No. 25-274

Supreme Court of the United States

WES ALLEN, SEC'Y OF STATE, ET AL.,
Appellants,

v.

EVAN MILLIGAN, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Northern District of Alabama

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

REPLY BRIEF

In 2022, Plaintiffs told this Court that Alabama's 2021 Plan "crack[ed]" the Black Belt because it "split[] the Black Belt into four districts." Milligan.Br.16, No. 21-1086 (U.S. July 11, 2022); *see id.* at 20-21, 33, 47. That "'inconsistent treatment' of communities of interest" was Plaintiffs' proffered "significant evidence of a § 2 violation." *E.g.*, *id.* at 53. This Court agreed at the preliminary-injunction stage, holding in particular that Plaintiffs' *Gingles*-1 maps were "reasonably configured" because "[t]here would be a split community of interest in both" the 2021 Plan and Plaintiffs' alternatives. *Allen v. Milligan*, 599 U.S. 1, 21 (2023).

Alabama then enacted an entirely new plan in 2023 that made "keeping the Black Belt together (*i.e.*, split between as few congressional districts as possible)" not just "important" (App.937) (2022 Order) but "non-negotiable" (App.544-46).

Now, the about face: it was never about "geographic splits," Plaintiffs say. Mot.16. Alabama's placing "the Black Belt into two districts instead of three" is *irrelevant* because the 2023 Plan still "cracks Black voters." Mot.16. How so? Because the 2023 Plan refused to split the Gulf Coast counties along racial lines, combining black voters from the Gulf with those in the Black Belt for the sole purpose of creating a new majority-minority district. This race-predominant reasoning was essential to the judgment below and mandates reversal. J.S.10-12. If Alabama had split the Gulf Coast community to maximize the "voting power" of "blacks," Mot.16, its map would be "unexplainable on grounds other than race," *Shaw v. Reno*, 509 U.S. 630, 644 (1993).

The flip side of *Callais v. Louisiana*, No. 24-109 (U.S.), this case perfectly illustrates the dilemma for States. Try to satisfy courts with a race-based map; get enjoined. Try to satisfy courts with a race-neutral map; get enjoined. There's no way for state officials to know whether a map satisfies federal law before federal-court inspection.

"States need clarity," *Merrill v. Milligan*, 142 S.Ct. 879, 881 (2022) (Kavanaugh, J., concurring), yes, but there will be no clarity with the district court's conception of §2. Allotting a "fair share of political power" among racial groups is no less impossible than among political groups. *Cf. Rucho v. Common Cause*, 588 U.S. 684, 709 (2019). Even if §2 used race in a "[l]imited," "objective," and "precis[e]" manner, Mot.25-26, it could not do so permanently, *SFFA v. Harvard*, 600 U.S. 181, 221-26 (2023). The district court's constitutional holding—that the Legislature discriminated by declining to discriminate—is proof positive that §2 is not "ridding our electoral process of race." *Callais*.Rearg.Tr.41. Nothing in Plaintiffs' response dispels the need for plenary review on each question presented.

I. The District Court's §2 Holding is Irreconcilable with *Allen* and the Constitution.

A. The district court ordered the State to sacrifice a community of interest to achieve a racial goal.

1. Now that Alabama has united the Black Belt in two districts,[1] Plaintiffs cannot complain about the "dispersal" of a community of interest, but only of "Black voters." Mot.16. That can be cured only with a new race-based district combining an "overwhelmingly rural, agrarian" community (Mot.12) with "Black Mobile" (App.708)—which is *not in the Black Belt* and lies over *250 miles* opposite the Black Belt's eastern edge.

Accepting Plaintiffs' new framing, the district court asked whether the 2023 Plan put enough "Black Belt counties in a majority-Black district." App.345. That was the wrong question. It treats "the minority population" itself as the community when the Black Belt is "a '*historical* feature' of the State, not a demographic one," and must be "treated … as a community of interest for [that] reason." *Allen*, 599 U.S. at 32 n.5 (plurality). Promoting the minority population "in and of itself" cannot be a traditional districting principle. *Id.* Thus, the notion that the 2023 Plan "limited Black … voting power" (Mot.16) could be *the conclusion* of a successful §2 challenge, but not the beginning *proof* of it, which would be circular.

Even if *Gingles*-1 maps can join together "farflung segments of a racial group," *contra LULAC v. Perry*,

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[1] Plaintiffs misleadingly fault Alabama for not keeping the Black Belt "together in one district," Mot.8, knowing full well that is impossible, *see* App.546; *Singleton*.Mot.15; Tr.200.

