No. ___A___

In the Supreme Court of the United States

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

v.

EVAN MILLIGAN, ET AL.

Respondents.

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

EMERGENCY APPLICATION FOR STAY PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

After this Court's decision in *Allen v. Milligan*, 143 S. Ct. 1487 (2023), Alabama enacted a new congressional redistricting plan. These emergency applications arise from materially identical orders and opinions enjoining use that new congressional redistricting plan. The *Milligan* order and opinion is signed by the three-judge court assigned to that case, and the *Caster* order and opinion is signed by the single-judge court assigned to that case. These emergency applications are materially identical.

Applicant in *Allen v. Milligan* is Hon. Wes Allen, in his official capacity as Alabama Secretary of State. Secretary Allen is a defendant before the U.S. District Court for the Northern District of Alabama. Additional defendants are State Senator Steve Livingston and Representative Chris Pringle. Respondents are Evan Milligan, Shalela Dowdy, Letetia Jackson, Khadidah Stone, Greater Birmingham Ministries, and the Alabama State Conference of the NAACP. Respondents are plaintiffs below. Adia Winfrey was also a plaintiff, but she voluntarily dismissed her case.

Applicant in *Allen v. Caster* is Hon. Wes Allen, in his official capacity as Alabama Secretary of State. Secretary Allen is a defendant before the U.S. District Court for the Northern District of Alabama. Defendant-intervenors below are State Senator Steve Livingston and Representative Chris Pringle. Respondents are Marcus Caster, Lakeisha Chestnut, Bobby Lee DeBouse, Benjamin Jones, Rodney Allen Love, Manasseh Powell, Ronald Smith, and Wendell Thomas. Respondents are plaintiffs below.

The proceedings below are:

1. *Evan Milligan, et al. v. Wes Allen, in his official capacity as Alabama Secretary of State, et al.*, No. 2:21-cv-1530 (N.D. Ala.) (three-judge court): preliminary injunction entered September 5, 2023; stay pending appeal denied September 11, 2023.

2. *Marcus Caster, et al. v. Wes Allen, in his official capacity as Alabama Secretary of State, et al.*, No. 2:21-cv-1536 (N.D. Ala.): preliminary injunction entered September 5, 2023; stay pending appeal September 11, 2023.

3. *Marcus Caster, et al. v. Wes Allen, in his official capacity as Alabama Secretary of State, et al.*, No. 23-12923 (11th Cir.): motion for stay pending appeal filed on September 11, 2023.

Related cases are:

1. *Bobby Singleton, et al. v. Wes Allen, in his official capacity as Alabama Secretary of State, et al.*, No. 2:21-cv-1291 (N.D. Ala.) (three-judge court): ruling on preliminary injunction as to Equal Protection Clause claim deferred on September 5, 2023.

RULE 29.6 STATEMENT

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

Respectfully submitted,

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Dated: September 11, 2023

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

In 2021, Plaintiffs sued to preliminarily enjoin Alabama's congressional redistricting plan. They described their challenge in these terms: "At the heart of this case is Alabama's treatment of the Black Belt."[1] The Black Belt is a mostly rural region named for its fertile black soil; it is defined by its "'historical boundaries'…'in the central part of the state,'" not its "'demographic[s].'"[2] In Plaintiffs' view, the 2021 Plan impermissibly "split the Black Belt across four districts" and "Montgomery across two districts," "while maintaining in a single district the majority-White, 'French and Spanish'-ethnic population" in Alabama's Gulf Coast community of "Baldwin and Mobile Counties."[3] As they argued, §2 of the Voting Rights Act did not permit Alabama's "'inconsistent treatment'"[4] of these communities, *i.e.*, preserving the Gulf Coast while splintering the predominantly black community in the Black Belt.[5] The three-judge district court agreed that Plaintiffs were likely to prevail on that claim, and this Court affirmed. *See Singleton v. Merrill*, 582 F. Supp. 3d 924 (N.D. Ala. 2022).

Alabama answered with new legislation that unified the Black Belt. Following *Allen*, the Governor called a special session to enact new congressional districts. Core retention took a back seat to unifying the Black Belt, including Montgomery. Shown

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[1] Br. of *Milligan* Respondents 5, *Allen v. Milligan* (No. 21-1086) (filed July 11, 2022) ("*Milligan* Br."); *Allen v. Milligan*, 143 S. Ct. 1487, 1511 n.5 (2023) (op. of Roberts, C.J.) (quoting 2 *Caster* App. 601); *see also* Br. of *Caster* Respondents 15-16, *Allen v. Caster* (No. 21-1087) (filed July 11, 2022) ("*Caster* Br.") (describing 2021 Plan's adherence to district lines, dating back to 1970s plan that "splintered the Black Belt among Districts 1, 2, 3, and 7.").

[2] *Allen v. Milligan*, 143 S. Ct. 1487, 1511 n.5 (2023) (op. of Roberts, C.J.).

[3] *Milligan* Br. 12, 20-21.

[4] *Milligan* Br. 38-39 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1015 (1994)).

[5] *Caster* Br. 36; *see also id.* at 35 (challenging "double standard"); *Caster v. Allen*, No. 2:21-cv-1536, ECF 56 at 9 ("striking … how HB 1 cracks Alabama's Black population in the historic Black Belt").

below, the 2023 Plan places the Black Belt[6] counties into only two districts, the fewest number of districts possible without violating population equality requirements.[7] Montgomery County is made whole in one district. No Black Belt county is split between districts. And by departing from existing district lines, the 2023 Plan achieved all that while also keeping communities of interest in Alabama's Gulf Coast and Wiregrass regions together to the fullest extent possible, minimizing county splits statewide, and making districts across the map more compact. *See infra*, p. 29-30 (chart comparing plans). The "inconsistent treatment" of the old plan is gone.[8]

Even so, the District Court enjoined the 2023 Plan. Why? Because it did not contain a second majority-black district. App.4-6. A stay pending appeal of that extraordinary order is warranted.[9] Without a stay, the State will have no meaningful opportunity to appeal before the 2023 Plan is replaced by a court-drawn map that no State could constitutionally enact. The Secretary respectfully requests a stay **by October 1, 2023**, at which point state officials and candidates must know whether the 2023 Plan's districts will govern so election preparations can begin. *See* App.17. That

[6] The Black Belt's "core counties" are Barbour, Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery, Perry, Pickens, Pike, Russell, Sumter, and Wilcox. *See* App.20 n.7. Five additional counties are sometimes included in the Black Belt: Clarke, Conecuh, Escambia, Monroe, and Washington. *Id.*; *see also* App.95. In the 2023 Plan, only Escambia County is in District 1, as necessary for population equality and contiguity requirements. *See* App.20.

[7] *Milligan*, 2:21-cv-1530, ECF 220-12 at 12-13.

[8] *Milligan* Br. 38-39 (quoting *De Grandy*, 512 U.S. at 1015).

[9] To further expedite these proceedings, Secretary Allen asks that this Court also construe the *Milligan* application as a jurisdictional statement and note probable jurisdiction. *See, e.g.*, *Merrill v. Milligan*, 142 S. Ct. 879 (2022); *Abbott v. Perez*, 138 S. Ct. 2305 (2018); *Perry v. Perez*, 565 U.S. 388 (2012). Similarly, Secretary Allen asks that this Court construe the *Caster* application as a petition for writ of certiorari before judgment, grant the petition, and consider this case alongside the State's direct appeal in *Milligan*. *See Merrill v. Caster*, 142 S. Ct. 879 (2022); *Trump v. Mazars USA, LLP*, 140 S. Ct. 660 (2019).

said, a stay could issue **as late as October 3, 2023**, when the court has tentatively scheduled a remedial hearing to select among court-drawn alternatives. *See* App.230.

The District Court's injunction is premised on this fundamental error: the *only* way for Alabama to satisfy §2 in a new redistricting plan was to create two majority-black districts.[10] It was not good enough to unify the Black Belt in the 2023 Plan. App.165. It was not good enough to jettison past district lines, eliminate county splits in the Black Belt, minimize county splits elsewhere, improve compactness, and keep together multiple communities of interest. App.147-77. Just the opposite—it would only have been good enough if Alabama drew more sprawling districts, splintered other communities of interest, and spliced counties to attain what the court believed was the "required remedy" of a second majority-black district. App.7. The court refused to "defer to the legislative findings" in the *2023 Plan* because of its prior liability finding about the repealed *2021 Plan*, while admitting that it would have deferred absent that "circular reasoning." App.161-62. Because "the 2023 Plan includes only one majority-Black district," instead of two, it is now enjoined. App.4-6.

