

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALPHA PHI ALPHA FRATERNITY
INC., et al.,

Plaintiffs,

v.

BRAD RAFFENSPERGER,

Defendant.

CIVIL ACTION

FILE NO. 1:21-CV-05337-SCJ

**DEFENDANT'S RESPONSE TO PLAINTIFFS' NOTICE OF
SUPPLEMENTAL AUTHORITY**

On January 25, 2022, Plaintiffs provided the Court with opinions in two recent cases involving the Voting Rights Act. [Doc. 61]. Defendant responds briefly to the issues raised to provide the Court with additional context as it considers the issues in this case.

First, Plaintiffs are correct that Judge Grimberg found that questions of partisan versus racial polarization are handled in the totality of the circumstances portion of a Section 2 case and not the *Gingles* preconditions and must be resolved at trial. [Doc. 61-1, pp. 28-32]. In his opinion, Judge Grimberg cites the Secretary's expert witness, Professor Michael Barber, for the Secretary's position on the causes of polarization in voting. A copy of the

Barber report relied on by Judge Grimberg for the dispute of fact in *Rose* as filed on that docket is attached as Ex. A.

Second, Plaintiffs provided the order in the Alabama congressional redistricting case and noted the stay of qualifying. Each Section 2 case “is particularly dependent upon the facts of each case and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms.” *Wright v. Sumter Cty. Bd. of Elections & Registration*, 979 F.3d 1282, 1301 (11th Cir. 2020) (quoting *Solomon v. Liberty Cty. Comm’rs*, 221 F.3d 1218, 1226 (11th Cir. 2000)). Thus, determinations by the Alabama court about potential remedies, polarization, and the Senate factors were based on an entirely different state and have little value to the Court in its decisions on similar issues in Georgia.

Further, while Alabama primaries are held on the same date as Georgia primaries (May 24), Alabama required candidates to qualify at a much earlier date. As Defendant will demonstrate at the hearing, the different timeline of elections in Georgia presents a completely different set of scenarios than that in Alabama.

Finally, Alabama appealed the three-judge decision to the U.S. Supreme Court and the single-judge decision to the Eleventh Circuit. Justice Thomas directed that responses to the application for stay in docket 21A375 be filed by

tomorrow at noon, and the Eleventh Circuit stayed consideration of Alabama's motion for stay in the single-judge case until the U.S. Supreme Court rules. The State of Georgia joined 13 other states in supporting a stay of the Alabama decision, citing the *Purcell* principle and the district court's application of the *Gingles* preconditions. A copy of the amicus brief filed by Georgia and the other states is attached as Ex. B.

This 1st day of February, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned certifies that the foregoing brief has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

/s/ Bryan P. Tyson
Bryan P. Tyson

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EXHIBIT A

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Expert Report of Michael Barber

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1 Introduction and Qualifications

I am an associate professor of political science at Brigham Young University and faculty fellow at the Center for the Study of Elections and Democracy in Provo, Utah. I received my PhD in political science from Princeton University in 2014 with emphases in American politics and quantitative methods/statistical analyses. My dissertation was awarded the 2014 Carl Albert Award for best dissertation in the area of American Politics by the American Political Science Association.

I teach a number of undergraduate courses in American politics and quantitative research methods.¹ These include classes about political representation, Congressional elections, statistical methods, and research design.

I have worked as an expert witness in a number of cases in which I have been asked to perform and evaluate various statistical methods. Cases in which I have testified at trial or by deposition are listed in my CV, which is attached to the end of this report.

In my position as a professor of political science, I have conducted research on a variety of election- and voting-related topics in American politics and public opinion. Much of my research uses advanced statistical methods for the analysis of quantitative data. I have worked on a number of research projects that use “big data” that include millions of observations, including a number of state voter files, campaign contribution lists, and data from the US Census.

Much of this research has been published in peer-reviewed journals. I have published nearly 20 peer-reviewed articles, including in our discipline’s flagship journal, *The American Political Science Review* as well as the inter-disciplinary journal, *Science Advances*. My CV, which details my complete publication record, is attached to this report as Appendix A.

The analysis and explanation I provide in this report are consistent with my training in statistical analysis and are well-suited for this type of analysis in political science and quantitative analysis more generally. My conclusions stated herein are based upon my review

¹The political science department at Brigham Young University does not offer any graduate degrees.

of the information available to me at this time. I reserve the right to alter, amend, or supplement these conclusions based upon further study or based upon the availability of additional information.

2 Summary of Findings

Based on the evidence and analysis presented below, my opinions regarding recent Public Service Commission races, and voting patterns more generally, in Georgia can be summarized as follows:

- It is well established across recent years and in a variety of electoral contexts that Black voters strongly support Democratic candidates. This support is much more unified than among White voters who prefer the Republican party, but not to the same degree that Black voters are loyal to Democratic candidates.
- However, when considered independently, a voter's partisanship is a much stronger predictor of their vote choice than is a voter's race.
- Support by Black and White voters for the candidates of their preferred parties holds true regardless of the race of the candidate from either party. A candidate's race has had little to no measurable impact on the partisan preferences of Black and White voters in Georgia.
- The most recent statewide elections in Georgia have been very competitive, and Democratic candidates won statewide races in 2020 and 2021 when Public Service Commission candidates were also on the ballot.
- Ballot rolloff, when a voter fails to vote for all races on the ballot, is a contributing factor to why Democratic candidates for Public Service Commission did not win when other Democratic candidates on the same ballot did win statewide.

3 African American Voters Have Historically Supported the Democratic Party in High Numbers

To assess the degree of racially polarized voting, Dr. Popick uses ecological inference methods to determine the degree to which Black and White voters supported candidates who ran for seats on the Georgia Public Service Commission between 2012 and 2021. There were eleven such races to consider, including two runoff elections due to Georgia's rule that candidates must receive a majority of ballots cast or go on to face a runoff election between the two candidates with the most votes. In all cases, Dr. Popick finds that White voters' candidate of choice is the Republican candidate. In all cases but one he finds that Black voters candidate of choice is the Democratic candidate.

These results illustrate that the Georgia Public Service Commission elections are better described as polarized by partisanship rather than by race. Two results from Dr. Popick's report support this conclusion. The first is that while both Black and White candidates ran for Public Service Commission over this time period, there is no correlation between the race of the candidate and support for the candidate among White and Black voters. In the five races where the Democratic candidate was Black, Black voter support for the Democratic candidate averaged 89.72%. In the remaining five races where the Democratic candidate was White,² Black voter support for the Democratic candidate averaged 92.08%. Thus, Black voters were no more likely to support the Democratic candidate for Public Service Commission when the candidate was Black than when the candidate was White. The results are similar among White voters as well. White voter support for Black Democratic candidates was 16.74% on average, and 17.24% when the Democratic candidate was White. Again, the race of the candidate had no impact on support for the Democratic candidate in these races. There were no Black Republican candidates for the Public Service Commission over this time period, so we cannot perform a similar analysis among Republican candidates.

²I exclude the 2016 District 2 race because no Democratic candidate ran in that race. I will discuss this race specifically later in the report.

The one aberration in which Black voters' candidate of choice was not affiliated with the Democratic Party occurred in the 2016 race for Public Service Commission District 2 in which no Democratic candidate ran in that race. Instead, the race featured a Republican candidate (Tim Echols) who ran against a Libertarian Party candidate (Eric Hoskins). Without a Democratic candidate on the ballot, there was a marked decline in support among Black voters. While the Libertarian candidate was still the preferred candidate of a majority of Black voters, their support declined to 79.18%, the lowest support across the 11 races included in Dr. Popick's analysis. Similarly, Black voter support for the Republican candidate in that race rose to its highest level at 20.82%. This unusual situation in which there was not a candidate from both major parties on the ballot illustrates that partisanship has a substantial impact on the level of support from voters in these races.

The results from the Public Service Commission races in Georgia align with broader patterns of the partisan preferences of voters in Georgia. Figure 1 shows that for the last 12 years, Black voters in Georgia have overwhelmingly voted for Democratic candidates while White voters in Georgia have supported Republican candidates, but not to the same degree as Black voters have supported Democratic candidates. On average, Black voters have preferred Democratic candidates at or near 90% while White voters have supported Democratic candidates around 30% of the time. The data for Figure 1 come from the Cooperative Election Study (CES), a very large survey of Americans conducted every two years that measures public opinion, voting behavior, and other political preferences across the United States. The survey is a collaboration of hundreds of scholars of American politics and has been used in the publication of many academic articles and other peer-reviewed materials. The survey team, which includes over 50 universities across the country, is led by researchers at Harvard University.³ The immense size of the survey (around 50,000 responses every two years) allows for statistically powerful analysis of individual-level voter responses at the state and sub-state level across time. Because of the CES survey's national scope,

³See <https://cces.gov.harvard.edu/> for more details of the survey design, datasets, researchers involved, and publications resulting from the survey data.

there were no questions regarding vote choice for Public Service Commission in Georgia. Nevertheless, given the high correlation between the results in those races and other elections in Georgia (for example, see Figure 1 below), I present results that look at vote choice in congressional, gubernatorial, and presidential elections — all of which are closely related.

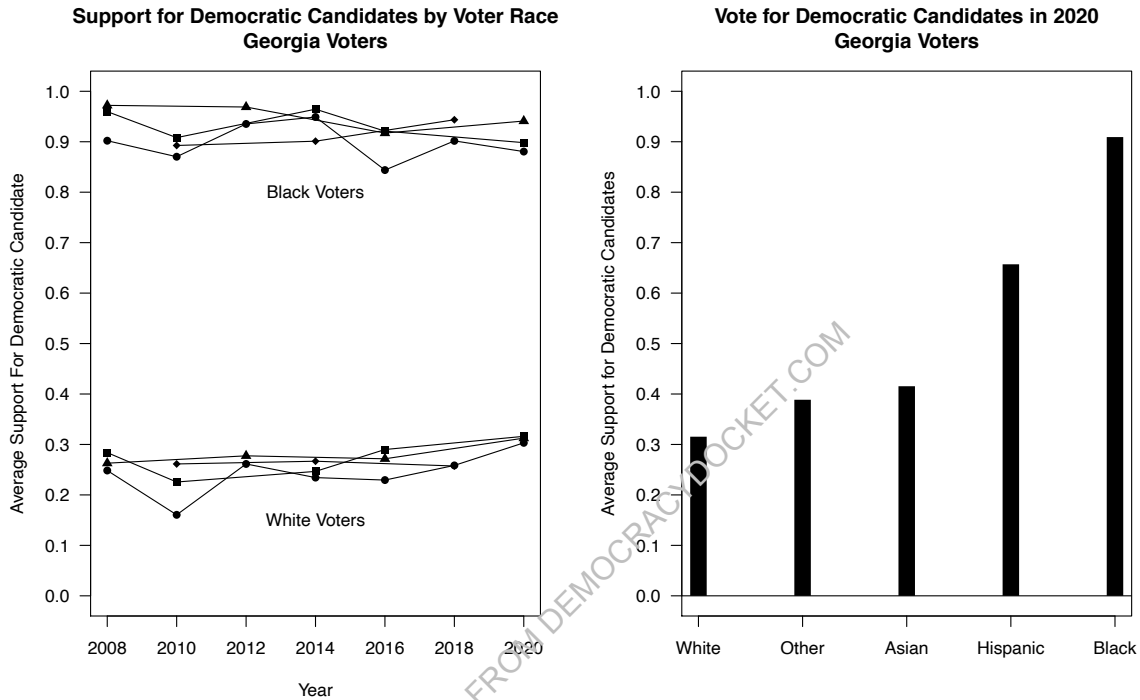


Figure 1: **Partisan Voting Patterns by Race** - The left panel shows historic voting patterns among White and Black voters in Georgia from 2008 to 2020 for multiple different races: US House (circles), US Senate (squares), President (triangles), and Governor (diamonds). The right panel shows the average support in 2020 for Democratic candidates in US House, US Senate, and President (averaged together) across multiple racial groups. Data Source: Cooperative Election Survey.

