No. 23A241

IN THE SUPREME COURT OF THE UNITED STATES

WES ALLEN, IN HIS OFFICIAL CAPACITY AS THE ALABAMA SECRETARY OF STATE,

Applicant,

v.

MARCUS CASTER, *et al.*,

Respondents.

RESPONDENTS' OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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

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

Marc E. Elias
Lalitha D. Madduri
Joseph N. Posimato
Jyoti Jasrasaria
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW,
Suite 400
Washington, DC 20001
(202) 968-4490

Counsel for Respondents

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicant is Wes Allen, in his official capacity as Alabama Secretary of State. Applicant was the defendant 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. Wes Allen, et al.*, No. 2:21-cv-1536 (N.D. Ala.). The district court issued a preliminary injunction on September 5, 2023, and it denied the defendants' motion for stay pending appeal on September 11, 2023.

Related cases include:

1. *Evan Milligan, et al. v. Wes Allen, et al.*, No. 2:21-cv-1530 (N.D. Ala.). The district court issued a preliminary injunction on September 5, 2023, and it denied the defendants' motion for stay pending appeal on September 11, 2023. Defendants filed an application for stay pending appeal in this Court on September 11, 2023 (No. 23A231).

2. *Bobby Singleton, et al. v. Wes Allen, et al.,* No. 2:21-cv-1291 (N.D. Ala.). During the remedial proceedings from which this application arises, *Singleton* asserted only an Equal Protection Clause claim, which the district court declined to consider.

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,

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

Dated: 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:

As far as Alabama is concerned, this Court didn't mean what it said in *Allen v. Milligan*. Just last year, Alabama repaired to this Court seeking release from the district court's preliminary injunction. Rather than point to clear evidence that it had in fact complied with this Court's Section 2 precedent, Alabama invited the Court to upend that precedent and absolve it of the need to comply with Section 2 in the first place. This Court was unmoved. It declined to remake its long-standing precedent and affirmed in no uncertain terms the district court's careful judgment of both fact and law. In so doing, the Court concluded that Alabama was likely in violation of Section 2.

But Alabama refused to take no for an answer. Rather than remedy the violation this Court affirmed, Alabama passed Senate Bill 5 (the "2023 Remedial Plan" or "2023 Plan"), a remedial plan in name only, which fails to create the additional opportunity district required to cure the dilution of Black voting power at the heart of this Court's liability determination. And so the district court enjoined the Plan, finding it a plainly insufficient remedy.

Now Alabama—this time, represented by the Secretary of State alone—returns to this Court for extraordinary relief in the form of a stay in a last-ditch attempt to evade the Voting Rights Act. Having lost once before this Court, Alabama has become even more brazen, insisting that passage of the 2023 Remedial Plan effectively nullifies the district court's original injunction and codifies the State's policy preferences over Voting Rights Act mandates. Alabama musters neither

precedent nor statute, policy nor reason to support its outright defiance of the Voting Rights Act and the courts charged with enforcing it. Instead, Alabama attempts once more to simply remake Section 2 to suit its preferences. This Court already declined Alabama's invitation on this score; it should do so again.

There is no dispute that Alabama failed to remedy its likely Section 2 violation, and the State has not identified a single error, let alone a clear error, in the district court's opinion. Alabama voters have waited long enough for the relief that this Court's and the district court's prior decisions entitle them to. This Court should deny Alabama's application for extraordinary relief.

COUNTERSTATEMENT OF THE CASE

I. Alabama's Likely Section 2 Liability

On November 4, 2021, the *Caster* Plaintiffs—Marcus Caster, LaKeisha Chestnut, Bobby Lee DuBose, Benjamin Jones, Rodney Allen Love, Manasseh Powell, Ronald Smith, and Wendell Thomas ("Plaintiffs")—filed a lawsuit alleging that Alabama's 2021 congressional plan (the "2021 Plan") violated Section 2 of the Voting Rights Act by diluting the voting power of Black Alabamians. App.13-14. Plaintiffs were joined in their Section 2 challenge by the *Milligan* Plaintiffs, who also asserted a Section 2 vote dilution claim against the 2021 Plan in conjunction with a constitutional claim. App.14. A third set of plaintiffs, the *Singleton* Plaintiffs, challenged the State's 2021 Plan only on constitutional grounds. App.13-14.

On January 24, 2022, after an extensive seven-day preliminary injunction hearing, the district court concluded that Alabama's 2021 Plan likely violated Section

2 of the Voting Rights Act. App.15-16. The court declined to reach the *Singleton* and *Milligan* Plaintiffs' constitutional claims. App.16.

By way of relief, the district court "held that under controlling precedent, 'the appropriate remedy is a congressional redistricting plan that includes 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.'" *Id.* Based on the unrebutted evidence of intensely racially polarized voting in Alabama, moreover, the court observed that as a "practical reality," App.135, "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." App.71. Because "redistricting and reapportioning legislative bodies is a legislative task," the district court gave the "Legislature the first opportunity to draw a new map" to remedy the State's likely Section 2 liability. App.16.[1]

Rather than reconvene to adopt a remedial map, the Alabama Legislature and Secretary of State appealed the district court's decision directly to this Court. App.17. On June 8, 2023, this Court affirmed the district court's preliminary injunction order in full. *See Allen v. Milligan*, 599 U.S. 1 (2023). First, this Court reaffirmed that "the three-part framework developed" in *Thornburg v. Gingles*, 478 U.S. 30 (1986), remains the proper test for evaluating claims under Section 2. *Allen*, 599 U.S. at 17-18. That test, the Court explained, "has governed [its] Voting Rights Act

[1] After the district court entered its preliminary injunction order, the *Singleton* Plaintiffs moved the court for an expedited ruling on their constitutional claims. App.16-17. The court denied that motion. *Id.*

jurisprudence since [*Gingles*] was decided 37 years ago," and "Congress has never disturbed our understanding of § 2 as *Gingles* construed it." *Id.* at 19. Second, this Court found "no reason to disturb the District Court's careful factual findings, which are subject to clear error review and have gone unchallenged by Alabama in any event," and no reason "to upset the District Court's legal conclusions." *Id.* at 23. The district court "faithfully applied [this Court's] precedents and correctly determined that, under existing law, [the 2021 Plan] violated § 2." *Id.* And third, the Court rejected Alabama's "attempt to remake [its] § 2 jurisprudence anew." *Id.*

This Court declined to graft a "race-neutral benchmark" requirement onto Section 2, as it would "run[] headlong into" its precedent, *id.* at 24-25; found no merit in Alabama's assertion that *Gingles* requires "proportionality," explaining that "properly applied, the *Gingles* framework itself imposes meaningful constraints" on that score, *id.* at 26; and flatly rejected Alabama's claim that Section 2 does not apply to single-member districts and was unconstitutional as the district court applied it, *id.* at 38-42. In sum, this Court was "content to reject Alabama's invitation to change existing law on the ground that the State misunderstands § 2 and [its] decisions implementing it." *Id.* at 30.

