

No. 21-1086 & 21-1087

IN THE SUPREME COURT OF THE UNITED STATES

JOHN H. MERRILL, IN HIS OFFICIAL CAPACITY AS THE ALABAMA
SECRETARY OF STATE, *et al.*,

Appellants,

v.

EVAN MILLIGAN, *et al.*,

Appellees.

JOHN H. MERRILL, IN HIS OFFICIAL CAPACITY AS THE ALABAMA
SECRETARY OF STATE, *et al.*,

Petitioners,

v.

MARCUS CASTER, *et al.*,

Respondents.

**APPELLEES AND RESPONDENTS' JOINT MOTION
FOR DIVIDED ARGUMENT**

Deuel Ross
Counsel of Record
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC. 700
14th Street N.W. Ste. 600
Washington, DC 20005
(212) 965-7712
dross@naacpldf.org

Counsel for Milligan
Appellees

July 18, 2022

Abha Khanna
Counsel of Record
ELIAS LAW GROUP LLP
1700 Seventh Ave.
Suite 2100
Seattle, WA 98101
(206) 656-0177
AKhanna@elias.law

Counsel for Caster
Respondents

Additional counsel listed on inside cover

Davin M. Rosborough
Julie A. Ebenstein
Dale E. Ho
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad St.
New York, NY 10004

Janai S. Nelson
Samuel Spital
Leah Aden
Stuart Naifeh
Kathryn Sadasivan
Ashley Burrell
Brittany Carter
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006

Latisha Gotell Faulks
Kaitlin Welborn
AMERICAN CIVIL LIBERTIES
UNION OF ALABAMA
P.O. Box 6179
Montgomery, AL 36106-0179

Sidney M. Jackson
Nicki Lawsen
WIGGINS CHILDS PANTAZIS
FISHER & GOLDFARB, LLC
301 19th Street North
Birmingham, AL 35203

Additional Counsel for Milligan Appellees

Richard P. Rouco
QUINN, CONNOR, WEAVER,
DAVIES & ROUCO LLP
Two North Twentieth
2-20th Street North,
Suite 930
Birmingham, AL 35203
(205) 870-9989

David D. Cole
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
915 15th Street N.W. Washington,
DC 20005

Jessica L. Ellsworth
David Dunn
Shelita M. Stewart
Jo-Ann Tamila Sagar
Johannah Walker
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004

Michael Turrill
Harmony A. Gbe
HOGAN LOVELLS US LLP
1999 Avenue of the Stars
Suite 1400
Los Angeles, CA 90067

Blayne R. Thompson
HOGAN LOVELLS US LLP
609 Main Street
Suite 4200
Houston, TX 77002

Marc E. Elias
Lalitha D. Madduri
Daniel C. Osher
Joseph N. Posimato
Olivia N. Sedwick
ELIAS LAW GROUP LLP
10 G. St. NE, Suite 600
Washington, DC 20002
(202) 968-4653

Additional Counsel for Caster Respondents

Pursuant to Supreme Court Rules 21 and 28.4, Appellees in No. 21-1086, Evan Milligan et al. (“*Milligan* Appellees”), and Respondents in No. 21-1087, Marcus Caster et al. (“*Caster* Respondents”) (collectively, “Plaintiffs”), respectfully move to divide their time for oral argument equally between one attorney for *Milligan* Appellees and one attorney for *Caster* Respondents.¹

Plaintiffs have conferred with counsel for Appellants/Petitioners Secretary John Merrill et al. (“Defendants”), who take no position on this motion for divided argument.

These consolidated cases concern the lawfulness of Alabama House Bill 1 of 2021 (“HB 1”), the State’s recently enacted congressional reapportionment plan. Both Plaintiffs challenge HB 1 as a violation of § 2 of the Voting Rights Act (“VRA”). These challenges, however, advance different arguments, marshal different sources of evidence with respect to the key issue on appeal, and were heard by separate courts, albeit in a consolidated preliminary injunction proceeding.²

Divided argument is appropriate for at least two reasons.

First, the *Milligan* Appellees and *Caster* Respondents advance different legal theories concerning the unlawfulness of HB 1. While the *Caster* Respondents focus their challenge on § 2, the *Milligan* Appellees challenge HB 1 on various statutory

¹ Plaintiffs understand that the United States intends to file a motion to divide and enlarge time to allow the United States 15 minutes of argument time. Plaintiffs do not oppose the United States’ motion.

