifteenth Amendment “does not authorize race-based redistricting as a remedy for § 2 violations.” *Allen*, 143 S. Ct. at

1516. The Supreme Court rejected this argument in two sentences: “But for the last four decades, this Court and the lower federal courts have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate § 2. In light of that precedent . . . we are not persuaded by Alabama’s arguments that § 2 as interpreted in *Gingles* exceeds the remedial authority of Congress.” *Id.* at 1516–17 (internal citations omitted).

D. The Record Establishes the Elements of Preliminary Injunctive Relief

We find that the Plaintiffs have established the elements of their request for preliminary injunctive relief. We discuss each element in turn.

For the reasons we have discussed, *see supra* Parts IV.A & IV.B, we find that the Plaintiffs are substantially likely to succeed on the merits of their claims that (1) the 2023 Plan does not completely remedy the likely Section Two violation that we found and the Supreme Court affirmed in the 2021 Plan; and (2) the 2023 Plan likely violates Section Two as well because it continues to dilute the votes of Black Alabamians.

We further find that the Plaintiffs will suffer irreparable harm if they must vote in the 2024 congressional elections based on a likely unlawful redistricting plan. “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.C. v.*

North Carolina, 769 F.3d 224, 247 (4th Cir. 2014) (internal quotation marks omitted) (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); and *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986)) (quoting *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986)).

“Voting is the beating heart of democracy,” and a “fundamental political right, because it is preservative of all rights.” *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1315 (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.

The Plaintiffs already suffered this irreparable injury once in this census cycle, when they voted under the unlawful 2021 Plan. The State has made no argument that if the Plaintiffs were again required to cast votes under an unlawful districting plan, that injury would not be irreparable. Accordingly, we find that the Plaintiffs will suffer an irreparable harm absent injunctive relief.

We observe that absent relief now, the Plaintiffs will suffer this irreparable injury until 2026, which is more than halfway through this census cycle. Weighed against the harm that the State will suffer — having to conduct elections according to a court-ordered districting plan — the irreparable harm to the Plaintiffs’ voting rights unquestionably is greater.

We next find that a preliminary injunction is in the public interest. The State makes no argument that if we find that the 2023 Plan perpetuates the vote dilution we found, or that the 2023 Plan likely violates

Section Two anew, we should decline to enjoin it. Nevertheless, we examine applicable precedent.

The principal Supreme Court precedent is older than the Voting Rights Act. In *Reynolds*, which involved a constitutional challenge to an apportionment plan, 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) (per curiam) (internal citations omitted).

We conclude that under these precedents, we should not withhold relief. Alabama's congressional elections are not close, let alone imminent. The general election is more than fourteen months away. The qualifying deadline to participate in the primary elections for the major political parties is more than two months away. Ala. Code § 17-13-5(a). And this Order issues well ahead of the "early October" deadline by which the Secretary has twice told us he needs a final congressional electoral map. *See* Milligan Doc. 147 at 3; *Milligan* Doc. 162 at 7.

V. REMEDY

Having found that the 2023 Plan perpetuates rather than corrects the Section Two violation we found, we look to Section Two and controlling precedent for instructions about how to proceed. In the Senate Report that accompanied the 1982 amendments to Section Two that added the proportionality disclaimer, the Senate Judiciary Committee explained that it did not "prescribe[e] in the statute mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied proof and local circumstances." S. Rep. No. 97-417 at 31, 97th Cong., 2d Sess. 26, *reprinted in* 1982 U.S. Code Cong. & Adm. News 177, 208.

Rather, that committee relied on "[t]he basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated," and explained its expectation that courts would "exercise [our] traditional equitable powers to fashion . . . relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." *Id.*

That committee cited the seminal Supreme Court decision about racially discriminatory voting laws, *Louisiana*, 380 U.S. at 154. S. Rep. No. 97-417 at 31 n.121. In *Louisiana*, the Supreme Court explained that upon finding such discrimination, federal courts have “not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.” 380 U.S. at 154.

The Supreme Court has since held that a district court does not abuse its discretion by ordering a Special Master to draw a remedial map to ensure that a plan can be implemented as part of an orderly process in advance of elections, where the State was given an opportunity to enact a compliant map but failed to do so. *See Covington*, 138 S. Ct. at 2553–54 (rejecting State’s argument that district court needed to “giv[e] the General Assembly—which ‘stood ready and willing to promptly carry out its sovereign duty’—another chance at a remedial map,” and affirming appointment of Special Master because the district court had “determined that ‘providing the General Assembly with a second bite at the apple’ risked ‘further draw[ing] out these proceedings and potentially interfer[ing] with the 2018 election cycle’” (internal citations omitted)).

Because we enjoin the use of the 2023 Plan, a new congressional districting plan must be devised and implemented in advance of Alabama’s upcoming congressional elections. The State has conceded that it would be practically impossible for the Legislature to reconvene in time to enact a new plan for use in the upcoming election. Aug. 14 Tr. 167. Accordingly, we find that there is no need to “provid[e] the [Legislature] with a second bite at the apple” or other good cause to

further delay remedial proceedings. *See Covington*, 138 S. Ct. at 2554.

We will therefore undertake our “duty to cure” violative districts “through an orderly process in advance of elections” by directing the Special Master and his team to draw remedial maps. *Id.* (citing *Purcell*, 549 U.S. at 4–5). We have previously appointed Mr. Richard Allen as a Special Master and provided him a team, including a cartographer, David R. Ely, and Michael Scodro and his law firm, Mayer Brown LLP to prepare and recommend to the Court a remedial map or maps for the Court to order Secretary of State Allen to use in Alabama’s upcoming congressional elections. *See Milligan* Docs. 102, 166, 183. The procedural history preceding these appointments has already been catalogued at length in our prior orders. *See Milligan* Docs. 166, 183. Specific instructions for the Special Master and his team will follow by separate order.

VI. CONSTITUTIONAL OBJECTIONS TO THE 2023 PLAN

In the light of our decision to enjoin the use of the 2023 Plan 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 any constitutional issues at this time. More particularly, we RESERVE RULING on (1) the constitutional objections to the 2023 Plan raised by the *Singleton* and the *Milligan* Plaintiffs, and (2) the motion of the *Singleton* Plaintiffs for preliminary injunctive relief on constitutional grounds, *Singleton* Doc. 147.

This restraint is consistent with our prior practice, *see Milligan* Doc. 107, and 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)). Where, as here, a decision on the constitutional issue would not entitle a plaintiff “to relief beyond that to which they [are] entitled on their statutory claims,” a “constitutional decision would [be] unnecessary and therefore inappropriate.” *Id.* at 446. This principle has particular salience when a court considers (as we do here) a request for equitable relief, *see id.*, and is commonly applied by three-judge courts in redistricting cases, *see, e.g., LULAC*, 548 U.S. at 442; *Gingles*, 478 U.S. at 38.

VII. EVIDENTIARY RULINGS

During the remedial hearing, the Court accepted into evidence many exhibits. *See generally* Aug. 14 Tr. 91–142. Most were stipulated, although some were stipulated only for a limited purpose. *Id.* We have since excluded one exhibit: the State’s Exhibit J, Mr. Bryan’s 2023 Report. *See supra* at Part IV.B.2.a.

At the hearing we reserved ruling on the motion *in limine* and on some objections to certain of the State’s exhibits. *See* Aug. 14 Tr. 91, 105–142. Most of the objections we reserved on were relevance objections raised in connection with the motion *in limine*. *See id.* at 108–30 (discussing such objections to State Exhibits C2, D, E, F2, G, H, I, L, M, N, O, P, Q, R, and S).

As we discussed in Parts II.B and II.C, we conclude that our remedial task is confined to a determination whether the 2023 Plan completely remedies the vote dilution we found in the 2021 Plan and is not otherwise unlawful, but we consider in the alternative whether under *Gingles* and the totality of the circumstances the Plaintiffs have established that the

2023 Plan likely violates Section Two. *See supra* at Parts II.B, II.C, IV.A & IV.B.

Accordingly, the motion *in limine* is GRANTED IN PART AND DENIED IN PART, and all of the Plaintiffs' relevance objections raised in connection with the motion *in limine* are OVERRULED to the extent that we consider the evidence as appropriate in our alternative holding.

After considerable deliberation, we dispose of the remaining objections this way:

- Objections to State Exhibits A, B2, B3, C2, D, N, and P are OVERRULED. These exhibits are admitted to establish what was said at public hearings held by the Committee and what materials were considered by the Committee, but not for the truth of any matter asserted therein.
- Objections to State Exhibits E, F2, G, H, I, L, M, O, Q, R, and S are OVERRULED. These exhibits are admitted.
- Objections to the *Milligan* Plaintiffs' Exhibits M13, M32, M38, and M47 are SUSTAINED. These exhibits are excluded.

DONE and ORDERED this 5th day of September, 2023.

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/s/ Stanley Marcus

STANLEY MARCUS

UNITED STATES CIRCUIT JUDGE

/s/ Anna M. Manasco

ANNA M. MANASCO

UNITED STATES DISTRICT JUDGE

/s/ Terry F. Moorer

TERRY F. MOORER

UNITED STATES DISTRICT JUDGE

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APPENDIX A
ACT #2023-563

XBT977-3

By Senator Livingston

RFD: Conference Committee on SB5

First Read: 17-Jul-23

2023 Second Special Session

Enrolled, An Act,

To amend Section 17-14-70, Code of Alabama 1975, to provide for the reapportionment and redistricting of the state's United States Congressional districts for the purpose of electing members at the General Election in 2024 and thereafter, until the release of the next federal census; and to add Section 17-40-70.1 to the Code of Alabama 1975, to provide legislative findings.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Section 17-14-70.1 is added to the Code of Alabama 1975, to read as follows.

