

No. _____

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.

MARCUS CASTER, *et al.*,
Respondents.

**EMERGENCY APPLICATION FOR ADMINISTRATIVE STAY,
STAY OR INJUNCTIVE RELIEF PENDING APPEAL, AND ALTERNATIVE
PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT**

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicants are John H. Merrill, in his official capacity as Alabama Secretary of State, State Senator Jim McClendon, and State Representative Chris Pringle. Applicants were the defendants and defendant-intervenors before the U.S. District Court for the Northern District of Alabama.

Respondents are Marcus Caster, Lakeisha Chestnut, Bobby Lee DeBose, Benjamin Jones, Rodney Allen Love, Manasseh Powell, Ronald Smith, and Wendell Thomas. Respondents were plaintiffs in the district court.

The proceedings below were:

1. *Marcus Caster, et al. v. John Merrill, et al.*, No. 2:21-cv-1536 (N.D. Ala.) – preliminary injunction entered January 24, 2022; motion for stay pending appeal denied January 27, 2022.

Related cases include:

1. *Evan Milligan, et al. v. John Merrill, et al.*, No. 2:21-cv-1530 (N.D. Ala.) – preliminary injunction entered January 24, 2022; motion for stay pending appeal denied January 27, 2022; application for stay pending appeal filed January 28, 2022, No. 21A375.
2. *Bobby Singleton, et al. v. John Merrill, et al.*, No. 2:21-cv-1291 (N.D. Ala.) – preliminary injunction requested as to Equal Protection Clause claim, which the district court declined to decide after granting the *Milligan* and *Caster* motions for preliminary injunction on January 24, 2022; preliminary injunction entered January 24, 2022; motion for stay pending appeal denied January 27, 2022.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants each represent that they do not have any parent entities and do not issue stock.

Respectfully submitted,

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TABLE OF CONTENTS

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS..... i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES..... iv

OPINIONS BELOW 4

JURISDICTION..... 5

BACKGROUND AND PROCEDURAL HISTORY..... 5

 A. Alabama’s 2021 Congressional Map 5

 B. Plaintiffs’ Lawsuits 7

 C. The District Court Enjoins Alabama’s Congressional Districts. 10

 D. The State’s Appeal 15

ARGUMENT 16

 I. This Court Is Likely To Grant The Petition For Writ Of Certiorari
 Before Judgment And Ultimately Vacate The Preliminary Injunction 17

 A. The court below badly misinterpreted *Gingles*’s first precondition
 beyond constitutional limits..... 19

 B. The injunction also cannot be reconciled with the statutory text 29

 C. Constitutional avoidance compels a stay pending appeal. 30

 II. Irreparable Harm Will Result Without A Stay 37

 III. The Balance Of Harms And Public Interest Warrant A Stay..... 38

CONCLUSION..... 40

TABLE OF AUTHORITIES

Cases

<i>Abbott v. Perez</i> , 138 S. Ct. 2305 (2018)	passim
<i>Abrams v. Johnson</i> , 521 U.S. 74 (1997)	18, 22, 34
<i>Barr v. Lee</i> , 140 S. Ct. 2590 (2020)	25
<i>Bartlett v. Strickland</i> , 556 U.S. 1 (2009)	passim
<i>Bethune-Hill v. Va. State Bd. of Elections</i> , 137 S. Ct. 788 (2017)	26
<i>Brnovich v. Democratic Nat’l Comm.</i> , 141 S. Ct. 2321 (2021)	28, 29, 35
<i>Bush v. Vera</i> , 517 U.S. 952 (1996).....	22
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991).....	35
<i>Cooper v. Harris</i> , 137 S. Ct. 1455 (2017)	passim
<i>Davis v. Chiles</i> , 139 F.3d 1414 (11th Cir. 1998)	26
<i>Favors v. Cuomo</i> , 881 F. Supp. 2d 356 (E.D.N.Y. 2012)	39
<i>Georgia v. Ashcroft</i> , 539 U.S. 461 (2003).....	19
<i>Gill v. Whitford</i> , 137 S. Ct. 2289 (2017)	16
<i>Gonzalez v. City of Aurora</i> , 535 F.3d 594 (7th Cir. 2008)	passim
<i>Graves v. City of Montgomery</i> , 807 F. Supp. 2d 1096 (M.D. Ala. 2011).....	38
<i>Holder v. Hall</i> , 512 U.S. 874 (1994).....	19, 25, 29, 31
<i>Hollingsworth v. Perry</i> , 558 U.S. 183 (2010).....	16

<i>Hunt v. Cromartie</i> , 526 U.S. 541 (1999).....	3
<i>Husted v. Ohio State Conference of NAACP</i> , 573 U.S. 988 (2014).....	39
<i>Johnson v. DeGrandy</i> , 512 U.S. 997 (1994).....	22, 30
<i>Johnson v. Miller</i> , 922 F. Supp. 1556 (S.D. Ga. 1995)	18
<i>League of United Latin Amer. Citizens v. Perry</i> , 548 U.S. 399 (2006).....	passim
<i>Mac Govern v. Connolly</i> , 637 F. Supp. 111 (D. Mass. 1986)	15
<i>McCulloch v. Maryland</i> , 4 Wheat. 316 (1819).....	36
<i>Miller v. Johnson</i> , 512 U.S. 1283 (1994).....	16
<i>Miller v. Johnson</i> , 515 U.S. 900 (1995).....	22, 30, 31, 34
<i>Nken v. Mukasey</i> , 555 U.S. 1042 (2008).....	4
<i>Perry v. Perez</i> , 565 U.S. 388 (2012).....	4, 15, 16
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006)	15, 39
<i>Rucho v. Common Cause</i> , 139 S. Ct. 2484 (2019)	28, 36
<i>Shaw v. Hunt</i> , 517 U.S. 899 (1996).....	24, 31, 32, 34
<i>Shaw v. Reno</i> , 509 U.S. 630 (1993).....	3, 34, 35, 36
<i>Thompson v. DeWine</i> , 959 F.3d 804 (6th Cir. 2020)	39
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986)	2, 19
<i>Trump v. Mazars USA, LLP</i> , 140 S. Ct. 660 (2019)	4, 15

<i>United States v. Georgia</i> , 546 U.S. 151 (2006).....	35
<i>Wesch v. Folsom</i> , 6 F.3d 1465 (11th Cir. 1993)	5
<i>Wesch v. Hunt</i> , 785 F. Supp. 1491 (S.D. Ala. 1992).....	5, 33
<i>Winter v. NRDC</i> , 555 U.S. 7 (2008)	15
<i>Wise v. Lipscomb</i> , 437 U.S. 535 (1978).....	2, 37
<i>ZF Auto. US, Inc. v. Luxshare, Ltd.</i> , 142 S. Ct. 637 (2021)	15
Constitutional Provisions	
U.S. CONST. amend. XV	35
Statutes	
28 U.S.C. §1253.....	1
28 U.S.C. §1254(1)	5
28 U.S.C. §1331.....	5
28 U.S.C. §2101(f).....	5
28 U.S.C. §2284.....	1, 8
52 U.S.C. §10301.....	passim
Ala. Code §17-6-22	39
Ala. Code §17-9-3(a).....	39
Other Authorities	
Duchin & Spencer, <i>Models, Race, and the Law</i> , 130 Yale L. J. Forum 744 (2021).....	9

TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

After receiving the 2020 Census data, the State of Alabama enacted a new congressional district plan. Guided by race-neutral redistricting principles, the State's congressional plan mirrors district lines of past plans, making slight adjustments to accommodate population changes. App.228-29. Days ago, a district court enjoined Alabama from using its districts in forthcoming elections. App.5.¹ Why? Because Alabama didn't "prioritize[] race" over traditional race-neutral redistricting principles. App.213-14. According to the court, Alabama should have first sorted its voters on the basis of race, starting with a "non-negotiable" racial target of adding another majority-black district. *Id.*

The court has barred Alabama from using its lawfully enacted plan on the theory that Alabama violated Section 2 of the Voting Rights Act. 52 U.S.C. §10301. The State's plan contains one majority-black district, as it has for decades; the court below

¹ This case (*Caster*) is one of three related challenges to Alabama's congressional districts pending before the district court. The others are *Singleton v. Merrill*, No. 2:21-cv-1291, and *Milligan v. Merrill*, No. 2:21-cv-1530. While *Caster* is pending before a single district judge, *Singleton* and *Milligan* are pending before a three-judge court because those plaintiffs also raised constitutional challenges to the congressional districts. 28 U.S.C. §2284. Even though the cases were not formally consolidated, the *Milligan* three-judge court conducted a consolidated hearing where evidence admitted by any party to any one of the three cases was considered by the court for all three cases. *Caster v. Merrill*, No. 2:21-cv-1536, ECF 101 at 4. The court then issued the same preliminary injunction in all three cases. App.5, 14; *see also* App.19-226 (opinion). The State has already filed in this Court an application for stay pending its direct appeal from the three-judge panel's decision in *Milligan*. 28 U.S.C. §1253; *see Merrill v. Milligan*, No. 21A375 (filed Jan. 28, 2022). Detailed below, and for the same reasons that the State seeks a stay in *Milligan*, the State simultaneously requests a stay pending appeal in *Caster*, which involves the same VRA theories, the same evidence, and the same preliminary injunction as *Milligan*.

concluded that the VRA requires two. The preliminary injunction of a State’s electoral districts at this eleventh hour is by itself extraordinary. But all the more extraordinary is the legal error that pervades the injunction here. The court-ordered redraw marks a radical change from decades of Alabama’s congressional plans. It will result in a map that can be drawn *only* by placing race first above race-neutral districting criteria, sorting and splitting voters across the State on the basis of race alone.

