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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LAQUISHA CHANDLER, *et al.*,

Plaintiffs,

v.

WES ALLEN, *et al.*,

Defendants.

No. 2:21-cv-1531-AMM

PLAINTIFFS' CORRECTED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs Laquisha Chandler, Evan Milligan, Khadidah Stone, Greater Birmingham Ministries, and the Alabama State Conference of the NAACP allege that six Alabama Senate Districts in Madison, Montgomery, and Jefferson Counties, and thirteen State House Districts in the Jefferson County and Tuscaloosa County areas, are racially gerrymandered in violation of Section 2 of the Voting Rights Act ("VRA") and the Fourteenth Amendment of the Constitution. *See* Pls.' Third Amended Compl., ECF No. 83 ("Complaint"). Plaintiffs allege that the enacted plan (the "2021 Plan") results in discrimination in violation of Section 2 and that race was the Legislature's predominate motive in the design of certain districts in a manner not narrowly tailored to comply with Section 2 in violation of the Fourteenth Amendment. In their Motions to Dismiss, Defendants assert that Plaintiffs as private

parties cannot sue under Section 2 of the VRA, and Defendants challenge the sufficiency of Plaintiffs' racial gerrymandering allegations, but do not challenge the sufficiency of Plaintiffs' Section 2 allegations. *See* Defs.' Mot. to Dismiss ("Defs.' Br."), ECF No. 92 at 1–2.

Since 1965 the existence of the private right of action under Section 2 has been the undisputed law of the land. *See Morse v. Republican Party of Va.*, 517 U.S. 186, 232 (1996) (plurality opinion). To assuage any doubt, in 1975, Congress amended the VRA to "provide the same remedies to private parties as had formerly been available to the Attorney General alone," *id*. at 233, making explicit that either the "Attorney General *or aggrieved person*" can seek relief to enforce the VRA. 52 U.S.C. § 10302(a), (b), and (c) (emphasis added). Over the decades, federal courts—including the Supreme Court—have heard hundreds of private plaintiffs' Section 2 cases. *See, e.g.*, *Allen v. Milligan ("Milligan II")*, 599 U.S. 1 (2023). Only one of those cases has been dismissed on the grounds that Section 2 lacks a private right of action. For good reason, "the existence of the private right of action under Section 2 has been clearly intended by Congress since 1965." *Morse*, 517 U.S. at 232 (cleaned up). Even if there were any ambiguity in the statutory text and design of the VRA (and there is not), Plaintiffs could bring Section 2 claims against Defendants, all of whom are proper parties to this action, under both the VRA and 42 U.S.C. § 1983.

Defendants nonetheless seek relief that runs counter to decades of binding precedent and judicial action.

There is no basis to dismiss this case. Plaintiffs have sufficiently pled their constitutional claims alleging Alabama's state legislative maps constitute unlawful racial gerrymanders. And Legislative Defendants are proper parties to this case who explicitly waived legislative privilege. For these reasons and those explained below, the court should deny the Defendants' motions to dismiss in full.

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FACTUAL BACKGROUND

I. FACTUAL ALLEGATIONS

Alabama has "historically had difficulty with reapportionment." Compl. ¶ 26 (quoting *Kelley v. Bennett*, 96 F. Supp. 2d 1301, 1308 (M.D. Ala. 2000), *rev'd on other grounds, Sinkfield v. Kelley*, 531 U.S. 28, 29 (2000)). This difficulty was manifest in the current redistricting cycle, with the Legislature twice failing to enact a congressional district plan that complied with Section 2, *Milligan II*, 599 U.S. at 17–24; *Milligan v. Allen*, No. 2:21-CV-1291-AMM, 2023 WL 5691156, at *1 (N.D. Ala. Sept. 5, 2023).

In the 2010 redistricting cycle, a three-judge court similarly held that the Legislature had unconstitutionally racially gerrymandered twelve House and Senate districts. *Ala. Legis. Black Caucus v. Ala. ("ALBC II")*, 231 F. Supp. 3d 1026, 1348–49 (M.D. Ala. 2017). Federal courts have found similar constitutional and statutory violations in previous redistricting cycles. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesch v. Hunt*, 785 F. Supp. 1491 (S.D. Ala. 1992), *aff'd sub nom. Camp v. Wesch*, 504 U.S. 902 (1992) (mem.); *Burton v. Hobbie*, 561 F. Supp. 1029 (M.D. Ala. 1983); *Burton v. Hobbie*, 543 F. Supp. 235 (M.D. Ala. 1982); *Sims v. Amos*, 336 F. Supp. 924 (M.D. Ala. 1972), *aff'd mem.*, 409 U.S. 942 (1972); *Sims v. Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965); *Brooks v. Hobbie*, 631 So.2d 883, 884 (Ala. 1993).

II. 2021 LEGISLATIVE REDISTRICTING PROCESS

Following the results of the U.S. 2020 Census, the Alabama Permanent Legislative Committee on Reapportionment (the "Committee') began developing redistricting plans for the State Senate and State House of Representatives. Compl. ¶ 43. The Census results showed that Alabama's population grew by 5.1% between 2010 and 2020. *Id.* ¶ 42. Alabama's population identified as 63.1% non-Hispanic white, 26.9% as any part Black, and 5.3% as Hispanic. *Id.* These percentages reflected a Black population increase of 3.5%, Hispanic population increase of 42.3%, and a decline in the white population by 1%. *Id.*

The Alabama Legislature passed the challenged House and Senate redistricting plans on November 4, 2021, in a Special Legislative Session. Plaintiffs Alabama NAACP, Greater Birmingham Ministries, and Evan Milligan, as well as Committee Members and members of the public, implored the Committee to conduct a racially polarized voting analysis in each House and Senate district before passing the maps, to ensure compliance with Section 2. Compl. ¶¶ 48, 51–53, 55, 66–67, 75. Some members of the Committee expressed concern that it was selectively disregarding the State's redistricting guidelines on keeping counties whole, following traditional redistricting principles, and splitting communities of interest, which resulted in racial disparities that disadvantaged Black Alabamians. Compl. ¶¶

48, 51–55, 66, 67, 72, 75. The Committee disregarded those concerns and passed the challenged maps. *Id.* ¶ 56.

Race predominated over traditional redistricting principles in the design of the challenged House and Senate districts, violating the Committee's own redistricting guidelines. *See* Compl. ¶¶ 33–41. The violations, which occur in many of the challenged districts, include: statistically noncompact districts, bizarrely-shaped districts in which irregular features create racial disparities, county splits that create racial disparities, and community of interest splits that create racial disparities. *Id.* ¶¶ 83–115. The racial predominance in these district boundaries is not narrowly tailored to serve Section 2 compliance or any other governmental interest. *Id.*

By way of example, Senate District Seven surgically carves out some of the Black population of central and north Huntsville to split apart those communities into two other Senate Districts, thereby diluting the voting power of Huntsville's Black voters. *See id.* ¶ 86. The six House Districts around Tuscaloosa County also evidence that racial demographics determined district lines. *Id.* ¶ 114. There, Black and white voters had their districts drawn so as to lump Black voters into several districts, while carving out white voters into others. *Id.* ¶ 115. These are just a few of the many examples of racial gerrymandering Plaintiffs highlight in their Complaint. *Id.* ¶¶. 83–115.

After Plaintiffs filed suit, the Secretary and Legislative Defendants both answered Plaintiffs' original Complaint. *See* ECF Nos. 52, 53. Once Plaintiffs submitted a Second Amended Complaint, ECF No. 57, the Secretary—but not the Legislative Defendants—filed a motion to dismiss. ECF No. 58. This court held this matter in abeyance, pending the resolution of *Milligan II* (decided on June 8, 2023), in the Supreme Court. ECF No. 59. Plaintiffs moved to modify the stay twice: first at a status conference on May 20, 2022, where both the Secretary and Legislative Defendants participated, and again by motion on February 16, 2023, to which all Defendants responded. ECF No. 73, at 6. The stay was lifted on June 9, 2023, ECF No. 75, and all Defendants filed their motions to dismiss thereafter. ECF Nos. 92, 93.

LEGAL STANDARD

On a motion to dismiss for failure to state a claim for which relief may be granted, courts must "accept[] the complaint's allegations as true and construe[] them in the light most favorable to the plaintiff." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1335 (11th Cir. 2012).

Where the factual allegations provide "enough fact to raise a reasonable expectation that discovery will reveal evidence of the defendant's liability," the court must deny the motion to dismiss. *Id.* at 1337 (cleaned up). Racial gerrymandering cases involve an "inherently complex endeavor" of evaluating intentional

discrimination claims, requiring the "trial court to perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (citation omitted). The pretrial dismissal of such cases is "inappropriate" where, as here, the alleged "evidence is susceptible of different interpretations or inferences by the trier of fact." *See id.* at 553 (reversing the grant of summary judgment for the defendants in a racial gerrymandering case).

ARGUMENT

III. THE STATUTORY TEXT AND BINDING PRECEDENT REQUIRE THIS COURT TO FIND THAT THE VOTING RIGHTS ACT CONTAINS A PRIVATE RIGHT OF ACTION.

A. The Supreme Court Has Interpreted the Voting Rights Act to Permit Private Litigants to Sue Under Section 2 and Other Sections of the Act.

The Supreme Court has consistently read the VRA to contain a private right of action, and the Court has recognized Congress's codification of this right. This court is bound by that precedent and Alabama provides no valid reason to depart from it.

In *Allen v. State Bd. of Elections*, the Supreme Court recognized that Section 5 of the VRA was enforceable by private litigants because of its implied private right of action. 393 U.S. 544, 557 (1969). The Court properly held that "achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Id.* at 556. Recognizing the importance of this ruling, Congress codified this private

right of action in two ways in the 1975 amendments to the VRA. First, Congress amended Section 3 of the VRA to provide that the "Attorney General *or an aggrieved person*" could pursue certain remedies, including injunctions against devices "used for the purpose or *with the effect*" of racial discrimination. 52 U.S.C. § 10302(a), (b), and (c) (emphasis added). Additionally, Congress added Section 14(e), which allows a "prevailing party, *other than the United States*," to obtain attorneys' fees in VRA enforcement actions. 52 U.S.C. § 13010(e) (emphasis added).