II. Alabama's 2023 Remedial Plan

Immediately after this Court affirmed its ruling, the district court convened a status conference to discuss the remedial process. App.18. During that conference, Alabama requested that the district court delay remedial proceedings until July 21, 2023, to provide the Legislature an opportunity to remedy the Court's liability finding with a new congressional redistricting plan. *Id.* Governor Ivey convened a special

legislative session on June 27, for the purpose of enacting a new plan. *Id.* On July 13, the State's reapportionment committee met and re-adopted the same redistricting guidelines that had governed the passage of the State's 2021 Plan. App.18-19. The Legislature's special session began four days later on July 17. *Id.*

On July 21, Alabama enacted its 2023 Remedial Plan. App.4. "The 2023 Plan, like the 2021 Plan enjoined by" the district court "has only one majority-Black district," Congressional District 7 ("CD-7"). App.21. The district with the next highest black voting-age population ("BVAP") in the 2023 Plan is CD-2, with 39.93% BVAP. *Id.* As Alabama conceded during the remedial proceeding, CD-2 in the 2023 Plan does not provide Black voters an opportunity to elect their preferred candidate of choice, nor does any other district in the 2023 Plan other than CD-7. App.89-92.

Unlike the 2021 Plan, the 2023 Plan was accompanied by "legislative findings," App.19, purporting to describe the intentions and criteria behind the 2023 Plan and setting forth certain principles considered "non-negotiable for the Legislature." App.199-207. Discovery on the passage of the 2023 Plan, however, revealed that Alabama's Solicitor General, Edmund LaCour, drafted these "legislative findings" and that legislators were neither consulted nor given time to provide input on those findings prior to voting on the bill that became the 2023 Plan. App.183-84. As the district court noted, moreover, the 2023 Plan's legislative findings ignored communities of interest in the northern half of the state, made no reference to avoiding dilution of minority voting strength, and removed race from the definition of communities of interest included in the guidelines readopted by the

reapportionment committee, all the more notable "[i]n a case involving extensive expert testimony about a racial minority's shared experience of a long and sordid history of race discrimination." App.163-64.

III. Proceedings Below

A. The Remedial Proceedings

On July 26, 2023, within days of the 2023 Plan's enactment, the parties jointly proposed a scheduling order for remedial proceedings, which the district court adopted. App.21.

On July 28, the *Caster* Plaintiffs objected to the 2023 Plan, asserting that the plan does not remedy the Section 2 violation because it fails to create an additional district in which Black voters have an opportunity to elect a candidate of their choice. App.22. In support of their objections, Plaintiffs submitted a performance analysis by Dr. Maxwell Palmer, whose testimony the district court credited in its original preliminary injunction order, App.40, confirming that Black-preferred candidates would have been defeated in nearly every election he analyzed in the 2023 Plan's purported remedial district. App.137-38. Plaintiffs requested that the district court enjoin the 2023 Plan and order a court-driven remedial process to ensure relief in time for the 2024 election. App.22.[2]

[2] The *Milligan* Plaintiffs raised similar objections, in support of which they submitted an expert report by Dr. Baodong Liu, whose testimony the district court likewise relied upon in finding a likely Section 2 violation, App.35-36. Like Dr. Palmer's analysis, Dr. Liu's analysis demonstrated that the 2023 Plan's "remedial" district would not perform for Black voters' candidate of choice, particularly in biracial elections. App.137-38. The *Singleton* Plaintiffs once again challenged the 2023 Plan solely on constitutional grounds.

The scope of the remedial proceedings was heavily debated by the parties in briefing and argument before the district court. App.18-26, 82-88. On August 1, 2023, the district court clarified that the scope of the remedial proceedings would be limited to whether the 2023 Plan complies with Section 2 of the Voting Rights Act and the January 2022 preliminary injunction order that was affirmed by this Court. App.23. The district court also clarified that the remedial proceedings would not relitigate the findings made in connection with the previous liability determination. App.25.

The remedial hearing in *Caster* and *Milligan* took place on August 14, 2023, App.26, and was based on a robust record consisting of the entire January 2022 preliminary injunction record along with new expert reports, deposition transcripts, and other evidence submitted during the remedial phase. App.26, 96. The parties also agreed to a set of stipulated facts about the 2023 Plan's passage and performance and about communities of interest in Alabama. App.88-96.

At the hearing, Alabama conceded that the 2023 Plan does not include two districts that give Black voters the opportunity to elect candidates of their choice, as the court's preliminary injunction order had instructed. App.8-9, 105. It instead represented that the district court's January 2022 statement on the appropriate remedy was irrelevant to the remedial proceedings. App.107-08. It also conceded that Plaintiffs met their burden on the second and third *Gingles* preconditions and the Senate Factors, such that the only remaining question—even under Alabama's theory that liability under the 2023 Plan should be litigated anew—was whether Plaintiffs have satisfied the first *Gingles* precondition. App.106. Lastly, Alabama conceded that

its "time has run out," and that any subsequent remedial plan for the 2024 election would need to be court-drawn. App.109.

B. The District Court's Remedial Order

On September 5, 2023, the district court issued an extensive, 198-page order preliminarily enjoining Alabama from conducting any elections under the 2023 Plan and directing the Special Master and cartographer to commence work on a remedial map forthwith. App.6-7.

The court determined that the 2023 Plan does not remedy the likely Section 2 violation that it found and that this Court affirmed. App.134. To reach that conclusion, the court explained that "the dispositive question is whether the 2023 Plan contains an additional Black-opportunity district." App.136. It found that the plan does not, for two reasons: First, Alabama conceded as much. *Id.* Second, the parties stipulated, based on performance analyses conducted by Plaintiffs' experts and the Legislature itself, that "white-preferred candidates would 'almost always defeat[] Black-preferred candidates'" in the 2023 Plan's purported remedial district. *Id.* The court independently examined the above-mentioned performance analyses and found that they support the conclusion that "the 2023 Plan perpetuates, rather than completely remedies, the likely Section Two violation." App.137-39.