Figure 2 shows a similar result to Figure 1, but looks at party identification rather than vote choice. We see again that Black voters in Georgia, when asked which party, if any, they affiliate with are very likely to identify with the Democratic Party. Over the time considered in the figure (2008-2020), affiliation with the Democratic Party ranges between 78% and 92% (the left panel of Figure 2) while affiliation with the Republican Party among Black voters (the right panel of Figure 2) is consistently around 5%. White voters over this period affiliated with the Democratic Party at roughly 25% and were affiliated with the

Republican Party between 52% and 64%.⁴

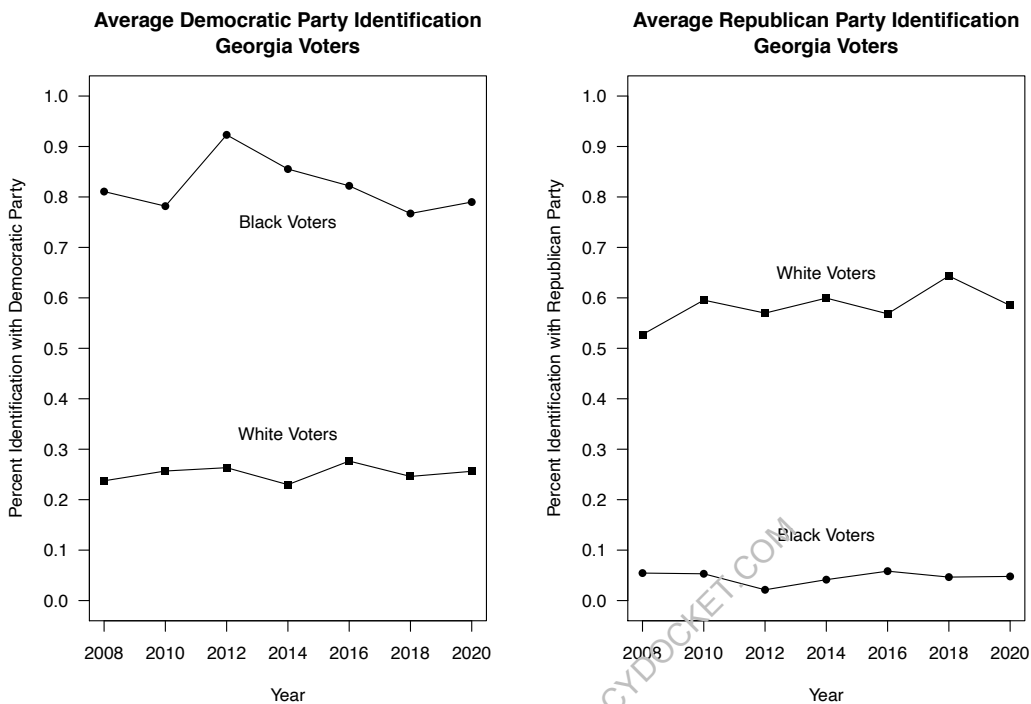


Figure 2: **Partisan Affiliation Patterns by Race** - The left panel shows historic affiliation with the Democratic Party among White and Black voters in Georgia from 2008 through 2020. The right panel shows the same information for affiliation with the Republican Party. Data Source: Cooperative Election Survey.

⁴Adding Democratic and Republican Party affiliation together will not sum to 100 since some voters choose not to identify with either party. The typical party affiliation question asks voters if they identify or “lean” towards one party or the other. I group “leaners” together with “affiliates” in these figures.

4 Partisanship Trumps Race in Voter Preferences

The results above show a strong and consistent preference for Democratic candidate among Black voters in Georgia and a more split preference among White voters, but with a majority supporting Republican candidates. Another way to consider this relationship is by using a multiple regression model. A multiple regression model allows us to disentangle the correlation between voters' race and vote choice versus their partisan affiliation and vote choice by showing the impact of each factor while holding constant the other. The outcome variable in each model is whether or not the voter indicated voting for the Democratic candidate in the race in question. This variable is regressed on a series of dichotomous variables measuring the voters stated race, partisan affiliation, gender, and age. I include four different regression models, one for voting for the Democratic candidate in each of the following races in Georgia in 2020: US House, Senate (the 2020 CES survey did not ask about the 2020 Senate Special election in Georgia), President, and Governor (I use the 2018 data for this question). The figure below shows the estimated coefficients (and associated 95% confidence intervals) for race and party and can be interpreted as the predicted change in the probability of voting for the Democratic candidate associated with that demographic feature. The left four points show the predicted change in Democratic vote propensity associated with race (holding partisanship constant) while the right four points show the predicted change in Democratic vote propensity associated with partisanship (holding race constant). The relatively smaller values of the points associated with race and the relatively larger values of the points associated with partisanship show that when considered separately, partisanship has a much larger impact than race in predicting the party of one's vote choice.

Figure 4 considers the race and partisanship of congressional candidates in Georgia and finds little variation in who Black and White voters support in Georgia regardless of the race of the candidates. I use Congressional races here so as to have more observations in which Black and White candidates from both parties ran for election (there were no Black Republican candidates for Public Service Commission in the time period considered

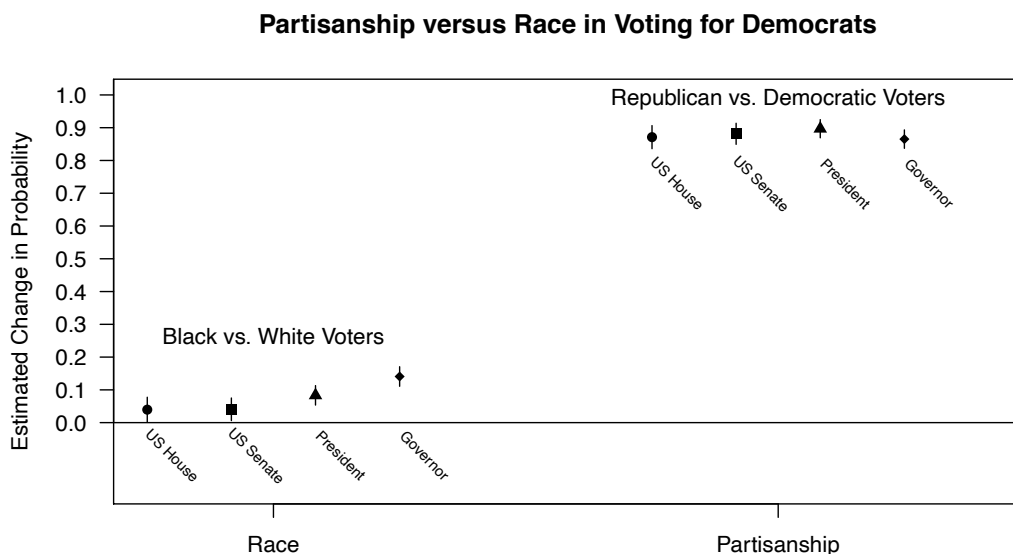


Figure 3: **Predictors of Vote Choice from a Multiple Regression Model in Georgia 2020** - Voting for the Democratic candidate in 2020 in US House, Senate, President and Governor (2018) elections is regressed on the voter's race, partisanship, gender, and age. The figure shows the change in the probability of voting for the Democratic candidate holding constant the other factors included in the model. The left four points show that when holding partisanship constant, race has a small impact on vote choice. On the other hand, the four points on the right show that when holding race constant, partisanship has a very large impact on the probability of voting for the Democratic candidate. The result is consistent across House, Senate, President, and Gubernatorial races.

in Plaintiff's report). However, the results are similar to those discussed earlier in the Public Service Commission races in that there is little variation in the preferences of Black and White voters based on the race of the candidates. The results here are consistent with those results discussed above. Regardless of the race of the candidate from either party, Black voters supported the Democratic candidate nearly 90% of the time in all cases (values range between 86% and 93%). White voters show slightly more variation, but support for Democratic candidates remains below 40% in all but one case.⁵

⁵The one outlier is support among White voters for Democratic candidates when a Black Republican is on the ballot (51.57%). However, this number is unusually high because of a particularly unpopular Black Republican candidate who ran in Georgia's 5th District in 2020 (Angela Stanton King). This race had another unusual component in that while the regular congressional election campaign was occurring there was a simultaneous runoff election campaign for a special election to fill the seat for the month prior to the sitting of the 117th Congress after the death of the incumbent legislator, John Lewis. The candidates

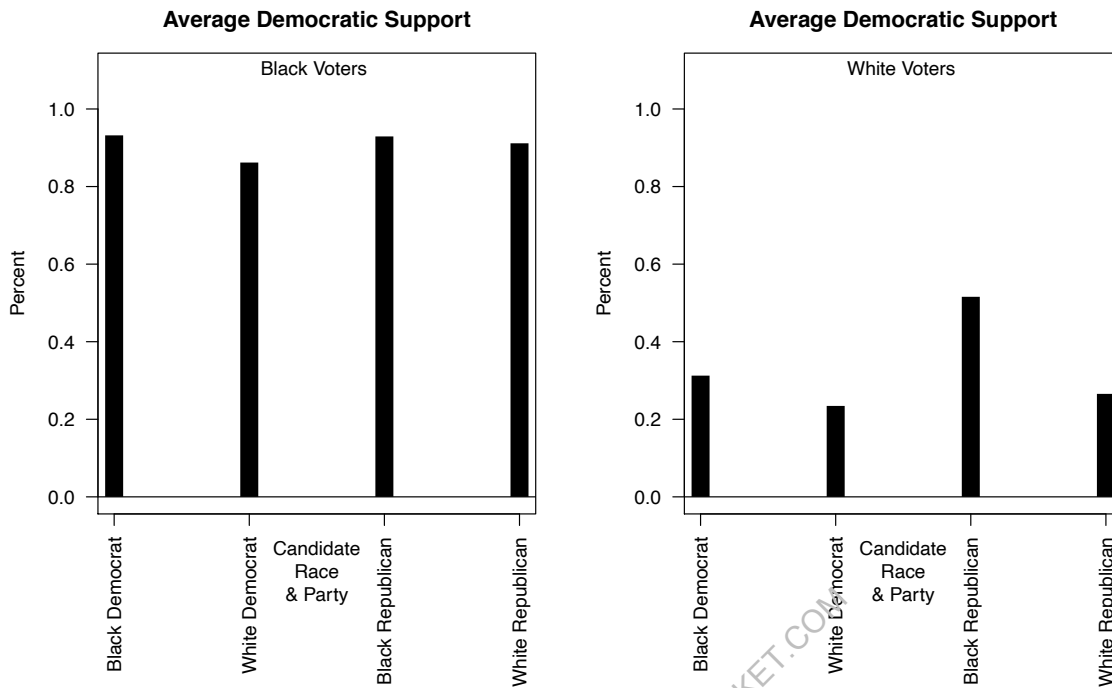


Figure 4: **Influence of Candidate Partisanship Versus Race**

The results presented in this section and in the previous sections show that there is strong evidence of cohesive Black voter support for Democratic candidates, regardless of the race of the candidates in either party. Similarly, there is slightly less cohesive, but still majority White voter support for Republican candidates, regardless of the race of the candidates in either party. Thus, the election analysis provided here and in Dr. Popick's report demonstrate that partisan polarization, rather than racial polarization, is the best explanation for the voting patterns in Georgia.

for the special election were separate from the candidates who appeared in the regularly occurring election. Removing this very unique election brings the support among White voters for Democratic candidates when there is a Black Republican on the ballot to 37.63%.

5 Recent Elections in Georgia Have Been Competitive

Figure 5 shows the two-party election results of statewide races in Georgia since 2018. Points inside the dotted horizontal lines were decided by less than 1 percentage point. Half of statewide elections in Georgia since 2018 have been decided by 1 percentage point or less, with Democratic candidates winning three of the five statewide races in 2020 (president and both Senate seats). The 2020-2021 results show that it is clearly the case that Democrats can win statewide elections in Georgia, and furthermore have come very close to winning statewide races in a number of other recent cases.

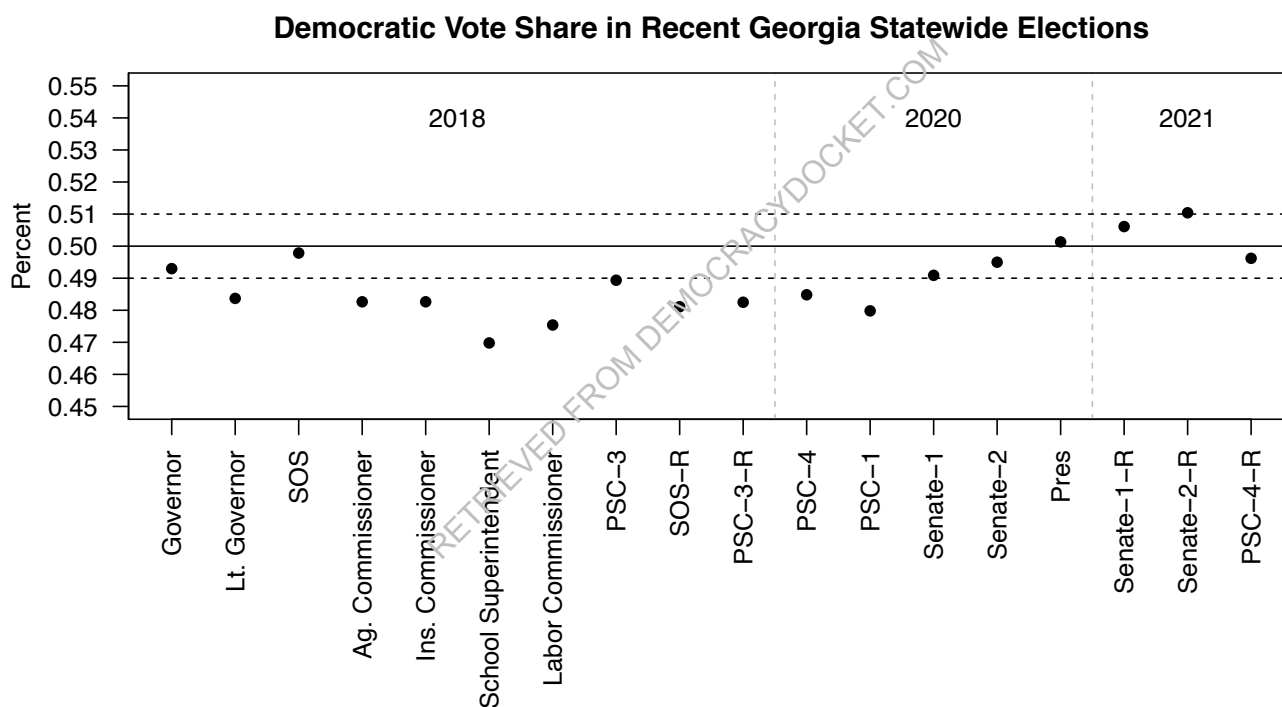


Figure 5: Statewide Election Results in Georgia Since 2018

6 Competition is Good for Democracy

One factor to be aware of when considering the proposed change from statewide elections to single-member districts is the likely change in the competitiveness of future Public Service Commission elections. Figure 6 below shows that the competitiveness of these races will likely decrease — in many cases substantially — if changed from a statewide election to the single-member geographic districts proposed by the plaintiffs.⁶ To calculate the expected change in competitiveness I collected from the Georgia Secretary of State’s website the share of the two-party vote earned by Democratic candidates who ran in statewide elections in Georgia in 2020 (the specific races are: president, Senate, Senate special, Public Service Commission 1 and 4). I then calculated the average Democratic vote in each of the five proposed districts put forward by the plaintiffs. This average Democratic vote share provides an aggregate measure of the partisan lean, or expected Democratic vote one might expect if the Public Service Commission races were to take place in these single-member districts rather than statewide. Of course, differences in candidate appeal, party support, and other factors will cause individual races to differ somewhat from these averages, but nevertheless, by averaging multiple races together, we obtain a general sense of how competitive future Public Service Commission races will be. Furthermore, the results of the most recent past Public Service Commission races have been highly correlated with the results of other statewide races held at the same time (see Figure 7 below).