This Court in *Allen* never said the measure of a congressional redistricting plan's compliance with §2 is as simple as counting the number of majority-minority

[10] *See, e.g.*, App.5-6; App.139 ("District 2 is not a Black-opportunity district. Accordingly, the 2023 Plan perpetuates, rather than completely remedies, the likely Section Two violation[.]"); App.149 (erroneously stating that "[t]he State has essentially conceded that it failed to do so"—that is, "satisfy Section Two"—by not enacting a second majority-Black district); App.149 ("The State cannot avoid the mandate of Section Two by improving its maps on metrics other than compliance with Section Two." (emphasis omitted)); App.162 ("[W]e 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."); App.184 (faulting State's argument that "the Legislature could remedy the vote dilution [the Court] found [in the 2021 Plan] without providing the remedy [the District Court] said was required: an additional opportunity district").

districts. Instead, *Allen* focused on the required "'intensely local appraisal'" of the 2021 Plan and pinpointed this particular discriminatory effect: the 2021 Plan districted the Gulf Coast counties together while splitting the Black Belt counties, which likely had "a disparate effect on account of race." 143 S. Ct. at 1503-05, 1507 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986)). *Allen* instructed that the State could not rely on "core retention" to justify that discriminatory effect. *Id.* at 1505. In response, the State replaced the 2021 Plan with the 2023 Plan, removing the 2021 Plan's discriminatory effects by departing from existing lines and unifying the Black Belt. There is no further requirement that §2 plaintiffs "be placed in a majority-minority district" in the 2023 Plan. *Shaw v. Hunt*, 517 U.S. 899, 917 n.9 (1996) (*Shaw II*). After all, "States retain broad discretion in drawing districts to comply with the mandate of § 2." *Id.* And §2 confers no license to split communities or counties along race-based lines to attain an additional majority-minority district. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 633-36, 647 (1993) (*Shaw I*); *Miller v. Johnson*, 515 U.S. 900, 908-11, 922-25 (1995). As *Allen* already said, the new 2023 Plan could not "achiev[e] proportionality" while "flouting traditional criteria," any more than North Carolina could in *Shaw* or Georgia could in *Miller*. *See Allen*, 143 S. Ct. at 1508-09.

This is no longer a case where there is "a split community of interest in both" the State's plan and Plaintiffs' alternatives. *Allen*, 143 S. Ct. at 1505; *see also id.* at 1518 n.2 (Kavanaugh, J., concurring). The 2023 Plan unifies the Black Belt better than *every* one of Plaintiffs' plans, which split the Black Belt counties into three or more districts. The question now is a different one: whether a State must sacrifice

traditional districting criteria to join voters from different communities, based on their race, to hit a 50-percent racial target, "'or something quite close to it.'" App.3.

The answer should be a resounding no. *See Allen*, 143 S. Ct. at 1509-10 & n.4; *De Grandy*, 512 U.S. at 1016 (rejecting "reading the first *Gingles* condition in effect to define dilution as a failure to maximize"). This Court has never told a State that it *must* splinter communities, split counties, and sacrifice compactness to create a majority-minority district. *But see* App.166 (explaining "there remains a need to split the Gulf Coast" to create a majority-minority district). This Court has only ever told States that doing so violates the Equal Protection Clause.[11] A stay is warranted before voters are sorted into racially gerrymandered districts that are "'by their very nature odious.'" *Wis. Legislature*, 142 S. Ct. at 1248. "Eliminating racial discrimination means eliminating all of it." *SFFA, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141, 2161 (2023).

OPINIONS BELOW

Secretary Allen seeks a stay pending appeal of the preliminary injunction of the 2023 Plan, entered on September 5, 2023. The District Court's opinion and order are reproduced at App.1-217 (*Milligan*) and App.232-453 (*Caster*). The opinions and

[11] *See, e.g.*, *Shaw I*, 509 U.S. at 635, 657 (majority-minority district added for §5 compliance could be challenged as unconstitutional "racial gerrymandering," which "even for remedial purposes, may balkanize us into competing racial factions"); *Miller v. Johnson*, 515 U.S. 900, 921-28 (1995) (majority-minority district added for §5 compliance was unconstitutional and would "demand the very racial stereotyping the Fourteenth Amendment forbids"); *Bush v. Vera*, 517 U.S. 952, 979-81 (1996) (plurality) (majority-minority districts drawn for §2 compliance were unconstitutional because they "exhibit a level of racial manipulation that exceeds what §2 could justify"); *Abbott v. Perez*, 138 S. Ct. 2305, 2334-35 (2018) (majority-minority district drawn for §2 compliance "to bring the Latino population back above 50%" was "an impermissible racial gerrymander"); *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1247-49 & n.1 (2022) (per curiam) (insufficient evidence that majority-minority district added for §2 compliance passed strict scrutiny).

orders are materially the same, except that the *Milligan* opinion and order is signed by the three-judge court and the *Caster* opinion and order is signed by the single-judge court. The District Court's denial of a stay pending appeal, entered on September 11, 2023, is reproduced at App.623-648. With respect to the *Caster* application, the Eleventh Circuit has not yet ruled on the pending motion to stay pending appeal. In light of the direct appeal in *Milligan* regarding materially the same order, Secretary Allen's Eleventh Circuit stay motion proposes that the Eleventh Circuit hold the *Caster* appeal, including the stay motion, in abeyance to allow this Court to review *Milligan* and *Caster* simultaneously as it did in *Allen*.[12]

JURISDICTION

This Court has jurisdiction to resolve the *Milligan* application under 28 U.S.C. §1253 and §1651. *See Merrill v. Milligan*, 142 S. Ct. 879 (2022). The three-judge district court's order barring the State from using the 2023 Plan in forthcoming elections is appealed to this Court. 28 U.S.C. §1253; *see also Abbott v. Perez*, 138 S. Ct. 2305, 2319-24 (2018). The three-judge district court had jurisdiction because the *Milligan* Plaintiffs' claims arise from "an action" that challenged both "the constitutionality of" congressional districts and their compliance with the Voting Rights Act. 28 U.S.C. §2284(a); *see, e.g.*, *Growe v. Emison*, 507 U.S. 25 (1993); *League of United Latin American Cities (LULAC) v. Perry*, 548 U.S. 399 (2006). With respect to the *Caster* application, this Court has jurisdiction under 28 U.S.C. §1331 and §2101(f), and the authority to grant certiorari before judgment under §1254(1).

[12] When *Caster* was last appealed, the Eleventh Circuit held the appeal in abeyance within one day of the filing of the motion to stay. *See* Order of January 28, 2022, *Caster v. Merrill*, No. 22-10272.

BACKGROUND AND PROCEDURAL HISTORY

A. In 2021, three sets of Plaintiffs filed lawsuits challenging Alabama's 2021 congressional redistricting plan. *See Allen*, 143 S. Ct. at 1502. The *Milligan* and *Caster* Plaintiffs moved to preliminarily enjoin the use of the 2021 Plan because it likely violated §2. *Id.* From day one, their cases centered on the Black Belt.[13] As they put it, the disparate treatment of the Black Belt, compared to other communities, was "the heart" of their case.[14] The Black Belt is named for its "fertile soil" and is "defined by its 'historical boundaries'—namely, the group of 'rural counties plus Montgomery County in the central part of the state.'" *Allen*, 143 S. Ct. at 1505, 1511 n.5. And while "the Black Belt contains a high proportion of black voters," it is a community of interest because it is a "'*historical* feature'" of the State, "not a demographic one." *Id.* at 1511 n.5 (op. of Roberts, C.J.). The Black Belt had long been dispersed into three or four congressional districts, and the State defended the 2021 Plan on the ground that maintaining those longstanding district lines did not run afoul of §2. *See id.* at 1505.

In challenging the 2021 Plan, Plaintiffs introduced 11 illustrative plans to show that a "reasonably configured" majority-minority district could be drawn to better unify the Black Belt, even if it meant sacrificing another community along the Gulf Coast. Plaintiffs argued that "the Black Belt better fits the Legislature's definition of 'community of interest,' so splitting it into as few districts as possible should

[13] *Milligan* Br. 1; *id.* at 39 (Alabama's 'inconsistent treatment' of Black and White communities [wa]s 'significant evidence' of a § 2 violation."); *Milligan*, 2:21-cv-1530, ECF 94 at 15 (discussing State's choice "to preserve one set of communities of interest—most or all of which are majority white—at the expense of respecting majority-Black communities of interest like the Black Belt and Montgomery County"); *id.*, ECF 59 at 9; *id.*, ECF 84 at 17.

[14] *Milligan* Br. 5.

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." *Singleton*, 582 F. Supp. 3d. at 1012; *see also id.* at 1015 (finding this was a "legitimate reason to split Mobile and Baldwin Counties consistent with traditional redistricting criteria"). Plaintiffs said their plans "meet or beat" the State's on traditional districting principles.[15]

The District Court concluded that those illustrative plans, along with evidence on the other *Gingles* factors, likely established a §2 violation and preliminarily enjoined the State from using the 2021 Plan. *Singleton*, 582 F. Supp. at 936. This Court stayed the preliminary injunction. *Milligan*, 142 S. Ct. 879. This Court affirmed. *Allen*, 143 S. Ct. at 1517.

In *Allen*, this Court deployed the following ground rules to determine whether Plaintiffs' illustrative plans sufficed to show a likely §2 violation in the 2021 Plan. First, §2 required "'an intensely local appraisal'" of the challenged plan. *Id.* at 1503. Second, the plan must be compared to Plaintiffs' alternatives to vet whether the State inconsistently applied redistricting criteria; deviation would mean "a disparate effect on account of race" "is *possible*." *Id.* at 1507. Third, the "State's adherence to a previously used districting plan" (that is, prioritizing "core retention") would not "defeat a §2 claim." *Id.* at 1505. But fourth, "§2 never requires adoption of districts that violate traditional redistricting principles," and the Constitution does not allow "flouting traditional criteria" in search of "achieving proportionality." *Id.* at 1509-10 (cleaned up).

[15] Oral Argument Tr. 67 (*Milligan* counsel), 83 (*Caster* counsel), *Allen v. Milligan* (No. 21-1086); *Milligan*, 2:21-cv-1530, ECF 105-1 (PI Tr.) at 441-42 ("meet or beat the county split"); *Caster*, No. 2:21-cv-1536, ECF 65 at 5.

