Nos. 21-1086 & 21-1087

IN THE

Supreme Court of the United States

JOHN H. MERRILL, ET AL.,

Appellants,

v.

EVAN MILLIGAN, ET AL.,

Respondents.

JOHN H. MERRILL, ET AL.,

Appellants,

v.

MARCUS CASTER, ET AL.,

Respondents.

On Appeal from and Writ of Certiorari to the United States District Court for the Northern District of Alabama

BRIEF OF *SINGLETON* PLAINTIFFS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*

Amici curiae Bobby Singleton, Rodger Smitherman, Eddie Billingsley, Leonette W. Slay, Darryl Andrews, and Andrew Walker are the plaintiffs in *Singleton v. Merrill*, No. 2:21-cv-1291 (N.D. Ala.). They are registered voters in congressional districts that they allege are racially gerrymandered. Bobby Singleton and Rodger Smitherman are also members of the Alabama Senate.[1] Although *Singleton* was consolidated with *Milligan* and *Caster* for purposes of a preliminary injunction hearing, the *Singleton* plaintiffs file as *amici* because they did not assert a claim under the Voting Rights Act and the district court mistakenly deferred ruling on their constitutional claim.

For these appeals, this Court identifies the question as whether the congressional plan Alabama enacted in 2021 violated Section 2 of the Voting Rights Act. The *Singleton* plaintiffs submit this brief because, like the Wisconsin Supreme Court in *Wisconsin Legislature v. Wisconsin Elections Commission*, ___ S. Ct. ___, 2022 WL 851720 (Mar. 23, 2022), the district court here did not conduct the preliminary assessment of Alabama's enacted plan that this Court's Voting Rights Act jurisprudence and the Equal Protection Clause require—namely, whether there were race-neutral alternatives to maintaining its one majority-

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[1] The appellants and appellees have provided blanket written consent to the filing of *amicus* briefs in this appeal. No counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than the *amici curiae* or their counsel made such a monetary contribution.

Black district. The *Singleton* plaintiffs' still-pending complaint alleges Alabama (1) perpetuated a congressional plan that the appellants admit is a racial gerrymander and (2) rejected race-neutral plans that would have created an additional opportunity district for minority voters. The appellants repeatedly refer to Alabama's 2021 plan as "race-neutral," but the district court never made such a determination and the facts show that the plan was not race-neutral.

Although the appellants are wrong about several issues, this brief supports neither party because it takes no position on the correctness of the district court's analysis of the evidence under the standards set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Instead, the *Singleton* plaintiffs believe that, unless this Court intends to affirm the decision below, the principle of constitutional avoidance required the district court to consider the *Singleton* plaintiffs' straightforward racial gerrymandering claim before addressing the constitutional issues implicated by the Voting Rights Act claim.

STATEMENT OF THE CASE

Singleton was the first of three cases challenging the congressional plan Alabama adopted in 2021. The *Singleton* plaintiffs alleged that the 2021 plan violates the Equal Protection Clause of the Fourteenth Amendment because it essentially carried forward a 1992 plan that segregated voters by race, packing Black voters into a single majority-Black district. Their proposed remedy was a "Whole County Plan," which splits no counties across district lines, was

drawn without a focus on race, and has a maximum population deviation of 2.47%. The Whole County Plan contains no majority-Black district, but two of its districts feature enough crossover voting to give Black voters an equal opportunity to elect candidates of their choice. The *Singleton* plaintiffs also proposed two alternative plans that started with the Whole County Plan but split a small number of counties, without focusing on race, to reduce or eliminate population deviation.

The Chief Judge of the Eleventh Circuit appointed a three-judge district court pursuant to 28 U.S.C. §2284, and *Singleton* was soon joined by the two cases on appeal here: *Milligan v. Merrill*, No. 2:21-cv-1530 (N.D. Ala.), and *Caster v. Merrill*, No. 2:21-cv-1536 (N.D. Ala.). *Milligan* challenged the 2021 plan as a violation of the Equal Protection Clause and Section 2 of the Voting Rights Act of 1965. *Caster* asserted a single count under Section 2. *Milligan* was assigned to the same three-judge court as *Singleton*, and the two cases were consolidated for the limited purposes of discovery and a hearing on motions for a preliminary injunction. *Caster* could not be heard by the three-judge court because it did not raise a constitutional claim, but it was assigned to a member of that court, and it proceeded on the same schedule as *Milligan* and *Singleton*.

