No. 22-10272

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARCUS CASTER, et al.,
Plaintiffs-Appellees,

v.

JOHN H. MERRILL, in his official capacity as the Secretary of State of Alabama, et al.,
Defendants-Appellants,

On Interlocutory Appeal from the United States
District Court for the Northern District of Alabama
No. 2:21-cv-1536-AMM

TIME SENSITIVE MOTION FOR STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 and 26.1-2, the undersigned counsel certifies that the following listed persons and parties may have an interest in the outcome of this case:

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35. Manasco, Hon. Anna M. – Judge for the United States District Court for the Northern District of Alabama
36. Marcus, Hon. Stanley – Judge for the United States Court of Appeals for the Eleventh Circuit
37. Marshall, Hon. Steve – Alabama Attorney General;
38. McClendon, Sen. Jim – Appellant
39. Merrill, Alabama Secretary of State John H. – Appellant
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68. Wilson, Thomas A. – Counsel for Appellant Secretary Merrill;

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Respectfully submitted this 27th day of January, 2022.

/s/ Edmund G. LaCour Jr.
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INTRODUCTION

After receiving the 2020 Census data, the State of Alabama drew new congressional district lines. Guided by race-neutral redistricting principles, the State's congressional plan mirrors district lines of past plans, making slight adjustments to accommodate population changes. Days ago, a district court enjoined the State from using the new plan in forthcoming elections. Why? Because Alabama didn't "prioritize[] race" over traditional districting principles. Op.204.

In particular, the district court has barred Alabama from using its congressional redistricting plan on the theory that Alabama violated Section 2 of the Voting Rights Act, 52 U.S.C. §10301. The State's plan contains one majority-black district, as it has for decades; the district court concluded that the VRA requires two such districts. The preliminary injunction of a State's electoral districts at this eleventh hour is by itself extraordinary. But all the more extraordinary is the legal error that pervades the injunction here. The court-ordered redraw marks a radical change from decades of Alabama's congressional plans, and will result in a map that can be drawn *only* by making the racial target of two majority-black districts "non-negotiable" and then splitting counties and sorting voters on the basis of race to hit the mark.

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No mapdrawer would create two majority-black districts in Alabama if only race-neutral redistricting criteria were considered. In a sample of more than *two million* race-neutral maps generated by Plaintiffs' own experts, not a single map contained two majority-black districts. It's hard to imagine better evidence that the preconditions for

a vote dilution claim announced in *Thornburg v. Gingles*, 478 U.S. 30 (1986), have not been met. This means that the VRA cannot justify, much less require, the race-based redraw of Alabama's race-neutral congressional districts that the district court has ordered.

The court's order is contrary to Supreme Court precedent and, more fundamentally, contrary to the promise of the Equal Protection Clause. An immediate stay pending appeal is warranted. Otherwise, Alabama will have no choice but to abandon its lawfully enacted congressional districts and prepare to run its forthcoming primary elections on a racially gerrymandered plan.

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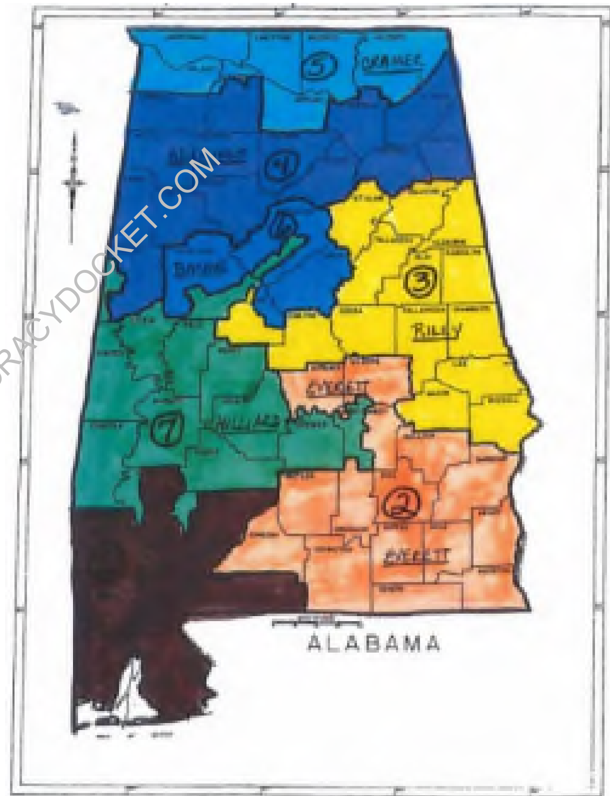
Defendants respectfully request a ruling on their stay motion **by January 31, 2022**. While the primaries are set for May 24, absentee voting is set to begin March 30 and numerous tasks must be completed before then. The court has stayed a deadline this week for candidates participating in the primary election to qualify with their political party, and it has given the Legislature only eleven more days from today to enact a new plan (which would likely be subject to challenge). A ruling by January 31 would ensure that the State can press ahead toward the imminent elections, while affording the losing party sufficient time to seek Supreme Court review.

