No. ________

In The
Supreme Court of the United States

KELVIN BUCK, et al.,

Appellants,

v.

MICHAEL WATSON, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Was the modification of the permanent injunction that required the State of Mississippi to produce a constitutional congressional redistricting plan that had been precleared pursuant to §5 of the Voting Rights Act of 1965 suitably tailored to changed circumstances?

2. Did the order issued by the three-judge District Court vacating the permanent injunction that required the State of Mississippi to produce a constitutional congressional redistricting plan that had been precleared pursuant to §5 of the Voting Rights Act of 1965 create or perpetuate a constitutional violation?

LIST OF ALL PARTIES TO THE PROCEEDING

The following were parties to the proceeding in the court below:

Plaintiffs in Civil Action No. 3:01-cv-855: John Robert Smith, Shirley Hall, and Gene Walker;

Defendants in Civil Action No. 3:01-cv-855: Michael Watson, Secretary of State of Mississippi; Lynn Fitch, Attorney General for the State of Mississippi; Tate Reeves, Governor of the State of Mississippi; Mississippi Republican Executive Committee; and Mississippi Democratic Executive Committee;

Intervenors in Civil Action No. 3:01-cv-855: Beatrice Branch, Rims Barber, L. C. Dorsey, David Rule, James Woodward, Joseph P. Hudson, and Robert Norvel;

Plaintiffs in consolidated case, Civil Action No. 3:11-cv-717: Kelvin Buck, Thomas Plunkett, Jeanette Self, Christopher Taylor, James Crowell, Clarence Magee, and Hollis Watkins, on behalf of themselves and all others similarly situated;

Defendants in consolidated case, Civil Action No. 3:11-cv-717: Tate Reeves, in his official capacity as Governor of the State of Mississippi, Lynn Fitch, in her official capacity as Attorney General of the State of Mississippi, and Michael Watson, in his official capacity as Secretary of State of the State of Mississippi, as members of the State Board of Election Commissioners;

LIST OF ALL PARTIES TO THE PROCEEDING
– Continued

the Mississippi Republican Party Executive Committee; the Mississippi Democratic Party Executive Committee; and Elijah Williams, in his official capacity as Chairman of the Tunica County, Mississippi Board of Election Commissioners, on behalf of himself and all others similarly situated

RELATED CASES

Smith, et al. v. Hosemann, et al., No. 3:01-cv-855-HTW-DCB-EGJ, consolidated with *Buck, et al. v. Barbour, et al.*, No. 3:11-cv-717-HTW-LRA, United States District Court for the Southern District of Mississippi. Judgment entered May 23, 2022.

Smith, et al. v. Hosemann, et al., No. 3:01-cv-855-HTW-DCB-EGJ, consolidated with *Buck, et al. v. Barbour, et al.*, No. 3:11-cv-717-HTW-LRA, United States District Court for the Southern District of Mississippi. Judgment entered July 25, 2022.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF ALL PARTIES TO THE PROCEEDING	ii
RELATED CASES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
CITATIONS OF OPINIONS AND ORDERS BELOW	1
THE BASIS FOR JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	9
1. Modification of the permanent injunction issued by the three-judge District Court that required the State of Mississippi to produce a constitutional congressional redistricting plan that had been precleared pursuant to §5 of the Voting Rights Act of 1965 was not suitably tailored to changed circumstances	10
2. The order issued by the three-judge District Court vacating the permanent injunction that required the State of Mississippi to produce a constitutional congressional redistricting plan that had been precleared pursuant to §5 of the Voting Rights Act of 1965 created or perpetuated a constitutional violation	14
CONCLUSION	16

TABLE OF CONTENTS – Continued

Page

APPENDIX

Notice of Appeal filed September 22, 2022 .... App. 1

Memorandum Opinion and Order issued by the United States District Court for the Southern District of Mississippi on May 23, 2022 .... App. 5

Memorandum Opinion and Order issued by the United States District Court for the Southern District of Mississippi on July 25, 2022 .... App. 49