Well-established in the court below, no race-neutral map drawer would draw that map. In a sample of more than *two million* race-neutral maps generated by the other plaintiffs’ own experts, *not even one* contained two majority-black districts. There is no better evidence that the first precondition for a vote dilution claim has not been met here. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). A second majority-black district that can be drawn only by initially subverting race-neutral redistricting criteria to a “non-negotiable” racial target is not a “reasonably configured” district. *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017). Accordingly, no invocation of the VRA can justify, much less require, the race-based redraw of a race-neutral map.

The injunction leaves the State with no choice at all. The State can replace its lawfully enacted congressional district plan with a racial gerrymander and suffer the consequences of follow-on litigation. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (op. of White, J.) (noting a “new legislative plan,” in response to redistricting litigation would “be the governing law,” thereby mooting a suit, “unless it, too, is challenged and found to violate the Constitution”); *see, e.g., Hunt v. Cromartie*, 526 U.S. 541,

544-45 (1999). Or the State can cede its redistricting power to the district court, which will hire a third party to redraw districts that segregate Alabamians in the Mobile area and elsewhere by race. App.6-7. Either way, without a stay, the State's forthcoming congressional elections will be run on district lines that never could have been drawn by the Legislature but for sorting Alabamians on the basis of race alone. The United States Constitution cannot tolerate such a perversion of the VRA.

The court's order is contrary to the promise of the Equal Protection Clause. The injunction is premised on the noxious idea that redistricting begins and ends with racial considerations. The race-based sorting of a State's voters that the injunction would require "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno* ("*Shaw I*"), 509 U.S. 630, 647 (1993). And it sends an "equally pernicious" message to elected representatives in those districts: "their primary obligation is to represent only the members of that [racial] group, rather than their constituency as a whole." *Id.* at 648. If this is what the VRA requires of single-member districts, then the VRA is unconstitutional as applied here.

An immediate stay pending appeal is warranted. Alabama respectfully requests an administrative stay while the Court considers its stay application and a ruling on its application for a stay pending appeal as soon as practicable. *See, e.g., Abbott v. Perez*, 138 S. Ct. 2305, 2319, 2322 (2018); *Perry v. Perez*, 565 U.S. 388, 392

(2012).² Given the exigency, the Court may also construe this application as a petition for a writ of certiorari before judgment, grant the petition, and consider this case alongside the State’s direct appeal in *Milligan*. See *Trump v. Mazars USA, LLP*, 140 S. Ct. 660 (2019); *Nken v. Mukasey*, 555 U.S. 1042 (2008).

The State’s pre-election deadlines are here, absentee voting for the congressional primaries is set to begin in little more than two months, with in-person primaries to follow on May 24. Any eleventh-hour change to existing districts would require reassignment of hundreds of thousands of voters to new districts. But this particular change is constitutionally intolerable: beyond the massive disruption in Alabama’s forthcoming elections, Alabamians will suffer the constitutional harm of being assigned to racially segregated districts, irreconcilable with the Fourteenth Amendment, the Fifteenth Amendment, and the VRA as initially conceived.

OPINIONS BELOW

Applicants seek an administrative stay and a stay or injunction pending appeal of the district court’s preliminary injunction, entered on January 24, 2022. The district court’s order is reproduced at App.1-8. The district court’s opinion, the same

² An immediate administrative stay is especially appropriate here, where the district court has made it “unmistakable” that it will redraw new plans with all deliberate speed in advance of the elections and has already solicited proposals for a map drawer. Cf. *Abbott*, 138 S. Ct. at 2322 (noting that “when the Governor declined to call a special session, the court moved ahead with its scheduled hearings and invited the parties to continue preparing for them even after this Court administratively stayed the August 15 order”). In the words of one member of the three-judge court, “[T]his [redistricting] process is going to go forward, and it will be done.” App.442 (Status Conf. Tr. 26:22-23).

opinion issued in the *Milligan* case, is reproduced at App.10-234. The district court's order and opinion denying a stay pending appeal is reproduced at App.241-77.

JURISDICTION

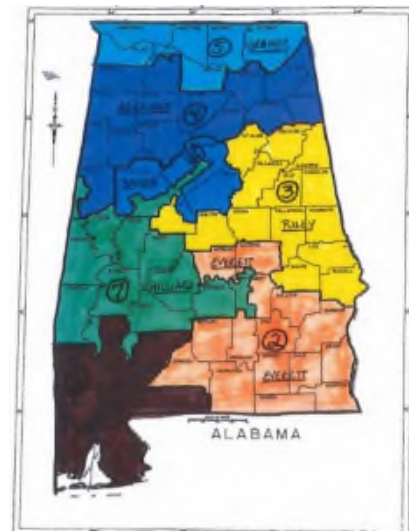
This Court has jurisdiction to resolve this application under 28 U.S.C. §§1331 and 2101(f), and the authority to grant certiorari before judgment under §1254(1).

BACKGROUND AND PROCEDURAL HISTORY

A. Alabama's 2021 Congressional Map

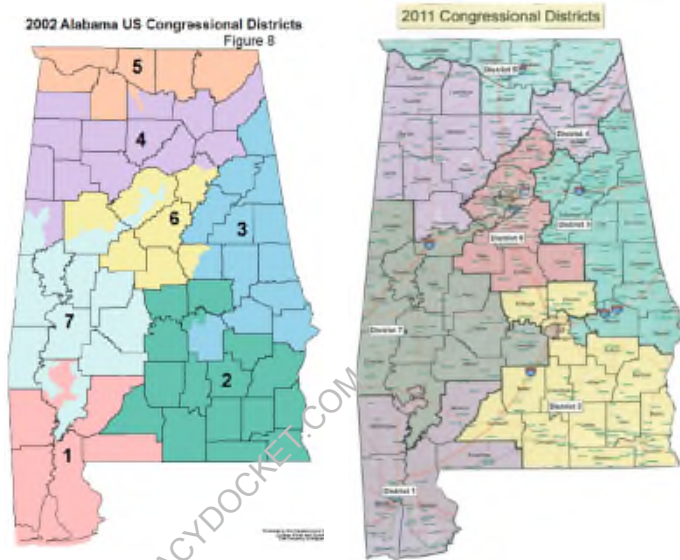
For nearly 50 years, Alabama's congressional districts have remained remarkably similar. Following the 1970 census, Alabama dropped from eight congressional districts to seven. Ever since, District 1 has included the Gulf Coast counties; District 2, the Wiregrass and all or parts of Montgomery; District 3, the eastern-central parts of the State; District 4, the rural northwestern counties and the Sand Mountain area; District 5, the northernmost Tennessee Valley area; District 6, much of Jefferson County; and District 7, the western Black Belt counties and parts of Tuscaloosa or Jefferson Counties. *Singleton v. Merrill*, No. 2:21-cv-1291, ECF 57-7 at 37-43.

As part of redistricting litigation in the 1990s, a three-judge court ordered a congressional plan containing a majority-black District 7. See *Wesch v. Hunt*, 785 F. Supp. 1491 (S.D. Ala. 1992); *Wesch v. Folsom*, 6 F.3d 1465 (11th Cir. 1993). In selecting between plans submitted to the court, the court picked what became the 1992 plan in part because it "maintain[ed] the cores of existing Districts 1 and 2," and thus "better preserv[ed] the communities



of interests in those two districts.” *Wesch*, 785 F. Supp. at 1495-97. An illustration of the 1992 Map is reproduced above. *See id.* at 1582; *Singleton v. Merrill*, No. 2:21-cv-1291, ECF57-7 at 40.

After the 2000 and 2010 re-districting cycles, congressional districts remained largely the same. Neither the 2001 nor 2011 Maps were ever declared unlawful by a court and both were pre-cleared by the Department of Justice. They are reproduced here.



See Singleton v. Merrill, No. 2:21-cv-1291, ECF 1 at 6, 25 & ECF 15 at 9, 28.

