

No. \_\_\_\_\_

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**Supreme Court of the United States**

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WES ALLEN, SEC'Y OF STATE, ET AL.,  
*Petitioners,*

v.

MARCUS CASTER, ET AL.,  
*Respondents.*

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On Petition for a Writ of Certiorari  
Before Judgment to the United States Court of Appeals  
for the Eleventh Circuit

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◆

**Petition for a Writ of Certiorari  
Before Judgment**

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## QUESTIONS PRESENTED

Alabama's 2021 congressional districting plan was preliminarily enjoined under §2 of the Voting Rights Act because it splintered one community of interest, the Black Belt, while keeping together another, the Gulf Coast. In 2023, Alabama passed a new plan uniting the Black Belt counties into as few districts as possible. Even so, the district court permanently enjoined the 2023 plan because it did not racially divide the Gulf to place more black voters from "Black Belt counties in a majority-Black district." App.345.

The court further held that the State's refusal to intentionally create a second majority-minority district constituted intentional racial discrimination. The court dismissed the notion that the State was trying to avoid gerrymandering claims, though such claims were pending and others threatened; drew racial inferences from race-neutral legislative findings; held that the preliminary ruling on the 2021 Plan eliminated Alabama's politics defense for the 2023 Plan; and treated efforts to persuade the court that the 2023 Plan was not racially dilutive as evidence of dilutive intent. The questions presented are:

1. Does §2 require Alabama to segregate a conceded community of interest to combine black voters from that community with black voters elsewhere to form a majority-black district?
2. Whether §2 can require Alabama to intentionally create a second majority-minority district without violating the Fourteenth or Fifteenth Amendments to the U.S. Constitution?
3. Does §2 create a privately enforceable right?
4. Did Alabama violate the Fourteenth Amendment by declining to draw a race-based plan?

## PARTIES AND PROCEEDINGS

Petitioners are Wes Allen, in his official capacity as Secretary of State for Alabama, and State Senator Steve Livingston and State Representative Chris Pringle, in their official capacities as Senate Chair and House Chair of the Alabama Permanent Legislative Committee on Reapportionment, respectively. Petitioners were defendants 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, and Wendell Thomas. All respondents were plaintiffs before the district court.

The relevant orders are:

*Caster v. Allen*, No. 2:21-cv-1536, 2025 WL 1643532 (N.D. Ala. May 8, 2025) (findings of fact, conclusions of law, judgment, and injunction).

*Caster v. Allen*, No. 2:21-cv-1536 (N.D. Ala. Aug. 7, 2025) (final judgment and injunction).

Petitioners filed a notice of appeal after the district court issued each of the above orders. The Eleventh Circuit cases are:

*Caster v. Allen*, No. 25-11915 (docketed Jun. 6, 2025);

*Caster v. Allen*, No. 25-12802 (docketed Aug. 14, 2025).

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## INTRODUCTION

For decades, States have faced “competing hazards of liability” when redistricting. *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality). Consider race too much and violate the Fourteenth Amendment. *Id.* at 959. Consider race too little and violate the Voting Rights Act. *Allen v. Milligan*, 599 U.S. 1, 25 (2023). However States traverse that “legal obstacle course,” *Abbott v. Perez*, 585 U.S. 579, 587 (2018), they seem predestined to lose. After the last census, Louisiana’s first plan was preliminarily enjoined, so Louisiana enacted a race-based plan with an additional majority-black district “stretch[ing] some 250 miles” from Shreveport to Baton Rouge. *Callais v. Landry*, 732 F. Supp. 3d 574, 588 (W.D. La. 2024). That second attempt was declared unconstitutional. *Id.* at 582. Meanwhile, after Alabama’s first plan was preliminarily enjoined, Alabama drew a map prioritizing non-racial goals. This second plan was enjoined for *not* creating a new majority-black district stretching some 250 miles from Mobile to the Georgia border. App.20.

It’s time that this “lose-lose situation” ends. *Alexander v. S.C. Conf. NAACP*, 602 U.S. 1, 65 (2024) (Thomas, J., concurring). Either there is a way for States to comply with §2 without making race the criterion that cannot be compromised, or the clock has run out §2’s authorization of “race-based redistricting,” which “cannot extend indefinitely into the future.” *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring). Whatever the path, the Court should grant the petition and reverse. A State does not violate §2, let alone the Fourteenth Amendment, when it refuses to sort its citizens based on race.

