Nos. 21-1086, 21-1087

IN THE

Supreme Court of the United States

JOHN MERRILL, *etc., et al.*,
Appellants,
v.
EVAN MILLIGAN, *et al.*,
Appellees.

JOHN MERRILL, *etc., et al.*,
Petitioners,
v.
MARCUS CASTER, *et al.*,
Respondents.

On Appeal and Writ of Certiorari to the United States Court of Appeals for the Northern District of Alabama

AMICUS CURIAE BRIEF FOR JOHN WAHL, CHAIRMAN, ALABAMA STATE REPUBLICAN EXECUTIVE COMMITTEE IN SUPPORT OF ALABAMA SECRETARY OF STATE JOHN MERRILL

RETRIEVED FROM DEMOCRACYDOCKET.COM

JOEL R. BLANKENSHIP
THE BLANKENSHIP LAW FIRM, LLC
2148 Pelham Parkway
Building 200
Pelham, Alabama 35214
(205) 542-3304
JRB@blankenshiplaw.net

ALBERT L. JORDAN
Counsel of Record
WALLACE, JORDAN, RATLIFF AND BRANDT, L.L.C.
800 Shades Creek Pkwy
Suite 400
Birmingham, AL 35209
(205) 874-0305
bjordan@wallacejordan.com

Counsel for Amicus Curiae John Wahl, Chairman, Alabama State Republican Executive Committee

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

CASES Page(s)

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES—Continued

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES—Continued

CONSTITUTIONS

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES—Continued

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES—Continued

Page(s)

RETRIEVED FROM DEMOCRACYDOCKET.COM

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Movant John Wahl is the Chairman of the Alabama State Republican Executive Committee ("ALGOP"). It is composed of over 400 persons who are elected from each of the State's 67 counties, several persons he appoints, and one person chosen separately by each of four named ancillary organizations self-identifying as Republican. ALGOP sends its Chairman, as well as two people, to serve on the Republican National Committee. ALGOP is known in common understanding as the Alabama Republican Party.[1]

The district lines in dispute in these cases have the kind of interest to ALGOP that the Court likely expects. Thus, for the biennial election of persons from Alabama to the United States House of Representatives, ALGOP certifies through its Chairman the names of persons to be its nominees at the November election for the State's seven House districts. The nominees actually are selected in a government-administered primary election that is open to properly registered Alabama voters in each House district. (*See* Ala. Code §§ 17-13-42, 46).

ALGOP also has an additional organizational interest in these cases that is perhaps more direct. Its own members are chosen in the same primary elections,

RETRIEVED FROM DEMOCRACYDOCKET.COM

[1] All parties have consented by the filing of "blanket consents" to the submission of this amicus curiae brief. As provided by Rule 37, counsel hereby advises that this brief is not authored in whole or in part by counsel for a party. Counsel further advises that no party or counsel for any party has made a monetary contribution intended to fund the preparation or submission of the brief. Finally, there is no person other than the amicus ALGOP, its members, or its counsel who have made a monetary contribution funding the preparation or submission of the brief.

and eligibility is keyed in part to residency in Alabama's seven Congressional districts. Thus, its members will be chosen in the upcoming May 24 primary election. At present, there are about 71 positions being sought that are contested. (https://algop.org/algop-sec-qualified-candidates/)(last visited April 27, 2022).

In addition, ALGOP's membership of over 400 persons is allocated among the counties in each Congressional district based on votes cast for Republican nominees, (https://algop.org/wp-content/uploads/2021/09/ALGOP-Bylaws-as-of-August-21-2021.pdf)(last visited April 27, 2022). Further, the ALGOP membership includes "bonus" seats, based on the number of Republican nominees elected to the local government of each county in a district. The members of ALGOP for each Congressional district chose a District Chair, who serves on a 21-person Steering Committee that manages policy for ALGOP between the twice per year meetings of the full membership. (*Id.*).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Just in case there is any doubt, in light of the extra-heated rhetoric of contemporary political discourse, there are no racial requirements for, or barriers to, election to ALGOP, or its officer positions. In contrast to the other major political party in Alabama, there is no racial proportionality required under the ALGOP bylaws. *See Kelly v. Harrison*, 2021 WL 3200989 (M.D. Ala. July 28, 2021)(outlining consent decree requiring proportionate racial make-up of Alabama Democratic Executive Committee); *Hawthorn v. Baker*, 750 F. Supp. 1090 (M.D. Ala. 1990).