§17-14-70.1

The Legislature finds and declares the following:

(1) The Legislature adheres to traditional redistricting principles when adopting congressional districts. Such principles are the product of history, tradition, bipartisan consensus, and legal precedent. The Supreme Court of the United States recently clarified that Section 2 of the Voting Rights Act “never requires adoption of districts that violate traditional redistricting principles.”

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(2) The Legislature's intent in adopting the congressional plan in this act described in Section 17-14-70.1 is to comply with federal law, including the U.S. Constitution and the Voting Rights Act of 1965, as amended.

(3) The Legislature's intent is also to promote the following traditional redistricting principles, which are given effect in the plan created by this act:

a. Districts shall be based on total population as reported by the federal decennial census and shall have minimal population deviation.

b. Districts shall be composed of contiguous geography, meaning that every part of every district is contiguous with every other part of the same district.

c. Districts shall be composed of reasonably compact geography.

d. The congressional districting plan shall contain no more than six splits of county lines, which is the minimum number necessary to achieve minimal population deviation among the districts. Two splits within one county is considered two splits of county lines.

e. The congressional districting plan shall keep together communities of interest, as further provided for in subdivision (4).

f. The congressional districting plan shall not pair incumbent members of Congress within the same district.

g. The principles described in this subdivision are non-negotiable for the Legislature. To the extent the following principles can be given effect consistent with the principles above, the congressional districting plan shall also do all of the following:

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1. Preserve the cores of existing districts.
2. Minimize the number of counties in each district.
3. Minimize splits of neighborhoods and other political subdivisions in addition to minimizing the splits of counties and communities of interest.

(4)a. A community of interest is a defined area of the state that may be characterized by, among other commonalities, shared economic interests, geographic features, transportation infrastructure, broadcast and print media, educational institutions, and historical or cultural factors.

b. The discernment, weighing, and balancing of the varied factors that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people.

c. If it is necessary to divide a community of interest between congressional districts to promote other traditional districting principles like compactness, contiguity, or equal population, division into two districts is preferable to division into three or more districts. Because each community of interest is different, the division of one community among multiple districts may be more or less significant to the community than the division of another community.

d. The Legislature declares that at least the three following regions are communities of interest that shall be kept together to the fullest extent possible in this congressional redistricting plan: the Black Belt, the Gulf Coast, and the Wiregrass.

e.1. Alabama's Black Belt region is a community of interest composed of the following 18 core counties: Barbour, Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery,

Perry, Pickens, Pike, Russell, Sumter, and Wilcox_ Moreover, the following five counties are sometimes considered part of the Black Belt: Clarke, Conecuh, Escambia, Monroe, and Washington.

2. The Black Belt is characterized by its rural geography, fertile soil, and relative poverty, which have shaped its unique history and culture.

3. The Black Belt region spans the width of Alabama from the Mississippi boarder to the Georgia border.

4. Because the Black Belt counties cannot be combined within one district without causing other districts to violate the principle of equal population among districts, the 18 core Black Belt counties shall be placed into two reasonably compact districts, the fewest number of districts in which this community of interest can be placed. Moreover, of the five other counties sometimes considered part of the Black Belt, four of those counties are included within the two Black Belt districts — Districts 2 and 7_

f.1. Alabama's Gulf Coast region is a community of interest composed of Mobile and Baldwin Counties.

2. Owing to Mobile Bay and the Gulf of Mexico coastline, these counties also comprise a well-known and well-defined community with a long history and unique interests. Over the past half-century, Baldwin and Mobile Counties have grown even more alike as the tourism industry has grown and the development of highways and bay-crossing bridges have made it easier to commute between the two counties.

3. The Gulf Coast community has a shared interest in tourism, which is a multi-billion-dollar industry and a significant and unique Economic driver for the region.

4. Unlike other regions in the state, the Gulf Coast community is home to major fishing, port, and ship-building industries. Mobile has a Navy shipyard and the only deep-water port in the state. The port is essential for the international export of goods produced in Alabama.

5. The Port of Mobile is the economic hub for the Gulf counties. Its maintenance and further development are critical for the Gulf counties in particular but also for many other parts of the state. The Port of Mobile handles over 55 million tons of international and domestic cargo for exporters and importers, delivering eighty-five billion dollars (\$85,000,000,000) in economic value to the state each year. Activity at the port's public and private terminals directly and indirectly generates nearly 313,000 jobs each year.

6. Among the over 21,000 direct jobs generated by the Port of Mobile, about 42% of the direct jobholders reside in the City of Mobile, another 39% reside in Mobile County but outside of the City of Mobile, and another 13% reside in Baldwin County.

7. The University of South Alabama serves the Gulf Coast community of interest both through its flagship campus in Mobile and Its campus in Baldwin County.

8. Federal appropriations have been critical to ensuring the port's continued growth and maintenance. In 2020, the Army Corps of Engineers allocated over two hundred seventy-four million dollars (\$274,000,000) for the Port of Mobile to allow the dredging and expansion of the port. Federal appropriations have also been critical for expanding bridge projects to further benefit the shared interests of the region.

9. The Gulf Coast community has a distinct culture stemming from its French and Spanish colonial heritage. That heritage is reflected in the celebration of shared social occasions, such as Mardi Gras, which began in mobile. This shared culture is reflected in Section 1-3-8(c), Code of Alabama 1975, which provides that “Mardi Gras shall be deemed a holiday in Mobile and Baldwin Counties and all state offices shall be closed in those counties on Mardi Gras.” Mardi Gras is observed as a state holiday only in Mobile and Baldwin Counties.

10. Mobile and Baldwin Counties also work together as part of the South Alabama Regional Planning Commission, a regional planning commission recognized by the state for more than 50 years. The local governments of Mobile, Baldwin, and Escambia Counties, as well as 29 municipalities within those counties, work together through the commission with the Congressional Representative from District 1 to carry out comprehensive economic development planning for the region in conjunction with the U.S. Economic Development Administration. Under Section 11-85-51(b), factors the Governor considers when creating such a regional planning commission include “community of interest and homogeneity; geographic features and natural boundaries; patterns of communication and transportation; patterns of urban development; total population and population density; [and] similarity of social and economic problems.”

g.1. Alabama’s Wiregrass region is a community of interest composed of the following nine counties: Barbour, Coffee, Covington, Crenshaw, Dale, Geneva, Henry, Houston, and Pike.

2. The Wiregrass region is characterized by rural geography, agriculture, and a major military base. The Wiregrass region is home to Troy University's flagship campus in Troy and its campus in Dothan.

3_ All of the Wiregrass counties are included in District 2, with the exception of Covington County, which is placed in District 1 so that the maximum number of Black Belt counties can be included within just two districts.

Section 2. Section 17-14-70, Code of Alabama 1975, is amended to read as follows:

“§17-14-70

(a) The State of Alabama is divided into seven congressional districts as provided in subsection (b).

(b) The numbers and boundaries of the districts are designated and established by the map prepared by the Permanent Legislative Committee on Reapportionment and identified and labeled as --Pringle Congressional Plan 1-- Livingston Congressional Plan 3-2023, including the corresponding boundary description provided by the census tracts, blocks, and counties, and are incorporated by reference as part of this section.

(c) The Legislature shall post for viewing on its public website the map referenced in subsection (h), including the corresponding boundary description provided by the census tracts, blocks, and counties, and any alternative map, including the corresponding boundary description provided by the census tracts, blocks, and counties, introduced by any member of the Legislature during the legislative session in which this section is added or amended.

(d) Upon enactment of Act 2021-555, adding the act amending this section and adopting the map identified in subsection (b), the Clerk of the House of Representatives or the Secretary of the Senate, as appropriate, shall transmit the map and the corresponding boundary description provided by the census tracts, blocks, and counties identified in subsection (b) for certification and posting on the public website of the Secretary of State.

(e) The boundary descriptions provided by the certified map referenced in subsection (b) shall prevail over the boundary descriptions provided by the census tracts, blocks, and counties generated for the map.”

Section 3. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, that declaration shall not affect the part which remains.

Section 4. This act shall be effective for the election of members of the state’s U.S. Congressional districts at the General Election of 2024 and thereafter, until the state’s U.S. Congressional districts are reapportioned and redistricted after the 2030 decennial census.

Section 5. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming law.

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S85 Enrolled

/s/ [Illegible]
President and Presiding Officer of the Senate

/s/ [Illegible]
Speaker of the House of Representatives

S85

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

/s/Illegible

GOVERNOR

Alabama Secretary Of State
Act Num.....:2023-563
Bill Num....:S-5

Recv'd 07/21/23 05:41pm SLF

SENATE ACTION		HOUSE 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 _____		DATE: 7-19 2023 RD 1 RFD 56	
years _____ days _____ abstain _____ PATRICK HARRIS, Secretary		REPORT OF STANDING COMMITTEE This bill having been referred by the House to its standing committee on <u>State Government</u> was acted upon by such committee in session, and returned therefrom to the House with the recommendation that it be <u>passed</u> (amend(s) <u>with</u> sub. <u>2</u>) This <u>22</u> day of <u>July</u> , 2023. <u>Glenn Bell</u> , Chairperson	
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		DATE: 7-20 2023 RF <u>W 506</u> RD 2 CA	
CONFERENCE COMMITTEE Senate Conferees _____		DATE: _____ 20____ RE-REFERRED <input type="checkbox"/> RE-COMMITTED <input type="checkbox"/> 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		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)			

SOR
W 506
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APPENDIX B

REAPPORTIONMENT COMMITTEE REDISTRICTING GUIDELINES

May 5, 2021

I. POPULATION

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

II. CRITERIA FOR REDISTRICTING

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

b. Congressional districts shall have minimal population deviation.