Article I, §2, U.S. Constitution .... App. 62

Fourteenth Amendment, Equal Protection Clause, U.S. Constitution .... App. 62

Fifteenth Amendment, Equal Protection Clause, U.S. Constitution .... App. 62

28 U.S.C. §1253 .... App. 63

28 U.S.C. §1331 .... App. 63

28 U.S.C. §2101(b).. App. 63

28 U.S.C. §2284 .... App. 64

52 U.S.C. §10304 .... App. 65

U.S. Sup. Ct. R. 18.. App. 68

Fed. R. Civ. P. 60(b)(5) .... App. 74

2011 Court-Drawn Map .... App. 76

Congressional Map (adopted by H.B. 384) .... App. 77

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 11

Alabama Legislative Black Caucus v. Alabama, 575 U.S. 254 (2015) 12, 14, 15

Cooper v. Harris, 581 U.S. 285 (2017) 12, 14, 15

Jordan v. Winter, 541 F. Supp. 1135 (N.D. Miss. 1982), *vacated, sub nom. Brooks v. Winter*, 461 U.S. 921 (1983), *on remand*, 604 F. Supp. 807 (*per curiam*), *aff'd, sub nom. Mississippi Republican Executive Committee v. Brooks*, 569 U.S. 1002 (1984) 3

Miller v. Johnson, 515 U.S. 900 (1995) 12, 14, 15

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) .... *passim*

Shaw v. Hunt, 517 U.S. 899 (1996) 12, 14, 15

Shelby County v. Holder, 570 U.S. 529 (2013) ... 8, 10, 11, 13

Smith v. Clark, 189 F. Supp. 512 (S.D. Miss. 2002) 3

Smith v. Hosemann, 852 F. Supp. 2d 757 (S.D. Miss. 2011) 4, 5, 6, 12

Thornburg v. Gingles, 478 U.S. 30 (1986) 15

Walker v. Birmingham, 388 U.S. 307 (1967) 13

Wisconsin Legislature v. Wisconsin Elections Commission, 595 U.S. ___ (2022) 15

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Article I, §2, U.S. Constitution 2

Fourteenth Amendment, Equal Protection Clause, U.S. Constitution 2, 15

Fifteenth Amendment, Equal Protection Clause, U.S. Constitution 2, 15

28 U.S.C. §1253 1

28 U.S.C. §1331 2

28 U.S.C. §2101 1

28 U.S.C. §2284 ....1, 2

52 U.S.C. §10301 ....*passim*

52 U.S.C. §10303(b)..8, 13

52 U.S.C. §10304 ....*passim*

U.S. Sup. Ct. R. 18...1

Fed. R. Civ. P. 60(b)(5)..*passim*

CITATIONS OF OPINIONS AND ORDERS BELOW

The Memorandum Opinion and Order entered by the three-judge District Court for the Southern District of Mississippi on May 23, 2022 is cited in the following official and unofficial reports: 2022 WL 2168960 and 2022 U.S. Dist. LEXIS 108874. The Memorandum Opinion and Order is set out in full at App. 5-48.

The Memorandum Opinion and Order entered by the three-judge District Court for the Southern District of Mississippi on July 25, 2022 is not cited in any official or unofficial report. The Memorandum Opinion and Order is set out in full at App. 49-61.

THE BASIS FOR JURISDICTION

The basis for jurisdiction in this Court is 28 U.S.C. §§1253, 2101(b), and 2284 and U.S. Sup. Ct. R. 18. This is a direct appeal from the (final) Memorandum Opinion and Order entered by a three-judge District Court in the United States District Court for the Southern District of Mississippi on July 25, 2022 denying appellants' motion for rehearing and the Memorandum Opinion and Order entered by the three-judge District Court on May 23, 2022 granting the appellees' Rule 60(b)(5) motion to vacate, in its entirety, the permanent injunction issued by the District Court on December 30, 2011 requiring the State of Mississippi to produce a constitutional congressional redistricting plan that had been precleared

pursuant to §5 of the Voting Rights Act of 1965. The basis for jurisdiction in the United States District Court for the Southern District of Mississippi was 28 U.S.C. §§1331 and 2284.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Fifteenth Amendment to the United States Constitution, Article I, §2 of the United States Constitution, §5 of the Voting Rights Act of 1965, and Federal Rule of Civil Procedure 60(b)(5). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Fifteenth Amendment to the United States Constitution, Article I, §2 of the United States Constitution, Section 5 of the Voting Rights Act of 1965, and Federal Rule of Civil Procedure 60(b)(5) are set out in App. 62-75.