In recent years, ALGOP has come to be regarded as the dominant political party in Alabama. Following the 2010 elections through the 2020 elections, of

Alabama's seven members of the U.S. House, six have been Republican nominees. *See Merrill v. Milligan*, No. 21A375, Amicus Curiae Brief in Support of Emergency Application, etc. for John Wahl, Chairman, Exhibit 1 (U.S. Feb. 2, 2022). Similarly, the Alabama legislature's 105-person House members and 35-person Senate each were composed of members identified as Republican by super-majorities. There are a total of 102 of 140 legislators who were Republican nominees. All current statewide elected officeholders were Republican nominees, including the Governor, the Attorney General, the Chief Justice and all members of the appellate courts. The one noteworthy exception to the general trend was a 2017 special election when Democrat nominee Doug Jones defeated Republican nominee Roy Moore to fill a vacancy arising from the resignation of U.S. Senator Jeff Sessions, who had been appointed U.S. Attorney General earlier that year.

The ALGOP is also interested in one of the underlying features embedded in the issue for review — what is the proper legal effect of the statistical phenomenon termed "racially polarized voting" in applying Section 2 of the Voting Rights Act. The record here shows that, in Alabama for the last twenty years, the vast majority of white voters favor a different candidate than the vast majority of black voters, and usually defeat the candidate preferred by those black voters. However, that is not because blacks (or any persons defined by race) are excluded from political life by a majority electorate that is racially organized. What occurred under the dominance of the Alabama Democratic Party in Alabama when the Voting Rights Act was first adopted seems like ancient history. There is no dispute that blacks have voting registration and turnout rates that indicate they are able to participate in the Alabama

RETRIEVED FROM DEMOCRACYDOCKET.COM

political process by voting at rates equal to or greater than whites.

Further information about the ALGOP interest in these cases is reflected in the previous amicus curiae brief filed in connection with the Emergency Stay Application made by Petitioner Merrill in January 2022 in *Merrill v. Milligan*, No.21A375. *See id.*, Amicus Curiae Brief in Support of Emergency Application, etc. (U.S. Feb. 2, 2022). In that submission, ALGOP argued that the relief granted by the district court was unduly disruptive of an ongoing primary election process, so a stay was warranted as a matter of wise judicial discretion. Also, ALGOP argued that the core of the Congressional districts had been stable since 1992, and that counseled in favor of a stay of the district court order.

A number of the records citations used hereafter in addition to being in the Joint Appendix ("JA") and the Supplemental Joint Appendix ("SJA") are to the Stay Appendix filed in the *Merrill* case, No. 21A375. The acronym used for the Stay Appendix is the one used by the Merrill Appellants — "MSA". This brief also includes references to portions of the record below not included as appendix by the parties, most notably parts of the transcript which is ECF 99 in the district court, as shown on the JA docket listings.

RETRIEVED FROM DEMOCRACYDOCKET.COM

SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, should not be applied as the district court did here. In finding that the Alabama legislature should have created an additional U.S. House district in which blacks comprise a majority of the voting population, the court was too quick to deem polarized voting by racial groups as having the effect of denying

an "equal opportunity" to participate "on account of race." In this day and time, rather than the era when the Act was first adopted, in the "totality of the circumstances," the voting statistics more likely reflect differences in support for the non-race based policy views of Republican nominees. There is nothing about current conditions in Alabama that indicate the fundamental protection of the Act — the casting of an election ballot — does not occur on equal terms for all persons without regard for race. Blacks and whites are registered at the same rates. In voting, the statistics imply they mostly vote for candidates of different political parties.

RETRIEVED FROM DEMOCRACYDOCKET.COM

This difference in voting pattern should not be actionable under § 2 to set aside district lines, absent a showing that line-drawing was not just "party politics." The "totality of the circumstances" in our time do not imply that equal opportunity has been denied. The claim that an unjust "vote dilution" occurs, as articulated in *Thornburg v. Gingles*, 478 U.S. 30 (1986), does not reflect current reality. Given the overall political power held by blacks in Alabama (and especially in the 2000's, as leaders in the Alabama Democratic Party) the circumstances do not warrant judicial action in the name of preventing "vote dilution." Indeed, the concept of "vote dilution" is too easily manipulated for partisan advantage. If the claim that dilution of voting strength of a group organized racially should be actionable under § 2, the claimant should be expected to prove that the dilution is not "party politics." The concept of vote dilution itself is very hard to measure, and is virtually unworkable in judicial proceedings. *See*, *e.g.*, *Ruco v. Common Cause*, 139 S. Ct. 2484 (2019); *Vieth v. Jubelirer*, 541 U.S. 267 (2004)(Scalia, J.)(plurality opinion).