BACKGROUND

A. Alabama's 2021 Congressional Map

For nearly 50 years, Alabama's congressional districts have remained remarkably similar. *See Singleton* DE1:6, 14-15, 18, 23, 25.[1] As part of redistricting litigation in the 1990s, a three-judge court ordered a congressional plan containing a majority-black District 7. *See Wesch v. Hunt*, 785 F. Supp. 1491 (S.D. Ala. 1992); *Wesch v. Folsom*, 6 F.3d 1465 (11th Cir. 1993). In selecting between plans submitted to the court, the court picked what became the 1992 plan in part because it "maintain[ed] the cores of existing Districts 1 and 2," and thus "better preserv[ed] the communities of interests in those two districts." *Wesch*, 785 F. Supp. at 1495-97. An illustration of the 1992 Map is reproduced here. *See Singleton* DE15:26.



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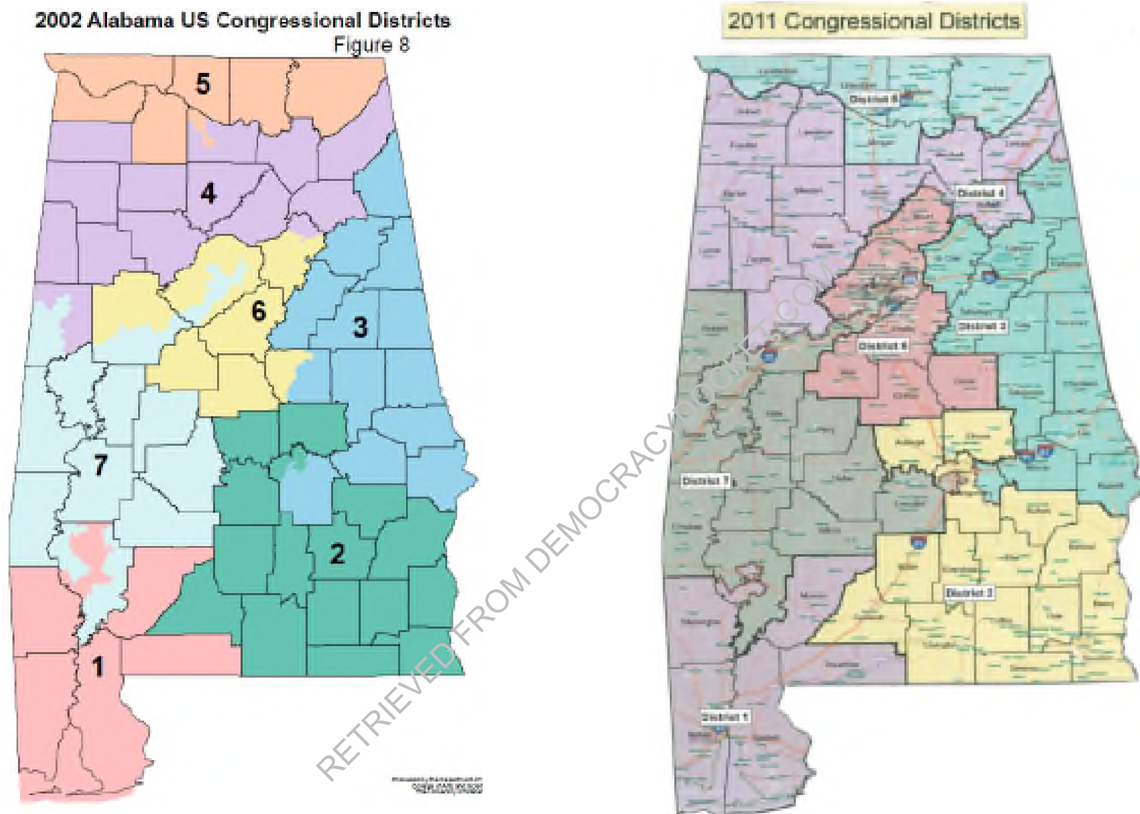
[1] This case (*Caster*) is one of three challenges to the 2021 Plan pending before the district court. The others are *Singleton v. Merrill*, Case No. 2:21-cv-1291-AMM, and *Milligan v. Merrill*, Case No. 2:21-cv-1530-AMM. *Caster* is pending before Judge Manasco alone, while *Singleton* and *Milligan* are pending before a three-judge court that includes Judge Manasco. The preliminary injunction proceedings for all three cases were held simultaneously, with *Singleton* and *Milligan* consolidated for that purpose. Any evidence admitted in any of the three cases was considered by the court in the other cases. *See Caster* DE101:4. "DE" refers to docket entries in the relevant case, with the number immediately following DE signaling the specific entry. Where a colon follows "DE," the number following the colon provides a pin cite. Pin cites align with ECF pagination. "Op." refers to the preliminary injunction opinion and order attached as Exhibit A to the *Caster* court's order (DE101), with the number corresponding to that at the bottom of each page.

