No. 23A231

IN THE

SUPREME COURT OF THE UNITED STATES

HON. WES ALLEN, in his official capacity as the Alabama Secretary of State,

Applicant.

v.

EVAN MILLIGAN, ET AL.,

Respondents.

SINGLETON RESPONDENTS' OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Henry C. Quillen
Counsel of Record
WHATLEY KALLAS, LLP
159 Middle Street, Suite 2C
Portsmouth, NH 03801
Tel: (603) 294-1591
Fax: (800) 922-4851
Email: hquillen@whatleykallas.com

James Uriah Blacksher
825 Linwood Road
Birmingham, AL 35222
Tel: (205) 612-3752
Fax: (866) 845-4395
Email: jublacksher@gmail.com

U.W. Clemon
U.W. CLEMON, LLC
Renasant Bank Building
2001 Park Place North, Tenth Floor
Birmingham, AL 35203
Tel.: (205) 506-4524
Fax: (205) 538-5500
Email: uwclemon1@gmail.com

Myron Cordell Penn
PENN & SEABORN, LLC
1971 Berry Chase Place
Montgomery, AL 36117
Tel: (334) 219-9771
Email: myronpenn28@hotmail.com

Counsel for *Singleton* Respondents

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Additional counsel listed on inside cover

Joe R. Whatley, Jr.
W. Tucker Brown
WHATLEY KALLAS, LLP
2001 Park Place North
1000 Park Place Tower
Birmingham, AL 35203
Tel: (205) 488-1200
Fax: (800) 922-4851
Email: jwhatley@whatleykallas.com
tbrown@whatleykallas.com

Edward Still
2501 Cobblestone Way
Birmingham, AL 35226
Tel: (205) 335-9652
Fax: (205) 320-2882
Email: edwardstill@gmail.com

Counsel for *Singleton* Respondents

Diandra "Fu" Debrosse Zimmermann
Eli Hare
DICELLO LEVITT LLP
505 20th Street North, Suite 1500
Birmingham, AL 35203
Tel.: (205) 855.5700
Email: fu@dicellolevitt.com
ehare@dicellolevitt.com

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

In addition to the parties and related cases identified in the Application, Respondents include Bobby Singleton, Rodger Smitherman, Eddie Billingsley, Leonette Slay, Darryl Andrews, and Andrew Walker, who were plaintiffs in *Bobby Singleton et al. v. Wes Allen et al.*, No. 2:21-cv-1291-AMM (N.D. Ala.).

RULE 29.6 STATEMENT

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

Respectfully submitted,

Henry C. Quillen
Counsel of Record
WHATLEY KALLAS, LLP
159 Middle Street, Suite 2C
Portsmouth, NH 03801
Tel: (603) 294-1591
Fax: (800) 922-4851
Email: hquillen@whatleykallas.com

Attorney for Singleton Respondents

September 19, 2023

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

In his first appeal, the Secretary asked this Court to rule that drawing racially targeted, majority-Black districts to comply with *Gingles* I is unconstitutional. This Court rejected that argument and held that Alabama's 2021 plan likely violated Section 2 of the Voting Rights Act. Now, in his second appeal, the Secretary asks this Court to rule that it is unconstitutional to use racially targeted, majority-Black districts to remedy the Section 2 violation affirmed by this Court. But that issue cannot be addressed on this record.

The Secretary does not bring this second appeal with clean hands. The 2023 plan, which Alabama's Solicitor General helped craft, retains one racially targeted, majority-Black district. That district, which splits voters in Jefferson County by race, derives from a district created in 1992, which the Secretary's predecessor argued in prior litigation was a racial gerrymander. *Singleton v. Allen*, No. 21-cv-1291-AMM (N.D. Ala.), ECF No. 189 at 5–6. Nevertheless, Alabama's Legislature has taken a "least change" approach to drafting that district ever since, and it pursued an explicit goal of creating a majority-Black district at least through 2021. *Id.* at 6–13.