The district court overlooked or unfairly distorted important facts of recent Alabama political history in finding the districts to violate § 2, despite its lengthy opinion. For instance, it faulted as "official discrimination" State legislative use of racial targets in setting new district lines for State legislative posts. Yet, those were the same core lines used as a partisan gerrymander by a legislature under Democratic control that included black leadership. *See Alabama Black Legislative Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1235 (M.D. Ala. 2013)(3-judge court), *vacated and remanded*, 575 U.S. 254 (2015). Even more troubling, those district lines were adjusted to preserve racial targets — undertaken in the name of the Voting Rights Act. The district court should not have counted that problem as one of the circumstances warranting judicial intervention — also in the name of the Voting Rights Act — to protect against vote dilution. It also made no reference to the absence of U.S. Attorney General objection to statewide voting changes after 1994. Yet the court faulted local jurisdictions that attempted flawed voting changes up until 2013, as if they should bear on the evaluation of this legislature's 2021 U.S. House lines.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Six of Alabama's seven members of the U.S. House are Republicans. Given the current super-majority Republican membership of the legislature, acquired in the last twelve years, it is hardly surprising that the 2021 districts make it likely that no change in the partisan balance in Alabama's U.S. House delegation will result in the next election. Given the partisans norms for districting, and the importance of the role of courts for resolving non-political disputes, any further proceedings should be allowed the Plaintiffs only with a showing that the voters in these districts are not assigned on a partisan political basis.

ARGUMENT

The Alabama Republican Party agrees with the position of Secretary of State John Merrill as advanced by Alabama's Attorney General Steve Marshall. For a claim under § 2 of the Voting Rights Act ("the Act"), 52 U.S.C. § 10301, that an election district configuration results in a dilution of the vote by a racial group, the challenger should be required to show that non-racial criteria would result in reasonably configured non-dilutive districts. To the extent that Merrill's position is an adjustment to the test used in *Thornburg v. Gingles*, 478 U.S. 30 (1986), such an adjustment is needed. In this case, ALGOP understands that computerized alternatives, designed without regard for race, do not produce an additional district that satisfies the demands of the claimants. Accordingly, the order of the district court granting them relief is due to be set aside.

ALGOP here goes a step further and also argues that the "totality of the circumstances" requires more from the claimants. The current circumstances are far removed from the Democratic hegemony of a Southern officialdom that often explained itself in racial terms, and justified adoption of the Act. Now, as explained more below, claimants also should be required to show that political alignment does not explain the challenged configuration.

I. The disputed U.S. House district lines for Alabama do not result in abridgement of the right to vote on account of race.

Alabama's 2021 U.S. House district lines are not, in the words of subsection (a) of the Act's § 2, a voting procedure "which results in. . . . abridgement of the right to vote **on account of race or color** . . . ."

RETRIEVED FROM DEMOCRACYDOCKET.COM

52 U.S.C. § 10301(a)(emphasis added). Moreover, under the text of subsection (b) of the Act, invoking the "totality of the circumstances," it cannot be said "that the political processes leading to nomination or election in the State . . . are not equally open to participation by members of a class of citizens protected by subsection (a). . . ." In short, the disputed Congressional district lines do not create a vote dilution result impliedly "on account of race."

The record before the district court should not be accepted as sufficient to find that the U.S. House district lines were established by the Alabama legislature in 2021 "on account of race" in violation of § 2. Given the text of the statute, and the reality of political alignments in the State, it is no surprise that the Alabama legislature adopted Congressional district lines that retain the core of existing districts and the apparent advantage they give Republican nominees. The Court should not approve the lower court's requirement that the districts be redrawn.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Over the course of the last two decades, Republican nominees for Congress have come to hold six of the seven Alabama U.S. House district seats, and other Republican nominees control the Alabama legislature that has responsibility for drawing the U.S. House districts lines. The Constitution's judicial branch, is not suited to evaluate claims that a partisan approach to setting Congressional district lines results in an inadequate amount of political power. *See Ruco v. Common Cause*, 139 S. Ct. 2484, 2499–2500, 2502–03 (2019)(lines . . . drawn on the basis of partisanship does not indicate that the districting was improper); *Easley v. Cromartie*, 532 U.S. 234 (2001)(rejecting claim that district lines were racial rather than

political); *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)("A jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats"). *Compare, Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2349 (2021) ("partisan motives are not the same as racial motives," for limits on mail-in voting) *with* S. Tofighbakhsh, Note, *Racial Gerrymandering After Ruco v. Common Cause: Untangling Race and Party*, 120 Colum. L. Rev. 1885 (2020).

In the same vein, the courts are not suited to judge the lawfulness of the districts established based on the politics of the voters allocated to each district. The vague language of the Voting Rights Act provides no genuine guidance on resolving claims that district lines merely result in an inadequate allocation of political power. *See, e.g., Holder v. Hall*, 512 U.S. 874, 892 (1994)(Thomas, J., concurring in the judgment) ("construing the Act to cover potentially dilutive electoral mechanisms [is] . . . a hopeless project of weighing questions of political theory"). If the lines can be explained in partisan, political terms, and the voters and political parties are not organized explicitly for the purpose of excluding people racially, that should end the judicial inquiry. Efforts by courts to do merely *something* — in the name of preventing racial misconduct — put courts in a position of being seen as playing partisan favorites.