After the 2000 and 2010 redistricting cycles, Alabama's congressional districts remained largely the same. Neither the 2001 Map nor the 2011 Map were ever declared unlawful by a court and both were precleared by the Department of Justice. They are reproduced below. *See also Singleton* DE15:9, 28.



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Following the 2020 census, Alabama retained its seven congressional districts. Because Alabama's population grew from 4,779,736 to 5,024,279 between 2010 and 2020, the Legislature had to update Alabama's congressional map. District 7 in particular fell far below the ideal population for a congressional district, requiring the addition of more than 50,000 people to make up the difference. In 2021, the Legislature added or subtracted people to the districts as necessary to equalize their populations. In so doing, the Legislature closed several county splits and made District 7 more compact.

It did all this without considering race. *See* Op.32; *see also Milligan* DE76-2:52 (demonstrating changes between 2011 and 2021 Plans); *Milligan* DE89-2:28; *Caster* DE80-19:25-26.

In short, the 2021 Legislature followed "common practice" by "start[ing] with the plan used in the prior map and…chang[ing] the boundaries of the prior districts only as needed to comply with the one-person, one-vote mandate and to achieve other desired ends," *Cooper v. Harris*, 137 S.Ct. 1455, 1492 (2017) (Alito, J., concurring in part). Doing so "honor[ed] settled expectations and, [because] the prior plan survived legal challenge, minimize[d] the risk that the new plan w[ould] be overturned." *Id.*

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B. Plaintiffs' Lawsuits

Three groups of Plaintiffs filed lawsuits challenging Alabama's 2021 Plan. Singleton raised Equal Protection Clause claims. Milligan raised Equal Protection and VRA claims. In this case, Caster raised only a VRA claim. *Caster* DE101:1. A three-judge court was convened to hear the Singleton and Milligan suits, *see* 28 U.S.C. §2284(a), but the Caster suit remained before only one judge (who was also part of the three-judge court).

Each set of Plaintiffs sought a preliminary injunction barring Alabama from using its new congressional districts in the forthcoming elections. Though the three-judge court declined to consolidate all cases, the court presided over the hearing and the submission of evidence by the Plaintiffs for all three cases.

The *Caster* and *Milligan* Plaintiffs presented materially the same VRA theory—that Section 2 required Alabama's congressional districts to go from one majority-black district to two. Plaintiffs proposed various illustrative plans, but each added the second majority-black district in the same way: by splitting Mobile County into two districts with exacting race-conscious precision. Most of Mobile's white population would be placed into District 1, while most of Mobile's black population would be placed into District 2, joined with black Alabamians in locations roughly 250 miles away. *See* Op.60, 164.

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Throughout the proceedings, one fact stood out. Plaintiffs conceded that literally millions of race-neutral maps generated by their experts' computer algorithms never resulted in a plan with two majority-minority black districts. For example, one of the experts, Dr. Imai, generated 10,000 maps based on several traditional race-neutral districting criteria, and not a single map included two majority-black districts. *See* Op.215-16; Tr.268:23-269:6; *Milligan* DE88-1:10.[2] Another of Plaintiffs' experts, Dr. Duchin, testified that she had created *two million* congressional districting plans for Alabama, also with a computer algorithm programmed not to "tak[e] race into account in any way." Tr.682. The result? She "found some [maps] with one majority-black district, but never found a second…majority-black district in 2 million attempts."

[2] Dr. Imai confirmed that his algorithm did not (as the Legislature did) consider "core retention," *i.e.*, keeping the cores of existing districts the same. Tr.230:3-14. This means that, even on a blank slate, a race-neutral mapdrawer would not draw two majority-black districts given Alabama demography.

Tr.682:11-12. Because "it is hard to draw two majority-black districts [in Alabama] by accident"—*i.e.*, on race-neutral grounds, Tr.685:23-25—Dr. Duchin decided to "do[] so on purpose," *id.*, programming racial preferences into her algorithm to generate illustrative plans. "[P]opulation balance" and "two majority-black districts" were "nonnegotiable principles"; "after that" followed things like "contiguity" and "compactness." Tr.577:16-20. In other words, every plan Dr. Duchin's new algorithm generated—including the illustrative plans endorsed by the court, Op.214—necessarily subordinate race-neutral districting principles to the "nonnegotiable principle[]" of hitting a racial target of two majority-black districts. *Id.*

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C. The District Court Bars Alabama From Using Its Congressional Districts

Days ago, the district court held that Plaintiffs were likely to prevail on the merits of their Section 2 claims. The court preliminarily enjoined the Secretary of State from conducting any congressional elections according to the 2021 Plan. Op.5. The Court also delayed Alabama's candidate qualification deadline from January 28 to February 11, 2022, and ordered Secretary Merrill to advise the political parties about the court's order. Op.6-7. Finally, the Court declared that "if the Legislature is unable to pass a remedial plan in 14 days," Chair McClendon and Chair Pringle must advise the court so it can hire an expert to draw a plan, at Defendants' expense. Op.6-7.