Based on this history, in *Morse*, the Court recognized that the text, purpose, and history of the VRA explicitly and implicitly permit private litigants to sue under the VRA. 517 U.S. at 231–32. In *Morse*, the Supreme Court considered whether private actors could enforce Section 10 of the VRA, which authorizes the Attorney General to challenge poll taxes with a discriminatory "purpose or effect," but does not mention private plaintiffs. 517 U.S. at 231–33 & n.42 (quoting 52 U.S.C. § 10306). In holding that Section 10 does provide such a private right of action, Justice Stevens' plurality opinion, joined by Justice Ginsburg, expressly recognized that the "existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965." *Id.* at 232 (quoting S. Rep. No. 97-417, at 30 (1982)).[1]

[1] The Senate Report is the "authoritative source" for interpreting Section 2. *Thornburg v. Gingles*, 478 U.S. 30, 44 n. 7 (1986); *accord Milligan II*, 599 U.S. at

Notably, that opinion also "attached significance to the fact that the Attorney General had urged" the Court "to find that private litigants may enforce the Act," *id.*, 517 U.S. at 231, just as the United States has here. ECF No. 110, at 3. Justice Breyer, joined by Justices O'Connor and Souter, also held that "Congress intended to establish a private right of action to enforce § 10, no less than it did to enforce §§ 2 and 5." *Id.* at 240 (Breyer, J., concurring). And, based on the 1975 Amendments, six Justices agreed that Section 3 "*explicitly* recognizes that private individuals can sue under the Act." *Id.* at 289 (Thomas, J., dissenting) (emphasis added) (cleaned up); *id.* at 234 (op. of Stevens, J., with Ginsburg, J.); *id*. at 240 (Breyer, J., concurring, with O'Connor, Souter, JJ.).

Relying on *Morse* and the 1975 Amendments, every court in this circuit to consider the issue has concluded that Section 2 has a private right of action.[2] *See, e.g.*, *Ala. State Conf. of NAACP v. Ala.*, 949 F.3d 647, 653 (11th Cir. 2020) (holding

10, 30 (consulting the Senate Report); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2333 (2021) (same).

[2] Other courts agree. *See, e.g.*, *Roberts v. Wamser*, 883 F.2d 617, 621 (1989); *Coca v. City of Dodge City*, No. 22-1274-EFM, 2023 WL 2987708, at *5 (D. Kan. Apr. 18, 2023); *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 819 (M.D. La. 2023) (explaining that "*Morse* has not been overruled" and courts must "apply Supreme Court precedent"); *Ark. United v. Thurston*, 626 F. Supp. 3d 1064, 1079 n.12 (W.D. Ark. 2022) (holding that the "Supreme Court has long found—consistent with § 3 and the VRA's remedial purpose—that a right of action exists for private parties to enforce the VRA's various sections."); *Mich. Welfare Rights Org. v. Trump*, No. 20-3388 (EGS), 2022 WL 990704, at *11 (D.D.C. Apr. 1, 2022) (noting the Supreme Court "recognized a private right of action under § 2" in *Morse*).

that Section 2 contains a private right of action, and rejecting Alabama's arguments about Section 3 as "contrary to both the text of the statute and Supreme Court precedent"), *vacated as moot* 141 S. Ct. 2618 (2021) (mem.); *Ford v. Strange*, 580 F. App'x 701, 705 n.6 (11th Cir. 2014) ("A majority of the Supreme Court has indicated that Section 2 of the [VRA] contains an implied private right of action."); *Milligan v. Merrill*, 582 F. Supp. 3d 924, 1031 (N.D. Ala. 2022) ("*Milligan I*") (three-judge court); *Fla. State Conf. of NAACP v. Lee*, 576 F. Supp. 3d 974, 988–91 (N.D. Fla. 2021); *Ga. State Conf. of NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1275 (N.D. Ga. 2017) (three-judge court); *Greater Birmingham Ministries v. Ala.*, No. 2:15-CV-02193-LSC, 2017 WL 782776, at *12 (N.D. Ala. Mar. 1, 2017).

Secretary Allen argues that *Morse* and its predecessor cases do not bind this court as to Section 2 because that portion of the opinion is dicta, and because "the *Morse* approach to the private-right-of action analysis does not survive *Sandoval* and its progeny." Defs.' Br. 23. These arguments lack any legal basis for several, independent reasons.

First, the *Morse* Court's "understanding that Section 2 provides a private right of action was necessary to reach the judgment that Section 10 provides a private right of action." *Milligan I*, 582 F. Supp. 3d at 1031. The Supreme Court's reasoning in *Morse* as to Section 2 is thus binding here even if it was not the case's central holding: "When an opinion issues for the Court, it is not only the result but also those

portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 66–67 (1996).

Second, even if the *Morse* reasoning about Section 2 were only dicta, this court remains bound by its ruling. This is because "dicta from the Supreme Court is not something to be lightly cast aside.'" *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) (citation omitted). The "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Id.* at 1326 (quoting *Wynne v. Town of Great Falls*, 376 F.3d 292, 298 n.3 (4th Cir. 2004)).

Third, Secretary Allen incorrectly claims that *Alexander v. Sandoval*, 532 U.S. 275 (2001) undermined the reasoning of *Morse* by discouraging the use of the "contemporary legal context" when the statute passed. Defs.' Br. 23. The Secretary's position misunderstands how lower courts must apply Supreme Court precedent. Although *Sandoval* might inform the analysis to identify new private rights of action, *Sandoval* does not authorize lower courts to simply ignore or overrule *existing* Supreme Court precedent where, as in *Morse* or *Allen*, the Court has already identified the right of private actors to enforce the VRA. Even the Secretary recognizes that "*Allen* and *Morse* are binding precedent insofar as they held that Sections 5 and 10 are privately enforceable." Stay Br. 23. This concession logically requires the same conclusion for Section 2. *See Morse*, 517 U.S. at 232 (plurality

opinion) ("It would be anomalous, to say the least, to hold that both § 2 and § 5 are enforceable by private action but § 10 is not, when all lack the same express authorizing language."); *id.* at 240 (Breyer, J., concurring) ("Congress intended to establish a private right of action to enforce § 10, no less than it did to enforce §§ 2 and 5."). Defendants point to nothing to suggest otherwise, and lower courts cannot unilaterally hold that the Supreme Court's "more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Rather, where precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," courts "should follow the case which directly controls, leaving to th[e] Court the prerogative of overruling its own decisions."[3] *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

B. Statutory Stare Decisis Compels the Conclusion that Section 2 of the VRA Contains a Private Right of Action.

Even if *Morse* and the 1975 Amendments left any ambiguity on the issue (and they do not), statutory stare decisis similarly counsels strongly in favor of recognizing Section 2's private right of action.

[3] Indeed, even when a Supreme Court decision calls into question a prior decision of the Eleventh Circuit, "the Supreme Court decision must be clearly on point" to overrule that decision. *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees*, 344 F.3d 1288, 1292 (11th Cir. 2003).

Statutory stare decisis carries "special force." *Halliburton Co. v. Erica P. John Fund*, 573 U.S. 258, 274 (2014). "[U]nlike in a constitutional case, . . . Congress can correct any mistake it sees." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). An opinion interpreting a statute is a "ball[] tossed into Congress's court, for acceptance or not as that branch elects." *Id.* Where, as here, Congress "acquiesce[s]" to this Court's interpretation by leaving a holding undisturbed, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008), its action "enhance[s] even the usual precedential force" of statutory stare decisis. *Shepard v. United States*, 544 U.S. 13, 23 (2005).

Federal courts have entertained hundreds of Section 2 cases brought by private litigants. *See, e.g.*, *Milligan II*, 599 U.S. at 17–18, *Brnovich*, 141 S. Ct. 2321, 2333 (2021) ("In the years since *Gingles*, we have heard a steady stream of vote dilution cases."); *Perry v. Perez*, 565 U.S. 388 (2012); *LULAC v. Perry*, 548 U.S. 399 (2006); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers Assoc. v. Attorney General of Texas*, 501 U.S. 419 (1991); *Thornberg v. Gingles*, 478 U.S. 30 (1986); *City of Mobile, Ala. v. Bolden*, 446 U.S. 55 (1980). "Congress is undoubtedly aware" of the Supreme Court construing Section 2 to contain a private right of action and "can change that if it likes. But until and unless it does, statutory stare decisis counsels our staying the course." *Milligan II*, 599 U.S. at 39. While Congress may sometimes struggle to "find[] room in a crowded legislative docket" to correct

judicial misinterpretations, *Ramos*, 140 S. Ct. at 1413 (Kavanaugh, J., concurring), Congress has closely monitored the VRA and congressional amendments have only ever made it *easier* for private litigants to enforce the VRA. *See, e.g.*, *Milligan II*, 599 U.S. at 12–14 (discussing the 1982 Amendments); *Morse*, 517 U.S. at 233–234 (plurality) (the 1975 Amendments).

This "long congressional acquiescence" to permitting courts to enforce Section 2's private right of action generally "enhance[s] even the usual precedential force [the Court] accords to [] interpretations of statutes." *See Watson v. United States*, 552 U.S. 74, 82–83 (2007) (internal quotation marks omitted). Where, as here, "Congress has spurned multiple opportunities to reverse" a statutory decision, this court demands a "super-special justification" to change course. *Kimble*, 576 U.S. at 456, 458. Defendants cannot clear that high hurdle here.

C. The VRA's Text and Structure also Plainly Establish a Private Right of Action to Enforce Section 2.

The VRA's text and structure further support private plaintiffs' rights to enforce Section 2. Even if *Morse* had not resolved the private right of action question—which it does—and the *Sandoval* test was applicable—which it is not—Section 2 still satisfies that test. The *Sandoval* test has two requirements to determine if private plaintiffs can enforce a statute: (1) the statutory provision contains a "private right," as evinced by "rights-creating" language; and (2) the statute provides for "a private remedy." *See Sandoval*, 532 U.S. at 286–88. Section 2 meets both.

i. The Voting Right Act Contains Rights-Creating Language.

The main criterion for whether a statute contains rights-creating language, as referenced in *Sandoval*, 532 U.S. at 288, is whether it explicitly refers to a citizen's "right[]" and is "phrased in terms of the persons benefited." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002). Section 2 contains such language. It expressly protects the "right of *any citizen* . . . to vote" free from discrimination. 52 U.S.C. § 10301(a) (emphasis added). Defendants are simply wrong to assert that Section 2 protects the "general public." Defs.' Br. at 8–9. Rather, the "right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual members.'" *LULAC*, 548 U.S. at 437 (quoting *Shaw v. Hunt*, 517 U.S. 899, 917 (1996)). "[T]he fact that the statute confers rights on a 'group' of people does not suggest that the group, rather than the persons, enjoy the right the statute confers." *Ga. State Conf. of NAACP*, No. 1:21-CV-5338-ELB-SCJ-SDG, 2022 WL 18780945, at *5 (N.D. Ga. Sept. 26, 2022). Defendants point to no decisions interpreting Section 2 differently.

Moreover, despite Defendants' assertions otherwise, Section 2's language "closely resembles" the language of 42 U.S.C. § 2000(d), which *Sandoval* "highlighted . . . as a specific example of a 'rights-creating' provision." *Ga. State Conf. of NAACP*, 2022 WL 18780945, at *4; *see also League of United Latin Am. Citizens v. Abbott*, No. EP-21-CV-00259-DCG-JES-JVB, 2021 WL 5762035, at *1 (W.D. Tex. Dec. 3, 2021) (three-judge court) (same).

ii. The Voting Rights Act clearly provides for a private remedy under Section 2.

