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.

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

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

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REPLY

Alabama enacted new redistricting legislation in response to *Allen*. The 2023 Plan eliminated the discriminatory effect identified in *Allen* resulting from the disparate treatment of the Black Belt vis-à-vis the Gulf Coast. The 2023 Plan unified the Black Belt counties better than any of Plaintiffs' illustrative plans. And it did so constitutionally. Racial gerrymandering claims were still pending against the State then (as they are now). And when those racial gerrymandering plaintiffs saw the *Milligan* and *Caster* Respondents' proposal to the Legislature, they said the State could not constitutionally "split[] counties along racial lines to achieve a racial target of 50 percent plus one."[1] This Court made the same point in *Allen*: "Forcing proportional representation" by "flouting traditional criteria" is "unlawful and inconsistent with this Court's approach to implementing § 2." *Allen v. Milligan*, 143 S. Ct. 1487, 1509 (2023). Exactly. Districts drawn "on the basis of race," segregating black voters from white voters from as far west as Mobile and as far east as Dothan, would be "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (*Shaw I*) (quotation marks omitted). "It is a sordid business, this divvying us up by race," *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (*LULAC*) (Roberts, C.J., concurring in part and dissenting in part).

After Alabama enacted the 2023 Plan, Respondents' case shifted to one about race alone. The "heart" of their case was no longer about unifying the Black Belt

[1] *Milligan v. Allen*, No. 2:21-cv-1530 (N.D. Ala.), ECF 220-1 at 72:14-23.

counties into fewer districts.[2] They abandoned earlier assurances that "states 'retain broad discretion in drawing districts to comply with the mandate of §2'" that "will not necessarily require the creation of a majority-minority district."[3] After *Allen*, they said that "Alabama gets no brownie points for uniting black voters and the Black Belt" in the 2023 Plan. App.104. What matters now is Alabama's failure to sort voters based on their race, including by putting (in Respondents' words) "Black Mobile" with the now-unified Black Belt districts. App.103, 157-58, 166.

Respondents call Alabama's 2023 Plan "open defiance" of court orders.[4] That theme might work in the press. But in this Court, the question presented is one of the most difficult that States face: Does the State's plan comply with §2 without violating the Constitution? *See Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018) (discussing "'competing hazards of liability'" for legislatures when redistricting). Here, the answer is yes. It is not "intransigence," let alone "open rebellion,"[5] for a State to adopt a redistricting plan that removes the discriminatory features of a past plan, while sticking with "traditional districting principles" to avoid the "constitutional problem" that "arises … from the subordination of those principles to race," *Bush v. Vera*, 517 U.S. 952, 978 (1996) (plurality). As Respondents said before *Allen*, "the remedy for a §2 violation entails no 'predetermined, "non-negotiable" racial target.'"[6]

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[2] *E.g.*, Br. of *Milligan* Respondents 5, *Allen v. Milligan* (No. 21-1086) (filed July 11, 2022) ("*Milligan* Br."); Br. of *Caster* Respondents 15-16, *Allen v. Caster* (No. 21-1087) (filed July 11, 2022) ("*Caster* Br."); *id.* at 35-36; *Caster v. Allen*, No. 2:21-cv-1536 (N.D. Ala.), ECF 56 at 9.

[3] *Caster* Br. 43; *accord Milligan* Br. 2, 44.

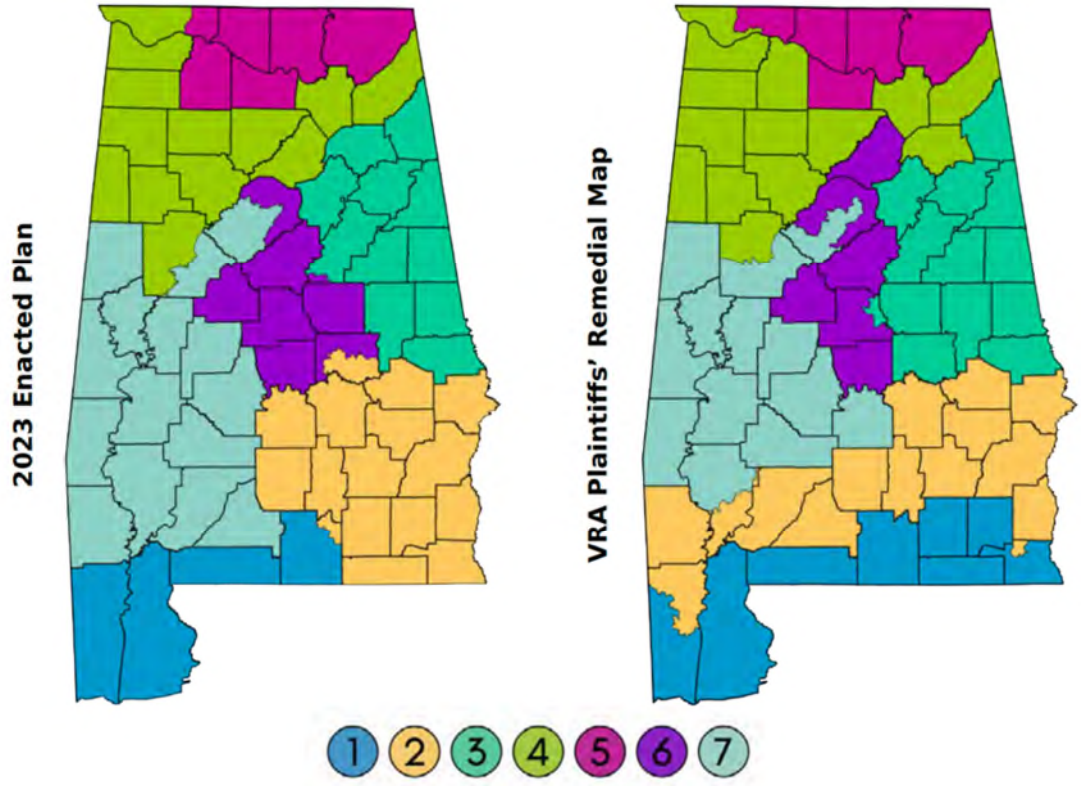
[4] *Milligan* Resp. 35; *id.* at 20 (similar); *Caster* Resp. 2; *id.* at 33.

[5] *Caster* Resp. 11, 33.

[6] *Caster* Br. 26.

To see how Respondents' case has shifted since *Allen*, look no further than the remedial plan that they proposed to the District Court last week (and to the Legislature before that). Before *Allen*, Respondents said there was no basis for conflating their *Gingles I* illustrative plans with the real-life districts to come as a remedy.[7] Not so anymore. Respondents' remedy looks little different from their illustrative plans with a new District 2 (below in yellow) that splits three counties on racial lines while stretching 200 miles to reach a Black Voting Age Population of a telling 50.08%.[8]