The plaintiffs in all three cases moved to enjoin the defendants from using the 2021 plan in the 2022 election. In January 2022, the court held a seven-day evidentiary hearing with live testimony from seventeen witnesses, more than 350 exhibits, more than 1,000 pages of briefing, and 75 pages of joint stipulations of

fact. MSA4, 201. Holding that the defendants had likely violated the Voting Rights Act, the court granted a preliminary injunction to the *Milligan* and *Caster* plaintiffs. MSA4–7. Citing the principle of constitutional avoidance, the court reserved ruling on the *Singleton* and *Milligan* plaintiffs' Equal Protection claims. MSA7. The defendants appealed.

SUMMARY OF ARGUMENT

The appellants assert that the 2021 plan, with its one majority-Black district, is race-neutral and that "[t]he question here is whether the VRA requires Alabama to intentionally create a second majority-black congressional district." Appellants' Br. at 28. But the 2021 plan's majority-Black district is not race-neutral. It perpetuates splits in three urban counties designed in 1992 to corral enough Black population to create a majority-Black district, which the Voting Rights Act was thought at that time to require. Three decades later, the district court erroneously deferred ruling on the *Singleton* plaintiffs' claim that this enduring majority-Black district is no longer needed to comply with Section 2 and thus violates the Equal Protection Clause. Since *Cooper v. Harris*, 137 S. Ct. 1455 (2017), this Court has emphasized that when it is presented with such an Equal Protection complaint "the key issue" is whether a district "created without a focus on race ... could lead to §2 liability." *Id.* at 1471. This is "[t]he question that our VRA precedents ask and the court failed to answer," *Wis. Legislature v. Wis. Elections Comm'n*, ___ S. Ct. ___, 2022 WL 851720, at *4 (Mar. 23, 2022). This Equal Protection analysis is a

"preliminary assessment" of the enacted plan the district court should have made before proceeding to address the VRA claims. *Id.* at *5 (Sotomayor, J., dissenting). The *Singleton* plaintiffs demonstrated below that a truly race-neutral congressional redistricting plan would restore the integrity of the split counties and naturally produce two effective crossover opportunity districts.

The appellants do not attempt to defend the district court's deferral of the *Singleton* constitutional claim. Instead, they represent the 2021 plan's majority-Black district as race-neutral, even though the district court made no such determination, and it invites this Court to import into *Gingles* I the race-neutral inquiry that this Court's recent equal-protection decisions require. But ignoring the constitutional challenge to the enacted plan and framing the issues on appeal as a VRA problem stands on its head the sequencing of issues in this Court's redistricting jurisprudence. This Court has acknowledged that Congress intended the VRA to provide a race-conscious remedy for protected minorities who lack an equal opportunity to elect candidates of their choice, but only "as a last resort." *Bartlett v. Strickland*, 556 U.S. 1, 29 (2009) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in the judgment)). These appeals do not provide this Court an opportunity to clarify VRA law. The cases should be remanded with instructions that the district court decide the threshold question: whether the enacted majority-Black district is constitutional.

ARGUMENT

I. Alabama's Legislature Rejected a Race-Neutral Plan in Favor of a Racial Gerrymander.

The district court's evidentiary hearing and the parties' stipulations established many facts beyond any genuine dispute, but three are most relevant here. First, the 2021 plan is an unconstitutional racial gerrymander. Second, the *Singleton* plaintiffs' Whole County Plan and its alternatives, which the Alabama Legislature rejected, were created without a focus on race. Third, the Whole County Plan and its alternatives would give Black voters an equal opportunity to elect candidates of their choice in two districts.