The *Singleton* Respondents contend that District 7 in the 2023 plan, which continues to divide Jefferson County along racial lines to produce a majority-BVAP district, is an unconstitutional racial gerrymander because it was drawn without first conducting the careful inquiry required by *Cooper v. Harris*, 581 U.S. 285 (2017), to see if districts drawn without this focus on race would satisfy both the Equal

Protection Clause and the VRA. The District Court reserved ruling on the *Singleton* Respondents' constitutional claim, but it gave them the right to participate fully in the pending Section 2 remedial proceedings. In those proceedings, they have submitted a race-neutral plan that includes two opportunity districts, and they expect the District Court itself to conduct the *Cooper v. Harris* inquiry before adopting any remedial plan that contains majority-Black districts.

Given this posture, the question Alabama is attempting to raise in its second appeal is not ripe. This Court has held that majority-Black districts can be adopted by a state or by a court to comply with the VRA, but only if a *Cooper v. Harris* inquiry shows they are necessary to provide the protected minority an equal opportunity to elect candidates of their choice. *E.g.*, *Wisconsin Legislature v. Wisconsin Elections Commission*, 595 U.S. 398 (2022).[1] If the District Court agrees with the *Singleton* Respondents that in Alabama, two race-neutral crossover districts can satisfy Section 2, and it adopts something like the *Singleton* Plan as the remedy for the Section 2 violation, there will be no majority-Black districts Alabama can challenge.

[1] The *Milligan* and *Caster* Respondents challenge the *Singleton* Respondents' standing on the ground that *Singleton* involves only a constitutional claim, and the District Court decided *Milligan* and *Caster*'s claim under the VRA. As this Court has noted, in redistricting cases, constitutional and statutory issues are interrelated: "The question that our VRA precedents ask and the court failed to answer is whether a race-neutral alternative that did not add a seventh majority-black district would deny black voters equal political opportunity. … When the Wisconsin Supreme Court endeavored to undertake a full strict-scrutiny analysis, it did not do so properly under our precedents, and its judgment cannot stand." *Wisconsin Legislature*, 595 U.S. at 406. In any event, the *Singleton* Respondents explain below why the District Court's orders make them "parties to the proceeding" in the District Court.

COUNTERSTATEMENT OF THE CASE

Because the Secretary did not name the plaintiffs in *Singleton v. Allen* as Respondents, the *Singleton* Respondents offer a brief explanation of their role as parties to the proceedings below.

In September 2021, the *Singleton* Respondents filed the first challenge to Alabama's congressional districts during this districting cycle, alleging that the districts enacted in 2011 were malapportioned and racially gerrymandered in violation of the Fourteenth Amendment. *Singleton*, ECF No. 1. A three-judge District Court was assigned to hear the case. Following the State's enactment of a new congressional plan in November 2021, the *Singleton* Respondents immediately amended their complaint to remove the claim of malapportionment and add a claim that the enacted 2021 plan perpetuated the unconstitutional racial gerrymander of Jefferson County. *Singleton*, ECF No. 15.

After the *Singleton* Respondents amended their complaint, the Respondents in *Milligan* and *Caster* filed their cases. *Milligan* asserted a claim under Section 2 of the Voting Rights Act, and claims for racial gerrymandering and intentional discrimination in violation of the Fourteenth Amendment. *Caster* asserted a claim under Section 2. *Milligan* was consolidated with *Singleton* for preliminary injunction proceedings. *Caster*, which was a single-judge case because it did not involve constitutional claims, was coordinated with *Singleton* and *Milligan*. In January 2022, the Respondents in *Singleton*, *Milligan*, and *Caster* presented evidence at a seven-day hearing. The three-judge District Court in *Singleton* and *Milligan*, and the single

judge in *Caster*, enjoined the Secretary of State from using the State's 2021 plan in future elections. *Singleton v. Merrill*, 582 F. Supp. 3d 924 (N.D. Ala. 2022). The District Court held that the 2021 plan likely violated Section 2, and it reserved judgment on the gerrymandering claims in *Singleton* and *Milligan*. *Id.* at 1004, 1034–35. This Court stayed that injunction but ultimately affirmed the District Court's decision. *Allen v. Milligan*, 599 U.S. 1 (2023).