STATEMENT OF THE CASE

This case is about a three-judge District Court's abuse of its equitable powers by vacating an injunction, in its entirety, and allowing the State of Mississippi to implement a racially gerrymandered congressional redistricting plan.

The case stems from the state's redistricting efforts in the 1980's when Mississippi had five congressional districts. Those districts resulted in discrimination against black voters. Black voters successfully challenged the districts, and a three-judge District Court remedied the discrimination by creating a majority black congressional district – the Second Congressional District ("CD2"). See *Jordan v. Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (three-judge court) (*per curiam*), *vacated, sub nom. Brooks v. Winter*, 461 U.S. 921 (1983), *on remand*, 604 F. Supp. 807 (*per curiam*), *aff'd, sub nom. Mississippi Republican Executive Committee v. Brooks*, 569 U.S. 1002 (1984).

Mississippi lost a congressional seat after the 2000 decennial census. In 2001, John Walker Smith, Shirley Hall, and Gene Walker sued state officials and political parties responsible for conducting elections seeking a remedy for the four malapportioned congressional seats.[1] A three-judge District Court drew four single-member congressional districts. The court-drawn plan maintained one black majority congressional district – CD2. The district was drawn to comply with §2 of the Voting Rights Act of 1965, as amended, 52 U.S.C. §10301 ("§2"). See *Smith v. Clark*, 189 F. Supp. 512 (S.D. Miss. 2002) (three-judge court).

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[1] The officials and political parties responsible for conducting congressional elections include the Secretary of State, the Governor, the Attorney General, the Mississippi Republican Party Executive Committee ("MREC"), and the Mississippi Democratic Party Executive Committee ("MDEC").

The 2002 court-drawn plan remained in effect until after the 2010 decennial census. The 2010 census revealed that the 2002 plan had become malapportioned. In 2011, the MREC filed a Rule 60(b)(5) motion requesting the three-judge District Court to amend its 2002 injunction by curing the malapportionment and allowing congressional elections to be conducted as scheduled. The appellants filed suit on November 12, 2011 seeking injunctive relief that required a properly apportioned congressional plan that did not discriminate against black voters. The three-judge District Court consolidated appellants' case with the 2001 case filed by the "*Smith*" plaintiffs.

On December 30, 2011, the three-judge District Court entered a permanent injunction. The court held that: (1) it had jurisdiction to amend its February 26, 2002 injunction; (2) the 2002 court-drawn congressional districting plan had become unconstitutionally malapportioned; and (3) the remedy for that malapportionment was the continued use of that plan, "with only such modifications as were necessary to equalize the population among the four districts." *Smith v. Hosemann*, 852 F. Supp. 2d 757, 764 (S.D. Miss. 2011) (three-judge court). The court then modified the 2002 redistricting plan and ordered its use in the 2012 and succeeding congressional elections. The court held that the court-drawn plan would be used "until such time as the State of Mississippi produces a constitutional congressional redistricting plan that is precleared in accordance with the procedures in Section 5 of the Voting Rights Act of 1965." *Smith v. Hosemann*, *supra*, at

767. The Court, as it did in 2002, retained "jurisdiction to implement, enforce, and amend [its] order as shall be necessary and just." *Smith v. Hosemann, supra*, at 767. The 2011 court-drawn plan remained in effect until 2022.[2]

The 2020 Decennial census revealed that the 2011 court-drawn plan had become malapportioned.

On November 19, 2021, the Mississippi Joint Congressional Redistricting and Legislative Reapportionment Committee ("the Joint Committee")[3] adopted criteria for congressional redistricting. The criteria included: (a) equal population among districts; (b) each district should be contiguous; (c) the congressional plan should comply with all applicable federal and state laws "including Section 2 of the Voting Rights Act of 1965, as amended"; and (d) neutral redistricting criteria used by the court in 2011. The neutral redistricting criteria used by the court in 2011 were: (a) compactness; (b) avoid splitting county and municipal boundaries; (c) preserving, as much as possible, historical and regional interests; (d) maintaining the major universities and military bases in separate districts; (e) placing growth areas in separate districts; (f) avoid pitting incumbents against each other; and (g) keeping the distance of travel within districts "approximately the same as they were under the Court's 2002 Plan."

[2] The 2011 court-drawn map is included in the Appendix at App. 76.

[3] The legislative committee responsible for congressional redistricting.