A. Alabama's 2021 Plan Is an Unconstitutional Racial Gerrymander.

From 1822 until 1965, Alabama drew its congressional districts with whole counties.[2] When Jefferson County grew so large that it exceeded the population of an ideal district by more than half, the Alabama Attorney General warned that a congressional plan that kept Jefferson County whole would not survive scrutiny by the federal courts. Thus, in 1965 the Alabama Legislature enacted a plan that split Jefferson County among three congressional districts. Only Jefferson

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[2] The defendants have stipulated to the facts in this paragraph. *Singleton*, Doc. No. 47 at 1–3.

County and one other county were ever split in the congressional plans in effect from 1965 to 1992.

After the 1990 census, the Alabama Legislature failed to enact a new congressional plan in time to receive preclearance by the Department of Justice before the 1992 elections. *Wesch v. Hunt*, 785 F. Supp. 1491, 1494–95 (S.D. Ala. 1992). Alabama voters filed suit, alleging that the existing plan was malapportioned and violated Section 2 of the Voting Rights Act. *Id.* at 1492–93. In that suit, all parties stipulated that the Voting Rights Act required the creation of a congressional district that was at least 65% Black. *Id.* at 1498. The district court accepted this stipulation without evaluating whether it was correct, and it ordered a new plan that included such a district (the "1992 plan"). *Id.* at 1499, 1501.[3] The defendants in *Singleton* stipulated that the 1992 plan split seven counties for the predominant purpose of drawing a majority-Black district. *Singleton*, Doc. No. 47 at 3. Secretary Merrill, who is a defendant in *Singleton*, has argued in other litigation that the 1992 plan "appears to be racially gerrymandered," and would be unlawful if enacted today for the same purpose. *Chestnut v. Merrill*, No. 2:18-cv-907-KOB (N.D. Ala.), Doc. No. 101 at 11.

Secretary Merrill has argued to this Court that in Alabama's 2021 plan, "[t]he enacted districts reflect past districts. There was no major change to the existing lines." Appellants' Br. at 53 (citations omitted).

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[3] *Wesch v. Hunt* was affirmed twice by this Court, but neither appeal presented the question whether the Voting Rights Act required a district that was 65% Black. *Camp v. Wesch*, 504 U.S. 902 (1992); *Figures v. Hunt*, 507 U.S. 901 (1993).

When a plaintiff alleges a racial gerrymander, the shape and demographics of districts alone can establish liability. *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). There can be no clearer case of racial gerrymandering than one in which the defendant admits that the Legislature perpetuated district lines that were drawn with the admitted purpose of separating voters by race. *See North Carolina v. Covington*, 138 S. Ct. 2548, 2552–53 (2018) ("[The plaintiffs] argued in the District Court that some of the new districts were mere continuations of the old, gerrymandered districts. Because the plaintiffs asserted that they remained segregated on the basis of race, their claims remained the subject of a live dispute ….").[4]

Despite the 2021 plan's obvious status as a racial gerrymander, Secretary Merrill and the other appellants repeatedly refer to it as "race-neutral" because the Legislature attempted to retain the cores of existing districts and protect incumbents. *Merrill v. Milligan*, No. 21A375, Reply in Support of Application for a Stay at 17 n.9; Appellants' Br. at 53; *Singleton*, Doc. No. 83 at 70. But when the starting point for the Legislature's plan is a racial gerrymander, attempting to

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[4] To be clear, the *Singleton* plaintiffs have never argued that previous gerrymandered plans "tainted" the 2021 plan, turning an otherwise permissible map into a racial gerrymander. *See Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018) (reversing a decision that a legislature's districting plan failed to remove the "discriminatory taint" associated with a previous, never-used plan). The *Singleton* plaintiffs rely only on the district lines that undisputedly separate White and Black voters in 2021, and direct evidence (described below) that the 2021 Legislature relied on an explicit racial target when deciding what plan to adopt.