Judicial intervention should be warranted only in the most rare, unlikely circumstance. In ALGOP's view, the district court application of Section 2 is inadequately sensitive to "party politics." Given the vast difference between 1965 and 2022 in Alabama (and other formerly "covered" jurisdictions), those

RETRIEVED FROM DEMOCRACYDOCKET.COM

seeking to establish a violation of Section 2 should be required to prove not simply a racial divide in the voting, but also that "party politics" does not account for the problem complained of.

The direction in the Act to evaluate the "totality of the circumstances" inevitably calls for an inquiry about partisan political goals. Moreover, it is the kind of inquiry that most likely is unmanageable, as a judicial matter, absent an explicit contemporaneous legislative embrace of racial objectives. *See*, *e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004)(Scalia, J.) (plurality opinion) (noting that Art. I, § 4 of the Constitution contemplates districting by political entities "that turns out to be root-and-branch a matter of politics"). As noted in the *Vieth* plurality opinion, the "totality of the circumstances" test in § 2 is the kind of test found non-justiciable in the political context. On the other hand, racial motive is easy to grasp as irrational, and "much more rarely encountered." *Id.* at 286. Yet, in the 2012, as this Court knows, the Alabama legislature did just that by establishing a required racial composition for certain of its own districts. *See Alabama Black Legislative Caucus v. Alabama*, 575 U.S. 254 (2015) (explicit racial targets adopted for minority districts to satisfy the Act).

In fairness to the 2012 Alabama legislature, that kind of misuse of the Voting Rights Act happens too much, as this Court's precedents have shown. *See Abbott v. Perez*, 138 S. Ct. 2305, 2334–35 (2018)); *Cooper v. Harris*, 137 S. Ct. 1455 (2017)(deliberately moving African-American voters into a district to ensure the district's racial composition in enlarged district — without evidence that same could occur without focus on race); *Miller v. Johnson*, 515 U.S. 900, 926–27 (1995). Perhaps that is because of assump-

RETRIEVED FROM DEMOCRACYDOCKET.COM

tions some have made that nothing really has changed in 60 years in American political life — i.e., assumptions that most political debate is but coded racial arguments. ALGOP does not share that assumption, and believes that public policy debate is real, and does not believe it is implicitly racial.

Allowing judicial relief in the name of mere effects on voters by showing racial voting patterns, without a challenger showing that politics does not drive the decision, should not be authorized by §2. Without some affirmative showing that politics was not the motive — as it normally would be, the courts would be dragged by the Act into attempting to unmask an unmanageable political decision in the name of establishing racial fairness and overcoming societal racial discrimination. Yet those racial goals are themselves so ambiguous as to be unmanageable from a judicial perspective, and sometimes an attempt to excuse racial discrimination in line-drawing, *see Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996). Such action also would be based on a reading of the Act not likely within the scope of "appropriate legislation" implementing the Fourteenth or Fifteenth Amendments at least not on the legislative record underlying the Act. And, the such an action would not be allowed by treating the Act as authorized by the Art. I, § 4's Elections Clause, given that clause itself is said to expect politics in the process.

RETRIEVED FROM DEMOCRACYDOCKET.COM

II. The partisan effect of equal voter participation and opportunity better account, under the totality of the circumstances, for Alabama election results than does racial polarization.

It is well-established that the official obstacles to voter registration and turnout by blacks in Alabama have ended. And, the practical effect has been noted to be equal participation by blacks and whites. *See Shelby County v. Holder*, 570 U.S. 529, 548 (2013)(as of 2004, voting registration rates for whites and blacks was 73.8% and 72.9% respectively); *Riley v. Kennedy*, 553 U.S. 406, 429 (2008) (Stevens, J. dissenting) ("Voting practices in Alabama today are vastly different from those that prevailed prior to the enactment of the Voting Rights Act . . . ."); *Alabama State Conf. of NAACP v. Alabama*, 2020 WL 583803, at *41 (M.D. Ala. Feb. 5, 2020)("*NAACP*")(2010 voter registration for blacks exceeds that of whites, 74.38% to 74.35%).