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

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

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

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f. 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 United States Constitution.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Districts shall respect communities of interest, neighborhoods, and political subdivisions to the extent practicable and in compliance with paragraphs a through i. 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. The term communities of interest may, in certain circumstances, include political subdivisions such as counties, voting precincts, municipalities, tribal lands and reservations, or school districts. The discernment, weighing, and balancing of the varied factors that

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contribute to communities of interest is an intensely political process best carried out by elected representatives of the people.

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

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

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

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

III. PLANS PRODUCED BY LEGISLATORS

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

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

3. Access to the Legislative Reapportionment Office Computer System, census population data, and redistricting work maps will be available to all

members of the Legislature upon request. Reapportionment Office staff will provide technical assistance to all Legislators who wish to develop proposals.

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

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

IV. REAPPORTIONMENT COMMITTEE MEETINGS AND PUBLIC HEARINGS

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

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

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

4. All interested persons are encouraged to appear before the Reapportionment Committee and to give

their comments and input regarding legislative redistricting. Reasonable opportunity will be given to such persons, consistent with the criteria herein established, to present plans or amendments redistricting plans to the Reapportionment Committee, if desired, unless such plans or amendments fail to meet the minimal criteria herein established.

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

V. PUBLIC ACCESS

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

2. A redistricting plan may be presented to the Reapportionment Committee by any individual citizen or organization by written presentation at a public meeting or by submission in writing to the Committee. All plans submitted to the Reapportionment Committee will be made part of the public record and

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made available in the same manner as other public records of the Committee.

3. Any proposed redistricting plan drafted into legislation must be offered by a member of the Legislature for introduction into the legislative process.

4. A redistricting plan developed outside the Legislature or a redistricting plan developed without Reapportionment Office assistance which is to be presented for consideration by the Reapportionment Committee must:

a. Be clearly depicted on maps which follow 2020 Census geographic boundaries;

b. Be accompanied by a statistical sheet listing total population for each district and listing the census geography making up each proposed district;

c. Stand as a complete statewide plan for redistricting.

d. Comply with the guidelines adopted by the Reapportionment Committee.

5. Electronic Submissions

a. Electronic submissions of redistricting plans will be accepted by the Reapportionment Committee.

b. Plans submitted electronically must also be accompanied by the paper materials referenced in this section.

c. See the Appendix for the technical documentation for the electronic submission of redistricting plans.

6. Census Data and Redistricting Materials

a. Census population data and census maps will be made available through the Reapportionment Office at

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a cost determined by the Permanent Legislative Committee on Reapportionment.

b. Summary population data at the precinct level and a statewide work maps will be made available to the public through the Reapportionment Office at a cost determined by the Permanent Legislative Committee on Reapportionment.

c. All such fees shall be deposited in the state treasury to the credit of the general fund and shall be used to cover the expenses of the Legislature.

Appendix.

ELECTRONIC SUBMISSION OF
REDISTRICTING PLANS
REAPPORTIONMENT COMMITTEE -
STATE OF ALABAMA

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

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

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

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

Example: (DOJ FORMAT BLOCK, DISTRICT #)

SSCCCTTTTTTBBBBDDDD

SS is the 2 digit state FIPS code

CCC is the 3 digit county FIPS code

TTTTTT is the 6 digit census tract code

BBBB is the 4 digit census block code

DDDD is the district number, right adjusted

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on their Member pages of the Official Website of the Alabama Legislature, legislature.state.al.us/aliswww/default.aspx.

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

MARCUS CASTER, <i>et al.</i>,)	
Plaintiffs,)	
v.	)	Case No.:
JOHN H. MERRILL,	)	2:21-cv-1536-AMM
<i>in his official capacity</i>)	
<i>as Alabama Secretary</i>)	
<i>of State, et al.,</i>)	
Defendants.)	

ORDER

(Filed Jan. 24, 2022)

This redistricting case is one 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 this case, which challenges the congressional map on statutory grounds only.

Singleton and *Milligan* are before a three-judge court that includes the undersigned judge, and *Caster* is before the undersigned 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 a brief argument by the

forty-three lawyers who have appeared in the litigation. The transcript of the preliminary injunction hearing spans nearly 2,000 pages.

On December 20, 2021, the three-judge court in *Singleton* and *Milligan* and this court held a Rule 16 conference in all three cases to discuss the logistics for the preliminary injunction proceedings. At that hearing, the *Caster* and *Milligan* plaintiffs alerted both the three-judge court and this 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. At the preliminary injunction hearing, counsel for the State repeated his understanding that any evidence admitted in one case could be used in any other case. Tr. 29. Accordingly, the court has considered all evidence adduced in *Singleton*, *Milligan* and *Caster*.

The court adopts the recitation of the evidence, legal analysis, findings of fact and conclusions of law explained in the preliminary injunction, memorandum opinion and order entered contemporaneously in *Singleton* and *Milligan* (attached in full to this Order as Exhibit A), including that court’s assessments of the credibility of expert witnesses, as though they were set forth in full herein. Accordingly, the court concludes that the *Caster* plaintiffs are substantially likely to establish that the Plan violates Section Two of the Voting Rights Act. More particularly, the court concludes that

the *Caster* 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 the court to consider, Black voters have less opportunity than other Alabamians to elect candidates of their choice to Congress.

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

Because the *Caster* 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.

The court **STAYS** 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 the court, the court is 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, the court **ORDERS** 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.

The court **ORDERS** Secretary Merrill to advise the political parties participating in the 2022 congressional elections of this order.

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**.

Compliance with the preliminary injunction in *Singleton* and *Milligan* constitutes compliance with this preliminary injunction.

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DONE and **ORDERED** this 24th day of January,
2022.

/s/ Anna M. Manasco
ANNA M. MANASCO
UNITED STATES
DISTRICT JUDGE

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EXHIBIT A

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

BOBBY SINGLETON,)	
<i>et al.,</i>)	
Plaintiffs,)	
v.	)	Case No.: 2:21-cv-
	)	1291-AMM
JOHN H. MERRILL, in	)	THREE-JUDGE
<i>his official capacity as</i>	)	COURT
<i>Alabama Secretary of</i>)	
<i>State, et al.,</i>)	
Defendants.)	

EVAN MILLIGAN, et al.,)	
Plaintiffs,)	
v.	)	Case No.: 2:21-cv-
	)	1530-AMM
JOHN H. MERRILL, in	)	THREE-JUDGE
<i>his official capacity as</i>	)	COURT
<i>Secretary of State of</i>)	
<i>Alabama, et al.,</i>)	
Defendants.)	

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

PER CURIAM:

PRELIMINARY INJUNCTION
MEMORANDUM OPINION AND ORDER

(Filed Jan. 24, 2022)

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 a brief 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 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

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.

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. McClen-don and Rep. Pringle not be deposed and that 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

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

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

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.

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

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

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.

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 Legislature’s redistricting guidelines, they are reproduced in

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.

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

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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.

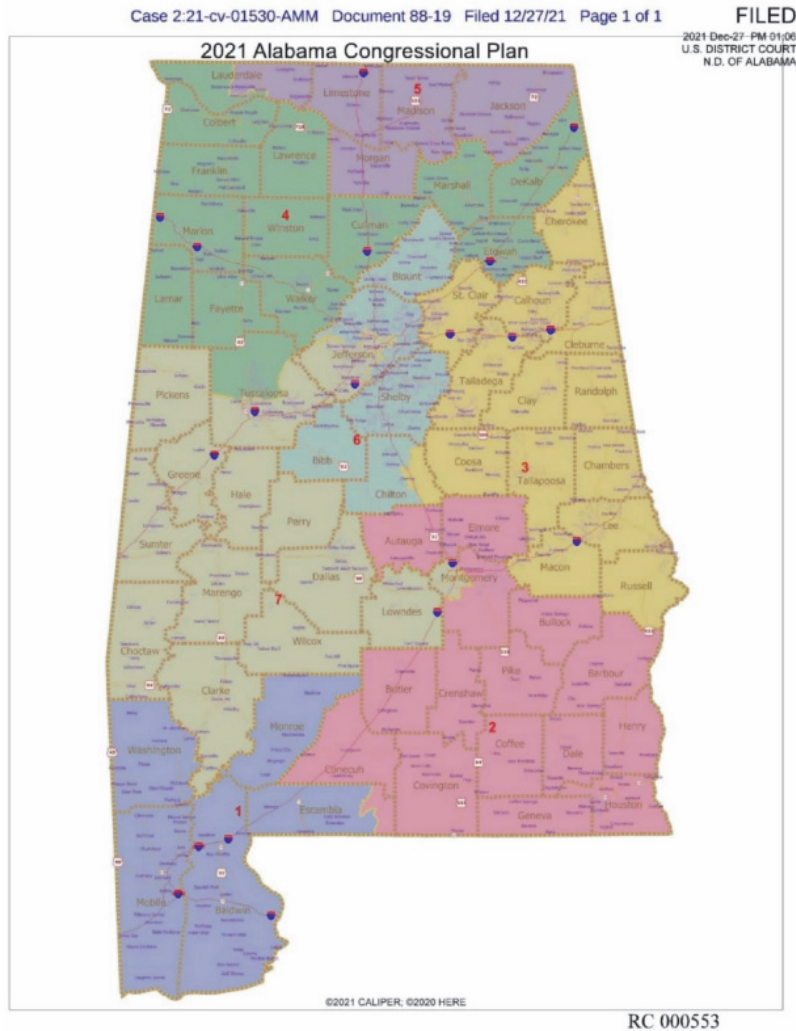
Milligan Doc. 88-23 at 1-3.