² The *Milligan* Appellees’ constitutional claims triggered the jurisdiction of a three-judge district court. *See* 28 U.S.C. § 2284. The *Caster* Respondents, in contrast, bring only a § 2 claim, and their claim remains properly before a single-judge district court.

and constitutional grounds; in addition to their § 2 claim, they also claim that HB 1 is a product of intentional racial discrimination and unconstitutional racial gerrymandering. Over the course of a consolidated seven-day hearing below, the *Milligan* Appellees made arguments and offered testimony and evidence in support of their multiple theories that were distinct from the arguments, testimony, and evidence relied upon by the *Caster* Respondents.

The distinctions between the *Milligan* Appellees' and *Caster* Respondents' positions remain significant even though the sole issue before the Court is their right to preliminary relief on their § 2 claims. In support of the § 2 claim, the *Milligan* Appellees rely in part on the evidence and arguments developed in conjunction with their constitutional claims about the State's race-based mapmaking and redistricting process and the historical background and events leading up to HB 1's enactment. *See, e.g., Milligan* Appellees' Br. 5-13, 35-39, 49-50. While both *Milligan* Appellees and *Caster* Respondents argue in their merits briefs that Defendants have proposed inappropriate and unworkable revisions to the standard for § 2 claims that are inconsistent with the statutory text, the *Milligan* Appellees' merits brief also argues that, even under Defendants' incorrect standard, the order below should be affirmed because HB 1 subordinated traditional race-neutral redistricting principles to predominantly racial considerations in a manner that indicates that HB 1 was enacted with a racially discriminatory intent. *See, e.g., Milligan* Appellees' Br. 35-39, 49-50.

The differences in legal claims and theories not only frame the Plaintiffs' separate arguments, but also implicate different interests in the consequences of this Court's ultimate ruling. The *Milligan* Appellees' constitutional claims remain live in the district court, and no matter how this Court rules, the *Milligan* Appellees will be required to prove those constitutional claims in subsequent district court proceedings. Therefore, the *Milligan* Appellees and *Caster* Respondents face different constraints in advancing their arguments to this Court, particularly as the *Milligan* Appellees must remain conscious of their need to preserve and later support their constitutional claims.

Defendants have emphasized this distinction between the *Milligan* Appellees and *Caster* Respondents' positions. In moving to exceed word limits in their briefing, Defendants' primary argument in support of their motion was that the *Milligan* Appellees' and *Caster* Respondents' "statutory arguments are not identical, emphasizing different arguments and portions of the record." Unopposed App. to Exceed Word Limits (Mar. 8, 2022).

Second, the cases put forward by the *Milligan* Appellees and *Caster* Respondents rely on two different experts who put forward two different sets of illustrative maps, each an amalgam of countless fact-specific map-drawing choices that result in plans that perform differently under traditional redistricting criteria.

The centerpiece of Defendants' argument on appeal is that "race predominated" in the illustrative plans offered by Plaintiffs' experts. Defs.' Br. at 66. The district court found both Dr. Moon Duchin (*Milligan* Appellees' expert) and Mr.

William Cooper (*Caster* Respondents' expert) to be "highly credible" experts whose eleven illustrative plans satisfied *Bartlett v. Strickland*, 556 U.S. 1 (2009), and reasonably complied with traditional redistricting principles without race predominating. MSA156-160. Defendants, meanwhile, rely on the specific testimony of individual experts to offer different criticisms of Plaintiffs' overall satisfaction of the first *Gingles* precondition. But the evidence offered in each distinct case need not rise and fall together. For instance, as the *Caster* Respondents' brief explains, Defendants place great weight on Dr. Duchin's testimony in arguing that race predominated in her illustrative plans, *see, e.g.*, Defs' Br. at 68-77, but Dr. Duchin's testimony has no bearing on the wholly separate testimony and plans proffered by Mr. Cooper. *Caster* Respondents' Br. 32. Indeed, Defendants' expert witness "never reviewed exhibits to Mr. Cooper's report" and failed to review all seven of Mr. Cooper's plans. MSA160. The Court therefore may be interested in individually exploring the testimony of Dr. Duchin or Mr. Cooper, their illustrative plans, and their separate mapmaking processes. The *Milligan* Appellees and *Caster* Respondents are best positioned to offer specific arguments regarding the two separate experts whom each presented below.