The VRA also satisfies the second part of the *Sandoval* test: the statute provides for "a private remedy." *Sandoval*, 532 U.S. at 286–88. In analyzing this issue, courts "must read the words" in a statute "in their context and with a view to their place in the overall statutory scheme" because the court's "duty, after all, is to construe statutes, not isolated provisions." *King v. Burwell*, 576 U.S. 473, 475, 486 (2015) (internal quotation marks omitted). As the Court instructed in *Sandoval*, courts ascertaining congressional intent must review not only the statutory text, but also its structure. 532 U.S. at 288. While the text of Section 2 itself does not expressly reference a private right of action, the VRA's structure unequivocally supports congressional intent to create a private remedy. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017) (quoting *Sandoval*, 532 U.S. at 286–87) (private right of action to challenge statutes that "'displa[y] an intent' to create 'a private remedy.'").

a. Defendants Misread Section 3's Language Regarding "Aggrieved Persons."

Section 3 of the VRA, provides for relief in "proceeding[s]" brought by "the Attorney General or an aggrieved person . . . under any statute to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment." 52 U.S.C. § 10302(a) (emphasis added); *see also id.* § 10302(b) (same), *id.* § 10302(c) (same). Under Section 2, private plaintiffs are "aggrieved person[s]" when their voting rights are

violated. *See Morse*, 517 U.S. at 233 (Congress' reference to "or an aggrieved person" in Section 3 was intended "to provide the same remedies to private parties as had formerly been available to the Attorney General alone."); *Roberts*, 883 F.2d at 621 (1989) (("In recognition of the Supreme Court's holding in *Allen*, Congress amended the Voting Rights Act in 1975 to reflect the standing of 'aggrieved persons' to enforce their right to vote."; *see also Ga. State Conf. of NAACP*, 2022 WL 18780945, at *6 ("The plain textual answer is that Section[] 3 . . . impl[ies] a private right to sue under whatever statute or statutes 'enforce the voting guarantees of the Fourteenth or Fifteenth Amendment'"). Section 3's text clearly creates a private right of action under Section 2, as Congress intended. *See supra*, at 17.

A Section 2 case is "a proceeding" brought under a statute "to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment." 52 U.S.C. § 10302(a). As the Supreme Court has explained, Section 3 provides private remedies for actions under "a statute" that, "by its terms," is "designed for enforcement of the guarantees of the Fourteenth and Fifteenth Amendments." *Morse*, 517 U.S. at 233–34 (emphasis added). Section 2 was adopted to enforce the Fifteenth Amendment. *Milligan II*, 599 U.S. at 41.

Save for one exception,[4] all other courts that have examined this issue have agreed that Section 3 provides remedies to private parties under Section 2. *See, e.g.*, *Ala. State Conf.*, 949 F. 3d at 652 ("The language of § 2 and § 3, read together, . . . explicitly provides remedies to private parties to address violations under the statute."); *Roberts*, 883 F. 2d at 621 n.6 (same); *Veasey v. Perry*, 29 F. Supp. 3d 896, 906 (S.D. Tex. 2014) (same); *Perry-Bey v. City of Norfolk, Va.*, 678 F. Supp. 2d 348, 362 (E.D. Va. 2009) (same).

Defendants' arguments—that Section 3 only applies to constitutional claims, or, alternatively, if it applies to the VRA, only to Section 5—is at odds with the statutory text, structure, and case law. *See* Defs.' Br. at 16–18. Section 3 clearly applies beyond constitutional claims. "[A]n action to enforce the protections of Section 2 is inevitably—at least in part—an action that 'enforce[s] the voting guarantees of the Fourteenth or Fifteenth Amendment' as contemplated in Section[]

[4] The exception is *Ark. State Conf. of NAACP v. Ark. Board of Apportionment*, 586 F. Supp. 3d 893 (E.D. Ark., Feb 17, 2022), currently pending a decision from the Eighth Circuit Court of Appeals. There, plaintiffs challenged Arkansas's state legislative house districts under Section 2 because Black voters are packed into 11 state house seats. *Id.* The Court—*sua sponte*—ordered the parties to "be prepared to discuss" the Section 2 private right-of-action question when no motion to dismiss was pending, and after the defendants filed a response to plaintiffs' preliminary injunction request. The district court offered defendants the opportunity to submit a sur-reply to argue Section 2 contains no private right of action, before dismissing the case in a ruling on the plaintiffs' request for preliminary relief. The case is an extreme outlier. In any event, Plaintiffs here litigate their Section 2 rights under § 1983 in the alternative, unlike those in *Arkansas*.

3." *Ga. State Conf. of NAACP*, 2022 WL 18780945 at *6 (quoting 52 U.S.C. §10302(a), (b), (c)). Sections 3(a) and 3(b) explicitly permit courts to provide a remedy where a direct constitutional violation is *not* shown. Section 3(b) permits a court to suspend the use of a test or device if it is used "for the purpose or with the effect of denying or abridging the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10302(b). And Section 3(a) authorizes courts to appoint observers to enforce Section 203 of the VRA. *See United States v. Sandoval Cnty.*, *N.M.*, 797 F. Supp. 2d 1249, 1256 (D.N.M. July 6, 2011). With respect to Section 3(c), the constitutional violation need not be the basis for granting Section 3(c) relief. *See Jeffers v. Clinton*, 740 F. Supp. 585, 587, 601 (E.D. Ark. 1990) (three-judge court) (ordering preclearance under Section 3(c) to remedy intentionally racially discriminatory majority-vote requirements in a Section 2 case first premised on a challenge to a discriminatory redistricting plan), *aff'd mem*. 111 U.S. 662 (1991).

And, again, even the dissenting justices in *Morse* acknowledged that "§ 3 explicitly recognizes that private individuals can sue under the [VRA]," including "suits under § 5, as well as any rights of action that we might recognize in the future." *Morse*, 517 U.S. at 289 (Thomas, J., dissenting).

b. Section 14(e) Provides Private Plaintiffs a Remedy for Violations of Section 2.

Section 14(e) provides a fee-shifting mechanism for prevailing Section 2 private plaintiffs, further supporting a private right of action under Section 2. Section

14 broadly authorizes "the prevailing party, other than the United States" to seek attorney's fees "[i]n any action or proceeding to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment." 52 U.S.C. § 10310(e). "Obviously, a private litigant is not the United States, and the Attorney General does not collect attorney's fees." *Morse*, 517 U.S. at 234. Section 14(e) offers attorney's fees "to enforce civil rights statutes, including the voting rights statutes." *Brooks v. Ga. State Bd. of Elections*, 997 F.2d 857, 860–61 (11th Cir. 1993); *see also Ga. State Conf. of NAACP*, 2022 WL 18780945, at *5. Section 2 is one of those statutes. *See, e.g.*, *Veasy v. Abbott*, 13 F.4th 362, 368 (5th Cir. 2021) (awarding attorney's fees to private plaintiffs in a § 2 case); *Dillard v. City of Greensboro*, 213 F.3d 1347, 1353 (11th Cir. 2000) (same).

Defendants argue that successful defendants against a VRA action might also be "prevailing parties," and that Section 14(e) need not necessarily confirm the availability of a private right of action under Section 2. But courts have held that Congress intended for fee-shifting to incentivize VRA enforcement by victims of discrimination. Section 12 seeks to "encourage private attorneys general to bring lawsuits vindicating individual voting rights." *Shelby Cnty., Ala. v. Holder*, 43 F. Supp. 3d 47, 67 (D.D.C. 2014) (collecting cases); *see also Shelby Cnty., Ala. v. Lynch*, 799 F.3d 1173, 1185 (D.C. Cir. 2015) (denying attorney's fees to prevailing defendants since "Congress intended for courts to award fees under the VRA . . .

when prevailing parties helped secure compliance with the statute"); *Howard v. Augusta-Richmond Cnty.*, 615 F. App'x 651 (11th Cir. 2015) (denying attorney's fees to a prevailing VRA defendant).

c. The Attorney General's Section 12 Authority Does not foreclose Private Plaintiffs Standing Under Section 2 of the VRA.

Defendants' Section 12 arguments also do not support dismissal. Section 12 describes remedies that only the Attorney General can seek, such as monetary fines and imprisonment. 52 U.S.C. § 10308. Defendants argue that Section 12 indicates that in passing the VRA, Congress did not make a remedy available to private plaintiffs. In support of their argument, Defendants cite *Sandoval* for the proposition that, "sometimes," an express "method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval*, 532 U.S. at 290. Section 12(a) and (c), concern criminal enforcement, which obviously cannot be enforced by private persons. However, the VRA plainly provides for civil enforcement as well. The availability of some remedies that private persons cannot obtain does not imply that private persons are precluded from securing the remedies that are available to them and to which they are legally entitled.

Defendants ignore that Congress and the Supreme Court have consistently accepted that the Attorney General's enforcement power under Section 12(d) is consistent with an implied private right of action under other VRA sections. When

the Supreme Court in *Morse* held that Section 10 of the VRA contained an implied private right of action, Section 12(d) explicitly gave the Attorney General the exact same enforcement power with respect to Section 10 violations as it does over Section 2. *See* 52 U.S.C. § 10308(d) (giving the Attorney General the same enforcement power over Section 2 (§ 10301) as it does Section 10 (§ 10306)). The same is true of *Allen*, which held that Section 5 contained an implied private right of action, despite Section 12(d)'s grant of enforcement power to the Attorney General. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 555 (1969); *see also* S. Rep. 97-417, at 30. Congress never amended the VRA to grant the Attorney General exclusive enforcement power over Sections 2, 5, or 10 following these decisions.

The Eleventh Circuit has also determined—in a case decided after *Sandoval*—that statutory provisions granting the Attorney General an express right to sue do not preclude finding an implied private right of action. *See Schwier v. Cox*, 340 F.3d 1284, 1296 (11th Cir. 2003) ("We conclude that neither § 1971's provision for enforcement by the Attorney General nor Congress's failure to provide for a private right of action expressly in § 1971 require the conclusion that Congress did not intend such a right to exist."); *see also Colon-Marrero v. Valez*, 813 F.3d 1, 21–22 (1st Cir. 2016) (private plaintiffs could bring suit even though the statute in question

expressly permits that "[t]he Attorney General may bring a civil action in federal court."). This is consistent with the Court's private right of action jurisprudence.[5]

Nor does Section 12(f) of the VRA suggest no private right of action exists under Section 2, when read in light of Section 12(e)'s references to the Attorney General's express right of action. ECF No. 92 at 14–15. Congress's grant of authority to the Attorney General does not foreclose private litigants' ability to litigate rights under Section 2. *See Schwier*, 340 F.3d at 1296 (citing *Morse*, 517 U.S. at 193) ("a private right of action had not been foreclosed even though the enforcement scheme of the Voting Rights provision at issue gave the Attorney General the right to sue for violations" as well.).