### OPINION BELOW

The opinion of the three-judge district court in *Singleton v. Allen*, No. 2:21-cv-1291, and *Milligan v. Allen*, No. 2:21-cv-1530, is available at 2025 WL 1342947 (N.D. Ala. May 8, 2025) and reproduced at App.9-558. The court's injunction and final judgment are reproduced at App.1018-21. The single-judge court in *Caster v. Allen*, No. 2:21-cv-1536, adopted the opinion of the three-judge court, App.5-6, and entered an injunction and final judgment, App.1022-23.<sup>1</sup>

### JURISDICTION

Petitioners timely filed notices of appeal on June 6, 2025, after the district court issued its permanent injunction on May 8, *see* 28 U.S.C. § 1292(a)(1), and on August 14, 2025, after the district court entered final judgment on August 7, 2025, *see* 28 U.S.C. § 1291. This Court has jurisdiction. *See* 28 U.S.C. § 1254(1); 28 U.S.C. § 2101(e). Because this appeal may implicate the constitutionality of 52 U.S.C. §10301, 28 U.S.C. §2403 may apply. The United States has participated throughout this case as an amicus and will be served consistent with Rule 29(4)(b).

### PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the appendix following this brief. *See* App.1a-2a.

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<sup>1</sup> Because these three cases are intertwined, Petitioners are simultaneously filing in *Singleton* and *Milligan* jurisdictional statements that raise the same arguments raised in this petition.

## STATEMENT

A. In 2021, Alabama enacted a congressional map that largely resembled those it had used since 1992. The map was preliminarily enjoined. A “critical issue[]” was the Black Belt. App.937. Plaintiffs called it the “heart of th[e] case.” Br. of *Milligan* Respondents 5, No. 21-1086 (U.S. filed July 11, 2022). The district court took issue with the 2021 Plan’s splitting of the 18 Black Belt counties because it was possible “to split the Black Belt less.” App.947; *see* App.950.

This Court affirmed. Based on the preliminary-injunction record, the 2021 Plan “likely violated” §2. *Allen*, 599 U.S. at 10. The Court concluded that Plaintiffs’ alternatives, which avoided splitting the Black Belt, were no less “reasonably configured” than the State’s plan, which avoided splitting the Gulf Coast. *Id.* at 21. “There would be a split community of interest in both.” *Id.* The Court clarified that core retention was no excuse for uniting the Gulf Coast while dividing the Black Belt. *Id.* at 21-22.

Addressing the State’s defense that race predominated in Plaintiffs’ alternatives given their treatment of the Black Belt, a plurality of this Court responded:

[T]he relevant community of interest here—the Black Belt—was a “*historical* feature” of the State, not a demographic one. The Black Belt, [Plaintiffs’ expert] emphasized, was defined by its “historical boundaries”—namely, the group of “rural counties plus Montgomery County in the central part of the state.” The District Court treated the Black Belt as a community of interest for the same reason.

*Id.* at 32 n.5 (citations omitted). Justice Kavanaugh did not join the plurality and noted in a concurring opinion “that even if Congress in 1982 could constitutionally authorize race-based redistricting under §2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future.” *Id.* at 45. Likewise, Justice Thomas’s dissent warned that there was no constitutional interpretation of §2 “that would entitle members of racial minorities, *qua* racial minorities, to have their preferred candidates win elections.” *Id.* at 81-82.

**B.** Faced with a preliminary injunction, Alabama enacted a new plan. The Legislature declared that the Black Belt would “be kept together to the fullest extent possible.” App.545 (SB5). The 2023 Plan placed the Black Belt’s 18 core counties into two districts and unified Montgomery County, the most populous area of the Black Belt. App.546. The Legislature did this while keeping the Gulf Coast’s two counties together, given its “long history and unique interests.” App.546. There was no longer a “split community of interest.” *Allen*, 599 U.S. at 21. The 2023 Plan unified both the Black Belt and the Gulf Coast. App.546; *see* App.553.

And yet, Plaintiffs moved to preliminarily enjoin the 2023 Plan. This time, the heart of their case was whether Alabama could keep the Gulf Coast together. Plaintiffs argued that §2 *requires* splitting the Gulf Coast by segregating Mobile County so that Mobile’s black voters could be combined with black voters in the Black Belt to form a second majority-black district. *See* App.340 (“The record contains no map that includes two majority-Black districts without splitting Mobile County, and all agree that it is not possible to draw such a map without splitting Mobile County.”).