On remand, the District Court gave the Alabama Legislature an opportunity to enact a new plan that complied with Section 2, but it also provided that any party, including the *Singleton* Respondents, could file an objection to that plan. *Singleton*, ECF No. 135 at 5. After a new plan was enacted in July 2023, the *Singleton*, *Milligan*, and *Caster* Respondents timely filed objections. The District Court then entered an order setting a hearing in *Milligan* and *Caster* on claims under Section 2, and a hearing the next day in *Singleton* on the racial gerrymandering claim. *Singleton*, ECF No. 154 at 3, 6. (On remand, the *Milligan* Respondents did not actively pursue their gerrymandering claim.) The Court's order also provided that if "the Court determines that the 2023 plan does not remedy the likely Section Two violation the Court previously identified, then the *Singleton* Plaintiffs will be afforded the opportunity to submit remedial maps for a Special Master to consider and to otherwise participate in proceedings before the Special Master to the same degree as the *Milligan* and *Caster* Plaintiffs." *Id.* at 5.

Following the hearings in *Milligan* and *Caster*, and then in *Singleton*, the three-judge District Court entered an order under the *Singleton* and *Milligan*

captions in which it held that the State's 2023 plan failed to remedy the Section 2 violation, and it enjoined the Secretary from using that plan in future elections. The Court again reserved ruling on the *Singleton* gerrymandering claim on the grounds of constitutional avoidance, stating that "Alabama's upcoming congressional elections will not occur on the basis of the map that is allegedly unconstitutional" due to the injunction. App.194. The Court then entered another order under the *Singleton*, *Milligan*, and *Caster* captions in which it directed the Special Master to begin his work. The Court ordered the Special Master to file his proposed maps and report and recommendations on the *Singleton* docket, and it allowed the *Singleton* Respondents to object to the report and recommendations and appear at the same hearing as the *Milligan* and *Caster* Respondents. App.230.

On the day the Court entered its orders, the Secretary moved for a stay pending appeal. Although the motion was filed only on the *Milligan* and *Caster* dockets, the Court ordered the *Singleton* Respondents to respond, which they did. *Singleton*, ECF Nos. 193, 199. The District Court denied the motion to stay in an order under the *Singleton* and *Milligan* captions and filed on the *Singleton* and *Milligan* dockets. App.623. When the Secretary applied to this Court for a stay, the Clerk's office conveyed Justice Thomas's request for a response to the counsel of record for the *Singleton* Respondents, along with the *Milligan* and *Caster* Respondents.

Meanwhile, the *Singleton* Respondents have participated fully in the proceedings before the Special Master. They have filed a proposed remedial plan and a brief supporting it, and they have filed comments on the other plans submitted to

the Special Master. In their capacity as parties, they will file objections to the Special Master's report and recommendations if they decide it is necessary, and they will appear at the District Court's hearing on the proposed remedial plans, which is scheduled for October 3. If the Secretary's application is granted, the proceedings before the Special Master will come to an immediate halt, and the *Singleton* Respondents will lose the opportunity to participate. Moreover, they will be harmed by the implementation of the 2023 plan to the same extent as the *Milligan* and *Caster* Respondents.

Given this history, the *Singleton* Respondents are "parties to the proceeding in the district court" under Supreme Court Rule 18.2, and they continue to have an interest in the outcome of this appeal.

ARGUMENT

The Secretary's application for a stay is dishonest. Over and over, the Secretary claims that the District Court will not accept a congressional plan that lacks two majority-Black districts. Application 2, 3, 4, 5, 17, 18, 19, 20, 22, 23, 24, 26, 27, 31, 32, 33, 34, 35, 36, 37, 38, 39. This is false. The District Court held that a plan enacted by the Alabama Legislature would satisfy Section 2 if it contained "either an additional majority-Black congressional district, *or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice*." App.3 (emphasis added). The word "opportunity" appears 140 times in the District Court's order granting an injunction, but the Legislature's option to create an opportunity district, which need not have any particular racial composition, gets

treated in the Secretary's application as a demand for a majority-Black district. Likewise, when the District Court directed the Special Master to recommend remedial plans, it used the exact language quoted above, permitting him to draw a plan without respect to race as long as it creates two opportunity districts. App.224. Yet the Secretary asserts that the District Court has ordered the creation of a gerrymander that segregates Alabamians by race. Application 5, 26, 39, 40.