The left panel of Figure 6 shows the results of this analysis. The circles show the most recent election results for each Public Service Commission race in which the election was held statewide. The squares show the average Democratic vote share in each of the proposed single-member districts. The vertical line is placed at .50, showing the point at which both candidates receive 50% of the vote and the race would be most competitive. There are two main points to take from these results. First, the most recent election for each Public Service Commission district has been quite competitive, with all but the most recent

⁶I refer here to the proposed maps labeled Exhibit 3 in the initial complaint.

District 2 race being decided by fewer than 3 percentage points.⁷ The second main takeaway is that in all cases but one, the proposed plan of having 5 single-member districts would make future elections less competitive. This is seen in the figure by noting that the squares are all (with the exception of District 3) further away from .50 than the circles. Instead of five highly competitive seats, as has been the case in recent PSC elections, the proposed plan would create two safe Republican seats (Districts 5 and 2), an extremely safe Democratic seat (District 1), one slightly Republican, but still possibly competitive seat (District 4), and one highly competitive seat (District 3).

The middle and right panels of Figure 6 show the same results but use a different election to calculate the expected Democratic vote in the proposed single-member districts. Rather than using the average of multiple races in each district, the squares in the middle panel show the two-party Democratic vote share in the District 1 election held in 2020. In the right panel, the squares show the result from the District 4 election held in 2020. The overall pattern is the same across the three panels. However, the average of multiple races (the left panel) is a better measure of the expected competitiveness because averaging across races helps to reduce the influence of any idiosyncratic effects of any one particular race or candidate.

A substantial literature in political science argues that competition is an important component of a healthy democracy and that there are numerous benefits to voters when elections are competitive rather than being lopsided toward one party or the other. For example, in his influential study of the mid-twentieth century one-party south, V.O. Key noted two-party competition as an important indicator of a healthy political system.⁸ Similarly, early scholars of democratic theory note the importance of competitive elections as an indicator of the quality of a democracy,⁹ and more recent work has sought to quantify this

⁷The most recent election for District 2 took place in 2016, however, no Democratic candidate ran in that election. As a result, I use the 2010 election for District 2 when both a Democratic and Republican candidate ran.

⁸Key, Valdimer Orlando., Heard, Alexander. *Southern Politics in State and Nation*. United States: University of Tennessee Press, 1984.

⁹Dahl, Robert A.. *A preface to democratic theory*. Chicago: University of Chicago Press, 1956; *Polyarchy*:

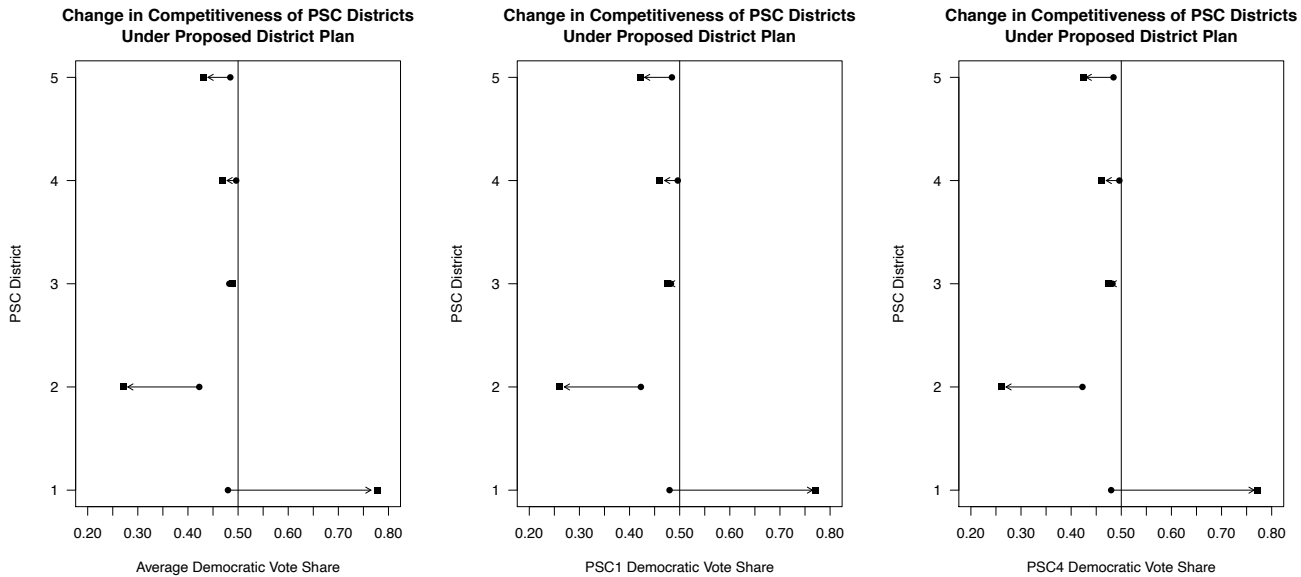


Figure 6: **Change in Competitiveness Under Proposed District Plan** - The circles show the two-party vote share for the Democratic candidate in the most recent election for each public service district. In the left panel the squares show the average Democratic vote share across a number of recent statewide elections (president, Senate, Senate special, PSC4, and PSC1) in each of the five proposed PSC districts. The middle and right panels show the same results, but use the PSC1 and PSC4 election results alone in each proposed district. All three figures show that the elections for PSC will likely become less competitive under the proposed single-member district plan with the exception of District 3.

by measuring competitiveness across a variety of electoral contexts and levels.¹⁰

Specifically, recent work has noted the abundant advantages that come with truly competitive elections. Increased competition has been associated with more informed and engaged citizens who consider their vote to be more consequential when elections are decided by narrower margins.¹¹ Competition has been associated with higher levels of political knowl-

Participation and Opposition. United States: Yale University Press, 2008; Downs, Anthony., *An Economic Theory of Democracy*. Germany: Harper, 1957; Schumpeter, J. 1947. *Capitalism, Socialism, and Democracy*. New York: Harper and Brothers

¹⁰Ranney, Austin. 1965. "Parties in State Politics." In *Politics in the American States: A Comparative Analysis*, eds. Herbert Jacobs and Kenneth N. Vines. Boston: Little, Brown; Hill, Kim Quaile. 1994. *Democracy in the Fifty States*. Omaha: University of Nebraska Press; Shufeldt, G. and P. Flavin. 2012. "Two Distinct Concepts: Party Competition in Government and Electoral Competition in the American States." *State Politics & Policy Quarterly*, 12(3): 330-342; Fraga, Bernard L. and Eitan D. Hersh. (2018) "Are Americans Stuck in Uncompetitive Enclaves? An Appraisal of U.S. Electoral Competition." *Quarterly Journal of Political Science* 13 (3): 291-311.

¹¹Kim, Jae-On, John R. Petrocik, and Stephen N. Enokson. "Voter turnout among the American states: systemic and individual components." *The American Political Science Review* 69, no. 1 (1975): 107-123; Cox, Gary W., and Michael C. Munger. "Closeness, expenditures, and turnout in the 1982 US House elections."

edge and greater interest in following politics and public affairs.¹² Moreover, voters living in competitive areas are more likely to participate in politics outside of voting in activities such as volunteering for political campaigns or participating in civic life more generally.¹³ There is also evidence that regularly competitive elections yield better accountability and responsiveness from elected officials. Research suggests legislators are more attentive to constituent communication, the issue preference of their voters, and do more to bring particularistic benefits (i.e. earmarked spending) back to their districts and constituents.¹⁴

7 Why Did Democrats Not Win PSC Races in 2020?

Figure 6 above indicated that recent elections for Public Service Commission have been competitive and decided by narrow margins. Nevertheless, Republican candidates have won all 5 of the most recent elections (and many more before that). What factors prevented, or at least contributed to Democrats not winning either (or both) of the District 1 and District 4 races? Figure 7 compares the results of the Public Service Commission elections in 2020 to the results of the presidential election held at the same time. Each point displays

The American Political Science Review (1989): 217-231; Rosenstone, Steven J., and John Mark Hansen. Mobilization, participation, and democracy in America. Longman Publishing Group, 1993; Campbell, D.E. 2006. Why We Vote: How Schools and Communities Shape Our Civic Life. Princeton: Princeton University Press; Pacheco, J.S. 2008. "Political Socialization in Context: The Effect of Political Competition on Youth Voter Turnout." Political Behavior, 30: 415-436

¹²Putnam, R.D. 2007. "E Pluribus Unum: Diversity and Community in the Twenty-First Century." Scandinavian Political Studies, 30(2): 137-174; Lyons, J., W.P. Jaeger, and J. Wolak. 2012. "The Roots of Citizens" Knowledge; Bowler, S. and T. Donovan. 2012. "Effects of Competitive US House Races on Voters." Paper prepared for the 2012 American Political Science Association Annual Meeting, New Orleans, LA.

¹³Kenny, C. B. 1992. "Political Participation and Effects from the Social Environment. American Journal of Political Science, 36(1): 59-267; Putnam, R.D. 2000. Bowling Alone: The Collapse and Revival of America Community. New York: Simon and Schuster; Lipsitz, K. 2011. Competitive Elections and the American Voter. Philadelphia: University of Pennsylvania Press.

¹⁴Ansolahehere, S., D. Brady, and M. Fiorina. 1992. "The Vanishing Marginals and Electoral Responsiveness". British Journal of Political Science 92(1): 21-38; Griffin, John D. "Electoral competition and democratic responsiveness: A defense of the marginality hypothesis." The Journal of Politics 68, no. 4 (2006): 911-921; Dropp, Kyle, and Zachary Peskowitz. "Electoral security and the provision of constituency service." The Journal of Politics 74, no. 1 (2012): 220-234; Abou-Chadi, Tarik. "Electoral competition, political risks, and parties' responsiveness to voters' issue priorities." Electoral Studies 55 (2018): 99-108; Ashworth, Scott, and Ethan Bueno de Mesquita. "Delivering the goods: Legislative particularism in different electoral and institutional settings." The Journal of Politics 68, no. 1 (2006): 168-179.

the results for a single county in Georgia (159 points total). The horizontal axis measures the presidential election results in that county while the vertical axis measures the Public Service Commission results in the same county. The left panel shows the results for District 1 and the right panel shows the results for District 4. Points below the diagonal line indicate counties where the Democratic vote share for president was larger than the Democratic vote share for Public Service Commission. Nearly all of the points fall below the diagonal line, indicating that in 2020, across nearly every county in Georgia the Democratic candidates for Public Service Commission underperformed the Democratic candidate for President held at the same time.

There are a variety of potential factors that could have contributed to the fact that Joe Biden won in Georgia while the Democratic candidates for Public Service Commission did not win while running at the same time, in the same electoral environment, on the same ballot. Of course, if every voter who cast a ballot for Joe Biden had also cast a ballot for the Democratic candidates for Public Service Commission, then each point in Figure 7 would fall exactly on the diagonal line and both Democratic candidates would have won alongside now-President Biden. One factor is the possibility that voters decided to split their tickets - voting for Joe Biden while voting for the Republican candidates for Public Service Commission. "Ticket splitting" is rare as voters have become increasingly loyal to one particular party;¹⁵ nevertheless, it still occurs in small numbers. We cannot, however, directly measure the degree to which ticket splitting occurred in these races since there are no data available that ask people their vote choice in both the presidential and Public Service Commission races in 2020.

A second contributing factor is what political science refers to as ballot "rolloff", which occurs when a person votes in one race but does not complete their entire ballot, leaving some races blank. Using data reported by the Georgia Secretary of State, we know the number of ballots cast for president and the number of ballots cast in the same jurisdiction (county).

¹⁵Jacobson, Gary C. "Polarization, gridlock, and presidential campaign politics in 2016." *The ANNALS of the American Academy of Political and Social Science* 667, no. 1 (2016): 226-246.

The difference between these two numbers measures the degree of ballot rolloff. Figure 8 measures the amount of ballot rolloff in each county in Georgia for both Senate races and both public service districts by comparing the number of ballots cast for these four races to the number of ballots cast for president in 2020. A value of “5” on the horizontal axis, for example, indicates that five percent fewer people voted in that particular race compared to the number of people who voted for president in that same county. The top row of Figure 8 shows the distribution of ballot rolloff for the two Senate races held in Georgia in 2020. The red vertical line shows the average rolloff across all 159 counties in each race. In the Senate elections the average ballot rolloff was between 1 and 2 percent. In the Public Service Commission races, rolloff is substantially larger. Not only is the average rolloff larger in both cases (3.2 and 4.3 percent), the distribution is also much more skewed toward larger numbers. In some counties nearly ten percent fewer ballots were cast for Public Service Commission than were cast for president in the same county.