The Legislature had good reasons to avoid segregating Mobile’s white and black voters. The Alabama Attorney General warned the Legislature that placing the race of voters ahead of traditional districting principles “would likely open the State up to claims that it has violated the Constitution’s Equal Protection Clause,” invoking this Court’s weeks-old decision in *SFFA v. Harvard*, 600 U.S. 181 (2023). *See Caster v. Allen*, No. 2:21-cv-1536, DE319-25:152.<sup>2</sup> The *Singleton* Plaintiffs reminded legislators during the 2023 special session that a “trial on the merits is still pending,” *id.* at 144-45; *Milligan*, DE404-32:71-73, on the racial gerrymandering claims they had brought based on county splits, App.997-999. Facing those competing hazards, Alabama prioritized traditional districting principles in passing what it believed were §2-compliant districts that also followed the Constitution.

C. The district court preliminarily enjoined the 2023 Plan. App.568. The 2024 congressional elections proceeded on a court-drawn plan combining parts of Mobile with Montgomery County and ending at the Georgia border. *See* App.16, 1037. That plan remains in place today. App.1018-19.

The State then fully litigated the lawfulness of the 2023 Plan. The parties spent two years compiling a record for trial, including voluminous new evidence regarding the Gulf Coast and Black Belt. *See, e.g.*, App.339-40. The district court then held an 11-day trial, where 10 fact and 13 expert witnesses testified

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<sup>2</sup> “[E]vidence admitted in any one of the three cases”—*Singleton*, *Milligan*, or *Caster*—“could be used in the other two cases absent a specific objection.” App.40. “DE” cites refer to the district court docket of the case indicated.



live, and the court received transcript testimony for 28 additional witnesses, hundreds of exhibits, and hundreds of pages of stipulations and proposed findings. App.18.

By close of trial, the following was undisputed: both the Black Belt and the Gulf Coast are communities of interest to be respected in any reasonably configured map, *see* App.340, 346; one could create equally populated districts by “keep[ing] the Gulf Coast together and split[ting] the Black Belt into only two districts” as the State did, App.354-55; all of Plaintiffs’ alternatives split the Gulf Coast, *see* App.340; and the only way to form a second majority-black district requires “splitting Mobile County” and combining it with Black Belt counties hundreds of miles away, App.340; *see also* App.126-127, 206-210.

1. After trial, the district court permanently enjoined use of the 2023 Plan, reasoning that Plaintiffs’ alternatives respected the Black Belt “much better” by placing more Black Belt counties in majority-black districts. App.345. This shifted the goalposts. In 2022, the question was whether Alabama’s plan produced impermissible racial effects by not “keeping the Black Belt together” in “as few congressional districts as possible.” App.937. But in 2025, the question was whether Alabama’s plan flunked §2 for failing to draw black voters from the Black Belt and black voters *from elsewhere* into “a majority-Black district.” App.345. Under this race-based rubric, the court concluded that §2 requires splitting the Gulf Coast—an undisputed community of interest—and combining black Mobilians with black voters in the Black Belt. App.355 (concluding “Black voters remain an ineffective minority of voters” in the 2023 Plan, and the §2 harm cannot

be remedied “simply by splitting the Black Belt into fewer districts”).

The district court rejected Alabama’s defenses regarding the proper application of *Gingles*, the meaning of §2, and constitutional requirements. For instance, while the court did not dispute that the Gulf Coast was a community of interest, App.348, the court deemed Plaintiffs’ alternative maps that split Mobile passable because States “cannot prioritize” maintaining communities of interest “above compliance with Section Two.” App.348. Though §2 “never require[s] adoption of districts that violate traditional redistricting principles,” *Allen* 599 U.S. at 30, sacrificing this principle was necessary so Alabama could not “skirt Section Two by excelling at whatever traditional districting principle the Legislature deems most pertinent,” App.329.

To Alabama’s argument that race predominated in Plaintiffs’ alternatives, the court reasoned that race did not predominate because the experts “repeatedly testified at trial that race did not predominate.” App.359.

Alabama argued that racially polarized voting was not legally significant because under the court-drawn plan used in 2024, Shomari Figures, the Democratic candidate for CD2, won by 9.2 points, even though the district was not majority-BVAP. The court rejected the notion that CD2 was “a crossover district” and speculated that “Figures may have won it with no support from White voters.” App.370-71.