retain the cores of existing districts is inherently not race-neutral. *Easley v. Cromartie*, 532 U.S. 234, 262 n.3 (2001) (Thomas, J., dissenting) (stating that the legitimacy of protecting "individuals [who] are incumbents by virtue of their election in an unconstitutional racially gerrymandered district ... is a questionable proposition," but noting that the question was not presented in that case). "[E]fforts to protect incumbents by seeking to preserve the 'cores' of unconstitutional districts … have the potential to embed, rather than remedy, the effects of an unconstitutional racial gerrymander …." *Covington v. North Carolina*, 283 F. Supp. 3d 410, 431 (M.D.N.C. 2018), *aff'd in relevant part and reversed in part on other grounds*, 138 S. Ct. 2548 (2018); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 561 n.8 (E.D. Va. 2016) ("In any event, maintaining district cores is the type of political consideration that must give way to the need to remedy a *Shaw* violation."); *Jeffers v. Clinton*, 756 F. Supp. 1195, 1200 (E.D. Ark. 1990) ("The desire to protect incumbents, either from running against each other or from a difficult race against a black challenger, cannot prevail if the result is to perpetuate violations of the equal-opportunity principle contained in the Voting Rights Act."). In *North Carolina v. Covington*, it was undisputed that the legislature "instructed its map drawers not to look at race when crafting a remedial map." 138 S. Ct. at 2553. Nevertheless, the plaintiffs were entitled to relief because of "sufficient circumstantial evidence that race was the predominant factor governing the shape of those four districts." *Id.* The same is true here; the appellants do not dispute that race is the predominant reason for the bizarre shape of Alabama's Seventh District.

To this day, Alabama's Seventh District stretches into Jefferson, Tuscaloosa, and Montgomery Counties not to respect any natural boundaries but to grab Black voters. As the appellants themselves have said, "[r]ace unconstitutionally predominates" when districts "steamroll natural boundaries by stretching districts to grab voters with little in common other than race." Appellants' Br. at 40.

While the shape and demographics of a challenged district alone can establish a racial gerrymander, there was also undisputed evidence that the Alabama Legislature used an explicit racial target when it decided what plan to adopt in 2021. Before the 2021 plan was enacted, the Chairs of the Reapportionment Committee, Senator Jim McClendon and Representative Chris Pringle, received "talking points" from their counsel stating that the Voting Rights Act required a majority-minority district, without any analysis supporting this assertion. The talking points advised voting against the Whole County Plan because it violated Section 2 of the Voting Rights Act by not including a majority-minority district. Both Representative Pringle and Senator McClendon testified that they used these talking points in debate on redistricting, and Senator McClendon testified that he would not vote for the Whole County Plan because it did not have a majority-minority district. In other words, the chairs of the relevant committee admittedly relied on guidance setting a specific racial threshold for a congressional district of more than 50% Black voting-age population, without any reason to believe that the

Voting Rights Act required such a threshold.[5] The appellants themselves describe this scenario as a racial gerrymander: "[R]acial gerrymander where Senators 'repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA'[.]" Appellants' Br. at 38 (quoting *Cooper*, 137 S. Ct. at 1468).

By perpetuating a plan concededly designed to pack Black voters into a single district, without any Section 2 analysis to support doing so, the Legislature violated one of its own guidelines: "No district will be drawn in a manner that subordinates race-neutral districting criteria to considerations of race, color, or membership in a language-minority group, except that race, color, or membership in a language-minority group may predominate over race-neutral districting criteria to comply with Section 2 of the Voting Rights Act, provided there is a strong basis in evidence in support of such a race-based choice. A strong basis in evidence exists when there is good reason to believe that race must be used in order to satisfy the Voting Rights Act." MSA219.

The admissions of Senator McClendon and Representative Pringle put this case squarely in the mold of *Cooper v. Harris* and *Abbott v. Perez*, in which legislators created majority-minority districts without "a strong basis in evidence to conclude that § 2 demands

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[5] Senator McClendon and Representative Pringle were defendants in the district court and are appellants here. The facts in this paragraph come from their own depositions and the talking points themselves. For specific references to the evidentiary record, see *Singleton*, Doc. No. 84 at 20–22.

such race-based steps." *Cooper*, 137 S. Ct. at 1471; *Abbott*, 138 S. Ct. 2305, 2334–35 (2018). In those cases, the majority-minority districts violated the Equal Protection Clause because they could not withstand strict scrutiny. Here, it was undisputed that Alabama's map drawers had not performed a racial polarization analysis before the 2021 plan was enacted, much less a "meaningful legislative inquiry" into whether a district "created without a focus on race … could lead to §2 liability." *Cooper*, 137 S. Ct. at 1471; *Abbott*, 138 S. Ct. at 2334–35. During the preliminary injunction hearing, Alabama's Solicitor General disclaimed any attempt to rely on Section 2. *Singleton*, Doc. No. 86-6 at 1854:24–1855:1 ("Our argument here is not that the VRA justifies the drawing of this map in – drawing of CD 7 currently."). Because the racially gerrymandered 2021 plan concededly fails strict scrutiny, it is unconstitutional.