Following the 2020 census, Alabama retained its seven congressional districts. Because Alabama’s population shifted and grew, the Legislature had to reapportion Alabama’s existing congressional map. *See Caster v. Merrill*, No. 2:21-cv-1536, ECF 75 at 6, Fig. 1. District 7 in particular fell far below the ideal population, requiring the addition of more than 50,000 people to make up the difference. *Id.*, ECF 76-7 at 12-13 (population figures). As the Legislature added or subtracted



people to and from districts to equalize their populations, the Legislature eliminated county splits in Cherokee, Clarke, and Montgomery Counties and made District 7 more compact. It did all this without considering race. *See* App.44; *see also* *Milligan v. Merrill*, No. 2:21-cv-1530, ECF 76-2 at 52 (comparing 2011 and 2021 Plans) & ECF 89-2 at 28; *Caster v. Merrill*, No. 2:21-cv-1536, ECF80-19 at 25-26. The resulting map is reproduced above. *See* App.42.

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

B. Plaintiffs’ Lawsuits

Three groups of Plaintiffs filed three lawsuits challenging Alabama’s 2021 congressional redistricting plan. Each sought a preliminary injunction barring Alabama from using its enacted congressional districts in the forthcoming elections. The *Singleton* suit raised Equal Protection Clause claims. *Singleton v. Merrill*, No. 2:21-cv-1291 (N.D. Ala.), ECF 15. The *Milligan* suit—for which the State has already sought a stay pending appeal from this Court—raised equal protection and VRA claims. *Milligan v. Merrill*, No. 2:21-cv-1530 (N.D. Ala.), ECF 1. The *Caster* suit—the subject of this stay application—raised only a VRA claim. *Caster v. Merrill*, No. 2:21-cv-1536 (N.D. Ala.), ECF 101. A three-judge court was convened for the *Singleton* and

Milligan suits. See 28 U.S.C. §2284(a). *Caster* remained pending before a single judge (who is a member of the three-judge court), but was combined with the other two cases for purposes of the preliminary injunction briefing, evidence, hearing, and resulting injunction. App.24-25.³

With respect to the VRA claims, the *Milligan* and *Caster* Plaintiffs presented materially the same theory—that Section 2 required Alabama’s congressional districts to go from one majority-black district (existing District 7) to two (existing District 7 and a completely redrawn District 2). Plaintiffs proposed various demonstration plans, but each added the second majority-black district in the same way: stretching both Districts 1 and 2 across the width of the State, segregating white Alabamians in District 1 and Black Alabamians in District 2. Where historically those of all races in the Mobile area were grouped together in a single district, unified by the industry and culture of Alabama’s third-largest city, Mobile’s black residents are now joined with black Alabamians in locations more than 250 miles away. See App.69, 173-74 (describing the “split” in Mobile County in every illustrative plan”). The resulting black voting-age population of the Plaintiffs’ proposed redrawn District 2 would barely exceed 50%. See App.94-95 (“In all the majority-Black districts in all the

³ Because *Caster* was technically before only a single judge, the State first moved for a stay pending appeal in the Eleventh Circuit in *Caster*, No. 22-10272, which the Eleventh Circuit is holding in abeyance pending this Court’s resolution of the stay application in *Milligan*. Discussed below, given the exigency, the State requests that this Court consider *Caster* together with the direct appeal to this Court in *Milligan*, by staying the preliminary injunction issued in both cases and construing this stay motion as a petition for writ of certiorari before judgment.

Cooper plans, the BVAP is between 50% and 52%, except that in two plans, the District 7 BVAP is between 53% and 54%.”).

Throughout the proceedings, one undisputed fact stood out. Millions of illustrative maps generated by some of the plaintiffs’ own experts—using algorithms programmed *not* to consider race—*never* resulted in a plan with two majority-minority black districts. One expert generated 10,000 maps without any consideration of race; not a single map included two majority-black districts.⁴ See App.224-25; App.289-90 (Tr. 268:23-269:6); *Milligan v. Merrill*, No. 2:21-cv-1530, ECF 88-1 at 10 (Imai expert report).⁵ Likewise, the *Milligan* Plaintiffs’ expert testified that she created two million congressional plans for Alabama, also with a computer algorithm programmed not to “tak[e] race into account in any way.”⁶ What did she find? Not one of the millions of maps in her race-neutral algorithm contained two majority-black districts. App.356 (Tr. 682:11-12) (finding “some [maps] with *one* majority-black district, but never found a second ... majority-black district in 2 million attempts”).

Knowing they could not draw a second majority-black district using only race-neutral traditional districting principles, Plaintiffs’ experts “prioritized” race first in the creation of their demonstration plans, such that other redistricting criteria had

⁴ The expert confirmed that his algorithm did not account for the Legislature’s policy of retaining the cores of existing districts. App.287 (Tr.230:3-14). Meaning, even if a map drawer were to draw Alabama’s congressional districts on a blank slate, without considering race *or* Alabama’s existing district lines, the map drawer would not draw two majority-black districts given Alabama’s demography.

⁵ “Tr.” refers to the hearing transcript, available in *Milligan v. Merrill*, No. 2:21-cv-1530, ECF 105. Cited excerpts are included in App.278-416.

⁶ App.356 (Tr. 682:13); *see also* Duchin & Spencer, *Models, Race, and the Law*, 130 Yale L. J. Forum 744 (2021).

to “yield.” App.213-14; *see also* App.359 (Tr. 685:23-25) (testifying about drawing majority-black districts “on purpose”). The *Caster* Plaintiffs’ expert testified that race-based considerations are “always in the background” and that race itself “i[s] a traditional redistricting principle.” App.297-98 (Tr. 478:11-479:2). Likewise, the *Milligan* Plaintiffs’ expert programmed “two majority-black districts” as a “nonnegotiable” in her creation of demonstration plans; only “after that” did she follow things like “contiguity” and “compactness.” *See* App.322 (Tr. 577:16-20); *see also* App.256-57. That is, in every plan proposed, she necessarily had to first subordinate race-neutral districting principles to the “nonnegotiable principle” of hitting her racial targets of two majority-black districts. App.256-57.

C. The District Court Enjoins Alabama’s Congressional Districts.

Days ago, the district court granted a preliminary injunction that bars Alabama from conducting any congressional elections using the 2021 Plan. App.5. The Court also delayed Alabama’s candidate qualification deadline by two weeks (moving it to February 11, 2022), and ordered Secretary of State Merrill to advise the political parties about the delayed deadline. App.6-7. Finally, the Court granted the Legislature fourteen days to enact a remedial plan containing two majority-black districts “or something quite close to it”; failing that, the court would enlist a third party to draw such a remedial plan at Defendants’ expense. App.6-7, 222-23.

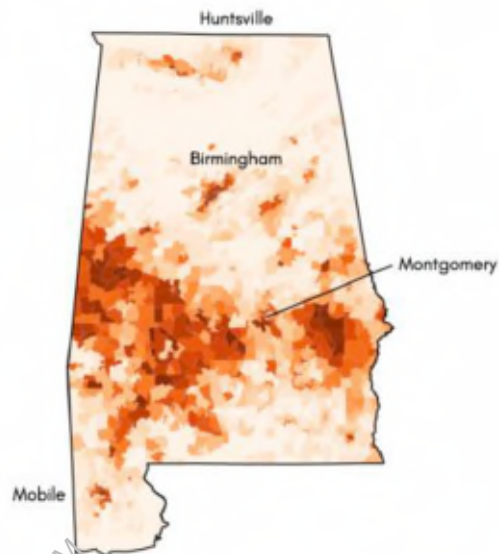
The Court held that Plaintiffs sufficiently demonstrated that two majority-black districts could be drawn, albeit by “prioritiz[ing] race,” and so they must be drawn. App.213-15 (describing Plaintiffs’ “compliance” with two-majority-black

district “criterion” first, followed by traditional criteria after). The court reasoned that it was sufficient that the two majority-black districts proposed by Plaintiffs were “reasonably compact,” based on “the testimony of eminently qualified experts in redistricting, and the relative compactness of the districts in the remedial plans compared to that of the districts in the [State’s existing] Plan.” App.166. The analysis included “eyeballing” Plaintiffs’ proposed plans. App.169. The court acknowledged that 400,000 black individuals reside in Alabama’s largest cities (Birmingham, Huntsville, Montgomery, and Mobile), and that the remaining 300,000 black individuals were spread across the State’s Black Belt—covering 18 counties and stretching across the entire State. App.170.⁷ But rather than map the number of individuals living in these locations, the court relied on Plaintiffs’ experts’ “visual assessment” of the *proportion* of black voters in these locations (below). App.169-70.

⁷ The “Black Belt” refers to a geographic region spanning across central Alabama that “is named for the region’s fertile black soil.” App.45. While there are different definitions, the parties to this case stipulated that the Black Belt includes “eighteen ‘core counties.’” App.46.