According to Defendants' view that courts lack jurisdiction to adjudicate Section 2 claims brought by private plaintiffs, all of the above-cited courts got it

[5] This is consistent with the Supreme Court's broader private right of action jurisprudence. The Supreme Court has acknowledged that Title IX itself contains an "express enforcement mechanism," *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009), which constitutes an "express provision of one method of enforcing a substantive rule," *Sandoval*, 532 U.S. at 290. Nevertheless, the Supreme Court—in *Sandoval* and afterward—has continued to hold that Title IX contains an implied private right of action despite this express enforcement mechanism. The Supreme Court has often stated that a provision for alternative relief does "not, by itself, preclude the availability of equitable relief." *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 328 (2015); *see also Blessing v. Freestone*, 520 U.S. 329, 347 (1997) (noting that private enforcement of a statute cannot be defeated simply by "[t]he availability of administrative mechanisms to protect the plaintiff's interests.") (internal quotation marks omitted).

wrong. But "there is no reason to ignore or refute the decades of Section 2 litigation in which courts (including the Supreme Court) have never denied a private plaintiff the ability to bring a Section 2 claim." *Alpha Phi Alpha Fraternity v. Raffensperger*, No. 1:21-cv-5337-SCJ (N.D. Ga. Jan. 28, 2022), ECF No. 65, Order Denying Defs.' Mot. to Dismiss at 34. Common sense demands otherwise.

D. Alternatively, Plaintiffs' Section 2 Claim Remains Viable Under Section 1983.

Plaintiffs also pled a cause of action to enforce their Section 2 rights under the VRA through § 1983 as a basis for jurisdiction. Compl., ¶ 9. "The attendant presumption is that § 1983 can play its textually prescribed role as a vehicle for enforcing [] rights, even alongside a detailed enforcement regime that also protects those interests, so long as § 1983 enforcement is not incompatible with Congress's handiwork." *See Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 188-89 (2023). Section 2 contains paradigmatic rights-creating language. *See supra* 24 (citing *LULAC*, 548 U.S. at 437). Accordingly, this "right is presumptively enforceable by § 1983." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002).[6] This

[6] Under the reasoning of every justice that heard *Talevski*, private parties can litigate Section 2 rights under § 1983. *See* 599 U.S. at 200 (Thomas, J., dissenting) ("[F]or the violation of a federal statutory provision to give rise to a cognizable § 1983 claim, the provision must confer 'rights, privileges, or immunities' that are 'secured by . . . la[w].' This Court's cases make clear that a right is secured by law in the relevant sense if [] federal law imposes a binding obligation on the defendant to respect a corresponding substantive right that belongs to the plaintiff."). *Id.* at 230 (Alito, J., dissenting) (same). Plaintiffs here are "citizen[s] of the United States,"

presumption can be rebutted only in "exceptional cases," *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994)—not a textbook Section 2 action like this one.

Enforcing Section 2 rights under § 1983 is not a novel concept. "Section 2 contain[s] clear rights-creating language—a legal position thus far unquestioned by any members of the Supreme Court[,]" and thus is enforceable under § 1983. *See Coca v. City of Dodge City*, No. 6:22-cv-01274-EFM-RES, 2023 WL 2987708, at *6 (D. Kan. Apr. 18, 2023); *Turtle Mountain Band of Chippewa Indians v. Jaeger*, No. 3:22-CV-22, 2022 WL 2528256, at *5 (D.N.D. July 7, 2022).

In *Schwier*, for example, the Eleventh Circuit reiterated that "Section 1983 provides a private right of action whenever an individual has been deprived of any constitutional or statutory federal right under color of state law." 340 F.3d at 1290. That mandate applies with force when the federal statutory right arose under the VRA: "we hold that the provisions of section 1971 of the Voting Rights Act may be enforced by a private right of action under § 1983." *Id.* at 1297. Section 2 and section 1971 share analogous "right-or-duty-creating language," evidencing *Schwier*'s application of equal force here. *Id.* at 1291; *compare* 52 U.S.C. § 10101(a)(2) ("No person acting under color of law shall … deny the right of any individual to vote . .

who Section 2 affords protection from States' "denial or abridgment" of their right to "vote on account of race or color." 52 U.S.C. § 10301(a). It is federal law that Section 2 creates individual rights for citizens, and those rights can be protected through legal actions brought under § 1983 in addition to the VRA.

. ") *with* 52 U.S.C. § 10301(a) ("No voting qualification . . . shall be imposed or applied . . . in a manner which results in a denial or abridgment of the right of any citizen . . . to vote"). Section 1983 accordingly serves as an alternative pathway for private litigants to bring their Section 2 claims.

IV. PLAINTIFFS PLEAD SUFFICIENT FACTS TO SUPPORT THEIR RACIAL GERRYMANDERING CLAIMS.

The factual allegations supporting Plaintiffs' racial gerrymandering claims are more than sufficient to set forth a claim, and withstand a motion to dismiss. Plaintiffs need not and do not allege intentional discrimination, nor are they required to prove discriminatory intent to prevail on their racial gerrymandering claims. Defendants attempt to hold Plaintiffs to a standard higher than what is needed to overcome a 12(b)(6) motion to dismiss. These arguments should be promptly rejected.

A. Defendants raise challenges that are inappropriate at the motion to dismiss stage.

Defendants improperly elevate the motion to dismiss standard. Defendants argue that Plaintiffs cannot "carry" their "burden of proof," pointing to the "demanding" standard that racial gerrymandering claims face. Defs.' Br. at 28. Yet, to survive a motion to dismiss, the facts alleged by the plaintiffs need simply "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). That standard "does not impose a probability requirement at the pleading stage; it simply calls for

enough fact to raise a reasonable expectation that discovery will reveal evidence of [the claim]." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Plaintiffs have no "burden of proof" at the pleading stage.

Defendants' arguments relating to the weight of particular evidence, such as the proper weight afforded to statements of individual legislators, are questions for the fact finder at trial, not issues to be resolved at the pleading stage. *See Cromartie*, 526 U.S. at 553 ("Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence"). Plaintiffs have stated a plausible claim for relief, and that is all that is required at this stage of the litigation.

B. Racial gerrymandering claims do not require a showing of intentional vote dilution or racial animus.

To prove racial gerrymandering, Plaintiffs must show that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 187 (2017) (citation omitted). Such predomination is shown when "the legislature subordinate[s] traditional race-neutral districting principles to racial considerations." *Id.* Those principles include: compactness; respect for political boundaries, *e.g.*, not splitting counties; and respect for communities of interest. And "race may predominate even when a reapportionment plan respects traditional principles." *Id.* at 189. To meet their burden, plaintiffs may rely on "'direct evidence' of legislative intent, 'circumstantial evidence of a district's

shape and demographics,' or a mix of both." *Cooper v. Harris*, 581 U.S. 285, 291 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (2017)). "Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny. The burden thus shifts to the State to prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Id.* at 292.

Unlike in intentional vote dilution claims, Plaintiffs are not required to prove "the State has enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities." *Miller*, 515 U.S. at 911 (citation and internal quotation marks omitted); *see, e.g.*, *Cooper*, 581 U.S. at 291; *Bethune-Hill*, 580 U.S. at 187; *Ala. Legis. Black Caucus v. Alabama ("ALBC I")*, 575 U.S. 254 (2015). Rather, racial gerrymandering claims are "analytically distinct" from intentional vote dilution claims. *Miller*, 515 U.S. at 911.

Intentional vote dilution and racial gerrymandering claims are distinct violations of the Fourteenth Amendment's Equal Protection Clause that pose two different harms and have two different remedies. Intentional vote dilution occurs where a "purposeful device to minimize[s] or cancel[s] out the voting potential of racial or ethnic minorities," resulting in the "disadvantaging" of racial minority voters. *Miller*, 515 U.S. at 911. The remedy in such cases is the creation of new majority-minority or opportunity districts that increase minority voters' ability to

elect candidates of their choice. *Rogers v. Lodge*, 458 U. S. 613, 616–17 (1982); *White v. Regester*, 412 U.S. 755, 769 (1973). On the other hand, the harms of racial gerrymandering "include being 'personally . . . subjected to [a] racial classification.'" *ALBC I*, 575 U.S. at 263 (quoting *Bush v. Vera*, 517 U.S. 952, 957 (1996)). And the remedy is redistricting without the elicit use of race, even if such non-racial redistricting does not result in the creation of new majority-minority or opportunity districts for minority voters. *See Abrams v. Johnson*, 521 U.S. 74, 93–94 (1997) (reducing the Black population in certain districts to remedy racial gerrymandering concerns while ensuring that the remedy does not violate the VRA).

Defendants ignore *ALBC II*, 231 F. Supp. 3d 1026, in which the Court found race predominated in the design of fourteen Alabama state legislative districts.[7] The Court cited no evidence of intentional vote dilution in finding that plaintiffs made a showing of race predominance. *See id.*; *see also Cooper*, 581 U.S. 285; *North Carolina v. Covington*, 581 U.S. 1015 (2017). And the Supreme Court has vacated and remanded district court opinions dismissing racial gerrymandering claims, without instructions that plaintiffs must proffer evidence that a legislature

[7] The *ALBC II* Court found that two of these fourteen districts survived strict scrutiny, as the Legislature "had a strong basis in evidence" to believe that those districts' Black population percentages were required to comply with the VRA. *See* 231 F. Supp. 3d at 1106, 1241–44.

intentionally sought to minimize minority voting strength. *See, e.g.*, *Bethune-Hill*, 580 U.S. 178 (2017); *ALBC I*, 575 U.S. 254 (2015).

Defendants' apparent preference to contest an intentional vote dilution claim, rather than the racial gerrymandering claim that Plaintiffs assert, is also evident in the inapposite cases Defendants cite. Defendants improperly confuse racial gerrymandering jurisprudence by quoting *League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905 (11th Cir. 2023), a case in which plaintiffs challenged voting restrictions and did not bring a racial gerrymandering claim. In *League of Women Voters*, the court's analysis of plaintiffs' claims has no applicability to the Plaintiffs' racial gerrymandering claims in this case. The reasoning in *Simpson v. Hutchinson* is similarly inapplicable. 636 F. Supp. 3d 951 (E.D. Ark. 2022) (three-judge court). The other cases Defendants cite also do not involve claims of racial gerrymandering. *See* Defs.' Br. at 24–25 (citing cases involving intentional attempts to exclude women or minority groups from housing, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), jobs, *Washington v. Davis*, 426 U.S. 229 (1976) and *Personnel Admin'r of Mass. v. Feeney*, 442 U.S. 256 (1979), and access to the ballot, *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299 (11th Cir. 2021)).