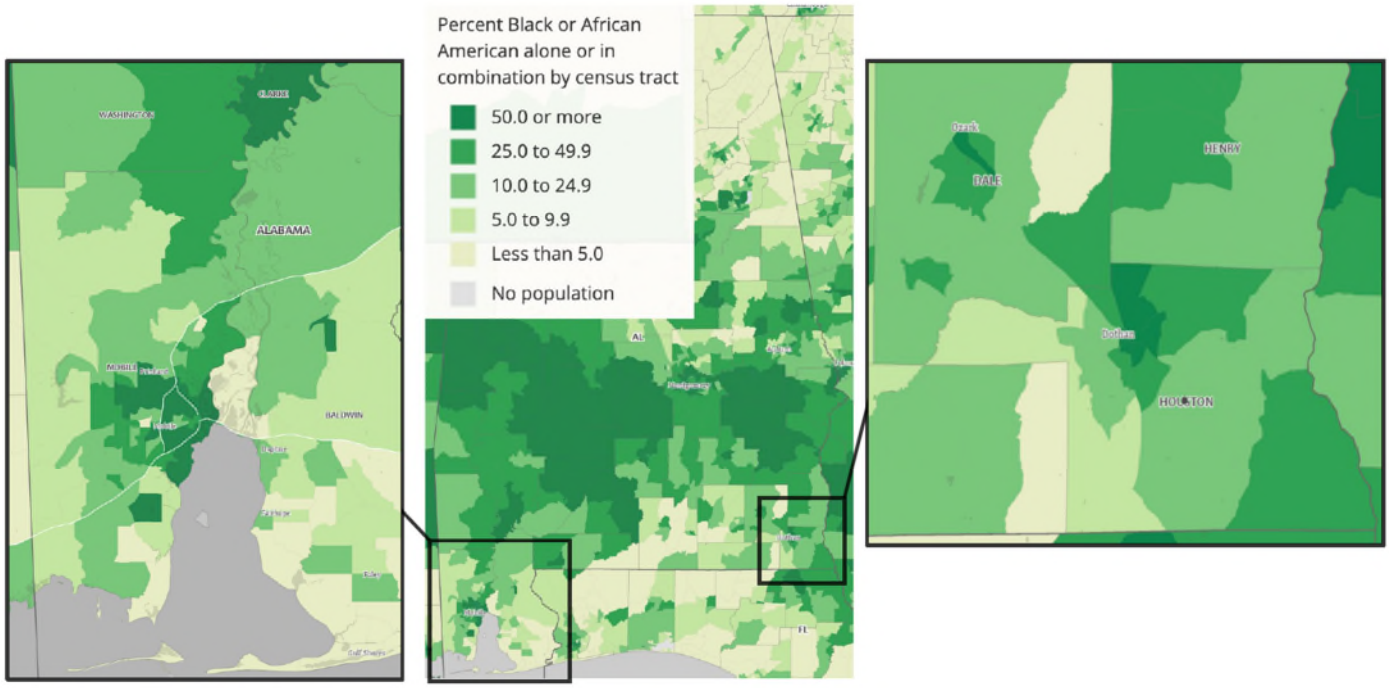
Respondents' Remedial Proposal



[7] *Caster* Br. 3 ("Section 2 does not require states to meet any strict racial threshold, and it will never require adoption of districts that violate traditional redistricting principles."); *id.* at 52 (faulting Alabama for "conflat[ing] the evidentiary showing that the first *Gingles* precondition requires litigants to undertake with the more flexible remedial requirements that §2 imposes on states"); *id.* at 53 (acknowledging that "§2 plaintiffs have no 'right to be placed in a majority-minority district once a violation of the statute is shown'" and that "states 'retain broad discretion in drawing districts to comply with the mandate of §2'" that "will not necessarily require the creation of a majority-minority district"); *Milligan* Br. 2, 44 (similar).

[8] *See* Report on VRA Plaintiffs' Remedial Map 2-3, *In re Redistricting 2023*, No. 2:23-mc-1181 (N.D. Ala.), ECF 7-3; *Milligan*, No. 2:21-cv-1530, ECF 200-7, at 4-5.

It is inconceivable that Alabama could have enacted Respondents' plan, reaching into Mobile (in Mobile County, Alabama's southwest-most county) and Dothan (in Houston County, Alabama's southeast-most county) to segregate voters along racial lines. Neither county is within the Black Belt's "'historical boundaries,'" *Allen*, 143 S. Ct. at 1511 n.5 (op. of Roberts, C.J.). And yet, Respondents' 200-mile-wide district would join those predominantly black areas, shown below,[9] while leaving white areas for District 1. No State could constitutionally insist on congressional districts separating "Black Mobile" from white. App.157-58, 166.



[9] *See* 2020 Census Demographic Data Map Viewer, U.S. Census Bureau, https://mtgis-portal.geo.census.gov/arcgis/apps/MapSeries/index.html?appid=2566121a73de463995ed2b2fd7ff6eb7. The State submitted a supplemental expert report documenting the troubling race-based splits in Respondents' proposal. *Milligan*, No. 2:21-cv-1530, ECF 220-10. But when Respondents returned to the District Court, they waived that map as an illustrative plan, and the court struck the report as "unhelpful." App.145-46. In a remarkable about-face, after the court enjoined the 2023 Plan, the *Milligan* and *Caster* Respondents re-introduced the plan as their desired remedy and briefed its virtues to this Court.

It was not "defiance" for the State of Alabama to find another way to comply with the Voting Rights Act. The Constitution is the same now as it was in *Abbott*, *Cooper*, *LULAC*, *Vera*, *Miller*, *Shaw*—all faulting States for failing to simultaneously comply with the Constitution and the Voting Rights Act with redrawn majority-minority districts.[10] This Court repeated those same principles in *Allen*. 143 S. Ct. at 1508-09. Contrary to Respondents' re-telling, *Allen* did not command the State to adopt Plaintiffs' *Gingles I* alternatives, or others resembling them, as the actual map sorting actual voters. There was not a majority opinion in *Allen* that those alternatives were constitutionally configured for the *Gingles* preconditions, let alone for a real-life remedy. *Id.* at 1511-12 (op. of Roberts, C.J.).

What *Allen* instead said was this: the State could not sacrifice the Black Belt counties for the Gulf Coast counties, even if the reason for doing so was retaining existing district lines, because splintering the Black Belt counties "has a disparate effect on account of race." *Id.* at 1504-05, 1507 (majority). In response, Alabama enacted new redistricting legislation that has been largely ignored. The Black Belt counties are unified in the 2023 Plan. Montgomery County is made whole. The discriminatory effects identified in the old plan are gone. And, unlike in Respondents' alternatives, Alabamians are treated "as more than mere racial statistics," *Vera*, 517 U.S. at 986 (plurality). There is no "Black Mobile" and white Mobile in the State's plan. App.158. There are instead whole cities, counties, and communities, districted

[10] *Abbott*, 138 S. Ct. at 2334-35; *Cooper v. Harris*, 581 U.S. 285, 306, 309-10 (2017); *LULAC*, 548 U.S. at 424-25; *Bush v. Vera*, 517 U.S. 952, 979-81 (1996); *Miller v. Johnson*, 515 U.S. 900, 921-28 (1995); *Shaw I*, 509 U.S. at 657.

together irrespective of race, in accordance with permissible neutral criteria and in direct response to *Allen*. If Respondents are right that §2 requires more than that, then Respondents have rendered §2 incompatible with the Constitution.

ARGUMENT

There is a fair prospect that the Court will note probable jurisdiction in *Milligan* and grant certiorari before judgment in *Caster* and conclude that, consistent with *Allen*, the 2023 Plan complies with §2. The balance of the equities weighs in Alabama's favor. The Court should grant a stay.