The court held that even though Plaintiffs "prioritized race" in drawing their illustrative plans, Plaintiffs sufficiently showed that two reasonably compact majority-

black districts could be drawn, and so a map that prioritizes race must be drawn. Op.204-05.

Defendants argued that the absence of a single demonstration plan with two majority-black districts in the millions of race-neutral maps Plaintiffs' experts generated was dispositive evidence that Plaintiffs' VRA claims failed. Tr.1883:12-20. But the district court never addressed this argument.

The court went on to conclude that *Gingles*'s second and third preconditions (racially polarized voting and majority bloc voting) were met, as well as the totality of the circumstances. Op.174-93.

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The court rejected the State's arguments that Plaintiffs' (and now the court's) conception of the VRA would raise serious constitutional questions because it prioritized race to dramatically overhaul the State's longstanding districts on account of race. The court described Plaintiffs' experts as "prioritiz[ing] race only for the purpose of determining and to the extent necessary to determine whether it was possible…to state a Section Two claim. As soon as they determined the answer to that question, they assigned greater weight to other traditional redistricting criteria." Op.205. The court forgave Plaintiffs' experts for making race a '"non-negotiable"' redistricting criterion because they didn't do more "to maximize the number of majority-Black districts, or the BVAP in any particular majority-Black district." Op.205. They merely "did not allow a minimum level of compliance with that [race-based] criterion to yield to other [race-neutral] considerations." Op.205.

The court declined to rule on the *Singleton* and *Milligan* Plaintiffs' Equal Protection Clause claims "because Alabama's upcoming congressional elections will not occur on the basis of the map that is allegedly unconstitutional." Op.216.

D. Defendants' Appeal

Defendants filed notices of appeal. *Caster* DE102; *Milligan* DE109. Defendants intend to directly appeal the three-judge court's injunction in *Milligan* to the Supreme Court. 28 U.S.C. §1253. In *Caster*, Defendants are considering whether to petition for a writ of certiorari before judgment, to be considered alongside *Milligan*.

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Defendants filed their stay motion with the district court on January 25, asking for a ruling that day. *See* DE103. Though the court has not yet formally ruled, it made clear at yesterday's status conference that it will deny the motion: "[T]his [redistricting] process is going to go forward, and it will be done." 1/26/21 Status.Conf.Tr.26. The court has thus far "failed to afford the relief requested," and is sure to "den[y]" the relief sought. Fed. R. Civ. P. 8(a)(1)-(2). Defendants thus now seek a stay from this Court in *Caster*, and will imminently seek a stay from the Supreme Court in *Milligan*.

ARGUMENT

A preliminary injunction is an "extraordinary remedy," *Winter v. NRDC*, 555 U.S. 7, 24 (2008), especially in the redistricting context. "When the massive disruption to the political process of the [State] is weighed against the harm to plaintiffs of suffering through one more election based on an allegedly invalid districting scheme, equity

requires that [this Court] deny relief." *Mac Govern v. Connolly*, 637 F. Supp. 111, 116 (D. Mass. 1986).

When deciding whether to stay the district court's preliminary injunction, this Court reviews the underlying legal conclusions *de novo* and any findings of fact for clear error. The Court considers: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Swain v. Junior*, 958 F.3d 1081, 1088 (11th Cir. 2020). "[W]here the government is the party opposing the preliminary injunction, its interest and harm merge with the public interest." *Id.*

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I. This Court will likely reverse the preliminary injunction.

Alabama is highly likely to succeed on the merits. The district court's interpretation of the VRA cannot possibly be constitutional, as the court ordered the Legislature to draw race-based districts that would never have been drawn based solely on race-neutral criteria. The court's conception of the *Gingles* preconditions and totality-of-circumstances analysis is contrary to Supreme Court precedent. And constitutional avoidance commands that the district court's interpretation of the VRA be reversed, lest the VRA be unconstitutional as applied to single-member districts.

A. The district court badly misinterpreted *Gingles*'s first precondition beyond constitutional limits.

Section 2 of the VRA states that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State…in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color…." 52 U.S.C. §10301(a). To prove a violation, one must show that "political processes leading to nomination or election in the State or political subdivision are not equally open to participation," meaning individuals "have less opportunity" than others "to participate in the political process and to elect representatives of their choice." *Id.* §10301(b). "The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003).