Mapping the *proportion* of black voters instead of the actual *number* of black voters creates the illusion that the black population across the Black Belt numerically exceeds the black population in Alabama’s cities. In fact, the actual number of voters in the geographically smaller shaded regions of Huntsville, Birmingham, Montgomery, and Mobile well exceed the actual number of voters dispersed across the Black Belt. App.170. And it is that *number* of voters that is relevant, not necessarily the proportion, because an equally apportioned *number* of voters must be placed into each district. By mistakenly focusing on the proportion of black voting-age population rather than the actual number of black individuals, the court concluded that “[j]ust by looking at the population map, we can see why [Plaintiffs’ experts] expected that they could easily draw two reasonably configured majority-Black districts.” *Id.*

Proportion of Black Voting Age Population



The court went on to conclude that *Gingles*’s second and third preconditions were met, as well as the totality of the circumstances. App.183-205; *see Cooper*, 137 S. Ct. at 1470 (requiring “politically cohesive” minority group and a “white majority [that] must vote sufficiently as a bloc to usually defeat the minority’s preferred candidate”). With respect to proportionality, the court acknowledged that the VRA disclaims that the number of majority-black districts must match the proportion of black voters. *See* 52 U.S.C. § 10301(b). App.202. But the court nevertheless concluded that

the share of majority-black districts (14% of the congressional delegation, compared to Alabama's 27% of black voters) "weighs decidedly in favor of the plaintiffs." App.204.

The court rejected the State's arguments that the Plaintiffs' (and now the court's) conception of the VRA would raise serious constitutional questions because it prioritized race to dramatically overhaul the State's longstanding district geography on account of race. The court described Plaintiffs' experts as "prioritiz[ing] race only for the purpose of determining and to the extent necessary to determine whether it was possible ... to state a Section Two claim. As soon as they determined the answer to that question"—meaning, after they hit a "non-negotiable" racial target of drawing two black-majority districts—"they assigned greater weight to other traditional redistricting criteria." App.213-14. The court forgave Plaintiffs' experts for making race a "non-negotiable" redistricting constraint because they did not try to "maximize" the number of majority-black districts or the BVAP of any one district. *Id.* They just had other race-neutral considerations "yield" "as necessary" to hit their race-based target of two majority-black districts. *Id.*

Finally, the court declined to rule on the *Singleton* and *Milligan* Plaintiffs' Equal Protection Clause claims. App.223-26. Invoking the canon of constitutional avoidance, the court stated that "in light of our decision to issue a preliminary injunction on statutory grounds, and because Alabama's upcoming congressional elections will not occur on the basis of the map that is allegedly unconstitutional, we decline to

decide the constitutional claims asserted by the Singleton and Milligan plaintiffs at this time.” App.225.

Yesterday, the district court denied the State’s motion for a stay of the preliminary injunction pending appeal. App.241-77. The court repeated that Plaintiffs’ experts considered race just enough (but not too much), and that race-neutral redistricting criteria will have “to yield” to race sometimes (but not always). App.259-60. With respect to *Gingles* I, the court emphasized various “fact-finding[s]” regarding “numerosity,” “geographical compactness,” “reasonable compactness that considers more than mere geography,” and credibility. App.248-49. But not once did the court address the question of law that looms large in these redistricting cases: whether a plaintiff necessarily fails *Gingles* I when a majority-minority district would have never been drawn but for prioritizing race. Instead, the court quibbled with whether Plaintiffs agreed that two majority-black districts could not be neutrally drawn in Alabama. App.254-55. That was strange, given that the genesis of this undisputed fact was Plaintiffs’ own evidence and testimony. In one of the plaintiffs’ expert’s own words, based on more than two million race-neutral maps she created, “it is hard to draw two majority-black districts by accident” in Alabama. App.359 (Tr. 685:23-25); *see also* App.356 (Tr. 682:11-12) (Plaintiffs’ expert “found some [maps] with one majority-black district, but *never* found a second ... majority-black district *in 2 million attempts*” (emphasis added)). And the court earlier agreed that other redistricting criteria must “yield” to race to draw to black-majority districts. App.213-14. In short,

the court's refusal to stay its injunction repeats the same errors that led to the preliminary injunction in the first place.

D. The State's Appeal

The State immediately filed notices of appeal to this Court in *Milligan* and to the Eleventh Circuit in *Caster*. In *Milligan*, the State has submitted an application for a stay pending appeal, which this Court could also construe as a jurisdictional statement, note probable jurisdiction, and expedite the appeal. 28 U.S.C. §1253; see *Perry*, 565 U.S. 1090. In *Caster*, the State moved for a stay pending appeal from the Eleventh Circuit, and the Eleventh Circuit is holding the motion in abeyance pending this Court's resolution of the stay application in *Milligan*. See Order, No. 22-10272 (11th Cir. Jan. 28, 2022).

Given the exigency and the Eleventh Circuit's order, the State now submits this application for a stay pending appeal, which this Court could also construe as a petition for writ of certiorari before judgment so that this case and *Milligan* may be heard simultaneously. See, e.g., *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 637 (2021); *Mazars*, 140 S. Ct. 660; *Purcell v. Gonzalez*, 549 U.S. 1, 2 (2006) (per curiam). The two suits involve the same facts, the same legal claims, and the same congressional redistricting plan. The three-judge court presided over both cases in a 7-day hearing and considered evidence from all Plaintiffs for any of the three cases, culminating in the same preliminary injunction in all cases. It would thus promote efficiency and judicial economy for this Court to consider the stay applications and the merits of each case simultaneously.

ARGUMENT

The three-judge court's preliminary injunction is an "extraordinary remedy." *Winter v. NRDC*, 555 U.S. 7, 24 (2008); see *Mac Govern v. Connolly*, 637 F. Supp. 111, 116 (D. Mass. 1986) ("When the massive disruption to the political process of the [State] is weighed against the harm to plaintiffs of suffering through one more election based on an allegedly invalid districting scheme, equity requires that [this Court] deny relief."). As one of Plaintiffs' counsel put it in the court below, the three-judge court's injunction and forthcoming overhaul of Alabama's congressional districts will be "the benchmark for redrawing congressional districts probably for several more decades." App.414 (Tr. 1903:5-12).

In such circumstances, a stay pending appeal is warranted. See, e.g., *Abbott*, 138 S. Ct. at 2319; *Gill v. Whitford*, 137 S. Ct. 2289 (2017); *Perry*, 565 U.S. 1090; *Miller v. Johnson*, 512 U.S. 1283 (1994). A stay is appropriate when there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

These redistricting cases feature the exceptional circumstances making an immediate stay or injunctive relief appropriate. Absent an order stopping the district court from imposing a racial gerrymander on Alabama for the forthcoming elections, the State and its millions of citizens will suffer irreparable injury and the Court will effectively lose its appellate jurisdiction. Without a stay, districts will be redrawn,

splitting and segregating Alabamians, for the upcoming primaries. Once the machinery of those elections begins and the first absentee ballots are cast in March, with hundreds of thousands of voters having been sorted into new race-based districts, the harm is done and cannot be unwound.

I. This Court Is Likely To Grant The Petition For Writ Of Certiorari Before Judgment And Ultimately Vacate The Preliminary Injunction.

Alabama is likely to succeed on the merits in these redistricting appeals. The district court's injunction is plainly unconstitutional. This case is virtually identical to the *Milligan* case, over which this Court must exercise its jurisdiction. The cases involve the same evidence and the same VRA theories. They were tried together in the same 7-day hearing, presided over by the same three-judge panel. Plaintiffs "coordinate[d] their presentation of their statutory claims" and shared evidence. App.28. The three-judge court applied the same analysis to both Plaintiffs' VRA experts and reached the same conclusions. Compare, e.g., App.158 (explaining *Milligan* expert "prioritized race only to the extent necessary"), with App.160 (explaining *Caster* expert "prioritized race only to the extent necessary"). The court concluded that "the *Caster* record ... compel[led] the same conclusion that [the court] reached in *Milligan*." App.205. And, of course, the same preliminary injunction issued in both cases. App.5-7, 14-15. There is every reason for the Court to grant the State's petition for writ of certiorari before judgment here so that the cases can be considered together.⁸

⁸ If that were not enough, there is now irreconcilable conflict in the lower courts. In *Gonzalez v. City of Aurora*, 535 F.3d 594 (7th Cir. 2008), then-Chief Judge Easterbrook explained that Section 2 can only provide remedial districts that are "*neutrally drawn*," noting that "[t]he Voting Rights Act does not require" "serious

There is also a more than reasonable probability that this Court will vacate the three-judge court's preliminary injunction in both *Caster* and *Milligan*. The court's interpretation of the VRA cannot possibly be constitutional, as the court ordered the Legislature to draw race-based districts that never could have been drawn without "prioritiz[ing] race." App.213-14.⁹ The court's misconception of the *Gingles* preconditions and what suffices for the "totality of circumstances," 52 U.S.C. §10301(b), is contrary to this Court's precedent. And constitutional avoidance commands that the district court's further distortion of Section 2's "effects test" be reversed, lest the VRA be unconstitutional as applied to single-member districts.

gerrymandering." *Id.* at 600 (emphasis added); *see also id.* at 598-99 (stating "outcome of a race-neutral process in which all districts are compact" could be the "benchmark" for dilution claims). That approach mirrored the district court's in *Johnson v. Miller*, which concluded that "[n]onracial factors do not support creation of a second majority-minority district largely because Georgia's minority population is not geographically compact." 922 F. Supp. 1556, 1567 (S.D. Ga. 1995) (emphasis added). An approach that this Court ultimately affirmed in *Abrams v. Johnson*, 521 U.S. 74 (1997), and that was, until now, broadly accepted.