I. The 2023 Plan complies with §2.

The *Milligan* and *Caster* Respondents contend that Alabama defied *Allen* and perpetuated "vote dilution" by failing to create a new "opportunity" district in the 2023 Plan. *See, e.g.*, *Milligan* Resp. 1, 20, 22; *Caster* Resp. 22, 33.[11] What they mean by additional "opportunity" district and remedying "vote dilution" is the creation of a majority-minority district or something quite close to it. That is how the District Court defined the terms. App.3, 135 (expressly equating "additional Black-opportunity district" with a district "includ[ing] a Black 'voting-age majority or something quite close to it'"); App.161-62 (reasoning that the 2023 Plan "perpetuate[s] vote dilution"); App.166 ("Black voters remain an ineffective minority of voters"); *see also, e.g.*, *Caster* Resp. 22 (arguments about "'ineffective minority of voters'" (quoting *Abbott*,

[11] The *Singleton* Plaintiffs have also submitted a response brief. The *Singleton* Plaintiffs have never pressed a §2 claim and have consistently argued that the §2 plaintiffs' proposed remedies are racially gerrymandered. *See*, *e.g.*, *Milligan*, No. 2:21-cv-1530, ECF 220-1 at 72:14-23. They have proposed a remedial plan in the District Court that is the whole-county plan they've advanced all along as required by the Equal Protection Clause. *In re Redistricting 2023*, 2:23-mc-1181, ECF 5. Secretary Allen addresses the inapplicability of the *Singleton* Plaintiffs' arguments and the mismatch of their proposed remedy in Part II.

138 S. Ct. at 2338 n.2 (Sotomayor, J., dissenting)). And the conflation of those terms is the overriding legal error pervading the decision below and Respondents' arguments here. It simply assumes that adding a majority-minority district, or something close, was the *only* way in which the newly enacted 2023 Plan could be "equally open," affording equal "opportunity" to all voters, 52 U.S.C. §10301(b). How the State's plan applies neutral principles is irrelevant. App.149. *Any* plan that lacks two districts that "perform[]" for black voters "dilutes" their votes. App.119

Allen never said that. And the District Court erred both by holding that it did and by refusing to defer to the State's traditional districting principles embodied in the 2023 Plan. App.161-62, 164 (deploying what it called "circular reasoning" but nonetheless "declin[ing] to defer" because the State did not create a second "opportunity district"). That "error about the relevant law" is reviewed without deference. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015); *accord Thornburg v. Gingles*, 478 U.S. 30, 79 (1986); *Abbott*, 138 S. Ct. at 2326.

A. The State has made no court-defying concessions.

Contrary to Respondents' repeated refrain,[12] Alabama has never once "conceded" that the 2023 Plan's districts are not "equally open" or that they fail to afford equal "opportunity" to all voters, 52 U.S.C. §10301(b). Here is what the State actually said in the court below:

> Q: Were you not required to draw a new map that provided a fair and reason[able] opportunity district?
>
> A: Your Honor, I think we were required to draw a new map that complies with [§]2 of the Voting Rights Act and the [Equal] Protection Clause of the

[12] *E.g.*, *Milligan* Resp. 1, 9; *Caster* Resp. 5, 7.

> United States Constitution …. [W]e were required to draw a map that was equally open and that did not have discriminatory effects on account of race.
>
> … Q: I'm asking about whether or not it provides a reasonable opportunity …
>
> A: I think this is as reasonable of an opportunity as you can get without violating traditional districting principles in service of a racial gerrymander. And for that reason, we do think it complies with Section 2 of the Voting Rights Act.[13]

The State presses those same arguments here: The 2023 Plan complies with §2 by removing the particular discriminatory effect identified in *Allen*. *Allen* focused specifically on the now-repealed 2021 Plan's treatment of the Black Belt community (split into many districts), as compared to its treatment of the Gulf Coast (kept in a single district), which had an impermissible "disparate effect on account of race." 143 S. Ct. at 1498, 1504-05, 1507. *Allen* called for removing that discriminatory effect, and the 2023 Plan did so. The State's arguments on that score do not "remake" §2, *contra Caster* Resp. 36; *Milligan* Resp. 19. Rather, it is Respondents who now find themselves ignoring what this Court has (and has not) said about §2.

B. *Allen* did not equate §2 compliance with adding majority-minority districts.

1. Respondents' new arguments about required remedies go well beyond *Allen*. *Allen* affirmed that Alabama's 2021 Plan "likely violated Section 2 of the Voting Rights Act." 143 S. Ct. at 1498; *id.* at 1502. It is a liability decision about the 2021 Plan. It is not a remedial decision about future redistricting plans.

Respondents invited that liability-only decision. Respondents *faulted* Alabama for "conflat[ing] the evidentiary showing that the first *Gingles* precondition requires

[13] App.607-09; *accord id.* at 617 ("District 2…is as close as you are going to get to a second majority-black district without violating *Allen*" and "without violating the Constitution.").

[of] litigants" at issue in *Allen* and the ultimate remedy, which they said was not at issue in *Allen*.[14] In their words, the "court need not impose [Plaintiffs' illustrative maps] and [t]he Legislature need not enact any of them" as a remedy.[15] Rather, "at the remedial stage, '§2 allows the States to choose their own method of complying with the [VRA],'" and that "will not necessarily require the creation of a majority-minority district."[16]

In response to *Allen*, the State was free, in Respondents' pre-*Allen* words, "to choose their own method of complying" with §2 in a new plan.[17] There was no §2 requirement to have voters "placed in a majority-minority district" in any intervening redistricting plan. *Shaw v. Hunt*, 517 U.S. 899, 917 n.9 (1996) (*Shaw II*). And nothing "limit[ed the] 'State's discretion to apply traditional districting principles,'" including "avoid[ing] strict scrutiny altogether" for that new redistricting plan "by respecting their own traditional districting principles" of keeping cities, counties, and communities whole to the fullest extent possible. *Vera*, 517 U.S. at 978 (plurality).

There were at least three reasons to stick to those traditional principles here in response to *Allen*. First, there were still racial gerrymandering claims pending against the State during the legislative session, and those plaintiffs cautioned that the *Milligan* and *Caster* Respondents' proposal was unconstitutional.[18] Second, there

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[14] *Caster* Br. 52-53; *accord id.* at 3 ("Section 2 does not require states to meet any strict racial threshold, and it will never require adoption of districts that violate traditional redistricting principles."); *id.* at 26 ("the remedy for a §2 violation entails no 'predetermined, "non-negotiable" racial target'"); *Milligan* Br. 2, 44.

[15] *Milligan* Br. 2, 44 (quotation marks omitted).

[16] *Milligan* Br. 44 (quoting *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009) (plurality); *Caster* Br. 53.

[17] *Id.*

[18] *Milligan*, No. 2:21-cv-1530, ECF 220-1 at 72:14-23.

was no majority opinion in *Allen* for Respondents' argument that race did not predominate in their experts' illustrative plans for *Gingles I* purposes,[19] let alone as an actual State-enacted remedy. Third, this Court has only ever faulted States for racially gerrymandering districts for VRA compliance; it has never compelled it.[20]

In short, nothing in *Allen* stopped Alabama from enacting legislation that removed the discriminatory effects identified in the 2021 Plan without a "'predetermined, "non-negotiable" racial target.'"[21] The State thus delivered exactly what Respondents asked for. The 2023 Plan unified the Black Belt to the fullest extent possible, more than any of Respondents' old illustrative plans, without splitting any Black Belt counties between districts. *See* Stay App. 1-2, 10-14, 29-34. That effected an increase in black voters in District 2 to nearly 40%. Notably, before *Allen*, the *Milligan* Respondents proclaimed that "District 2 plans with BVAPs as high as almost 40%" would ensure that "Black voters are no longer artificially denied electoral influence in a second district."[22]

2. Only after *Allen* and the enactment of the 2023 Plan did Respondents change course and say that's not good enough. And the District Court agreed, enjoining the 2023 Plan for failing to racially sort voters from Mobile to Dothan.