C. Plaintiffs plead facts which, if taken as true, are sufficient to assert their racial gerrymandering claims.

Plaintiffs' Third Amended Complaint contains ample factual allegations of statistically non-compact and irregularly shaped districts, split counties and communities of interest causing racial disparities, analyses of boundary line decisions at the precinct level and their racial impacts, as well as RPV analysis and legislative process defects. Compl. ¶¶ 25–115. Defendants misunderstand Plaintiffs' criticism of the Legislature's failure to conduct a racially polarized voting study. If Plaintiffs demonstrate that race predominated in the design of the challenged districts, Defendants will carry the burden of proving that the Legislature's race-based sorting of voters is "narrowly tailored" to serve a "compelling interest." *See supra*, at 36–37 (citing *Cooper*, 581 U.S. at 291). Compliance with the VRA is a compelling interest. *Clark v. Putnam Cty.*, 293 F. 3d 1261, 1273 (11th Cir. 2002); *see also Milligan II*, 599 U.S. at 41. "[T]o meet the 'narrow tailoring' requirement," Defendants must prove the Legislature "had 'a strong basis in evidence' for concluding that the [VRA] required its action." *Id.* at 292 (quoting *ALBC I*, 575 U.S. at 278). This requires a "functional analysis of the electoral behavior within the particular election district." *Bethune-Hill*, 580 U.S. at 194 (citation omitted) (cleaned up). Where courts "have accepted a State's 'good reasons' for using race in drawing district lines, the State made a strong showing of a pre-enactment analysis with justifiable conclusions"—an "actual 'legislative inquiry' that would establish the

need for its manipulation of the racial makeup of the district." *Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018). By the Legislature's own admission, it did not do this.

Plaintiffs allege that these tactics "packed" and "cracked" voters along clear racial lines and were not justified by a narrowly tailored, compelling governmental interest.[8] These allegations are more than sufficient to state a plausible claim for relief. *See, e.g.*, *ALBC II*, 231 F. Supp. 3d 1026. Plaintiffs have sufficiently pleaded that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district" in each of the challenged districts. *Bethune-Hill*, 580 U.S. at 187.

Defendants assert in a conclusory manner that "the allegations about the shape and other characteristics of the challenged districts fall well short of shouldering Plaintiffs' heavy burden to show an equal protection violation." Defs.' Br. at 30. But plaintiffs may rely on "'direct evidence' of legislative intent, 'circumstantial evidence of a district's shape and demographics,' or a mix of both." *Cooper*, 581 U.S. at 291 (quoting *Miller*, 515 U.S. at 916). Certainly, Plaintiffs' robust factual allegations containing "circumstantial evidence of [the challenged districts']

[8] For example, Plaintiffs have adequately pled that "the lines [of Senate District 7] themselves indicate that race is the reason for the unusual shape of District 7 above and beyond any other factors," cracking the Black community in Huntsville, in an unnaturally surgical manner, into three districts, which deviates from the Legislature's stated redistricting principles governing SB1. Compl. ¶¶ 84–87. Defendants do not single out any of the allegations about Senate District 7 in their instant Motion.

shape[s] and demographics" are more than sufficient at the motion to dismiss stage. *Cooper*, 581 U.S. at 291.

Defendants do not specifically contest the vast majority of the particularized factual allegations in Plaintiffs' Third Amended Complaint. Where they do challenge one of Plaintiffs' specific factual allegations—relating to Plaintiffs' challenged districts in the Montgomery area, Senate Districts 25 and 26—Defendants single out Plaintiffs' characterization of District 25's irregular shape including a "pronounced divot," arguing that a "pronounced divot," on its own, cannot substantiate the intentional racial discrimination claim that Defendants mistakenly believe Plaintiffs allege.[9] In doing so, Defendants conveniently ignore Plaintiffs' allegations that the non-compact "pronounced divot" has a racial impact as it "reach[es] in to capture white communities," that Senate District 25 is "one of the least compact in the State," that Districts 25 and 26 split Montgomery with "all but a few" majority white precincts included in District 25 and "all but two" of Montgomery's majority-Black precincts included in District 26, and that "the districts work together to pack Black voters into District 26 and draw white voters

[9] Defendants quote, partially, a footnote from *McCleskey v. Kemp*, 481 U.S. 279 (1987), an inapposite intentional racial discrimination case. Defs.' Br. at 30 (quoting *id.* at 294 n.12). The Court's assessment of the evidence of racial disparities in Georgia death penalty sentencing required to prove intentional death penalty discrimination has no applicability here. Defendants misapply intentional racial discrimination case law to a racial gerrymandering claim.

into neighboring District 25." Compl. ¶¶ 89–91. These factual allegations are more than sufficient to allege Plaintiffs' racial gerrymandering claims.

V. LEGISLATIVE DEFENDANTS ARE PROPER PARTIES.

A. Legislative Defendants Waived Their Legislative Immunity.

Legislative Defendants separately seek absolute immunity from suit, nearly two years into litigation, and move to dismiss on those grounds. Legislative immunity aims to prevent the harassment of legislators from the worries and distraction associated with litigation. *Scott v. Taylor*, 405 F.3d 1251, 1256 (11th Cir. 2005). But where the legislators actively participate in the litigation, as Legislative Defendants have here, that immunity is waived. *Singleton v. Merrill*, 576 F. Supp. 3d 931, 941–42 (N.D. Ala. Dec. 16, 2021) ("the Legislators' extensive litigation conduct . . . worked the waiver").

Legislative Defendants explicitly waived any privilege in these proceedings. During the Parties' May 20, 2022, hearing before the Court, the Chairs' counsel—while noting that some legislators may assert legislative immunity—explicitly acknowledged that "the [Reapportionment Committee] chairs have ***obviously*** waived their immunity." Exhibit A, May 20, 2022 Hearing, Tr. 18:1-1 (emphasis added). The Chairs have affirmatively and actively sought to defend the legislation

throughout this litigation.[10] They cannot *both* seek to defend the legislation *and* claim immunity.

"[F]ederal jurisprudence reflects no doubt" that "legislative immunity can be waived in a civil action." *Singleton*, 576 F. Supp. 3d at 939 (collecting cases). As in *Singleton*, the Chairs "identif[y] no authorities establishing or suggesting that legislative immunity cannot be waived in a civil action." *Id.* at 940. Further, "the party holding a privilege can, in general, waive its privilege implicitly through litigation conduct in a civil case." *Id.* at 939–40. Applied here, the Chairs cannot substantively participate in the case for years and later raise legislative immunity as a shield; to do so would be "to turn what [is] the shield of legislative immunity into a sword." *Id.* at 940 (citing *Powell v. Ridge*, 247 F.3d 520, 525 (3d Cir. 2001)).

In *Singleton*, the Committee Chairs[11] likewise attempted to assert legislative immunity. 576 F. Supp. 3d at 934. The court rejected their argument, finding that the Chairs' "extensive litigation conduct" effectively waived their privilege.[12] *See*

[10] *See, e.g.*, ECF No. 45, Defendants' Opposition to Plaintiffs' Motion for Recusal; ECF No. 53, Senator Jim McClendon and Representative Chris Pringle's Answer to Plaintiffs' Complaint; ECF No. 73, Defendants' Response to Plaintiffs' Motion to Modify Stay.

[11] Senator Steve Livingston succeeded Senator Jim McClendon as the Senate Chair of the Alabama Permanent Legislative Committee on Reapportionment.

[12] In *Singleton*, legislative defendants affirmatively intervened in the action. 576 F. Supp. 3d at 934. But whether legislators intervene or not does not determine whether the privilege is waived. Instead, legislators can waive their privilege "implicitly through litigation conduct in a civil case" as Defendant Legislators have done here. *Id.* at 939–40.

id. at 941. In support of this finding, the court cited, in part, the legislators' answering of the complaint and their active participation in pre-hearing motion practice, "without giving the slightest indication that they were participating in the litigation for the limited purpose of asserting legislative immunity." *Id.*

The present situation is similar. The Chairs have willingly and actively engaged in the litigation. For instance, the Chairs filed their own Answer to Plaintiffs' original Complaint, ECF No. 53, joined Defendants' Opposition to Plaintiffs' Motion for Recusal, ECF No. 45, and Defendants' Response to Plaintiffs' Motion to Modify Stay, ECF No. 73. And, as in *Singleton*, at no point did the Chairs give the "slightest indication that they were participating in the litigation for the limited purpose of asserting legislative immunity." *Singleton*, 576 F. Supp. 3d at 941. To the contrary, during the May 20, 2022 hearing concerning Plaintiffs' Motion to Modify the Stay, after the Chairs engaged substantively on the merits of the motion the Court raised the question of legislative immunity, resulting in the following exchange:

> JUDGE MANASCO: I have one question and that is, do you foresee that there will be legislative immunity issues that we have to deal with? It sounds like maybe some discussion between the parties to that effect.
>
> MR. WALKER: I can tell you that some of the legislators have told me that they will assert immunity. So, yes, ma'am, there will be. ***Now, the chairs have obviously waived their immunity.*** But the testimony of some individual -- yeah, there will be privileges.

Exhibit A, May 20, 2022 Hearing, Tr. 17:1-25 (emphasis added).

The Legislators now seek to enforce the immunity they previously stated was "obviously waived." However, like any other privilege, once an individual's immunity is waived, the Chairs "may not unring the bell." *See In re Sims*, 534 F.3d 117, 126 (2d Cir. 2008) (discussing waiver of psychotherapist-patient privilege). Accordingly, the Chairs' motion to dismiss on legislative immunity grounds should be denied.

B. Legislative Defendants Play a Role in Redressing Plaintiffs' Injuries, Making them Proper Defendants.

Far from being "powerless to remedy the plaintiffs' alleged injury," the Chairs head the very Committee assigned responsibility for overseeing the redistricting process, which, in 2021, resulted in the enactment of SB1 and HB2—the source of Plaintiffs' injuries. In this capacity, the Chairs are uniquely positioned to provide critical relief sought by Plaintiffs, the "adopt[ion] and enact[ment] [of] constitutional and VRA-compliant districting plans for State House and State Senate that remedy the unconstitutional gerrymanders and Voting Rights Act violations." Compl., Prayer for Relief (D)), ECF No. 83, at 53. Because Plaintiffs' have properly alleged (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision, the Chairs' motion to dismiss for lack of Article III standing should be denied. *See Jacobson v. Fla.*

Sec'y of State, 974 F.3d 1236, 1245 (11th Cir. 2020) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (cleaned up).

First, unlike the cases Defendants rely upon, here, Plaintiffs' injuries are directly traceable to the Chairs' conduct in constructing and adopting the State House and Senate districts that violate Plaintiffs' rights under the Constitution and the VRA. *Contra Doe v. Pryor*, 344 F.3d 1282, 1285 (11th Cir. 2003) (finding injury not traceable where Attorney General conceded that the challenged statute was unconstitutional and refused to enforce statute against plaintiffs); *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1299 (11th Cir. 2019) (finding injury not traceable where challenged statute "doesn't require (or even contemplate) 'enforcement' by anyone, let alone the Attorney General.").

The Alabama Legislature created the Committee to "prepare for and develop a reapportionment plan for the [State of Alabama]." Ala. Code §§ 29-2-50 to 29-2-52. The Committee engages in activities necessary for the "preparation and formulation of a reapportionment plan" and the "readjustment or alteration of the Senate and House districts and of congressional districts of the [S]tate [of Alabama]." *Id.* § 29-2-52(c). The Committee is authorized "to do and perform any acts that may be necessary, desirable, or proper to carry out the purposes and objectives" for which it was created, including "request[ing] and receiv[ing] from any court . . . of the state . . . such assistance . . . as will enable it to properly carry

out its powers and duties ….” *Id.* § 29-2-52(e) and (h). The Chairs possess the unique authority to “prepare for and develop a reapportionment plan for the [State of Alabama],” which they exercised in developing SB1 and HB2. *Id.* § 29-2-52(c). Their failures to comply with their obligations under the VRA and Constitution while exercising this authority directly caused Plaintiffs’ asserted injuries.