These numbers, when added up across the various counties result in a substantially smaller electorate that voted in the Public Service Commission elections compared to those who voted for president. According to the official results from the Secretary of State, 118,965 fewer ballots were cast in the Public Service Commission District 1 race than were cast for president. An even larger 159,069 fewer ballots were cast for the District 4 race than were cast in the presidential race in Georgia. Note that this number of ballots is actually larger than the narrow margin of victory in this particular race.

We can further investigate if there is any correlation in where ballot rolloff is more or less likely to occur. Multiple regression results of ballot rolloff in the two Public Service Commission races show that there is a relationship between the proportion of a county’s African American population and the amount of ballot rolloff that occurred in that county in the 2020 election. Table 1 shows these results. In other words, counties with a higher proportion of African Americans were more likely to see higher ballot rolloff — i.e. fewer ballots cast for Public Service Commission races than for the presidential race. Given the

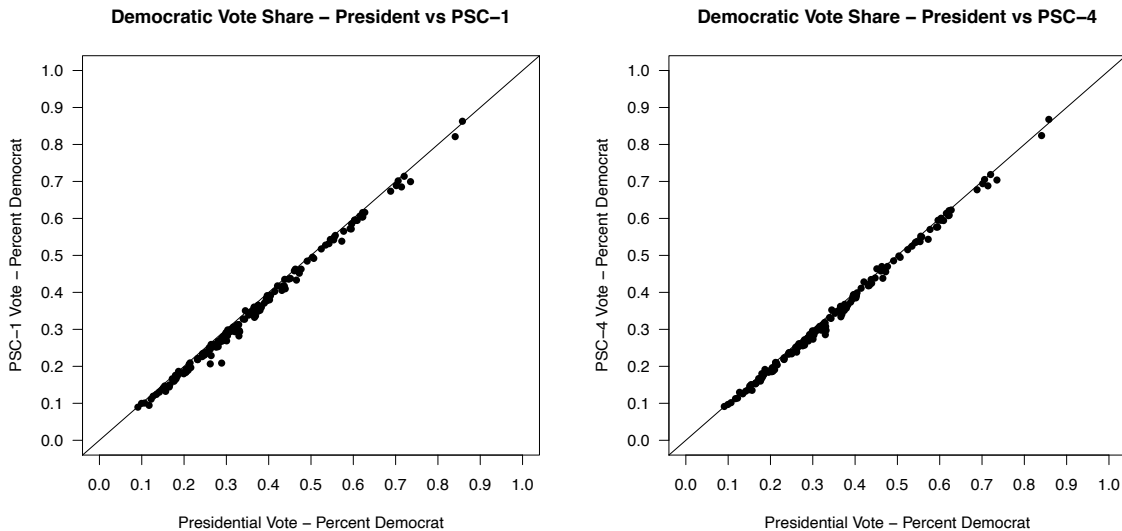


Figure 7: **2020 Public Service Commission Results vs Presidential Election Results** - Each point represents the Democratic vote share in a county in Georgia. The horizontal axis shows the Democratic vote share for the presidential race in that county and the vertical axis shows the Democratic vote share for the Public Service Commission race - District 1 on the left panel and District 4 in the right panel. The diagonal line shows the point of equality where the Democratic candidate for president and the Democratic candidate for Public Service Commission earned the same proportion of the vote. Points below the line indicate the Public Service Commission Democratic candidate under-performing Biden's performance in that county while points above the line indicate the Public Service Commission Democratic candidate out-performing Biden in that county.

propensity for African American candidates to vote for Democratic candidates, as noted in Figures 1-4 above, this relationship likely contributed to the underperformance of the Democratic candidates in these two races compared to the winning outcome for Joe Biden in Georgia. In the District 1 race, the coefficient of 4.06 in column 2 of Table 1 is statistically significant and indicates that for every additional percentage point increase in the African American population in the county, we would expect to see an additional .00406 (.01 x 4.06) percent increase in ballot rolloff. Another way to consider this effect is by looking at the predicted change in rolloff between the least and most heavily African American counties in the state. Using citizen voting age population data provided by the US Census, the county with the smallest share of African Americans is Gilmer County (0.48% Black CVAP) while the county with the largest share of African American voters is Clayton County (74.7% Black CVAP). Between these two counties, the regression model would predict an increase in ballot

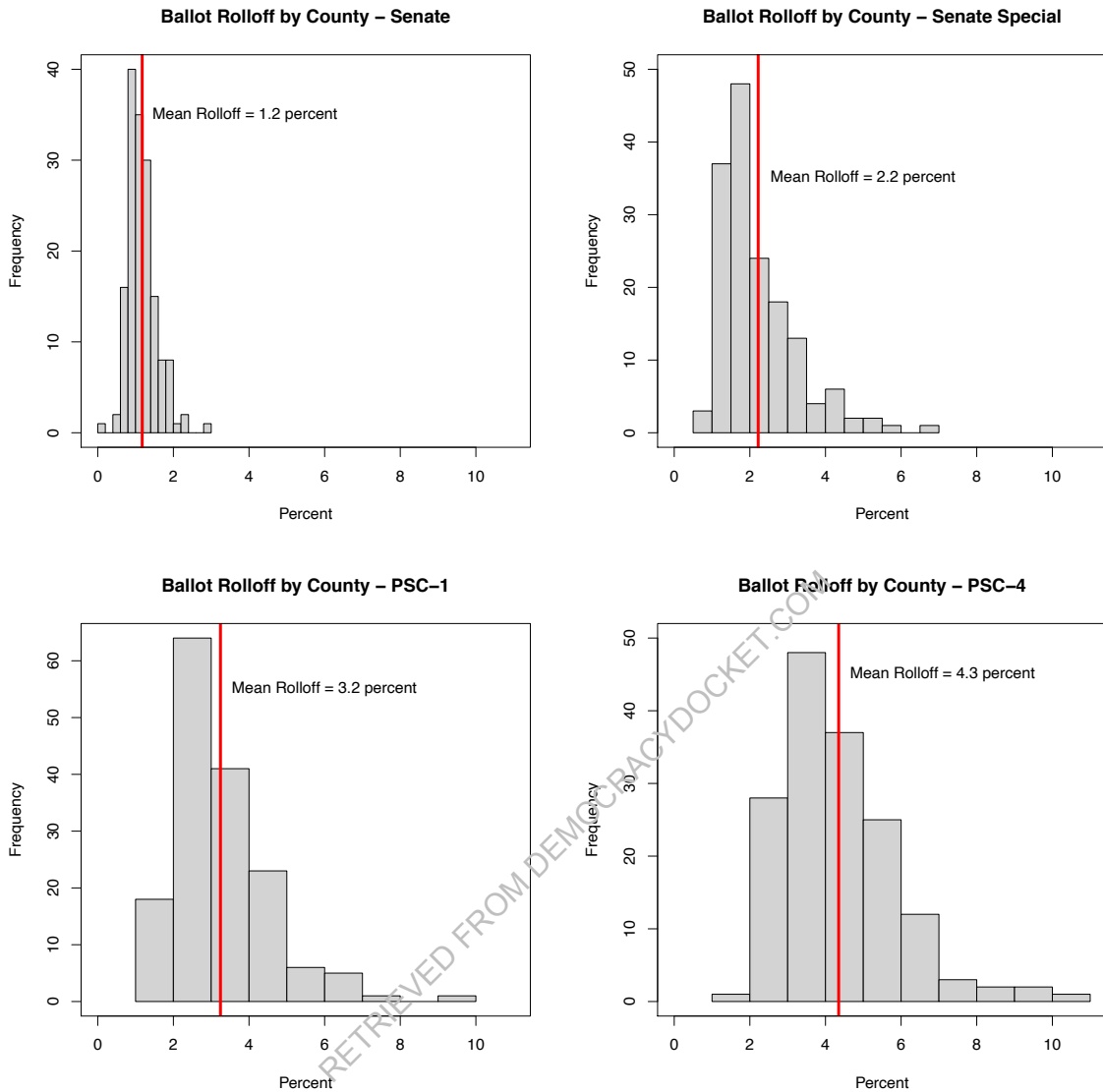


Figure 8: **Ballot Rolloff in Senate and Public Service Commission Races** - Each panel shows the distribution of ballot rolloff compared to the presidential race across the 159 counties in Georgia. The red line in each panel shows the average across all counties. Rolloff is substantially higher in the Public Service Commission races than in the Senate races held at the same time.

rolloff of between 3 and 4 percentage points.

These results are consistent with academic research on the differences in ballot roll-off between White and Black voters. In a variety of different locations and electoral contests, scholars have consistently found that Black voters (and non-White voters more generally) are more likely to “rolloff” than are White voters in the same election.¹⁶ Further research into

¹⁶Harris, Jamie M., and John F. Zipp. "Black candidates, roll-off, and the black vote." Urban Affairs

Predictors of Ballot Rolloff

Variable	PSC-1	PSC-4
County Percent Black Population	4.06** (1.21)	5.56** (1.45)
County Population Density	-0.07* (0.03)	-0.08* (0.04)
County Percent Democratic Vote for President	-2.98 (1.53)	-5.08** (1.82)
Number of Observations:	159	159

Table 1: Regression of Predictors of Ballot Rolloff - Both models estimate the size of ballot rolloff, measured as the percentage difference between the number of ballots cast for US President in a county and the number of ballots cast for Public Service Commission in the same county (i.e. a value of 0 means the same number of ballots cast in both races, a value of 1 means one percent fewer ballots cast in the PSC race compared to the presidential race, etc.). The second column contains results for the District 1 race and the third column contains results for the District 4 race. Coefficients from an ordinary least squares regression are shown with standard errors in parentheses below. In both models, counties with a higher Black population are more likely to have higher ballot rolloff. Key: ** $p < .01$, * $p < .05$

the explanations for this difference has postulated a variety of contributing factors, including ballot formatting that could lead to voter confusion, a lack of salience or interest in particular down-ballot races, and voter fatigue when confronted with especially long ballots with many races to consider.¹⁷

8 Conclusions

Based on the evidence and analysis presented below, my opinions regarding recent Public Service Commission races, and voting patterns more generally in Georgia can be

Review 34, no. 3 (1999): 489-498; Darcy, Robert, Schneider, Anne. 1989. "Confusing Ballots, Roll-Off, and the Black Vote." *Western Political Quarterly* 42 (3): 347-64; McGregor, R. Michael. "Voters Who Abstain: Explaining Abstention and Ballot Roll-Off in the 2014 Toronto Municipal Election." *Urban Affairs Review* 54, no. 6 (2018): 1081-1106; Nichols, Stephen M., and Gregory A. Strizek. "Electronic voting machines and ballot roll-off." *American Politics Quarterly* 23, no. 3 (1995): 300-318.

¹⁷Bullock III, Charles S., and Richard E. Dunn. "Election roll-off: A test of three explanations." *Urban Affairs Review* 32, no. 1 (1996): 71-86; Vanderleeuw, James M., and Baodong Liu. "Political empowerment, mobilization, and black voter roll-off." *Urban Affairs Review* 37, no. 3 (2002): 380-396; Reilly, Shauna, and Sean Richey. "Ballot question readability and roll-off: The impact of language complexity." *Political Research Quarterly* 64, no. 1 (2011): 59-67.

summarized as follows:

- It is well established that across recent years and a variety of electoral contexts Black voters are strongly support Democratic candidates. This support is much more unified than among White voters who prefer the Republican party, but not to the same degree that Black voters are loyal to Democratic candidates.
- However, when considered independently, a voter's partisanship is a much stronger predictor of their vote choice than is a voter's race.
- Support by Black and White voters for the candidates of their preferred parties holds true regardless of the race of the candidate from either party. A candidate's race has had little to no measurable impact on the partisan preferences of Black and White voters in Georgia.
- Statewide elections in Georgia have been very competitive in the last 3 years, and Democratic candidates won recent statewide races in 2020 and 2021 when Public Service Commission candidates were also on the ballot.
- Ballot rolloff is a contributing factor to why Democratic candidates for Public Service Commission did not win when other Democratic candidates on the same ballot did win statewide.

