No. 21A376

IN THE SUPREME COURT OF THE UNITED STATES

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

Applicants,

v.

MARCUS CASTER, *et al.*,

Respondents.

RESPONDENTS' OPPOSITION TO EMERGENCY APPLICATION FOR ADMINISTRATIVE STAY, STAY OR INJUNCTIVE RELIEF PENDING APPEAL, AND ALTERNATIVE PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicants are John H. Merrill, in his official capacity as Alabama Secretary of State, Alabama State Senator Jim McClendon, and Alabama State Representative Chris Pringle. Applicants were the defendants and defendant-intervenors before the United States District Court for the Northern District of Alabama.

Respondents are Marcus Caster, Lakeisha Chestnut, Bobby Lee DuBose, Benjamin Jones, Rodney Allen Love, Manasseh Powell, Ronald Smith, and Wendell Thomas. Respondents were plaintiffs in the district court.

The proceedings below were *Marcus Caster, et al. v. John Merrill, et al.*, No. 2:21-cv-1536-AMM (N.D. Ala.). The district court issued a preliminary injunction on January 24, 2022, and it denied the defendants' motion for stay pending appeal on January 27, 2022.

Related cases include:

1. *Evan Milligan, et al. v. John Merrill, et al.*, No. 2:21-cv-1530-AMM (N.D. Ala.). The district court issued a preliminary injunction on January 24, 2022, and it denied the defendants' motion for stay pending appeal on January 27, 2022. Defendants filed an application for stay pending appeal in this Court on January 28, 2022 (No. 21A375).

2. *Bobby Singleton, et al. v. John Merrill, et al.,* No. 2:21-cv-1291-AMM (N.D. Ala.). While the district court issued, on January 24, 2022, the same order granting a preliminary injunction that was issued in *Milligan*, plaintiffs in *Singleton* assert only an Equal Protection Clause claim, which the district court declined to consider.

The district court denied defendants' motion to stay pending appeal on January 27, 2022.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents each represent that they do not have any parent entities and do not issue stock.

Respectfully submitted,

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INTRODUCTION

Alabama's new congressional redistricting plan provides Black voters the opportunity to elect just one of Alabama's seven congressional representatives, even though they comprise more than 27 percent of Alabama's voting-eligible population. After hearing from five fact witnesses, scrutinizing eight experts, considering a dozen briefs, and reviewing hundreds of exhibits, the district court issued a 225-page order reaching the unsurprising conclusion that the plan unlawfully dilutes the voting strength of Black Alabamians, and granted a preliminary injunction against it. This textbook vote dilution case was, as the district court determined, not even "a close one." App.204.

The court's extensively reasoned order concluded that the new plan cracks Black voters among four congressional districts—precisely what Section 2 of the Voting Rights Act prohibits. The district court closely examined the substantial evidentiary record, delved deep into each of the expert's reports, and made detailed credibility determinations based on witnesses' demeanor during live testimony. It carefully considered Alabama's arguments about the injunction's impact on the 2022 elections, but nevertheless determined that immediate intervention was warranted to ensure that Black Alabamians are not denied equal access to the political process.

This decision was not an abuse of discretion.

Alabama's stay application ignores almost entirely the evidence presented to the district court and discussed in its thorough opinion and instead relies on a novel theory of Section 2 that has no basis in this Court's precedents: that Plaintiffs failed

to satisfy the first *Gingles* precondition because they intentionally sought to draw an illustrative district that contained the requisite "large and geographically compact" minority group rather than stumbling into that showing by accident. *See Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). But Plaintiffs satisfied the first *Gingles* precondition by showing that it is possible to draw an additional majority-Black district in Alabama consistent with traditional districting principles. The mere consideration of race in advancing an illustrative plan in a racial vote dilution claim neither undermines that showing nor requires race to predominate over other factors. Alabama's contrary argument seeks a wholesale revision of Section 2 precedent—and falls well short of the high bar the State must clear to stay an injunction.

Alabama's separate assertion that it is too late in the election cycle for relief ignores that the primary elections are still months away, and the State's fears of electoral "chaos" are as baseless as its merits arguments. Plaintiffs filed this suit just hours after Alabama's new congressional plan became law. The district court's preliminary injunction ruling was issued less than 12 weeks later. Under Alabama's reasoning, passage of a new redistricting plan effectively immunizes the State from compliance with federal law for at least one election. No precedent of this Court or any other provides the free pass the State seeks. The requested stay should be denied.

BACKGROUND AND PROCEDURAL HISTORY

I. Congressional Redistricting in Alabama

Since the 1990 redistricting cycle, Black Alabamians have had the opportunity to elect their preferred candidate in just one of the state's seven congressional districts, Congressional District ("CD") 7. That district—the state's only majority-

Black congressional district—was the result of federal court litigation. *Wesch v. Hunt*, 785 F. Supp. 1491 (S.D. Ala. 1992). CD 7, as drawn by the *Wesch* court, was a "significant majority African-American district with an African-American population of 67.53%." *Wesch v. Folsom*, 6 F.3d 1465, 1468 (11th Cir. 1993).

Since *Wesch*, CD 7 has elected Black-preferred candidates to Congress in every election cycle in increasingly uncompetitive races. Between 2002 and 2010, the candidate preferred by Black voters in CD 7 received no less than 72% of the vote. ECF No. 44 at 6.[1] Representative Terri Sewell was elected in 2012 with 75% of the vote, and she has run unopposed in every general election since. *Id.* at 7.

During this time, Black Alabamians' share of the state's total population has steadily increased, while white Alabamians' share of the population has decreased. This past decade exemplified this trend. Between 2010 and 2020, the state's Black population increased by 6.53%, accounting for over a third of the state's total population growth since 2010. ECF No. 48 at 6-7. By contrast, white Alabamians' share of the total population decreased, from 67.04% to 63.12%. *Id.* at 6. Since 1990, white Alabamians' share of the total population has dropped more than 10 percentage points. App.94. Today, 27.16% of Alabama's population is Black. ECF No. 48 at 6.

A significant part of Alabama's Black population resides in and around the

[1] "ECF No." refers to entries on the district court docket below, *Caster v. Merrill*, No. 2:21-cv-1536-AMM (N.D. Ala.). "Tr." refers to the transcript of the district court's preliminary injunction hearing, relevant excerpts of which are included in an appendix to this opposition. "App." refers to the Appendix to Alabama's application, which contains the district court's orders granting preliminary injunctive relief and denying a stay pending appeal.

Black Belt, a region in the southern half of the state originally named for its black soil. ECF No. 44 at 5. Black residents constitute a majority or near-majority of the voting-age population in each of the Black Belt counties. *Id.* That community has a legacy in the area spanning centuries, beginning with slave owners bringing their slaves to the Black Belt and forcing them to work the fertile soil. *Id.*; *see also* ECF No. 84-2. There is no dispute that Alabama's Black Belt is a community of interest, due to the shared history, culture, and political interests of Black residents of this area. Tr. 1064:1-3; *see also Ala. Legis. Black Caucus v. Alabama*, 231 F. Supp. 3d 1026, 1222 (M.D. Ala. 2017) (three-judge court) (noting "all parties have recognized" the Black Belt "as a community of interest"). While Black voters in CD 7 during the last three decades have elected their candidate of choice by overwhelming margins, Black residents of the Black Belt have been distributed among CDs 1, 2, and 3, where white voters overwhelmingly outnumber and outvote them.