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The Supreme Court has since applied the VRA to the drawing of single-member districts. To establish a Section 2 violation in such circumstances, three preconditions must be met: (1) "a 'minority group' must be 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district," (2) "the minority group must be 'politically cohesive,'" and (3) "a district's white majority must 'vote[] sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.'" *Cooper*, 137 S.Ct. at 1470 (quoting *Gingles*, 478 U.S. at 50-51).

1. The district court's injunction is premised on legal error about how Plaintiffs can establish that "a 'minority group' is 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district." *Cooper*, 137 S.Ct. at 1470. The district court believed that Plaintiffs satisfied *Gingles I* even in the face of overwhelming evidence that two majority-minority districts could *not* be drawn using only race-neutral criteria. Plaintiffs' own experts showed that it is effectively impossible to draw two such majority-black districts using race-neutral traditional redistricting principles. *Milligan* DE88-1:7-9. Indeed, Dr. Duchin testified that she produced *two million* maps drawn with only race-neutral criteria, and that *not one* contained two majority-black districts. Tr.682:3-14. It is difficult to imagine better evidence of Plaintiffs' failure to establish that a second "reasonably configured" majority-black district could be drawn. But the district court never even mentioned that stunning omission, let alone reconciled it with *Gingles*'s first precondition.

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Worse still, the district court held that the VRA not only allowed but *required* this prioritization of race. Because demonstrating that a reasonably configured majority-minority district is possible obviously requires considering the racial makeup of the hypothetical district, the district court reasoned that proscriptions on "prioritize[ing] race" over traditional race-neutral principles would necessarily thwart Section 2. Op. 205-06. But that reasoning gets *Gingles* exactly backwards. The first *Gingles* factor is designed to test whether an additional majority-minority district that accords with traditional, race-neutral districting principles *can* be drawn; if it can, then *Gingles*'s

additional preconditions and the totality-of-circumstances inquiry allow a court to determine whether the district *must* be drawn. Yet Plaintiffs and the district court started by assuming that two majority-minority districts were "non-negotiable," infusing Section 2 with their race-predominate goals. They then worked backwards to see which race-neutral, traditional districting principles they could maintain, and compromised those they couldn't.

Under the correct approach, a Section 2 plaintiff alleging vote dilution must *first* prioritize traditional, race-neutral redistricting criteria. Only then may the plaintiff assess whether employment of traditional redistricting criteria could result in reasonably configured majority-minority districts. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 433-34 (2006) (discussing use of traditional redistricting criteria in satisfying *Gingles I*, lest courts "fail[] to account for the differences between people of the same race"). Injecting race as one of those traditional principles at step one is circular; it immediately assumes the Plaintiffs are entitled to the very remedy they are seeking through their Section 2 claim. And it unavoidably entangles those traditional, race-neutral principles with racial considerations, raising serious constitutional questions. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

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Here, Plaintiffs worked backwards. In Dr. Duchin's own words, "it is hard to draw two majority-black districts by accident" in Alabama. Tr.685:23-25. For that reason, she *started* by making two majority-black districts her "'non-negotiable'" objective. Op.205. Everything else was secondary. *See* Tr.577:16-20 (programming "two

majority-black districts" as "nonnegotiable," and only "after that" following principles like "contiguity" and "compactness").[3] Likewise, the *Caster* Plaintiffs' expert, Bill Cooper, testified that race-based considerations are "always in the background" and that race itself "i[s] a traditional redistricting principle, so like compactness or contiguity, you have to be aware of it as you are drawing a plan." Tr.478:11-479:2. Cooper testified that he "ha[d] no way of answering" whether his demonstrative plans could be drawn without prioritizing race. *Id.* at 510:20-511:13. By Plaintiffs' own admission, "[r]ace was the criterion that…could not be compromised." *Shaw II*, 517 U.S. at 907.

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That view of the VRA collapses Section 2 compliance and racial gerrymandering into indistinguishable endeavors, contravenes Supreme Court precedent, and violates the Constitution. A map that can be drawn only when race is "prioritized" (Op.151) goes far beyond Section 2's mandate of an "equally open" political process. 52 U.S.C. § 10301(b). Just as "[n]othing in §2 grants special protection to a minority group's right to form political coalitions," *Bartlett*, 556 U.S. at 15, nothing in Section 2 grants Plaintiffs a right to predetermined racial quotas in districts which can exist only when race subordinates "traditional districting principles," *LULAC*, 548 U.S. at 433.

2. The district court wrongly held that *Gingles I* always requires a mapdrawer to subvert, to some extent, traditional redistricting criteria to race. According to the court,

[3] Dr. Duchin also conceded that race informed other decisions in her maps like where to split counties or voting districts, where to depart from geographic compactness, and where to depart from core-preservation criteria. *Id.* at 573:3-5; *id.* at 647:12-20; *id.* at 664:17-24; *id.* at 600:10-16, 671:22-672:14.