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

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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.

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.

The region has a substantial Black population because of the many enslaved people 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 *Miligan* 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

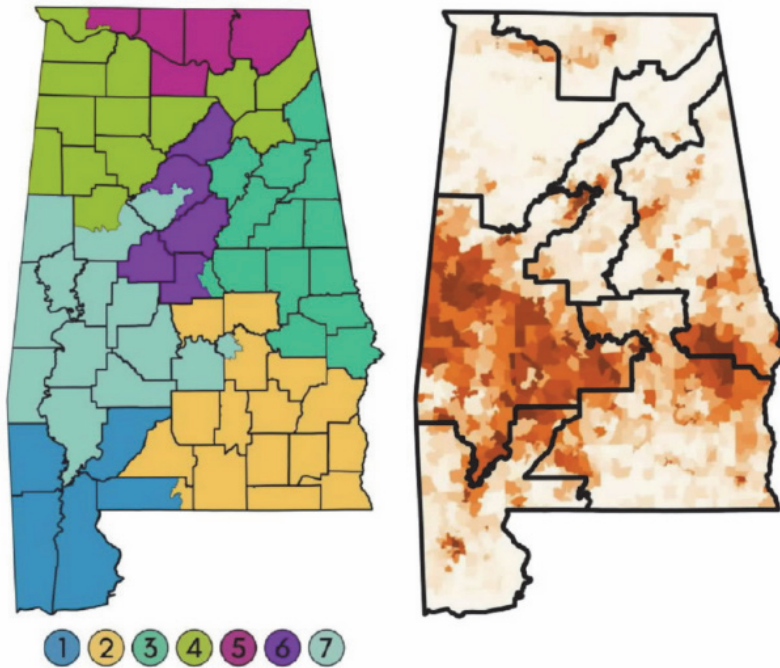
hearing, Dr. Duchin was qualified as an expert in redistricting, applied mathematics, quantitative redistricting analysis, and demography and use of census data, with no objection from any party. Tr. 554-55. For the reasons explained in our findings of fact and conclusions of law (*see infra* Part V.B.2.a), we find Dr. Duchin’s testimony highly credible.

Dr. Duchin opined in her report that because 27.16% of Alabama residents identified as a ny-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 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.

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.

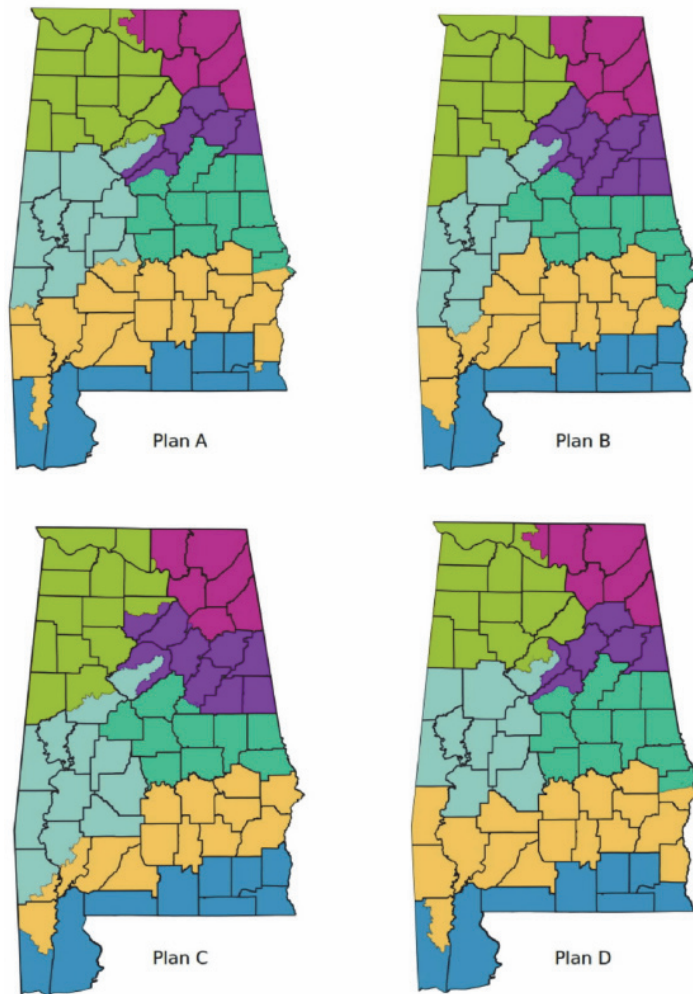
More particularly, Dr. Duchin testified that she relied heavily on the Legislature's redistricting guidelines, and she took the creation of two majority-Black districts, which she was asked to try to draw, as a "nonnegotiable principle" sought in her illustrative plan, along with equal population among 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

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 $4\pi A/P^2$. Higher

provided 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

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.*

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.

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 verhart	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	dia 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)	es	es

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 color-mask 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

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.

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.

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 a “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 pre-clearance 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. Sincok*, 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 (re-direct). 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:

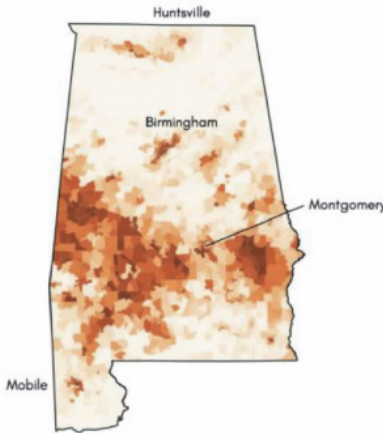


Figure 3: Black voting-age population share is shown by shading at the precinct level. The major cities have visible concentrations of Black population, and the Black Belt rural counties are clearly visible running East-West across the state.

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.

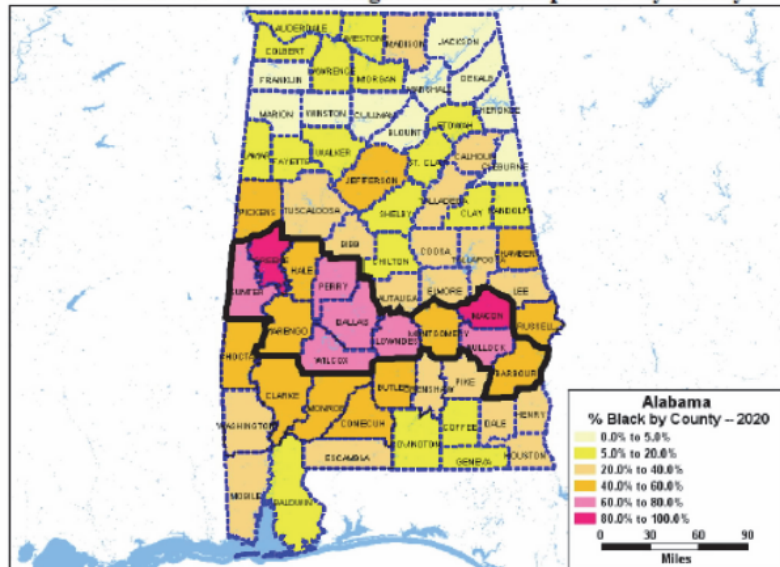
Before we explain our findings and conclusions on this issue, we observe that this was fervently disputed during the preliminary injunction hearing, and all parties devoted significant time and argument to it. Defendants strongly object to Dr. Duchin and Mr. Cooper’s decisions to split Mobile County 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 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,

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 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

¹² Defendants supplied a link to the ad in their opposition to the motions for preliminary injunctive relief. *See Milligan* Doc. 78 at

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, 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

114 (providing this link: <https://www.youtube.com/watch?v=31HHFy8JkoU>).

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 races 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.

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.

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 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, de-void-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 re-districting 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**.

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DONE and **ORDERED** this 24th day of January, 2022.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES CIRCUIT JUDGE

/s/ Anna M. Manasco
ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE

/s/ Terry F. Moorer
TERRY F. MOORER
UNITED STATES DISTRICT JUDGE

APPENDIX A

REAPPORTIONMENT COMMITTEE REDISTRICTING GUIDELINES

May 5, 2021

I. POPULATION

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

II. CRITERIA FOR REDISTRICTING

- a. Districts shall comply with the United States Constitution, including the requirement that they equalize total population.
- b. Congressional districts shall have minimal population deviation.
- c. Legislative and state board of education districts shall be drawn to achieve substantial equality of population among the districts and shall not exceed an overall population deviation range of $\pm 5\%$.
- d. A redistricting plan considered by the Reapportionment Committee shall comply with the one person, one vote principle of the Equal Protection Clause of the 14th Amendment of the United States Constitution.
- e. The Reapportionment Committee shall not approve a redistricting plan that does not comply with these population requirements.
- f. 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 United States Constitution.
- g. No district will be drawn in a manner that subordinates race-neutral districting criteria to considerations of race, color, or membership in a language-minority group, except that race, color, or membership in a language-minority group may predominate over

race-neutral districting criteria to comply with Section 2 of the Voting Rights Act, provided there is a strong basis in evidence in support of such a race-based choice. A strong basis in evidence exists when there is good reason to believe that race must be used in order to satisfy the Voting Rights Act.