⁹ Four separate times, the court's stated that Plaintiffs "prioritized" race in some way: "She was candid that she prioritized race only to the extent necessary to answer the essential question asked of her as a *Gingles* I expert...and clearly explained, with concrete examples, that she did not prioritize it to any greater extent." App.158. "He was candid that he prioritized race only to the extent necessary to answer the essential question asked of him as a *Gingles* I expert ... and clearly explained that he did not prioritize it to any greater extent." App.160. "They explained that they prioritized race only as necessary to answer the essential question asked of them as *Gingles* I experts." App.213. And most damning: Plaintiffs' experts testified "that they prioritized race only for the purpose of determining and to the extent necessary to determine whether it was possible ... to state a Section Two claim. As soon as they determined the answer to that question"—by prioritizing race—only then did they "assign[] greater weight to other traditional redistricting criteria." App.213-14.

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

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

This Court has since applied the VRA to the drawing of single-member districts. *See Cooper*, 137 S. Ct. at 1464 (noting that the “Court has long assumed that one compelling interest ... is complying with operative provisions of the Voting Rights Act”); *see also Holder v. Hall*, 512 U.S. 874, 893 (1994) (Thomas, J., concurring in judgment) (“[W]e have converted the Act into a device for regulating, rationing, and apportioning political power among racial and ethnic groups.”). To establish a Section 2 violation in such circumstances, three preconditions must be met: (1) “a ‘minority group’ must be ‘sufficiently large and geographically compact to constitute a majority’ in some reasonably configured legislative district,” (2) “the minority group must be ‘politically cohesive,’” and (3) “a district’s white majority must ‘vote[] sufficiently as a

bloc' to usually 'defeat the minority's preferred candidate.'" *Cooper*, 137 S. Ct. at 1470 (quoting *Gingles*, 478 U.S. at 50-51). This dispute largely centers on the first of these preconditions.

1. The district court's injunction is premised on a fundamental legal error about how Plaintiffs can establish that "a 'minority group' is 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district." *Id.* The three-judge court believed that Plaintiffs satisfied *Gingles* I even in the face of Plaintiffs' own evidence showing that an Alabama map drawer would not draw two majority-minority districts using only race-neutral criteria. *See supra*, pp.9-10.¹⁰ The map drawer would have to "prioritize[]" race and draw race-based districts "on purpose." App.213-14; App.359 (Tr. 685:24-25). There is no better indication that Plaintiffs' Section 2 claim fails at the first step as a matter of law. *See Cooper*, 137 S. Ct. at 1470 (requiring the possibility of "reasonably configured" majority-minority districts); *see, e.g., Gonzalez*, 535 F.3d at 598 (Easterbrook, C.J.) ("So what benchmarks [for Section 2 dilution] are possible? One would be the outcome of a race-neutral process in which all districts are compact."). A minority population is definitionally not sufficiently numerous and compact for purposes of *Gingles*'s first

¹⁰ *See, e.g.,* App.289 (Tr. 268:23-269:6) ("noting that "[n]one" of the "30,000 simulated plans included two" majority-black districts "because [he] didn't tell the algorithm to create a second"); App.359 (Tr. 685:23-25) (Plaintiffs' expert's testimony that "it is hard to draw two majority-black districts by accident" in Alabama); App.356 (Tr. 682:11-12) (discussing Plaintiffs' expert's two million computer-generated race-neutral maps, where she "*never* found a second ... majority-black district in 2 million attempts" (emphasis added)).

precondition if a race-neutral map drawer, considering only race-neutral traditional redistricting criteria, would never draw two majority-minority districts.

Worse still, the court below believed that the VRA not only allowed but *required* this prioritization of race. App.213-14 (discussing how experts “prioritized race only for the purpose of determining and to the extent necessary to determine whether it was possible ... to state a Section 2 claim,” considering other criteria after); *see also* App.264 (rejecting argument that Section 2 plaintiff must use “only race-neutral districting principles” to meet *Gingles* I). The court reasoned that *Gingles*’s first precondition requires Plaintiffs to propose plans with districts exceeding 50% BVAP; accordingly (in the court’s view) a Section 2 plaintiff must necessarily prioritize race first and consider other race-neutral factors second. App.214-15 (describing Plaintiffs’ experts’ testimony “that they *prioritized* race only for the purpose of determining and to the extent necessary to determine whether it was possible ... to state a Section Two claim” and “as soon as they determined the answer to that question”—by prioritizing race—“they assigned greater weight to other traditional redistricting criteria”).¹¹ By

¹¹ The district court’s 50-percent rationale is also oversimplified. In *Bartlett v. Strickland*, 556 U.S. 1 (2009), the plurality opinion held that race-based redistricting could *not* be justified under the VRA if a legislature’s aim was only to draw “crossover” districts, where the minority population did not exceed a majority, versus a majority-minority district. *Id.* at 13-15. By implication, one cannot state a claim for vote dilution under the VRA if voters would not otherwise make up 50% or more of the black voting-age population in a “reasonably configured” district. *Id.* at 18; *Cooper*, 137 S. Ct. at 1470. But this Court has never suggested that one can “prioritize[]” race in drawing a proposed district to hit that 50% target. App.213-15. That would not only be circular; it would be inconsistent with the constitutional restraints on legislatures nationwide. As the Court explained in *Cooper*, it is unconstitutional for a legislature to set that same race-based target. 137 S. Ct. at 1469.

the district court's lights, Section 2 plaintiffs must therefore *assume* they are entitled to the relief they seek and then reverse engineer that remedial district, no matter how racially segregated. That reasoning is exactly backwards. It would render *Gingles* first precondition no precondition at all.

This Court's precedents—and the Constitution—make clear that a Section 2 plaintiff alleging vote dilution must *first* prioritize traditional redistricting criteria. Only then may the plaintiff assess whether the employment of traditional redistricting criteria has resulted in “reasonably configured” majority-minority districts that the State failed to create. *See Cooper*, 137 S. Ct. at 1470; *see, e.g., League of United Latin Amer. Citizens v. Perry (“LULAC”)*, 548 U.S. 399, 433-34 (2006) (discussing use of traditional redistricting criteria to satisfy *Gingles*, lest courts “fail[] to account for the differences between people of the same race”); *Abrams*, 521 U.S. at 91-92; *Miller v. Johnson*, 515 U.S. 900, 919 (1995) (warning traditional principles cannot be “subordinated to racial objectives”); *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality op.) (Section 2 inquiry should account for “traditional districting principles such as maintaining communities of interest and traditional boundaries”). Injecting race as one of those traditional redistricting principles at step one is circular and senseless. It assumes at step one what Plaintiffs are ultimately trying to prove. A plaintiff cannot “prioritize[] race” from the start and then work backwards to try to draw districts with that “non-negotiable” constraint (by “eyeballing” no less). App.169, 214. That approach unavoidably prioritizes race-based considerations in place of race-neutral

redistricting, thereby raising serious constitutional questions. *Miller*, 515 U.S. at 916.¹²

The decision below fundamentally errs in this regard. The court accepted Plaintiffs' invitation to *start* the *Gingles* analysis by “prioritiz[ing]” race. App.213-14. That is, the court started the *Gingles* analysis by presuming the answer to the ultimate question. The court doubled down when it denied the State's stay motion, specifically rejecting that a plaintiff must “set about drawing illustrative remedial plans using only race-neutral districting principles and hope to happen upon a plan that includes an additional majority-minority district.” App.264; *but see Gonzalez*, 535 F.3d at 600 (Easterbrook, C.J.) (asking whether Latino population was “concentrated in a way that *neutrally drawn* compact districts would produce three” VRA districts (emphasis added)).

That error would be bad in any case. But it is especially serious here where the prioritization of race in this case made all the difference. No race-neutral map drawing would result in two black-majority districts. In one of the plaintiffs' experts own words, “it is hard to draw two majority-black districts by accident” in Alabama. App.359 (Tr. 685:23-25). For this reason, Plaintiffs had to start by making two black-

¹² The court's error is little different than claims that majority-minority districts must be maximized in a redistricting plan, claims that this Court rejected in *Johnson v. DeGrandy*, 512 U.S. 997, 1016 (1994), and *Miller*, 515 U.S. at 923. In both cases, this Court rejected the notion that a VRA violation can be proved by the failure to maximize districts. *Id.* So too here—starting from the premise that two districts must be drawn, prioritizing that two-district racial target above race-neutral criteria raises the same constitutional problems. It transforms the VRA from a statute meant to stamp out race discrimination to a statute that requires it.

majority districts “non-negotiable,” even if race-neutral criteria had to “yield” to draw them. App.214, 223. Everything else was secondary. *See, e.g.*, App.322 (Tr. 577:16-20) (programming “two majority-black districts” as “nonnegotiable,” and only “*after that*” following principles like “contiguity” and “compactness” (emphasis added)); *see also* App.256-57.¹³ Simply put, Plaintiffs *first* prioritized a racial target (drawing two majority-minority districts) and then backfilled their case with various arguments about how those illustrative plans were sufficiently consistent with race-neutral traditional redistricting criteria, even though such plans would not have resulted but for the prioritization of race first and other criteria second. Plaintiffs’ reverse order of operations rendered their maps unconstitutional: “Race was the criterion that ... could not be compromised.” *Shaw v. Hunt* (“*Shaw II*”), 517 U.S. 899, 907 (1996).