"a remedial plan" would be rendered "unconstitutional…for attempting to satisfy *Gingles I*" if the State is correct. Op.205. That is not so. Under the correct approach, there should be no "remedial plan" *at all* unless the *Gingles* preconditions are all met. Plaintiffs and the district court bypassed *Gingles I* by assuming the conclusion that there needed to be two majority-black districts in Alabama.

To be clear, the flaw in this approach is not Plaintiffs' *subjective* intent to present maps with two majority-black districts, but the *objective* fact that no mapdrawer produced maps in which race did not "conflict with traditional principles." *Bethune-Hill v. Va. St. Bd. of Elections*, 137 S.Ct. 788, 799 (2017). Thus, if many of Plaintiffs' race-neutral maps included two majority-minority districts and others included only one such district, this might be a different case. Perhaps Section 2 Plaintiffs could pick from the first group of race-neutral maps even "if race for its own sake [were] the overriding reason for choosing one map over others." *Id.* But everyone agrees that's not what happened here. It is essentially impossible in Alabama to draw *any* map with two majority-minority districts "consistent with traditional districting principles." *Davis v. Chiles*, 139 F.3d 1414, 1425 (11th Cir. 1998). Thus, Plaintiffs tried to satisfy *Gingles I* by starting with a target of two majority-black districts as the "non-negotiable" objective and then working backwards, with race-neutral criteria "yield[ing]" "as necessary" to reach their

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goal. Op.204-05. If that's enough to satisfy *Gingles I*, then *Gingles I* is a meaningless test that will always make race the overriding criterion in drawing district lines.

Finally, even if hitting racial targets could be considered a traditional districting principle at *Gingles I*, Plaintiffs' claims would fail at the totality-of-circumstances step. That inquiry looks to whether "the political processes…in the State" are "equally open to participation by [black Alabamians] in that [they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. §10301(b). But because Plaintiffs cannot produce a map with two majority-minority districts without "prioritiz[ing] race," Op.204, their claim fails, for the State does not deny them equal opportunity by declining to grant them racial preferences. *See also Brnovich v. DNC*, 141 S. Ct. 2321, 2343 (2021) ("§2 does not deprive the States of their authority to establish non-discriminatory voting rules.").

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B. Constitutional avoidance compels a stay pending appeal.

The district court's interpretation of the VRA raises serious constitutional questions. If the district court is correct, then Section 2's "effects test" cannot possibly be constitutional as applied to single-member districts.

1. Any "assignment of voters on the basis of race" is subject to constitutional law's "strictest scrutiny." *Miller*, 515 U.S. at 915. Redistricting is not an exception to that constitutional proscription. Section 2 permits race-conscious districting only in the limited context of choosing among maps that honor a State's "traditional districting

principles." *LULAC*, 548 U.S. at 433. For example, it should be beyond dispute that the Legislature never could have constitutionally passed the maps that the district court has ordered here since those maps started from a racial target of two majority-black districts, which made it "necessary" for the mapdrawers to split Mobile (and even small voting districts) in a way that is unexplainable on grounds other than race. *See, e.g.*, *Miller*, 515 U.S. at 916 (racial gerrymander where map "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations"). Here too, a court cannot order something that a legislature constitutionally could not do.