Second, the Chairs’ assertion that they are “powerless to remedy” Plaintiffs’ injury stands in stark contrast to their asserted position less than two years ago in their motion to intervene in *Caster v. Allen*, 2:21-CV-1536-AMM (N.D. Ala. Dec. 20, 2021), ECF No. 60. In *Caster*, the Chairs argued strenuously that they *should* be allowed to intervene in a congressional redistricting challenge due to their distinctive role in the redistricting process. *Id.* at 4. They argued that “Alabama has exclusive responsibility for redistricting its Congressional districts” and “[w]ithin Alabama government, this responsibility is the exclusive responsibility of the Legislature.” *Id.* The Legislature, in turn, “delegated to the Reapportionment Committee responsibility for preparing new Congressional Districts,” and “[a]s Chairs of the Reapportionment Committee, the Committee Chairs oversee operation of the Legislature’s Reapportionment Office.” *Id.* at 2–4. Thus, the plaintiffs’ attempt to challenge the constitutionality of the congressional districts without naming the Chairs as defendants, amounted to an attempt “to wrest from the Legislature exclusive authorship of the State’s congressional districts.” *Id.* at 5. Further, the

Chairs argued that the Secretary of State could not adequately represent the Chairmen's interest because, as a member of the Executive branch, "[h]e has no authority to conduct redistricting, and consequently has no experience in redistricting." *Id.*

The Chairs concluded, "'[t]he manner in which a state legislature is districted and apportioned is primarily the duty and responsibility of the State,' and within the state, it 'is primarily a matter for legislative consideration and determination.'" *Caster v. Allen*, 2:21-CV-1536-AMM, ECF No. 60 at 6 (citing *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Connor v. Finch*, 431 U.S. 407, 414 (1977)). When intervening in *ALBC*, the Chairs position was unequivocal; "the Alabama Legislature, and its individual members, have 'a judicially cognizable interest in matters affecting its composition' and have a justiciable, institutional interest in ensuring that the congressional districts in Alabama are composed in a constitutionally lawful manner." *Id.* at 6–7 (citing *United States House of Representatives v. United States Department of Commerce*, 11 F. Supp. 2d 76, 86–87 (D.C. 1998) (three-judge court)). That court not only granted the Chairs' motion, but more recently, in an order denying defendants' emergency motion for stay pending appeal in a related case, the court reiterated that "[i]t is the Legislature's task to draw districts; the Secretary simply administers elections," citing to the

Chairs' motion to intervene. *Milligan v. Allen*, 2:21-cv-1530-AMM (N.D. Ala. Sept. 11, 2023), ECF No. 289 at 23.

The Supreme Court has also acknowledged the Legislature's unique interest within the election context. In *Berger v. N.C. State Conf. of the NAACP*, the Supreme Court reversed the lower court's denial of the North Carolina legislature's motion to intervene in a lawsuit involving a challenge to the constitutionality of a North Carolina election law. 142 S. Ct. 2191 (2022). The Court concluded that "[t]he legislative leaders seek to give voice to a different perspective," than the state's executive branch. *Id.* at 2205. And, unlike the executive branch, "[t]heir 'primary objective' is not clarifying which law applies," but instead, they can "focus on defending the law vigorously on the merits without an eye to crosscutting administrative concerns." *Id.* Thus, because "branches of government may seek to vindicate different and valuable state interests," the Court found the legislature was entitled to intervene. *Id.*

This decision also strongly suggests that the Chairs' reliance on *Chestnut v. Merrill* is misplaced. In *Chestnut*, then Chairman McClendon affirmatively argued "that his assistance would be necessary should the court order the state to redraw its congressional districts." *Chestnut*, No. 2:18-cv-907-KOB, 2018 WL 9439672, at *1 (N.D. Ala. Oct. 16, 2018). The court's decision to deny intervention rested on findings that while the Chair may impact a potential remedy, that the necessity of

future remedial processes were highly speculative, and that legislators' other interests were already adequately represented by Defendants. ECF No. 93 at 8 (citing *Chestnut*, 2018 WL 9439672, at *1).

Here, in contrast, the question before the court is whether a "judgment on the [Chairs]" granting Plaintiffs' requested relief by requiring the enactment of constitutional and VRA-compliant districting plans for State House and State Senate, "redresses the plaintiff's injury, whether directly or indirectly." *Lewis*, 944 F.3d at 1301. Under the Chairs' prior consistently held position, the answer is undoubtedly yes. *See Caster*, 2:21-CV-1536-AMM, ECF No. 60 at 4; *Chestnut*, 2018 WL 9439672, at *1. Thus, the Chairs' motion to dismiss for lack of standing should be denied.

CONCLUSION

For the reasons discussed above, Defendants' Motions to Dismiss should be denied.

DATED this 25th day of September 2023.

/s/ Alison Mollman
Alison Mollman (ASB-8397-A33C)
AMERICAN CIVIL LIBERTIES UNION OF ALABAMA
P.O. Box 6179
Montgomery, AL 36106-0179
510-909-8908
amollman@aclualabama.org

/s/ Deuel Ross
Deuel Ross*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th Street N.W. Ste. 600
Washington, DC 20005
(202) 682-1300
dross@naacpldf.org

Leah Aden*
Stuart Naifeh*
Kathryn Sadasivan (ASB-517-E48T)
Brittany Carter*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
laden@naacpldf.org
snaifeh@naacpldf.org
ksadasivan@naacpldf.org

David Dunn*
HOGAN LOVELLS LLP
390 Madison Avenue
New York, NY 10017
(212) 918-3000

Respectfully submitted,

/s/ Davin M. Rosborough
Davin M. Rosborough*
Julie A. Ebenstein*
Dayton Campbell-Harris*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, NY 10004
(212) 549-2500
drosborough@aclu.org
jebenstein@aclu.org
dcampbell-harris@aclu.org

/s/ Sidney Jackson
Sidney Jackson (ASB-1462-K40W)
Nicki Lawsen (ASB-2602-C00K)
WIGGINS, CHILDS, PANTAZIS, FISHER, & GOLDFARB
301 19th Street
North Birmingham, AL 35203
(205) 314-0500
sjackson@wigginschilds.com
nlawsen@wigginschilds.com

/s/ Jack Genberg
Jack Genberg*
Jess Unger*
SOUTHERN POVERTY LAW CENTER
PO Box 1287
Decatur, GA 30031
(404) 521-6700
jack.genberg@splcenter.org
junger@splc.org

Jessica L. Ellsworth*
Shelita M. Stewart*
HOGAN LOVELLS LLP

david.dunn@hoganlovells.com

Blayne R. Thompson*
HOGAN LOVELLS US LLP
609 Main St., Suite 4200
Houston, TX 77002
(713) 632-1400
blayne.thompson@hoganlovells.com

555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
jessica.ellsworth@hoganlovells.com
shelita.stewart@hoganlovells.com

Michael Turrill*
Harmony R. Gbe*
HOGAN LOVELLS US LLP
1999 Avenue of the Stars
Suite 1400
Los Angeles, CA 90067
(310) 785-4600
michael.turrill@hoganlovells.com
harmony.gbe@hoganlovells.com

Attorneys for Plaintiffs

Anthony Ashton*
Anna-Kathryn Barnes*
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP)
4805 Mount Hope Drive
Baltimore, MD 21215
(410) 580-5777
aashton@naacpnet.org
abarnes@naacpnet.org

Attorneys for Plaintiff Alabama State Conference of the NAACP

*Admitted *pro hac vice*

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N.D. OF ALABAMA

Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES THOMAS, et al., Plaintiff,

vs.

JOHN MERRILL, et al., Defendants.

2:21-cv-1531-AMM

May 20, 2022

Birmingham, Alabama

1:00 p.m.

* *

REPORTER'S OFFICIAL TRANSCRIPT OF
STATUS CONFERENCE

HONORABLE ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE

HONORABLE COREY L. MAZE
UNITED STATES DISTRICT JUDGE

HONORABLE KEVIN C. NEWSOM
UNITED STATES CIRCUIT JUDGE

COURT REPORTER:
Teresa Roberson, RMR
Federal Official Court Reporter
1729 Fifth Avenue North, Ste. 200
Birmingham, Alabama 35203

* * * * *

A P P E A R A N C E S

* * * * *

FOR THE PLAINTIFFS:

Blayne R. Thompson

Davin Rosborough

Jack Genberg

Shelita Stewart

Sidney Monroe Jackson

FOR THE DEFENDANTS:

Andrew Harris

Brenton Merrill Smith

James W. Davis

Jordan Dorman Walker

* * * * *

P R O C E E D I N G S

* * * * *

JUDGE MANASCO: Good afternoon. All right. Well, thanks for joining us here today. It's quite nice to see everybody in person, instead of on Zoom.

So, as you know, we are here on a motion of the plaintiff following a series of events in the case that culminated in sua sponte stay order from the court. The Second Amended Complaint was filed on February 25th. It asserts, as I understand it, racial gerrymandering and claims under Section 2 of the Voting Rights Act.

The Motion to Dismiss filed on March 11th, we hold that in abeyance. And then the next day, got a report from the parties, we appreciate your willingness to collaborate and work together to that end. We then stayed the case on March the 21st. And on the 28th, we received the Plaintiff's Motion for the Status Conference, which I think still shows is unruled on on the docket sheet, we're all here, so we'll get that taken care of.

We will hear from the plaintiff first. I can say and speak on our behalf, we have read the motion, you don't have to summarize it for us. If there is anything that you want to call to our attention or emphasize, we would love to hear it.

MR. ROSBOROUGH: Your Honor, we asked for the status conference to discuss the stay order and ask the court to reconsider for a couple of primary reasons.

First, we believe the appeal in Milligan does not provide a basis to stay this case, at least in its entirety. The issue before the Supreme Court in Milligan concerns standard under Section 2 of the VRA, specifically whether Alabama congressional districts violate Section 2 of the VRA. That standard does not have a bearing on the racial gerrymandering standard which are the focus of the claims in this case concerning thirty-two state legislative districts.

Milligan is the only case in the current redistricting cycle, which is the case before the Supreme Court, of course, which has been stayed out of at least twenty-six other cases in federal court that bring either VRA and/or racial gerrymandering claims, and the other two courts that have addressed stay motions by the plaintiffs involved redistricting claims in Louisiana and in Texas, both denied those attempts to stay, with the Texas case heading to trial this fall.

Second, a continuing stay here will severely prejudice the plaintiffs and will likely deprive the plaintiffs of any chance for relief until 2026.

Both sides agree that there is a lot of discovery to be done in this case. Racial gerrymandering claims are

district-specific claims.

The defendants, in their part of the submission, asked for the ability to conduct up to fifty depositions in the case. There will likely be discovery involving state legislators which may involve privilege claims that need to be adjudicated by the court.