Appendix A - Curriculum Vitae

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ACADEMIC APPOINTMENTS

Brigham Young University, Provo, UT

August 2020 - present Associate Professor, Department of Political Science
2014 - July 2020 Assistant Professor, Department of Political Science
2014 - present Faculty Scholar, Center for the Study of Elections and Democracy

EDUCATION

Princeton University Department of Politics, Princeton, NJ

Ph.D., Politics, July 2014

- Advisors: Brandice Canes-Wrone, Nolan McCarty, and Kosuke Imai
- Dissertation: "Buying Representation: the Incentives, Ideology, and Influence of Campaign Contributions on American Politics"
- 2015 Carl Albert Award for Best Dissertation, Legislative Studies Section, American Political Science Association (APSA)

M.A., Politics, December 2011

Brigham Young University, Provo, UT

B.A., International Relations - Political Economy Focus, April, 2008

- *Cum Laude*

RESEARCH INTERESTS

American politics, congressional polarization, political ideology, campaign finance, survey research

PUBLICATIONS

19. "Ideological Disagreement and Pre-emption in Municipal Policymaking" with Adam Dynes
Forthcoming at *American Journal of Political Science*
18. "Comparing Campaign Finance and Vote Based Measures of Ideology"
Forthcoming at *Journal of Politics*
17. "The Participatory and Partisan Impacts of Mandatory Vote-by-Mail", with John Holbein
Science Advances, 2020. Vol. 6, no. 35, DOI: 10.1126/sciadv.abc7685
16. "Issue Politicization and Interest Group Campaign Contribution Strategies", with Mandi Eatough
Journal of Politics, 2020. Vol. 82: No. 3, pp. 1008-1025

15. **“Campaign Contributions and Donors’ Policy Agreement with Presidential Candidates”**, with Brandice Canes-Wrone and Sharece Thrower
Presidential Studies Quarterly, 2019, 49 (4) 770–797
14. **“Conservatism in the Era of Trump”**, with Jeremy Pope
Perspectives on Politics, 2019, 17 (3) 719–736
13. **“Legislative Constraints on Executive Unilateralism in Separation of Powers Systems”**, with Alex Bolton and Sharece Thrower
Legislative Studies Quarterly, 2019, 44 (3) 515–548
Awarded the Jewell-Loewenberg Award for best article in the area of subnational politics published in *Legislative Studies Quarterly* in 2019
12. **“Electoral Competitiveness and Legislative Productivity”**, with Soren Schmidt
American Politics Research, 2019, 47 (4) 683–708
11. **“Does Party Trump Ideology? Disentangling Party and Ideology in America”**, with Jeremy Pope
American Political Science Review, 2019, 113 (1) 38–54
10. **“The Evolution of National Constitutions”**, with Scott Abramson
Quarterly Journal of Political Science, 2019, 14 (1) 89–114
9. **“Who is Ideological? Measuring Ideological Responses to Policy Questions in the American Public”**, with Jeremy Pope
The Forum: A Journal of Applied Research in Contemporary Politics, 2018, 16 (1) 97–122
8. **“Status Quo Bias in Ballot Wording”**, with David Gordon, Ryan Hill, and Joe Price
The Journal of Experimental Political Science, 2017, 4 (2) 151–160.
7. **“Ideologically Sophisticated Donors: Which Candidates Do Individual Contributors Finance?”**, with Brandice Canes-Wrone and Sharece Thrower
American Journal of Political Science, 2017, 61 (2) 271–288.
6. **“Gender Inequalities in Campaign Finance: A Regression Discontinuity Design”**, with Daniel Butler and Jessica Preece
Quarterly Journal of Political Science, 2016, Vol. 11, No. 2: 219–248.
5. **“Representing the Preferences of Donors, Partisans, and Voters in the U.S. Senate”**
Public Opinion Quarterly, 2016, 80: 225–249.
4. **“Donation Motivations: Testing Theories of Access and Ideology”**
Political Research Quarterly, 2016, 69 (1) 148–160.
3. **“Ideological Donors, Contribution Limits, and the Polarization of State Legislatures”**
Journal of Politics, 2016, 78 (1) 296–310.
2. **“Online Polls and Registration Based Sampling: A New Method for Pre-Election Polling”** with Quin Monson, Kelly Patterson and Chris Mann.
Political Analysis 2014, 22 (3) 321–335.
1. **“Causes and Consequences of Political Polarization”** In *Negotiating Agreement in Politics*. Jane Mansbridge and Cathie Jo Martin, eds., Washington, DC: American Political Science Association: 19–53. with Nolan McCarty. 2013.
 - Reprinted in *Solutions to Political Polarization in America*, Cambridge University Press. Nate Persily, eds. 2015
 - Reprinted in *Political Negotiation: A Handbook*, Brookings Institution Press. Jane Mansbridge and Cathie Jo Martin, eds. 2015

AVAILABLE
WORKING PAPERS

“Taking Cues When You Don’t Care: Issue Importance and Partisan Cue Taking”
with Jeremy Pope

“A Revolution of Rights in American Founding Documents”
with Scott Abramson and Jeremy Pope (Under Review)

“410 Million Voting Records Show the Distribution of Turnout in America Today”
with John Holbein (Under Review)

“Misclassification and Bias in Predictions of Individual Ethnicity from Administrative Records” (Under Review)

“Partisanship and Trolleyology”
with Ryan Davis (Under Review)

“Who’s the Partisan: Are Issues or Groups More Important to Partisanship?”
with Jeremy Pope (Under Review)

“The Policy Preferences of Donors and Voters”

“Estimating Neighborhood Effects on Turnout from Geocoded Voter Registration Records.”
with Kosuke Imai

“Super PAC Contributions in Congressional Elections”

WORKS IN
PROGRESS

“Collaborative Study of Democracy and Politics”
with Brandice Canes-Wrone, Gregory Huber, and Joshua Clinton

“Preferences for Representational Styles in the American Public”
with Ryan Davis and Adam Dynes

“Representation and Issue Congruence in Congress”
with Taylor Petersen

“Education, Income, and the Vote for Trump”
with Edie Ellison

INVITED
PRESENTATIONS

“Are Mormons Breaking Up with Republicanism? The Unique Political Behavior of Mormons in the 2016 Presidential Election”

- Ivy League LDS Student Association Conference - Princeton University, November 2018, Princeton, NJ

“Issue Politicization and Access-Oriented Giving: A Theory of PAC Contribution Behavior”

- Vanderbilt University, May 2017, Nashville, TN

“Lost in Issue Space? Measuring Levels of Ideology in the American Public”

- Yale University, April 2016, New Haven, CT

“The Incentives, Ideology, and Influence of Campaign Donors in American Politics”

- University of Oklahoma, April 2016, Norman, OK

“Lost in Issue Space? Measuring Levels of Ideology in the American Public”

- University of Wisconsin - Madison, February 2016, Madison, WI

“Polarization and Campaign Contributors: Motivations, Ideology, and Policy”

- Hewlett Foundation Conference on Lobbying and Campaign Finance, October 2014, Palo Alto, CA

“Ideological Donors, Contribution Limits, and the Polarization of State Legislatures”

- Bipartisan Policy Center Meeting on Party Polarization and Campaign Finance, September 2014, Washington, DC

“Representing the Preferences of Donors, Partisans, and Voters in the U.S. Senate”

- Yale Center for the Study of American Politics Conference, May 2014, New Haven, CT

CONFERENCE
PRESENTATIONS

Washington D.C. Political Economy Conference (PECO):

- 2017 discussant

American Political Science Association (APSA) Annual Meeting:

- 2014 participant and discussant, 2015 participant, 2016 participant, 2017 participant, 2018 participant

Midwest Political Science Association (MPSA) Annual Meeting:

- 2015 participant and discussant, 2016 participant and discussant, 2018 participant

Southern Political Science Association (SPSA) Annual Meeting:

- 2015 participant and discussant, 2016 participant and discussant, 2017 participant

TEACHING
EXPERIENCE

Poli 315: Congress and the Legislative Process

- Fall 2014, Winter 2015, Fall 2015, Winter 2016, Summer 2017

Poli 328: Quantitative Analysis

- Winter 2017, Fall 2017, Fall 2019, Winter 2020, Fall 2020, Winter 2021

Poli 410: Undergraduate Research Seminar in American Politics

- Fall 2014, Winter 2015, Fall 2015, Winter 2016, Summer 2017

AWARDS AND
GRANTS

2019 BYU Mentored Environment Grant (MEG), American Ideology Project, \$30,000

2017 BYU Political Science Teacher of the Year Award

2017 BYU Mentored Environment Grant (MEG), Funding American Democracy Project, \$20,000

2016 BYU Political Science Department, Political Ideology and President Trump (with Jeremy Pope), \$7,500

2016 BYU Office of Research and Creative Activities (ORCA) Student Mentored Grant x 3

- Hayden Galloway, Jennica Peterson, Rebecca Shuel

2015 BYU Office of Research and Creative Activities (ORCA) Student Mentored Grant x 3

- Michael-Sean Covey, Hayden Galloway, Sean Stephenson

2015 BYU Student Experiential Learning Grant, American Founding Comparative Constitutions Project (with Jeremy Pope), \$9,000

2015 BYU Social Science College Research Grant, \$5,000

2014 BYU Political Science Department, 2014 Washington DC Mayoral Pre-Election Poll (with Quin Monson and Kelly Patterson), \$3,000

2014 BYU Social Science College Award, 2014 Washington DC Mayoral Pre-Election Poll (with Quin Monson and Kelly Patterson), \$3,000

2014 BYU Center for the Study of Elections and Democracy, 2014 Washington DC Mayoral Pre-Election Poll (with Quin Monson and Kelly Patterson), \$2,000

2012 Princeton Center for the Study of Democratic Politics Dissertation Improvement Grant, \$5,000

2011 Princeton Mamdouha S. Bobst Center for Peace and Justice Dissertation Research Grant, \$5,000

2011 Princeton Political Economy Research Grant, \$1,500

OTHER SCHOLARLY ACTIVITIES Expert Witness in NANCY CAROLA JACOBSON, et al., Plaintiffs, vs. LAUREL M. LEE, et al., Defendants. Case No. 4:18-cv-00262 MW-CAS (U.S. District Court for the Northern District of Florida)

Expert Witness in COMMON CAUSE, et al., Plaintiffs, vs. LEWIS, et al., Defendants. Case No. 18-CVS-14001 (Wake County, North Carolina)

Expert Witness in Kelvin Jones, et al., Plaintiffs, v. Ron DeSantis, et al., Defendants, Consolidated Case No. 4:19-cv-300 (U.S. District Court for the Northern District of Florida)

Expert Witness in Community Success Initiative, et al., Timothy K. Moore, et al., Defendants, Case No. 19-cv-15941 (Wake County, North Carolina)

ADDITIONAL TRAINING EITM 2012 at Princeton University - Participant and Graduate Student Coordinator

COMPUTER SKILLS Statistical Programs: R, Stata, SPSS, parallel computing

Updated May 19, 2021

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I, Michael Barber, am being compensated for my time in preparing this report at an hourly rate of \$400/hour. My compensation is in no way contingent on the conclusions reached as a result of my analysis.

A handwritten signature in black ink, appearing to read "Michael Barber". The signature is fluid and cursive, with the first name "Michael" and last name "Barber" clearly distinguishable.

Michael Barber

May 20, 2021

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EXHIBIT B

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No. 21A375 & 21A376

In the Supreme Court of the United States

JOHN H. MERRILL,
IN HIS OFFICIAL CAPACITY AS THE ALABAMA SECRETARY OF STATE, et al.
Applicants,

v.

EVAN MILLIGAN, et al.
Respondents.

AND

JOHN H. MERRILL,
IN HIS OFFICIAL CAPACITY AS THE ALABAMA SECRETARY OF STATE, *et al.*,
Applicants,

v.

MARCUS CASTER, *et al.*,
Respondents.

**BRIEF OF THE STATES OF LOUISIANA, ARKANSAS, ARIZONA,
GEORGIA, INDIANA, KENTUCKY, MISSOURI, MISSISSIPPI, MONTANA,
OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH AND WEST VIRGINIA AS
AMICI CURIAE IN SUPPORT OF APPLICANTS**

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<i>Bethune-Hill v. Virginia State Board of Elections</i> , 326 F. Supp. 3d 128 (E.D. Va. 2018)	15, 16
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<i>Democratic Nat’l Comm. v. Wis. State Legislature</i> , 141 S. Ct. 28 (2020)	1, 4, 6, 7
<i>Easley v. Cromartie</i> , 532 U.S. 234 (2001)	18
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Va. House of Delegates v. Bethune-Hill,
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INTERESTS OF AMICI CURIAE

States have deep and long-standing interests in redistricting.¹ When courts issue injunctions that bar States from implementing maps that result from the legislative process, citizen involvement is stymied, confusion and chaos are injected into elections, and ultimately trust in the entire process erodes. “[R]unning a statewide election is a complicated endeavor” that requires “thousands of state and local officials and volunteers [to] participate in a massive coordinated effort” to implement the requirements of state election law. *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). Moreover, when the rules that apply to redistricting change after the legislative process has concluded, it further erodes confidence by rendering the completed political process contemplated by Congress and the Constitution irrelevant.

In this case, States have an additional interest related to the federal government’s delay in producing Census data. This delay resulted in every state having to compress its redistricting process, even though several amici states litigated cases with the federal government to avoid this very result – litigation ensuing after the maps were drawn, injunctions being issued delaying qualifying or otherwise causing downstream difficulties in carrying out their elections.

¹ Amici provided notice to the parties who consented to the filing of this amicus brief.

SUMMARY OF THE ARGUMENT

In a 234-page decision, just *four days* before Alabama's candidate-filing deadline and mere months before absentee ballots will be sent to voters, a federal district court has enjoined Alabama from using its newly drawn congressional districts—districts Alabama created on a remarkably truncated schedule, through no fault of its own. In doing so, the district court injected confusion in the election cycle, penalized Alabama for diligently drawing new congressional districts on a tight timeline, and improperly held Alabama violated § 2 of the Voting Rights Act by not using race as a predominate feature of its maps. This Court should grant the stay and end this Court-created injury.

First, the district court has violated the *Purcell* principle. This Court has cautioned lower courts from altering election laws before elections. Doing so creates confusion for elections officials, candidates, and voters. Here, the district court has left Alabama wondering how they will administer the upcoming primary election without finalized congressional districts, left Alabama candidates wondering who their constituents will be and where they will run, and left Alabama voters wondering what congressional districts they will end up in. To create certainty once again and prevent this confusion from continuing, the *Purcell* principle militates in favor of granting the stay.