II. Alabama's New Congressional Plan

Governor Kay Ivey signed Alabama's new congressional plan, HB 1, into law on November 4, 2021. Once again, Alabama's plan includes just one majority-Black district, CD 7, and it divides the remainder of the Black community in the southern half of the state, including much of the Black Belt, among CDs 1, 2, and 3. App.176. CDs 1, 2, and 3 all have Black voting age populations ("BVAPs") between 24.99% and 30.12%. ECF No. 48 at 12. Because of racially polarized voting in which Black and white Alabamians overwhelmingly prefer different candidates, none of those districts provides Black voters an opportunity to elect their preferred candidates.

Before drawing HB 1, the Legislature's Reapportionment Committee adopted a set of redistricting guidelines for use in redrawing congressional, state legislative, and State Board of Education ("SBOE") plans based on the 2020 Census. App.228-34. The guidelines prioritized population equality, compliance with Section 2 (including avoiding the dilution of minority voting strength), contiguity, and compactness. App.228-29. They separately called for avoiding incumbent pairings, respecting communities of interest, minimizing the number of counties in each district, and preserving cores of existing districts, but only "to the extent that they do not violate or subordinate" the prioritized principles above. App.229-30. Using those same guidelines, Alabama created an eight-district SBOE plan containing two majority-Black districts, one of which covers much of the Black Belt and connects Montgomery to the City of Mobile, splitting Mobile County with another district. ECF No. 48 at 19.

III. Proceedings Below

A. The Preliminary Injunction Proceedings

Plaintiffs here—Dr. Marcus Caster and seven other Black voters—filed suit against the Alabama Secretary of State within hours of HB 1's enactment, asserting the plan violates Section 2 by diluting the voting strength of Black Alabamians. ECF No. 1. Plaintiffs allege that, under the totality of circumstances, HB 1's failure to draw a second, reasonably compact majority-Black district denies Black voters an equal opportunity to elect their candidates of choice.

Two other suits are pending in the Northern District of Alabama challenging HB 1: *Singleton v. Merrill*, No. 2:21-cv-1291-AMM, which asserts solely a Fourteenth Amendment claim, and *Milligan v. Merrill*, No. 2:21-cv-1530-AMM, which asserts a

Fourteenth Amendment claim and a Section 2 claim. Both cases were assigned to Judge Anna M. Manasco. Because those two suits assert constitutional claims, the Chief Judge of the U.S. Court of Appeals for the Eleventh Circuit appointed Circuit Judge Stanley Marcus and District Judge Terry F. Moorer of the Southern District of Alabama to form a three-judge district court along with Judge Manasco. *See* 28 U.S.C. §2284(a) (requiring three-judge district courts in cases asserting "constitutional" challenges to redistricting plans).

Because the present case involves only a statutory claim, it is proceeding before Judge Manasco alone. However, after all three groups of plaintiffs indicated an intent to seek preliminary injunctive relief, the districts courts determined that the most efficient course of action was to hold a joint hearing. While this case was not consolidated with the others, the parties in all three cases agreed that evidence admitted by the parties in one case would be usable by the parties in the other. App.28.

The hearing convened on January 4, 2022. Over seven days, the court heard testimony from eight expert witnesses and five fact witnesses relevant to the Section 2 claim. Plaintiffs presented evidence on each element of their claim. Those elements begin with the *Gingles* "preconditions," which require Plaintiffs to show (1) the Black population is "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) Black voters are "politically cohesive," and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidates." *Gingles*, 478 U.S. at 50-51.

To satisfy the first *Gingles* precondition, Plaintiffs offered the testimony of

William Cooper, an expert mapdrawer with three decades of experience who has been accepted as an expert in approximately 45 federal court cases. Tr.419:11-420:8. Mr. Cooper developed seven illustrative plans that each contained a second majority-Black district, CD 2. App.93-95. CD 2 in his illustrative plans resembles the majority-Black district in Alabama's SBOE plan—drawn using the same redistricting guidelines as HB 1—which connects the City of Mobile to Montgomery County, with the Black Belt in the middle. App.95-96; ECF No. 48 at 23-37; ECF No. 65 at 2-6. Mr. Cooper testified how his mapdrawing process involved balancing all traditional redistricting principles (in particular, those identified in Alabama's guidelines), and how he did not give more attention to race than any other principle. App.96-100.

Similarly, the *Milligan* plaintiffs offered Dr. Moon Duchin, who created four illustrative plans containing a majority-Black CD 2. App.69. Dr. Duchin also explained how she balanced all traditional principles when drawing her plans, and that she did not give race more consideration than any other principle. App.63-73.

The *Caster* and *Milligan* Plaintiffs also offered extensive additional expert and lay witness testimony demonstrating the common political interests, needs, history, and culture among Black voters in CD 2 under their illustrative plans. App.73, 89, 100-01. This included expert testimony from Dr. Joseph Bagley, a historian, who discussed the Black Belt's historical foundations, its importance to the Black community in southern Alabama, and the serious poverty, employment, education, and health issues that Black residents in the Black Belt face. ECF No. 84-2; Tr. 1161:18-1165:10; *Milligan v. Merrill*, No. 2:21-cv-1530-AMM (N.D. Ala.), ECF No. 68-

2 at 7, 18, 21 24-25. Several lay witnesses testified about the strong connections between Black residents of the Black Belt and Black residents of the City of Mobile, Washington County, and Montgomery County, who face similar concerns relating to poverty, employment, education, and healthcare. Tr. 136:23-137:6, 140:11-144:22, 372:24-375:4, 1348:18-1356:5, 1358:22-1359:19, 1628:1-1636:6, 1637:7; *see also* ECF No. 56-4 at 337:3-341:8, 354:20-365:13, 420:10-428:1; ECF No. 56-7 at 220:3-227:17.

With respect to the second and third *Gingles* preconditions, the *Caster* and *Milligan* Plaintiffs offered testimony from Dr. Maxwell Palmer and Dr. Baodong Liu, both of whom demonstrated through ecological inference analysis that Black voters vote extremely cohesively at the statewide level and in the areas of CDs 1, 2, 3, and 7 under HB 1. App.74-80, 101-105. They further showed that white voters in Alabama vote as a bloc against Black-preferred candidates, and, as a result, white voters' preferred candidates consistently beat the preferred candidates of Black voters unless the majority of the electorate is Black. *Id.*

Finally, Plaintiffs offered evidence relevant to the "totality of the circumstances" analysis, which requires a court "to determine whether members of a racial group have less opportunity than do other members of the electorate." *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 425-26 (2006). "For this purpose, the Court has referred to the Senate Report on the 1982 amendments to the Voting Rights Act, which identifies [nine] factors typically relevant to a § 2 claim." *Id.* at 426. Plaintiffs presented expert and lay testimony about Alabama's history of voting-related discrimination and use of electoral schemes that enhance the

opportunity for discrimination, racially polarized voting, socioeconomic effects of discrimination that have the tendency to impede political participation, racial appeals in Alabama political campaigns, the severe underrepresentation of Black Alabamians in public office, unresponsiveness of elected officials to Black residents, and the tenuousness of the HB 1's justifications. *See id.*; App.80-91, 105-110.

The Secretary and intervenor-defendants State Senator Jim McClendon and State Representative Chris Pringle (collectively, "Alabama" or "the State") presented two experts and one lay witness. Alabama offered Thomas Bryan as a mapping expert, who attempted to demonstrate that Plaintiffs' illustrative plans were inconsistent with select traditional redistricting principles. App.111-16, 131-128. They then offered Dr. M.V. Hood III, who agreed that voting in Alabama is racially polarized. App.127, 129. Last, they called former Congressman Bradley Byrne, who spoke about the community of interest in the Mobile Bay. App.123-25.