Applying those ground rules to the 2021 Plan, this Court concluded that Plaintiffs' plans were on par with the State's according to the traditional criteria. *See id.* at 1504-05; *see also id.* at 1518 n.2 (Kavanaugh, J., concurring) ("it is important that at least some of the plaintiffs' proposed alternative maps respect county lines at least as well as Alabama's redistricting plan"). On compactness, this Court affirmed the finding that Plaintiffs' maps "perform[ed] generally better on average" or were "roughly as compact" as the 2021 Plan. *Id.* at 1504. On political subdivisions, "some of plaintiffs' proposed maps split the same number of county lines as (or even fewer county lines than)" the 2021 Plan. *Id.* On communities of interest, Plaintiffs' maps were "reasonably configured because," while they split the Gulf, "they joined together a different community of interest" in the Black Belt, which 2021 Plan had split. *Id.* at 1505. Crucially, there would "be a split community of interest in both" the State's 2021 Plan and Plaintiffs' alternatives. *Id.*

Four Justices rejected Alabama's argument that race predominated in the *Caster* Plaintiffs' expert's illustrative plans, without addressing the *Milligan* expert's illustrative plans. *Id.* at 1511-12 (op. of Roberts, C.J.); *see id.* at 1529-30 (Thomas, J., dissenting). The opinion reasoned that the *Caster* plans were race-conscious but not race-predominant. *Id.* at 1511-12 (op. of Roberts, C.J.). The Court understood those illustrative plans as treating the Black Belt as "a '*historical* feature' of the State," to be "defined by its 'historical boundaries,'" "not a demographic one.'" *Id.* at 1511 n.5 *Allen* noted that the District Court "treated the Black Belt as a community of interest for the same reason"—that is, based on historical boundaries and not demographics.

Id. The majority did "not diminish or disregard" the concern "that § 2 may impermissibly elevate race in the allocation of political power within the States." *Id.* at 1517.

B. One week after *Allen*, the State informed the District Court that the "Legislature intend[ed] to enact a new congressional redistricting plan that w[ould] repeal and replace the 2021 Plan." App.18. On June 27, 2023, the Governor called a special session of the Legislature to that end. App.92. The Legislature considered testimony on communities of interest and took documentary evidence. App.74.[16] The resulting legislation identified the Black Belt, Gulf Coast, and Wiregrass as distinct communities of interest that should be kept together to the fullest extent possible. Ala. Code §17-14-70.1(4)(d). Going into the special session, it was undisputed that the Black Belt is a community of interest based on its historic boundaries. App.19 n.7; *see also Allen*, 143 S. Ct. at 1511 n.5. With respect to the Gulf Coast and Wiregrass regions, the legislative record and findings are summarized here.

Gulf Coast: The District Court acknowledged "new evidence" that "better substantiates [the State's] argument that the Gulf Coast is or could be a community of interest." App.164-65. And indeed, reams of evidence supported the Legislature's express finding that the Gulf Coast is a community of interest based on Mobile and Baldwin Counties' substantial economic interdependence and cooperation, unique economy, and unique culture. Ala. Code §17-14-70.1(4)(f).[17]

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[16] *See, e.g.*, *Milligan*, 2:21-cv-1530, ECF 220-1; ECF 266-1 through 266-23.

[17] In addition to the examples discussed here, other evidence established that the Gulf Coast has been united as far back as the colonial era, *Milligan*, 2:21-cv-1530, ECF 220-1 at 80:17-81:19, and the Legislature considered evidence about the funding needs of the University of South Alabama (which has campuses in both counties) and the Coast Guard Aviation Center in Mobile, *id.*, ECF 259-1 at 1:43:19-40; *id.* at 71:11-73:16.

For one example, the Legislature considered substantial evidence about how the Port of Mobile links together Mobile and Baldwin Counties.[18] The Port supported 312,896 jobs for fiscal year 2021, with large numbers of workers from both counties.[19] The Port's economic value to the State is an estimated at $85 billion.[20] Its success has spurred the growth of major industry across the bay in Baldwin County.[21] And that success is made possible by hundreds of millions of dollars in recent federal funding.[22]

For another example, the Legislature considered substantial evidence about economic development projects in the Gulf Coast, led by the South Alabama Regional Planning Commission's (SARPC).[23] SARPC was created by state law over 50 years ago to bind together Mobile, Baldwin, and Escambia Counties in recognition of their shared "community of interest and homogeneity; geographic features and natural boundaries; patterns of communication and transportation; patterns of urban development; total population and population density; similarity of social and economic problems." Ala. Code §11-85-51(b). Through SARPC, those counties, and 29 municipalities within them, work together with their congressional representative and the U.S. Economic Development Administration.[24] Right now, that work includes multi-billion-dollar plans to build a new bridge spanning Mobile Bay to further connect Mobile and Baldwin Counties.[25]

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[18] *Id.*, ECF 220-5 at 8 (Alabama Port Authority 2021 Economic Impact).
[19] *Id.* at 8, 23.
[20] *Id.* at 10.
[21] *Id.*, ECF 220-3 at 66.
[22] *Id.*, ECF 220-6 at 18 (Comprehensive Financial Report).
[23] *Id.*, ECF 220-3.
[24] *Id.* at 3.
[25] *Id.*, ECF 220-3 at 30.

And the Legislature had before it a statement by Representative Adline Clarke, a Democrat from Mobile: "I consider Mobile and Baldwin counties one political subdivision and would prefer that these two Gulf Coast counties remain in the same congressional district because government, business and industry in the two counties work well together—with our congressman—for the common good of the two counties."[26]

Wiregrass: The 2023 Plan defines the Wiregrass Counties of Barbour, Coffee, Covington, Crenshaw, Dale, Geneva, Henry, Houston, and Pike Counties. Ala. Code §17-14-70.1(4)(g)(1). "The Wiregrass region is characterized by rural geography, agriculture, and a major military base" and "is home to Troy University's flagship campus in Troy and its campus in Dothan." *Id.* §17-14-70.1(g)(2). Among other evidence, the former mayor of Dothan, who is currently a civilian aide to the Secretary of the Army, testified about the importance of keeping the region's small communities together.[27] He testified about the importance of having one congressional representative to represent the interests of the Fort Novosel and Maxwell military bases,[28] as well as the interests of Troy University and Dothan's medical school.[29] He also discussed the Southeast Alabama Gas District, a partnership between municipalities across the region.[30]

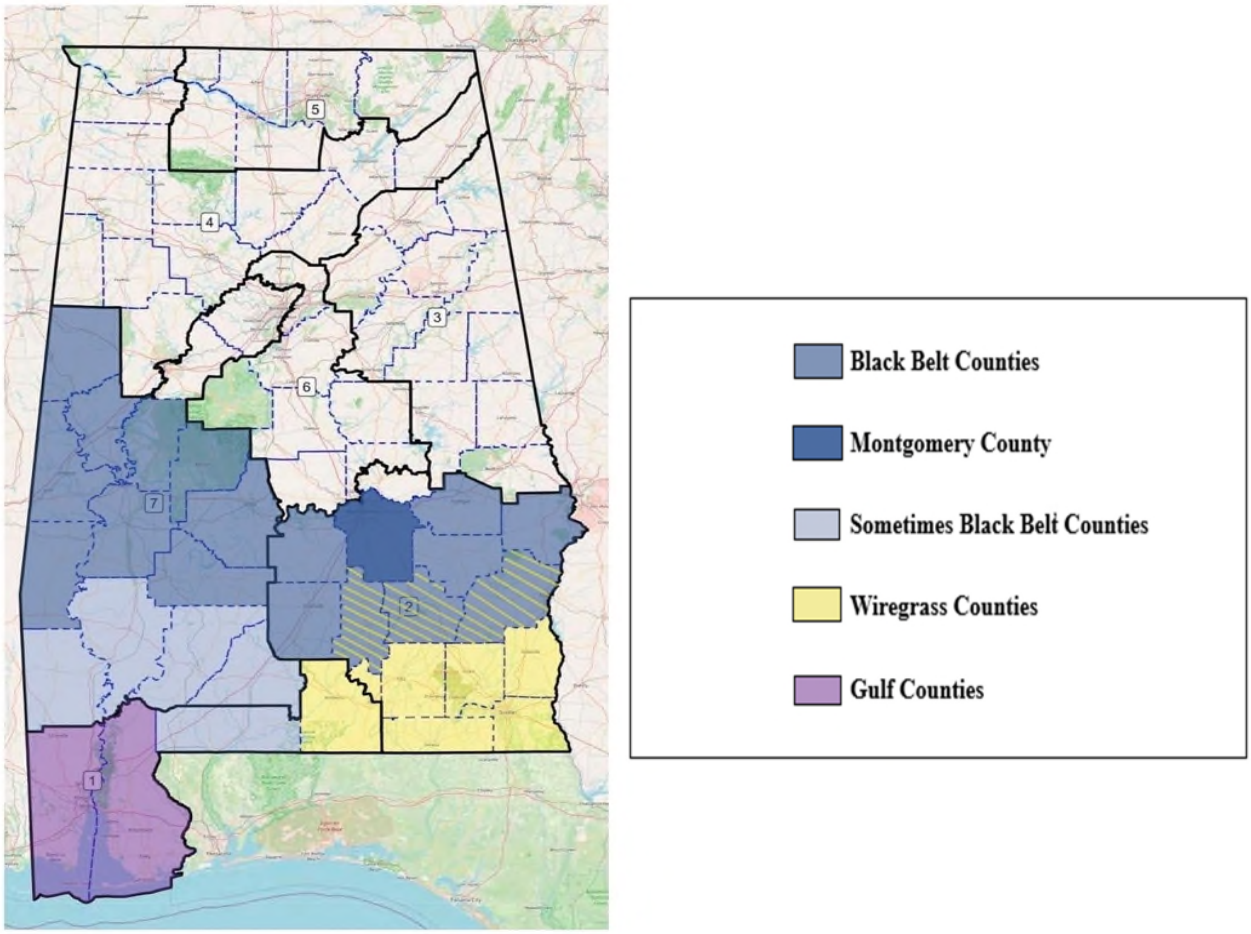
[26] *Id.*, ECF 220-4.
[27] *Id.*, ECF 220-2 at 24:14-25:7, 25:14-21.
[28] *Id.* at 26:5-25.
[29] *Id.*
[30] *Id.*, ECF 259-1 at 25:22-26:4.