Instead of vote dilution "on account of race," the disputed district lines result in voting patterns that break down along partisan political lines. Persons who vote Democrat control the 7th District, and that district has elected a Democrat throughout its thirty-year history. That the district also has a large black voter majority is not sufficient to imply that the lines pack blacks into the district to reduce their voting power in other districts. Over 90% of blacks in Alabama vote for the same candidate, and they have chosen to vote for Democrat nominees in Alabama general elections. SJA 122 (Palmer Report)(analyzing twelve elections from 2012 to 2020)); JA63 ECF 99 at 758 (Palmer)("They tend to vote for Democratic candidates"); JA63 ECF 99 at 1079–80 (Bryan). In the record of this case, there was no evidence of racial

RETRIEVED FROM DEMOCRACYDOCKET.COM

polarization where a majority of white voters supported Democrats. Racial polarization only occurs where whites tend to vote for Republicans, (JA 63 ECF 99 at 766)(Palmer)(not "in at least recent era"). Thus, in Alabama, polarization only occurs when whites refuse to support Democrats. That kind of understanding of the conditions which warrant judicial intervention are not what builds public confidence in a judicial role.

In ALGOP's view, that polarization can be explained best on the basis of policy choices of individuals (that are not race-based) favoring the Republicans, and not by any ALGOP efforts to limit participation in its affairs on the basis of race, *see*, *e.g.*, *Morse v. Republican Party*, 517 U.S. 186 (1995)(registration fee for participation in nominating convention)*; Smith v. Allwright*, 321 U.S. 649 (1944)(Texas statute allowing political party rules to exclude racially). That blacks may choose Democrats over Republicans on the basis of the policy positions should give no basis for judicial intervention. Given the limited role of statistics in a § 2 results case, there would not be an inference from that data of what is the reason for the polarization.

RETRIEVED FROM DEMOCRACYDOCKET.COM

The "totality of the circumstances" due consideration by the Court should not be understood to limit evidence about the role of partisan policy choices in voter decisions. Here, it does not appear that the district court made the same error that the Wisconsin Supreme Court was found by this Court to have made recently in *Wisconsin Legislature v. Wisconsin Election Commission*, 142 S.Ct. 1245 (U.S. Mar. 23, 2022). In applying the Act, the Wisconsin court had ordered the creation of an additional majority-black State legislative seat by deeming six, rather than seven,

majority black districts to show a disproportionate number of representatives that implied a lackof equal opportunity — under the "totality of the circumstances." However, even though the district court here parsed many more circumstances than the Wisconsin court, it did unduly discount the political realities.

Furthermore, despite Republican electoral dominance in the last decade, blacks have continued to hold other offices in Alabama in proportion to their part of the population. For instance, since 1993, the Alabama legislature has been composed of at least seven black State Senators out of a total of 35 positions. And, since 1993, in the other body of the Alabama legislature, the House, there have been at least 26 black members out of a total of 105 positions. Thus, for three decades, the legislature has been composed of black members elected from majority black districts in close proportion to their share of the total Alabama population. All were Democrats. *See Vieth v. Jubelirer*, No. 02-1580, Brief of Amici Curiae Leadership of the Alabama Senate and House of Representatives at 7 (U.S. Oct. 17, 2003); *NAACP* at *61.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Not only did black voters have proportionality in the legislature, but the black legislators they elected used their positions in a manner showing they possessed official power. In 2002, when Democrats controlled the legislature, and these same core Congressional district lines as now used were embraced, the Democratic leadership of the legislature thought well of them. They "touted the [State legislative] districts adopted in 2001 as a lawful partisan gerrymander that enabled black legislators to serve in positions of unprecedented leadership." *Alabama Black Legislative Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1235 (M.D. Ala. 2013) (3-judge court)(noting rejection in early 2000's of

partisan gerrymander claim), *vacated and remanded*, 575 U.S. 254 (2015). As noted in the remand proceedings in the *Black Legislative Caucus* case, Democrats managed to populate the State legislature with 71% of the Senate seats and 60% of the House seats, despite only 52% of the statewide vote supporting Democrats in Senate races, and 51% supporting Democrats in House races. *See Ala. Black Legis. Caucus v. Alabama*, 231 F. Supp.3d 1026, 1036 (M.D. Ala. 2017)(3-judge court). In those days, there were two Democrats and five Republicans nominees filling the U.S. House seats. The district lines were established as a result of black legislators exercising their bargaining power in the Alabama legislature in the process of setting U.S. House lines. *See*, *e.g*, *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994)("pull, haul, and trade to find common political ground" with colleagues). In 2008, those State legislatively established U.S. House lines resulted in the election of a third Democrat nominee. In other words, by 2008, the candidates of choice for black voters won 42% of the seats in Congress, but black voters comprised about 25% of the State's population.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Of further importance in the "totality of the circumstances," by this time, the number of black office holders in Alabama at all levels of government had grown dramatically. *See* C.S. Bullock, III & R.K. Gaddie, *An Assessment of Voting Rights Progress in Alabama* tbl.4 (Am. Enter. Inst. 2005), available at https://www.aei.org/wp-content/uploads/2011/10/-executive-summary-of-the-bullockgaddie-expert-report-on-alabama_134411621012.pdf?x91208 (last visited April 27, 2022). Much of the expansion came in the wake of the class action litigation initiated under the then new "results" test of § 2 of the Act, and captioned as *Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D.