Second, the U.S. Census Bureau harmed Alabama; then the district court made it worse. The Bureau flouted federal law when it delayed the release of the 2020 census data—a situation not seen since 1840. Alabama challenged the Bureau's delay in federal court but was denied relief. Despite diligently drawing and enacting new

congressional districts in a truncated timeline, the district court has now forced Alabama to draw new maps on an even shorter schedule. The condensed schedule with which Alabama must comply—through no fault of its own—further militates in favor of granting the stay.

Third, the district court faulted Alabama for not letting race predominate when it redrew its districts. Yet this Court and other federal courts have consistently *required* States not to let race predominate when drawing legislative districts. Nevertheless, the district court held Alabama violated § 2 of the Voting Rights Act because it did not use race as a predominant feature of its districts.

Federal courts have been less than clear when providing States with an evidentiary standard to satisfy § 2 of the Voting Rights Act and the Equal Protection Clause. This Court now has the opportunity to clarify this standard. Specifically, this Court should clarify that *Gingles* factors cannot be satisfied without also complying with traditional districting criteria. The absence of clarity no doubt means litigation will ensue across the country over new maps and further militates in favor of granting the stay

For these reasons, this Court should grant the stay.

I. ORDERING STATES TO REDRAW ELECTORAL MAPS AT THIS LATE DATE VIOLATES THE *PURCELL* PRINCIPLE

By enjoining Alabama's congressional map only four days before its candidate filing deadline, the district court injected confusion into Alabama's 2022 election process and thus created a *Purcell* problem. The *Purcell* principle emphasizes that lower courts should avoid altering election rules before an election. *See Purcell v.*

Gonzalez, 549 U.S. 1, 4–5 (2006) (per curiam). When lower courts change “the rules of the road” before elections—at a time when such rules should be “clear and settled”—they inject confusion into the election cycle and create a cascade of problems for election administrators, candidates, and voters. *Democratic Nat’l Comm.*, 141 S. Ct. at 31. (Kavanaugh, J., concurring in denial of application to vacate stay).

If the *Purcell* principle serves one end, it exists to prevent “judicially created confusion” in the elections cycle. *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). “[R]unning a statewide election is a complicated endeavor” that requires “thousands of state and local officials and volunteers [to] participate in a massive coordinated effort” to implement the requirements of state election law. *Democratic Nat’l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring). Deadlines for candidate filing and absentee ballot applications might seem arbitrary to a reviewing federal judge, but they are the result of carefully reasoned policy choices by state officials that should only be enjoined in cases featuring the most egregious constitutional violations.

Here, by enjoining Alabama’s newly drawn congressional districts and extending the candidate filing deadline by fourteen days, the district court has left Alabama elections officials wondering how they will administer the upcoming primary election without a finalized district map, left Alabama candidates wondering who their constituents will be, and left Alabama voters wondering which district they will end up in. In short, the district court has fostered enormous confusion where there was certainty, and done so only days before qualifying.

Local elections officials now have a much more difficult job ahead thanks to the district court. As Alabama Director of Elections Clay Helms attested below, local officials are already racing against the clock. *See Milligan v. Merrill*, 2:21-cv-1530-AMM, ECF No. 79-7 ¶ 2 (N.D. Ala. Dec. 22, 2021) (“Helms Decl.”). Due to the U.S. Census Bureau’s delayed release of 2020 census data, addressed further in Section II *infra*, Alabama’s new congressional districts were drawn and approved much later than is typical. *Id.* ¶ 15. After the new districts were in place, county boards of registrar began reassigning 3.6 million Alabama voters to the new districts. *Id.* ¶ 6. Forty-five out of sixty-seven counties reassign voters “manually,” a “laborious” process that requires “officials to pore over maps and lengthy lists of voters to ensure that each voter is correctly assigned to his or her precinct”—a process that usually takes three to four months to complete. *Id.* ¶ 9. The deadline to reassign voters is March 30, 2022, the date when absentee voting begins for the May 24, 2022 primary election.² Ala. Code §§ 17-11-5(b); 17-11-12.

Thanks to the district court, this timeline is now much tighter—instead of five months to properly reassign all of Alabama’s voters to their new districts, registrars will now have only *two*. As Director Helms warned, this “rushed” process has the potential of “increasing the likelihood of mistaken reassignments” and affords “less time to notify voters about changes”—thus “increasing the likelihood of voter, political party, and candidate confusion.” Helms Decl. ¶ 18. *See Democratic Nat’l*

² Alabama also must send absentee ballots to overseas voters by April 9, 2022. 52 U.S.C. § 20302(a)(8)(A).

Comm., 141 S. Ct. at 31 (Kavanaugh, J., concurring) (emphasizing that “judicial restraint” “prevents election administration confusion—and thereby protects the State’s interest in running an orderly, efficient election”).

The district court has caused confusion for candidates as well. Before the district court’s decision, January 28th was the deadline for candidates to qualify for the primary election. Ala. Code § 17-13-5(a). Candidates had identified the districts in which they intended to run, knew their constituencies, and were familiar with district-specific issues. Now, candidates have no certainty with regard to any of these considerations—many cannot even be sure they live in their sought-after district. As Director Helms pointed out, this “[u]ncertainty about which district a potential candidate resides in and the characteristics of that district could impact fundraising, campaigning, and even the decision whether to run at all.” Helms Decl. ¶ 20. This confusion is worse for independent candidates and committees. To achieve ballot access, independent candidates and committees must submit a petition that is signed by registered voters who are eligible to vote in the election at issue. *Id.* ¶ 21. Because of the district court’s order, these candidates and committees do not know whether the signatures they have gathered will help them achieve ballot access, or if all of their efforts to date have been useless. *Id.*

Changes to election laws at the state level will have cascading downstream effects for voters who, through no fault of their own, must figure out how to accommodate their new reality. And the confusion of elections officials and candidates is compounded for Alabama voters. *Id.* ¶¶ 11, 18. Election officials have less time to

notify voters of their district reassignments, which also increases the likelihood of voter confusion and decreased voter turnout. *Id.* Voters cannot even be certain whether they can vote for their incumbent representatives.

There was no uncertainty in this election cycle until the district court created it. This Court has blocked election rule changes close to an election and has recognized that “[e]ven seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences.” *See Democratic Nat’l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring); *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020); *Andino v. Middleton*, 141 S. Ct. 9 (2020); *Veasey v. Perry*, 574 U.S. 951 (2014). For the reasons explained above, the Court should do so here as well. As this Court has stated, “when a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error.” *Republican Nat’l Comm.*, 140 S. Ct. at 1207 (2020). Due to the confusion that the district court has created and will continue to create, this Court should stay the district court’s decision.

II. BECAUSE OF THE SPECIAL CIRCUMSTANCES SURROUNDING THE 2020 CENSUS DELAYS, FEDERAL COURTS SHOULD BE ESPECIALLY CAUTIOUS IN ISSUING PRELIMINARY INJUNCTIONS IN REDISTRICTING CASES IN 2022.

In addition to the background *Purcell* principle, there are special concerns that counsel against judicial interference with state election calendars in 2022. Last year, for the first time since 1840, the Census Bureau delayed release of population data from the 2020 census until months into the next calendar year. *Nat’l Urban League*

v. Ross, 508 F. Supp. 3d 663, 674 (N.D. Cal. 2020) (noting that the Bureau last missed its reporting deadline in 1840 and last missed its collection deadline in 1950).

Nearly every State relies on federal census data to make its own redistricting decisions, so the delay prevented States from starting their redistricting processes in earnest until the autumn of 2021. This extensive delay has already made it more difficult for States to hold their spring 2022 primary elections on-time. And any further delay predicated upon the novel Section 2 theory advanced by Respondents would upend the 2022 election calendar nationwide. Countless States would be forced to start from scratch, redrawing their district maps to incorporate the new Supreme Court guidance thereby preventing candidates from filing to run for office and elections from being held on their currently scheduled dates. New rules not only upend congressional elections, but also have downstream effects on other office-holders whose districts are based on congressional districts. And the rules for drawing districts matter no matter what level the office. The potential for creating chaos in federal, state, and local elections is enormous.

The deadline for the release of census data is not subject to reasonable dispute, because it is specifically enshrined in federal law. The tabulation of total population by State (*i.e.*, the top-line population numbers for each State that determine how many seats the State receives in congressional apportionment) must be completed “within 9 months after the census date[,]” meaning they are reported to the President by the Secretary of Commerce no later than December 31st of the census year. 13 U.S.C. § 141(b). The same section also sets a deadline for the delivery of state-specific

population data to the Nation's Governors, which must be "be transmitted to each respective State within one year after the decennial census date[,]" or by March 31st of the calendar year immediately following the census. *Id.* § 141(c). The deadlines were clear, and yet in the most recent census cycle they were ignored for the first time in decades – indeed in over a century.

One might assume that the COVID-19 pandemic was the primary factor affecting the Bureau's extended delay, and it certainly contributed. The Census Bureau has explained in other fora the myriad difficulties of collecting reliable data in the midst of a pandemic, natural disasters, and civil unrest. *See, e.g., Nat'l Urban League*, 508 F. Supp. 3d at 671-75. But the Bureau's data collection operations ceased in mid-October 2020, and yet the release of the final data to the States did not occur until almost a full year later. *Ross v. Nat'l Urban League*, 141 S. Ct. 18 (Oct. 13, 2020) (granting stay of district court preliminary injunction and thereby allowing Bureau to conclude field operations).

The pandemic was not, therefore, the *sole* reason for the Bureau's lengthy delay: In 2020, the Bureau was also involved in implementing a new algorithm that was, they assert, designed to protect the privacy of Census respondents. Indeed, the Bureau did not finalize this algorithm until June 2021—more than two months after its statutory deadline for reporting population data to each State.³ In other words, long after its data collection efforts ended in mid-October 2020 and months after its

³ U.S. Census Bureau, *Census Bureau Sets Key Parameters to Protect Privacy in 2020 Census Results*, (June 9, 2021), <https://www.census.gov/newsroom/press-releases/2021/2020-census-key-parameters.html>.

statutory deadline, the Bureau was still tinkering with the data rather than releasing it to the States that desperately needed it to initiate their redistricting processes. Even worse, the Bureau persisted in applying its algorithm to the data despite legitimate concerns raised in litigation concerning the effect its new “differential privacy” method would have on the usability of the underlying population data for redistricting purposes. *See, e.g., Alabama v. U.S. Dep’t of Com.*, 2021 U.S. Dist. LEXIS 120917 (M.D. Ala. June 29, 2021) (plaintiffs alleging that the application of differential privacy would “generate intentionally skewed and untrustworthy data” that would be insufficient for compliance with the Voting Rights Act, among other uses, but dismissed on standing).

Two States—including Petitioner in the present application for stay—took the initiative last spring to attempt to enforce the Census Bureau’s statutory deadlines for the release of state population data. *See generally Alabama*, 2021 U.S. Dist. LEXIS 120917; *Ohio v. Raimondo*, 528 F. Supp. 3d 783 (S.D. Ohio 2021). A three-judge panel in the Middle District of Alabama denied the State’s requested injunctive relief after concluding that the Bureau had presented sufficient evidence that it could not meet its deadlines. *Alabama*, 2021 U.S. Dist. LEXIS 120917, at *37-38. Similarly, although a three-judge panel of the Sixth Circuit concluded that Ohio had been injured by the delay in the release of data, the Bureau was never ordered to comply with a deadline earlier than the one it voluntarily imposed on itself. *Ohio v. Raimondo*, 848 F. App’x 187, 188 (6th Cir. 2021).

Although legislation was introduced that would have extended the relevant deadlines, *see* H.R. 2699, 117th Cong. (2021), it never passed. Hence, the Census Bureau, without any legislative changes to its statutory deadlines for the release of data to the States, unilaterally breezed past those deadlines without any lawful authority. Individual States diligently attempted to obtain judicial relief in early 2021 so they could begin redistricting as scheduled and avoid precisely the problems created here, but their efforts were rejected. *Alabama*, 2021 U.S. Dist. LEXIS 120917; *Ohio*, 528 F. Supp. 3d 783. The apportionment data was finally reported to the President on April 26, 2021. *Alabama*, 2021 U.S. Dist. LEXIS 120917, at *11. The state-specific data was released in “legacy format” on August 12, 2021, and the final release of user-friendly P.L. 94-171 data did not occur until September 16, 2021, nearly *six months* after the statutory deadline.⁴

The delayed start of redistricting in 2021 was not the fault of any State, but States and their citizens are most injured if the Court fails to grant Petitioner’s requested emergency stay. Despite the interminable delay, States leapt into action as soon as they could and commenced redistricting so new districts would be finalized before any candidate filing deadlines. Alabama, exhibiting impressive speed, enacted its new congressional map November 4, 2021. Order, *Caster v. Merrill*, No. 2:21-cv-1536-AMM, at *3 (N.D. Ala. Jan. 24, 2022). The recent decision by the three-judge

⁴ U.S. Census Bureau, *Census Bureau Delivers 2020 Census Redistricting Data in Easier-to-Use Format*, (Sept. 16, 2021), <https://www.census.gov/newsroom/press-releases/2021/2020-census-redistricting-data-easier-to-use-format.html>; U.S. Census Bureau, *2020 Census Statistics Highlight Local Population Changes and Nation’s Racial and Ethnic Diversity*, (Aug. 12, 2021), <https://www.census.gov/newsroom/press-releases/2021/population-changes-nations-diversity.html#:~:text=AUG.,identify%20their%20race%20and%20ethnicity>.

panel in the instant case threw a giant wrench into those plans at the last minute of the eleventh hour.