B. The District Court's Order

Twelve days after the hearing ended, the district court issued an extensive, 225-page order granting Plaintiffs' preliminary injunction on Section 2 grounds. The court concluded Plaintiffs satisfied the first *Gingles* precondition by offering eleven illustrative plans containing a second, reasonably compact majority-Black district (CD 2), and that those plans were consistent with traditional redistricting principles. App.155-83. In reaching that conclusion, the court examined each specific principle—compactness, population equality, contiguity, maintenance of political subdivisions, respect for communities of interest, incumbency, and core retention—and described in detail how the illustrative plans accounted for each. App.168-82.

In doing so, the court relied upon extensively reasoned credibility determinations. The court found Plaintiffs' experts, Mr. Cooper and Dr. Duchin, "highly credible" and their methods and conclusions "highly reliable," App.157-61, but Alabama's expert, Mr. Bryan, uncredible and unreliable. App.161-65. The court explained that Mr. Bryan's analyses were based on an incomplete review of the relevant facts (particularly regarding communities of interest), his report contained references to authorities he had not reviewed, many of his opinions lacked sufficient (or at times, any) basis, his testimony was internally inconsistent, and his demeanor did not suggest credibility. App.161-65.

The court also rejected Alabama's contention that Plaintiffs' illustrative plans are unconstitutional racial gerrymanders, finding this argument wrong on the facts and law. App.213-15. On the facts, the court found that race did not predominate in the creation of the illustrative plans, which were drawn consistent with traditional redistricting principles. App.213-14. On the law, the court explained that the limited consideration of race in drawing an illustrative plan to establish the first *Gingles* precondition does not equate to racial predominance, and if that fact rendered Plaintiffs' illustrative plans racial gerrymanders—as Alabama contends—no Section 2 plaintiff could ever prevail. App.214-15.

As for the second and third *Gingles* preconditions, the court found that "voting in the challenged districts is intensely racially polarized," with Black voters and white voters cohesively voting for opposing candidate, and white voters' candidates of choice consistently defeating Black voters' candidate of choice unless Black voters

constituted a majority of the electorate. App.183-87.

Having found the *Gingles* preconditions satisfied, the court turned to the totality of the circumstances analysis. The Court found "that every Senate Factor [it was] able to make a finding about"—Factors 1, 2, 3, 5, 6, and 7—"weighs in favor" of Plaintiffs, "and that no Senate Factors or other circumstances we consider at this stage weigh in favor of Defendants." App.204. It also found a stark disproportionality between Black Alabamians' share of the state population (27%) and the number of congressional districts in which they have an opportunity to elect their candidates of choice (1 of 7, or 14%). App.202-04.

As to the remaining factors relevant to the preliminary injunction analysis, the court found HB 1 threatens Plaintiffs and other Black Alabamians with the irreparable harm of vote dilution; there is sufficient time before the May 24 primary elections to implement a new, lawful plan; and an injunction is in the public interest. App.206-213. As a result, the court granted Plaintiffs' motion, allowed the Alabama Legislature 14 days to enact a remedial plan, and extended the candidate qualifying deadline (originally set for January 28) by two weeks. App.219-23.

C. Alabama's Appeal

After noticing appeals in this case (to the Eleventh Circuit) and in *Milligan* (to this Court), Alabama filed a motion to stay, which the district court denied in a 34-page order. App.241-77. Alabama next sought a stay from the Eleventh Circuit in this case. On January 28, 2022, that court held the motion for a stay in abeyance pending the outcome of the stay application in *Milligan* here. Order, *Caster v. Merrill*, No. 22-10272. Alabama subsequently filed its emergency application for a stay or injunction

with this Court in *Milligan*. *Merrill v. Milligan*, No. 21A375. A few hours later, Alabama filed this emergency stay application and alternative petition for writ of certiorari before judgment.

ARGUMENT

Alabama cannot meet its heavy burden of demonstrating that a stay of the district court's thorough and extensively reasoned order is warranted. "A stay is an intrusion into the ordinary process of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks omitted). As a result, a "stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian Ry. Co. v. United States*, 272 U.S. 658, 673 (1926). It is "extraordinary relief," and by requesting it, Alabama bears a "heavy burden." *Winston-Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971); *see also Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) ("[T]he applicant must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal." (quoting *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975))).

To prove its entitlement to a stay, Alabama must establish (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari," (2) "a fair prospect that a majority of the Court will vote to reverse the judgment below," and (3) "a likelihood that irreparable harm will result from the denial of a stay." *Corsetti v. Massachusetts*, 458 U.S. 1306, 1306-07 (1982) (Brennan, J., in chambers) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980)). "[I]n a

close case it may be appropriate to 'balance the equities' to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.*

This Court regularly receives requests to stay court orders enjoining the use of redistricting plans, but it rarely grants them. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 914 (2019) (denying stay of injunction against use of state legislative plan); *McCrory v. Harris*, 577 U.S. 1129 (2016) (denying stay of injunction against use of congressional plan); *Wittman v. Personhuballah*, 577 U.S. 1125 (2016) (denying stay of injunction against use of congressional plan); *see also League of United Latin Am. Citizens v. Perry*, 567 U.S. 966 (2012) (denying stay of injunction adopting remedial congressional plan). This run-of-the-mill Section 2 litigation should not be the exception to that trend. Because Alabama entirely fails to show that it is likely to succeed in this appeal or that irreparable harm will result without a stay, its application should be denied.[2]

I. Alabama fails to make a strong showing of likelihood of success in this appeal.

Alabama does not make any showing—let alone a strong showing—that it is substantially likely to succeed in this appeal. On that basis alone, this Court should deny the application.

[2] Plaintiffs do not oppose Alabama's petition for certiorari pending judgment. Alabama's appeal in *Milligan* is currently pending in this Court via mandatory appeal, while its appeal in this case is pending before the Eleventh Circuit. Issuing a writ of certiorari before judgment in this case would prevent the prospect of two disjointed appeals from the same order based on the same record.

A. The standard of review requires significant deference to the district court's conclusions.

The State's bid for a reversal of the injunction below must overcome a significant amount of deference to the district court's findings and conclusions. This Court reviews a district court's finding of vote dilution under Section 2 using "the clearly-erroneous test of Rule 52(a)." *Gingles*, 478 U.S. at 79. This is because Section 2's inquiry is "particularly dependent upon the facts of each case, and it requires an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Id.* (cleaned up). "[A]pplication of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law." *Id.* This is particularly the case where, as here, the district court heard a substantial amount of live testimony and made explicit and extensively reasoned witness credibility determinations, to which this Court gives "singular deference." *Cooper v. Harris*, 137 S. Ct. 1455, 1474 (2017); *see also Anderson v. City of Bessemer*, 470 U.S. 564, 575-76 (1985) (holding that "[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings," which "can virtually never be clear error").

Clear-error review "extends not only to the district court's ultimate conclusion of vote dilution, but also to [any] 'finding that different pieces of evidence carry different probative values in the overall section 2 investigation.'" *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1301 (11th Cir. 2020) (quoting *Solomon v. Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1227 (11th Cir. 2000) (en banc)).

This is because the various factors considered in that analysis "will be more or less probative depending upon the facts of the case." *Id.* As a result, this Court "review[s] all of the district court's findings regarding the probative value assigned to each piece of evidence for clear error." *Id.* (internal quotation marks omitted).