With that new legislative record before it, the Legislature passed, and the Governor signed into law, new redistricting legislation that repealed the 2021 Plan and replaced it with the 2023 Plan. The 2023 Plan departed from existing district lines to unify the Black Belt, it split the minimum number of county lines necessary to equalize population among districts, and it made the map significantly more compact through changes to each district. Ala. Code § 17-14-70.1(3)-(4).[31]

Shown below, the 2023 Plan is a direct response to the Plaintiffs' challenge about Alabama's treatment of the Black Belt in past redistricting plans. Now, the core 18 Black Belt Counties are kept together in two districts. The western Black Belt Counties are kept together in District 7, while the eastern Black Belt Counties are kept together in District 2. Not a single Black Belt county is split between districts, and Montgomery County is kept whole in District 2. The Gulf Coast counties are kept together in District 1. And all but one of the nine Wiregrass counties are kept together in District 2. The ninth (Covington County) is necessarily split between Districts 1 and 2 to allow District 1 to meet equal population and contiguity requirements without having to split counties in the Black Belt.[32]

[31] *Id.*, ECF 220-12 at 9-12.

[32] Ala. Code § 17-14-70.1(g)(3); *Milligan*, 2:21-cv-1530, ECF 220-12 at 13. The 2023 Plan lines are in the record at *id.*, ECF 200-1 and App.20. The communities of interest by counties are in the record at App.19-20 n.7 and App.24 n.8 and are codified at Ala. Code § 17-14-70.1(e)-(g).



The demographics of the districts changed too. As a result of unifying Montgomery County in District 2, District 7's Black Voting Age Population (BVAP) in the 2023 Plan is 50.65% (compared to 55.26% in the 2021 Plan). District 2's BVAP increases to 39.93% (from 30.12% in the 2021 Plan). App.88. The demographics of the 2023 Plan resemble the *Milligan* Plaintiffs' suggestion that "[a] neutral plan" would have a "BVAP in District 7 … around 50%" and in District 2 "almost 40%," such "that Black voters are no longer artificially denied electoral influence in a second district."[33]

[33] *Milligan*, 2:21-cv-1530, ECF 69 at 36.

C. Plaintiffs submitted their own proposal to the Legislature. App.75 & n.16. Like the 2023 Plan, Plaintiffs' proposal would have unified the Black Belt into two districts.[34] But, unlike the 2023 Plan, Plaintiffs' proposal would have split counties as far west as Mobile County and as far east as Houston County, dividing those counties and the bottom half of the State between Districts 1 and 2 on race-based lines.[35] The Legislature rejected that proposal, and the *Milligan* and *Caster* Plaintiffs have "not offer[ed] the[ir] VRA Plan in this litigation as a remedial map for purposes of satisfying *Gingles* I or for any other purpose." App.75 n.16.

The *Singleton* Plaintiffs, with still-pending racial gerrymandering claims, testified that the *Milligan* and *Caster* Plaintiffs' proposed plan would likely violate the Equal Protection Clause for being *too* race-based.[36] In their words, they did not "believe it's going to be able to pass strict scrutiny…[b]ecause it splits counties along racial lines to achieve a racial target of 50 percent plus one."[37]

D. Before the special session, the State explained that if a new plan was enacted, the only question that would remain before the District Court is whether tha plan violated federal law anew.[38] The court agreed that if the State enacted new legislation, then "the parties would be able to present to [the Court] whatever evidence went to the question of the new map," distinguishing those proceedings from remedial proceedings for a court-drawn plan.[39] After Alabama enacted the 2023 Plan, Plaintiffs

[34] *Id.*, ECF 200-7 at 2.
[35] *Id.* at 4.
[36] *Id.*, ECF 220-1 at 72:14-23.
[37] *Id.*
[38] *Caster*, No. 2:21-cv-1536, ECF 180-1 at 44-45.
[39] *Id.* at 48.

returned to the District Court to object. The court then told the parties that "th[e] remedial hearing" regarding those objections "will be limited in scope" and "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 of the Voting Rights Act."[40]

At no point as part of their "objections" filed with the District Court did the *Milligan* or *Caster* Plaintiffs present any new illustrative plans. Relying on only the 11 plans presented in the 2021-2022 proceedings, the *Milligan* Plaintiffs argued that the 2023 Plan did not remedy the 2021 Plan's §2 violation "because it does not include an additional opportunity district." App.65. The *Caster* Plaintiffs argued "[t]he demographic statistics" of the 2023 Plan "speak for themselves."[41]

The State responded, explaining that the 2023 Plan was a direct response to Plaintiffs' arguments that the Black Belt must be unified into two congressional districts.[42] The State explained how the 2023 Plan accomplishes that goal without sacrificing the Gulf and Wiregrass communities of interest, county splits, or compactness.[43] The State submitted more than 1,000 pages of evidence from the legislative record, government records, as well as declarations and expert testimony regarding the communities of interest and the treatment of those communities and other neutral districting criteria in the 2023 Plan.[44] In the face of the State's response,

[40] *Milligan*, 2:21-cv-1530, ECF 203 at 3-4.
[41] *Caster*, No. 2:21-cv-1536, ECF 179 at 7.
[42] *Milligan*, 2:21-cv-1530, ECF 220.
[43] *Id.*
[44] All such evidence is available on the electronic docket in *Milligan* at ECF 220-1 through ECF 220-18, ECF 224-1, and ECF 266.

Plaintiffs argued that the remedial hearing should be limited to the question whether the 2023 Plan creates a second majority-black district.[45]

At the hearing, the Court asked the State how the 2023 Plan could comply with §2 without adding a majority- or nearly-majority black district. *See* App.530, 607-09, 617. The State was unequivocal that the 2023 Plan did not violate §2 as it "was equally open" and "did not have discriminatory effects on account of race." App.607-08. The State said the redrawn districts were "as close as you could get without violating the Constitution" and "without violating *Allen*." App.617.

E. The District Court enjoined the 2023 Plan because it did not create a second majority-black district "or something close to it." App.6. The court described that decision as resting on "two separate, independent, and alternative grounds." App.129. But both grounds boil down to the same thing said in two different ways: only a plan with two majority- or nearly majority-black districts would have been good enough. The court first held that the 2023 Plan fell short of that "necessary remedy," regardless of the 2023 Plan's changes (or its virtues under traditional criteria). App.6. At times, the court used the language "Black-opportunity district," which the court defined to mean a district with "a Black 'voting-age majority or something quite close to it.'" App.134-37.

With respect to its second holding, the District Court ended in the same place. The 2023 Plan violates §2 anew, it said, because it "perpetuate[d] the vote dilution" in the 2021 Plan by failing to add another majority-black district. App.161-62

[45] *Milligan*, 2:21-cv-1530, ECF 233 at 8, 12; *Caster*, No. 2:21-cv-1536, ECF 201 at 8, 12.

(refusing to defer to legislative findings for *Gingles* I purposes because "the 2023 Plan perpetuates vote dilution"); App.170 (rejecting arguments regarding communities of interest because the 2023 Plan "perpetuates vote dilution"); App.191. The court rejected the State's arguments that Plaintiffs' old illustrative plans were not "reasonably configured" as compared to the plan at issue—now the 2023 Plan. App.149-50; *see also* App.150-51, 169-70, 175. The court did not pinpoint discriminatory effects like those identified in *Allen*, resulting from the State's adherence to core retention and splintering of the Black Belt. *See Allen*, 143 S. Ct. at 1505. Instead, the court characterized the changes in the 2023 Plan, such as joining together the Black Belt, as evidence of the State's "improving its map on metrics **other than compliance with Section Two**"—meaning, in the court's view, creation of a second majority-black district. App.149) (emphasis in original). For instance, the court rejected the argument that the State's unification of the Black Belt remedied the "cracking problem found in the 2021 Plan" because "in the new District 2, Black voters remain an *ineffective minority of voters*." App.165-66 (emphasis added). The District Court held that Alabama *must* "split the Gulf Coast" and that there must be "tradeoffs" in the Wiregrass to combine black voters from the Gulf Coast with black voters in the Black Belt to attain two majority-black districts. App.166. Anything less "dilutes Black voting strength," *id.*, by failing to create a second majority-black district.

Secretary Allen moved for a stay pending appeal on the same day. On September 11, 2023, the District Court denied the stay. Remedial proceedings are underway. The court has directed a special master to propose three remedial plans and a report

and recommendation by no later than September 25, 2023. App.223-24. Each plan shall include "'either an additional majority-Black congressional district" "'or something quite close to it.'" App.224; App.135. Objections to the proposed plans are due three days later, and a hearing will be held October 3, 2023, if necessary. App.230. Secretary Allen will apprise this Court of any relevant remedial developments.