The Secretary's application is also unripe. It assumes a result—a court-ordered unconstitutional racial gerrymander—that not only has not happened yet, but that the District Court has indicated will not happen. The Court's directions to the Special Master do not require him to gerrymander districts by race, but they do require him to ensure that his recommended plans comply with the Constitution. App.224. In its order denying the Secretary's motion for a stay, the District Court reiterated this fact: "Nothing about our injunction applying [the Voting Rights Act] countenances, let alone demands, segregation, racial gerrymandering, or anything else improper. … And we have not yet ordered the Secretary to use any specific map, so any suggestion that we are 'segregat[ing]' voters based on race is unfounded and premature." App.645. Because no remedial plan has been ordered, much less a racially gerrymandered remedial plan, and the District Court has indicated that no such plan will be implemented, the Secretary's claims rest on premature, counterfactual speculation.

The closest the Secretary comes to justifying his speculation and pervasive misstatements about the decisions below is to cite the following language, which first appeared in the District Court's order granting an injunction in January 2022:

> The Legislature enjoys broad discretion and may consider a wide range of remedial plans. As the Legislature considers such plans, it should be mindful of the practical reality, based on the ample evidence of intensely racially polarized voting adduced during the preliminary injunction proceedings, that any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close to it.

Singleton v. Merrill, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022); Application 5. The District Court's reference to "a voting-age majority or something quite close to it" was not a command but a recognition of the "practical reality" of "intensely racially polarized voting in Alabama." Nowhere did the District Court suggest that it would reject the Legislature's plan based on BVAP statistics. Instead, the District Court required the creation of two opportunity districts, and it enjoined the Legislature's plan for failing to meet that standard: "The State concedes that the 2023 plan does not include an additional opportunity district. … That concession controls this case." App.5–6. Moreover, the court-ordered process for drawing remedial plans includes no requirement that opportunity districts be majority-Black or "quite close to it." The District Court's instructions to the Special Master do not include this phrase at all. App.218–31.

In any event, there is a glaring exception to the "practical reality" of racially polarized voting in Alabama, which gives the Special Master wide leeway to draw opportunity districts without segregating voters by race. Jefferson County, the most populous county in the State and the home of Birmingham, has a tradition of

significant crossover voting. Although the county's BVAP is just 41.5%, Jefferson County voters have favored the preferred candidate of Black voters in each of the last 99 races for statewide and countywide office. *In re Redistricting 2023*, No. 23-mc-1181-AMM (N.D. Ala.), ECF No. 5 at 13. It is therefore possible to create an opportunity district containing an ideal population of 717,754 without racial gerrymandering by adding just 43,033 people to Jefferson County from nearby counties.

In the proceedings below, the *Singleton* Respondents submitted a remedial plan that does just this. It contains a district that includes Jefferson County and eight precincts in the Birmingham suburbs just over the border in Shelby County, and another district that includes nearly all of the Black Belt. Neither district is majority-Black, but the preferred candidates of Black voters—both Black and White—have usually won more votes than their opponents in these districts.[2] Thus, both districts are opportunity districts that comply with the Voting Rights Act. *See* 52. U.S.C. § 10301(b) (Voting Rights Act is violated if the members of the minority "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice"). And the *Singleton* Plan raises no equal-protection concerns because it does not separate voters by race.

[2] In the proceedings below, the Secretary admitted that in the *Singleton* Plan, the preferred candidates of Black voters received more votes than their opponents in 22 of the last 28 contested races in the Jefferson County district (79%), and in 28 of 28 races in the Black Belt district (100%). During that time, Black candidates received more votes in 8 of 12 races in the Jefferson County district (67%), and 12 of 12 in the Black Belt District (100%). *Singleton*, ECF No. 180-1 at 5.