The initial Complaint in this case was filed on November 4, 2021, the same day the new Alabama congressional map was enacted. Less than three months later—and only four days before Alabama’s candidate filing deadline for its May 24, 2022 primary elections—the three-judge panel issued its 234-page order preliminarily enjoining the Secretary of State from conducting congressional elections using Alabama’s adopted map. Code of Ala. §§ 17-13-3(a); 17-13-5(a); Order, *Caster v. Merrill*, No. 2:21-cv-1536-AMM, at *5 (N.D. Ala. Jan. 24, 2022). Simultaneously, the panel stayed Alabama’s candidate filing deadline for 14 days. *Id.* at 6-7. Of course, if the state legislature is unable to produce a map in this limited period of time that the panel finds satisfactory, that filing deadline could be extended even further. The time crunch, created by the federal government as a result of the delay in the Census, is now – based on the rulings from the panel –penalizing Alabama. What is happening here does not bode well for other States who have not yet completed their work. In the unique context of the 2022 redistricting cycle, this Court should instruct federal courts that the Census delays are an additional factor to weigh against preliminary injunctions challenging adopted maps in the 2022 election cycle.

Alabama begins mailing absentee ballots to voters 45 days before an election, or April 9, 2022 for the May 24th primary.⁵ The court’s current timetable leaves only

⁵ Nat’l Conf. of State Legislatures, *Table 7: When States Mail Out Absentee/Mail Ballots* (Dec. 28, 2021), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-7-when-states-mail-out-absentee-ballots.aspx>.

sixty days for the State to print ballots and make other election administration decisions between the extended candidate filing deadline on February 8th and the mailing of the first absentee ballots on April 9th. Any further constriction of that timeframe creates an untenable situation in States across the country, as important deadlines get extended and candidates campaign in ever-changing districts without any certainty as to the identity of their ultimate constituents. In other states, with candidate filing and absentee ballot mailing deadlines that are weeks earlier than Alabama's, confusion worsens and distrust in the process increases.

This Court should re-enforce – that in addition to *Purcell* – the unique circumstances of the timing of the Census data should weigh against the issuance of preliminary injunctions except in extreme and patently unlawful circumstances.

III. GINGLES FACTORS MUST BE GIVEN MEANING AND CLARIFICATION

Legislatures, commissions, and others responsible for drawing maps are looking to this Court for clarity as to how to comply with Section 2 and limit consideration of race in a manner that satisfies strict scrutiny. Over the last decade, federal courts have struck down congressional and state legislative maps in North Carolina and Virginia that were drawn with race as a predominant factor. Legislators across the country look to these cases to guide their actions. Because the decision below would require map-drawers to violate traditional districting principles and consider race as a predominant factor to comply with Section 2, it cannot stand.

There is a significant lack of clarity on what constitutes evidence necessary to satisfy Section 2 and therefore require the creation of majority-minority districts,

while at the same time remaining faithful to the Fourteenth Amendment. This Court should use this opportunity to clarify that Section 2 cannot require districts that require the subversion of traditional districting principles to racial considerations. To do otherwise would undermine this Court's substantive decisions in *LULAC v. Perry*, 548 U.S. 399 (2006) and *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

A. The Court Should Clarify that *Gingles* Factors Cannot be Satisfied Without also Complying with Traditional Districting Criteria

States need clarity on jurisprudential standards governing compliance with Section 2 or they will increasingly be mired in lengthy, costly litigation over their maps. This ultimately erodes confidence in the integrity of our elections as a whole. A brief review of the current state of the jurisprudence illustrates just how hopelessly opaque the standards are.

In *Page v. Virginia State Board of Elections*, 58 F. Supp. 3d 533 (E.D. Va. 2014), the court struck down a congressional district that was initially created in 1991 as a majority-minority district. That district was maintained as a majority-minority district in the 2000 redistricting cycle and initially in the 2010 cycle when the Virginia legislature adopted a new map. In *Page*, the court found that the congressional district violated the Fourteenth Amendment's equal protection clause as constituted because the district was drawn with race as the "predominant consideration." *Id.* at 540. The court highlighted the lack of empirical evidence before the legislature about racial block voting, the irregular shape and compactness of the district, the number of splits of political subdivisions, and the predominance of race as a factor in drawing the maps based upon the testimony of the drafter, and determined that all of this

evidence caused the district to violate the Equal Protection Clause. *Id.* at 545-50. *Page* was vacated in light of this Court's decision in *Alabama Legislative Black Caucus v. Alabama*, and remanded. 575 U.S. 931 (2015). The three-judge court subsequently issued later opinions reaching similar conclusions, 2015 U.S. Dist. LEXIS 73514 (E.D. Va. 2015), and this Court ultimately dismissed the appeal from that decision in *Wittman v. Personhuballah*, 578 U.S. 539 (2016). The appeal was not denied on the merits, but rather for lack of standing by the intervenor Defendants after Virginia's Attorney General declined to defend the otherwise duly enacted state law. *Id.* at 544-46.

Similarly, in another Virginia case focusing on state legislative maps, the three-judge Court in *Bethune-Hill v. Virginia State Board of Elections*, 326 F. Supp. 3d 128, 136 (E.D. Va. 2018), found that "race predominated over traditional districting factors" in 11 state house districts and struck those down in violation of the Fourteenth Amendment. This Court held that no "actual conflict" need be found between race and traditional districting principles to find racial predominance, but that "there may be cases where challengers will be able to establish racial predominance in the absence of an actual conflict by presenting direct evidence of the legislative purpose and intent or other compelling circumstantial evidence." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). This language is so vague that no reasonable legislator reading the opinion would know what it means. The district court found that "harm from such racial sorting is apparent" and conducted a "holistic analysis" of the evidence. *Bethune-Hill*, 326 F. Supp. 3d at 140,

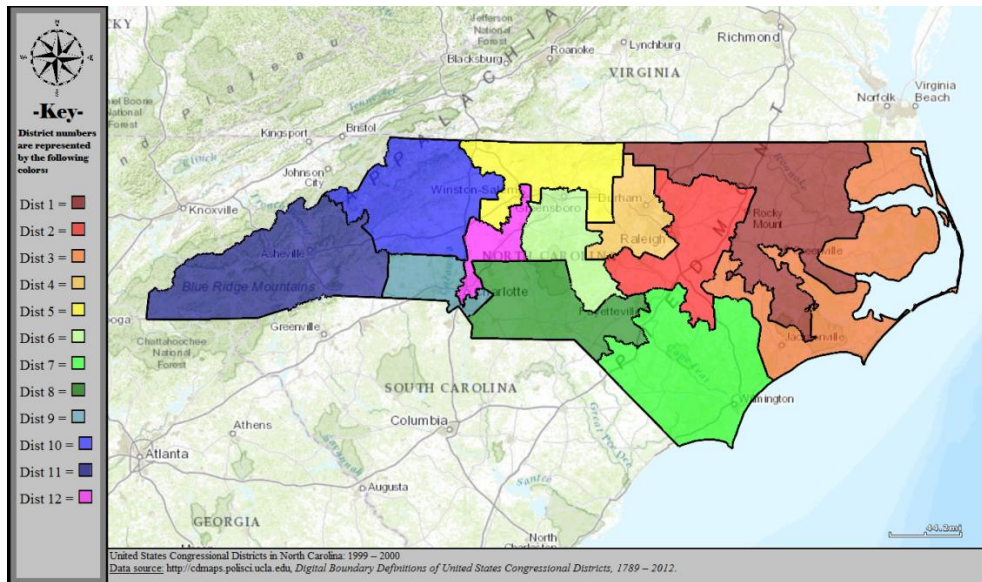
142. Once again, this language is vague, yet suggests considerations of race are dangerous to the long-term survivability of the maps. Ultimately, the three-judge court there struck down the 11 districts it was charged with reviewing on remand. Once again, Virginia’s then-Attorney General declined to defend the map, and this Court dismissed the appeal by the intervenors for lack of standing. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1955-56 (2019).⁶

In *Alabama Legislative Black Caucus*, 231 F. Supp. 3d 1026 (M.D. Ala. 2017), the three-judge court – in accordance with this Court’s instructions in *Alabama Legislative Black Caucus*, 575 U.S. 254 (2015) – went through Alabama’s legislative maps literally district-by-district and line-by-line (including several hundred maps of small areas), and ultimately struck down 12 districts where it found that “race predominated” in the drawing of the district’s lines. In contrast to the three-judge court in *Page*, in this case anecdotal testimony from incumbent members of the legislature was deemed a sufficiently “strong basis in evidence” to justify a 55% “floor” in the black voting age population of many of the districts. *Alabama Legislative Black*

⁶ Of note here, after the Virginia legislature declined to adopt a remedial map, the three-judge court imposed a map that made significant reductions in the black voting age population of many of the challenged districts. *Bethune-Hill v. Virginia State Bd. of Elections*, 368 F. Supp. 3d 872 (E.D. Va. 2019). District 63 was reduced from 59.53% percent black voting age population to 47.47% black voting age population. District 75 was reduced from 55.42% black voting age population to 52.45%. Two political scientists (including one serving as the court’s special master) calculated that these districts would allow black voters to continue to elect their preferred candidates. *Id.* at 882-883. Once again, as Chief Justice Roberts wrote in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2503 (2019), “Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time.” In the next election held under this plan, the incumbent black Delegates in districts 75 and 63 were defeated by white candidates. See Virginia 2021 election results at <https://results.elections.virginia.gov/vaelections/2021%20November%20General/Site/GeneralAssembly.html> (visited Jan. 27, 2022). These two districts are the seats that currently give Republicans a majority in the Virginia House of Delegates and contributed to the reduction of the size of the Legislative Black Caucus in the Virginia House.

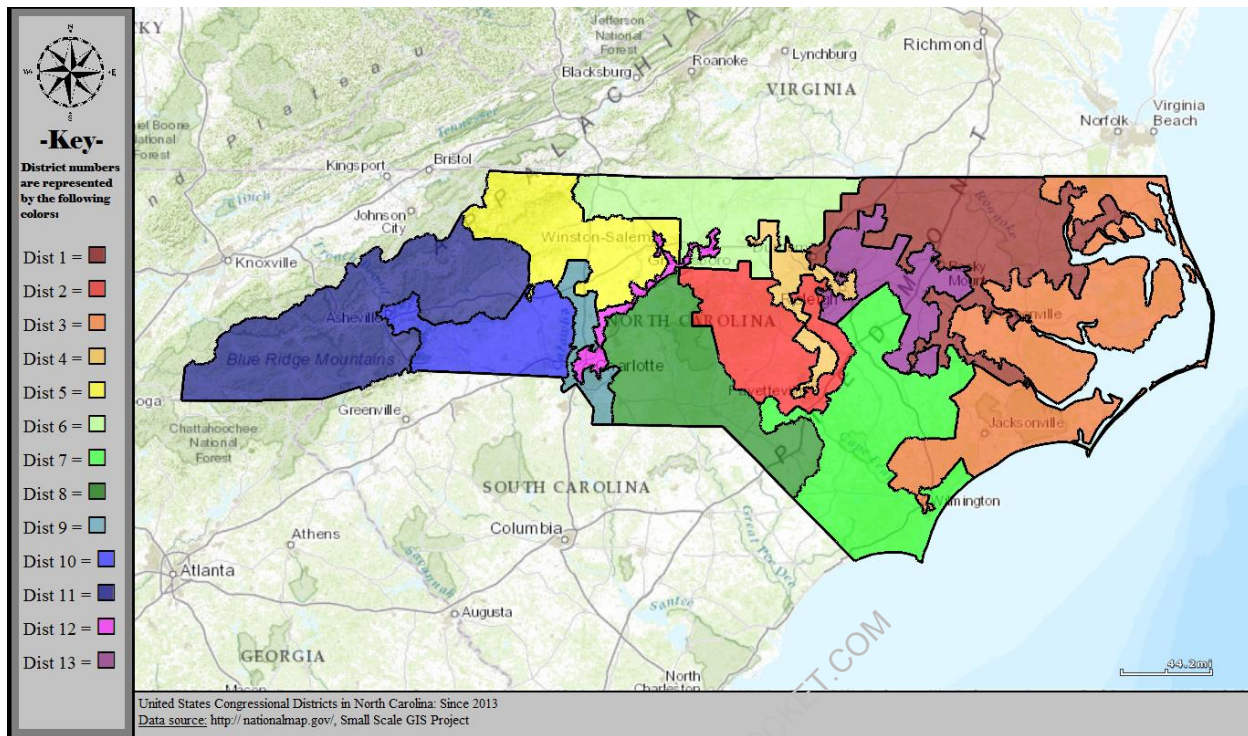
Caucus, 231 F. Supp. 3d at 1033. In fact, that court said, “the Supreme Court does not require that the legislature conduct studies.” *Id.* There was evidence in the record based on testimony from incumbent black legislators that their districts needed to be 62% black voting age population or even 65% black voting age population. *Id.* at 1040. That Court correctly found that “we must determine whether the legislature subordinated *traditional race-neutral districting principles* . . . to racial considerations.” *Id.* at 1049 (internal quotations omitted). Ultimately, the court found 12 of the districts violated the Fourteenth Amendment while upholding a majority of the districts it reviewed.