This Court's cases cannot be squared with that injunction, premised on Respondents' new arguments that the newly enacted 2023 Plan was doomed from the

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[19] *See Allen*, 143 S. Ct. at 1511-12 (op. of Roberts, C.J.) (specifically emphasizing "the whole point of the [*Gingles I*] enterprise" is to hit a racial target); *see also id.* at 1527 (Thomas, J., dissenting).

[20] *See, e.g.*, *Shaw I*, 509 U.S. at 657; *Miller*, 515 U.S. at 921-29; *Vera*, 517 U.S. at 979-81; *LULAC*, 548 U.S. at 424-25; *Abbott*, 138 S. Ct. at 2334-35; *see also Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1247-49 & n.1 (2022) (per curiam).

[21] *Caster* Br. 26.

[22] *Milligan*, No. 2:21-cv-1530, ECF 69 at 36.

start without a majority-minority district, or something close. *See* App.3-6. The 2023 Plan, like any other law, was not required to prioritize race above traditional criteria to eliminate the discriminatory effect in the 2021 Plan. *See Allen*, 143 S. Ct. at 1510. As this Court has made clear in other "disparate effect" cases, *id.* at 1507, "even when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution." *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 545 (2015). To that end, "[r]emedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that arbitrarily operates invidiously to discriminate on the basis of race." *Id.* (cleaned up). The discriminatory effects should be eliminated "through *race-neutral* means." *Id.* (emphasis added). "Remedial orders that impose racial targets or quotas raise more difficult constitutional questions." *Id.* And in the redistricting context, "even for remedial purposes," they "may balkanize us into competing racial factions" that "carry us further from the goal of a political system in which race no longer matters." *Shaw I*, 509 U.S. at 657.

C. *Allen* requires an intensely local appraisal of the 2023 Plan.

Respondents' remaining arguments ignore that §2 demands more than an abstract thought experiment about whether one of plaintiff's hypothetical alternatives achieves platonic notions of "reasonableness." There was no basis for enjoining the 2023 Plan without first conducting the same "'intensely local appraisal'" of that redistricting plan, which includes requiring Plaintiffs to show, through their illustrative plans, that there are discriminatory effects in the 2023 Plan *on account of race*. *Allen*, 143 S. Ct. at 1503, 1508 (quoting *Gingles*, 478 U.S. at 79).

That's not the State's rule, it's *Allen*'s. In analyzing the reasonableness of Respondents' old illustrative plans, this Court made specific reference to those plans *as compared to the 2021 Plan*. So did Respondents themselves.[23] *Allen* reasoned that Plaintiffs' alternative plans "produced districts roughly as compact *as the existing plan*." *Id.* at 1504 (emphasis added). *Allen* reasoned that some alternatives "split the same number of county lines as (or even *fewer* county lines than) *the State's map*." *Id.* (emphasis added). And in response to the State's arguments about the Gulf Coast, *Allen* again made specific reference to Plaintiffs' alternatives *as compared to the 2021 Plan*—there was "a split community of interest *in both*," and that's why no further "'beauty contest[]'" was required. *Id.* at 1505 (emphasis added); *see also* Stay App. 27-28 & n.48. Those comparisons are critical "[t]o ensure that *Gingles* does not improperly morph into a proportionality mandate." *Allen*, 143 S. Ct. at 1518 & n.2 (Kavanaugh, J., concurring). And those comparisons are how a plaintiff's map may "show[] it is *possible* that the State's map has a disparate effect on account of race." *Id.* at 1507; *cf. Easley v. Cromartie*, 532 U.S. 234, 255-58 (2001) (discounting alternative maps that ignore "[t]raditional districting considerations" in the challenged map).

The District Court eschewed that analysis for the 2023 Plan. What mattered, by the court's admission, was not the 2023 Plan's application of traditional districting criteria but instead that the 2023 Plan did not unify the Black Belt in a racially

[23] *Allen v. Milligan* Oral Argument Tr. 67 (*Milligan* counsel : "And the district court found on all of those that Plaintiffs' plan meet or beat Alabama."), 83 (*Caster* counsel: "illustrative plans meet or beat the enacted plan."); *Milligan*, No. 2:21-cv-1530, ECF 105-1 (PI Tr.) at 441-42 ("meet or beat the county split"); *Caster*, No. 2:21-cv-1536, ECF 65 at 5.

maximizing way—by joining voters in the Black Belt with black voters in cities beyond the Black Belt to create a majority-minority district or "something quite close." App.135; App.161-62. That framing, repeated here by Respondents, is irreconcilable with *Allen* and what *Allen* showed §2 requires before the 2023 Plan can be enjoined.

***First*,** the analysis was "circular," as the District Court itself admitted. App.162. The District Court said it could not honor the traditional redistricting criteria embodied in the 2023 Plan because the 2023 Plan "perpetuate[d] vote dilution" by not adding a "Black-opportunity district," App.161-62, defined by the District Court as a majority-minority district or something close, App.135. The District Court acknowledged that its self-described "circular reasoning" ought not apply in the "ordinary case," but it could apply here. App.162.

***Second*,** the analysis allowed a headcount of majority- or nearly majority-minority districts as a substitute for actual proof of discriminatory effects in the 2023 Plan. *But see Abbott*, 138 S. Ct. at 2324-25 (plaintiffs continue to bear the burden even after a liability finding). Respondents laud that here, saying no "beauty contest" was required. *Milligan* Resp. 28; *Caster* Resp.26. But the reason for bypassing the so-called "beauty contest" in *Allen* was precisely because Plaintiffs' alternatives were on par with the 2021 Plan's application of traditional criteria. *Allen*, 143 S. Ct at 1505 ("[t]here would be a split community of interest in both"). As such, the 2021 Plan's "[d]eviation from" plaintiffs' plans could "show[] it is *possible* that the State's map has a disparate effect on account of race." *Id.* at 1508. For the required "'intensely local appraisal'" of the 2023 Plan, *id.* at 1503, the same legwork is required. And here,

there is no "beauty contest," not because of problems with the 2023 Plan, but because Plaintiffs' old maps don't even qualify. *See* Stay App. 29-31.[24] They reveal nothing about the 2023 Plan because they "fail[] to incorporate Alabama's own districting guidelines, including keeping together communities of interest." *Allen*, 143 S. Ct. at 1512. If that's not right, then "traditional districting criteria" are doing no work to "limit[] any tendency of the VRA to compel proportionality" in the 2023 Plan. *Id.* at 1509 & n.4 ("we have rejected districting plans that would bring States closer to proportionality when those plans violate traditional districting criteria"); *see also id.* at 1518 n.2 (Kavanaugh, J., concurring) (similar).