ARGUMENT

The District Court enjoined enforcement of Alabama's 2023 Plan because it did not racially gerrymander a second majority-black district into existence. That is reversible error because it is contrary to §2 and the Constitution. The 2023 Plan eliminated the features of the 2021 Plan that *Allen* said likely violated §2, *see Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 544 (2015), and thus the 2023 Plan should have been deemed "the governing law," *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (op. of White, J.). The State was entitled the "presumption of legislative good faith," and the 2023 Plan was entitled the same "'intensely local appraisal'" as any other legislation challenged under §2. *Abbott*, 138 S. Ct. at 2325; *Allen*, 143 S. Ct. at 1503; *see also United States v. Des Moines Nav. & Ry. Co.*, 142 U.S. 510, 544 (1892) ("It is conclusively presumed that a legislature acts with full knowledge, and in good faith."); *see, e.g.*, *Dillard v. Crenshaw Cnty.*, 831 F.2d 246, 249-50 (11th Cir. 1987) (rejecting that a court could merely "t[ake] the findings that made the original electoral system infirm and transcrib[e] them to the new electoral system"); *McGhee v. Granville Cnty.*, 860 F.2d 110, 115 (4th Cir. 1988) (similar).

That's not what happened here. Plaintiffs did not even take the first step of proving that the 2023 Plan violated §2. They presented no new "reasonably

configured" illustrative plans to show a meaningful "[d]eviation" between any such plan and the 2023 Plan. *Allen*, 143 S. Ct. at 1505, 1507. And the District Court said that was okay. The "dispositive" and "control[ling]" question, according to the court, was simply whether the State created a second majority-black district "'or something quite close to it'" in 2023. App.3, 5-6, 136. The 2023 law could be enjoined simply because the Legislature did not hit a racial target. App.6.

A stay pending appeal is warranted. There is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" or note probable jurisdiction; "(2) a fair prospect that a majority of the Court will vote to reverse the [order] below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). As in *Abbott*, the court below is poised to replace lawfully enacted redistricting legislation with a court-drawn plan. *See Abbott*, 138 S. Ct. at 2319. A stay is appropriate in those circumstances. *See id.*; *see also Perry v. Perez*, 565 U.S. 1090 (2011); *Miller v. Johnson*, 512 U.S. 1283 (1994).

Absent a stay, Alabama's duly enacted law will be replaced by a court-drawn map that no State could constitutionally enact. Millions of voters will be placed into congressional districts whose design is dictated not by the "'historical feature'" of the Black Belt counties, but instead by the race of voters not just within but also well beyond those "'historical boundaries,'" *Allen*, 143 S. Ct. at 1511 n.5 (op. of Roberts, C.J.). Indeed, the District Court chided the State for treating the Black Belt as "a 'nonracial' community of interest," App.161, and declared a "need" to separate "Black

Mobile" from the rest of the Gulf. App.157-58, 166. But "§ 2 never requires adoption of districts that violate traditional redistricting principles" in this way. *Allen*, 143 S. Ct. at 1510 (cleaned up). "[F]louting traditional criteria" in pursuit of a racial goal is unconstitutional, as this Court said in *Shaw*, then in *Miller*, then in *Vera*, and again in *Allen*. *See Allen*, 143 S. Ct. at 1508-09.

The balance of harms and public interest also warrant a stay. "The importance of the question and the substantiality of the constitutional issues are beyond cavil." *Rostker v. Goldberg*, 448 U.S. 1306, 1308-09 (1980) (Brennan, J., in chambers); *Miller*, 515 U.S. at 923 (An "interpretation of the" VRA that "compels race-based districting … by definition raises a serious constitutional question."). The District Court's misapplication of *Allen* raises constitutional concerns that every opinion in *Allen* cautioned against. *See Allen*, 143 S. Ct. at 1508-09, 1517 (majority); *id.* at 1519 (Kavanaugh, J., concurring) ("the authority to conduct race-based redistricting cannot extend indefinitely into the future"); *id.* at 1530 (Thomas, J., dissenting) (stating plaintiffs cannot "resort[] to a racial gerrymander"); *id.* at 1551 (Alito, J., dissenting) ("When the race of one group is the predominant factor in the creation of a district, that district goes beyond making the electoral process equally open" and "gives the members of that group an advantage that §2 does not require and that the Constitution may forbid."). And the State's irreparable injury should be undisputed because the State "face[s] the prospect that the District Court will implement its own redistricting plan" and this Court "has repeatedly emphasized that legislative apportionment plans created by the legislature are to be preferred to judicially constructed

plans." *Karcher v. Daggett*, 455 U.S. 1303, 1306-07 (1982) (Brennan, J., in chambers). The State and its voters should be allowed this Court's review before voters are sorted into race-based districts flouting all conceivable districting principles in search of super-proportionality.

I. There is a fair prospect that the Court will note probable jurisdiction, and a majority of the Court will conclude that the District Court misapplied §2 to enjoin the 2023 Plan.

A majority of this Court is likely to conclude that review of the District Court's order is warranted. The court enjoined Alabama's enforcement of its new state law because it did not racially gerrymander a second majority- or nearly majority-black district. App.3, 6, 117-129, 135. Contrary to that order, compliance with §2 does not turn simply on that new plan's failure to place a §2 plaintiff into a majority-minority district. *See Shaw II*, 517 U.S. at 917 n.9. It instead turns on an "'intensely local appraisal'" of the 2023 Plan, which entails comparing it to at least one "reasonably configured" illustrative plan to see whether "[d]eviation" between the two "shows it is *possible* that the State's map has disparate effect on account of race." *Allen*, 143 S. Ct. at 1503, 1507. The order must be stayed for eschewing that intensely local appraisal. And it must be stayed to examine the serious constitutional questions raised by the court's alternative ruling that reduced §2 to a game of super-proportionality.

A. The District Court failed to treat the 2023 Plan as the "governing law" of Alabama unless proved to violate §2 anew.

The District Court first erred by misconceiving the task before it. The court expressly rejected that Plaintiffs were required to make a new *Gingles* showing for the new 2023 Plan. App.116-129. The court deemed Plaintiffs' old arguments and old illustrative plans submitted to challenge the repealed 2021 Plan sufficient to require

a second majority-black district in the 2023 Plan. *See, e.g.*, App.128. Under that approach, a newly enacted statute doesn't remedy a §2 violation in a repealed statute *even if the new statute complies with §2*. Thus, it was irrelevant to the court how much the 2023 Plan deviated from the 2021 Plan or Plaintiffs' old plans. *See* App.5-6, 116-17, 134-37, 165-66. Plaintiffs' challenge to the 2023 Plan was reduced to whether the 2023 Plan ensured that Democrats are likely to win two congressional districts, not whether the law violated §2. *See, e.g.*, App.5-6, 116-17, 134-37.

Contrary to that framing, when a State successfully enacts new redistricting legislation, even in response to litigation, the new legislation is the "governing law unless it, too, is challenged and found to violate" federal law. *Wise*, 437 U.S. at 539 (op. of White, J.). As "[t]his Court has repeatedly held," redistricting "is a legislative task which the federal courts should make every effort not to pre-empt." *Id.* The State has the "'freedom'" to "'devise substitute[]'" redistricting legislation however it wishes, so long as it complies with federal law. *Id.* at 540 (quoting *Burns v. Richardson*, 384 U.S. 73, 84-85 (1966)). That new legislation is entitled the presumption of legality, and Plaintiffs bear the burden of proving its unlawfulness. *See Abbott*, 138 S. Ct. at 2324-25 (2018); *Des Moines Nav. & Ry. Co.*, 142 U.S. at 544.

At no point did the District Court meaningfully interact with these principles, and its failure to do so makes it an outlier.[46] Rather than giving the 2023 Plan a

[46] Time and again federal courts have relied on *Wise*'s requirement to defer to legislation enacted to remedy an alleged constitutional or VRA violation. *See*, *e.g.*, *Dillard*, 831 F.2d at 250 ("procedures that are discriminatory in the context of one election scheme are not necessarily discriminatory in another scheme"); *McGhee*, 860 F.2d at 115 (district court "may only consider whether the proffered remedial plan is legally unacceptable because it *violates anew constitutional or statutory voting rights*—that is, whether it fails to meet the *same standards applicable to the original challenge* of a

"fresh" look, App.130, the court doubled down on its error by holding that Plaintiffs' old illustrative plans were enough to reject the 2023 Plan too. *See supra*, pp.17-18. For that "alternative" holding, the District Court said it would not "defer to the legislative findings" and new policy choices evident in the 2023 Plan because the 2023 Plan did not add a second majority-black district. App.161-62, 164, 168-70. For example, the 2023 Plan's unification of the Black Belt made no difference because black voters were still a "minority" in one of the two unified Black Belt districts. *See* App.165-66. The District Court admitted it wouldn't have "refuse[d] deference to legislative findings for *Gingles I* purposes" had the 2023 Plan added a second majority-black district. App.161-62. It therefore openly "assum[ed] the truth of" its principal holding "as a premise," that a second majority-black district or something quite close was the only permissible remedy, in its purported "alternative" holding. App.130, 161-62. The court thus (expressly) presumed the answer to the question presented at every step: the only way for Alabama to comply with §2 in the 2023 Plan or any future plan was to create an additional majority-minority district. That "circular reasoning" is proof positive that it did not give the 2023 Plan a "fresh" look. *Id.*

That framing contravenes this Court's precedents. Whatever "'[p]ast discrimination'" was likely present in the 2021 Plan "cannot, in the manner of original sin, condemn governmental action that is not itself unlawful" in the 2023 Plan. *Abbott*, 138 S. Ct. at 2324. Whether the 2023 Plan could be enjoined instead demands proof

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legislative plan in place" (emphasis added)); *Mississippi State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 407 (5th Cir. 1991) (similar); *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 750 (N.D. Ohio 2009) (similar); *Jeffers v. Clinton*, 756 F. Supp. 1195, 1199 (E.D. Ark. 1990) (three-judge court) (similar), *sum. aff'd*, 498 U.S. 1019 (1991).

that the 2023 Plan violates §2. *See id.*; *accord Wise*, 437 U.S. at 539-40 (op. of White, J.). While Plaintiffs were free to rely on old evidence to the extent it was still relevant,[47] they still needed to make a new §2 showing, not merely recycle their old arguments about the 2021 Plan, especially when the case about the 2021 Plan was in a preliminary injunction posture. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394-95 (1981). Nor was Alabama limited to findings about the 2021 Plan when going back to the drawing board in 2023. In particular, Alabama was not required to racially gerrymander in the 2023 Plan merely because choices in the 2021 Plan—*e.g.*, core retention and treatment of the Black Belt—might have required a second-majority black district had Alabama stuck with the 2021 Plan. *See Abbott*, 138 S. Ct. at 2324. If the 2023 Plan does not violate §2, then the District Court was obliged to defer to that plan and the neutral districting principles that governed it. *See Upham v. Seamon*, 456 U.S. 37, 42 (1982); *White v. Weiser*, 412 U.S. 783, 794-95 (1973).