For the totality-of-the-circumstances analysis, the State argued, like it successfully argued five years earlier in *Alabama State Conference of the NAACP v.*

*Alabama*, 612 F. Supp. 3d 1232 (M.D. Ala. 2020), that “what appears to be bloc voting on account of race [is instead] ... the result of political or personal affiliation of different racial groups with different candidates.” App.384. But this district court disagreed. Though multiple black Republicans testified about the support they received from the party, App.309-10, 312, and the State noted electoral wins from black Republicans like Bill Lewis to a judgeship and Kenneth Paschal to the State House, App.386, the court wrote off Paschal as a “unicorn,” App.388, and rejected Alabama’s argument by finding that “issues of race drive Black voters’ choices at the polls,” App.391.

The court also resorted to circular reasoning. Alabama’s effort “to persuade” the court that the 2023 Plan was not dilutive was proof that the plan was dilutive. App.422. And, without citing *SFFA*, the court rejected Alabama’s arguments that §2 may not continue to constitutionally authorize race-based districting. Based on “the Legislature’s deliberate decision to” not engage in race-based districting, the court concluded that race-based districting must “extend[] at least past today.” App.455-56.

2. The court’s opinion did not end with §2. The court further held that Alabama violated the Fourteenth Amendment. As the district court saw it, the 2023 Legislature made a “deliberate decision not to satisfy” the district court’s 2022 opinion and order—a *preliminary* injunction—regarding the 2021 Plan. App.456, 491-92. In the court’s view, “[p]reliminary injunctions are preliminary, but they are not advisory.” App.517. This meant “the State had no basis to expect it could enact a new plan” without a second Democratic-leaning district and “still receive our blessing

for the plan.” App.518. Even trying to “persuade” the district court at trial that there was no dilution (App.22) was proof of “a deliberate decision to double down on the dilution of Black Alabamians’ votes,” App.492, and “an attempt to evade a court order,” App.520. The court thus held Alabama was required to treat the *preliminary* injunction on a preliminary record as dispositive—and not just for the 2021 Plan, but for any plan the rest of the decade.

The court found “there was no basis” for Alabama’s concerns about the competing hazards of complying with §2 and the Constitution. App.521-22. Rejecting those concerns as “implausible,” *id.*, the court found Alabama discriminated in 2023 by *not* discriminating: failing to move “much of the Black Belt” and “Black Alabamians in Mobile” out of their “White district[s]” violated the Fourteenth Amendment. App.489, 518.

Finally, the court admitted that there was no alternative plan that “achieve[s] all the political goals of the Legislature, particularly the goal of keeping Mobile and Baldwin Counties whole and together in one congressional district.” App.514. But this somehow counted as proof that race, rather than those recognized “political goals,” motivated the Legislature. *Id.*

Based on the district court’s intentional-discrimination holding, Plaintiffs asked that the VRA’s “bail-in” provision be applied to require Alabama to pre-clear future changes to congressional districts. App.486; *see* 52 U.S.C. §10302(c). The court denied that request without prejudice and retained jurisdiction until Alabama enacts new congressional districts based on 2030 census data. App.1036.

## REASONS TO GRANT THE WRIT

### I. The District Court Misconstrued §2 to Require Alabama to Combine Black Voters from Different Regions Because They Are Black.

To hold that the 2023 Plan violated §2, the district court resorted to exclusively racial reasoning: while the 2023 Plan reunified the Black Belt, what really matters is whether black voters in the Black Belt are combined with black voters elsewhere to create a new majority-minority district. App.345. Such racial reasoning cannot be squared with this Court’s decision in *Allen* or other §2 precedents.

A. When plaintiffs allege a §2 violation, they must adduce alternative maps with “reasonably configured district[s]” drawn in accordance with the State’s “traditional districting criteria.” *Allen*, 599 U.S. at 18, 26. For three decades, this Court has recognized “maintaining communities of interest” as a necessary feature of a reasonably configured map. *Vera*, 517 U.S. at 977 (plurality). The principle is not about “reach[ing] out to grab ... minority communities.” *Id.* at 979. It is the “recognition of *nonracial* communities of interest.” *LULAC v. Perry*, 548 U.S. 399, 433 (2006) (emphasis added). Otherwise, plaintiffs could prove unequal treatment of a racial group based merely on the failure to prioritize that group.

It is undisputed that there are 18 counties in Alabama that are part of the “Black Belt” community of interest. App.340 n.57, 948. And until now, it was undisputed that the Black Belt, named for its rich soil, App.60, was a *nonracial* community of interest—a

“*historical* feature’ of the State, not a demographic one.” *Allen*, 599 U.S. at 32 n.5 (plurality).