B. The Whole County Plan and Its Alternatives Are Race-Neutral and Satisfy Alabama's Redistricting Criteria.

In April 2021, counsel for the *Singleton* plaintiffs asked a map drawer to create a congressional plan, with only two instructions: keep counties whole and attempt to keep the Black Belt counties together.[6] The

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[6] The defendants have stipulated to the facts in this paragraph. *Singleton*, Doc. No. 70 at 1–4. "Black Belt refers to a geographic region spanning central Alabama that is named for the region's fertile black soil." Appellants' Br. at 10 n.2. The Black Belt is undisputedly a community of interest. MSA169 ("[W]e

resulting plan circulated among Black political leaders and organizations preparing for redistricting after the release of the 2020 census results, and the League of Women Voters of Alabama agreed to sponsor it in public discussions and hearings involving the legislative redistricting process. After the 2020 census data were published in August 2021, the plan was revised to lower the maximum population deviation from 5% to 2.47% by moving four counties.[7] This revised plan is the Whole County Plan, which was submitted to the Legislature's Reapportionment Office in September 2021. In October 2021, two variations of the Whole County Plan made a limited number of county splits to reduce the maximum deviation; one reduced the deviation to 0.69%, and the other reduced it to zero. Both were submitted to the Legislature as well.

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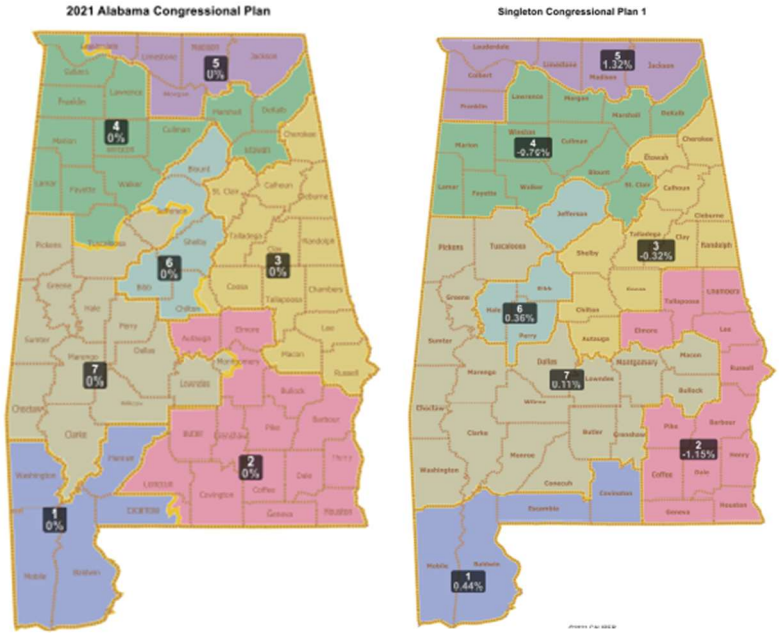
find that the Black Belt is a community of interest ...."); *Singleton*, Doc. No. 86-6 at 1875:7–1876:7 (defendants' counsel stating, "I would not dispute" that the Black Belt is a community of interest).

[7] The four counties that moved—Colbert, Franklin, Jackson, and Morgan—are predominantly White counties in the northern part of the state. This change did not affect the racial composition of the Whole County Plan's opportunity districts, which are in the central and southern parts of the state.