Thus, the district court's finding that HB 1 violates Section 2 can be reversed only if, "on the entire evidence," this Court "is left with the definite and firm conviction that a mistake has been committed." *Anderson*, 470 U.S. at 573 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). Reversal is not permitted "simply because it is convinced it would have decided the case differently." *Id.*

The district court's decision to grant a preliminary injunction, meanwhile, is reviewed only for abuse of discretion. *See Gonzales v. O Centro Espirita Beneficente Umiao do Vegetal*, 546 U.S. 418, 428 (2006). It is not this Court's role, under this standard, to "reweigh[] evidence" or "reconsider[] facts already weighed and considered by the district court." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990). "This deferential standard follows from [t]he expedited nature of preliminary injunction proceedings, in which judgments . . . about the viability of plaintiff's claims and the balancing of equities and the public interest . . . are the district court's to make." *Jones v. Gov. of Fla.*, 950 F.3d 795, 806 (11th Cir. 2020) (emphases added) (internal quotation marks omitted)).

Considering the significant deference owed to the district court in this appeal, Alabama has an extraordinarily high burden to show that it is likely to succeed. Its application falls woefully short.

B. The district court's finding that Plaintiffs satisfied the first *Gingles* precondition was not clearly erroneous.

Alabama's stay application contests only one issue on the merits—Plaintiffs' satisfaction of the first *Gingles* precondition. But Alabama fails to demonstrate any basis for this Court to find the district court's conclusion on this issue clearly erroneous. Apparently recognizing that the governing precedent, evidentiary record, and detailed findings below compel just one conclusion, Alabama invents a new legal standard altogether. Under Alabama's novel theory, illustrative plans that considered race cannot satisfy the first *Gingles* precondition. Nothing in this Court's case law supports Alabama's theory, which would preclude success under Section 2 regardless of whether an illustrative plan is consistent with traditional districting criteria.[3]

1. To determine whether an illustrative plan satisfies the first *Gingles* precondition's compactness requirement, courts examine whether the proposed additional majority-minority district is consistent with "traditional districting principles." *LULAC*, 548 U.S. at 433. The district court applied this standard, performing an exhaustive, in-depth analysis of Plaintiffs' illustrative plans alongside each individual traditional redistricting principle. App.156-83. Based on this meticulous analysis, the district court found Plaintiffs satisfied this precondition. *Id.*

Alabama asserts this conclusion was clearly erroneous because Plaintiffs'

[3] Alabama's application does not challenge the district court's findings that Plaintiffs satisfied the second and third *Gingles* preconditions. As a result, Plaintiffs do not discuss those issues here.

experts drew a second majority-Black district "on purpose." Application 20. That position turns the first *Gingles* precondition on its head. Alabama's theory faults Plaintiffs' experts for making the very showing that *Gingles* requires: that it is possible to "creat[e] *more* than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *LULAC*, 548 U.S. at 430 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994)) (emphasis added); *see also Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) ("It remains the rule . . . that a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). To make that showing, Plaintiffs' experts had to create, on purpose, a reasonably compact, majority-Black district that did not yet exist. This necessarily required some consideration of race. *See Davis v. Chiles*, 139 F.3d 1414, 1426 (11th Cir. 1998) (holding race must be "a factor in [Plaintiffs' experts'] process of designing" illustrative plans because *Gingles* "*require*[*s*] plaintiffs to show that is possible to draw majority-minority voting districts" that do not currently exist). Rejecting Plaintiffs' illustrative plans because their experts intentionally drew majority-Black districts would "penalize [plaintiffs] . . . for attempting to make the very showing that *Gingles* [and its progeny] demand," making it "impossible, as a matter of law, for any plaintiff to bring a successful Section Two action." *Id.* at 1425.

Doubling down on this theory, Alabama invents out of whole cloth a specific set of steps it asserts Section 2 plaintiffs' expert must take in drawing an illustrative plan. First, according to Alabama, the expert must draw the plan using race-neutral

redistricting criteria, and "only then may the [expert] assess whether the employment of traditional redistricting criteria *has resulted* in 'reasonably configured' majority-minority districts that the State failed to create." Application 22 (emphasis added); *id*. at 23 (faulting Plaintiffs' experts for failing to take these specific steps). This rigid requirement contravenes this Court's repeated instruction "that the *Gingles* requirements 'cannot be applied mechanically.'" *Bartlett*, 556 U.S. at 15 (quoting *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993)). Not one of "[t]his Court's precedents" sets forth such a requirement as Alabama claims, Application 22, and certainly not the cases Alabama cites. The portion of *LULAC* Alabama cites, for example, speaks only of the requirement that a court not assume members of the same minority group share the same "characteristics, needs, and interests." 548 U.S. at 434. The district court below made no such assumption here. Plaintiffs offered substantial evidence—discussed at length by the district court—showing that members of the Black communities connected in CD 2 in the illustrative plans have much in common. App.73, 89, 100-01, 164-71; *see also id.* at 177 ("Defendants are swinging at a straw man."). The State can point to nothing in *LULAC* that prescribes a specific method of drawing illustrative plans under Section 2. Nor does its newfound theory of the first *Gingles* precondition find any support in the remaining cases it cites, all of which involve racial gerrymandering claims, not Section 2 claims. Application 22.[4]

The first *Gingles* precondition does not require Plaintiffs' experts to blindly

[4] Argument Section I.C, below, explains why those decisions do not support Alabama's assertion that Plaintiffs' illustrative plans are racial gerrymanders.

stumble around Alabama's map, hoping they might just happen to run into a new majority-Black district. All it requires is a showing that one can create an additional majority-Black congressional district in Alabama that "take[s] into account traditional districting principles." *LULAC*, 548 U.S. at 433 (internal quotation marks omitted); *see also Davis*, 139 F.3d at 1425 (requiring plaintiff to show "it would be possible to design [a majority-minority] electoral district, consistent with traditional districting principles").[5]

The same applies to Alabama's repeated citation to Dr. Duchin's statement that she considered it "non-negotiable" to include two majority-Black districts in her illustrative plans, Application 1, 2, 13, 22, 27, 35, and that she did not happen to draw two majority-Black districts "by accident," *id.* at 23, 26. Those statements are unremarkable given her task: to determine whether it was possible to create a second majority-Black district consistent with traditional redistricting principles. Surely it would have made no sense, in answering that question, for Dr. Duchin to consider plans that did *not* contain two majority-Black districts.

Alabama mischaracterizes the district court's decision by claiming that it found Plaintiffs' illustrative plans "'prioritiz[ed] race' over traditional race-neutral

[5] Notwithstanding its initial insistence that the problem is that Plaintiffs' experts drew illustrative plans with two majority-Black districts "on purpose," Application 22, Alabama later argues that it is not the experts' "subjective intent" that determines satisfaction of the first *Gingles* precondition, but instead the illustrative plans' "objective" consistency with "race-neutral criteria." Application 26. If that is true, however, it is unclear what Alabama's quarrel is with the district court, which extensively analyzed that issue and concluded that Plaintiffs' illustrative plans were entirely consistent with traditional redistricting principles.

principles." *E.g.*, Application 1 (quoting App.213-14). The court found precisely the opposite. In the very pages Alabama cites, the court stated that Plaintiffs' experts did *not* "prioritize[] race above everything else." App.214. In fact, as the court explained, Plaintiffs' illustrative plans would have looked quite different had their experts allowed race to predominate. App.96-97, 214. Alabama misunderstands the meaning of this fact by characterizing it as an assertion that Plaintiffs' illustrative plans "could have been [worse]." Application 28. But that is not what the district court's order says. Rather, it found that Plaintiffs' experts made their individual line-drawing decisions not by subordinating traditional redistricting principles to race, but instead by taking race-neutral principles into account, resulting in, for example, minimization of county and municipality splits, increased compactness, and ensuring contiguity. *See* Tr. 442:9-12, 524:5-16. Mr. Cooper explained, for example, that the only time he split census blocks was to achieve zero population deviation, not to achieve a race-based goal. Tr. 525:3-11. Indeed, Alabama's own expert, Mr. Bryan, admitted he could not point to a *single* "line drawing decision[]" made by Mr. Cooper that appeared to be based on race. Tr. 975:21-25.