***Third*,** and relatedly, the importance of the illustrative plans is to reveal something about "the State's map." *Allen*, 143 S. Ct. at 1507. Citing *LULAC*, Respondents' say no comparison between their illustrative plans and the 2023 Plan was required before it could be enjoined for failure to add a second majority-minority district, or something close to it, because they'd already showed "'the compactness of the minority population.'" *Milligan* Resp. 28 (quoting *LULAC*, 548 U.S. at 433); *see Caster* Resp. 16; *see also id.* 25-27. But read on in *LULAC*, and the Court's decision makes the very

[24] For the first time before this Court, the *Milligan* Respondents suggest (at 31) that their remedial proposal (previously submitted to the Legislature) can be a twelfth illustrative plan. They said the opposite below: "Mr. LaCour keeps referencing the remedial plans that plaintiffs … put in front of the Legislature. That plan is not in front of this Court. We have never offered it as an illustrative plan. We have never offered it as a remedy to Section 2 … ." App.576. Any *Gingles I* arguments are affirmatively waived. App.75 n.16 ("The Milligan and Caster Plaintiffs do not offer the VRA Plan in this litigation as a remedial map for purposes of satisfying *Gingles* I or for any other purpose."). And in all events, the plan does not show any impermissible effect on account of race. It merely shows how a plan can sacrifice compactness and split cities like Mobile and Dothan to achieve a racial goal. *See* Stay App. 29-30; *Milligan*, 2:21-cv-1530, ECF 220-12 at 9-13 (compactness, county splits, and communities of interest, including for the VRA Remedial Plan); *id.*, ECF 200-7, at 4-5 VRA Remedial Plan BVAP); *In re Redistricting 2023*, No. 2:23-mc-1181, ECF 7-3 at 3 (BVAP).

point that the State makes here: assessing that "compactness" for §2 requires "taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries." 548 U.S. at 433. That application of those traditional criteria in a *Gingles I* plan is supposed to "impose[] meaningful constraints on proportionality." *Allen*, 143 S. Ct. at 1508-1509 & n.4. To do so, a plaintiff's *Gingles I* plan must apply "traditional districting principles" in ways resembling the State's plan; otherwise it reveals nothing about a possible "disparate effect on account of race" in the State's plan. *Id.* at 1507. At best, it reveals effects on account of the prioritization of traditional redistricting criteria.

***Fourth*,** to the extent the court and Respondents engaged with the 2023 Plan on the merits, they ignored the actual features of the plan. The 2023 Plan no longer "prioritize[s] the Gulf," *contra Milligan* Resp. 29-30. By departing from prior lines, the 2023 Plan prioritizes the Black Belt, Gulf Coast, and Wiregrass regions simultaneously. This is no longer a case where "there is a split community of interest" in both the State's plan and the Plaintiffs' alternatives. *Allen*, 143 S. Ct. at 1505. Ignoring that fact, Respondents offer no meaningful defense of the District Court's instruction that a §2-compliant plan *must* "split the Gulf Coast" and "'Black Mobile,'" App.157, 166, even though the State's 2023 Plan already unified the Black Belt counties into

as few districts as possible.[25] "[R]ace—and race alone—explains"[26] the "need to split the Gulf Coast," App.166.

Respondents' newly hatched community-of-interest arguments likewise ignore undisputed facts about what counties comprise what communities of interest. Respondents erroneously assert that the District Court's instructions to split the Gulf can be justified because "the district court found that Plaintiffs' plans connected" a community of interest of Black Mobile and the Black Belt. *Milligan* Resp. 30-31. To the contrary, the District Court did not "find" there was a newfound Black Mobile-Black Belt community of interest. The District Court suggested "that the Black Belt and the Gulf Coast are *geographically overlapping* communities of interest." App.166 (emphasis added); *see also Milligan* Resp. 2, 7. And that was clear error as a matter of geography. It contradicts the District Court's own order and party stipulations, which list the Black Belt counties *without* including Mobile. *See* App.19-20 n.7, 24 n.8, 95. It ignores that Mobile is not even contiguous with any of the "core" counties of the Black Belt. And it defies the premise relied upon by the plurality in this Court for the conclusion that race did not predominate: that the Black Belt is "defined by its 'historical boundaries,'" not demographics. *Allen*, 143 S. Ct. at 1511 n.5.

***Fifth*,** Respondents' rejection of traditional districting criteria as a defense of the State's plan is foreign to §2 jurisprudence. Respondents say allowing States to

[25] For instance, the *Milligan* Respondents recycle arguments about the State Board of Education districts (at 9, 30), which have districted Mobile with the western Black Belt counties. But those arguments about a different redistricting plan, with a different number of districts, are not grounds for instructing the State to split the Gulf Coast counties in the 2023 Plan.

[26] *SFFA v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2169 n.6 (2023).

choose their own districting criteria will allow States to "disregard the Voting Rights Act whenever compliance with the Act may pose an inconvenience to their policy agenda." *Caster* Resp. 22; *Milligan* Resp. 29-32. They assert that the State cannot "dictate the contours of Section 2 through its *subjective* criteria," *Caster* Resp. 21; *Milligan* Resp. 32. The District Court likewise concluded that the 2023 Plan's compactness and "respect [for] communities of interest" was irrelevant if the resulting districts didn't "perform[]" for black voters. App.119, App.149. In the court's view, "[t]he State cannot avoid the mandate of Section Two by improving its map on metrics other than compliance with Section Two." App.149.

But §2 compliance is not at war with the application of traditional districting criteria. In complying with the Voting Rights Act, States are free to "avoid strict scrutiny altogether by respecting their own traditional districting principles." *Vera*, 517 U.S. at 978 (plurality). If it is now *verboten* for the State to redistrict in accordance with neutral districting policies such as more compact districts or keeping communities with military bases or schools or ports together in redistricting plans, then what is the State to rely on in defending against a §2 claim?

Ultimately, Respondents offer no response to the State's principal argument: The unification of the Black Belt is the opposite of "disregard [of] the Voting Rights Act," *Caster* Resp.21. The State's respect for "nonracial communities of interest" both in the Black Belt and beyond are included within the traditional criteria of which courts must take account at *Gingles I. E.g.*, *LULAC*, 548 U.S. at 433; *see also Abrams v. Johnson*, 521 U.S. 74, 92 (1997) ("And the § 2 compactness inquiry should take into

account 'traditional districting principles such as maintaining communities of interest and traditional boundaries.'" (quoting *Vera*, 517 U.S. at 977)). *Allen* reaffirmed the importance of such "traditional districting criteria," necessary to "limit[] any tendency of the VRA to compel proportionality." *Id.* at 1509. "[I]n case after case," this Court has rejected attempts to "bring States closer to proportionality" with "plans [that] violate traditional districting criteria." *Id.* at 1509 n.4. It must do so again here.

Consistent with *Allen* and contrary to Respondents' arguments, a stay and reversal are warranted to require Respondents to show that there is a discriminatory effect in the 2023 Plan. Respondents have made no effort to establish "[d]eviation from" any illustrative plans, *Allen*, 143 S. Ct. at 1507, not even their old illustrative plans. *See* Stay App. 27-31. Because they can't. Respondents claim their plans matched the 2023 Plan on compactness and preserving counties without grappling with the State's arguments on that score. *See Milligan* Resp.29; *Caster* Resp.26-27; Stay App.29-30 & n.51. The District Court mixed and matched plans deeming it sufficient that one illustrative plan split similar numbers of counties, even if it was not compact, so long as another illustrative plan was compact, even if it split more counties. *See* Stay App.29-30. That was legal error. Illustrative plans that sacrifice county splits for compactness or *vice versa* show only that the 2023 Plan's "disparate effect" is on account of the State's legitimate goals of reducing county splits without sacrificing compactness, not "on account of race." *Allen*, 143 S. Ct. at 1507; *see also Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340 (2021) (considering "strong state

interests"); *id.* at 2361 (Kagan, J., dissenting) ("Section 2 demands proof" that the challenged "law [is] not needed to achieve a government's legitimate goals.").