548 U.S. 399, 433 (2006), race cannot predominate in a §2 *remedy* without satisfying strict scrutiny. Now at the end of this case, a district court has concluded that Alabama's only means of complying with §2 was a race-first district combining "Black Mobile" with black voters from a separate community of interest 250 miles away. App.708.[2] That remedy is "explicit[ly]" racial because it demands that more Black Belt counties be placed in a race-based district. *Shaw,* 509 U.S. at 642. And, as the district court observed, "all paths" to another majority-black district "require[] splitting" white voters from black voters in the Gulf Coast. App.7, 531.[3] Admitting that no §2-compliant map "achieve[s] all the political goals" of the 2023 Plan, App.514; *see* App.492, the court thus "subordinated" neutral criteria to race. *Alexander v. S.C. NAACP*, 602 U.S. 1, 7 (2024).

2. The rejoinder that the district court's remedy did not consider race "at all," Mot.3, 22-23, or lacked "awareness of race," Mot.21, is preposterous. The court ordered a "district[] in which Black voters either comprise a voting-age majority or something quite close to it." App.13. It insisted that CD2 have enough black voters that a Democrat would likely win. *E.g.*, *Milligan*, DE311:41. These are "racial targets." *Contra* Mot.23-24.

We know that "race-neutral considerations 'came into play only after the race-based decision had been made,'" *Bethune-Hill v. Va. State Bd. of Elections*, 580

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[2] Alabama does not "admit[]" that any failure to draw such a district constitutes "cracking." *Contra* Mot.16.

[3] The *Singleton* plaintiffs offered a "whole county" plan that would preserve the Gulf, Mot.38, but sacrifice other traditional principles, *see* App.105-06, 480. The district court rejected it.

U.S. 178, 189 (2017), because the court treated Alabama's "redistricting principle[s]" as "[]negotiable," App.329. Traditional criteria were to be "consider[ed]" by the special master, *Milligan*, DE273:9, but only "to the extent reasonably practicable," *id.* at 8. Neutral principles could be compromised; racial targets could not. *See* App.329 (no "non-negotiable" principles), App.514 (no "deference" to any principle that "entrenches vote dilution"), App.719 (communities of interest not a "trump card").

Drawing maps without *displaying* racial data, as the special master says he did, Mot.9, does not erase race-predominance. *Cf. Cooper v. Harris*, 581 U.S. 285, 313-17 (2017).[4] The court required that he remedy "ineffective" "Black voting strength." App.715; *see Milligan*, DE273:7. He "confirmed" he hit his target before presenting his plans. *Milligan*, DE295:36. His plans thus sacrificed compactness, paired incumbents, and split a major city, a county, and a community of interest. *See Milligan*, DE295:14, 17, 23, 25, 38; *id.* at 42 (acknowledging "'need to split the Gulf Coast'" for "Black voting strength").[5]

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[4] The special master had a roadmap to hit the racial target without explicitly relying on racial data: "split the Gulf Coast," App.715, "split Mobile County," App.947, and split Mobile City to connect its urban core with Montgomery and Black Belt counties on the Georgia border, *id.*; *see Milligan*, DE295:13 (he had "the eleven illustrative plans"). Small wonder he "grouped together the same" far-flung populations "as Plaintiffs' illustrative maps." *Caster*.BIO.6.

[5] Alabama united the two Gulf Coast counties in 1972 after the census resulted in the loss of a congressional seat. In fifty years, no court found that animus drove that decision. *Contra* Mot.2, 17-18. The attempt to taint this proven community of interest (led by an expert whose book identifies Mobile and

B. Requiring race-based districts is racial discrimination that cannot survive strict scrutiny.

The district court addressed the State's constitutional argument in just three pages, did not cite *SFFA*, and refused to apply strict scrutiny. App.454-56. Bereft of any serious constitutional analysis, its judgment must be reversed. *See* J.S.16-25; Br. of Alabama and 15 States, *Louisiana v. Callais*, No. 24-109 (U.S. Sept. 24, 2025).

1. The district court held that race-based redistricting could not be "render[ed] unconstitutional" by "the mere passage of time," App.454, but that's not Alabama's argument. *See* Ala.*Callais*.Br.8, 25-29. Rather, time is "the acid test of [the] justification" for using race. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). If race-based districting had any "efficacy," Plaintiffs would be able to say when it will "no longer be necessary." *Id.* "[A]t least past today" (App.456), or until a State "outrun[s]" its past (App.455), are insufficient answers.

Under the current regime, States can *never* stop using race. The census may restart redistricting anew, Mot.30, but that just guarantees a "periodic review" of how States use (or do not use) race every decade in perpetuity, much like Harvard's use of race every admissions cycle. *SFFA*, 600 U.S. at 225.