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Districts shall respect communities of interest, neighborhoods, and political subdivisions to the extent practicable and in compliance with paragraphs a through i. 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. The term communities of interest may, in certain circumstances, include political subdivisions such as counties, voting precincts, municipalities, tribal lands and reservations, or school districts. The discernment, weighing, and balancing of the varied factors that contribute to communities of interest is an intensely political

process best carried out by elected representatives of the people.

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

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

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

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

III. PLANS PRODUCED BY LEGISLATORS

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

2. A proposed redistricting plan will become public information upon its introduction as a bill in the

legislative process, or upon presentation for consideration by the Reapportionment Committee.

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

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

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

IV. REAPPORTIONMENT COMMITTEE MEETINGS AND PUBLIC HEARINGS

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

2. Minutes of all Reapportionment Committee meetings shall be taken and maintained as part of the public record. Copies of all minutes shall be made available to the public.
3. Transcripts of any public hearings shall be made and maintained as part of the public record, and shall be available to the public.
4. All interested persons are encouraged to appear before the Reapportionment Committee and to give their comments and input regarding legislative redistricting. Reasonable opportunity will be given to such persons, consistent with the criteria herein established, to present plans or amendments redistricting plans to the Reapportionment Committee, if desired, unless such plans or amendments fail to meet the minimal criteria herein established.
5. Notice of all Reapportionment Committee meetings will be posted on monitors throughout the Alabama State House, the Reapportionment Committee's website, and on the Secretary of State's website. Individual notice of Reapportionment Committee meetings will be sent by email to any citizen or organization who requests individual notice and provides the necessary information to the Reapportionment Committee staff. Persons or organizations who want to receive this information should contact the Reapportionment Office.

V. PUBLIC ACCESS

1. The Reapportionment Committee seeks active and informed public participation in all activities of the Committee and the widest range of public information and citizen input into its deliberations. Public access to the Reapportionment Office computer system is available every Friday from 8:30 a.m. to 4:30 p.m. Please contact the Reapportionment Office to schedule an appointment.
2. A redistricting plan may be presented to the Reapportionment Committee by any individual citizen or organization by written presentation at a public meeting or by submission in writing to the Committee. All plans submitted to the Reapportionment Committee will be made part of the public record and made available in the same manner as other public records of the Committee.
3. Any proposed redistricting plan drafted into legislation must be offered by a member of the Legislature for introduction into the legislative process.
4. A redistricting plan developed outside the Legislature or a redistricting plan developed without Reapportionment Office assistance which is to be presented for consideration by the Reapportionment Committee must:
 - a. Be clearly depicted on maps which follow 2020 Census geographic boundaries;

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- b. Be accompanied by a statistical sheet listing total population for each district and listing the census geography making up each proposed district;
- c. Stand as a complete statewide plan for redistricting.
- d. Comply with the guidelines adopted by the Reapportionment Committee.

5. Electronic Submissions

- a. Electronic submissions of redistricting plans will be accepted by the Reapportionment Committee.
- b. Plans submitted electronically must also be accompanied by the paper materials referenced in this section.
- c. See the Appendix for the technical documentation for the electronic submission of redistricting plans.

6. Census Data and Redistricting Materials

- a. Census population data and census maps will be made available through the Reapportionment Office at a cost determined by the Permanent Legislative Committee on Reapportionment.
- b. Summary population data at the precinct level and a statewide work maps will be made available to the public through the Reapportionment Office at a cost determined by the Permanent Legislative Committee on Reapportionment.

c. All such fees shall be deposited in the state treasury to the credit of the general fund and shall be used to cover the expenses of the Legislature.

Appendix.

**ELECTRONIC SUBMISSION
OF REDISTRICTING PLANS
REAPPORTIONMENT COMMITTEE –
STATE OF ALABAMA**

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

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

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

In order for plans to be analyzed with our attribute data, to be able to edit, report on, and produce maps in the most efficient, accurate and time saving

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procedure, electronic submissions are REQUIRED to be in DOJ format.

Example: (DOJ FORMAT BLOCK, DISTRICT #)

SSCCCTTTTTTBBBBDDDD

SS is the 2 digit state FIPS code

CCC is the 3 digit county FIPS code

TTTTTT is the 6 digit census tract code

BBBB is the 4 digit census block code

DDDD is the district number, right adjusted

Contact Information:

Legislative Reapportionment Office
Room 317, State House
11 South Union Street
Montgomery, Alabama 36130
(334) 261-0706

For questions relating to reapportionment and redistricting, please contact:

Donna Overton Loftin, Supervisor
Legislative Reapportionment Office
donna.overton@alsenate.gov

Please Note: The above e-mail address is to be used only for the purposes of obtaining information regarding redistricting. Political messages, including those relative to specific legislation or other political matters, cannot be answered or disseminated via this email to members of the Legislature. Members of the Permanent Legislative Committee on Reapportionment may be contacted through information contained

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on their Member pages of the Official Website of the
Alabama Legislature, [legislature.state.al.us/aliswww/
default.aspx](http://legislature.state.al.us/aliswww/default.aspx).

App. 1012
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Filed: June 6, 2025]

Case No. 2:21-cv-01291-AMM

BOBBY SINGLETON, *et al.*,
Plaintiffs,

v.

WES ALLEN, in his official capacity as Alabama
Secretary of State, *et al.*,
Defendants.

THREE-JUDGE COURT
NOTICE OF APPEAL

NOTICE OF APPEAL OF ORDER
GRANTING INJUNCTION

Notice is hereby given that Defendants Secretary of State Wes Allen, Senator Steve Livingston, and Representative Chris Pringle hereby appeal to the Supreme Court of the United States from this Court's May 8, 2025 Injunction and Order. *See Singleton* Doc. 324. This appeal is taken under 28 U.S.C. § 1253.

Respectfully submitted,

Steve Marshall
Attorney General

s/ Edmund G. LaCour Jr.
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Solicitor General

App. 1013

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App. 1014

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*Counsel for Senator Livingston and
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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification to counsel of record.

s/ Edmund G. LaCour Jr.

Edmund G. LaCour Jr.

Solicitor General

Counsel for Secretary Allen

App. 1015
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Filed: June 6, 2025]

Case No. 2:21-cv-01530-AMM

EVAN MILLIGAN, *et al.*,
Plaintiffs,

v.

WES ALLEN, in his official capacity as
Alabama Secretary of State, *et al.*,
Defendants.

THREE-JUDGE COURT
NOTICE OF APPEAL

NOTICE OF APPEAL OF ORDER
GRANTING INJUNCTION

Notice is hereby given that Defendants Secretary of State Wes Allen, Senator Steve Livingston, and Representative Chris Pringle hereby appeal to the Supreme Court of the United States from this Court's May 8, 2025 Injunction and Order. *See Milligan* Doc. 490. This appeal is taken under 28 U.S.C. § 1253.

Respectfully submitted,

Steve Marshall
Attorney General

s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr. (ASB-9182-U81L)
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App. 1016

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Scott Woodard (ASB-1001-F94C)

Brenton M. Smith (ASB-1656-X27Q)

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App. 1017

s/ Michael P. Taunton

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*Counsel for Senator Livingston and
Representative Pringle*

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification to counsel of record.

s/ Edmund G. LaCour Jr.

Edmund G. LaCour Jr.

Solicitor General

Counsel for Secretary Allen

App. 1018
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No.: 2:21-cv-01291-AMM

BOBBY SINGLETON, *et al.*,
Plaintiffs,

v.

WES ALLEN, in his official capacity as Alabama
Secretary of State, *et al.*,
Defendants.

THREE-JUDGE COURT

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

BY THE COURT:

INJUNCTION AND FINAL JUDGMENT

The Court issued findings of fact, conclusions of law, and an injunction on May 8, 2025. Doc. 324. In addition, the Court ADOPTS the recitation of the parties' arguments and agreements, findings of fact, and conclusions of law explained in the remedial order entered contemporaneously in *Milligan v. Allen*, Case No. 2:21-cv-1530-AMM (appended to this Order as Exhibit A) as though they were set forth in full herein. Accordingly, the Court PERMANENTLY ENJOINS Alabama Secretary of State Wes Allen, and his successors in office, from conducting any elections

according to Alabama's 2023 Plan. The Court further ORDERS Secretary Allen, and his successors in office, to administer Alabama's congressional elections using Special Master Remedial Plan 3 (appended to this Order as Exhibit B) until Alabama enacts a new congressional districting plan based on 2030 census data. This mandatory injunction EXPIRES upon that enactment.

Final judgment is ENTERED in favor of the *Singleton* Plaintiffs and against the Defendants on the *Singleton* Plaintiffs' claim under Section Two of the Voting Rights Act of 1965, 52 U.S.C. § 10301 (Count III). The Court DECLINES to decide the *Singleton* Plaintiffs' remaining claims under the United States Constitution (Counts I & II) pursuant to the canon of constitutional avoidance. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 446 (1988). The Court RETAINS JURISDICTION over this case until the expiration of the mandatory injunction for the purpose of enforcing this judgment and ruling on appropriate post-trial applications.