Likewise, any faithful appraisal of the 2023 Plan reveals that the 2023 Plan unifies the Black Belt into fewer districts than any of Plaintiffs' alternatives. *Id.*[27] The District Court's assertion that there is "a wash on th[e] metric" of communities of interest, App.166, *after* its "circular reasoning," App.162, 164, makes no sense when looking at the 2023 Plan compared to Respondents' alternatives. That discriminatory effect at the "heart" of Respondents' case was eliminated, *Milligan* Br. 1, 39, but the court enjoined the 2023 Plan anyway.

D. *Covington* is not grounds for bypassing an intensely local appraisal.

The District Court refused to decide whether the 2023 Plan violates §2 anew—beyond its "circular reasoning" that it did not contain a second majority-minority district, App.161-62—because that would put "redistricting litigation in an infinity loop," App.127. Respondents press the same argument again here. *Caster* Resp. 19. That argument, if deployed here as grounds for ignoring what the State did in the 2023 Plan, deprives the State of its "opportunity" to "adopt[] a substitute [redistricting] measure rather than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (op. of White, J.). Sometimes the States

[27] Plaintiffs agree that splitting the Black Belt into more than two districts is a bad thing. They recently faulted other remedial proposals for "fall[ing] short" on traditional criteria like keeping together communities of interest. *See In re Redistricting 2023*, 2:23-mc-1181, ECF 23 at 1-2. Plaintiffs complained that "the Singleton Plan … splits the Black Belt across three districts," *id.* at 2, which is true of all the illustrative maps on which the District Court based its liability finding against the 2023 Plan, App.165-68. (The *In re Redistricting 2023* case was administratively opened to facilitate the special master's work.)

can't do so. *See, e.g.*, *Abrams*, 521 U.S. at 82. But here, the State did, initiating public hearings and a special session that culminated in the passage of the 2023 Plan. That new plan is "the governing law unless it too, is challenged and found to violate the Constitution" or federal law. *Wise*, 437 U.S. at 540.

This Court's *per curiam* decision in *North Carolina v. Covington*, 138 S. Ct. 2548 (2018), is not to the contrary. Respondents rely on *Covington* for the argument that they were not required "to prove their Section 2 case anew." *Caster* Resp. 18-19 ("passage of a remedial plan does not erase the very liability that triggered it"). They ignore four differences between this case and *Covington*—differences that illuminate why a stay and reversal are warranted here.

First, the State's argument is not a "mootness" argument like that in *Covington*, *contra Caster* Resp. 18. The State's argument has always been that it was allowed an opportunity to redistrict in response to *Allen*, it successfully did so, and that law must be the governing law unless it, too, is shown to violate §2. Before *Allen*, the District Court agreed with that principle, quoting *Wise*. *See Singleton v. Merrill*, 582 F. Supp. 3d 924, 1032 (N.D. Ala. 2022). Only after the State enacted 2023 Plan did the District Court reverse course, declaring that "the State has identified no controlling precedent" that required Respondents to "reprove" the new law violated federal law before it could be enjoined. App.117. That was reversible error.

Second, unlike the North Carolina General Assembly in *Covington*, Alabama actually changed its district lines. Stay App. 10-14. Without any sense of irony, Respondents now tell this Court that *Covington*, a racial gerrymandering case, dictates

their race-first remedy here. *See Caster* Resp.18-19; *Milligan* Resp.21, 26. They say that the 2023 Plan did not sufficiently segregate citizens in "Black Mobile" from neighboring white citizens. App.4-6, 157. That, too, was reversible error.

Third, the *Covington* Plaintiffs "turned up sufficient circumstantial evidence that race was the predominant factor" in the new plan. *Covington*, 138 S. Ct. at 2553. They obtained a new injunction because they proved the new "districts unconstitutionally sort voters on the basis of race." *Id.* Respondents here were not required to show that the 2023 Plan likely violated federal law. App.117.

Fourth, *Covington* followed years of litigation. Here, there have been weeks-long preliminary injunction proceedings, where "findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding" later. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). The notion (*Milligan* Resp. 36) that the law-of-the-case doctrine precludes the State's defense of the 2023 Plan—legislation that did not exist in *Allen*—is frivolous. *See id.*; *Vital Pharms., Inc. v. Alfieri*, 23 F.4th 1282, 1289 (11th Cir. 2022) (Pryor, C.J.) (rejecting the "conten[tion] that the district court may afford law-of-the-case status to its prior clear legal conclusions reached at the preliminary injunction stage" (cleaned up)).

*

The District Court's injunction goes well beyond and conflicts with *Allen*. It requires Alabama to abandon its 2023 Plan based on Respondents' old illustrative plans that split more communities, while also sacrificing compactness, counties, or both. *See* Stay App. 29-30. It requires Alabama to sacrifice once-uncontroversial

traditional districting criteria, including "compactness," county splits, and "respect for [other] political subdivisions," despite *Allen*'s assurance that "§2 'never require[s] adoption of districts that violate traditional redistricting principles.'" *Allen*, 143 S. Ct. at 1510; *id.* at 1509 n.4 (courts must reject "plans that would bring States closer to proportionality when those plans violate traditional districting criteria"); *Shaw I*, 509 U.S. at 647. It is a return to the world before *Shaw*, where rather than "reembrac[ing] traditional districting practices," the State of Alabama has been ordered back to the world of treating "voters as … mere racial statistics." *Vera*, 517 U.S. at 985 (plurality). The notion that "splitting the Gulf Coast" by carving out "Black Mobile" "precipitates no … racially discriminatory harm," App.157, 166, is a giant step backward in this country's pursuit of equality. It surrenders the State to pernicious stereotypes and sends an "equally pernicious" message to its elected representatives "at war with the democratic ideal" that *all* voters are represented in Congress, not just the black representative for the black voter, the white representative for the white voter, the Jewish representative for the Jewish voter, or the Catholic representative for the Catholic voter. *Shaw I*, 509 U.S. at 648 (quotation marks omitted).

II. The 2023 Plan is the constitutionally sound way of complying with §2.

Respondents parody the State's constitutional arguments. The State has never argued that "*any* map that remedies the Section 2 violation would be a racial gerrymander," *contra Caster* Resp. 29. The State's more specific argument—met by silence—is that the 2023 Plan's unification of the Black Belt was what §2 required in light of *Allen* and, with §2 now satisfied, the Constitution did not permit the State to go a

step further to maximize black voters in District 2 by sacrificing traditional districting criteria. *Shaw I*, 509 U.S. at 657; *see also Tex. Dep't of Hous. & Cmty. Affs.*, 576 U.S. at 545. Such a plan would prioritize race for reasons not necessary for §2 compliance. Thus, it would flunk strict scrutiny, without even reaching the question of whether §2 compliance could permit race-predominant redistricting in some future case. *See Abbott*, 138 S. Ct. at 2334-35; *Miller*, 515 U.S. at 919-22.

A. The proposed remedial plans require no speculation about what's to come.

The ongoing remedial proceedings now involve remedial proposals the State could not have enacted in the first instance. Having unified the Black Belt in the 2023 Plan, the State had no constitutional license to take the next step: split cities, counties, and communities and create districts more sprawling all to join "Black Mobile" with voters in the Black Belt so that black voters are no longer an "'ineffective minority'" in the first instance, App.157, 166. But the 2023 Plan was invalidated on that basis, and those are the instructions now in the hands of the special master.