The theory that §2 will sunset on its own is divorced from reality. *See* Ala.*Callais*.Br.19-25. According to district courts, if a 250-mile-wide majority-black district can be drawn in Alabama (or Louisiana),

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Baldwin counties as a distinct region he calls "Metropolitan Mobile," Tr.1440-41) is a smoke screen. *Infra* II.C.

it must be drawn. As for the totality-of-circumstances inquiry, States can win repeatedly in one decade and lose in the next, even with overlapping evidentiary records. J.S.16-17. Anything that has ever happened in the State is fair game, and which facts courts will deem relevant is anyone's guess. Ben Carson's finish in the 2016 primary was counted against Alabama in 2022. App.844. After Alabama proved that Carson's tally in Alabama was one of his best in the country, App.281, the State was faulted for not proving that relatively underfunded and unknown congressional candidates were not penalized for their race, Mot.13. Likewise, after Alabama proved that it had the second-smallest racial gap in incarceration in the Nation, Tr.2203:24-25, the district court turned to gaps in infant mortality, App.405. States can make "substantial progress" across any number of vectors, App.455, and still flunk the ever-changing test.

2. Remedying "specific, identified instances of past discrimination," Mot.21, cannot be the constitutional reason for using race indefinitely. *First*, a §2 violation is anything but specific. No one really thinks that "few legal tests are as clear as the *Gingles* inquiry." *Caster*.BIO.29. The law "is notoriously unclear." *Merrill*, 142 S.Ct. at 881 (Kavanaugh, J., concurring). Even after forty years, "considerable disagreement and uncertainty" about the very "nature" of vote dilution persists. *Id.* at 883 (Roberts, C.J., dissenting). Core aspects of the test lack objective standards, culminating in a limitless inquiry into all past and present "circumstances," Ala.*Callais*.Br.9-25, which may yield a "527-page decision," Mot.10, but not a finding that can be fairly called "specific." Even the most concrete and measurable indicators of political participation are discounted (App.411) or ignored (App.403).

See J.S.16. Government use of race is "simply too pernicious," *SFFA*, 600 U.S. at 217, to rest on a test plagued by such "uncertainties," *Merrill*, 142 S.Ct. at 883 (Roberts, C.J., dissenting).

Second, a §2 vote-dilution claim does not prove racial "discrimination." *Contra* Mot.21. Discrimination is treating someone "worse than others who are similarly situated." *Bostock v. Clayton County*, 590 U.S. 644, 657 (2020). But courts do not ask §2 plaintiffs to prove that the State's districting plan makes them worse off than other voters—only that they are less likely to vote for the winning candidate than they would be in an alternative plan. That can be true for a host of race-neutral reasons, such as a legislature's partisan goals, which make plaintiffs differently "situated." Simply *calling* the result "discrimination" does not make it so. *Cf. Miller v. Johnson*, 515 U.S. 900, 922 (1995) (no "blind judicial deference").

Third, a §2 violation does not mean "likely intentional discrimination." *Contra Caster*.BIO.23; *see Thornburg v. Gingles*, 478 U.S 30, 44 (1986). States can violate §2 even when they are "intensely concerned with complying with the VRA." *Turtle Mountain v. Howe*, No. 3:22-cv-22, 2023 WL 8004576, at *16s (D.N.D. Nov. 17, 2023). Or even when lines drawn by a "bipartisan and independent commission reflected a difficult balance of many competing factors and could be justified in any number of rational, nondiscriminatory ways." *Soto Palmer v. Hobbs*, 686 F.Supp.3d 1213, 1232 (W.D. Wash. 2023). As courts interpret §2 today, a violation does not begin to prove intent.

II. The Legislature Did Not Intentionally Discriminate by Declining to Adopt a Race-Based Map.

The holding that the Legislature acted out of "racial animus" (App.523) when it declined to adopt a race-based map that would "not achieve all [its] political goals" (App.514) goes to show how far afield §2 has gone in redistricting. The court was required to "draw the inference that cuts in the legislature's favor" whenever possible. *Alexander*, 602 U.S. at 10; *see Abbott v. Perez*, 585 U.S. 579, 605-07 (2018). It did the opposite, consistently inferring invidious intent from its disagreement with Alabama's §2 arguments and twisting neutral legislative findings. But whatever the district court thought about the legal arguments could not change the Legislature's "actual considerations." *Bethune-Hill*, 580 U.S. at 189. Regardless of how this Court resolves the §2 claims, it should summarily reverse or give plenary review to this extraordinary holding, which contravenes *Alexander* and *Abbott* and will haunt the State for decades to come.

A. Racial-Gerrymandering Concerns. Start with the fanciful idea that "Alabama had no reason for 'concern[] that splitting Mobile County [along racial lines] exposed it to a racial gerrymandering claim." Mot.38. The *Robinson* plaintiffs said the same thing, Stay.Opp.31-35, *Ardoin v. Robinson*, No. 21A814 (U.S. June 23, 2022), and within two years, Louisiana's new map was enjoined for racial gerrymandering.