DONE and ORDERED this 7th day of August, 2025.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES CIRCUIT JUDGE

/s/ Anna M. Manasco
ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE

/s/ Terry F. Moorer
TERRY F. MOORER
UNITED STATES DISTRICT JUDGE

App. 1020
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No.: 2:21-cv-01530-AMM

EVAN MILLIGAN, *et al.*,
Plaintiffs,

v.

WES ALLEN, in his official capacity as Alabama
Secretary of State, *et al.*,
Defendants.

THREE-JUDGE COURT

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

BY THE COURT:

INJUNCTION AND FINAL JUDGMENT

The Court issued findings of fact, conclusions of law, and an injunction on May 8, 2025. Doc. 490. Today, the Court entered a remedial order. Doc. 509. In accordance with that remedial order, the Court PERMANENTLY ENJOINS Alabama Secretary of State Wes Allen, and his successors in office, from conducting any elections according to Alabama's 2023 Plan. The Court further ORDERS Secretary Allen, and his successors in office, to administer Alabama's congressional elections using Special Master Remedial Plan 3 (appended to this Order as Exhibit A) until

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Alabama enacts a new congressional districting plan based on 2030 census data. This mandatory injunction EXPIRES upon that enactment.

Final judgment is ENTERED in favor of the *Milligan* Plaintiffs and against the Defendants on the *Milligan* Plaintiffs' claim under Section Two of the Voting Rights Act of 1965, 52 U.S.C. § 10301; 42 U.S.C. § 1983 (Count I) and their claim of intentional discrimination under the Fourteenth Amendment to the United States Constitution (Count II). The Court RETAINS JURISDICTION over this case until the expiration of the mandatory injunction for the purpose of enforcing this judgment and ruling on appropriate post-trial applications.

DONE and ORDERED this 7th day of August, 2025.

/s/ Stanley Marcus

STANLEY MARCUS

UNITED STATES CIRCUIT JUDGE

/s/ Anna M. Manasco

ANNA M. MANASCO

UNITED STATES DISTRICT JUDGE

/s/ Terry F. Moorer

TERRY F. MOORER

UNITED STATES DISTRICT JUDGE

App. 1022
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No.: 2:21-cv-01536-AMM

MARCUS CASTER, *et al.*,
Plaintiffs,

v.

WES ALLEN, in his official capacity as Alabama
Secretary of State, *et al.*,
Defendants.

INJUNCTION AND FINAL JUDGMENT

The Court issued findings of fact, conclusions of law, and an injunction on May 8, 2025. Doc. 401. In addition, the Court ADOPTS the recitation of the parties' arguments and agreements, findings of fact, and conclusions of law explained in the remedial order entered contemporaneously in *Milligan v. Allen*, Case No. 2:21-cv-1530-AMM (appended to this Order as Exhibit A) as though they were set forth in full herein. Accordingly, the Court PERMANENTLY ENJOINS Alabama Secretary of State Wes Allen, and his successors in office, from conducting any elections according to Alabama's 2023 Plan. The Court further ORDERS Secretary Allen, and his successors in office, to administer Alabama's congressional elections using Special Master Remedial Plan 3 (appended to this Order as Exhibit B) until Alabama enacts a new congressional districting plan based on 2030 census

App. 1023

data. This mandatory injunction EXPIRES upon that enactment.

Final judgment is ENTERED in favor of the *Caster* Plaintiffs and against the Defendants on the *Caster* Plaintiffs' claim under Section Two of the Voting Rights Act of 1965, 52 U.S.C. § 10301; 42 U.S.C. § 1983. The Court RETAINS JURISDICTION over this case until the expiration of the mandatory injunction for the purpose of enforcing this judgment and ruling on appropriate post-trial applications.

DONE and ORDERED this 7th day of August, 2025.

/s/ Anna M. Manasco

ANNA M. MANASCO

UNITED STATES DISTRICT JUDGE

App. 1024
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No.: 2:21-cv-01530-AMM

EVAN MILLIGAN, *et al.*,
Plaintiffs,

v.

WES ALLEN, in his official capacity as Alabama
Secretary of State, *et al.*,
Defendants.

THREE-JUDGE COURT

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

PER CURIAM:

ORDER

This congressional redistricting case is once again before the Court for further remedial proceedings. From the enactment of the Voting Rights Act in 1965 until the Supreme Court's decision in *Shelby County v. Holder* in 2013, Alabama was required to preclear its congressional districting plans with federal authorities before putting them into use. 570 U.S. 529, 537, 556–57 (2013); *see* 52 U.S.C. § 10304. Now, the *Milligan* Plaintiffs move this Court to bail Alabama back into federal preclearance under Section 3(c) of the Voting Rights Act for congressional redistricting “until 60

days after the Alabama Legislature enacts a congressional plan under the 2030 census or a period of approximately seven years.” Doc. 485 at 436, ¶ 1173; Doc. 329 at 77; *see* 52 U.S.C. § 10302(c). Alternatively, they ask us to retain jurisdiction over the case for at least that period.

For the reasons explained below, the application for bail-in relief is DENIED WITHOUT PREJUDICE, and the Court RETAINS JURISDICTION over this case (and by separate order the related case *Singleton v. Allen*, Case No. 2:21-cv-1291-AMM) until Alabama enacts a congressional districting plan based on 2030 census data.¹

I. BACKGROUND

After two preliminary injunctions and a lengthy trial, in May 2025 the Court enjoined Alabama Secretary of State Wes Allen, and his successors in office, “from conducting any elections according to Alabama’s 2023 Plan” and ruled “that the 2023 Plan violates both Section Two of the Voting Rights Act and the Fourteenth Amendment to the United States Constitution.” Doc. 490 at 16. On Plaintiffs’ Section Two claim, we found that “the 2023 Plan unlawfully dilute[d] Black voting strength by consigning it to one majority-Black district despite Alabama’s Black population plainly being numerous and compact enough, and voting in Alabama racially polarized enough, to readily support an additional opportunity district.” *Id.* at 11. We also determined that the Alabama Legislature intentionally discriminated on account of race in violation of the Fourteenth

¹ Judge Manasco will retain jurisdiction over the other related case, *Caster v. Allen*, Case No. 2:21-cv-1536-AMM, for the same period.

Amendment – “the purpose of the design of the 2023 Plan was to crack Black voters across congressional districts in a manner that [made] it impossible to create two districts in which they have an opportunity to elect candidates of their choice.” *Id.* at 15.

On May 28, 2025, the Defendants filed a statement concerning remedial proceedings, in which:

- The legislative defendants Senator Steve Livingston and Representative Chris Pringle (“the Legislators”) (Co-Chairs of the Permanent Legislative Committee on Reapportionment) “state[d] that both they and leadership for both chambers of the Alabama Legislature will voluntarily forgo any rights that they may have to attempt to draw an additional congressional district map as part of remedial proceedings in this case,” subject to their rights on appeal.
- The Legislators further “represent[ed] in good faith that neither they nor leadership for either chamber of the Alabama Legislature have any intention of passing any additional congressional district maps before receiving 2030 census data.”

Doc. 493 ¶¶ 3, 5–6.

On June 9, 2025, the parties filed a joint status report, in which:

- The Defendants (“the State”) “represented to the Court and continue to represent to the Court that the Special Master Plan 3 [(“Special Master Plan”)] will remain in place for the 2026, 2028 and 2030 congressional elections (as well as all special or other congressional elections prior to the adoption of a new congressional

district map based on 2030 census data), subject to [the State's] rights on appeal.”

- The State “further represent[ed] . . . that [it] will not challenge on appeal the duration of an injunction that requires the Secretary of State to use the [Special Master] Plan for the 2026, 2028, and 2030 congressional elections (as well as all special or other congressional elections prior to the adoption of a new congressional district map based on 2030 census data).”
- The *Milligan* Plaintiffs, *Singleton* Plaintiffs, and *Caster* Plaintiffs “agree[d] that an injunction barring the Secretary of State from administering Alabama’s congressional elections according to the 2023 Plan and ordering him to administer congressional elections according to the [Special Master] Plan . . . is a full remedy to the Section 2 violation identified by this Court in the May 8, 2025 Order.”
- The parties stated that “[a]s to the *Milligan* Plaintiffs’ request for Section 3(c) relief and/or continuing jurisdiction over potential challenges to a post-2030 census plan, the *Milligan* Plaintiffs and Defendants [did] not come to an agreement that would obviate the need for further briefing on those issues.”

Doc. 497 ¶¶ 1–4.

In its opposition to bail-in, the State argues that (1) “Section 3(c) is not triggered because [the *Milligan*] Plaintiffs failed to show multiple constitutional violations justifying equitable relief”; (2) “[p]reclearance is inappropriate and unconstitutional absent pervasive, flagrant, rampant, and widespread voting discrimination

that makes case-by-case litigation inadequate”; and (3) the Court should not retain jurisdiction until 60 days after Alabama enacts a congressional districting plan based on 2030 census data as an exercise of the Court’s equitable power because that “requested remedy would be virtually unprecedented” and is an effort “to obtain preclearance by another name.” Doc. 498 at 10, 18, 28, 30 (emphasis omitted).