The district court’s view of the VRA makes VRA compliance irreconcilable with the U.S. Constitution. A map that starts with a “non-negotiable” racial target of two majority-black districts and that can be drawn only when race is “prioritized” goes

¹³ Specifically, the court endorsed the *Milligan* Plaintiffs’ expert’s approach that “took the creation of two majority-Black districts, which she was asked to try to draw, as a ‘nonnegotiable principle’ sought in her illustrative plan, along with equal population among districts.” App.66. She then deployed a euphemism, labeling that non-negotiable race-based target as the “minority opportunity to elect” criteria. *Id.* Other evidence shows how race abounded in Plaintiffs’ creation of two majority-black districts. None of the more than two million race-neutral maps contained two majority-black districts. App.310, 356 (Tr. 565:11-14; 682:3-14; 682:12-14); *see also* App.337 (Tr. 647:12-20) (“no question” that “one reason that there are nine splits in counties in this plan as opposed to six splits in counties is ... because of the weight [she] gave to the criteria of ensuring two majority-black congressional districts”); App.344 (Tr. 664:17-24) (subordinating geographic compactness to racial preferences by placing “the Black Belt counties in majority-black districts” despite rendering lower geographic-compactness scores); App.330,351-52 (Tr. 600:10-16, 671:22-672:14).

far beyond Section 2's mandate of an "equally open" political process, 52 U.S.C. §10301(b). Just as "[n]othing in §2 grants special protection to a minority group's right to form political coalitions," *Bartlett*, 556 U.S. at 15, nothing in Section 2 grants Plaintiffs a right to a predetermined number of majority-minority districts that can exist only when race subordinates "traditional districting principles," *LULAC*, 548 U.S. at 433; *see also Holder*, 512 U.S. at 907 (Thomas, J., concurring) ("few devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act").

2. The district court wrongly believed that *Gingles* I always requires a map drawer to subvert, to some extent, traditional redistricting criteria to race. According to the court, "a remedial plan" would be rendered "unconstitutional ... for attempting to satisfy *Gingles* I" if the State is correct App.214. That is not so. Under the correct approach, there should be no "remedial plan" *at all* unless the *Gingles* preconditions are all met. Plaintiffs and the district court bypassed all of this by assuming the conclusion that Alabama needed two majority-black districts.

The flaw in this approach is the fact that no map drawer could produce such maps without subordinating traditional districting principles to race. *Supra*, p.9. It cannot be done unless race is "prioritized" first and other race-neutral redistricting principles "yield" to that race-based target. App.213-14. There is no better indication that *Gingles* I is not met. The district court never reconciled that stunning fact with *Gingles*'s first precondition. The court instead deferred to Plaintiffs' "eminently qualified" experts' conclusion that the districts were good enough. But no court can defer

to an expert, however “eminently qualified” in some regard, when it comes to the legal requirements (and limitations) of the legal standards of Section 2. *See Abbott*, 138 S. Ct. at 2326; *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020) (per curiam) (vacating preliminary injunction after finding plaintiffs failed to establish they were likely to succeed on the merits). Especially so here, where that expert’s “understanding” was that “race consciousness is expressly permitted,” App.359 (Tr. 685:19-20), and she didn’t “know of a way to talk about the traditional principles that is truly race blind,” App.356 (Tr. 682:20-22). In her words: “[T]hat it is hard to draw two majority-black districts by accident shows the importance of doing so on purpose.” App.359 (Tr.685:23-25) (emphasis added).

To be clear, the flaw is not Plaintiffs’ subjective intent to present maps with two districts that exceed 50% BVAP, as they must to state a claim. The flaw is the objective fact that no map drawer could hit that racial target of two majority-black districts without prioritizing race first and race-neutral criteria second. Put differently, the problem is not that Plaintiffs were “attempting to satisfy *Gingles I*,” App.214; the problem is that their attempt failed because no map drawer could have produced those maps in a race-neutral way. *But see Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). If Plaintiffs could show that some subset of millions of race-neutral maps would produce two majority-black districts, this might be a different case. But the problem for Plaintiffs—and what ends this case—is that it is impossible in Alabama to draw any map with two majority-minority districts “consistent with traditional, race-neutral principles.” *Id.*; *see also, e.g., Davis v. Chiles*,

139 F.3d 1414, 1425 (11th Cir. 1998). As the three-judge court said, Plaintiffs had to “prioritize[]” race, and have other race-neutral criteria “yield” to that race-conscious one. App.213-14.¹⁴

The court’s error is best encapsulated by its statement that Plaintiffs’ experts “prioritized race only to the extent necessary.” App.158, 160. That makes no sense. The court’s formulation presumes the answer to the question at the heart of *Gingles*’s first precondition. If it were permissible to “prioritize[]” race to meet *Gingles* I (it is not), then *Gingles* I is a meaningless test that can always be satisfied and will always make race the overriding criterion in drawing district lines. It is hardly surprising, especially with modern redistricting technology, that one can put race first and re-draw a district where the black voting-age population just exceeds 50%. The relevant question for *Gingles* I—the question the three-judge court never asked but that Plaintiffs’ experts have already answered—is instead what results when one does not prioritize race as a “non-negotiable” constraint. App.214.

The three-judge court’s rule is also unadministrable, for all the same reasons this Court decided the plaintiffs’ twist on the VRA was unadministrable in *Bartlett*. If Section 2 requires legislatures to “prioritize[] race” over traditional race-neutral districting principles somewhat (for *Gingles* I) but not too much (for the Constitution), then there can be no “sound judicial and legislative administration” of the statute.

¹⁴ For one example, the *Milligan* expert conceded that looked at race when splitting small voting districts (or “VTDs”), “but really, only to make sure that I was creating two districts over 50 percent.” App.67. This is like an archer saying she did not consider the bullseye except to ensure she was aiming at it. *See also supra*, p.24, n.13.

Bartlett, 556 U.S. at 17. Every redistricting cycle, legislatures will be forced to ask whether they have allowed their traditional race-neutral principles “to yield” enough—but not too much—to racial considerations. App.214. Apparently, “*some awareness of race likely is required*” but not so much that “race must predominate.” App.255 (emphasis added). This “test” would practically guarantee redistricting litigation every cycle in numerous jurisdictions, “transfer[ring] much of the authority to regulate [districting] from the States to the federal courts.” *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2341 (2021).

“A requirement to draw election districts” based on answers to questions like how much race is too much “ought not to be inferred from the text or purpose of §2.” *Bartlett*, 556 U.S. at 17. For if federal courts are not equipped to answer the question, “At what point does permissible partisanship become unconstitutional?” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019), neither are they equipped to determine “How much race is too much?” when it comes to prioritizing race over traditional race-neutral principles. The only “workable standard[]” for “sound judicial and legislative administration,” *Bartlett*, 556 U.S. at 17, is one in which Section 2’s compactness inquiry focuses on possible “outcome[s] of a *race-neutral* process in which all districts are compact,” *Gonzalez*, 535 F.3d at 598 (emphasis added).

Finally, it makes no sense that the court sanctioned Plaintiffs’ use of race because it wasn’t as bad as it could have been. According to the court, Plaintiffs’ map-drawers could have subordinated those traditional principles to race even more, but they didn’t. *See, e.g.*, App.67-68 (noting that one of plaintiffs’ experts “took ... county

integrity to take precedence over the level of BVAP *once that level was past 50 percent*) (emphasis added); App.97 (noting that *Caster* Plaintiffs' expert "testified that if he had wanted to assign race a greater role, he could have"). If that were acceptable, then the maps drawn in *Cooper*—ultimately declared unconstitutional by this Court—should have been acceptable too. North Carolina subordinated traditional districting principles to race only "sometimes," when it interfered with "the more important thing' ... to create a majority-minority district." 137 S. Ct. at 1469. Sound familiar? It was unconstitutional in *Cooper*, and it was unconstitutional here. A federal court cannot order an overhaul of Alabama's congressional map based on the same fundamental error.

B. The injunction also cannot be reconciled with the statutory text.

Even if race prioritization were permissible under the *Gingles* framework (Constitution aside), Section 2's text forecloses Plaintiffs' claim in another way. The statute asks whether the political processes ... in the State" are "*equally open* to participation by [black Alabamians] in that [they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. §10301(b) (emphasis added). That text "commands" the "consideration of 'the totality of circumstances' that have a bearing on whether the State makes voting 'equally open' to all and gives everyone an equal 'opportunity' to vote." *Brnovich*, 141 S. Ct. at 2341; *accord Holder*, 512 U.S. at 901 (Thomas, J., concurring) (noting "[s]ome conceptions of representative government may primarily emphasize the formal value of the vote as a mechanism for participation in the

electoral process, whether it results in control of a seat or not,” such that “a vote duly cast and counted would be deemed just as ‘effective’ as any other”).