Plaintiffs' experts did precisely what the first *Gingles* precondition requires: determine whether it is possible to draw a second majority-Black congressional district in Alabama that is consistent with traditional redistricting principles. After engaging in that specific inquiry, they independently reached the conclusion that such a district was possible, and they offered 11 different examples of how that can be done. As explained next, Alabama identifies no basis to conclude that the district

court clearly erred in crediting those experts' opinions.

2. Despite proclaiming that Plaintiffs' illustrative plans "subvert . . . traditional principles to race," Application 25, Alabama offers no reason to question a *single one* of the district court's findings relating to any of those principles. It provides no basis for questioning the district court's conclusions as to district compactness, App.166-68, 162; population equality, App.171; contiguity, App.172; maintenance of political subdivisions, App.172-73; respect for communities of interest, App.173-80; incumbency, App.180-81; or core retention, App.181-82. Instead, it relies on one piece of evidence—results of computer-simulated plans generated for a different purpose that account for only some traditional redistricting principles—claiming those results disprove Plaintiffs' entire case. Application 2.

Alabama badly oversells what those simulations show. No expert suggested that the simulation analyses demonstrated it is "impossible" to draw an additional majority-Black district "consistent with traditional, race-neutral redistricting principles." Application 26. In fact, they said the opposite: Dr. Duchin, who in a past publication performed one of the simulation sets on which Alabama so heavily relies, testified that despite those results it was "certainly possible" to randomly generate a plan with two majority-Black districts using exclusively non-racial considerations. Tr.685:2-10. Moreover, those simulations were based on outdated data from 2010, which do not take into account the significant population growth among the Black population in the last decade. More importantly, as the district court explained, Alabama's "inference is a bridge too far: although the simulation results suggest that

some awareness of race likely is required to draw two majority-Black districts, they do not establish that race must predominate to achieve that result." App.255 (emphasis added). This obvious fact—that Plaintiffs' experts paid attention to race when drawing a second majority-Black district—is far from "stunning." Application 25. And it surely does not defeat Plaintiffs' Section 2 claim. *Davis*, 139 F.3d at 1425-26 (the first *Gingles* precondition "require[s]" some consideration of race). Nor, as discussed further below, *infra* Argument Section I.C, does it trigger any heightened scrutiny under the Equal Protection Clause. *Bush v. Vera*, 517 U.S. 952, 958 (1996) ("Strict scrutiny does not apply . . . to all cases of intentional creation of majority-minority districts."). At bottom, the separate, simulated plans tell us nothing about whether *Plaintiffs' illustrative plans* respect traditional redistricting principles, which is the analysis in which the district court properly engaged, and which Alabama offers no reason to question. *LULAC*, 548 U.S. at 429 (explaining that the *Gingles* analysis should be performed by "[c]onsidering the district [at issue] in isolation"); *id.* at 504 (explaining the "inquiry under § 2" focuses "on the district lines") (Roberts, C.J., concurring).

Alabama's reliance on the simulated plans is misplaced for another reason: the simulations did not take into account all of Alabama's redistricting guidelines or the traditional redistricting principles Plaintiffs' experts balanced in drawing their plans. Alabama admitted that Dr. Duchin's simulation set looked to "only a few traditional non-racial districting criteria." ECF No. 103 at 2. Likewise, Dr. Imai's simulation set excluded several relevant redistricting principles, including near-zero population

deviation, respect for communities of interest, and non-dilution of minority voting rights—all of which Mr. Cooper and Dr. Duchin considered and balanced in their illustrative plans. *Milligan v. Merrill*, No. 2:21-cv-1530-AMM (N.D. Ala.), ECF No. 68-4 at 7. Thus, in arguing that the simulations prove race predominated in Plaintiffs' illustrative plans, Alabama compares apples to oranges.

Indeed, the simulations Alabama points to failed to factor in the most contested redistricting principle in this case: respect for communities of interest. That principle "was fervently disputed during the preliminary injunction hearing, and all parties devoted significant time and argument to it." App.173. Alabama's expert agreed that the Black Belt is a community of interest, Tr. 1064:1-3, and Plaintiffs' illustrative plans actively sought to reduce its fragmentation. But the simulations on which Alabama so heavily relies did not account for communities of interest at all. Ultimately, the State's emphasis on simulations offered by a different party for a different claim based on different principles demonstrates just how far afield Alabama strays from the actual record in this case. Whatever concerns Alabama has about the simulated plans have no bearing on whether *Plaintiffs' illustrative plans* were drawn consistent with traditional redistricting principles.

Alabama's assertion that the district court's application of the first *Gingles* precondition would make it a "meaningless test that can always be satisfied" is simply false. Application 27. To meet the first precondition, it must be possible to draw an additional majority-Black district consistent with traditional redistricting principles. Often that will not be possible—no matter how hard one tries—because the minority

group is simply too small or dispersed. And even where a district can be drawn, it will often not be possible to draw one that complies with traditional principles. In *LULAC*, for example, this Court applied this standard to find that Texas could *not* satisfy the first *Gingles* precondition in its creation of District 25 in 2003. 548 U.S. at 429-35. Crucially, that holding was *not* based on Texas's intentional creation of a majority-minority district, as Alabama would have it; instead, it was based on the district's subordination of *specific traditional redistricting principles*, most glaringly respect for communities of interest, in an effort to cobble together a majority-Latino district in the absence of a sufficiently large and compact population. *Id.* at 433-35. District 25 brought together two "farflung" communities with "divergent needs and interests, owing to differences in socio-economic status, education, employment, health, and other characteristics." *Id.* at 424 (internal quotation marks omitted). It is this sort of redistricting principle-specific analysis that informs satisfaction of the first *Gingles* precondition. And that is precisely what the district court did here.

To be sure, the evidence in this case is nothing like *LULAC*. Plaintiffs offered substantial evidence that the Black residents who would live in CD 2 under their illustrative plans share many of the same political interests and needs due to significant challenges they jointly face in terms of poverty, education, employment, health and access to quality health care, transportation, and other issues. App.73, 89, 100-01, 164-71. Indeed, Alabama's own expert agreed that the Black Belt is a community of interest. App.112-13. Thus, this case is not an instance where a district

has joined together minority groups with "disparate needs and interests," *LULAC*, 548 U.S. at 435; it is precisely the opposite.