The United States of America filed a statement of interest also opposing bail-in. Doc. 499. The United States argues (1) that “[a] single violation of the constitutional right to vote cannot suffice” for Section 3(c) relief; (2) that the *Milligan* Plaintiffs’ “bail-in request relates to a single violation – the adoption of Alabama’s Congressional redistricting plan”; and (3) that the Court should deny the request to exercise its equitable power because “Alabama’s acceptance of the remedial Congressional plan has foreclosed Section 3(c) relief” and the State’s agreement “to not pass any other additional congressional district maps before receiving the 2030 census data or otherwise participate in mid-cycle redistricting” “afford[s] the *Milligan* Plaintiffs full relief in this case.” Doc. 499 at 13, 16–17 (quoting Doc. 498 at 5).

In support of bail-in, the *Milligan* Plaintiffs assert that (1) “one or more constitutional violations in a single case suffices to bail-in a jurisdiction”; (2) “even if Section 3(c) requires multiple findings of discriminatory intent, the record and recent Alabama history allow for such a finding here”; (3) “[t]he record here meets or beats” the records before other federal courts that imposed Section 3(c) relief or retained jurisdiction; (4) though the “Court does not need to find that conditions present in Alabama now are identical to those in 1965 to impose the limited bail-in requested

here . . . even a cursory inquiry highlights many startling similarities between these periods”; (5) there is not a presumption against Section 3(c) relief in a case where a constitutional violation is found; (6) “even if [the *Milligan*] Plaintiffs were required to prove that ordinary litigation is inadequate to protect the right to vote, Alabama’s bad-faith conduct in this case and earlier reveals that ‘case-by-case litigation’ has proven ‘inadequate’ to overcome ‘persistent discrimination’”; and (7) they do not “concede that a court order maintaining the current map through 2030 is sufficient to remedy the Fourteenth Amendment violation.” Doc. 502 at 7, 9, 16, 21– 22, 24 (emphasis omitted) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966)).

The *Milligan* Plaintiffs request that if we deny Section 3(c) relief, we should exercise this Court’s “inherent equitable power to retain jurisdiction over challenges to Alabama’s congressional maps through the next census cycle.” *Id.* at 25.

On July 29, 2025, the Court held a hearing on the *Milligan* Plaintiffs’ application. At the hearing, those Plaintiffs “emphasize[d] that [they] are asking for a very narrow form of preclearance review” — “that this Court put the State back under preclearance for a period of roughly seven years in which [the Court] would only require the State to preclear congressional redistricting plans.” Doc. 508 at 6.

We inquired extensively at the hearing about the timeframe of the *Milligan* Plaintiffs’ request that if we deny bail-in, we retain jurisdiction over the case until at least 60 days after Alabama enacts a map based on 2030 census data, or through the 2030 census cycle. *See id.* at 12–14. The *Milligan* Plaintiffs explained that they “certainly don’t have an objection to” the Court’s

retention of jurisdiction only until the day that Alabama enacts a map after the 2030 census, *id.* at 12, but described such a ruling as affording “incomplete relief for the constitutional violation” without preclearance “[b]ecause of the threat of backsliding” as evidenced by “the actions that Alabama took in this case and because of the potential of Alabama getting a freebie as it did in this case [for the 2022 election],” *id.* at 16. Put differently, the *Milligan* Plaintiffs expressed their concern that if the Court retains jurisdiction only until Alabama enacts a plan based on the 2030 census, and if that plan discriminates based on race, the State would be able to use an unlawful plan for the 2032 election in the absence of a preclearance remedy if new litigation does not move quickly enough.

We further asked the *Milligan* Plaintiffs whether the practical effect of their Section 3(c) application would be that this Court would be required to supervise congressional redistricting in Alabama until 2041, if a legal challenge were filed within 60 days of Alabama’s enactment of its 2030-cycle map. *See id.* at 12–14. The *Milligan* Plaintiffs replied that it would not be necessary for the Court “to hold [onto] this case forever” so long as the State did not “choos[e] to violate the Voting Rights Act or the Constitution again,” and so long as there was no “backsliding.” *Id.* at 13. They further suggested that they are not asking this Court to retain jurisdiction for fifteen years. *See id.* at 14. But when pressed on whether that is “the net effect of exactly what [they]’re asking for,” the *Milligan* Plaintiffs responded by redirecting the Court back to the request for bail-in. *Id.*

For its part, the State repeatedly conceded that this Court has jurisdiction to enforce its orders, including the May 2025 permanent injunction and any

mandatory injunction entered on remedy, regardless of whether the Court retains jurisdiction and/or bails Alabama back into federal preclearance. *See, e.g., id.* at 46–47, 63–64. Nevertheless, the State urged the Court throughout the hearing neither to retain jurisdiction over this case nor to invoke the bail-in remedy found in Section 3(c). *See id.* at 44–45. At the end of the day, the State conceded that it “does not have serious qualms with” the Court retaining jurisdiction through the 2030 election. *Id.* at 46.

The Legislators, in turn, represented “that the Legislature is out of the map-drawing business outside of the context of this litigation” and that “the [pending] appeal in this case will determine what map is used for the rest of this decade.” *Id.* at 65–66. They argued “that those representations may mean that . . . preclearance is inappropriate” because it is designed “to serve as a remedy when litigation is not up to the task” and “litigants can never actually get the relief they have been promised by the Court.” *Id.* at 66.

All parties, including the *Caster* and *Singleton* Plaintiffs, reiterated their agreement that a mandatory injunction ordering the Secretary and his successors in office to administer Alabama’s congressional elections based on the Special Master Plan until Alabama enacts a new congressional districting plan based on 2030 census data is a complete remedy to the Section Two violation identified in the Court’s May 2025 order. *See id.* at 15, 26–27, 35–37, 64, 66. The State also reiterated its agreement that (subject to its appellate rights as to that order) it “would not contest the . . . durational element of that mandatory injunction.” *Id.* at 38, 66. In light of these agreements, the State urged that “any

additional remedy [would not] be appropriate under the words of Section 3(c).” *Id.* at 38; *see also id.* at 66.

The United States did not appear at the hearing.

II. ANALYSIS

Longstanding legal rules dictate the role of the Court at this remedial stage. Any injunction entered by the Court must be “remedial in nature” and designed “to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.” *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (emphasis omitted) (quoting *Milliken v. Bradley*, 418 U.S. 717, 746 (1974)). “[O]ne of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions.” *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990). “[A]ppropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief.” *Rizzo v. Goode*, 423 U.S. 362, 379 (1976). This is especially true since “[t]he Constitution entrusts States with the job of designing congressional districts.” *Cooper v. Harris*, 581 U.S. 285, 291 (2017); *accord Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 6 (2024). Accordingly, we have taken care to calibrate the equitable relief in this case (and in the related cases) to remedy the serious constitutional and statutory violations we identified in the least intrusive and most restrained manner possible, and no more.

As we have explained at length already, “the Special Master Plan satisfied all constitutional and statutory requirements while hewing as closely as reasonably possible to the 2023 Plan,” was drawn race-blind, and resulted in a reasonably compact remedial opportunity

district (the Black share of the voting age population in that district is 48.69%). Doc. 490 at 8–9, 70, 72, 544; *see also* Doc. 311 at 36–44. We are satisfied that the Special Master Plan remedies unlawful racial vote dilution without violating the Fourteenth Amendment.

Accordingly, we agree with the parties that in addition to the injunction we issued barring the use of Alabama’s 2023 Plan, an injunction ordering the Secretary and his successors in office to administer Alabama’s congressional elections according to the Special Master Plan until Alabama enacts a new congressional districting plan based on 2030 census data provides a complete remedy to the Section Two violation we identified in our May 2025 Order.

We also find it appropriate for us to retain jurisdiction over this case (and the related cases) for the duration of that injunction. We do so for three reasons. *First*, retaining jurisdiction is a normal result in redistricting cases and Section Two cases, even in the absence of a finding that the State intentionally discriminated on account of race. *See, e.g., North Carolina v. Covington*, 585 U.S. 969, 976 (2018) (*per curiam*) (holding that “the District Court properly retained jurisdiction” when “some of the new districts [drawn by the legislature] were mere continuations of the old, gerrymandered districts”).²

² *See also United States v. City of West Monroe*, No. 21-cv-00988 (W.D. La. Apr. 15, 2021), ECF No. 5, at 7 (“This Court shall retain jurisdiction over this matter to enforce the provisions of this Decree and for such further relief as may be appropriate.”) (for nine years); *United States v. Chamberlain Sch. Dist.*, No. 20-cv-04084 (D.S.D. June 18, 2020), ECF No. 4, at 8 (“This Court shall retain jurisdiction over this matter to enforce the provisions of this Decree and for such further relief as may be appropriate.”) (for three election cycles over three years); *United States v. City*