Ala. 1986). The affected local governments resolved claims in large measure by consent decrees that ordered the creation of single member districts and an increase in the number of officeholders used in local governance. Though this Court later rejected the idea that vote dilution could be remedied by a court order requiring an increase in the number of elected officeholders in *Holder v. Hall*, 512 U.S. 874 (1994), and thus called into doubt the *Dillard* remedial orders, *see generally, Nipper v. Smith*, 39 F. 3d 1494, 1532–33 (11th Cir. 1994)(*en banc*), there was no retrenchment. Instead, in 2006, the legislature and its Democrat majorities, still composed of black members in leadership positions, eventually ratified the court orders by State statute. *See* Ala. Act No. 2006-252 (codified at Ala. Code §11-80-12); *Dillard v. Chilton County Commission*, 615 F. Supp. 2d 1292 (M.D. Ala. 2009).

The district court's canvas of factors recognized as bearing on the Section 2 inquiry here led to rejection of the State's argument that racially polarized voting implied something other than race-based decision-making. Thus, the court was unwilling to conclude that the pattern of blacks and whites supporting different candidates was "attributable to politics." MSA 179–80.

It was wrongly indifferent to the exhaustive findings in the 2020 Alabama district court decision rejecting a Section 2 challenge to at-large elections for Alabama appellate judges. MSA 179–80 (*citing NAACP*, 2020 WL 583803 at *42)("virtually impossible for Democrats — of any race — to win statewide . . . in the past two decades."). Deeming that case to have a record not present here, the court discounted the findings of the *NAACP* court and said they "do[ ] not

RETRIEVED FROM DEMOCRACYDOCKET.COM

stand for the broad proposition that racially polarized voting in Alabama is simply party politics." (*Id.*).

This recent history is hardly in dispute, even if the full story is not in the record of this case. Part of the history, as noted in the *NAACP* case, is the current "fractured state of the Alabama Democratic Party. . . [that was in 2020] the subject of a state court lawsuit in which one faction of the party has sued the other for party control." (*NAACP*, 2020 WL 583803 at *44 (citing *Ala. Democratic Party v. Gilbert*, No. CV-2019-000531 (15th Jud. Cir., Ala. Oct. 30, 2019)). The district court in the 2020 *NAACP* case also made findings that partisan affiliation was not a proxy for race, but was based, by large majority, on an agreement with the issues of the political party. 2020 WL 583803 at *47–53 (discussing recent Alabama political history, and "whether party is a proxy for race").

The conclusions of the *NAACP* district court decision are consistent with a pattern of partisan motives driving elections noted over 25 years ago, when Democrats dominated Alabama politics, in the *en banc* decision of Eleventh Circuit in *SCLC v. Sessions*, 56 F. 3d 1281 (11th Cir. 1995)(*en banc*). There, the circuit court affirmed a finding that "factors other than race, such as party politics and the availability of qualified candidates" were driving the election results for judges. *Id.* at 1293–94. In that era, one expert analyzed 353 judicial elections beginning in 1976 (and 43 involving a black Supreme Court justice who won two Statewide general elections and served until the early 1990's), and found that the preferred candidate of black voters won over 76 percent of the time. 56 F. 3d at 1291 & n.18.

Yet here, the district court was unimpressed with the recent election to the Alabama legislature of a

RETRIEVED FROM DEMOCRACYDOCKET.COM

black Republican from a majority-white district in Shelby County, a suburban area immediately south of the county where Birmingham is located. MSA 179. It was said to be a 2021 "special election" with low turnout, and therefore unreliable. This Court should take judicial notice of the undisputed fact that the same black Republican qualified in 2022 to be the GOP nominee in the same district for the 2022 general election, and he has no opposition. *See* https://algop.org/alabama-house-and-senate-qualified-candidates/ (last visited April 27, 2022); Alabama Democratic Party Qualifying List, https://docs.google.com/spreadsheets/d/1wfBK-sg1LiGHPQsZ50Q3bw5R6cJ-h8uNSSHavtDKo6s/edit#gid=4070004496 (last visited April 27, 2022).

The Court should also be aware that the record here shows black candidate success in overwhelmingly white, Republican Shelby County's primary election for school superintendent in 2018. (SJA 144–45) (Second Declaration of Bridgett King (Dec. 21, 2021)). That primary election victory meant a general election victory for the black Republican, as there was no Democratic nominee. (*Id*. at 145 n.33). In the district court's diminishing of the importance of the 2021 special election victory, MSA 179–80, there is no mention of the school superintendent victory.