Below is a comparison of the 2021 plan and the Whole County Plan:



Before the district court, no party contended that the Whole County Plan sorted voters by race. In fact, the defendants' own expert agreed that the Whole County Plan has the smallest possible population deviation for a plan that keeps counties whole and "still make[s] some kind of districting sense for Alabama." *Singleton*, Doc. No. 86-3 at 1093:4–12. It is possible to draw maps with smaller deviations without splitting counties, he said, but they are "ridiculous looking" and "will all virtually fail if you hold them to any other criteria." *Id.* at 1086:20–1087:1, 1089:15–21. One of the *Milligan* plaintiffs' experts testified that achieving zero deviation in Alabama requires splitting at least six counties (unless a county is split among more than

two districts). *Singleton*, Doc. No. 86-2 at 626:10–627:8. That is the number of counties the zero-deviation alternative to the Whole County Plan splits; nothing is split unnecessarily.

Before adopting a congressional plan, the Legislature's Redistricting Committee adopted a set of guidelines. Among these were that a plan shall have minimal population deviation, shall not have the effect of diluting minority voting strength, will have reasonably compact districts, shall respect communities of interest, and shall try to minimize the number of counties in each district. MSA31–32. On these criteria, the Whole County Plan or its alternatives perform better than the 2021 plan on most criteria and no worse on the others.[8]

Population Deviation: One of the alternatives to the Whole County plan had zero deviation, just as the 2021 plan does. Even the 2.47% maximum deviation of the Whole County Plan itself is less than the 2.59% deviation of the plan Alabama adopted in 1981, the last plan before its racial gerrymander.

Minority Voting Strength: As described below, the Whole County Plan gives Black voters the opportunity to elect candidates of their choice in two of Alabama's seven districts. The 2021 plan has just one opportunity district, diluting minority voting strength.

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[8] The redistricting guidelines also call for preserving the cores of existing districts and protecting incumbents, but these criteria lose their importance when the starting point for redistricting is a racially gerrymandered plan. *See supra* pp. 8–9.

Compact Districts: One of the defendants' experts calculated four different compactness scores for the 2021 plan and the Whole County Plan. *Singleton*, Doc. No. 54-1 at 29–30. The Whole County Plan outperformed the 2021 plan on two of the scores and underperformed on the other two. *Id.* Therefore, the Whole County Plan serves the goal of compactness about as well as the 2021 plan without being racially gerrymandered.

Communities of Interest: The Alabama Legislature's redistricting guidelines call for the preservation of communities of interest, which are "defined as an area with recognized similarities of interests, including but not limited to ethnic, racial, economic, tribal, social, geographic, or historical identities. The term communities of interest may, in certain circumstances, include political subdivisions such as counties, voting precincts, municipalities, tribal lands and reservations, or school districts." MSA31–32. The racially gerrymandered 2021 plan includes major splits in counties, voting precincts, and municipalities in order to pack Black voters into a single congressional district. It also splits the core counties of the Black Belt, which the defendants stipulated is a community of interest, among three districts. The Whole County Plan and its alternatives largely preserve the Black Belt in a single district, and they split counties, voting precincts, and municipalities minimally or not at all. The defendants never identified any communities of interest that the Whole County Plan splits but the 2021 plan preserves.

Number of Counties in Each District: The 2021 plan splits six counties for the predominant purpose of separating voters by race. As a result, the average number of counties per district is higher than it is for the Whole County Plan, which splits no counties. The alternative to the Whole County Plan with 0.69% population deviation splits three counties, and the zero-deviation alternative splits six counties. These splits are solely to equalize population, not to separate voters by race.

Taking these criteria together, the Whole County Plan and its alternatives are far superior to the 2021 plan. These plans also have the benefit of not being unlawful.

C. The Whole County Plan and Its Alternatives Include Two Opportunity Districts.

Although the Whole County Plan and its alternatives were created without focusing on race, and no district in these plans is majority-Black, they provide Black voters with an equal opportunity to elect candidates of their choice in two districts. This is possible because each of these districts has sufficient White support for candidates supported by Black voters. In fact, the defendants stipulated that the candidate supported by Black voters would have prevailed in each of the Whole County Plan's two opportunity districts in every election for President, United States Senate, Governor, Lieutenant Governor, and Auditor from 2012 to 2020. *Singleton*, Doc. No. 47 at 6.