In light of these differences, Plaintiffs believe that the Court's adjudication of this appeal would be best served by allowing them to present divided argument. *See* Stephen M. Shapiro, *et al.*, *Supreme Court Practice* 777 (10th ed. 2013) ("Having more than one lawyer argue on a side is justifiable . . . when they represent different parties with different interests or positions."). This Court has regularly granted motions for

divided argument in complex redistricting cases where aligned parties assert distinct legal theories based on different evidence. *See, e.g., Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (permitting divided argument between aligned plaintiffs who relied on different evidence and arguments to support related claims in challenges to a state’s districting plan); *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1237 (2019) (permitting divided argument where aligned parties offered different perspectives on redistricting issues); *Abbott v. Perez*, 138 S. Ct. 1544 (2018) (permitting divided argument between aligned plaintiffs who brought similar § 2 challenges to state districting maps but relied on different evidence and arguments); *Wittman v. Personhuballah*, 577 U.S. 1134 (2016) (permitting divided argument among two aligned parties and the United States, as *amicus curiae* in support thereof); *Harris v. Arizona Independent Redistricting Comm’n*, 577 U.S. 1001 (2015) (same); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 434 (2014) (permitting divided argument among the United States, as *amicus curiae*, and two aligned plaintiffs who raised related constitutional and § 2 claims but relied on different analytical frameworks to challenge Alabama’s redistricting map); *LULAC v. Perry*, 126 S. Ct. 1186 (2006) (permitting divided argument between aligned plaintiffs who “d[id] not join each other as to all claims” in constitutional and § 2 challenge to a state redistricting map); *see also Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 951 (2019) (permitting divided argument among two aligned parties and the United States, as *amicus curiae* in support thereof). Plaintiffs respectfully request that the Court do the same here to

ensure it has a full opportunity to explore the various and different legal and evidentiary issues presented by the parties.

CONCLUSION

Plaintiffs respectfully request that the Court grant their joint motion for divided argument.

Respectfully submitted,

Deuel Ross
Counsel of Record
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC. 700
14th Street N.W. Ste. 600
Washington, DC 20005
(212) 965-7712
dross@naacpldf.org

Janai S. Nelson
Samuel Spital
Leah Aden
Stuart Naifeh
Kathryn Sadasivan
Brittany Carter
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006

Latisha Gotell Faulks
Kaitlin Welborn
AMERICAN CIVIL LIBERTIES
UNION OF ALABAMA
P.O. Box 6179
Montgomery, AL 36106-0179

Sidney M. Jackson
Nicki Lawsen
WIGGINS CHILDS PANTAZIS
FISHER & GOLDFARB, LLC
301 19th Street North
Birmingham, AL 35203

Davin M. Rosborough
Julie A. Ebenstein
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St.
New York, NY 10004

David D. Cole
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
915 15th Street N.W. Washington,
DC 20005

Jessica L. Ellsworth
David Dunn
Shelita M. Stewart
Jo-Ann Tamila Sagar
Johannah Walker
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004

Michael Turrill
Harmony A. Gbe
HOGAN LOVELLS US LLP
1999 Avenue of the Stars
Suite 1400
Los Angeles, CA 90067

Blayne R. Thompson
HOGAN LOVELLS US LLP
609 Main Street
Suite 4200
Houston, TX 77002

Counsel for Milligan Appellees

Richard P. Rouco
QUINN, CONNOR, WEAVER,
DAVIES & ROUCO LLP
Two North Twentieth
2-20th Street North,
Suite 930
Birmingham, AL 35203
(205) 870-9989

Abha Khanna
Counsel of Record
ELIAS LAW GROUP LLP
1700 Seventh Ave., Suite 2100
Seattle, WA 98101
(206) 656-0177
AKhanna@elias.law

Marc E. Elias
Lalitha D. Madduri
Daniel C. Osher
Joseph N. Posimato
Olivia N. Sedwick
ELIAS LAW GROUP LLP
10 G. St. NE, Suite 600
Washington, DC 20002
(202) 968-4653

Counsel for *Caster* Respondents