Those new instructions run headlong into *Allen*'s discussion of *Shaw*, *Miller*, and *Vera*. *See Allen*, 143 S. Ct. at 1508-09. In those cases and others, this Court has "rejected districting plans that would bring States closer to proportionality when those plans violate traditional districting criteria." *Id.* at 1509 n.4; *see also LULAC*, 548 U.S. at 433 ("A district that 'reaches out to grab small and apparently isolated minority communities' is not reasonably compact."). If it was "the *Gingles* framework itself" that "impose[d] meaningful constraints on proportionality" in those cases, *Allen*, 143 S. Ct. at 1508, then it imposes the same constraints here.

Those instructions also gloss over the fact that there was no majority holding in *Allen* that the State could have constitutionally enacted any one of Respondents' illustrative plans. Four justices agreed that race did not predominate in one expert's plans for purposes of the *Gingles I* inquiry. *See Allen*, 143 S. Ct. at 1511-12 (op. of Roberts, C.J.). And that agreement was premised on the promise that the Black Belt was a community of interest "defined by its 'historical boundaries,'" not "demographic[s]," *id.* at 1511 n.5—a promise forsaken by the District Court's instructions that define the Black Belt and Black Mobile by demographics. App.160-61.

Respondents' feeble rejoinder is that the State's arguments about the forthcoming racial gerrymander to replace the 2023 Plan are premature. *See Milligan* Resp. 36 & n.7; *see also Singleton* Resp. 2. But shown above (*supra*, p.3-4), the *Milligan* and *Caster* Respondents have proposed their remedy, as well as others, all pursuant to the District Court's instructions. They necessarily make "[r]ace the criterion that … could not be compromised." *Shaw II*, 517 U.S. at 907. The *Milligan* and *Caster* Respondents' remedy presumes there is a §2 "right to be placed in a majority-minority district once a violation of the statute is shown," when in fact "States retain broad discretion in drawing districts to comply with the mandate of §2" without splitting cities on race-based lines. *Id.* at 917 n.9. As Respondents admit, their proposal "splits seven counties" and "places … most of the City of Mobile in the Black Belt districts,"[28] complying with the District Court's instructions to split the Gulf Coast. App.166. It is a 200-mile-wide district that takes "'Black Mobile,'" App.157, and predominantly

[28] *In re Redistricting 2023*, 2:23-mc-1181, ECF 7 at 7.

black portions of Dothan in Houston County for the same purpose: to combine them with Montgomery to create a majority-black district of exactly 50.08% BVAP. It is the same map submitted to the Legislature[29]—called out as unconstitutional by the *Singleton* Plaintiffs then and now.[30]

This Court's precedents foreclosed the Legislature from having any similar race-based purpose. Nonetheless, on Respondents' view, a non-"defiant" Legislature might have been one that racially gerrymandered an unconstitutional plan maximizing majority-minority districts pursuant to the Department of Justice's demands in *Miller*, 515 U.S. at 915-927, or one that "purposefully established a racial target" for "African-Americans [to] make up no less than a majority of the voting-age population" in *Cooper*, 581 U.S. at 299. The Legislature should have unconstitutionally "instructed" the mapmakers "'to draw [District 2] with a [BVAP] in excess of 50 percent,'" even if they "sometimes could not respect county or precinct lines as" much as they "wished," *id.* at 300—in the Gulf Coast or in the Wiregrass. If they had been candid "in expressing th[e] goal" that "District [2] had to be majority-minority, so as to comply with the VRA" as interpreted by the District Court, this Court's precedents clearly establish that the remedial plan would have been race predominant. *See id.* at 300-01 (holding that "an announced racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites" was

[29] "The Special Master noticed in his review that the submission by the *Caster/Milligan* Plaintiffs of the VRA Plan … is generally part of the record through the legislative process in the underlying proceedings." *In re Redistricting 2023*, 2:23-mc-01181, ECF 27. It "used Mr. Cooper's Illustrative Plan 2 as a starting point," *id.*, ECF 7-3 at 1, a plan that flouted all three criteria of compactness, county splits, and communities of interest compared to the 2023 Plan, *see* Stay App. 29-30.

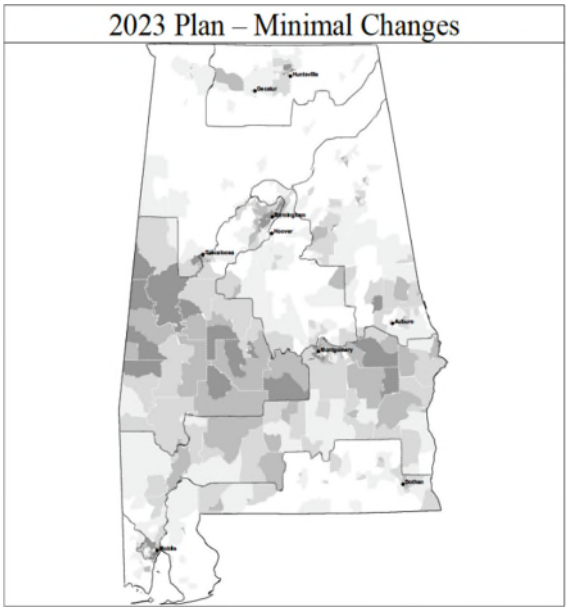
[30] *In re Redistricting 2023*, 2:23-mc-1181, ECF 24 at 1-12.

race predominant); *see also Abbott*, 138 S. Ct. at 2334-35 (district drawn expressly "to bring the Latino population back above 50%" was race predominant and failed strict scrutiny). This Court's precedents foreclose the race-based remedial intention that the District Court said the State should have "nurture[d]." App.8.

Other remedial proposals similarly put the lie to arguments that the State's appeal is premature, or that one must "[s]peculat[e]" about what's "forthcoming," *contra Milligan* Resp. 36 n.7.

Alabama Democratic Caucus Proposal

Grofman Proposal



See In re Redistricting 2023, 2:23-mc-1181, ECF 10 at 4 (Alabama Democratic Caucus proposal); *id.*, ECF 15 at 4 (Grofman proposal). Those proposals and others, like the *Milligan* and *Caster* proposal, intentionally split Mobile for race-based ends. The District Court's majority-black, or something close, remedial order that led to its enjoining the 2023 Plan forces the subordination of traditional districting principles to race.

The State isn't alone in calling out the unconstitutionality of various remedial proposals now before the special master in the District Court. As the *Singleton* Plaintiffs argue, the *Milligan* and *Caster* Respondents' "Plan's focus on race manifests in the way it splits counties," and "divides Houston County for the first time in Alabama's history." *In re Redistricting 2023*, 2:23-mc-1181, ECF 24 at 8-9 (explaining that the "portion [left] in District 1 is 16% Black, but the portion in District 2 is 54% Black, a dramatic difference"). The ADC Plan is a "severe racial gerrymander." *Id.* at 18. And the Grofman Plan enforces "a racial target of 50% Black Citizen Voting Age Population" and is therefore likewise "unconstitutional." *Id.* at 19. Because the State could never have constitutionally intended to grab "'Black Mobile,'" App.157-58, and "Black Dothan" to create a majority-black district, the District Court erred when it rejected the 2023 Plan for its failure to do so.