Alabama’s first round of redistricting litigation centered on the Black Belt. Alabama lost at the preliminary-injunction stage because it splintered the Black Belt, which is predominantly black, across three districts while keeping the Gulf Coast, which is predominantly white, in one district. The district court found that “inconsistent treatment” was evidence that Alabama had not “employed the same line-drawing standards” across the State. *Johnson v. De Grandy*, 512 U.S. 997, 1015 (1994); see App.937-38, 950, 953. In 2022, the court said it was “critical” that the Black Belt be “split between as few congressional districts as possible.” App.937. This Court agreed. It avoided a “beauty contest between plaintiffs’ maps” (splitting the Black Belt less) and Alabama’s map (splitting the Gulf Coast less) because “[t]here would be a split community of interest in both.” *Allen*, 599 U.S. at 21. (cleaned up). Alabama responded with new redistricting legislation that united *both* regions.

The district court held that was not good enough. Although the 2023 Plan consolidated the Black Belt into the fewest possible districts, the district court said it did not “respect” the Black Belt as well as Plaintiffs’ alternatives. App.345. “Respect” morphed from *Allen*’s race-neutral inquiry into an expressly racial one: Did the 2023 Plan place enough “Black Belt counties in a majority-Black district”? App.345 (emphasis added). No, held the district court, because “only half (nine) of the Legislature’s 18 identified Black Belt counties [were] in a majority-Black district.” *Id.* Plaintiffs’ alternatives were “much better”

for the Black Belt, the court said, even when they split the region across *five* districts. *Id.* See App.208.

Only by prioritizing race over conceded communities of interest could the district court bless Plaintiffs' alternatives as "reasonably configured." After trial, the court did not question that Mobile and Baldwin Counties have long formed the Gulf Coast community of interest. App.348. And yet, the court applauded Plaintiffs' alternatives precisely for "split[ting] part of Mobile County away from the Gulf Coast to connect it with the Black Belt," App.345, while treating Baldwin County and the rest of Mobile as an isolated region sharing little in common with any part of Alabama. "Black Alabamians in Mobile" had to be separated from the rest of the Gulf Coast, lest there be a "majority-White district." App.489, 518.

Simply put, the court deployed §2 not to unite the Black Belt but to split the Gulf Coast between black and white voters. That sort of "inconsistent treatment" is more likely to *violate* §2 than to cure a §2 violation. *De Grandy*, 512 U.S. at 1015.

Plaintiffs hardly denied their "racial tinkering," *Miller v. Johnson*, 515 U.S. 900, 919 (1995). This Court relied on Plaintiffs' expert Bill Cooper's testimony during the 2021-2022 preliminary injunction proceedings that he treated the Black Belt as a "historical feature" of Alabama, not a racial one. *Allen*, 599 U.S. at 32 n.5. But Cooper changed his tune at the 2025 trial. He testified that extracting the city of Mobile from surrounding suburbs "is a way to ... create two majority-Black districts." App.338. "Why can't you have a *majority-black district* in south-central Alabama and also have a Gulf Coast district that includes part of Mobile County and all of Baldwin County?"

Tr.207:22-208:3 (emphasis added).<sup>3</sup> That “announced racial target” not only contradicted Cooper’s earlier testimony; it was direct evidence of racial predominance. *See Cooper v. Harris*, 581 U.S. 285, 300 (2016). Race was “the actual consideration[] that provided the essential basis for the lines drawn.” *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189 (2017). The court clearly erred when it credited evidence that Cooper *generally* drew lines based on neutral factors. App.222. If there were any doubt, the court’s own ground rule—that Mobile’s black voters *must* be combined with black voters hundreds of miles away—confirms §2 is now synonymous with race-predominant redistricting in Alabama.

Plaintiffs’ next expert, Dr. Moon Duchin, could have been reading from this Court’s gerrymandering decisions when describing how she “took to be nonnegotiable principles of population balance and seeking two majority-black districts, [and] *after that*, [] took contiguity as a requirement and compactness as paramount.” PI.Tr.577:17-20 (emphasis added); *see, e.g., Bethune-Hill*, 580 U.S. at 189. That prioritization led to racial predominance because when race and a neutral factor came into conflict, race prevailed. *See* PI.Tr.664:17-24 (confirming that race was “part of the reason why [her] compactness scores for CD1 and CD2 were lower”). If two principles conflict, “whatever trumps the other, that’s the predominant one.” *Bethune-Hill*, Oral.Arg.Tr.6 (Dec. 5, 2016).