The district court also concluded, in the alternative, that Plaintiffs carried their burden to establish anew that the 2023 Plan likely violates Section 2. App.139. Specifically, because Alabama has never contested whether Black voters as a group are "sufficiently large . . . to constitute a majority" in a second majority-Black congressional district, *id.*, the court spent the bulk of its analysis on whether

Plaintiffs had established "that Black voters as a group are sufficiently geographically *compact* to constitute a majority in a second reasonably configured congressional district," App.140-78 (emphasis added). It held that Plaintiffs had met that burden. *Id.* In reaching that conclusion, the court reaffirmed its extensively reasoned credibility determinations from the preliminary injunction proceedings at the liability stage. App.140-46. The court again found Plaintiffs' experts, Mr. Cooper, Dr. Duchin, and Dr. Bagley, credible, App.140-41, whereas it excluded Alabama's expert Mr. Bryan as uncredible, unreliable, and unhelpful, App.141-46.

The court also rejected Alabama's contention that Plaintiffs were required to produce an illustrative map that "meets or beats" the 2023 Plan on every traditional redistricting principle in order to establish liability. App.147. In doing so, the court underscored that accepting Alabama's premise "would allow the State to immunize from challenge a racially discriminatory redistricting plan simply by claiming that it best satisfied a particular principle the State defined as non-negotiable." *Id.* The court further clarified that improvement on metrics other than vote dilution is inapposite to whether a map has remedied its predecessor's Section 2 violation. App.149-50.

Lastly, the court rejected Alabama's assertion that Plaintiffs' illustrative plans lack geographic compactness, even when compared to the 2023 Plan on the State's preferred criteria. App.150-78. Based on the court's detailed analysis of traditional redistricting criteria in the 2023 Plan and Plaintiffs' illustrative plans, the court confirmed its previous determination that Plaintiffs' illustrative plans are reasonably configured and consistent with traditional redistricting criteria. App.152-78.

Having found *Gingles* 1 satisfied, the court concluded that Plaintiffs had also satisfied the remaining *Gingles* preconditions and Senate Factors. App.178-84. It also rejected Alabama's argument, relying on *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* ("*SFFA*"), 143 S. Ct. 2141 (2023), that including an additional opportunity district to satisfy Section 2 is "unconstitutional affirmative action in redistricting." App.185-88.

As to the remaining factors relevant to the preliminary injunction analysis, the court found that Plaintiffs will suffer irreparable harm if yet another election is held under a likely unlawful plan, and that an injunction is in the public interest. App.188-91. As a result, the court enjoined the 2023 Plan and established a remedial process in accordance with Section 2 and controlling precedent. App.191-94.[3]

IV. Alabama's Latest Appeal

Although Defendants below were the Secretary of State and Co-Chairs of the Permanent Legislative Committee on Reapportionment Representative Pringle and Senator Livingston, the latter two appear to have accepted the district court's preliminary injunction against the 2023 Plan. *See* App.648 ("As a practical matter, the Legislators' silence undermines the Secretary's position. It is the Legislature's

[3] The *Singleton* Plaintiffs' objections to the 2023 Plan were heard during a separate hearing on a separate day, App.26, and the district court declined to issue a decision on the *Singleton* Plaintiffs' constitutional challenge to the 2023 Plan, App.7-8. Since there is no judgment on the *Singleton* Plaintiffs' claim, Alabama has not and could not appeal that proceeding to this Court. Accordingly, the *Singleton* Plaintiffs should be treated as amici rather than parties to these proceedings, precisely as this Court handled an identical procedural posture during the liability phase. *See* Brief for Singleton Plaintiffs as *Amici Curiae*, *Allen v. Milligan*, 599 U.S. 1 (2023) (No. 21-1086).

task to draw districts; the Secretary simply administers elections."). The Secretary alone defends Alabama's intransigence on appeal.

After noticing appeals in this case (to the Eleventh Circuit) and in *Milligan* (to this Court), the Secretary filed a motion to stay in the district court. App.629. The district court denied that motion, reaffirming its prior conclusions in a 26-page order. App.623-51; *see also* App.642 ("Having prevailed at every turn so far, the Plaintiffs are entitled to relief. Having lost at every turn so far, the Secretary cannot support a demand that Alabamians again cast their votes under an unlawful map while he tries for the fourth time to prevail.").

The Secretary next sought a stay from the Eleventh Circuit in this case, and from this Court in *Milligan*, *Merrill v. Milligan*, No. 23A231, and proposed that the Eleventh Circuit hold the *Caster* appeal, including the stay motion, in abeyance to allow this Court to review *Milligan* and *Caster* simultaneously as it did in *Allen*. *See* Application 6 n.12. The Secretary subsequently filed this emergency application for stay pending petition for writ of certiorari before judgment.

ARGUMENT

In seeking the "extraordinary relief" of a stay—particularly on this extraordinary procedural posture—Alabama bears a "heavy burden" that it has not and cannot meet here. *Winston-Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, J., in chambers); *see also Packwood v. S. Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers) (explaining applicants bear the "especially heavy burden" of proving extraordinary relief is

warranted). That's so because "[a] stay is an intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks omitted). Indeed, 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).[4]

To obtain a stay, Alabama must establish (1) "a strong showing that [it] is likely to succeed on the merits;" (2) a likelihood that irreparable harm will result "absent a stay;" (3) that issuance of the stay will not "substantially injure" Plaintiffs; and (4) the "public interest lies" in granting a stay. *Nken*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Alabama has not carried its burden. First, Alabama's application faces a strong headwind in the standard of review. As this Court has explained, Section 2 findings are reviewed only for clear error, and a lower court's injunction is reviewed only for abuse of discretion. Second, Alabama cannot show that the district court's remedial order constitutes reversible clear error. The district court's injunction of the 2023 Plan was guided by both the text of the Voting Rights Act and the decades of precedent applying it, including this Court's affirmation of Alabama's likely Section

[4] 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. Golden 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).