And the racial gerrymandering claims in this case focus on events that have entirely already happened, they happened last year, events regarding the legislative process, the shape and demographics of the districts drawn and the motivation of the legislators.

And whatever happens in the Supreme Court won't change those facts, it won't change the import of those facts. And if we're looking at the proposition of starting depositions, for example, not until 2023, we're going to be looking at information that's about two years stale by that point. You know, memories fade over time.

So we believe it's important to start soon both because of the quantity and the importance of time here.

And the reason, you know, we're looking for this to be moving and we need to be before 2026 is that where courts have found districts either unconstitutional or in violation of the Voting Rights Act and regularly scheduled elections are in the distant future, courts, at least over a dozen times, have consistently ordered special elections.

Now, if we were to, you know, initially we were looking for a trial this fall, that's obviously off the table at this point, given the status of things, but we believe that a trial which was proposed by the State in the summer of 2023 is very reasonable. It will allow over a full year for discovery, and we will have a decision from the Milligan court at that point as well.

The State in Milligan has asserted that any relief that comes after late or, sorry, after early October 2023 will be too late to implement for the 2024 cycles.

And we believe here, while there may be some other wiggle room in terms of candidate filing deadlines, if it were to be special elections here, it would make the most sense to align them with the primaries and general election occurring in 2024, and because of that, we're really in a position where, if we're not in a point to go to trial by the point that the defendant said was acceptable, summer or at least by September of 2023, we're going to be in a position where it's very difficult to get relief until 2026, even if the court finds that some of these districts in 2023 are unconstitutional.

I'm happy to address any of those issues in greater depth or anything else the court wants to hear, or answer any questions at this point.

JUDGE MAZE: You said that the Supreme Court's

decision won't change the facts. But would it change the questions that you asked? Depending on what they say, do you not see yourself needing to ask different questions of the same witnesses?

MR. ROSBOROUGH: Your Honor, I think for purposes of the racial gerrymandering claims, I don't see that occurring.

As recently as the Wisconsin decision, the Supreme Court has reaffirmed that the racial gerrymandering standard asks, number one, whether race was a predominant factor in drawing the lines of a particular district; and two, if so, whether the State had good reason to use race as a predominant factor such as a compelling interest in drafting a plan in a narrowly tailored way to comply with the VRA.

I think the questions and the facts about what occurred may not change.

Now, it may change how we present the evidence to the court, which is why we're not asking for a trial at this point until after we'll have a decision in Milligan, but we don't believe it will change any of the actual discovery that we need to take about the events that have occurred, the motivations of the legislature.

JUDGE MAZE: Would there be any witnesses or a slate of witnesses that you would be willing to say, if we depose them now, that we are willing to waive any future

depositions of those witnesses, regardless of what the Supreme Court says?

MR. ROSBOROUGH: Your Honor, any fact witnesses, we would be willing to take that position, and any expert witnesses that are solely put up for purposes of supporting the racial gerrymandering claims.

The only category of witnesses where I could see either leaving open the option for supplementation of discovery or just postponing any expert witnesses, that solely goes to the VRA claim, which just focuses on a single State Senate district in the Montgomery area.

JUDGE MANASCO: In Milligan, there is expert testimony that was adduced in support of the constitutional claim that is being used against the Section 2 claim.

So I will ask you the same question I asked at a similar conference in Milligan which is, if we were to do those depositions now, how does the lawyer taking the deposition, the witness being deposed, and the lawyer defending the deposition understand the significance of the testimony and calculate the risks of certain questions and answers such that the deposition to be effective?

MR. ROSBOROUGH: Yes, Your Honor. I think, honestly, any risk there would really be on the side of the plaintiffs, and I think that's a risk we're willing to take.

The State has now filed their brief in the Supreme

Court in Milligan, so we know exactly what their legal positions are. The Supreme Court has set out the question that it's looking to hear. So I think we have a good idea of the range of possibilities that could occur and are willing to, you know, run the risk of putting up witnesses that the State very well -- regardless of what we know or don't know, the State is obviously going to do its best to defend the case and that may involve using evidence from one claim against the other one. And I think we're willing -- any risk there for us is outweighed by the harm in not proceeding at all until some time as late as June of next year in the case.

JUDGE MANASCO: Next question: How does the request to proceed with a trial or proceed with at least readiness for a trial of the constitutional claims in advance of a fully developed record on the Section 2 claims -- I mean, isn't that sort of the reverse order? Isn't the idea that if we develop those records and there's an opportunity to decide a case on statutory grounds rather than constitutional grounds that we should take it?

MR. ROSBOROUGH: Yes, that's a great question, Your Honor. I would say two things in response.

First of all, other than two State Senate districts in Montgomery, the VRA claim should have no affect on our thirty other district challenges of racial

gerrymandering. So it would be a very narrow -- it would be dealing with State Senate District 25 and 26.

Second, as the State is now arguing in the Supreme Court, any sort of, under the State's own position, the court would actually be creating greater constitutional avoidance by adjudicating the racial gerrymandering first. Under their position, under any sort of race-conscious districting, which the VRA require, raises constitutional questions.

Whereas the racial gerrymandering standard is very well laid out and consistent by the Supreme Court.

So, based on the State's own arguments, we believe that pursuing the -- either pursuing the constitutional claims fully without the VRA and either potentially holding those in abeyance presents a reasonable remedy.

Alternatively, given the narrow scope of the VRA claim and the fact that it would be just, for the most part, expert testimony that would be affected on the VRA claim by the factors in whatever the court comes up with in Milligan, that we could potentially sequence expert reports on the VRA claim with still plenty of time to hold a trial by September of 2023. And we think either of those are workable options.

JUDGE MANASCO: Any other questions? Okay. Mr. Davis.

MR. ROSBOROUGH: Thank you very much, Your Honor.

MR. DAVIS: Thank you, Judge. Jim Davis for Secretary Merrill.

And I will start, but I will invite Mr. Walker to pitch in for any other views for his clients.

We think it makes more sense to wait and to hear what the Supreme Court says about the contours of the Section 2 claim and, in doing so, we think they'll necessarily or at least they're quite likely to address Equal Protection Claim.

One of our defenses in court right now is that -- the reason we disagreed with the court's remedy in Milligan was that, in our view, that would have required the State to engage in race-conscious decisions.

We thought plaintiff's proposed remedy required them to divide voters by race.

So we think, and at least one judge, one justice said, they are likely to address whether the plaintiff's remedy was required by Section 2 or, in the alternative, prohibited by the Equal Protection Clause.

So we don't accept plaintiff's contention that equal protection is not going to be a part of the upcoming Milligan, Caster decision. We think it will be.

We also think, Judge Manasco, that you hit on a very blunt point. It's difficult to know how to advise your clients when they are about to be deposed or witnesses for

the State before they are about to be deposed. We don't know yet where -- if they try to say something in defense of an Equal Protection Claim, it might put the State in jeopardy of a Section 2 claim, as that claim exists after the Supreme Court rules.

We don't know what they are going to do. They could keep the status quo. We could not have a Gingles case anymore. It could be anything in between. We just don't know what it's going to look like.

One of your questions, Judge Manasco, was, does the constitutional avoidance doctrine suggest that we ought to wait. I think it does. The plaintiff's raise both Equal Protection and Section 2 claims involving Senate Districts 25 and 26.

If you look at the map that appears in their complaint, it looks like a proposed map that shows, in their view, that you can draw by districts, has ripple effects all over the State. It changed the district -- the lineup of districts -- the Senate District 33 in Mobile, for example. Senate District 33 currently has part of Baldwin County, they would have it moved all the way into Mobile County because, when you make changes over here, there are domino effects around the State. It isn't just any one district; it impacts other districts.

So, it seems to us that it would make sense to

hear -- well, one, wait for the Supreme Court to rule. Let's know what the Section 2 rule looks like before we start building a record.

Number two, possibly address that claim first because it looks like, if they prevail under Section 2, it's going to have ripple effects all over the State.

Although, in fairness, we obviously haven't engaged in discovery, we don't know that's what their map drawer would say, we don't know who the map drawer is, I am just judging by the map that appears in the complaint.

We think there are good reasons for a stay under these circumstances. We haven't briefed it here, but Judge Manasco is familiar with the filing we filed on April 12. For the record, this is in case 21-1530, Document 144, a pleading filed April 12, that we filed before the Caster and Milligan court got us together for a status conference. And there we cited cases where federal courts have stayed litigation in light of upcoming appellate decision that will likely affect the law related to the case.

One of those cases was Miccosukee Tribe found at 559 F.3d 1198, the Eleventh Circuit wrote, "awaiting a federal appellate decision that is likely to have a substantial or controlling effect on the claims and issues in the stayed case is at least a good reason, if not an excellent one, for granting a stay."

We also think there's time. The next election under these districts will not be held until 2026. We know the plaintiffs make an argument they are entitled to some type of special election. We know that has happened in the past. I think the standard is a little tighter now after the North Carolina v. Covington case in the Supreme Court, I believe that's a 2017 decision. But they set out factors that a district court would consider before ordering a special election.

One of those is just the nature and impact of the constitutional violation, how bad was the behavior.

Another is the state sovereignty interest and how much would a special election interfere with the administration of elections.

And here we think plaintiffs are quite unlikely to make their burden. Under the Equal Protection Claim -- certainly they are unlikely to show they are entitled to the extraordinary relief of shortening the constitutional terms of office of every Alabama state legislator.

I know you don't want to prejudge the case, but just for backdrop, we know from the record built in Milligan and Caster what strategy the legislature took during the redistricting trial. They took existing plans, the most recent plans and they adjusted the lines as necessary to bring the districts within roughly equal population. The

record shows what they did in the congressional plan, but the record in this case will show that's what happened on the state legislative districts, too.

So the legislative starting point was a State House map and a State Senate map that was approved by a federal court just in 2016 or 2017 -- 2017, and it was blessed on by the Alabama Legislative Black Caucus, just five years ago, they had no objection to the map after the legislature remedied the violations found by Judge Pryor, Watkins and Thompson in the ALBC.

And from there they made minimal changes as necessary just to adjust for the population shifts so that the population would be roughly equal in the districts.

That's what's being challenged here. We don't know all the contours of plaintiff's claim, I admit that, but that's the starting point.

We think under those circumstances, it would -- the plaintiffs bear a really steep burden to show they are entitled to have completely new legislative elections ahead of the terms of office. That means we think more likely that we have four more years for this court to hear the case after we learn from the Supreme court.

JUDGE MAZE: Do you think, going back to what Mr. Rosborough told me, do you think that the Supreme Court's opinion impacts the way that you would prepare all

of your witnesses for depositions and all of your discovery responses, or can you carve out pieces that are so absolutely unaffected by the Supreme Court they could be done earlier?

MR. DAVIS: I cannot think of anyone, as I stand here right this minute, that I would be willing to say there's no chance that witness' testimony would be affected.

Under the Equal Protection Claims, there's thirty-two districts challenged, I believe, we would foresee taking testimony from officials around the State about the communities of interest involved. And there would be testimony from map drawers about why decisions were made.