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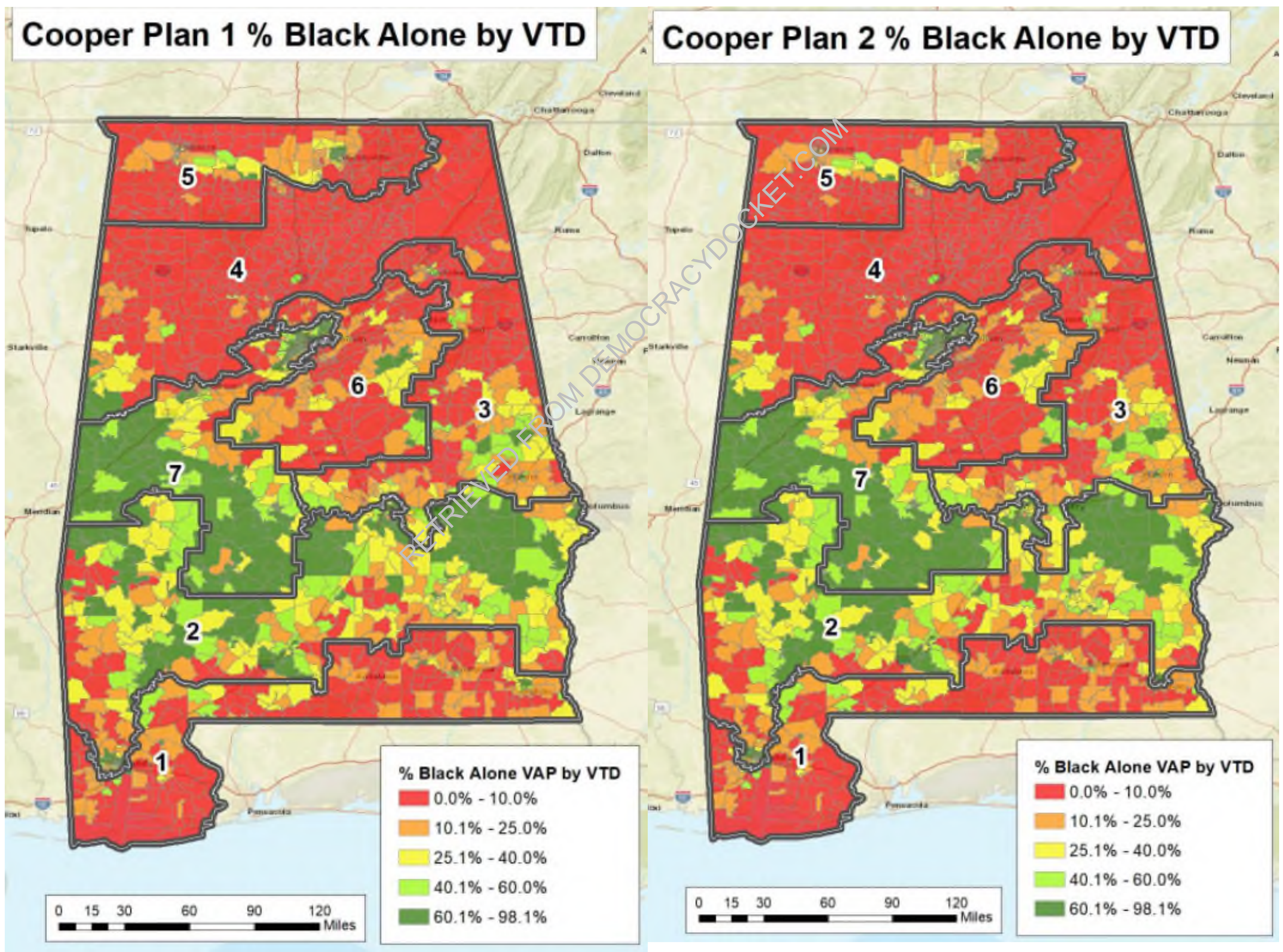
2. The district court's order takes Section 2 beyond its promise of "equal[]…opportunity." 52 U.S.C. §10301(b). It "would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (plurality op.). The district court approved Plaintiffs' consideration of race-neutral criteria only "after the race-based decision [of reaching a targeted number of majority-minority districts] had been made," *Shaw II*, 517 U.S. at 907. If that is what the VRA requires, then the VRA is unconstitutional as applied to single-member districts.

The court's error is further made manifest by the racial gerrymander that will necessarily follow. The only inference to be drawn from Plaintiffs' proposed districts—every one of which must divide Mobile County along racial lines—is that race

predominates. The maps below show how the district lines for Plaintiffs' majority-black District 2 splits Mobile and stretches across the State "as necessary" (Op.204) to honor the new race-based districting "principle" of "minority opportunity to elect." Op.57. White voters to the south are placed in redrawn District 1 and black voters to the north in redrawn District 2, precisely "for the purpose of separating voters by race." *Shaw I*, 509 U.S. at 645.



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See DE76-4:69, 71, 73, 75, 78, 80, 82, 84, 86, 88.

A second majority-minority district would likely have to stretch roughly 250 miles from Mobile to the Georgia border (or close to it). *See* Op.60; *Milligan* DE48:23, 25, 29; *cf. LULAC*, 548 U.S. at 441 (faulting plan for stringing together several "different communities of interest" "hundreds of miles apart"). Such race-based redistricting "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

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3. Congress derived its authority to enact Section 2 of the VRA pursuant to the Fifteenth Amendment, guaranteeing "[t]he right of citizens of the United States to vote shall not be denied or abridged by…any State on account of race, color, or previous condition of servitude." *Chisom*, 501 U.S. at 383; U.S. CONST. amend. XV, §§1-2. Congress may enforce the substantive provisions of the Fifteenth Amendment, as well as the Fourteenth Amendment, "by creating private remedies against the States for *actual violations* of those provisions." *United States v. Georgia*, 546 U.S. 151, 158 (2006) (emphasis added). But here, the district court's interpretation of the VRA goes well beyond remedying any "actual violations" of the Fourteenth or Fifteenth Amendments, which would require proof of discriminatory intent. *See Washington v. Davis*, 426 U.S. 229 (1976). Instead, it would compel such discrimination.