As for the District Court's reliance on *North Carolina v. Covington*, 138 S. Ct. 2548 (2018) (per curiam), App.120-21, *Covington* merely confirms the court's error. In *Covington*, this Court concluded that a racially gerrymandered plan that unconstitutionally "segregated" voters "on the basis of race" could not be replaced with nearly identical lines that still segregated voters. 138 S. Ct. at 2552-53. To the extent *Covington* has any application here, it is that Alabama, unlike North Carolina, *departed from* its past district lines to remove the 2021 Plan's discriminatory effects. *See Allen*, 143 S. Ct. at 1505. The District Court's order should be stayed to allow a

[47] As explained below, *see* Part I.C, Plaintiffs' old illustrative plans no longer reveal anything relevant about the 2023 Plan.

meaningful opportunity to appeal the court's erroneous framing. The 2023 Plan should govern Alabama unless and until Plaintiffs prove it violates §2.

B. Section 2 is not a rudimentary exercise of asking whether the 2023 Plan created a second majority-black district.

The District Court's principle holding was that Alabama's only option was to create a second majority-black district in new redistricting legislation. That was error. No State is required to violate "'traditional districting principles such as maintaining communities of interest'" to "create, on predominantly racial lines," a second majority-black district. *Abrams v. Johnson*, 521 U.S. 74, 91-92 (1997). Section 2 "never requires" that. *Allen*, 143 S. Ct. at 1510 (cleaned up). But in the District Court's view, no plan would have been good enough unless it contained a second majority-black district "or something quite close to it." App.6. No fewer than ten times, the court repeated that the 2023 Plan "perpetuates" the likely vote dilution of the 2021 Plan because it did not contain a second majority-black district. App.116, 139, 160-62, 164, 170, 173, 190. The court gutted the "State's discretion to apply traditional districting principles" in 2023, *Bush*, 517 U.S. at 978, by expressly refusing to defer to them when they didn't yield the "right" racial results, App.161-62, 164.

Without a stay, that rudimentary rule will be applied to impose a race-segregated court-drawn plan that splits communities of interest to create a second majority-black district, in violation of the State's redistricting principles. *But see Upham*, 456 U.S. at 42. It will be a plan the State could never have lawfully enacted. No State can break up "*nonracial* communities of interest" like the Gulf Coast and Wiregrass regions to "combine[] … farflung segments of a racial group." *LULAC*, 548 U.S. at 433

(emphasis added). Nor is that "the opportunity that § 2 requires or that the first *Gingles* condition contemplates." *Id.*; *e.g.*, *Miller*, 515 U.S. at 919-20. Section 2 requires an "equally open" redistricting plan. 52 U.S.C. §10301(b). That is not coterminous with "the right to be placed in a majority-minority district" in a new redistricting plan. *Shaw II*, 517 U.S. at 917 n.9; *see also De Grandy*, 512 U.S. at 1014 n.11 ("the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race"); *Allen*, 143 S. Ct. at 1508-09; *id.* at 1518 & n.2 (Kavanaugh, J., concurring).

C. The District Court did not require Plaintiffs to prove that there were "reasonably configured" alternatives to the 2023 Plan.

The District Court also held in the "alternative" that "a fresh and new *Gingles* analysis [of] the 2023 Plan still meets the same fate"—that it fails without a second majority-black district. App.130. But the court never identified a discriminatory effect in the 2023 Plan akin to that in the 2021 Plan. *See* App.139-178. Instead, the court concluded that Plaintiffs' old illustrative plans were reasonably configured in 2021-2022 and so are still reasonably configured today. *See, e.g.*, App.149-150.

The District Court erred by considering Plaintiffs' old illustrative maps in the abstract. To the District Court, if those old maps were reasonably compact as compared to the 2021 Plan, the court didn't need to judge a "'beauty contest'" for the newly enacted 2023 Plan. App.147-48.[48] But the State didn't ask for a "beauty contest." It

[48] The concept of redistricting "beauty contests" originated in *Vera*, when the plurality said that a *State's* plan need not survive *plaintiff's experts'* "'beauty contests,'" given this Court's "longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan." 517 U.S. at 977-78. But here, contravening that federalism principle, it is *Plaintiffs'* old illustrative plans that were declared the winner of the proverbial beauty contest without even

asked for proof that the 2023 Plan "has a disparate effect on account of race." *Allen*, 143 S. Ct. at 1507; *see also Allen*, 143 S. Ct. at 1518 (Kavanaugh, J., concurring) ("plaintiff's proposed alternative map" must "respect[] compactness principles and other traditional districting criteria"). And on that score, Plaintiffs failed. No court could have concluded Plaintiffs' old maps were "reasonably configured" when every one of them split the Black Belt into more districts than the 2023 Plan, split the Gulf Coast counties, split the Wiregrass counties, and had more sprawling districts, more county splits, or both.

Before it can be enjoined, Alabama's new redistricting legislation requires the same (1) "'intensely local appraisal,'" and (2) comparison with at least one illustrative plan on par with the 2023 Plan on neutral criteria. *Allen*, 143 S. Ct. at 1503, 1507. Only then can a court identify any "inconsistent" application of redistricting principles with a discriminatory effect. *De Grandy*, 512 U.S. at 1015. The District Court should have done with the 2023 Plan what this Court did with the 2021 Plan in *Allen*: examine how the challenged plan's application of the State's neutral criteria deviated from that of Plaintiffs' plans. *See, e.g.*, 143 S. Ct. at 1504 (observing Plaintiffs' plans' compactness "perform[ed] generally better on average than did [the 2021 Plan]"); *id.* at 1505 (comparing State's splitting of Black Belt with Plaintiffs' splitting of Gulf Coast); *id.* at 1507 (discussing relevance of "[d]eviation from" illustrative plans).

competing. As for *Allen*, this Court said it needn't "conduct a 'beauty contest'" because "[t]here would be a split community of interest in both" the *2021 Plan* and Plaintiffs' alternatives, 143 S. Ct. at 1505, not that the mere existence of an illustrative map that performs significantly worse than the State's plan was enough, *contra* App.148.

Likewise, the §2 analysis of Georgia's plan in *Abrams* required accounting for "Georgia's traditional districting policies." 521 U.S. at 91.

Had the District Court held Plaintiffs to that same standard here, the 2023 Plan would not be enjoined. With the 2023 Plan, the Legislature "eliminat[ed]" the unlawful features of the repealed plan through "race-neutral means." *Texas Dep't of Hous. & Cmty. Affairs*, 576 U.S. at 544; *see also id.* at 545 ("Remedial orders that impose racial targets or quotas might raise more difficult constitutional questions."); *Wise*, 437 U.S. at 539-40 (op. of White, J.). The likely violation in the repealed plan was its alleged "crack[ing]" of "majority-Black communities of interest" in the Black Belt and Montgomery.[49] In response, the Legislature enacted new legislation that unifies multiple communities of interests—including the Black Belt—better than any of Plaintiffs' plans, while also improving on other criteria. Shown below, none of Plaintiffs' old plans measure up to the 2023 Plan on the "traditional districting principles" that States retain "discretion to apply." *Vera*, 517 U.S. at 978 (plurality).[50]

	2023 Plan	**2021 Plan**	**Duchin A**	**Duchin B**	**Duchin C**	**Duchin D**	**Cooper 1**	**Cooper 2**	**Cooper 3**	**Cooper 4**	**Cooper 5**	**Cooper 6**	**Cooper 7**
Districts w/ 18 Core Black Belt Counties	2	3	3	4	3	3	4	4	3	4	4	5	3
Districts with Gulf Coast Counties	1	1	2	2	2	2	2	2	2	2	2	2	2

[49] *See Milligan* Br. 5, 16, 39.

[50] *Milligan*, 2:21-cv-1530, ECF 220-12 at 9-12 (compactness and county splits); *id.*, ECF 68-5 at 7, 10 (Duchin Plans' lines and BVAP); *Caster*, No. 2:21-cv-1536, ECF 48 at 23-33 (Cooper Plans 1-6 lines and BVAP); *id.*, ECF 65 at 2-3 (Cooper Plan 7 lines and BVAP); App.21 (2021 Plan and 2023 Plan BVAP for Districts 2 and 7); App.20 (2023 Plan lines); App.32 (2021 Plan lines); App.24 n.8 (describing Gulf Coast and Wiregrass); App.95 (describing Black Belt); Ala. Code §17-14-70.1(e)-(g) (describing communities of interest).