2 violation *in this very case*. Alabama points to no error—and certainly no clear error—in the district court's orders. Third, because Alabama's 2023 Remedial Plan perpetuates rather than remedies the State's likely Section 2 liability, Alabama will not be irreparably harmed by denying its stay application. Granting a stay, by contrast, will make it all but certain that Plaintiffs will be yet again forced to vote under an unlawful, dilutive plan in the 2024 election and thereby suffer irreparable harm. Plaintiffs therefore respectfully request that the Court deny Alabama's application.[5]

I. Alabama fails to demonstrate a strong showing that it is likely to succeed in this appeal.

Alabama has not made any showing—let alone a strong one—that it is likely to succeed in its appeal. For that reason alone, this Court should deny the State's application.

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

The State's bid for a reversal of the decision 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. "[A]pplication of the clearly-

[5] For procedural purposes, 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. Once both appeals are before it, this Court should summarily affirm the district court's decision below.

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.*

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 the 2023 Plan does not remedy the likely violation of Section 2, or likely violates Section 2 anew, 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 v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). This standard does not permit this Court to reverse "simply because it is convinced that 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 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 a plaintiff's claims and the balancing of equities and the public interest . . . are the district court's to make." *Jones v. Governor of Fla.*, 950 F.3d 795, 806 (11th Cir. 2020) (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, especially as this Court has already considered and rejected many of the very arguments Alabama repeats here. *See* App.630 ("[I]t is exceptionally unusual for a litigant who has presented his arguments to the Supreme Court once already — and lost — to assert that he is now 'overwhelmingly likely' to prevail on those same arguments in that Court in this case.").

B. The district court's finding that Alabama's 2023 Remedial Plan fails to remedy its likely Section 2 liability is not clearly erroneous.

The district court correctly determined that Alabama's 2023 Remedial Plan "perpetuates, rather than completely remedies" its finding, affirmed by this Court, that Alabama likely violated Section 2. App.139.

1. There is no dispute that the 2023 Remedial Plan fails to address—let alone completely remedy—the district court's January 2022 liability determination, as it fails to provide an additional district in which Black voters would have an opportunity to elect their candidates of choice.

"The essence of a § 2 claim," this Court explained just a few months ago, "is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters." *Allen v. Milligan*, 599 U.S. 1, 17 (2023) (citing *Gingles*, 478 U.S. at 47). A state is liable under this standard when it adopts a plan that "is not equally open," *id.*, in that the plan dilutes the voting power of a minority group as compared to a nonminority voter, *id.* at 1507 (explaining "[a] district is not equally open" when "a minority vote [is] unequal to a vote by a nonminority voter").

Because the "essence" of Section 2 liability is unequal electoral opportunity, the remedy for such liability is a new plan that cures that inequality through the creation of additional districts in which the injured minority group has an opportunity to elect its preferred candidates. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428-29 (2006) ("*LULAC*"). A remedial plan suffices where it "*completely* remedies the prior dilution of minority voting strength and *fully* provides equal opportunity for minority citizens to participate and to elect candidates of their choice." *United States v. Dall. Cnty. Comm'n*, 850 F.2d 1433, 1442 (11th Cir. 1988) (citing S. Rep. No. 417, 97th Cong. 2d Sess. 26, *reprinted in* 1982 U.S. Code Cong. & Adm. News 177, 208); *White v. Alabama*, 74 F.3d 1058, 1069 n.36 (11th Cir. 1996) (same).

Whether a remedial district provides a minority group an opportunity to elect is a fact-based analysis that evaluates the likelihood that the injured minority group's candidate of choice will be elected based on factors such as the district's demographics,

the degree of racially polarized voting in the state, and historical election performance. *See, e.g.*, *LULAC*, 548 U.S. at 428-29 (considering past election performance and minority voting-age population to determine whether district provides opportunity). Evaluation of a remedy must be considered against the backdrop of the district court's broad and flexible powers "to do equity and to mould each decree to the necessities of the particular case." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971); *see also Brown v. Plata*, 563 U.S. 493, 538 (2011).

The district court faithfully applied this precedent. As the court explained, the only question that remained open during the remedial proceedings was "whether the 2023 Plan, 'in combination with the racial facts and history' of Alabama, completely corrects, or 'fails to correct the original violation' of Section Two." App.115 (quoting *Dillard v. Crenshaw*, 831 F.2d 246, 248 (11th Cir. 1987)). Under that framework, the district court held that the "record establishe[s] quite clearly that the 2023 Plan does not completely remedy the likely Section Two violation that we found and the Supreme Court affirmed" because it does not include a second district in which Black voters have an opportunity to elect a candidate of their choice. App.135-39. The court's conclusion rested on analyses performed by Dr. Palmer and Dr. Liu—both of whom the district court found credible during the liability and remedial phases—which showed that the Black-preferred candidate in the 2023 Remedial Plan's proposed remedial district would lose almost every election analyzed. *Id.* Indeed, Alabama "itself concede[d] that the 2023 Plan does not include an additional opportunity district." *Id.*

The district court's conclusion that the 2023 Remedial Plan fails to remedy the likely Section 2 violation found by the district court and affirmed by this Court is thus beyond dispute.

2. Alabama argues that the district court erred by evaluating whether the 2023 Plan remedied the State's Section 2 liability by providing Black Alabamians an additional opportunity district. App.22-25. In the State's view, the passage of the 2023 Plan erased the district court's liability finding, affirmed by this Court, and reset the score, requiring Plaintiffs to prove their Section 2 case anew. Alabama's argument, however, is foreclosed by this Court's decision in *North Carolina v. Covington*, 138 S. Ct. 2548 (2018).

Like Alabama here, the defendants in *Covington* argued that "[w]here . . . a lawsuit challenges the validity of a statute," a state's passage of "remedial plans" moots the case and the plaintiffs' original claims "cease[] to exist." 138 S. Ct. at 2552. This Court flatly rejected that argument, holding that the plaintiffs' claims "did not become moot simply because the General Assembly drew new district lines around them." *Id.* at 2552-53. Because the plaintiffs argued that the legislature's proposed remedy failed to cure the original violation, their "claims remained the subject of a live dispute, and the District Court properly retained jurisdiction." *Id.* at 2553.

Plaintiffs' Section 2 claim here is of a piece. Plaintiffs' vote dilution claim turns not on the "legislature's line-drawing" but Alabama's failure to provide its Black citizens equal electoral opportunity. *Id.* at 2552-53. The passage of the 2023 Plan by itself neither absolves the State of its Section 2 liability nor informs whether the

violation is cured. And Plaintiffs' challenge to the sufficiency of that remedy means the matter remains live. *Id.* Indeed, if Alabama's preferred standard were adopted, states could avoid complying with the Voting Rights Act indefinitely by repeatedly passing purported remedial plans that perpetuate the very dilution that made the state liable in the first place. Neither statute, nor precedent, nor reason demands such an absurd result.