Smith v. Hosemann, *supra*, at 766-767. The Joint Committee then drafted a congressional redistricting plan that subordinated the neutral criteria to race. The Vice-Chair of the Joint Committee admitted that neutral criteria was subordinated to race in order to comply with §2 of the Voting Rights Act. The neutral criteria that was subordinated to the consideration of race included: (1) compactness; (2) avoid splitting county and municipal boundaries; (3) preserving, as much as possible, historical and regional interests; (4) placing growth areas in separate districts; and (5) keeping the distance of travel within districts approximately the same as it was in the 2002 plan. Instead of using neutral criteria as a predominant factor in drawing CD2, the Joint Committee used race as a predominant factor. United States District Judge Henry T. Wingate, in his dissenting opinion, noted the Joint Committee's predominant use of race in drawing CD2. Judge Wingate wrote:

> On January 24, 2022, Mississippi Governor Tate Reeves signed into law a new four-district congressional redistricting statute for the State of Mississippi, H.B. 384. The MREC contends that H.B. 384 satisfies this court's previous instruction for the State of Mississippi to produce a constitutional congressional redistricting plan. In drawing the new map, however, the Mississippi legislature packed thousands of Black Mississippians into District 2 ("CD 2"), already a majority Black district which historically had elected a

> Black-preferred candidate by generous margins.
>
> Relevant to this point, the Mississippi Vice-Chair of the Redistricting Committee defended the packed CD 2 on the Senate floor, admitting the Legislature's predominant racial motive. He explained, more specifically, that the State could have made CD2 more compact, but the 'numbers just didn't work' – because it would have 'decrease[d] [the district's Black Voting Age Population]' below the State's racial target of at least 61.36%. Apparently, the Mississippi Legislature reached this figure of 61.36% because the Redistricting Committee sought to keep the number 'as close as it was' to the Black Voting Age Population ("BVAP") assigned to CD 2 in this court's 2011 Plan.

App. 30-31.

The same day that Governor Tate Reeves signed H.B. 384 into law, the MREC filed its Rule 60(b)(5) motion requesting the three-judge District Court to vacate the 2011 injunction in its entirety. The injunction required the State of Mississippi to produce a constitutional congressional redistricting plan that had been precleared pursuant to §5 of the Voting Rights Act of 1965. The other appellees and Smith plaintiffs joined in the MREC's motion. They asserted that the 2011 injunction should be vacated because there had been a change in the facts and a change in the law. The change in facts was that the 2011 court-drawn plan was malapportioned and the State of Mississippi Legislature

had enacted a redistricting plan that complied with §2. The change in law was that preclearance was no longer required after the decision in *Shelby County v. Holder*, 570 U.S. 529 (2013).

Appellants filed their response opposing vacation of the 2011 injunction, in its entirety, and suggesting, instead, that the court amend the injunction, as it did in 2002, by making minor adjustments to cure the malapportionment and allowing the cured plan to be used for congressional elections until the State of Mississippi produced a constitutional plan. The MDEC joined in the appellants' response. The appellants argued that the appellees had not complied with the 2011 injunction because they had not produced: (1) a nondiscriminatory constitutional redistricting plan (2) that had been precleared pursuant to §5 of the Voting Rights Act of 1965, 52 U.S.C. § 10304. Furthermore, there had not been a change in the law concerning race not being a predominant factor in redistricting or the constitutionality of §5. Appellants acknowledged that this Court held that the Voting Rights Act's coverage formula[4] was unconstitutional. However, appellants argued that §5 had not been declared unconstitutional.

Appellants produced evidence showing that the Joint Committee subordinated traditional neutral criteria to the consideration of race in drawing CD2 that was codified in H.B. 384.

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[4] 52 U.S.C. §10303(b).

On May 23, 2022, the three-judge District Court filed its Memorandum Opinion and Order vacating, in its entirety, the court's December 30, 2011 injunction. App. 5-48. The court declined to address the constitutionality of H.B. 384 thereby allowing a racially gerrymandered congressional redistricting plan to go into effect.[5]

On June 8, 2022, appellants filed their motion to alter or amend the District Court's May 23, 2022 Memorandum Opinion and Order. On July 25, 2022, the three-judge District Court filed its Memorandum Opinion and Order denying appellants' motion to mend the May 23, 2022 Memorandum Opinion and Order. App. 49-61. Then, on September 22, 2022, appellants filed their Notice of Appeal. App. 1-4.