If the District Court were to adopt the *Singleton* Plan or something like it, the Secretary would have no grounds to complain that Alabama is being "required to violate 'traditional districting principles such as maintaining communities of interest' to 'create, on predominantly racial lines,' a second majority-black district." Application 26 (quoting *Abrams v. Johnson*, 521 U.S. 74, 91–92 (1997)). In fact, the *Singleton* Plan respects communities of interest better than the plan the State enacted in 2023. The *Singleton* Plan keeps 16 of the 18 "core" Black Belt counties together in a single district, while the State's plan splits the Black Belt in half, forcing its residents to share representation in Congress with other regions.[3] Application 1 n.2, 14. Although the *Singleton* Respondents take no position on whether the Gulf Coast and the Wiregrass are important communities of interest, the *Singleton* Plan outperforms the State's plan here as well. Both plans keep the Gulf Coast counties together. But the *Singleton* Plan keeps all the Wiregrass counties together in a single district (except for two counties that are also part of the "core" Black Belt and are in the Black Belt district), while the State's plan places most of Covington County, a Wiregrass county, in the Gulf Coast district. Application 14. Moreover, the *Singleton* Plan keeps the Jefferson County community of interest intact, while the State's plan cuts it in two along racial lines. In sum, the *Singleton* Plan outperforms the State's plan in three of the four communities of interest that have been identified in this case, and performs just as well in the fourth, without segregating voters by race. As long

[3] As a matter of geography, no more than sixteen Black Belt counties can share the same district. If seventeen or eighteen counties were in a single district, they would cut off about a million people in southern Alabama, making it impossible to comply with the one-person, one-vote principle because an ideal district contains 717,754 people.

as the *Singleton* Plan is sitting on the Special Master's desk, the Secretary cannot argue that Alabama is being railroaded into a racial gerrymander that ignores traditional districting principles.

CONCLUSION

The Secretary's argument boils down to a counterfactual claim that the District Court rejected the State's congressional plan because it did not have two majority-Black districts, and that the remedial plan will be racially gerrymandered. But the *Singleton* Respondents have submitted a plan that demonstrates how two opportunity districts can be created without resorting to segregation. As long as the Court implements such a plan, the Secretary has no grounds to seek a stay.

Respectfully submitted,

/s/ Henry C. Quillen
Henry C. Quillen
Counsel of Record
WHATLEY KALLAS, LLP
159 Middle Street, Suite 2C
Portsmouth, NH 03801
Tel: (603) 294-1591
Fax: (800) 922-4851
Email: hquillen@whatleykallas.com

James Uriah Blacksher
825 Linwood Road
Birmingham, AL 35222
Tel: (205) 612-3752
Fax: (866) 845-4395
Email: jublacksher@gmail.com

U.W. Clemon
U.W. CLEMON, LLC
Renasant Bank Building
2001 Park Place North, Tenth Floor
Birmingham, AL 35203
Tel.: (205) 506-4524
Fax: (205) 538-5500
Email: uwclemon1@gmail.com

Myron Cordell Penn
PENN & SEABORN, LLC
1971 Berry Chase Place
Montgomery, AL 36117
Tel: (334) 219-9771
Email: myronpenn28@hotmail.com

Joe R. Whatley, Jr.
W. Tucker Brown
WHATLEY KALLAS, LLP
2001 Park Place North
1000 Park Place Tower
Birmingham, AL 35203
Tel: (205) 488-1200
Fax: (800) 922-4851
Email: jwhatley@whatleykallas.com
tbrown@whatleykallas.com

Edward Still
2501 Cobblestone Way
Birmingham, AL 35226
Tel: (205) 335-9652
Fax: (205) 320-2882
Email: edwardstill@gmail.com

Diandra "Fu" Debrosse Zimmermann
Eli Hare
DICELLO LEVITT LLP
505 20th Street North, Suite 1500
Birmingham, AL 35203
Tel.: (205) 855.5700
Email: fu@dicellolevitt.com
ehare@dicellolevitt.com

Counsel for *Singleton* Respondents