of *Eastpointe*, No. 17-cv-10079 (E.D. Mich. June 26, 2019), ECF No. 64, at 6 (“This Court shall retain jurisdiction over this matter to enforce the provisions of the Decree and for such further relief as may be appropriate.”) (for four years); *United States v. Town of Lake Park*, No. 09-cv-80507 (S.D. Fla. Oct. 26, 2009), ECF No. 39, at 5 (“This Court shall retain jurisdiction over this matter to enforce the provisions of the Decree and for such further relief as may be appropriate under the Voting Rights Act and the United States Constitution.”); *United States v. Salem County*, No. 08-cv-03726 (D.N.J. July 29, 2008), ECF No. 2, at 9 (“The Court shall retain jurisdiction of this case to enter further relief or such other orders as may be necessary for the effectuation of the terms of this agreement and to ensure compliance with Sections 2, 4(e) and 208 of the Voting Rights Act.”) (for nearly three years); *United States v. Sch. Bd. of Osceola Cnty.*, No. 08-cv-00582 (M.D. Fla. Apr. 23, 2008), ECF No. 6, at 6 (“This Court shall retain jurisdiction through the 2010 elections to enforce the provisions of the Decree and for such further relief as may be appropriate.”) (for two years); *United States v. Georgetown Cnty. Sch. Dist.*, No. 08-cv-00889 (D.S.C. Mar. 21, 2008), ECF No. 5, at 6 (“This Court shall retain jurisdiction over this matter to enforce the provisions of the Decree and for such further relief as may be appropriate. If the local legislative delegation fails to enact local legislation embodying a districting plan of the kind required by this Decree, this Court shall retain jurisdiction and order into effect a method of election and districting plan that satisfies the terms of this Decree and the legal standards in existence at that time, including those standards under the Voting Rights Act and the United States Constitution.”) (for two years); *United States v. City of Philadelphia*, No. 06-cv-04592 (E.D. Pa. June 1, 2007), ECF No. 37, at 1 (“It is further ordered that this Court shall retain jurisdiction over this matter until July 1, 2009, and shall have the authority to enforce the settlement agreement among the parties.” (emphasis omitted)) (for two years); *United States v. Village of Port Chester*, No. 06-cv-15173 (S.D.N.Y. Dec. 22, 2009), ECF No. 119, at 6 (“The Court shall retain jurisdiction through three election cycles . . . to enter further relief or such other orders as may be necessary to effectuate the terms of this Decree and to ensure compliance with Section 2 of the Voting Rights Act.”) (for nearly seven years, covering three election cycles); *United States v. Long County*, No. 06-cv-0040 (S.D. Ga. Feb. 10, 2006), ECF No.

Second, our retention of jurisdiction will ensure that we can enter further orders as may become necessary to enforce the relief that we awarded in May 2025 as well as the relief we award today. We expect that such further orders will be unnecessary. For the time being, and subject to their appellate rights, (1) the Secretary has agreed to be bound by a mandatory injunction until Alabama enacts a 2030-cycle map, and (2) the Legislature has repeatedly represented to this Court that it will not redraw Alabama’s congressional map before the 2030 census. But if future Secretaries or Legislatures do not adhere to these representations and agreements, retention of jurisdiction will ensure our ability to promptly address any change in their posture.

Third, as a practical matter, our retention of jurisdiction largely obviates any need for us to consider invoking Section 3(c) of the Voting Rights Act and bailing Alabama back into federal preclearance. So long as the Legislature does not pass any legislation that would violate the injunctive relief we have entered, and the Secretary abides by our injunctions, we can discern no compelling reason to tread into such intrusive waters. As for the *Milligan* Plaintiffs’ concern about Alabama’s 2032 congressional elections, we see no need to prematurely inject the federal government into an election that postdates the Secretary’s and Legislature’s concessions by seven years. And we will not, in an unrestrained attempt to resolve any hypothetical issue that may arise far down

6, at 5 (“The Court shall retain jurisdiction of this case to enter further relief or such other orders as may be necessary for the effectuation of the terms of this agreement and to ensure compliance with Section 2 of the Voting Rights Act.”) (for nearly three years).

the road, assign to our Court the exceedingly intrusive task of supervising Alabama's congressional elections for the next fifteen years. This litigation was filed in November 2021, and neither the rules of equity nor federal law supplies a basis for us to keep the issue before this Court for two decades.

We have no doubt that the remedial rulings we have entered fully redress the constitutional and statutory violations we have found. We do no more than enter a remedy designed to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. Accordingly, we decline at this time and on these facts to bail Alabama back into federal preclearance.

III. CONCLUSION

For the foregoing reasons, the *Milligan* Plaintiffs' application for bail-in relief under Section 3(c) of the Voting Rights Act is DENIED WITHOUT PREJUDICE, and the Court RETAINS JURISDICTION over this case until the day that Alabama enacts a new congressional districting plan based on 2030 census data.

A final judgment will enter accordingly.

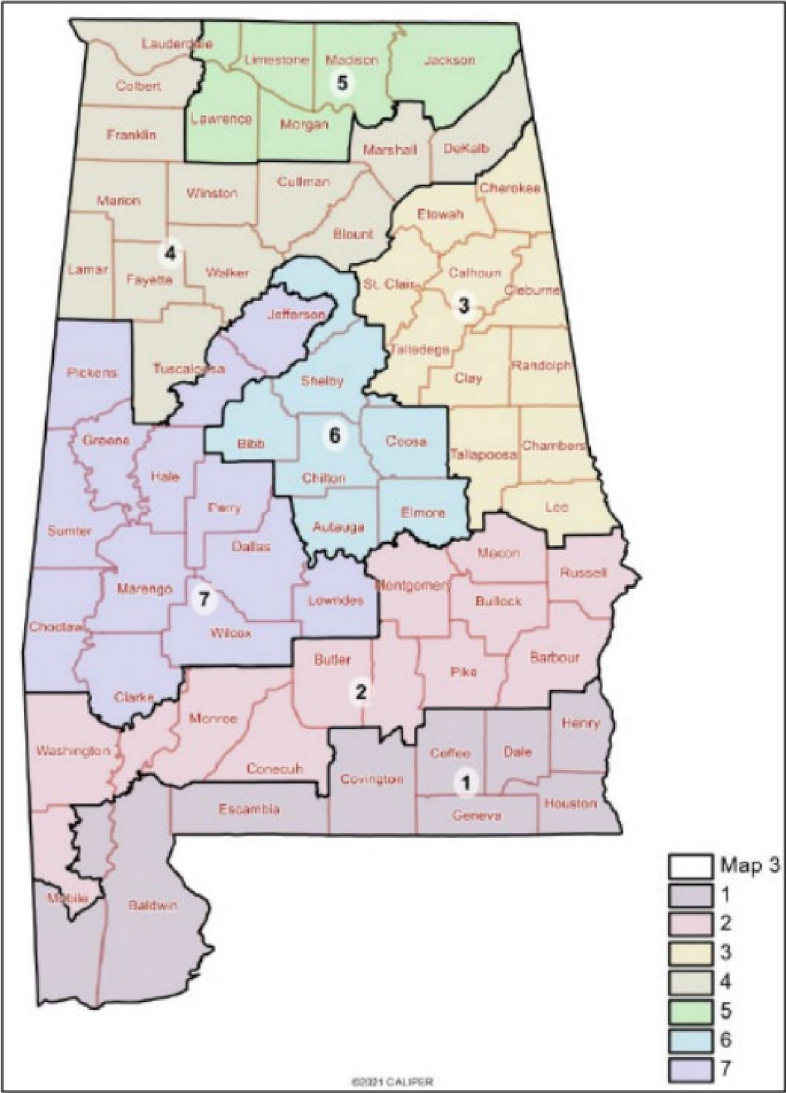
DONE and ORDERED this 7th day of August, 2025.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES CIRCUIT JUDGE

/s/ Anna M. Manasco
ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE

/s/ Terry F. Moorer
TERRY F. MOORER
UNITED STATES DISTRICT JUDGE

Remedial Plan 3



App. 1038

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

[Filed: Aug. 14, 2025]

Case No. 2:21-cv-01291-AMM

BOBBY SINGLETON, *et al.*,
Plaintiffs,

v.

WES ALLEN, in his official capacity as Alabama
Secretary of State, *et al.*,
Defendants.

THREE-JUDGE COURT
NOTICE OF APPEAL

NOTICE OF APPEAL OF
INJUNCTION AND FINAL JUDGMENT

Notice is hereby given that Defendants Secretary of State Wes Allen, Senator Steve Livingston, and Representative Chris Pringle hereby appeal to the Supreme Court of the United States from this Court's August 7, 2025 Injunction and Final Judgment. *See Singleton* Doc. 338. This appeal is taken under 28 U.S.C. § 1253.

App. 1039

Respectfully submitted,

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App. 1040

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App. 1041

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification to counsel of record. In addition, I hereby certify that on this date, August 14, 2025, in accordance with Supreme Court Rules 18 and 29, I also served Defendants' Notice of Appeal on Plaintiffs' counsel by United States mail, first-class postage prepaid, addressed as follows:

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s/ Edmund G. LaCour Jr.

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App. 1042

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

[Filed: Aug. 14, 2025]

Case No. 2:21-cv-01530-AMM

EVAN MILLIGAN, *et al.*,
Plaintiffs,

v.

WES ALLEN, in his official capacity as Alabama
Secretary of State, *et al.*,
Defendants.

THREE-JUDGE COURT
NOTICE OF APPEAL

NOTICE OF APPEAL OF
INJUNCTION AND FINAL JUDGMENT

Notice is hereby given that Defendants Secretary of State Wes Allen, Senator Steve Livingston, and Representative Chris Pringle hereby appeal to the Supreme Court of the United States from this Court's August 7, 2025 Injunction and Final Judgment. *See Milligan* Doc. 510. This appeal is taken under 28 U.S.C. § 1253.

App. 1043

Respectfully submitted,

Steve Marshall
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s/ Edmund G. LaCour Jr.

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App. 1044

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Representative Pringle*

App. 1045

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification to counsel of record. In addition, I hereby certify that on this date, August 14, 2025, in accordance with Supreme Court Rules 18 and 29, I also served Defendants' Notice of Appeal on Plaintiffs' counsel by United States mail, first-class postage prepaid, addressed as follows:

Deuel Ross
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND INC
700 14th Street NW
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Washington, DC 20005
(646) 630-5353

s/ Edmund G. LaCour Jr.

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