	2023 Plan	2021 Plan	Duchin A	Duchin B	Duchin C	Duchin D	Cooper 1	Cooper 2	Cooper 3	Cooper 4	Cooper 5	Cooper 6	Cooper 7
Districts with Wiregrass Counties	2	1	2	3	2	2	2	2	3	2	3	3	3
Districts with Montgomery County	1	2	1	1	1	1	2	2	1	2	2	1	1
County Splits	6	6	9	7	9	6	6	7	6	6	6	7	5
Reock Average	0.411	0.389	0.363	0.358	0.335	0.384	0.320	0.327	0.324	0.325	0.283	0.306	0.400
Reock (Least Compact District)	0.285 (CD1)	0.248 (CD5)	0.192 (CD1)	0.185 (CD1)	0.185 (CD1)	0.190 (CD1)	0.188 (CD1)	0.187 (CD1)	0.185 (CD1)	0.185 (CD1)	0.171 (CD1)	0.212 (CD1)	0.186 (CD1)
Polsby Popper Average	0.282	0.222	0.256	0.282	0.255	0.249	0.180	0.176	0.183	0.214	0.183	0.159	0.211
Polsby Popper (Least Compact District)	0.185 (CD6)	0.154 (CD6)	0.129 (CD1)	0.156 (CD1)	0.149 (CD2)	0.132 (CD1)	0.134 (CD7)	0.115 (CD2)	0.124 (CD4)	0.131 (CD6)	0.112 (CD7)	0.098 (CD6)	0.129 (CD7)
District 7 BVAP	50.65%	55.3%	51.5%	50.24%	53.5%	51.73%	53.28%	53.79%	50.09%	50.09%	50.09%	51.09%	50.31%
District 2 BVAP	39.93%	30.6%	51.37%	51.06%	50.06%	50.05%	50.09%	50.88%	50.27%	50.07%	50.24%	51.28%	51.88%

As is obvious, the District Court clearly erred by finding that "the Plaintiffs' illustrative maps and the 2023 Plan each preserve a different community, suggesting a wash when measured against this metric." App.166. This is no longer a case about Alabama's splintering the Black Belt into multiple districts to keep the Gulf in one district, with resulting racially discriminatory effects. Contrary to the court's perplexing reasoning,[51] there is no longer "'a split community of interest in both'" the State's

[51] The District Court's comparison of Plaintiffs' old illustrative plans to the newly enacted 2023 Plan was a game of whack-a-mole. For example, it emphasized that the State's expert, Mr. Trende, said that "Duchin plan 2 is 'marginally more compact' than the 2023 Plan," App.151, without acknowledging the 2023 Plan's nearly identical compactness scores and fewer splits of counties and

operative plan and Plaintiffs' old plans. App.166 (quoting *Allen*, 143 S. Ct. at 1505). Rather, Plaintiffs split the Gulf Coast and the Wiregrass and the Black Belt more than the State's Plan. The State keeps together each community of interest as well as counties to the fullest extent practicable while Plaintiffs would split them on race-based lines. Thus, the District Court's suggestion that the Gulf Coast is not "of primary importance" and isn't "more important than the Black Belt," App.164, misses the point. *Both* communities are kept together in the 2023 Plan, but *neither* is kept together as well in any of Plaintiffs' plans. So too with the Wiregrass. Even if there is more "extensive evidence" about the Black Belt than the Wiregrass, App.167, the 2023 Plan keeps them *both* together better than any of Plaintiffs' plans. Accordingly, the question presented by the court's order enjoining the 2023 Plan is now a different and more constitutionally significant one: even though Alabama's 2023 Plan unifies the Black Belt better than any of Plaintiffs' proffered alternatives, *must* Alabama split that community and other communities of interest, and sacrifice county lines or compactness, all to grab black voters from beyond the Black Belt for racial reasons?

The District Court said yes. According to the court, the 2023 Plan still "crack[s]" the Black Belt because black voters are still not a majority or near-majority of the 2023 Plan's two Black Belt districts. App.165. And beyond the Black Belt, the Gulf Coast *must* be split to attain the District Court's goal of two majority-black

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communities of interest. App.174. Similarly, the court reasoned that *other* illustrative plans were on par with the 2023 Plan's relatively few county splits, App.174, while ignoring that *all* of those plans split the Black Belt and Gulf Coast into more districts than the 2023 Plan while also sacrificing compactness. Had the District Court looked holistically at all plans, it would have been clear that Plaintiffs' old illustrative plans at most include one map that at best ties the 2023 Plan on compactness, but splits more counties (7 versus 6) and more communities of interest. And likewise, Plaintiffs have *no* old illustrative plans that split the Black Belt into the same or fewer districts than the 2023 Plan.

districts. App.166. As the court saw it, the 2023 Plan "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"—meaning it does not result in a majority-black district—"while splitting the Gulf Coast precipitates no such racially discriminatory harm"—meaning it would result in a majority-black district by combining black voters in Mobile with black voters in the Black Belt. *Id.*[52] The District Court's conclusion boils down to this: the "legitimate reason to separate Mobile and Baldwin Counties," App.164, is race. That conclusion is fundamentally flawed.

First, this Court already said in *Allen* that §2 does not require "flouting traditional criteria" in pursuit of proportionality. 143 S. Ct. at 1509. Section 2 "*never* require[s] adoption of districts that violate traditional redistricting principles." *Id.* at 1510 (emphasis added). But that is exactly what the District Court has now commanded. The State must break apart the Gulf Coast to create a second majority-black district, even after unifying the Black Belt (so this metric is not "a wash"), and must likely split additional counties and sacrifice compactness. App.166.

Second, that command transforms this case into one about racial outcomes alone, contrary to *Allen*. In *Allen*, this Court did not fault the State's treatment of the Black Belt in those overtly racial terms. Rather, *Allen* was premised on defining the Black Belt as "a '*historical* feature' of the State, not a demographic one." 143 S. Ct. at

[52] With respect to the Gulf, the District Court acknowledged that there was substantial new evidence about the Gulf as a community of interest. App.159-60. The District Court clearly erred by describing that community of interest as "overlapping" with the Black Belt. App.166. The Black Belt is defined by its historic grouping of counties, none of which include the Gulf-coast counties of Baldwin and Mobile. *See Allen*, 143 S. Ct. at 1511 n.5; *see also* App.19-20 n.7; App.95. The court's remaining errors regarding the Gulf are errors of law, described above.

1511 n.5 (op. Roberts, C.J.). After *Allen*, the District Court moved the goal posts.[53] The Black Belt is now, in the court's telling, a community characterized by features "many of which relate to race." App.156, 160-65; *see also* App.161 (rejecting the "State's assertion that the Black Belt is a 'nonracial' community of interest"). Whether the State's treatment of the Black Belt was discriminatory was no longer measured by the State's treatment of that community according to "its 'historical boundaries,'" *Allen*, 143 S. Ct. at 1511 n.5 (op. Roberts, C.J.), but instead by the State's failure to stitch together black voters from not only within those historical boundaries but also beyond to attain a second majority-black district. The Constitution does not tolerate sacrificing traditional criteria in this way. *See Allen*, 143 S. Ct. at 1510-11 & n.5; *see infra*, Part II. In holding otherwise, the District Court ignored this Court's precedent: "Legitimate yet differing communities of interest should not be disregarded in the interest of race." *LULAC*, 548 U.S. at 434.

Third, the District Court's conclusion did not follow from any analysis whereby Plaintiffs showed a "[d]eviation" between the *2023 Plan* and any illustrative plan. *Allen*, 143 S. Ct. at 1507; *compare, e.g.*, *id.* at 1504 ("[S]ome of plaintiffs' proposed maps split the same number of county lines as (or even *fewer* county lines than) the State's map."); *id.* at 1518 n.2 (Kavanaugh, J., concurring) (similar). Plaintiffs' themselves described the requirement that a §2 Plaintiff must show that their illustrative plans "meet or beat" the 2023 Plan on the governing traditional principles the Legislature chose. *See, e.g.*, Oral Arg. Tr. 67, 83; *Singleton*, 582 F. Supp. 3d at 979, 1006,

[53] *See, e.g.*, App.156, 160, 167 (describing Black Belt as area defined by "demographics"); App.157-58 (focusing on "Black Mobile").

1012. But they were never held to that test here. The District Court rejected it. App.147-49. According to the District Court, it was good enough that Plaintiffs had shown deviations between the *2021 Plan* and their old illustrative plans. App.147-48; IV.B. But those old arguments and old plans do not show that there is a "reasonably configured" alternative remedy that would respect the Legislature's neutral districting principles "at least as well as Alabama's [new] redistricting plan" *in the 2023 Plan*. *Allen*, 143 S. Ct. at 1518 n.2 (Kavanaugh, J., concurring); *accord id.* at 1503-05. Plaintiffs did not even attempt to make that showing with a new illustrative plan.

II. Constitutional avoidance compels reversal of the District Court's mistaken view that the only acceptable §2 remedy is the creation of an additional majority-black district in the 2023 Plan.

In just a few paragraphs, the District Court rejected constitutional arguments that §2 could not require Alabama to subordinate neutral redistricting principles to the race-based goal of enacting a second majority-black district. *See* App.185-88. If left undisturbed, the District Court's understanding of §2 will require the intentional creation of race-based districts to "extend indefinitely into the future," *see Allen*, 143 S. Ct. at 1519 (Kavanaugh, J., concurring), based on "impermissible racial stereotypes" that voters "of the same racial group," regardless of "the community in which they live," will "think alike, share the same political interests," and "will prefer the same candidates at the polls," *Shaw I*, 509 U.S. at 647. That rule would command, rather than condemn, a racial gerrymander. For any of the following four reasons, constitutional avoidance requires rejecting the District Court's mistaken view of §2.