Finally, the *Singleton* Plaintiffs devote their response to the argument that the District Court might ultimately adopt a constitutional alternative, in lieu of the *Milligan* and *Caster* Respondents' proposal. *Singleton* Resp. 2. But the plan touted by the *Singleton* Plaintiffs does not solve constitutional problems as it too sacrifices compactness to hit "crossover" racial targets.[31] Moreover, that plan departs significantly from the 2023 Plan and, because it is a remedy they have proposed for their racial gerrymandering claims—claims on which the District Court has repeatedly deferred ruling—it makes changes in areas of the State where no likely violation of federal law

[31] *Compare In re Redistricting 2023*, 2:23-mc-1181, ECF 5 at 15 (compactness of *Singleton* Plan), *with Milligan*, 2:21-cv-1530, ECF 220-12 at 9-10 (compactness of 2023 Plan).

has been found. App.185-88, 639-41.[32] The federal court's authority is limited to remedying the likely §2 harm, not the *Singleton* Plaintiffs' unresolved (and unsupported) legal contentions. *Covington*, 138 S. Ct. at 2554; *Upham v. Seamon*, 456 U.S. 37, 40-41 (1982) (per curiam).

In any event, the *Singleton* Plaintiffs' filing underscores that the District Court's instructions to create an additional opportunity district—defined to mean a majority-minority district, or something close—will require subordinating traditional criteria by splitting communities, drawing more sprawling districts, or both. App.135, 166. Those instructions to put race first are racial gerrymandering instructions.

B. A race-based plan cannot be constitutional in light of the 2023 Plan.

Respondents take a "trust us" theme for the remaining constitutional arguments. The *Milligan* Respondents (at 38) assure the Court that a new map will not rely on stereotypes about black voters having a "characteristic minority viewpoint" because "Plaintiffs proved" black Alabamians think alike. But assuming an individual is going to vote a certain way—whether on a ballot or on a jury—based on skin color remains an "impermissible stereotype[]" that "violate[s] the Equal Protection Clause, even when some statistical support can be conjured up for the generalization." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 n.11 (1994). In redistricting, "[t]he recognition of *nonracial* communities of interest reflects the principle that a State may not assume from a group of voters race that they think alike, share the same

[32] The *Milligan* Plaintiffs agree that "the Singleton plaintiffs' advocacy for their favored map is irrelevant to the § 2 claims before this Court." Resp. 4.

political interests, and will prefer the same candidates at the polls." *LULAC*, 548 U.S. at 433 (emphasis added, quotation marks omitted). "[P]erpetuating such notions … may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract." *Shaw I*, 509 U.S. at 648.

Respondents also contend that §2 will come to a natural end. *Milligan* Resp. 39; *Caster* Resp. 32. But there is no "de facto sunset date for §2," *id.*, if the District Court's approach is right.[33] If Plaintiffs can satisfy *Gingles I* with old illustrative plans judged only by a court's abstract sense of what's "reasonable" (App.150) rather than an objective comparison with the challenged plan on the State's traditional districting principles, then there is no logical stopping point. *Allen*, 143 S. Ct. at 1507; *id.* at 1509 n.4; *id.* at 1518 n.2 (Kavanaugh, J., concurring). As "residential segregation" declines, *Caster* Resp. 32, plaintiffs can simply draw more sprawling, 200-mile-wide districts as they have done here.

Nor is there any logical stopping point if plaintiffs can satisfy *Gingles I* by merely asserting the goal of unifying black voters in Black Mobile with Black Montgomery and Black Dothan. App.158. That approach "unnecessarily infuse[s] race into virtually every redistricting," *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality), in a way that extends "indefinitely into the future," *SFFA*, 143 S. Ct. at 2223 (Kavanaugh, J., concurring); *id.* at 2170-73 (majority) (rejecting the argument that an

[33] The *Milligan* Respondents falsely assert that "this is a new argument that ... cannot form the basis of a stay before we respond to the argument on the merits." *Milligan* Resp. 39. The Secretary prominently raised these constitutional arguments below, *Milligan*, No. 2:21-cv-1530, ECF 220 at 60-68, which Respondents ignored in reply, *see id.* ECF 225 at 9-10.

affirmative-action program "need not have an end point at all because [administrators] frequently review them to determine whether they remain necessary").

III. The remaining factors warrant a stay.

A stay of the District Court's injunction is necessary to prevent the irreparable harm of replacing lawfully enacted redistricting legislation with a court-drawn plan, and the balance of equities are strongly in the State's favor. A stay is warranted here as it has been in many other similar cases.[34]

Respondents also argue this application is "premature" and "unripe" because it is too soon to know whether Alabamians will be sorted into districts based on race. *Singleton* Resp.7; *see Milligan* Resp.36 & n.7; Caster Resp.29 & n.8. But the 2023 Plan is enjoined *right now*, which is irreparable harm. *See Abbott*, 138 S. Ct. at 2324 n.17. And the District Court has already made clear that any map that replaces the 2023 Plan will, by definition, be a racial gerrymander. Because "splitting the Black Belt into fewer districts" doesn't do enough for "Black voting strength in the Black Belt," the District Court declared "a need to split the Gulf Coast." App.166. And any replacement map that stretches District 2 across the State to grab even part of "Black Mobile," App.157-58, will necessarily subordinate compactness to "Black voting strength," App.166.[35] Whether the resulting plan is "bizarre on its face" or passes a

[34] *See e.g.*, *Abbott*, 138 S. Ct. at 2318-19 (stay); *Covington*, 138 S. Ct. at 2552 (stay); *Gill v. Whitford*, 138 S. Ct. 1916, 1926 (2017) (stay); *Perry v. Perez*, 565 U.S. 1090 (2011) (stay); *Miller*, 515 U.S. at 910 (stay); *Growe v. Emison*, 507 U.S. 25, 31 (1993) (stay); *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers) (stay); *Wise v. Lipscomb*, 434 U.S. 1329 (1977) (Powell, J., in chambers) (stay); *see also Wis. Legislature*, 142 S. Ct. 1245 (construing stay application as petition for certiorari, granting petition, and summarily reversing).

[35] Proposals that don't split the Gulf Coast still subordinate compactness to race to create "opportunity" districts. *Compare, e.g.*, *In re Redistricting 2023*, 2:23-mc-1181, ECF 5 at 15 (compactness of *Singleton* Plan), *with Milligan*, 2:21-cv-1530, ECF 220-12 at 9-10 (compactness of 2023 Plan).

judge's eyeball test, it will be a gerrymander in which traditional, neutral principles will be "subordinated to racial objectives." *Miller*, 515 U.S. at 912, 919; *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 187-91 (2017).

Respondents say the State has not demonstrated irreparable harm absent a stay because its irreparable harm argument presupposes success on the merits. *Caster* Resp.33-34. But this Court assesses "likelihood of irreparable harm, *assuming the correctness of the applicant's position*." *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1319 (1994) (Rehnquist, C.J., in chambers) (emphasis added); *accord Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302 (2010) (Scalia, J., in chambers). The State has shown a likelihood of success on the merits—that the 2023 Plan cannot be enjoined and substituted with a racial gerrymander. Irreparable harm necessarily follows, both to the State from the "the inability to enforce its duly enacted plans," *Abbott*, 138 S. Ct. at 2324 n.17, and to millions of Alabama voters who "may [be] balkanize[d] . . . into competing racial factions," *Shaw I*, 509 U.S. at 657.

CONCLUSION

The State of Alabama has been maligned as engaging in "open rebellion" because it remedied the discriminatory effect in the 2021 Plan without going further to split Mobile, or Dothan, or the places in between on race-based lines. No State could constitutionally draw such plans. The Court should stay the District Court's order enjoining the State from using the 2023 Plan to allow the State a meaningful opportunity to obtain appellate review, which can proceed on an expedited basis if the Court deems necessary.

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