To the extent Alabama complains that CD 2 in the illustrative plans is simply too large, Application 34 (noting that CD 2 in some of Plaintiffs' illustrative plans stretches "from Mobile to the Georgia border"), *LULAC* again is instructive. There, the Court was careful to note that it was the "geographical distance separating" the two minority communities "*coupled with* the disparate needs and interests of these populations—*not either factor alone*—" that "render[ed] District 25 noncompact." *LULAC*, 548 U.S. at 435 (emphases added). Because Plaintiffs proved that the minority communities within their proposed CD 2 have very similar interests and needs, the geographic size of that proposed district is not a sufficient basis to render them non-compact under *Gingles*.[6]

For the same reasons, the mere fact that Plaintiffs' illustrative plans split Mobile County does not—as Alabama contends without any explanation, Application 33—mean they are inconsistent with traditional redistricting principles. If that were true, Alabama's SBOE plan, which was governed by the same guidelines as HB 1 and splits Mobile County, would be invalid. Particularly where HB 1 splits several other counties—including most notably Jefferson and Montgomery Counties—Alabama offers no reason to believe *Mobile* County is uniquely sacrosanct. To the extent Alabama suggests that splitting Mobile County is inconsistent with the principle of

[6] If the mere length or width of districts could doom a plan, HB 1's own districts—in particular, CD 4, which "spans the width of the state," Tr. 1716:6-13—would fail Alabama's own test.

respecting communities of interest, that issue was extensively analyzed by the district court, which ultimately concluded that those living in CD 2 under the illustrative plans share communities of interest. App.173-82.

There is also no basis for Alabama's claim that the district court's routine application of the first *Gingles* precondition is somehow "unadministrable." Application 27. The premise of this claim is Alabama's incorrect assertion that the district court concluded Plaintiffs' experts prioritized race over all other redistricting principles, which has been thoroughly refuted by the record and findings below. Once that assertion is disposed of, all that is left to this argument is a complaint that *Gingles*'s holistic standard for determining compactness is harder to predict than a bright-line rule. But *Gingles* is the governing standard, and courts have been applying it successfully for decades. *Cf. Vera*, 517 U.S. at 984 (rejecting same concern about the Court's racial gerrymandering doctrine).[7]

Ultimately, after reviewing Mr. Cooper's and Dr. Duchin's live testimony, three judges hailing from three different courts spoke with one voice in concluding that those experts "carefully studied the Legislature's redistricting guidelines, considered many traditional redistricting principles, made careful decisions about

[7] Alabama does not seriously challenge the district court's findings on the Senate Factors or its ultimate conclusion that, under the "totality of circumstances," HB 1 dilutes Black voting strength by giving Black voters an unequal "opportunity . . . to elect representatives of their choice." 52 U.S.C. §10301(b); *see* Application 29-30. Instead, it simply repackages the same incorrect argument discussed above, asserting that because race must be "prioritized" over "other criteria" to draw a second majority-Black district, the political process must be "equally open" for Black voters. Application 30 (quoting 52 U.S.C. §10301(b)). For the reasons already discussed, that assertion finds no basis in the evidentiary record.

how to prioritize particular principles when circumstances forced tradeoffs, and illustrated what different remedial plans might look like if the principles were prioritized in a different order." App.182. In challenging the district court's findings as to the first *Gingles* precondition, all Alabama offers is the "attention-grabbing but unsupported claim[]" that the experts allowed race to subordinate all other principles. App.264. The only way to arrive at this conclusion is to wholly disregard, as Alabama does, the substantial evidence and extensive findings below. Far from demonstrating a likelihood that this Court would reverse this unanimous conclusion below, Alabama has indicated the opposite.

C. The Equal Protection Clause poses no bar to Plaintiffs' Section 2 claim.

Alabama's assertion that the district court's routine application of *Gingles* provokes constitutional concerns finds no basis in the record or in this Court's precedents. Because nothing in the record indicates that race predominated in the creation of Plaintiffs' illustrative plans, no heightened scrutiny would be applied to their implementation. But even if race did predominate, compliance with Section 2's anti-vote dilution requirement satisfies strict scrutiny in this case.

1. As an initial matter, Alabama misconstrues the constitutional avoidance doctrine, which cannot be applied to the district court's conclusion that HB 1 violates Section 2. "Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018). Rather, the constitutional avoidance doctrine applies only when a court is presented with "competing *plausible* interpretations of a statutory text." *Id.*

(quoting *Clark v. Martinez*, 543 U.S. 371, 381 (2005)). If one of those plausible interpretations provokes constitutional inquiry, the court should choose the other interpretation under "the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark*, 543 U.S. at 381. But not once during the proceedings below did Alabama identify a "plausible interpretation" of Section 2 that it wanted the district court to adopt to avoid a constitutional inquiry, except for the mere conclusion that Plaintiffs cannot satisfy the first *Gingles* precondition in this specific case. That is not an interpretation of Section 2; it is an application of it.

Alabama has apparently now decided it wanted the district court to interpret Section 2 to not apply to "single-member district[]" plans. Application 30. But that assertion finds no support in Section 2's text and is plainly contrary to decades-settled precedent. *See LULAC*, 548 U.S. at 424-43 (holding single-member districting plan violated Section 2); *Growe v. Emison*, 507 U.S. 25, 40-41 (1993) (holding the *Gingles* analysis applies in Section 2 challenges to single-member district plans); *Voinovich*, 507 U.S. at 157-58 ("In *Growe*, . . . we held that the *Gingles* preconditions apply in challenges to single-member as well as multimember districts."). Alabama offers no explanation as to why it would be "plausible" to read Section 2 to apply, for example, to multi-member districts, but not single-member districts. *Jennings*, 138 S. Ct. at 843. Without a plausible alternative interpretation of Section 2 distinguishable from the district court's, the constitutional avoidance doctrine cannot apply. Alabama cannot use this doctrine to preclude routine application of *Gingles* simply by waiving

the Fourteenth Amendment in the air and proclaiming that doing so presents "serious constitutional questions." Application 30. "That is not how the canon of constitutional avoidance works." *Jennings*, 138 S. Ct. at 843.

2. Even if the constitutional avoidance doctrine could apply the way Alabama wishes, Alabama offers no convincing reason why this run-of-the-mill Section 2 case provokes constitutional concerns. Alabama's basic theory is as follows: the district court cannot, consistent with the Fourteenth Amendment, implement any of Plaintiffs' illustrative plans because the experts that drew them were conscious of race when they were determining whether it is possible to draw a second majority-Black district consistent with traditional redistricting principles. But this Court has "emphasized[that] the decision to create a majority-minority district [is not] objectionable in and of itself." *Vera*, 517 U.S. at 962; *see also id.* at 958 (strict scrutiny does not "apply to all cases of intentional creation of majority-minority districts"); *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (for strict scrutiny to apply, one must show more than the fact that race was "*a* motivation for the drawing of a majority-minority district"); *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 905 (1996) (a mapdrawer "may be conscious of the voters' races without using race as a basis for assigning voters to districts"); *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 642 (1993) ("[R]ace-conscious redistricting is not always unconstitutional."). Indeed, even when Texas conceded in *Vera* that "it was committed from the outset to creating majority-minority districts," this Court explained that such intent was not "independently sufficient to require strict scrutiny." *Vera*, 517 U.S. at 953.

Instead, strict scrutiny applies to a districting plan only when a mapdrawer "'subordinate[s]' other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to 'racial considerations.'" *Cooper*, 137 S. Ct. at 1464 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). Such subordination occurs when the mapdrawer "relied on race in *substantial disregard* of customary and traditional districting practices." *Miller*, 515 U.S. at 928 (O'Connor, J., concurring) (emphasis added).