ARGUMENT

When analyzing a request to modify an injunction, the court "should determine whether the proposed modification is suitably tailored to the changed circumstances." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391 (1992). The appellees' Rule 60(b)(5) motion to vacate the District Court's 2011 injunction was not suitably tailored to changed circumstances. The 2011 injunction required the State of Mississippi to produce a constitutional congressional redistricting plan that had been precleared pursuant to §5 of the

[5] The racially gerrymandered redistricting map, H.B. 384, is included in the Appendix at App. 77.

Voting Rights Act. The State of Mississippi failed to produce a constitutional plan that had been pre-cleared. "Of course, a modification must not create or perpetuate a constitutional violation." *Id*. In this case, the District Court created or perpetuated a constitutional violation when it vacated its 2011 injunction because the court allowed a racially gerrymandered plan – H.B. 384 – to go into effect.

1. Modification of the permanent injunction issued by the three-judge District Court that required the State of Mississippi to produce a constitutional congressional redistricting plan that had been precleared pursuant to §5 of the Voting Rights Act of 1965 was not suitably tailored to changed circumstances.

The appellees sought vacation of the 2011 injunction in its entirety. They argued in support of their Rule 60(b)(5) motion that: (1) the 2011 court-drawn plan was malapportioned; (2) the State of Mississippi had produced a new plan that was not malapportioned and complied with §2; (3) the state plan was presumptively constitutional; and (4) preclearance was no longer required after this Court's decision in *Shelby County v. Holder*, *supra*.

Appellants agree that the 2011 court-drawn plan had become malapportioned. However, appellants disagree that H.B. 384 is constitutional and complies with §2 of the Voting Rights Act. In fact, H.B. 384 is an unconstitutional racial gerrymander. Although this

Court invalidated the preclearance coverage formula in *Shelby County v. Holder*, the Court did not invalidate §5. The appellees did not obtain preclearance of H.B. 384. The court's vacation of the injunction was not suitably tailored to the changed circumstances.

Appellants recognize that an injunction may be modified due to a change in either factual circumstances or the law. *Agostini v. Felton*, 521 U.S. 203, 215 (1997); *Rufo v. Inmates of Suffolk County Jail*, *supra*, at 384. However, the vacation of the 2011 injunction in its entirety is not suitably tailored to the change in factual circumstances of malapportionment. "Ordinarily, . . . , modification should not be granted where a party relies upon events that actually were anticipated" when the injunction was entered. *Rufo v. Inmates of Suffolk County Jail*, *supra*, at 385. The appellees anticipated that the 2011 court-drawn plan would become malapportioned by 2022. In 2011, appellees filed a Rule 60(b)(5) motion to modify the 2002 injunction because that plan had become malapportioned. Then, appellees sought only to make adjustment to congressional district lines to cure the malapportionment. They did not seek vacation of the 2002 injunction. They knew the 2002 plan had become malapportioned just like they knew the 2011 plan had become malapportioned by 2022. Surely, the appellees anticipated that the 2011 court-drawn plan would become malapportioned by 2022. Since the appellees anticipated that the 2011 congressional redistricting plan by 2022, the court should not have vacated its 2011 injunction. *Id*. Consequently, vacation of the 2011 injunction is not

suitably tailored to the changed factual circumstances of malapportionment. *Id*.

The 2011 injunction could have been modified simply by moving congressional district lines to cure the malapportionment until the State of Mississippi produced a constitutional redistricting plan that had been precleared pursuant to §5 of the Voting Rights Act. See *Smith v. Hosemann*, *supra*.

Vacation of the 2011 injunction was not suitably tailored to a change in the law because there has not been a change in the law. The law in 2011 provided that heightened scrutiny is required when race is a motivating factor in placing "a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). A legislative body could use compliance with §2 of the Voting Rights Act as justification for using race to place a significant number of voters within or without a particular district. *Cooper v. Harris*, 581 U.S. 285, 291-292 (2017). However, the legislature must narrowly tailor its use of race to comply with §2. *Cooper v. Harris*, *supra*, at 301-302. A redistricting plan is not narrowly tailored to comply with §2 when there is an announced racial target, neutral redistricting criteria are subordinated to race as the predominant criteria, and more minority voters are placed in a district than necessary to allow them an opportunity to elect a representative of their choice. *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Cooper v. Harris*, *supra*. The law concerning how race is used in redistricting has not changed since 2011. Therefore,

there has not been a change in constitutional law concerning redistricting.