Applied here, the court jumped straight to the amorphous so-called Senate factors, failing to start with the text. App.187. As a result, the court failed to realize Plaintiffs’ claims failed the statute’s “equally open” requirement in a more basic way. If Plaintiffs cannot produce a map with two majority-minority districts without prioritizing race before other criteria, then it is impossible to say that the State has denied minority voters equal opportunity to participate in the political process. *See, e.g., Gonzalez*, 535 F.3d at 598-600.

C. Constitutional avoidance compels a stay pending appeal.

The district court’s interpretation of the VRA raises serious constitutional questions. If correct, then Section 2’s “effects test,” as prescribed by *Gingles* and progeny, cannot possibly be constitutional as applied to single-member districts. Likewise, if an “equally open” political process under Section 2 requires racial preferences in drawing single-member districts, then Section 2 cannot possibly be constitutional as applied to single-member districts. *See DeGrandy*, 512 U.S. at 1017 (stating “one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast”). To the extent there is any doubt about whether Section 2 would permit Plaintiffs’ race prioritization here, the Court should “resolve that doubt by avoiding serious concerns under the Equal Protection Clause.” *Bartlett*, 556 U.S. at 21.

1. Any “assignment of voters on the basis of race” is subject to constitutional law’s “strictest scrutiny.” *Miller*, 515 U.S. at 915. Redistricting is not an exception to that constitutional proscription. Section 2 permits race-conscious districting only in

the limited context of choosing among maps that honor a State’s “traditional districting principles.” *LULAC*, 548 U.S. at 433. For example, it should be beyond dispute that the Legislature never could have constitutionally passed the maps that the district court has ordered here since those maps started from a racial target of two majority-black districts—a target that made it “necessary” for Plaintiffs’ map drawers to split areas as large as Mobile County and as small as voting districts in a way unexplainable on grounds other than race. *See, e.g., Shaw II*, 517 U.S. at 907 (racial gerrymander where “[r]ace was the criterion that ... could not be compromised”); *Miller*, 515 U.S. at 916 (unconstitutional map “subordinated traditional race-neutral districting principles ... to racial considerations”).

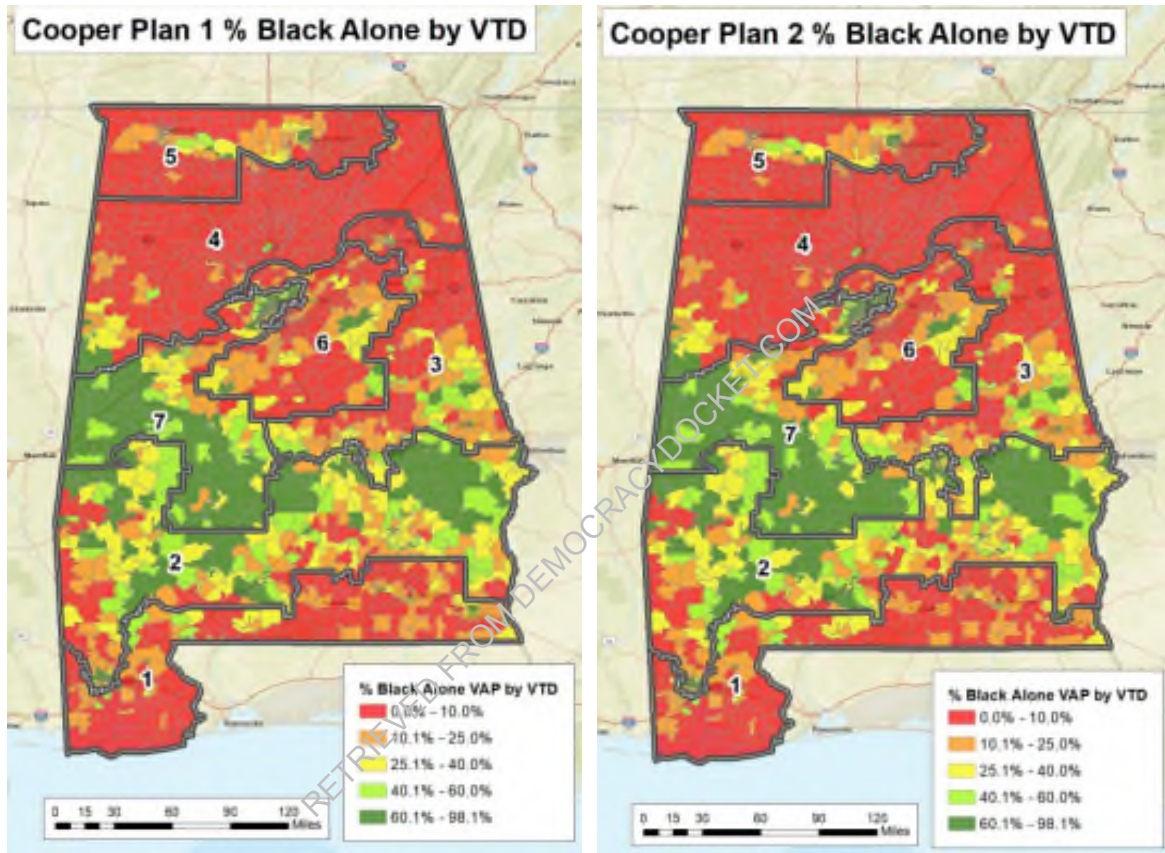
Here, too, a court cannot order something that a legislature constitutionally could not do. Just as a legislature cannot make race a “more important thing” than race-neutral considerations “to create a majority-minority district,” *Cooper*, 137 S. Ct. at 1469, a court cannot order that race be “prioritized” before the *Gingles* preconditions have even been met, *see supra*, p.18, n.9. The VRA does not authorize race-based changes at all times, in all places, and in all districts. And the VRA certainly does not authorize race-based changes where, as here, such changes would not have resulted if only race-neutral criteria were considered. *See supra*, p.9

2. The district court’s application of *Gingles* I and its totality-of-circumstances analysis takes Section 2 beyond its promise of “equal[] ... opportunity.” 52 U.S.C. §10301(b). It is yet another real-world example of the federal courts’ transformation of the VRA, a statute “originally perceived as a remedial provision directed

specifically at eradicating discriminatory practices that restricted blacks' ability to register and vote in the segregated South." *Holder*, 512 U.S. at 893 (Thomas, J., concurring). Now? The Act has become "a grant of authority to the federal judiciary to develop theories on basic principles of representative government" and impose "destructive assumptions" on legislative redistricting in particular. *Id.* at 893-94.

Applying those destructive assumptions to single-member districts, the district court "ha[s] acted on the implicit assumption that members of racial and ethnic groups must all think alike on important matters of public policy"—wherever they live—"and must have their own 'minority preferred' representatives holding seats in elected bodies if they are to be considered represented at all." *Id.* at 903. The court's injunction, like others that have come before it, will "unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Bartlett*, 556 U.S. at 20. Plaintiffs programmed "two majority-black districts" as "nonnegotiable" and only "[a]fter that" considered traditional districting principles. App.66-67. Nevertheless, the court approved this decision to consider race-neutral criteria only "after the race-based decision [of reaching a targeted number of majority-minority districts] had been made," *Shaw II*, 517 U.S. at 907. If that is what the VRA requires, the VRA is unconstitutional.

The court’s error is illustrated by the racial gerrymander that will necessarily follow. The only inference to be drawn from Plaintiffs’ proposed districts—every one of which divides southern Alabama, beginning in Mobile County, by black and white—is that race predominates:¹⁵



Caster v. Merrill, No. No. 2:21-cv-1536 (N.D. Ala.), ECF 66-1, at 78, 80.

¹⁵ The district court suggested that the Legislature could submit a remedial plan that keeps together Alabama’s two Gulf Counties—Mobile and Baldwin. App.180. But prioritizing that non-racial principle would require an even more grotesque racial gerrymander elsewhere in the State. Thus, none of Plaintiffs’ proposed plans tried to maintain communities of interest on the Gulf Coast. And so it is, with some irony, that thirty years after the three-judge court in *Wesch* rejected a plan that split Mobile in favor of one that “better preserve[d] the communities of interests in” “Districts 1 and 2,” 785 F. Supp. at 1497, the court below has declined to “maintain[]” those “communities of interest,” *LULAC*, 548 U.S. 433.