In a similar vein, the district court is unduly disparaging of "parity in registration and turnout" between blacks and others, as "too formulaic." MSA 188. From where ALGOP sits, the district court puts too much emphasis on past official discrimination. After all, the Voting Rights Act is aimed mostly as assuring equal right to participate in choosing government leaders. MSA 188. From the view of the ALGOP, the court's analysis seems to rationalize a judicial handicap on candidates of one political party.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Ironically, the analysis imposes the handicap on the political party that has been opposed to official discrimination, and was not in power while this official discrimination was in place. While it may be true that, in Alabama, there are vastly fewer Republican nominees and elected officials that identify as black compared to Democrat nominees, ALGOP contends the difference is not driven by any race-based ALGOP policy. ALGOP sees its voters as casting ballots on ideological grounds, and not on the basis of race. *See, e.g.*, JA 781–83 (Hood). *See also*, M.V. Hood III, *et al.*, *True Colors: White Conservative Support for Minority Republican Candidates*, 19 Public Op. Qtrly. 28 (2015).

The district court saw justification for a Voting Rights Act order here in certain recent specific forms of alleged "official discrimination." MSA 183–84. In a pointed irony, it saw the finding that, after the 2010 census, the legislature adopted "unconstitutional racial gerrymanders" in twelve State legislative districts. MSA 183–84. (citing *Legislative Black Caucus*, 231 F. Supp.3d at 1348–49). Yet, as the cited decision notes, those legislatively adopted racial gerrymanders themselves had been established in the name of the Voting Rights Act by using fixed racial targets to prevent retrogression of black voting strength in violation of § 5 of the Act, *see id.*, 231 Supp. 3d at 1061–64, before the coverage formula for § 4 of the Act was held to be unconstitutional in *Shelby County v. Holder*, *supra*. (*See* 52 U.S.C. §§ 10303, 10304). They were not based on a determination that the legislature had diluted black voting strength by packing blacks into a limited number of districts. *See* 231 F. Supp.3d at 1043 (affirming previous 2013 holding rejecting § 2 vote dilution claim). Instead of finding that the

RETRIEVED FROM DEMOCRACYDOCKET.COM

requirements of the Voting Rights Act are susceptible to being misunderstood and therefore cause erroneous use of racial thinking (in the name of remediation), the district court relied on that error to justify further judicial oversight *in the name of the Voting Rights Act*.

It bears note that the district court here credited the testimony of Georgia historian Joseph Bagley. MSA 185. But the district court overlooked a significant omission from Bagley's narrative about continuing discrimination — the role of black leadership in the Democratic State legislative partisan gerrymander in 2001. Bagley's chronology slides past the black leadership and participation in that redistricting. JA 220–26, JA 299–306. And, the district court too makes no mention of black official leadership, in praising the completeness of Bagley's testimony. MSA 186–88. Rather than note the black leadership in that Democratic partisan gerrymander, as recounted in the *Black Legislative Caucus* case, the district court found continuing "official discrimination" in Republican preservation of those districts. MSA 183–84.

The district court "totality of the circumstances" also omitted an important feature of the stipulation of the parties about the State's successful compliance with past requirements for § 5 approval. As stipulated by the parties, "the last sustained objection to an Alabama state law occurred in 1994." JA 172 ¶ 149. *See also*, JA 351 ¶¶ 117–18. Instead of noting that record, the court observed that there had been over 100 proposed voting changes between 1965 and 2013 that were blocked or altered. MSA 184. This Court should be clear that the objectionable changes after 1994 were not statewide election rules — for district lines or other forms of election administration.

RETRIEVED FROM DEMOCRACYDOCKET.COM

As additional instances of "official discrimination," the district court also cited two 2019 court decisions from Jefferson County about two local governments there. MSA 183–84. But they hardly show the kind of continuing official discrimination under the "totality of the circumstances" that justify relief now. In short, the record says nothing about whether the Democrat controlled legislature in the 2000's, in which blacks exercised considerable leadership, took any action against these two local government agencies whose members were chosen by election.

One involved the Jefferson County Board of Education which has five members, with one member selected from a "sub-district" chosen from the area where there are municipal-run schools pursuant to a local statute adopted in 1975. *Jones v. Jefferson County Board of Education*, 2019 WL 7500528 (N.D. Ala. Dec. 16, 2019). The sub-district has elected a black person since 1986. The suit was filed in 2018, the same year a black lost an election for one of the at-large seats, and the cited order provided that the other four seats would be chosen from districts rather than at-large, and was entered by consent.