Similarly, in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), this Court struck down two Congressional Districts after finding race was the predominant factor in their creation. In that case, this Court directly addressed the applicability of both Section 2 and the Equal Protection Clause and found neither justified those Congressional districts. *Id.* at 1481-82. This followed a long line of cases about race and redistricting in North Carolina including *Shaw*, *Cromartie I*, and *Cromartie II*. To summarize *Cooper*, the map adopted by the North Carolina legislature in 1997, was twice approved by this Court in *Hunt v. Cromartie*, 526 U.S. 541 (1999) and *Easley v. Cromartie*, 532 U.S. 234 (2001). That map is reproduced for the Court’s convenience here (available at https://en.wikipedia.org/wiki/North_Carolina%27s_congressional_districts#/media/File:United_States_Congressional_Districts_in_North_Carolina,_2003_-_2013.tif (Visited Jan. 27, 2022):



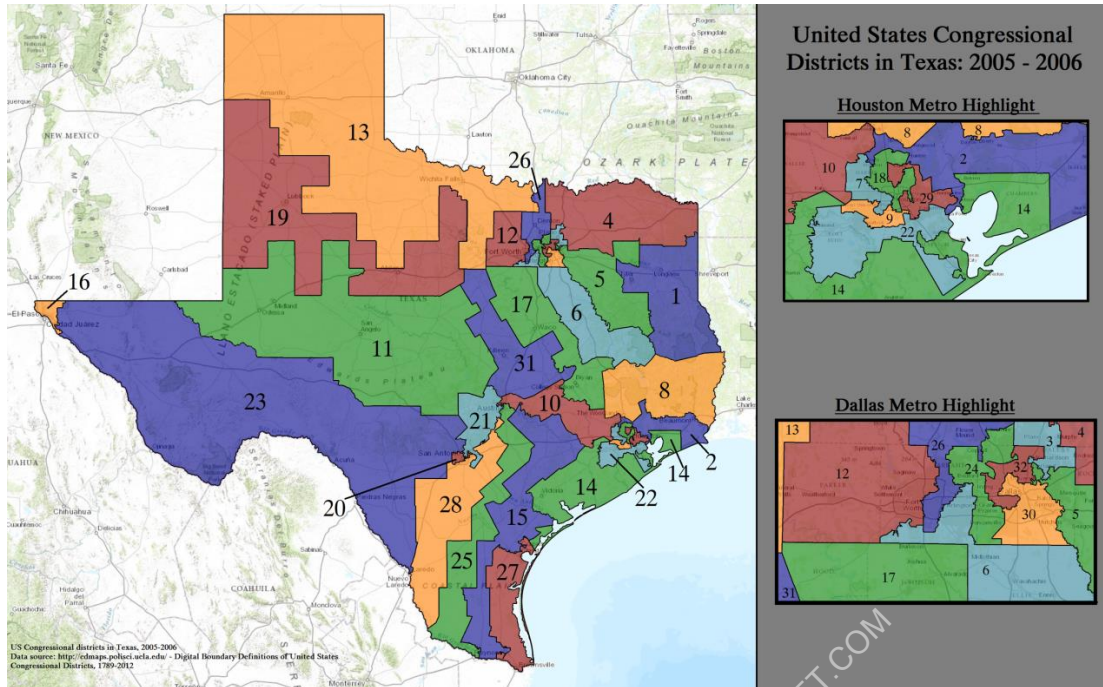
Just over a decade later, this Court struck down North Carolina’s 2011 congressional map, reproduced below, as unconstitutional (available at https://en.wikipedia.org/wiki/North_Carolina's_congressional_districts#/media/File:United_States_Congressional_Districts_in_North_Carolina,_since_2013.tif (visited Jan. 27, 2022):

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To the ordinary observer, District 12 (the pink district) and District 1 (the brown district) in these two maps look substantially similar, but the 1997 version was deemed constitutional while the 2011 version was not. No ordinary legislator could possibly understand why the 1997 districts were permissible but the 2011 districts were not.

In *LULAC v. Perry*, this Court struck down a district that Texas argued it was compelled to draw by Section 2. That district – District 25 – stretched from Austin to the Rio Grande Valley. It is reproduced here: https://en.wikipedia.org/wiki/United_States_congressional_delegations_from_Texas#/media/File:United_States_Congressional_Districts_in_Texas,_2005–2006.tif (Visited January 27, 2022).



The lesson legislatures took from this Court is that districts combining disparate minority populations hundreds of miles apart for the purpose of creating majority-minority districts did not in fact satisfy the requirements of Section 2.

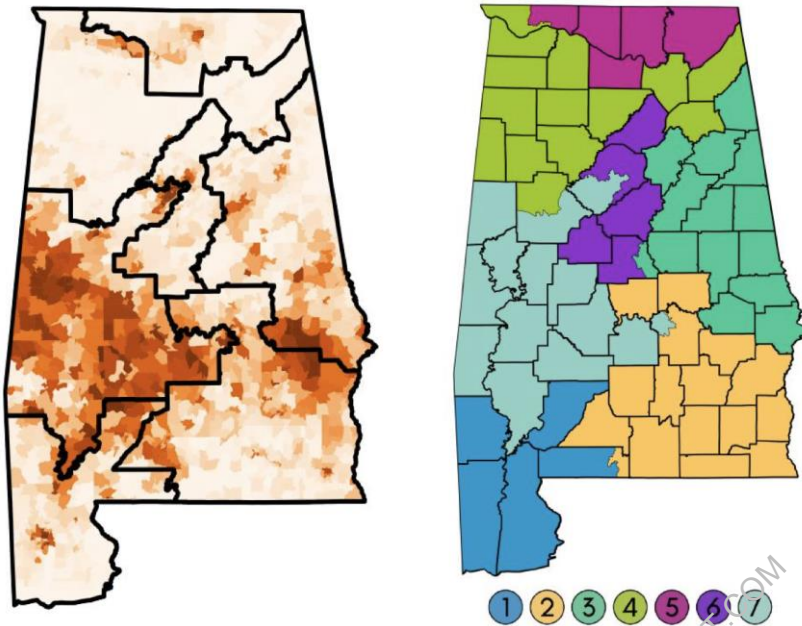
It is against this backdrop – with a murky evidentiary standard and with the legislature seeing four maps struck down by courts this past decade and Texas’ map the prior decade that considered race “too much” – that the three-judge court decision now pending review before this Court is **requiring** the State of Alabama to consider race predominately and draw two exceedingly slim, geographically distant, majority black Congressional districts. This Court now has the opportunity to provide much-needed clarity to state legislatures.

B. Plaintiffs’ Proposed Districts in Alabama Do Not Satisfy Traditional Districting Criteria

In *Alabama Legislative Black Caucus*, the three-judge court summarized the distribution of the black population in Alabama as follows, “[T]he black population in Alabama is not evenly dispersed throughout the state. It is concentrated in counties along the Black Belt in the south-central part of the state, as well as the counties that contain major metropolitan areas: Madison County in the north (Huntsville), Jefferson County in the north-central (Birmingham), Montgomery County in the south-central (Montgomery), and Mobile County in the southwest (Mobile).” 231 F. Supp. 3d at 1055. That court well-established that the black population in Alabama is geographically concentrated and not entirely in the same region of the state.

As this Court explained in *LULAC v. Perry*, the only way to satisfy the compactness requirement of Section 2 is the “compactness of the minority population, not [] the compactness of the contested district.” 548 U.S. at 433 (internal citation omitted).

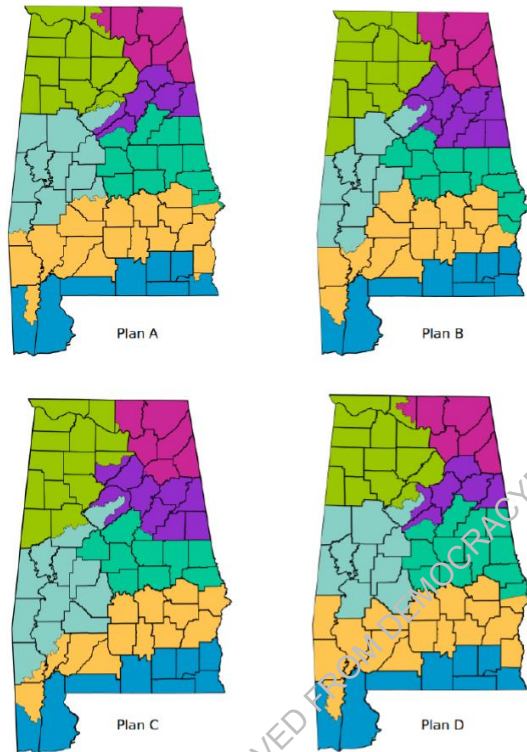
A map showing the concentrations of black populations in Alabama is included in the three-judge court’s opinion below:



This population distribution lines up well with the description provided by Judge Pryor in *Alabama Legislative Black Caucus*. The black lines in the map above (left) present the new Congressional Districts recently adopted by Alabama. The map to the right shows the districts in various colors overlaid over Alabama’s county lines, demonstrating that only three counties are split to create the enacted districts and that the enacted map unites three of the five concentrations of black population described by Judge Pryor (namely Birmingham, and Montgomery) in a geographically compact fashion.

The four exemplar maps presented by Dr. Duchin to the court, which the court below credited, requires bisecting the otherwise concentrated minority population in every iteration, and requires combining population in the southwestern portion of the state (black population in Mobile) with black population more than 200 miles away on the Alabama / Georgia border. There appears to be no reason to combine the

populations in Eufala in a single district with Mobile other than the fact that many of the people who live in those two far-flung communities are black. For the Court's convenience, Dr. Duchin's maps are below:



Dr. Duchin's "black voting age population" using the "any part" black numbers are 51.37% for Plan A, 50.24% for Plan B, 50.06% for Plan C, and 50.05% for Plan D.⁷

Mr. Cooper, demographer for another group of Plaintiffs, also submitted exemplar maps that similarly divide otherwise concentrated population in Alabama's "Black Belt" and presented districts that similarly bisect it in every iteration (from 2:21-cv-01536-AMM, Document 48):

⁷ Dr. Duchin's other black voting age population count is 51.5%, 51.06%, 53.5% and 51.73% respectively for her plans A, B, C and D.

Figure 10

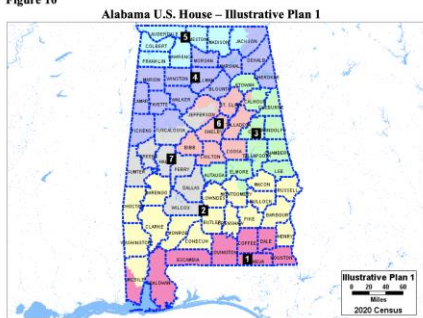


Figure 12



Figure 14



Figure 16



For Mr. Cooper’s districts, the black voting age population using the “any part black” measure of his “second” district ranges from 50.09% in Illustrative Plan 1,⁸ to 50.88% in Illustrative Plan 2⁹, to 50.09%¹⁰ in Illustrative Plan 3, to 50.07% in Illustrative Plan 4.¹¹ There is simply no plausible way to draw these proposed districts unless black population numbers were the “predominant factor” in the map drawer’s methodology. And, once again, Mr. Cooper combines Mobile with Eufala in three of his four maps.

Despite the precise focus on race of all of these plans to obtain population numbers that are barely majority-minority,¹² the need to bisect the “Black Belt” in

⁸ The “18+ any part black” number of Mr. Cooper’s other majority-minority district is 53.28%.

⁹ The “18+ any part black” number of Mr. Cooper’s other majority-minority district is 53.79%.

¹⁰ The “18+ any part black” number of Mr. Cooper’s other majority-minority district is 50.27%.

¹¹ The “18+ any part black” number of Mr. Cooper’s other majority-minority district is 50.09%.

¹² In addition, in *Alabama v. Department of Commerce, supra*, Alabama raised substantial questions with respect to the accuracy of these population numbers with the implementation of the Census Bureau’s “differential privacy” methods. “Differential privacy” methodology results in the Census redistricting data not being the actual enumerated population in each Census block, but rather

every plan, and the combination of geographically disparate minority communities on opposite sides of the state, the court below found that Section 2 of the Voting Rights Act *requires* Alabama to adopt a configuration like this.

The decision below conflicts with this Court’s decision in *LULAC v. Perry*, where the state was not justified in drawing a district that stretched 300 miles from Austin to the Rio Grande Valley connecting two different Hispanic communities. 548 U.S. at 429-30. Yet – if this ruling is permitted to stand – Alabama has violated the law by not drawing the slimmest of majority-minority districts and connecting Mobile with Eufala – more than 200 miles apart.

CONCLUSION

States need clarity. Over the last decade, this Court and the lower courts have consistently told legislatures that race cannot predominate when they draw representative districts. The court below concluded that Alabama violated the Voting Rights Act by not using race as a predominant feature of its maps in violation of this Court’s rulings in *LULAC* and *Cooper*. This Court should stay the decision below and make clear why it is correcting this error.

“adjusted” by adding and subtracting from population numbers and then running a series of algorithms on the data to correct for fractions and negative numbers. The Census Bureau’s use of differential privacy for the first time ever in the 2020 Census raises real questions about whether a district that is 50.05% black voting age population according to Census data adjusted by differential privacy is in actuality a majority black voting age population district.

Respectfully submitted,

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