This Court has described the advantages of crossover districts over majority-minority districts. In *Bartlett v. Strickland*, the plurality stated,

> Assuming a majority-minority district with a substantial minority population, a legislative determination, based on proper factors, to create two crossover districts may serve to diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal. The option to draw such districts gives legislatures a choice that can lead to less racial isolation, not more.

556 U.S. 1, 23 (2009) (plurality opinion). And in dissent, four Justices agreed: "A crossover is thus superior to a majority-minority district precisely because it requires polarized factions to break out of the mold and form the coalitions that discourage racial divisions." *Id.* at 34–35 (Souter, J., dissenting). That is precisely the situation here. Two crossover districts are better for democracy than one racially gerrymandered majority-minority district.

II. Constitutional Avoidance Favors Remand for Consideration of the Plaintiffs' Racial Gerrymandering Claim.

In the proceedings below, the district court heard evidence on the *Milligan* and *Caster* plaintiffs' Voting Rights Act claim and the *Milligan* and *Singleton* plaintiffs' racial gerrymandering claim. Ultimately, the court ruled on the former claim but not the latter, invoking the principle of constitutional avoidance.

MSA216 ("For these reasons, in the light of our decision to issue a preliminary injunction on statutory grounds, … we decline to decide the constitutional claims asserted by the *Singleton* and *Milligan* plaintiffs at this time.").

On appeal, the posture has changed. This Court has no constitutional claim before it, so it does not have to decide what claim to prioritize, as the district court did. But there is an important constitutional issue at stake; the appellants challenge the district court's application of the Voting Rights Act on constitutional grounds. They claim that the three-judge court's view of the VRA makes compliance with that law irreconcilable with the Constitution, and they seek reversal on that ground. Appellants' Br. at 71. If adopted, the appellants' position would upend a near-unanimous understanding among the courts of appeals that a plaintiff in a Section 2 case may intentionally create illustrative majority-minority districts to satisfy the first *Gingles* requirement without offending the Constitution.[9]

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[9] *See Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 278 (2d Cir. 1995), *vacated on other grounds*, 512 U.S. 1283 (1994); *Cane v. Worcester Cnty.*, 35 F.3d 921,926 n.6 (4th Cir. 1994); *Clark v. Calhoun Cnty.*, 88 F.3d 1393, 1406–07 (5th Cir. 1996); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (9th Cir. 2006); *Sanchez v. Colorado*, 97 F.3d 1303, 1327 (10th Cir. 1996); *Davis v. Chiles*, 139 F.3d 1414, 1417–18 (11th Cir. 1998); *but see Gonzalez v. City of Aurora, Ill.*, 535 F.3d 594, 598–600 (7th Cir. 2008) (proposing a race-neutral benchmark for claims of vote dilution).

In this context, "the duty of the federal courts to avoid the unnecessary decision of constitutional questions," *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 470 (1945), requires this Court to at least consider ways to decide this case without declaring a statute unconstitutional. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) ("When a serious doubt is raised about the constitutionality of an act of Congress, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (cleaned up).

The *Singleton* plaintiffs' racial gerrymandering claim raises no significant constitutional issues, despite its basis in the Equal Protection Clause. That is because the claim boils down to one simple factual question: did race predominate in the creation of the 2021 plan? If it did, strict scrutiny applies. *Cooper v. Harris*, 137 S. Ct. at 1463–64. While in some cases strict scrutiny involves difficult constitutional questions, no such questions arise here because the appellants chose not even to attempt to satisfy strict scrutiny. *See supra* p. 12. Thus, if race predominated, the 2021 plan is an unconstitutional racial gerrymander. Regardless of how the district court might decide that issue, it will break no new ground, and its decision will fit neatly within an uncontroversial line of precedent.

If the district court rules in the *Singleton* plaintiffs' favor on their racial gerrymandering claim, all plaintiffs may very well obtain the same remedy the court ordered for the Voting Rights Act claim—the creation of two opportunity districts—without even implicating strict scrutiny. This is because the Whole County

Plan or its alternatives would return Alabama to its century-old practice of building districts with counties, respect communities of interest, and provide two opportunity districts, all without a focus on race. Moreover, according to the defendants' experts, it has the lowest population deviation of any plan that keeps counties whole and "make[s] some kind of districting sense for Alabama." *See supra* p. 14. Because race did not predominate in the creation of the Whole County Plan, the district court could implement it (or a similar plan) without triggering strict scrutiny at all.