To determine whether race predominated in the creation of a plan, one "must scrutinize each challenged district" and determine whether it substantially disregarded non-racial principles. *Vera*, 517 U.S. at 965; *see id.* at 965-71 (analyzing individual redistricting principles). But Alabama fails to identify a *single* traditional redistricting principle that the illustrative plans supposedly offend. And even though Alabama offered an expert who tried to do just that, the expert conceded he could not identify any "line drawing decision[]" made by Mr. Cooper based on race. Tr. 975:21-25. That should end the inquiry. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) ("[T]his Court to date has not affirmed a predominance finding, or remanded a case for determination of predominance, without evidence that *some district lines deviated from traditional principles*." (emphasis added)).

Alabama instead hangs its hat on one piece of evidence—the simulated plans—which, as already explained, suggest at most that Plaintiffs' mapping experts were conscious of race when drawing their plans. App.255. Because that fact is not "objectionable in and of itself," *Vera*, 517 U.S. at 962, and Alabama offers no other

reason to believe traditional principles were substantially disregarded in favor of race, Alabama fails to show that strict scrutiny would apply to those plans if enacted. If that evidence were sufficient, that would be entirely inconsistent with the requirement that courts "scrutinize" the allegedly gerrymandered district to determine racial predominance. *Id.* at 964. It would also defy the foundational premise that the racial-predominance inquiry is "a holistic analysis" that must take account of "all of the lines of the district at issue." *Bethune-Hill*, 137 S. Ct. at 799, 800.

Plaintiffs' experts drew their plans not with the sole goal of creating two majority-Black districts, but to determine whether an additional majority-Black district could be drawn in a way that adheres to Alabama's 2020-cycle redistricting guidelines and traditional redistricting principles. App.65-66, 96-97. For example, they wished to unite communities of interest such as the Black Belt. App.72, 99. And as discussed, Plaintiffs offered a substantial amount of evidence to show how their illustrative plans respected this community of interest in a way HB 1 plainly does not. App.73, 89, 100-01, 164-71. This fact—that the illustrative plans "were drawn in part on the basis of evidence . . . of where communities of interest exist[]"—directly "weaken[s]" Alabama's "claim that race predominated." *Vera*, 517 U.S. at 964. It also makes this case quite unlike *Vera* itself, where those who created the plan at issue "made no apparent attempt" to consider "communities of interest." *Id.* at 967.

For this reason, Alabama's repeated invocation of the harms of racial gerrymandering simply do not apply here. Plaintiffs do not dispute that racial

gerrymandering "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." Application 35 (quoting *Shaw I*, 509 U.S. at 647). But that is the opposite of what Plaintiffs have done here. They offered substantial evidence that Black residents of the communities that would live in CD 2 of their illustrative plans *do* share the same political interests, App.73, 89, 100-01, 164-71, and *do* prefer the same candidates, App.74-80, 101-107, 183-187. The district court found this evidence convincing, and Alabama offers no reason why such findings were clearly erroneous.

Neither *Cooper* nor *Bethune-Hill* support Alabama's theory. *See* Application 21 n.11, 26. In both cases, it was not just the racial targets that legislators used to craft the majority-minority districts that triggered strict scrutiny, but the combination of those targets *and* the subordination of traditional redistricting principles, which the plaintiffs proved by comparing the mapdrawers' line-drawing decisions with each individual traditional redistricting principle. *See Cooper*, 137 S. Ct. at 1469 (discussing North Carolina's intent to create majority-minority districts *and* the "direct and significant impact" that intent had "on District 1's configuration"); *Bethune-Hill*, 137 S. Ct. at 799 (describing the need to show that "race was the overriding factor *causing neutral considerations to be cast aside*" (emphasis added)). Here, by contrast, Alabama's own expert admitted that he could not point to any "line drawing decision[]" made by Mr. Cooper based on race. Tr. 975:21-25. That makes sense, given that Plaintiffs' experts made such line-drawing decisions based on all

relevant principles, not just race. *See* Tr. 525:3-11 (Mr. Cooper explaining how his precinct splits were the result of an effort to achieve population equality, and not to achieve a race-based goal).

The figure on page 33 of Alabama's application comes nowhere close to proving racial predominance. This figure was created by Mr. Bryan, whom the district court found uncredible and his analyses unreliable (a finding Alabama not only fails to mention, but also offers no reason to question). App.161-65. The figure omits crucial context, namely, the boundaries of Alabama's political subdivisions. What the figure misleadingly suggests are jagged district lines are, in fact, county, municipality, and precinct boundaries. *See, e.g.*, App.69. Mr. Bryan offered no textual analysis in his report to accompany these figures, and during the hearing he admitted they did not show whether Mr. Cooper's illustrative plans violated, for example, city or precinct boundaries in the Mobile area. Tr. 993:9-23. The district court found that Plaintiffs' illustrative plans respect the boundaries of political subdivisions, such as counties and precincts, as well as (and for some plans, better) than HB 1. App.172-73. Alabama offers no reason why that conclusion was clearly erroneous. Once again, this fact distinguishes Plaintiffs' illustrative plans from those which this Court has found to be racial gerrymanders. *E.g.*, *Vera*, 517 U.S. at 974 (describing district's "utter disregard" for political subdivisions).

At bottom, Alabama's "constitutional avoidance" argument fails for the same reason its *Gingles* argument does: its assertion that Plaintiffs' illustrative plans allowed race to predominate over all other traditional redistricting principles has no

basis in the record. And its argument that strict scrutiny should apply to Plaintiffs' illustrative plans in any event, simply because their experts intended to draw two majority-Black districts, cannot be squared with this Court's precedents.

3. As for the State's argument under the Constitution itself, even if the district court does adopt, at the remedy stage, a plan in which race predominated, that fact alone would not violate the Fourteenth Amendment. Instead, strict scrutiny would apply, requiring the district court to consider whether use of that plan is "narrowly tailored to achieve a compelling interest." *Bethune-Hill*, 137 S. Ct. at 800-01 (citing *Miller*, 515 U.S. at 920) (upholding district drawn for racially predominant purpose because it was narrowly tailored to comply with the Voting Rights Act). As the district court found, even if race had predominated in the drawing of Plaintiffs' illustrative districts, their use would be narrowly tailored to serve the compelling state interest of compliance with Section 2. App.215. Alabama makes no mention of, and offers no challenge to, that conclusion. Instead, it simply proclaims that use of Plaintiffs' plans would violate the constitution without actually engaging in the requisite constitutional analysis. Application 35-36.

This Court has "long assumed that complying with the VRA is a compelling interest." *Cooper*, 137 S. Ct. at 1469; *Shaw II*, 517 U.S. at 915; *Vera*, 517 U.S. at 977. Indeed, Alabama has expressly declared that compliance with Section 2 is a "compelling State interest[]" to be given "priority." App.230. A district in which race predominates "is narrowly tailored to [Section 2 compliance] if" there are "good reasons for thinking that the [Section 2] demanded such steps." *Cooper*, 137 S. Ct. at

1469. There must "only" be "a strong basis in evidence in support of the (race-based) choice . . . made." *Bethune-Hill*, 137 S. Ct. at 801 (citing *Shaw II*, 517 U.S. at 915). And sufficient "good reason[s]" exist where, as here, "all the '*Gingles* preconditions' are met." *Cooper*, 137 S. Ct. at 1470.