While States are *always* navigating the twin hazards of §2 and the Constitution, here there were racial gerrymandering claims pending in both *Milligan* and *Singleton*, which plaintiffs raised during the 2023 Special Session, just weeks after *SFFA*. J.S.5, 28-29.

Of course the Legislature "may well have believed" there was a constitutional problem (App.519), and that possibility precludes a finding of animus.

B. Partisan Motives. None of the "undisputed facts" (Mot.34) distinguish partisan motives from discriminatory ones. That even an "occasional opportunity" for Democrats to win CD2 "was too much" for the Republican Legislature is *more than* plausibly explained by partisanship. *Id.* Likewise for the adoption of the "worst-performing map" for Democrats. Mot.37. At the same time that Plaintiffs say "partisanship does not explain" why Selma remained in CD7, Mot.39, they concede that leaving it there reduced any Democrat's "chance of winning," Mot.8.

Plaintiffs are not just "quick to hurl [] accusations" of racism, *Alexander*, 602 U.S. at 11; they ignore obvious indicia of party politics. The 2023 Plan was crafted by Republicans and passed along party lines. The Republican Speaker of the U.S. House of Representatives called Republican members of the Legislature and urged them not to lose a seat. App.524. Yet the court below demanded direct testimony that legislators "acted on those conversations," *id.*, which was not the State's burden, *see* Project on Fair Representation Br.8-10, No. 25-274 (U.S. Oct. 9, 2025). "Without an alternative map" that achieves the same partisan goals, plaintiffs could not "defeat [the] starting presumption" of good faith. *Cf. Alexander*, 602 U.S. at 10.

C. Traditional Principles. In Plaintiffs' upside-down world, when it is "impossible" to draw a second majority-minority district while still satisfying a State's race-neutral goals, those goals must be "pretext" for discrimination. Mot.35. But refusal to subordinate race-neutral goals to race is anything but

evidence of a constitutional violation. And even if a §2 remedy that jettisons the State's goals could be lawful, that still would not mean the State intends "discriminatory vote dilution" by pursuing non-racial goals. *Id.*

Like the district court, Plaintiffs scold the State for not splitting the Gulf Coast in particular. This is a canard. *First*, after the district court and this Court found evidence from the breakneck-paced preliminary-injunction stage "insufficient," 599 U.S. at 21, the State showed with tremendous evidence that the Gulf is its own community. It is unsurprising, even "expect[ed]" (App.953), that the Legislature would enact findings and develop testimony (App.494) about what was "being litigated" (App.504), especially with how easily courts manipulate communities of interest, Ala.*Callais*.Br.15-17. Likewise, it is not surprising that the Legislature dedicated less space to the Black Belt, which no one disputes is a community. *Contra* Mot.8. In any event, the district court agreed with the State, recognizing the Gulf as a community. App.346. Plaintiffs do not contest that finding.

Second, there's nothing untoward about identifying the French and Spanish influence in the Gulf region (*contra* Mot.1, 4, 8, 35, 39), any more than recognizing the "Anglo-Saxon tradition of criminal justice[] embodied in the United States Constitution," *United States v. Bailey*, 444 U.S. 394, 414 (1980). Neither suggests any racial preference, as the NAACP has recognized elsewhere. *Nairne v. Ardoin*, 715 F.Supp.3d 808, 844-45 (M.D. La. 2024) (NAACP identifying "community" of both "White and Black people" that was "influenced by French colonialism").

Third, the State did not, and need not, "exalt and extol one community" over others. *Contra* Mot.35. The

whole explanation for the 2023 Plan was showing that Alabama could preserve *both* the Gulf Coast *and* the Black Belt, splitting them no more than necessary.

D. Ordinary Legal Disagreement. The most basic error in the decision below is the idea that Alabama "refused to provide the remedy" that Plaintiffs say was "required" by virtue of a preliminary-injunction order. Mot.37. Enforcement of the *2021 Plan* was *preliminarily* enjoined. After that, the State was not required to enact a new map at all. Passing a better plan that the State believed gave it a "good shot" at winning (App.510) is "defiance" (Mot.2, 4) only if one misunderstands the fundamentals of a preliminary injunction, which says only that a particular map "likely" violates §2 and nothing about whether a different map actually does so. *See* Fair.Rep.Br.11-16.

The premise that the 2023 Plan reflects "*zero* effort" by Alabama to comply with §2 (Mot.37) is equally absurd. The parties have many disagreements about this notoriously unclear area of law. But disagreeing with Plaintiffs is not discrimination.

CONCLUSION

The Court should note probable jurisdiction or summarily reverse.

Respectfully submitted,

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