The district court faithfully applied *Covington* in accord with decisions from across the federal courts. *See* App.117-29; *see also Dillard*, 831 F.2d at 248 (explaining the question during the remedial phase was whether the proposed remedy "fails to correct the original violation of amended Section 2 of the Voting Rights Act of 1965"); *McGhee v. Granville Cnty., N.C.*, 860 F.2d 110, 118 (4th Cir. 1988) ("If a vote dilution violation is established, the appropriate remedy is to restructure the districting system to eradicate, to the maximum extent possible by that means, the dilution proximately caused by that system."); *Jeffers v. Clinton*, 756 F. Supp. 1195, 1199 (E.D. Ark. 1990), *aff'd*, 498 U.S. 1019 (1991) (evaluating a proposed remedy for compliance with the court's prior liability findings and finding that because the defendants' remedial districts "would have been held unlawful at the liability stage" precisely because they fell below the BVAP required to afford Black voters an opportunity to elect their candidates of choice, the remedy was insufficient).

These decisions speak with one voice: In the Section 2 context, the passage of a remedial plan does not erase the very liability that triggered it, and the sufficiency of a proposed remedy is measured by the degree to which it resolves the court's

liability finding. *Covington*, 138 S. Ct. at 2552-53. Alabama does not even attempt to grapple with this precedent. And it certainly offers no solution to the absurd results that would follow from its preferred standard. The Court should decline Alabama's invitation to remake its Section 2 precedent on this score.

3. Alabama argues next that it had no obligation to remedy its violation of the Voting Rights Act or to comply with the district court's orders because doing so would require the State to alter its preferred district lines. Application 26-27.[6] Alabama is confused. Neither courts nor states may adhere to state policy where, as here, doing so would conflict with federal law. *See Perry v. Perez*, 565 U.S. 388, 393 (2012) (explaining courts may use state policy as a guide "to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act" (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)); *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (same); *LULAC*, 548 U.S. at 441 (rejecting state policy of incumbency protection because it "cannot justify the effect on Latino voters").

Alabama offers no argument on whether or how its policy preferences are consistent with the Voting Rights Act. Instead, it contends that this Court's statement in *Allen* that Section 2 "never require[s] adoption of districts that violate

[6] Throughout this section, Alabama misleadingly contends that the district court ordered the State to create a second "majority-black district." *See* App.26. In fact, the district court held that Section 2 requires the creation of "*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. Based on the unrebutted evidence of intense racially polarized voting in the state, the district court predicted that the remedial district may need to be a majority-minority district "or something quite close to it." *Id.*

traditional redistricting principles," 599 U.S. at 29-30, authorizes states to disregard the Voting Rights Act whenever compliance with the Act may pose an inconvenience to their policy agenda. But of course this Court held no such thing. If it had, the Court could not have flatly rejected, just a few months ago, Alabama's argument that Plaintiffs' Section 2 claim failed because their illustrative plans did not adhere to the State's much-touted "core retention" principle or its preferred communities of interest. *Id.* at 21. And it could not have done so without overturning decades of precedent. *See Perry*, 565 U.S. at 393; *Upham*, 456 U.S. at 43; *LULAC*, 548 U.S. at 441.

Allen referred instead to the ordinary proposition that the reasonable compactness component of the first *Gingles* precondition ensures that a Section 2 remedy will be reasonably configured, in that it complies with objective redistricting criteria. *Allen*, 599 U.S. at 18, 29-30 ("A district will be reasonably configured, our cases explain, if it comports with traditional districting criteria, such as being contiguous and reasonably compact."); *see also Shaw v. Reno*, 509 U.S. 630, 647 (1993) (identifying "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" as "objective factors").

Permitting a state to dictate the contours of Section 2 through its *subjective* redistricting criteria, as Alabama invites, would mean States could perpetually avoid remedying their Section 2 liability by identifying new "non-negotiable" directives that would preclude equal opportunity for minority voters. Alabama's approach in this case only illustrates the point. Alabama appended "legislative findings" to the 2023 Plan, drafted by Alabama's Solicitor General, as a means of reinventing the State's

districting criteria—and then faulted Plaintiffs' illustrative plans for not abiding by them. App.609 (Alabama explaining its strategy that altering the balance of districting criteria in the 2023 Plan allegedly permits the State to ignore the Court's order requiring the creation of a second opportunity district). The district court found that Alabama's legislative findings failed to reference, let alone incorporate, the need to remedy minority vote dilution, App.163, and that the State's "non-negotiable" interest in a specific community of interest could not trump its obligation to comply with the Voting Rights Act, App.148, 183. Consistent with this Court's precedent, *see Perry*, 565 U.S. at 393; *Upham*, 456 U.S. at 43; *LULAC*, 548 U.S. at 441, the district court declined to defer to Alabama's policy preference at the expense of the Voting Rights Act.

4. Alabama also appears to argue that because the 2023 Plan no longer "cracks" the Black Belt in the same manner as its 2021 Plan, it has remedied its likely Section 2 liability. Alabama, however, misapprehends the meaning of "cracking" in the Section 2 context. "Cracking" does not simply mean "dividing" a given population irrespective of the community at issue or its effect on voting power. App.605 (Mr. LaCour: "It's now the plaintiffs who are demanding that you order the cracking of the Black Belt because every one of their illustrative plans puts the Black Belt into at least three if not four districts."). Rather, "cracking" is a legal term of art, defined as "the dispersal of [a protected class of voters] into districts in which they constitute an ineffective minority of voters." *Abbott v. Perez*, 138 S. Ct. 2305, 2338 n.2 (2018) (Sotomayor, J., dissenting) (quoting *Gingles*, 478 U.S. at 46 n.11); *see also Voinovich*

v. Quilter, 507 U.S. 146, 153-54 (1993); *Bartlett v. Strickland*, 556 U.S. 1, 19 (2009) ("[I]t is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district.").