Here, there is more than a strong basis in evidence for the district court's findings not only as to the *Gingles* preconditions, but also the remainder of Section 2's totality-of-the-circumstances. As the district court not once, but twice, explained, this case is not even a "close one." App.204-05; App.246. The only issue Alabama's application contests—Plaintiffs' satisfaction of the first *Gingles* precondition—was amply met for the reasons already discussed. *See supra* Argument Section I.B. As for the second and third *Gingles* preconditions, there can be no question that there is a strong basis in evidence that voting in Alabama and the relevant congressional districts is highly racially polarized, and that outside of Alabama's lone majority-Black district, white bloc voting almost always defeats Black voters' preferred candidates. App.183-85. Alabama makes no argument otherwise.

While this Court has held that the establishment of the *Gingles* preconditions alone demonstrates narrow tailoring, *Cooper*, 137 S. Ct. at 1470, there is also no doubt that the totality-of-circumstances analysis confirms what the *Gingles* preconditions indicate: HB 1 dilutes the voting strength of Black voters in Alabama. The district court correctly found—and again, Alabama's application does not dispute—that every relevant consideration on which it could make a finding weighed in favor of Plaintiffs, and no consideration weighed in favor of Alabama. App.204; App.187-205.

Finally, any alleged use of race, as already explained, was minimal and only to the extent necessitated by the first *Gingles* precondition's requirement to determine whether a majority-Black district could be drawn. This is a far cry from "a level of racial manipulation that exceeds what § 2 could justify." *Vera*, 517 U.S. at 980-81; App.206.

It is thus clear that even if the racial gerrymandering inquiry applied to Plaintiffs' illustrative plans (it does not) and race predominated in their drawing (it did not), use of Plaintiffs illustrative plans at the remedial stage of this litigation would satisfy strict scrutiny.

II. Equitable considerations weigh heavily against staying the district court's preliminary injunction.

This Court has stated that subjecting voters to a redistricting plan that has been deemed unlawful requires an "unusual" showing that doing so is a "[n]ecessity." *Upham v. Seamon*, 456 U.S. 37, 44 (1982); *see also Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("[I]t would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under [an] invalid plan."). Analysis of the equities here shows that Alabama cannot meet this standard, requiring denial of a stay.

A. Alabama is not at risk of irreparable harm.

Alabama's asserted administrative inconvenience in complying with the district court's injunction does not amount to irreparable harm. The only concrete harms Alabama highlights if a stay is not granted are that counties would have to update voter-registration records, Application 37, and that some candidates will have

to shift their campaign strategies. Application 38-39. These are quintessential examples of the types of consequences that do not demonstrate irreparable harm, particularly when weighed against the denial of Plaintiffs' federally-protected voting rights. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 266, (1970) (holding that the right to procedural due process outweighs "the State's competing concern to prevent any increase in its fiscal and administrative burdens"); *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) (three-judge court) (denying request for a stay after finding congressional district invalid because "the mere administrative inconvenience the Florida Legislature and Florida elections officials will face in redistricting simply cannot justify denial of Plaintiffs' fundamental rights"). Alabama provides no authority suggesting courts must prioritize candidate or administrative convenience over the irreparable harm Black Alabamians face from unlawful vote dilution.

Alabama also fails to demonstrate irreparable harm based on its purported injury of being forced to hold an election on a racially gerrymandered plan. *See* Application 37. Nothing in the record supports the assertion that creating two majority-Black districts in Alabama would require racial gerrymandering. *Supra* Argument Section I.C. Thus, Alabama's claim that it (and Alabama voters) will be harmed if an election is held under an unlawful plan supports *denial* of a stay here, as it would force Alabama to conduct an election using a plan that three federal judges have already found to be unlawful.

The general election is more than ten months away, and the primary election more than three and a half months away. App.209. Given this significant runway,

Alabama's concerns about the time to draw and implement a new plan are unconvincing. Application 37-39. Its claim that the 14 days provided to the Legislature by the court to enact a new plan is too "limited [a] window," Application 38, is belied by the fact that HB 1 was enacted in "five." App.211. And Alabama itself acknowledges that there is plenty of time before the election, vaguely gesturing to "looming" pre-election deadlines while admitting that absentee voting in the primary is not scheduled to begin until March 30, 2022, nearly two months from now. Application 37. This timing makes this case unlike any of the cases Alabama cites. *See Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) (staying injunction of voter identification law in October of election year); *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020) (concerning extension of deadline for initiative petitions, which had already passed); *Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 561 (6th Cir. 2014) (addressing preliminary injunction issued "only days [before] early voting [wa]s set to begin"); *Favors v. Cuomo*, 881 F. Supp. 2d 356, 362 (E.D.N.Y. 2012) (concerning preliminary injunction of congressional plan sought in April of election year, with a decision in May).

Alabama's reliance on cases impacting voters' ability to register to vote, sign initiative petitions, and cast a ballot are particularly inapposite. *See Purcell*, 549 U.S. 1 at 6; *Thompson*, 959 F.3d at 813; *Ohio State Conf. of N.A.A.C.P.*, 768 F.3d at 561. In such cases, this Court has expressed concerns that last-minute changes to those processes "result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5.; *see also, e.g., Republican Nat'l Comm. v.*

Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020) (explaining that the *Purcell* principle seeks to avoid "judicially created [voter] confusion"). But this litigation does not impact whether, where, or how a given voter can cast a ballot or sign a petition; it impacts only the candidates listed on their ballot. Because there is plenty of time before the election and Alabama can only point to administrative concerns, Alabama cannot show irreparable harm.

B. Plaintiffs and other voters will be irreparably harmed by a stay.

Alabama does not contest the district court's conclusion that, if HB 1 violates Section 2, its use would impose significant and irreparable harm on Plaintiffs and other Black Alabamians. App.206-07. Indeed, if this Court stays the injunction below based solely on the proximity of upcoming elections, "[P]laintiffs will suffer irreparable injury until 2024 — nearly halfway through this census cycle." App.276. Alabama only attempts to minimize Plaintiffs' harms by once again repeating its assertion that a remedial plan would be unconstitutional, Application 40, but this contention remains untrue for the reasons already discussed. *Supra* Argument Section I.C. The balance of the harms here is decisively in Plaintiffs' favor, further proving the impropriety of a stay.

C. Staying the preliminary injunction below will gravely harm the public interest.

In addition to irreparably harming Plaintiffs, granting a stay would do a severe disservice to the public interest by rendering unlawful plans functionally immune from challenge during the first election of a redistricting cycle. It took monumental efforts by all parties and the district court to adjudicate these issues in time to remedy

the harms HB 1 will cause if used in the 2022 elections. Plaintiffs filed suit just hours after HB 1 became law. And the district court moved mountains to commence a preliminary injunction hearing as soon as possible in the midst of the holiday season and a global pandemic. After the conclusion of seven days of court proceedings, the court conducted a thorough review of the evidence and issued a 225-page decision just 12 days later. To say that, under these circumstances, necessity still requires subjecting Plaintiffs to vote dilution would signal to states that they get a free pass on their plans so long as they delay enactment until it is too late for courts to provide relief. That outcome gravely disserves the public interest.[8]

CONCLUSION

The Court should deny Alabama's application for stay pending appeal. The Court should grant Alabama's petition for a writ of certiorari pending judgment and adjudicate this appeal in conjunction with *Milligan*.

[8] The *amicus curiae* briefs filed in this proceeding add little to the discussion above. They simply repeat the flawed arguments found in Alabama's application for a stay by misapplying this Court's Section 2 and Equal Protection Clause precedents and misunderstanding the equities at issues. For all the reasons discussed above, their briefs do not move the needle.

Respectfully submitted,

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