1. First, nothing in *Allen* "diminish[ed] or disregard[ed]" the persistent concern "that § 2 may impermissibly elevate race in the allocation of political power within

the States." *Allen*, 143 S. Ct. at 1517. *Allen* said, emphatically, that "[f]orcing proportional representation is *unlawful* and inconsistent with this Court's approach to implementing § 2." *Id.* at 1509 (emphasis added). The upshot of *Allen* is that "§2 never requires adoption of districts that violate traditional redistricting principles," *id.* at 1510 (cleaned up), because §2 could not *constitutionally* require such a thing. Since *Shaw I*, "[l]egislators and district courts nationwide have … reembraced th[ose] traditional districting practices," in recognition that voters are "more than mere racial statistics." *Vera*, 517 U.S. at 986 (plurality) (collecting cases). In redistricting, as everywhere else, this Court's "Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes." *Id.* For that reason, "the States retain a flexibility … insofar as they may avoid strict scrutiny altogether by respecting their own traditional districting principles." *Id.* at 978.

But here, the District Court has commanded that race come first and all other criteria come second. Indeed, it redefined "compliance with Section Two" to mean attaining a second majority-black district, as distinct from a map that fairly applies principles of communities of interest, county splits, and compactness. App.149. With respect to each of those principles, the court explicitly held that it didn't matter if the alternative plans fared worse because, "fundamentally," the 2023 Plan didn't create a second majority-black district. *See* App.149, 164. But if the Legislature had adopted any of Plaintiffs' proposals over the 2023 Plan, there'd be no doubt that compactness, county splits, and "communities of interest … came into play only after the race-based

decision" required by the District Court "had been made." *Shaw II*, 517 U.S. at 907. Those alternatives subordinate neutral criteria to race to create an additional majority-black district "'or something quite close to it.'" App.3, 5-6.

2. Second, imposition of the District Court's race-based remedy cannot be squared with the Constitution. *All* race-based government action must satisfy strict scrutiny. *Harvard*, 143 S. Ct. at 2161-62. "Under the Equal Protection Clause, districting maps that sort voters on the basis of race are by their very nature odious." *Wis. Legislature*, 142 S. Ct. at 1248 (cleaned up). "This is true whether or not the … purpose [is] remedial." *Shaw II*, 517 U.S. at 905. Because "the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race," a §2 remedy that would require the State to put race first and other criteria second must satisfy strict scrutiny. *See Abbott*, 138 S. Ct. at 2315; *see also Wis. Legislature*, 142 S. Ct. at 1249-50; *Harvard*, 143 S. Ct. at 2162. This Court has never held that §2 compliance is a compelling government interest that can justify race-first redistricting. *See*, *e.g.*, *Abbott*, 138 S. Ct. at 2315. And the 2023 Plan is a more narrowly tailored means of complying with §2 than the District Court's race-first remedy.

3. Third, the District Court would require a race-based replacement redistricting plan if a repealed plan violated §2, regardless of what other changes the newly enacted plan makes. App.6. That race-based action "fail[s] to comply with the twin commands of the Equal Protection Clause that race may never be used as a 'negative' and that it may not operate as a stereotype." *Harvard*, 143 S. Ct. at 2168.

The District Court's order uses race as a negative because it rejected the 2023 Plan based on the pernicious fiction that black Alabamians across the State were the relevant community of interest required to be districted together. *See* App.157-161, 164-166. The Legislature's finding that the Gulf Coast should be kept together because of its shared and unique economic and cultural interests, Ala. Code §17-14-70.1(d), (f)(1)-(10), was set aside because Plaintiffs' expert said "'Black Mobile'" doesn't have enough in common with "whiter Baldwin County," App.157-58—despite more than 1,000 pages of testimony and evidence to the contrary. The State cannot be allowed to keep together a *nonracial* community characterized by shared economic (*e.g.*, the Port of Mobile or large state universities or military bases) or cultural (*e.g.*, Mardi Gras) interests. *See supra*, pp.10-13. Instead, black voters in the Gulf and Wiregrass regions must be districted with black voters hundreds of miles away. App.165-66. The *Milligan* Plaintiffs even went so far as to argue that "in *Gingles* I, the community of interest that's relevant is the African-American community." App.510. This Court has never permitted a State to make the race of voters a criterion that cannot be compromised. *See Shaw II*, 517 U.S. at 907; *see, e.g.*, *Miller*, 515 U.S. at 921-28; *Vera*, 517 U.S. at 979-81; *Abbott*, 138 S. Ct. at 2334-35.

Likewise, the District Court's remedial order requires racial stereotyping. This Court has held that governments may not operate on the belief that members of racial minorities "'always (*or even consistently*) express some characteristic minority viewpoint on any issue.'" *Harvard*, 143 S. Ct. at 2165 (emphasis added). Subordinating "nonracial communities of interest" to the goal of a second majority-black district

indulges the "prohibited assumption" that voters in these districts are similar based on race alone. *See LULAC*, 548 U.S. at 433; *see also Miller*, 515 U.S. at 919-20.

4. Fourth, the District Court's rule has no logical endpoint. The State would have to continue intentionally creating a second majority-black district in lieu of keeping together communities of interest until "'Black Mobile'" has enough in common with other parts of the Gulf Coast, *see* App.157-61. So long as black voters "'express some characteristic minority viewpoint'" "consistently," *see Harvard*, 143 S. Ct. at 2165, §2 would require "combin[ing] two farflung segments of a racial group," *LULAC*, 548 U.S. at 433-34. Indulging that "prohibited assumption," *id.* at 433, means there's "no end in sight," *see Harvard*, 143 S. Ct. at 2166.

But just as this Court held that "race-based" affirmative action in education "at some point" had to "end," *Harvard*, 143 S. Ct. at 2165-66, 2170-73 (majority), the same principle applies to affirmative action in districting. "[R]emediating specific, identified instances of past discrimination," *id.* at 2162, may have justified race-based redistricting in 1982. But "even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future." *Milligan*, 143 S. Ct. at 1519 (Kavanaugh, J., concurring). The alternative would ultimately elevate a statutory remedy for old violations of the Constitution above the Constitution itself. *See Shelby County v. Holder*, 570 U.S. 529, 557 (2013) ("[W]hile any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."). All the more reason why the

Court "must rigorously apply the 'geographically compact' and 'reasonably configured' requirements" and conclude that Plaintiffs have not shown that the 2023 Plan likely violates §2. *Allen*, 143 S. Ct. at 1518 n.2 (Kavanaugh, J., concurring).

The District Court's only response was that it has not forced proportional representation on Alabama because it "performed a thorough *Gingles* analysis" of the repealed plan. App.128-29, 186-87. But proportional representation is exactly what the court has required by demanding a second majority-black district even if it comes at the expense of violating the State's traditional districting principles. Both §2 and the Equal Protection Clause reject such a remedy. *See De Grandy*, 512 U.S. at 1014 n.11; *Shaw II*, 517 U.S. at 917 n.9.

III. Alabama will suffer irreparable harm absent this Court's intervention, and the balance of harms and the public interest warrant a stay.

A stay of the District Court's injunction is necessary to prevent the irreparable harm of replacing lawfully enacted redistricting legislation with a court-drawn plan. *See, e.g.*, *Abbott*, 138 S. Ct. at 2318-19; *Karcher*, 455 U.S. at 1306-07 (Brennan, J., in chambers) ("applicants would plainly suffer irreparable harm"). And the stakes are even higher here. Absent a stay, the State will be compelled to cede its sovereign redistricting power to a court that will intentionally segregate Alabamians based on race. The District Court has made clear that the only acceptable remedy is one that splits the Gulf Coast to ensure that enough black voters in the Gulf Coast are combined with enough black voters in the Black Belt to guarantee a majority-black district, or something quite close. *See* App.165-66. Not only will the State be precluded from enforcing a "statute[] enacted by representatives of its people," *Maryland v.*

King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers), which "clearly inflicts irreparable harm on the State," *Abbott*, 138 S. Ct. at 2324 n.17, the State and public will also suffer the harm of a court-drawn plan that racially segregates Alabamians.

The balance of harms supports a stay so that millions of Alabama voters are not soon districted into that court-ordered racial gerrymander. Race-based redistricting at the expense of traditional principles "bears an uncomfortable resemblance to political apartheid." *Shaw I*, 509 U.S. at 647. It sends an "equally pernicious" message to elected representatives "that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Id.* at 648. Such race-based voter assignments "cause society serious harm." *Miller*, 515 U.S. at 912.

A stay will also further the public interest. The 2023 Plan reflects valid State policies to which the District Court should have deferred. Like any duly enacted statute, the 2023 Plan "is in itself a declaration of public interest." *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 552 (1937); *see Berman v. Parker*, 348 U.S. 26, 32 (1954) ("when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive"). Redistricting "is a legislative task which the federal courts should make every effort not to pre-empt." *Wise*, 437 U.S. at 539-40 (op. of White, J.) (collecting cases). A stay serves the public interest by preserving the opportunity for the legislatively enacted 2023 Plan to be used in the upcoming election, rather than a court-drawn, race-segregated plan.

CONCLUSION

The Court should stay the District Court's order enjoining the State from using the 2023 Plan to allow the State a meaningful opportunity to obtain appellate review.

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