II. The equities favor a stay.

A. Without a stay, the State will forever lose its ability to appeal the preliminary injunction before the forthcoming elections are conducted under a court-ordered racially gerrymandered map that radically upends the legislatively enacted map. The injunction leaves Alabama with no real choice. The State can replace its Plan (by February 7) with a racial gerrymander and suffer the consequences of follow-on litigation for that unconstitutional Act. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (op. of White, J.) (noting a "new legislative plan," in response to redistricting litigation would "be the governing law," thereby mooting a suit, "unless it, too, is challenged and found to violate the Constitution"). Or the State can cede its redistricting power to the district court, which has indicated that it will hire a third party to redraw districts that segregate Alabamians in Mobile and elsewhere by race. Op.213. Either way, without a stay and appellate review, the State's forthcoming congressional elections are guaranteed to be run on district lines that never would or could have been drawn but for sorting Alabamians on the basis of race alone. Thus, Alabama's "inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State," *Abbott v. Perez*, 138 S.Ct. 2305, 2324 n.17 (2018), and the harm is magnified because of the racial gerrymander the State will have to administer.

B. A stay is also warranted because the district court's order at this late hour is inflicting grave harm on the public interest, which outweighs Plaintiffs' purported interest in voting in racially gerrymandered districts. "When the massive disruption to

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the political process of the [State] is weighed against the harm to plaintiffs of suffering through one more election based on an allegedly invalid districting scheme, equity requires that [this Court] deny relief." *Mac Govern*, 637 F. Supp. at 116.

Enjoining the State from using the 2021 Plan throws the current election into chaos for candidates and voters. First, the district court's order charges the Legislature with enacting a new map (whose sole purpose is to reach a racial target of two majority-black districts)in the next 11 days, or the court will do so. Op.6-7. As even the district court recognized, "there can be no doubt that there is a limited window" for such action. Op.214. Hundreds of thousands of voters will need to be reassigned to new districts by local election officials—a task that took some election officials up to four months the last time the State faced remedial redistricting. *See* Caster DE76-7:4. A rushed reassignment process is likely to lead to mistaken reassignments of voters and "voter, political party, and candidate confusion." *Id.* at 6.

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The court's stay of "the January 28, 2022 qualification deadline for 14 days, through February 11, 2022," Op.6, hardly helps. Even if there's a new map next week, candidates would have only about a week to assess the map and decide whether to enter a congressional race in which absentee voting will begin the following month. Op.133. "It is best for candidates and voters to know significantly in advance of the petition period who may run where." *Favors v. Cuomo*, 881 F. Supp. 2d 356, 371 (E.D.N.Y. 2012); *see also* Tr.1693:16-1694:7. Non-major-party candidates and political organizations seeking ballot access may have to scramble to obtain thousands of new signatures if

they find that they have been obtaining signatures from the wrong district. Ala. Code §17-6-22; Ala. Code §17-9-3(a).

That is why federal courts ordinarily are not supposed to change election rules at the eleventh hour. Such orders "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). By creating radically new districts days before the candidate qualifying deadline and less than two months before absentee voting is to begin, the district court's decision squarely implicates *Purcell. See, e.g.*, *Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014) (staying a lower-court order that changed election laws 61 days before election day); *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020) (election day was "months away but important, interim deadlines…[we]re imminent").

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C. By comparison, Plaintiffs assert irreparable harm from having to vote under a Plan that did not sufficiently "prioritize[] race" over non-racial districting principles. Op.204. This factor does not weigh heavily in their favor, particularly where Alabama's districts have retained the same geography for decades and most (if not all) Plaintiffs could have lodged nearly identical arguments against Alabama's 2011 Map. Indeed, some *Caster* Plaintiffs did challenge the 2011 Map in *Chestnut v. Merrill*, No. 2:18-CV-00907-KOB (N.D. Ala. filed June. 13, 2018), ECF No. 1—but not until seven years after its passage. *See Calhoun v. Lillenas Publ'g*, 298 F.3d 1228, 1235 (11th Cir. 2002) ("[W]here unreasonable delay has occurred, courts have concluded that such delay is suggestive of a lack of irreparable harm."). And Plaintiffs ignore the millions of

Alabamians, not parties to this litigation, who will suffer the harm of their race-"prioritized" redraw. The interest of all Alabamians not to be placed into unconstitutional, racially gerrymandered districts on the eve of the congressional primaries well outweighs the last-minute overhaul to Alabama's longstanding district lines.

CONCLUSION

This Court should stay the preliminary injunction pending appeal.

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Dated: January 27, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with Rule 27(d)(2) because it contains 5,195 words, excluding the parts that can be excluded. This motion complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: January 27, 2022

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CERTIFICATE OF SERVICE

I filed this brief with the Court via ECF, which will electronically notify all parties.

Dated: January 27, 2022

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