Because a decision on the *Singleton* claim may yield the same result with the same remedy as the *Milligan* and *Caster* claims under the Voting Rights Act, this Court can discharge its duty not to decide constitutional questions unnecessarily by vacating the district court's order and remanding for consideration of the racial gerrymandering claim.

This Court's recent redistricting jurisprudence also requires the courts to decide the claim of gerrymandering before or concurrently with the §2 claim. When this Court decided in *Bartlett v. Strickland*, 556 U.S. 1 (2009), that the availability of crossover districts is insufficient to establish a §2 violation, it left open the question of how plaintiff voters can seek implementation of those districts. *Cooper v. Harris* answered that question. It held that when a state draws a majority-Black district, voters can challenge it under the Equal Protection Clause using "a two-step analysis." 137 S. Ct. at 1463. First, plaintiffs must show that the district is a race-based gerrymander, and second they must show that it cannot be justified by the VRA. *Id.*

at 1463–64. That is exactly what the Singleton plaintiffs did here.

Cooper says this constitutional claim must be heard first. Before considering arguments by the state or §2 plaintiffs that the VRA requires drawing the majority-Black district, the court must require the state to show that it has conducted a "meaningful legislative inquiry into ... whether a new, enlarged District …, created without a focus on race but however else the State would choose, could lead to §2 liability." 137 S. Ct. at 1471. Thus, the constitutional claim must be addressed before the §2 claim. Subsequent decisions of this Court have confirmed this priority of issues. *Abbott v. Perez*, 138 S. Ct. 2305 (2018) (Texas could point to no legislative inquiry that a district "created without a focus on race" would comply with §2) (quoting *Cooper*, 137 S. Ct. at 1471); *Wis. Legislature*, 2022 WL 851720 at *3 ("As we explained in *Cooper*, '[t]o have a strong basis in evidence to conclude that §2 demands ... race-based steps, the State must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions ... in a new district created without those measures.'").

III. The Appellants' Fundamental Premise—That the 2021 Plan Is Race-Neutral—Is Incorrect.

The racial gerrymander underlying Alabama's 2021 plan makes these appeals unsuitable vehicles for addressing whether that plan violates Section 2 of the Voting Rights Act for another reason. The appellants have framed this case as a contest between Alabama's

"race-neutral" plan and the appellees' allegedly race-driven plans. Appellants' Br. at 78. But the district court never held that Alabama's 2021 Plan was race-neutral. As described above, a mountain of evidence shows that it was not, including the sworn testimony of two of the appellants. Those appellants, who were the chairs of the Legislature's Reapportionment Committee, both testified that they were instructed by counsel to reject plans that did not meet a specific racial threshold, and that they communicated this guidance on the floor of the Alabama House and Senate. *See supra* pp. 10–11. In short, Alabama did exactly what the appellants now claim is so odious.

If "§2 and the Equal Protection Clause must act in concert," Appellants' Br. at 78, then a determination of the appellants' liability or lack thereof depends on the constitutionality not only of the *Milligan* and *Caster* illustrative plans, but also the enacted 2021 plan. Here, the appellants are not entitled to claim that their plan is race-neutral when the district court made no such determination and the claim is plainly incorrect. If this Court takes the State's claim at face value, it may order the reinstatement of a plan predominantly driven by race, without examining whether the Voting Rights Act justifies that race-driven plan. Just weeks ago, this Court reversed another court for doing the same. *Wis. Legislature*, 2022 WL 851720, at *3. Therefore, the Question Presented here cannot be answered until the district court determines the role of race in the 2021 plan.

CONCLUSION

The district court's preliminary injunction should be vacated, and these cases remanded for consideration of the claims of the *Singleton* and *Milligan* plaintiffs that the 2021 plan is racially gerrymandered, and the *Singleton* plaintiffs' claim that there are race-neutral plans that would comply with Section 2 of the Voting Rights Act.

Respectfully submitted,

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