Contrary to Defendants' suggestion, the "cracking" of Black voters in the Black Belt is not resolved by uniting them in a district where they remain an "ineffective minority of voters." And as explained above, CD 2 under the 2023 Plan does not afford Black voters in the Black Belt an effective opportunity to elect their preferred candidates. Alabama's likely violation remains alive and well.[7]

5. Finally, Alabama reprises once again its misleading charge that Plaintiffs and the district court interpreted Section 2 to require proportionality. *See, e.g.*, Application 32. But the district court was emphatic that "[t]he State is swinging at a straw man: the Plaintiffs' analysis did not and does not rest on proportionality grounds, and neither does ours," and "[a]ny suggestion that the Plaintiffs urge us to reject the 2023 Plan because it fails to provide proportional representation blinks reality." App.128-29 (explaining "we do not enjoin the 2023 Plan on the ground that it fails to provide proportional representation"). Alabama shuts its eyes nonetheless. This Court need not join Alabama's game of make-believe.

* * *

[7] Alabama cannot and has not argued that it is impossible to keep the Black Belt in two districts while remedying the State's likely Section 2 violation. In special session, the Legislature had before it the VRA Plaintiffs' Remedial Plan, which accomplished just that. *See* App.93.

In the end, Alabama's argument that the district court erred in finding that the State failed to remedy the likely Section 2 violation musters nothing more than arguments foreclosed by precedent and outright mischaracterizations of the district court's remedial proceedings. That is not the stuff worthy of extraordinary relief. The district court correctly determined that Alabama must remedy its likely Section 2 liability, affirmed by this Court, with an additional district in which Black Alabamians have an opportunity to elect their preferred candidates. And as Alabama concedes, its 2023 Remedial Plan fails to do so. This Court therefore is not likely to reverse on appeal.

C. The district court's finding in the alternative that the 2023 Remedial Plan independently violates Section 2 is not clearly erroneous.

Even if Alabama were right that passage of the 2023 Remedial Plan resets the clock, the district court's conclusion that Plaintiffs have more than satisfied their burden to re-prove the State's Section 2 liability is not subject to likely reversal on appeal. First, some table-setting: Alabama did not contest during the remedial proceedings, and does not contest here, Plaintiffs' satisfaction of the numerosity prong of the first *Gingles* precondition, the second and third *Gingles* preconditions, or the totality of the circumstances analysis with respect to the State's 2023 Plan. App.139, 178-79. The only element of the Section 2 standard in dispute is the reasonable compactness prong of the first *Gingles* precondition. Alabama contends that the district court erred by relying on the 11 illustrative plans Plaintiffs proffered during the liability phase to find that the State's 2023 Plan also likely violates Section 2. Once again, Alabama is mistaken.

As an initial matter, Alabama's brief insinuates that the district court failed to apply the presumption of regularity and good faith to the 2023 Plan. *See* Application 19, 23. But the district court anticipated Alabama's scheme. "Lest a straw man arise on appeal," the court explained, "we say clearly that in our analysis, we did not deprive the Legislature of the presumption of good faith." App.184; *see also* App.124 ("[W]e have applied the presumption of good faith."). There is no doubt the district court gave the 2023 Plan "a fair shot." *Id.* at 124.

On the merits, this Court explained in *Allen* that to satisfy the first *Gingles* precondition, Plaintiffs must show that the minority group is "sufficiently . . . [geographically] compact to constitute a majority in a reasonably configured district." 599 U.S. at 18. "A district will be reasonably configured," the Court found, "if it comports with traditional districting criteria, such as being contiguous and reasonably compact." *Id.*

The district court determined, and this Court agreed, that Plaintiffs satisfied this standard 20 months ago. Plaintiffs' 11 illustrative plans demonstrated the possibility of drawing congressional plans with two majority-minority districts that comported with traditional redistricting principles. *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1010-16 (2022). As this Court concluded, those plans "'strongly suggest[ed] that Black voters in Alabama' could constitute a majority in a second, reasonably configured, district." *Allen*, 599 U.S. at 20 (alteration in original).

In so doing, this Court emphasized that the reasonable compactness inquiry does not require Plaintiffs' illustrative plans to "meet or beat" the redistricting

criteria the State happened to prioritize in its own enacted plan. *Allen*, 599 U.S. at 21. Indeed, "[a] § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries" is not required "to defeat rival compact districts designed by [the State] in endless 'beauty contests.'" *Bush v. Vera*, 517 U.S. 952, 977 (1996); *cf. Bethune-Hill*, 580 U.S. at 190 (explaining that the redistricting principles "a legislature could consider" are "numerous and malleable" and "surprisingly ethereal").

Accordingly, this Court rejected Alabama's arguments during the liability phase that Plaintiffs failed to satisfy the first *Gingles* precondition because their illustrative plans failed to keep together the "Gulf Coast region" or scored lower than the State's 2021 Plan on the core retention criterion. *Allen*, 599 U.S. at 20-23, 26. This Court explained that these arguments were not "persuasive" and noted that the district court "correctly" declined to be baited into the "beauty contest" Alabama's arguments were designed to invite. *Id.* at 20-23.

Against this backdrop, the district court correctly concluded once again that Plaintiffs' 11 illustrative plans satisfy the first *Gingles* precondition and that nothing in the passage of the 2023 Plan altered that conclusion. And in any event, the court further concluded that even if it were required to compare the illustrative plans to the 2023 Plan, Alabama was *incorrect* as a matter of fact that the 2023 Plan performs better on select criteria than Plaintiffs' illustrative plans. *See, e.g.*, App.177 ("[E]ven if we were to conduct the 'meet or beat' beauty contest that the State asks us to, the

undisputed evidence shows that the Plaintiffs have submitted at least one illustrative map that beats the 2023 Plan with respect to county splits.").

Alabama remains undeterred. Writing as if *Allen* was never decided, Alabama once again argues that the district court erred by finding that Plaintiffs satisfied *Gingles* 1 where the illustrative maps fail to outdo the enacted map on various criteria, including (once again) protection of the Gulf Coast region and (this time) county splits. *See, e.g.*, Application 26-28. But nothing has changed since this Court considered and rejected Alabama's arguments on this score three months ago. *Allen*, 599 U.S. at 20-21. Alabama therefore has once again failed to identify any error, let alone clear error, in the district court's remedial decision.

D. The Equal Protection Clause poses no bar to remedying Alabama's likely Section 2 violation.

Alabama's assertion that remedying its likely Section 2 violation will necessarily violate the Equal Protection Clause fails at every level.