We haven't identified who those witnesses would be to talk about community of interest.

But even then, I would be unwilling at this time to say there's no chance that testimony would not be impacted by the Supreme Court's decision. And we think, too, especially for those around 25 or 26 in the Montgomery area where you have overlap between the Equal Protection and the Section 2 claims, it's hard to imagine that if we took a witness now, deposed him or her, that we wouldn't need to reopen the deposition down the road. Seems inefficient, to us, not to wait.

JUDGE MANASCO: Great. Mr. Walker.

MR. DAVIS: Thank you, Judges.

MR. WALKER: Your Honor, to further answer your question, I think the issue before the Milligan court is knowledge of race and use of race; and that's exactly the issue in the gerrymandering case. And it seems to me that there is likely to be some overlap. I can't see how the court could address knowledge of race and use of race in regard to Section 2 without saying something about that in the constitutional context.

So I can't think of anything that might not be affected -- I mean, it could be that they address issues in a way so that doesn't happen. I don't see how that can happen. Even though the two types of claims are analytically distinct, knowledge of race and use of race is at the core.

With regard to special elections, I would just add that another factor is that I don't think it would be hard to get testimony, you could find it also in the case law, that out-of-cycle elections typically have lower voter turnout which is in -- because of voter confusion and they also prejudice the State, the candidates and the parties, by which I mean the Republican and Democrat parties, by the cost of those special elections. It doesn't seem to be any urgency for that here when we could have elections on the regular four-year cycle.

That's all I had to add. Thank you very much.

JUDGE MANASCO: I have one question and that is, do you foresee that there will be legislative immunity issues that we have to deal with? It sounds like maybe some discussion between the parties to that effect.

MR. WALKER: I can tell you that some of the legislators have told me that they will assert immunity. So, yes, ma'am, there will be.

Now, the chairs have obviously waived their immunity. But the testimony of some individual -- yeah, there will be privileges.

JUDGE MANASCO: I think Mr. Davis had something to add.

MR. DAVIS: I do have one point that I forgot to raise earlier.

MR. WALKER: Thank you, Your Honor.

MR. DAVIS: I got out of order. I'm sorry.

I just forgot to mention that we don't yet know enough about plaintiff's claims to know what specific line drawing decisions they claim were improperly motivated by race.

But it is conceivable that if they -- if they show that this particular decision -- that race predominated in this particular case, the State could have a defense under existing Section 2 law that that decision was supported by Section 2. The legislature had a strong basis and evidence

to believe that that decision was necessary in order to avoid a potential Section 2 violation.

I cannot represent to you that there's any such circumstance in this case because we don't yet know enough about plaintiff's claims.

But that's one more reason why I think it's a fiction to separate Equal Protection and Section 2. Section 2 at times can be used as a defense to justify a race-based decision.

I just wanted to add that point.

MR. WALKER: I also failed to make a point. And this may be just over-cautious on my part. But I do represent my clients.

And I'm worried that deposing legislators, to the extent that they agree to be deposed, while the law is undergoing change, may result in them giving answers that seem different or are understood differently once a new standard is announced. Not that they would change their answer necessarily, but that if they don't fully know what the law is, we don't fully know what the law is, which we would not, particularly if whatever the court says about Section 2 interacts with how a gerrymandering claim is defined, asking them to answer questions about things in this case when the law is in a state of actual flux, but not yet revealed to them, seems a bit unfair.

JUDGE MANASCO: Thank you.

Mr. Rosborough, it's your motion.

MR. ROSBOROUGH: Thank you, Your Honor. I will be happy to answer. I have three main points on rebuttal.

First, the parties' joint filing here where we set our respective positions here after the 26(f) conference was after the court took the Milligan case. In that, the defendants did not say we shouldn't go forward on racial gerrymandering claims and they suggested a trial in the summer of 2023 and we agree with that. The only thing that's changed since then was this court's stay order.

So we believe that to sort of delay the assertions of prejudice don't really play out given the State's assertions after the Supreme Court has already undertaken the Milligan case.

Relatedly, you know, neither here nor Milligan have we proposed any particular remedy. Obviously in Milligan there were Gingles I maps put forward to show potential illustrative district; likewise, there's a demonstrative map in this complaint that shows different ways to draw the districts. But any remedial map would necessarily be determined by what the court ordered, how many districts of the ones we've challenged are unconstitutional -- all of them, couple of them, some of them -- so it's really sort of speculative to guess about

what we might or might not need.

The second point about the intersection between the constitutional issues and the VRA issues here. The Supreme Court has clearly laid out the question presented in Milligan and that is whether Alabama's congressional redistricting plan violates Section 2 of the Voting Rights Act.

It didn't offer a broader question about when a State can use or know about race in drawing its districting plans. And all the arguments that the State has made and all the references that Chief Justice Roberts and Justice Kavanaugh made in their stay order in that case were all about the propriety in considering the Shaw standard, the racial gerrymandering standard as part of Gingles I, as part of the VRA claim. It doesn't go the other way.

So, yes, the defendants are absolutely right that the court is considering how the racial gerrymandering standard may affect the plaintiff's evidentiary burden under Section 2, but the inverse of that is not true.

JUDGE MANASCO: The inverse is true for us; right? I mean, in paragraph 225 and 230 of the complaint, you agreed that the districts were gerrymandered because they weren't narrowly tailored in part to comply with the VRA.

MR. ROSBOROUGH: Yes, Your Honor. And I think the Supreme Court is really -- I mean, the Supreme Court just

spoke to that in the Wisconsin case where they looked at what the State had done there and they said, this is, you know, this is a State's burden, like, to have a strong basis in evidence for the need to consider race. And if anything, the position that the State is taking in the Supreme Court is that racial predominance should mean it's done, the inquiry is over. That's the State's own position.

So they are already taking a position in the Supreme Court that, if accepted, will come back to hurt them in this case.

So, really, the status quo is the best case scenario for the State, they're arguing for a standard that's going to be more harmful to them later. And regardless, you know, addressing the issues about what may come out in discovery, the facts are the facts. The legislative process has happened. And hopefully, whoever is testifying under deposition, they are just going to tell the truth about what happened. There is no need to tailor fact witness testimony to what the legal standard might be.

I mean, we'll be asking about what considerations were in play, that either were or weren't, they tell the truth or they're not. It's not really a situation -- we're not talking about expert testimony here.

The third point I would like to make is that since the Covington case, which Mr. Davis is right, did set out a

more specific standard about when special elections are proper. That's the only case that I'm aware of where the court then denied special election. And the gist of that was, regularly scheduled elections are already occurring next year. Three other cases, Wright v. Sumter County, that was affirmed in the Eleventh Circuit; Navajo Nation v. San Juan County out of the District of Utah, both of those cases did order special elections and apply the Covington standard, as did a three-judge panel in League of Women Voters of Michigan v. Benson case, that was ultimately vacated because that was a partial gerrymandering case and the original decision came down, but the rationale behind the special election, I think, still stands there.

In effect, the defendant's argument here is that plaintiff should bear the full prejudice of any possibility that the VRA standard may in some way on the margins affect the racial gerrymandering test which we think, as we have already put forward, is unlikely and it certainly won't affect the facts that have already occurred here.

As the court in Louisiana just said, Speculation about what the Supreme Court may do, and that is a Section 2 case, that is concerning the actual standard, is not sufficient to put that amount of prejudice on the plaintiffs.

Here, we're dealing with a case that is focused on

racial gerrymandering where the discovery that is going to be taken, the fact discovery about events that have already happened, and as I have said, the plaintiffs are willing to stipulate that we will not redepose any fact witnesses after the Milligan decision comes down, should the court allow us to proceed with discovery.

So, for those reasons, we respectfully ask the court to allow us to proceed and lift the stay, at least with regard to the racial gerrymandering claims, if not the case as a whole.

JUDGE MANASCO: Let me ask, exactly who would you propose to depose if we were able to move forward?

MR. ROSBOROUGH: Certainly, the top of that list would be Mr. Hinaman who was the State's map drawer; Professor -- Dr. M.V. Trey Hood who we understand was the person who performed effectiveness analysis, racial polarization analysis for certain state legislative districts; other remembers of the joint legislative redistricting committee; and potentially other State legislators concerning the input they gave to the committee and the knowledge of their district. So potentially a number of the legislators concerning their challenged districts.

We would certainly also seek document production, emails, text messages, concerning that creation of the

standards that went into redistricting, the decisions of where to draw the lines, the input received, decisions about why and when to apply racial data in the process, information about how the State attempted to comply with the Voting Rights Act. I think there is a wide range of discovery there.

JUDGE MANASCO: One last question that I have, and it may be to Mr. Davis more so than to you.

Any questions that y'all have? Okay.

Mr. Davis --

MR. ROSBOROUGH: Thank you, Your Honors.

JUDGE MANASCO: Mr. Davis, what is the secretary's position on how soon we would need to conduct a trial if the special elections were not to occur, meaning for the 2026 election cycle?

MR. DAVIS: For the 2026 election cycle, the schedule would roughly mirror what we had in '22, this year. So it would mean qualifying would be, it was late January, if my memory -- January 28 was qualifying for '22, it would be late January which would mean we would need a trial, I think if we had a trial by the summer of '25, that would leave, even if the court found there were violations, that would leave months for a remedy to be put in place.

MR. ROSBOROUGH: I would ask for surrebuttal.

One point I forgot to make, that's more

specifically to Mr. Walker's point about turnout and the risks of special elections. It's a fair point.

Here, I think we would be looking to align, were the courts to rule in our favor, new districts to be drawn, the whole point here with timing would be to align perhaps, depending on other than the candidate filing deadline, the schedule with the 2024 election. Those are presidential elections, those are the highest turnout elections there are.

We would be looking -- people would be coming out for the primaries and the general elections in presidential years, we think that's a very good fit and it would actually reduce administrative burden on the State localities because they are running those elections.

JUDGE MAZE: Assuming, based on what Mr. Davis just said, we would need to have a trial in the summer of '23 to meet that cycle.

MR. ROSBOROUGH: I believe we would, based on the position -- I will let the State say -- based on the position in Milligan, I think we would need a ruling before early October 2023. But it may be better to address it to Mr. Davis.

MR. DAVIS: In '24, there will not be a presidential primary. Under Alabama law -- '24 will be a presidential primary. Under Alabama law, the primary will

be in May instead of earlier, so everything pushed back earlier, I would say we would need a trial by spring in order to have a -- of '23 --

JUDGE MAZE: April, May?

MR. DAVIS: Qualifying would be in November, so it'd be time for the court to write, time for the legislature to enact new districting plan which cannot -- roughly. I invite Mr. Walker, he's more familiar --

MR. WALKER: It depends on how many districts are affected as to how long it would take to do it. But I would say roughly a month.

JUDGE MANASCO: All right.

JUDGE MAZE: We're good.

JUDGE MANASCO: Thank you all.

(End of proceeding.)

C E R T I F I C A T E

I hereby certify that the foregoing is a correct transcript from the record of the proceedings in the above-referenced matter.

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Teresa Roberson, RPR, RMR