RETRIEVED FROM DEMOCRACYDOCKET.COM

The district court also noted the presence and ending in 2019 of an at-large municipal election procedure in a small single city in Jefferson County, as further evidence of "official discrimination." MSA184 (citing *Ala. State Conf. of NAACP v. City of Pleasant Grove*, 2019 WL 5172371 (N.D. Ala. Oct. 11, 2019)). This Court should be clear that Jefferson County is said in opinion testimony to have been Democratic for at least two decades, (JA 63 ECF 99 at 87 ("has been blue")), and, in Alabama, municipal elections are non-partisan. *See* Ala. Code § 11-46-3.

Lastly, the disturbing racial comment of one State Senator in 2010, when his political party was in a minority position in the Alabama legislature, is due a closer look. From reading the district court decision, one might think it was a generally used remark in the State Senate at the time — as the district court indicates, using the plural form of "senator" — that the remark was made by "senators." MSA 184. The cited pages indicate otherwise. Moreover, the comment arises in the context of assessing the credibility of two senators (who had been wired by the FBI) in assessing whether certain others, who were criminal defendants in a bribery scheme seeking to lift limits on gambling in Alabama, could be retried. The remark reflects a single Senator's private bias, and his supposed comments to one official colleague aimed, according to the court, at "increasing Republican chances to take control of the state legislature" in the upcoming November 2010 elections. *See United States v. McGregor*, 824 F. Supp. 2d 1339, 1345–47 (M.D. Ala. 2011). In the *McGregor* case, the court was clear that there was no indication that "prosecutors in this case condoned or shared any of the biases of their cooperating witnesses," *id.* at 1348. Though the court did not say so, there was no indication that the biases extended to other officials, including those of the State — or to ALGOP. A proper assessment of the "totality of the circumstances" under the Act would not treat this single, isolated remark as official discrimination effecting State government administration. *Compare Brnovich*, 141 S. Ct. at 2349–50 (race-tinged start to debate does not mean "legislature as a whole was imbued with racial motives"), *with*, *Hunter v. Underwood*, 471 U.S. 222 (1985)(invalidating due to widespread racial purposes, § 182 of 1901 Alabama

RETRIEVED FROM DEMOCRACYDOCKET.COM

Constitution that made domestic violence and certain other crimes disqualifying).

Finally, ALGOP urges the Court not find Alabama's old history of racial discrimination controlling in the "totality of the circumstances." Over twenty-five years ago, Alabama's Constitution was revised to discard restrictions on voting established in 1901 by racially minded political leaders. *See* Ala. Const., art. VIII § 177 (Amendment No. 579). The critique of events in the late 19th Century to the last decade of the 20th Century in Alabama history, is often-repeated by historians, and used in cases like the *Dillard v. Crenshaw County* proceedings. But it refers to a time when the Republican Party had been ousted from power after Reconstruction, depended mostly on federal government patronage, and had no State legislators. https://algop.org/our-party/history-of-algop/ at 1–2 (last visited April 27, 2022). That bears little or no resemblance to the Alabama of today.

RETRIEVED FROM DEMOCRACYDOCKET.COM

CONCLUSION

Voting success is a struggle, as is any human competition. So has it been for the Alabama Republican Party throughout its existence. Today's success may presage tomorrow's loss. Likewise, the Republican success in Alabama of the past twenty years shows that the Democrat restoration after the Civil War was no guarantee of future results. And, as noted in the previous ALGOP amicus brief in support of the Appellants/Petitioners, Alabama's recent political history shows that court intervention in candidate disputes in the name of vague phrases in the law has a way of creating unexpected consequences. *See Merrill v. Milligan*, No. 21A375, Amicus Curiae Brief in Support of Emergency Application, etc., (U.S. Feb. 2, 2022). If the struggle over political control means

anything, it is that political glory tends to be fleeting when people can vote. A fair construction of the Voting Rights Act, constrained by appropriate respect for federalism interests, should not apply its remedial objectives in a way that assumes voters, once empowered, are merely racial actors rather than citizens resolving differences about who will develop the best public policy.

Section 2 of the Act, as applied by the district court, allows courts to speculate that voters are being injured "on account of race," and not show enough respect for partisan debate and alignment. This Court should conclude that Alabama's 2021 U.S. House districting plan does not violate § 2.

Respectfully submitted,

JOEL R. BLANKENSHIP
THE BLANKENSHIP LAW FIRM, LLC
2148 Pelham Parkway
Building 200
Pelham, Alabama 35214
(205) 542-3304
JRB@blankenshiplaw.net

ALBERT L. JORDAN
Counsel of Record
WALLACE, JORDAN, RATLIFF AND BRANDT, L.L.C.
800 Shades Creek Pkwy
Suite 400
Birmingham, AL 35209
(205) 874-0305
bjordan@wallacejordan.com

Counsel for Amicus Curiae John Wahl, Chairman, Alabama State Republican Executive Committee

May 2, 2022

RETRIEVED FROM DEMOCRACYDOCKET.COM