1. As an initial matter, Alabama completely mischaracterizes the district court's opinion. Nowhere does the district court "command[] that race come first and all other criteria come second" or "redefine[] 'compliance with Section Two' to mean attaining a second majority-black district" at all costs. *Contra* Application 35. Rather, at the liability stage, the district court faithfully applied this Court's precedent to hold that "the appropriate remedy is a congressional redistricting plan that includes 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. And it carefully considered "ample evidence of racially polarized

voting" to observe 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." *Id.* Moreover, the district court found that the Section 2 violation *could* be remedied without race predominating over other considerations, as reflected in Plaintiffs' illustrative maps. *Merrill*, 582 F. Supp. 3d at 1029-30. This Court affirmed the district court's findings of fact and conclusions of law in full. *Allen*, 599 U.S. at 23.

The district court's opinion at the remedial stage is consistent with its earlier opinion that this Court affirmed. The district court held that the 2023 Plan fails to remedy the likely Section 2 violation not by "counting the number of majority-minority districts," *contra* Application 3-4, but because it plainly "does not include an additional opportunity district," App.5-6—which Alabama does not dispute.

2. Even if this Court were to revisit the constitutional issues Alabama re-raises here, it would find that Alabama offers no reason why this run-of-the-mill Section 2 case provokes constitutional concerns, particularly where any such concerns were put to bed after Alabama's last appeal to this Court. Alabama's basic theory is that the district court cannot, consistent with the Fourteenth Amendment, remedy Alabama's Section 2 violation because doing so would necessarily require racial gerrymandering. But just three months ago, in this very case, this Court rejected the assumption that race-based redistricting necessarily violates the Equal Protection Clause. *See Allen*, 599 U.S. at 41.

Alabama's Equal Protection Clause argument has not improved with age. Alabama's contention that "the District Court would require a race-based

replacement redistricting plan" fails to challenge any specific district as a constitutional violation. Application 36. This Court has made clear, however, that "the basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district." *Bethune-Hill*, 580 U.S. at 191; *see also Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 262-63 (2015) ("We have consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of *one or more specific electoral districts*." (emphasis added) (citations omitted)). But there are no "specific electoral districts" for Alabama to attack, as the special master's remedial process has only just begun.[8] As a result, Alabama appears to contend that *any* map that remedies the Section 2 violation would be a racial gerrymander. *See, e.g.*, Application 36 ("[T]he District Court would require a race-based replacement redistricting plan."). This Court's precedent, however, forecloses Alabama's argument outright. *Bethune-Hill*, 580 U.S. at 191; *see also Ala. Legis. Black Caucus*, 575 U.S. at 262-63.

So does the record in this case: Both the district court and this Court have already found that race did *not* predominate in Plaintiffs' illustrative plans, *Merrill*, 582 F. Supp. 3d at 1005-06; *Allen*, 599 U.S. at 29-33 (plurality opinion), demonstrating that race need not predominate in a remedial plan either. To the extent Alabama means to argue that the passage of the 2023 Plan somehow

[8] The district court's instructions to the Special Master specifically require that each of the proposed remedial plans "[c]omply with the U.S. Constitution" and "[r]espect traditional redistricting principles to the extent reasonably practicable," App.224-25, thus foreclosing Alabama's claim that any court-drawn plan will be a racial gerrymander.

establishes that, contrary to the courts' prior decisions, race *did* predominate in the drawing of Plaintiffs' illustrative plans, that argument is deeply confused. Alabama fails to explain how the 2023 Plan's passage could inform whether race predominated in the drawing of Plaintiffs' illustrative plans 18 months earlier. For this reason, Alabama's invocation of the constitutional avoidance doctrine widely misses the mark. This Court has already explained there is no constitutional issue to avoid.

Even if Alabama could establish racial predominance in remedying the Section 2 violation, the use of race in this context would be "narrowly tailored to serve a compelling state interest." *Ala. Legis. Black Caucus*, 575 U.S. at 260-61 (quotation omitted); *see also Abbott*, 138 S. Ct. at 2309; *Bethune-Hill*, 137 S. Ct. at 800-01 (citing *Miller v. Johnson*, 515 U.S. 900, 920 (1995)) (upholding district drawn for racially predominant purpose because it was narrowly tailored to comply with the Voting Rights Act). This Court has "long assumed that complying with the VRA is a compelling interest." *Cooper v. Harris*, 137 S. Ct. 1455, 1469 (2017); *Shaw v. Hunt*, 517 U.S. 899, 915 (1996); *Vera*, 517 U.S. at 977. Indeed, Alabama itself has recognized that compliance with Section 2 is a "compelling State interest[]" to be given "priority." *Merrill*, 582 F. Supp. 3d at 1037.

And 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; *see also Ala. Legis. Black Caucus*, 575 U.S. at 278 ("[A] court's analysis of the narrow tailoring requirement insists only that the legislature have a 'strong basis in evidence' in support of the (race-based) choice that

it has made."). Sufficient "good reason[s]" exist where "all the '*Gingles* preconditions' are met." *Cooper*, 137 S. Ct. at 1470. Here, there is more than a "strong basis in evidence" for a remedial map based on the district court's extensive findings—not only as to the *Gingles* preconditions, but also the remainder of Section 2's totality-of-the-circumstances—and this Court's affirmance of those findings and conclusions in full. *See Abbott*, 138 S. Ct. at 2332 (holding that a state had "good reasons" to believe that Section 2 required a particular district that "satisfied the Gingles factors"). Alabama's head-in-the-sand argument is just plain wrong. As the district court has now explained four times, this case was never a "close one." *See, e.g.*, App.52.

3. Finally, this Court's decision in *SFFA*, 143 S. Ct. 2141 (2023), an affirmative action case decided a few weeks after *Allen*, does nothing to undermine its clear decision in *this very case*. Notwithstanding that the Court held that race did *not* predominate in Plaintiffs' illustrative maps, *Allen*, 599 U.S. at 31 (plurality opinion) ("While the line between racial predominance and racial consciousness can be difficult to discern, it was not breached here."), in *SFFA* this Court stated that "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" is a "compelling interest[] that permit[s] resort to race-based government action," 143 S. Ct. at 2162 (citing *Shaw*, 517 U.S. at 909-10); *see also Allen*, 599 U.S. at 41 ("[F]or the last four decades, this Court and the lower federal courts have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate § 2.").

Alabama's remaining arguments related to *SFFA* are no more availing. First, consideration of race in the Section 2 context does not raise the same pernicious stereotyping concerns that motivate affirmative action and racial gerrymandering challenges—i.e., a race-based *assumption* that members of a minority group "share the same political interests, and will prefer the same candidates at the polls," *Shaw*, 509 U.S. at 647—because Section 2 plaintiffs will necessarily have *proved* political cohesion among the minority group, as Plaintiffs have done here. App.178.