Additionally, there has not been a change in the law concerning §5 – only §4(b). Appellees argued that this Court invalidated the preclearance coverage formula in 2013 when the Court decided *Shelby County v. Holder*. Although the coverage formula was held unconstitutional, the Court did not invalidate §5. *Shelby County v. Holder*, *supra*, at 557 ("We issue no holding on §5 itself, only on the coverage formula."). The District Court's 2011 injunction required the State of Mississippi to produce a congressional redistricting plan that had been precleared pursuant to §5. A party subject to an injunction cannot simply ignore the injunction even if another federal court invalidates the statute on which the injunction is based. See *Walker v. Birmingham*, 388 U.S. 307, 314 (1967). The party must still comply with the injunction until relieved of compliance by the issuing court or appellate court. *Id*.

Thus, the vacation of the 2011 injunction was not suitably tailored for the changed circumstances.

2. The order issued by the three-judge District Court vacating the permanent injunction that required the State of Mississippi to produce a constitutional congressional redistricting plan that had been precleared pursuant to §5 of the Voting Rights Act of 1965 created or perpetuated a constitutional violation.

This Court held in *Rufo* that "a modification must not create or perpetuate a constitutional violation." *Rufo*, at 391. The District Court's vacation of its 2011 injunction created or perpetuated a constitutional violation. The constitutional violation is allowing the implementation of a racially gerrymandered redistricting plan. As argued above, appellees sought to implement H.B. 384 for the 2022 congressional elections. H.B. 384 had a racial target that was announced by the legislative drafters. H.B. 384 subordinated neutral criteria to race. And, H.B. 384 placed more black voters in CD2 than necessary to afford black voters an opportunity to elect a representative of their choice. These facts support appellants' argument that H.B. 384 was an unconstitutional racial gerrymander. See *Alabama Legislative Black Caucus v. Alabama*, *supra*; *Miller v. Johnson*, *supra*; *Shaw v. Hunt*, *supra*; *Cooper v. Harris*, *supra*.

Furthermore, the appellees did not have or produce a strong basis in evidence supporting their argument that H.B. 384 packed black voters in CD2 to comply with §2 of the Voting Rights Act. State officials must have a strong basis in evidence to justify the use

of race as a motivating factor in redistricting. *Wisconsin Legislature v. Wisconsin Elections Commission*, 595 U.S. ___ (2022); *Cooper v. Harris*, *supra*. Compliance with §2 is a compelling state interest justifying the use of race in redistricting but only if there is a strong basis in evidence. *Wisconsin Legislature v. Wisconsin Elections Commission*, *supra*; *Cooper v. Harris*, *supra*. In this case, the appellees did not offer any evidence of racially polarized voting, statistically significant white bloc voting, socio-economic factors that adversely affect the ability of blacks to participate in the political process and elect representatives of their choice, or racial appeals in elections. The appellees did not offer any evidence of the *Gingles*[6] preconditions or totality of the circumstances in support of their argument that H.B. 384 was drafted to comply with §2 of the Voting Rights Act. Without such proof, §2 does not support their argument. See *Wisconsin Legislature v. Wisconsin Elections Commission*, *supra*. Without such proof, H.B. 384 is an unconstitutional racial gerrymander. See *Alabama Legislative Black Caucus v. Alabama*, *supra*; *Miller v. Johnson*, *supra*; *Shaw v. Hunt*, *supra*; *Cooper v. Harris*, *supra*; *Wisconsin Legislature v. Wisconsin Elections Commission*, *supra*. "Of course, a modification must not create or perpetuate a constitutional violation." *Rufo*, at 391. H.B. 384 creates and perpetuates a Fourteenth Amendment Equal Protection and Fifteenth Amendment violation.

[6] *Thornburg v. Gingles*, 478 U.S. 30 (1986).

CONCLUSION

The Court should note probable jurisdiction, reverse the District Court, and remand the case to the District Court to modify its 2011 injunction consistent with this Court's ruling.

Dated November 21, 2022.

Respectfully submitted,

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