Districts 1 and 2 in Plaintiffs' plans were "obviously drawn for the purpose of separating voters by race," *Shaw I*, 509 U.S. at 645, and subordinating the State's traditional communities of interest to Plaintiffs' own "predominant, overriding desire to create [two] majority-black districts," *Abrams*, 521 U.S. at 81 (internal quotation marks omitted); see also *Miller*, 515 U.S. at 917 ("Although by comparison with other districts the geometric shape of the [district at issue] may not seem bizarre on its face, when its shape is considered in conjunction with its racial and population densities, the story of racial gerrymandering ... becomes much clearer."); see also App.368 (Tr. 856:12-23) (observing District 2's "line almost ... exactly follows the contours of the very highest black population VTDs—can literally go from one to the next like the dividing line of black and much less-black population."); App.369 (Tr. 857:9-14) ("Similarly, in District 7, you can see that it ... very carefully captures large portions of black populations."). Indeed, the *Singleton* Plaintiffs' expert described the Plaintiffs' illustrative plans as "an effort to pull and concentrate black voters in the Second [District] and then in the Seventh [District]." App.282 (Tr. 112:6-7). "It's an outcome-based plan," she continued, "[t]here's no question." *Id.* at 112:8-9. Those "[r]acial classifications" that animate Plaintiffs' proposed remedies "are antithetical to the Fourteenth Amendment, whose central purpose was to eliminate racial discrimination emanating from official sources in the States." *Shaw II*, 517 U.S. at 907.

In short, a second majority-minority district would likely have to stretch roughly 250 miles from Mobile to the Georgia border. App.69; *Milligan v. Merrill*, No. 2:21-cv-1530, ECF 48 at 23, 25, 29; cf. *LULAC*, 548 U.S. at 432 (faulting plan for

stringing together several “disparate communities of interest”). Such race-based re-districting “reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.” *Shaw I*, 509 U.S. at 647. And it sends an “equally pernicious” message to elected representatives that “their primary obligation is to represent only the members of that group, rather than their constituency as a whole.” *Id.* at 648.

3. Congress derived its authority to enact Section 2 of the VRA pursuant to the Fifteenth Amendment, guaranteeing “[t]he right of citizens of the United States to vote shall not be denied or abridged by ... any State on account of race, color, or previous condition of servitude.” *Chisom v. Roemer*, 501 U.S. 380, 383 (1991); U.S. CONST. amend. XV, §§1-2. Congress may enforce the substantive provisions of the Fifteenth Amendment, as well as the Fourteenth Amendment, “by creating private remedies against the States for *actual violations* of those provisions.” *United States v. Georgia*, 546 U.S. 151, 158 (2006) (emphasis added). But here, the district court’s interpretation of the VRA goes well beyond remedying any “actual violations” of the Fourteenth or Fifteenth Amendments. The court effectively deprived Alabama of its ability to keep its race-neutral redistricting plan, directly contrary to this Court’s most recent statement that “§2 does not deprive the States of their authority to establish non-discriminatory voting rules.” *Brnovich*, 141 S. Ct. at 2343.

Where the Alabama Legislature cannot draw two majority-black districts, given the State’s demography, without “prioritiz[ing] race” as a “non-negotiable”

redistricting constraint, App.213-14, it is unfathomable that the VRA could compel the State to depart from existing law and draw two majority-black districts anyway. Any such expansion of the VRA that endorses Plaintiffs' race-conscious meddling with the State's race-neutral plan ignores that any "exercise of [Congress's] Fifteenth Amendment authority even when otherwise proper still must 'consist with the letter and spirit of the Constitution.'" *Id.* (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819)). Requiring States' redistricting processes to bear an "uncomfortable resemblance to political apartheid," *Shaw I*, 509 U.S. at 647, consists with neither.

* * *

In the dissenting opinion in *Rucho*, members of this Court lamented the possibility that "today's mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting traditional districting requirements)." 139 S. Ct. at 2513 (Kagan, J., dissenting). What Plaintiffs have done here would make the dissenters' nefarious mapmaker blush. Plaintiffs generated *millions* of random race-neutral maps. *None* resulted in two majority-minority districts. There can be no question, then, that the maps Plaintiffs ultimately proffered are an extreme racial gerrymander solely designed to hit a predetermined racial target. *Cf. id.* at 2518 (deeming congressional map an extreme political gerrymander after an "expert produced 3,000 maps, adhering ... to the districting criteria that the North Carolina redistricting committee had used, other than partisan advantage," and every "one of the 3,000 maps would have produced at least one more Democratic House Member than the State's actual map").

Each is “an out-out-outlier,” *id.*, with the most severe constitutional consequence—ordering unprecedented changes to Alabama’s existing districts on the basis of race.

II. Irreparable Harm Will Result Without A Stay.

Without a stay, the State will forever lose its ability to appeal the preliminary injunction before the forthcoming elections are conducted under a court-ordered racially gerrymandered map that upends the legislatively enacted map. The injunction leaves Alabama with no real choice. The State can replace its congressional plan (by February 7) and suffer the consequences of follow-on litigation for the newly gerrymandered districts. *See Wise*, 437 U.S. at 540 (op. of White, J.); App.5. Or the State can cede its sovereign redistricting power to the district court, which will hire a third party to redraw districts (at the State’s expense) that segregate Alabamians in Mobile and elsewhere by race. App.5, 222. Either way, without a stay and appellate review, the State’s forthcoming elections are guaranteed to be run on district lines that never would or could have been drawn but for sorting Alabamians on the basis of race alone.

Adding to the harm, the court has required all of this mere days before the first in a series of forthcoming election deadlines. The candidate qualifying deadline was supposed to be today, but has been extended until February 11 by the court’s order. App.6. Other pre-election deadlines are also looming. Any redrawing of district lines requires the State to update voter-registration records to reflect the redraw, well in advance of when absentee voting begins on March 30, 2022. Federal law, moreover, requires the State to provide ballots to certain overseas voters no later than April 9,

2022. See 52 U.S.C. §20302(a)(8). Simply put, “the election machinery wheels [are] in full rotation,” *Graves v. City of Montgomery*, 807 F. Supp. 2d 1096, 1112 (M.D. Ala. 2011), and the district court has ordered the State to scrap existing law and replace it with something unconstitutional.

Without this Court’s intervention, Alabama’s only choices are effectively no choices at all: a state-drawn racially gerrymandered map or a court-drawn racially gerrymandered map. See *Lipscomb*, 437 U.S. at 540; see, e.g., *Abbott*, 138 S. Ct. at 2317. Moreover, this overhaul of Alabama’s congressional map at this late hour would require the last-minute reassignment of hundreds of thousands of voters to new districts and could force candidates and groups seeking ballot access to obtain thousands of new signatures. The State’s “inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State.” *Abbott*, 138 S. Ct. at 2324 n.17.

III. The Balance Of Harms And Public Interest Warrant A Stay.

A stay is also warranted because the district court’s order at this late hour is inflicting grave harm on the public interest, which outweighs Plaintiffs’ purported interest in voting in districts that prioritize race. Enjoining the State from using its congressional districts throws the current election into chaos.

That disruption harms not only the State, it also harms voters and candidates across the State. As even the district court recognized, “there can be no doubt that there is a limited window” for redrawing the districts. App.223. Courts and experts alike have recognized that a court drawing a map “should have as its goal the imposition of a plan no later than one month before candidates may begin qualifying for

the primary ballot,’ which ‘means that the court should begin drawing its plan about three months before the beginning of ballot qualification in order to build in time for possible hearings and adjustments to the plan.’” *Favors v. Cuomo*, 881 F. Supp. 2d 356, 364 (E.D.N.Y. 2012). After all, “[i]t is best for candidates and voters to know significantly in advance of the petition period who may run where.” *Id.* at 371; *see also* App.403-04 (Tr. 1693:16-1694:7).

But here, the district court proposes beginning this complicated process just days before (and possibly even days after) ballot qualification has ended. Voters and candidates everywhere are bound to be confused. In particular, non-major-party candidates and political organizations seeking ballot access may have to scramble to obtain thousands of new signatures if they find that they have been obtaining signatures from the wrong district. Ala. Code §§17-6-22, 17-9-3(a).

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

By comparison, Plaintiffs assert irreparable harm from having to vote under a plan that did not “prioritize[] race” enough over non-racial districting principles. App.213. The general geography of districts has remained largely the same for decades. And this factor does not weigh heavily in their favor, particularly where that alleged irreparable harm can be solved only by harming hundreds of thousands of others with a racial gerrymander as a “remedy.”

Finally, the court’s stay of “the January 28, 2022 qualification deadline for 14 days, through February 11, 2022,” App.6, does little to help. Even if the Legislature or court could settle on a new map in the next week, congressional candidates would have only about a week to assess any new map (which could also be subject to constitutional challenge) and decide whether to enter a congressional race in which absentee voting will begin the following month. Most fundamentally, there are hundreds of thousands of Alabamians who are not a party to this litigation but who nevertheless will be thrown into new districts based on their race. The public interest undoubtedly weighs in favor of a stay

CONCLUSION

For the foregoing reasons, Applicants respectfully ask the Court to enter an administrative stay and then a stay pending appeal. The Court should also construe this stay application as a petition for writ of certiorari before judgment and consider this case alongside the direct appeal in *Milligan*.

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