Second, Section 2 is self-sunsetting. Section 2 liability is found only where a minority group is large and compact enough and voting is racially polarized enough that an additional reasonably compact district can be drawn to give the minority group an opportunity to elect a candidate of choice that would otherwise be defeated. Then, too, Section 2 plaintiffs must establish the totality of circumstances, which includes "an intensely local appraisal" of the extent to which race continues to infuse and inform access to the political process in the jurisdiction. *Allen*, 599 U.S. at 19 (quoting *Gingles*, 478 U.S. at 79). This is an exceedingly difficult burden. As this Court recognized in *Allen*, "§ 2 litigation in recent years has rarely been successful," 599 U.S. at 29 (plurality opinion), in large part due to declining residential segregation and decreasing racial polarization in many parts of the country, *see* Brief for Professors Jowei Chen et al. as *Amici Curiae* at 4, *Allen v. Milligan*, 599 U.S. 1 (2023) (No. 21-1086). As racial division in residential and voting patterns wanes over time, so does Section 2's application. Thus, there is in fact a self-actuating "logical endpoint" to Section 2—when conditions in a jurisdiction change such that the

preconditions are no longer met. *Contra* Application 38. But as this Court and the district court found, that is not the case in Alabama.

Indeed, the State's passage of the 2023 Plan provides nothing but further evidence that official voting-related discrimination persists in Alabama. This is not the first time Alabama has staged an open rebellion against judicial enforcement of the Voting Rights Act. *See Dillard v. Crenshaw Cnty.*, 640 F. Supp. 1347, 1359 (M.D. Ala. 1986) (recounting "open and unashamed" state action taken to diminish Black political power "in response to both the Supreme Court's ban of all-white primaries and the Civil Rights Acts of 1957, 1964, and 1965"). If there were any question whether Section 2 has run its course, Alabama's brazen refusal to provide an equal opportunity for Black voters in opposition to multiple federal court opinions—six decades after the passage of the Voting Rights Act—proves that the answer is "no."

II. Equitable considerations weigh heavily against granting the stay.

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*, 456 U.S. at 44; *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."). Alabama falls far short of this standard, and its application for a stay must be denied.

A. Alabama is not at risk of irreparable harm.

Alabama's irreparable harm argument presupposes that it will win on the merits. *See* Application 39-40. But nothing in the record supports Alabama's assertion

that the 2023 Plan is lawful or that remedying the Section 2 violation would require racial gerrymandering. *Supra* Argument Section I.D; *see also* App.189 (finding that the only harm to the State is "having to conduct elections according to a court-ordered districting plan"). Accordingly, Alabama's claim that it (and Alabama voters) will be harmed if an election is held under an unlawful plan, Application 39-40, supports *denial* of a stay here, where three federal judges have found Alabama's 2023 Plan, like its 2021 Plan, unlawful. *Cf. Abbott*, 138 S. Ct. at 2324 (holding that enjoining enforcement of enacted statute "would seriously and irreparably harm the State" *unless* the statute is unlawful).

This is not the first time Alabama has sought relief from the prospect of a court-ordered plan. Alabama made the same irreparable harm argument the last time it sought a stay before this Court. *See* Alabama's Application for Stay at 37, *Allen v. Caster*, 599 U.S. 1 (2023) (No. 21-1087). This Court granted the State reprieve to allow for a thorough review of the law and facts. Now that this Court has affirmed the district court's decision below, Alabama's cries of irreparable harm ring hollow.

Finally, even if replacing a legislatively enacted plan with a court-drawn plan could amount to harm to Alabama, any such harm is self-imposed. *See Barton v. Dist. of Columbia*, 131 F. Supp. 2d 236, 247 (D.D.C. 2001)) ("A preliminary injunction movant does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted." (quoting *Fiba Leasing Co., Inc. v. Airdyne Indus., Inc.,* 826 F. Supp. 38, 39 (D. Mass. 1993)). The State knowingly and intentionally defied court orders. App.5-6. And after it squandered its final opportunity to draw a remedial map itself, the State

conceded that Alabama will have a court-drawn remedial plan for the 2024 election. App.109. Ultimately, the "harm" Alabama now faces is the price it was willing to pay for its insistence on diluting Black Alabamians' voting power rather than righting the wrong identified by the district court and this Court.

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

Alabama does not contest the district court's conclusion that, if the 2023 Plan violates Section 2, its use would impose significant and irreparable harm on Plaintiffs and thousands of other Black Alabamians. *See* App.188-90. Indeed, if this Court stays the injunction below based solely on the fact that Alabama would otherwise have to conduct elections under a court-ordered plan, Plaintiffs—who have already suffered irreparable injury by voting under the unlawful 2021 Plan—"will suffer [] irreparable injury until 2026, which is more than halfway through this census cycle." App.189. The balance of harms here is decisively in Plaintiffs' favor.

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 effectively allowing states like Alabama to avoid complying with the Voting Rights Act in perpetuity. Despite the monumental efforts of all parties and the district court to timely adjudicate the legality of the 2021 Plan, Alabama held its 2022 election under a plan that irreparably diluted Black Alabamians' votes. Now, after this Court has affirmed the district court's liability finding, to say that "necessity" requires Black Alabamians to vote under an illegally dilutive plan for yet another election cycle would send the message that courts are

powerless to enforce their own orders to protect the rights of litigants. That outcome gravely disserves the public interest.

CONCLUSION

Alabama's application for a stay is not "about the law as it exists." *Allen*, 599 U.S. at 23. It is about Alabama's *second* bid "to remake [this Court's] § 2 jurisprudence anew." *Id.* Not once in its 40-page brief does Alabama meaningfully claim the district court misapplied or misinterpreted binding precedent. Nor does Alabama quibble with any one of the district court's relevant factual findings on this score, all of which the State concedes in any event. Alabama's game is instead to remake Section 2—to conform the law to its congressional map instead of its map to the law—without regard for the text of the statute or the decades of precedent interpreting it. This Court should reject this invitation, just as it did a mere three months ago.

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 summarily affirm the district court's decision below.

Respectfully submitted,

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

Marc E. Elias
Lalitha D. Madduri
Joseph N. Posimato
Jyoti Jasrasaria
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW,
Suite 400
Washington, DC 20001
(202) 968-4490

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

September 19, 2023