Nos. 21-1086 & 21-1087

In the Supreme Court of the United States

JOHN H. MERRILL,
IN HIS OFFICIAL CAPACITY AS THE ALABAMA SECRETARY OF STATE, *et al.*,
Appellants,
v.
EVAN MILLIGAN, *et al.*,
Appellees.

JOHN H. MERRILL,
IN HIS OFFICIAL CAPACITY AS THE ALABAMA SECRETARY OF STATE, *et al.*,
Petitioners,
v.
MARCUS CASTER, *et al.*,
Respondents.

RESPONSE TO APPELLEES' AND RESPONDENTS' JOINT MOTION TO MODIFY OR AMEND THE QUESTION PRESENTED

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These consolidated cases are about whether Alabama's current congressional districting plan violates Section 2 of the Voting Rights Act. After conducting a consolidated hearing, the District Court granted preliminary injunctions to both sets of Plaintiffs (now Appellees and Respondents) based on Section 2. On February 7, 2022, this Court stayed those injunctions; construed the State's stay application in *Merrill v. Milligan*, No. 21-1086, as a jurisdictional statement and noted probable jurisdiction; and construed the State's stay application in *Merrill v. Caster*, No. 21-1087, as a petition for a writ of certiorari before judgment and granted the petition.

On February 22, 2022, this Court consolidated the cases for briefing and oral argument and set the following question presented: "Whether the District Courts in these cases correctly found a violation of section 2 of the Voting Rights Act, 52 U.S.C. §10301." Because there is no basis for changing that question, Plaintiffs' motion to amend it should be denied.

Plaintiffs argue that "because the District Court ruled on a preliminary injunction motion" and the State's stay applications "focus on the first *Gingles* precondition to a Section 2 claim" the Court should instead consider the following question:

> Did the District Court abuse its discretion in concluding that Plaintiffs demonstrated a substantial likelihood of success in satisfying the first *Gingles* precondition and entering a preliminary injunction on their section 2 of the Voting Rights Act claim?

Mot. 1. But this repackaging of the question, to the extent it is materially different from this Court's framing of the question, unduly narrows the State's arguments against Plaintiffs' (and the District Court's) approach to Section 2.

Although the State's stay application identified several errors in the District Court's interpretation of *Gingles* I, the State also raised several broader statutory and constitutional questions about the scope of Section 2. *See, e.g., Merrill v. Milligan*, Stay Application at 28 ("Even if the prioritization of race were permissible under this Court's *Gingles* framework (Constitution aside), the statutory text forecloses Plaintiffs' Section 2 claim in another way."); *id.* at 29 ("The district court's interpretation of the VRA raises serious constitutional questions."); *id.* at 31 ("The district court's application of *Gingles* I and its totality-of-circumstances analysis takes Section 2 beyond its promise of 'equal[] … opportunity.'"). More to the point, it is Section 2—not *Gingles*—upon which Plaintiffs have sued. Thus, "[a]s to the merits, the underlying question here is whether a second majority-minority congressional district (out of seven total districts in Alabama) is required by the Voting Rights Act and not prohibited by the Equal Protection Clause." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring).

Plaintiffs are correct that a preliminary injunction order is reviewed for an abuse of discretion, but they never explain why that would matter here. For example, though Plaintiffs rely heavily on *Brown v. Chote*, 411 U.S. 452 (1973), they don't contend that this is a case in which the District Court "balance[d]" the merits against the equities without "consider[ing] fully the grave, far-reaching constitutional questions presented." *Id.* at 457. Rather, they have always presented this matter as "a straightforward Section 2 case." Milligan Opp. to Stay at 35.

Meanwhile, "the focus of the State's stay motion"—and now these merits cases—"is the district court's fundamental misunderstanding of Section 2." *Merrill v. Milligan*, State Reply at 3 n.1. Though the State also maintains that "the district court clearly erred in several of its factual determinations, any of which could be further briefed on the merits," *id.*, changing the question presented will not change this Court's analysis, for "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 564 n.2 (2014) (quoting *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990)).

In short, this case presents an ideal vehicle for resolving "considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim." *Merrill*, 142 S. Ct. at 883 (Roberts, C.J., dissenting). The District Court concluded "that the remedial plans developed by [Plaintiffs'] experts satisfy the reasonable compactness requirement of *Gingles* I" (App. 173-74)[1] and present no constitutional problems, even though Plaintiffs' mapdrawers "prioritized race" such that traditional districting principles had to "yield" to racial goals. App. 204-05. Thus, while the District Court concluded that Plaintiffs "established that the Plan substantially likely violates Section Two," App. 196, asking whether that ruling was an abuse of discretion or legal error "is merely a semantic difference in this case." *Walters v. Nat'l Ass'n*

[1] "App." cites refer to the appendix filed with the State's stay application in *Merrill v. Milligan*, No. 21-1086.

of Radiation Survivors, 473 U.S. 305, 317 (1985). Accordingly, this Court should answer the question as properly written by the Court.

CONCLUSION

For the foregoing reasons, this Court should deny Appellees' and Respondents' Joint Motion to Modify or Amend the Question Presented.

Respectfully submitted,

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MARCH 8, 2022