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<sup>3</sup> “Tr.” refers to trial transcripts. *See Milligan*, DE463 through DE473. “PI.Tr.” refers to the 2022 preliminary injunction hearing transcripts. *See Milligan*, DE105.



**B.** The district court’s rationale contravenes *Allen*. There is no longer a “split community of interest” in Alabama’s plan, but there are in Plaintiffs’ alternatives. *Allen*, 599 U.S. at 21. No “beauty contest” is needed to see that the lower court demanded Alabama do what this Court said §2 “never” does: “violate traditional redistricting principles.” *Allen*, 599 U.S. at 30.

Worse, the district court’s rationale abandons *Allen*’s race-neutral reasons for holding that §2 likely required new districts in Alabama. In response to the *Allen* dissenters’ critique that new districts would cross the line from race-conscious to race-predominant, the plurality relied on “the Black Belt as a community of interest” based on its “historical boundaries,” not its “demographic[s].” *Id.* at 32 n.5.

Nonetheless, the district court’s rule was not about “maintaining communities of interest” to keep “nonracial communities” together. *LULAC*, 548 U.S. at 433. Splitting one community (the Gulf Coast) to combine its black voters with black voters in another community (the Black Belt) has nothing to do with respect for the Black Belt’s “historical boundaries,” *contra Allen*, 599 U.S. at 32 n.5. It has everything to do with race. By the district court’s logic, Plaintiffs’ alternatives are “reasonably configured” even when they scatter Black Belt counties across *five* districts. App.345; *see* App.208 (Plan 6). And *contra* the district court’s assertion, App.357, Alabama has disputed all along that splitting the Gulf Coast is required to “better serve[]” the Black Belt. *Id.* Separating Mobile from the rest of the Gulf Coast “better serves” Alabamians only if one treats them “as the product of their race” and nothing more. *SFFA*, 600 U.S. at 221.

C. The district court's race-first rationale is irreconcilable with §2's text and history. Section 2 requires proof of "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). The "inability to elect representatives of their choice" is not enough unless "the members of the protected class have less opportunity to participate in the political process" too. *Chisom v. Roemer*, 501 U.S. 380, 397 (1991).

For example, in *Whitcomb v. Chavis*, this Court held plaintiffs had sufficient "opportunity" to participate because there was no evidence that they could not "register or vote," "choose the political party they desired to support" and "participate in its affairs," or "be equally represented." 403 U.S. 124, 149-50, 153 (1971). Nor was there evidence that candidates from plaintiffs' neighborhood were "regularly excluded" from the major parties' candidate slates. *Id.* at 150. Despite "[s]trong differences" in socioeconomic indicators, *id.* at 132, and despite the failure to elect a Democrat in four out of five elections from 1960 to 1968, *id.* at 150, the *Whitcomb* plaintiffs could not show they had less opportunity to participate and thus could not make out a dilution claim.

The district court nevertheless dismissed arguments about "parity in rates of voter registration and turnout" as "too formulaic." App.411. But under the district court's view, "had the Democrats won all of the elections or even most of them," plaintiffs "would have had no justifiable complaints about representation." *Whitcomb*, 403 U.S. at 152. Dilution was "a mere euphemism for political defeat at the polls." *Id.* at 153.

## II. After *SFFA*, There Is No Constitutional Justification for Continued Race-Based Districting.

The decision below lost sight of the Equal Protection Clause’s prohibition: “race-based state action” is forbidden “except in the most extraordinary case.” *SFFA*, 600 U.S. at 208. In 1965, racial discrimination in voting practices was an “extraordinary problem,” *Shelby County v. Holder*, 570 U.S. 529, 534 (2013), and “pervasive evil,” *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). The VRA’s “purpose” was to combat that evil and “foster our transformation to a society that is no longer fixated on race.” *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003). And it thus allowed the creation of majority-minority districts, even though “they rely on a quintessentially race-conscious calculus.” *De Grandy*, 512 U.S. at 1020.

But today, no one contends that the same degree of “pervasive evil,” *Katzenbach*, 383 U.S. at 309, persists. Gone are the days of “literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters, and the like.” *Shelby County*, 570 U.S. at 537. Progress has been dramatic. In 1965, Alabama’s black voter registration rate was a dismal 23.5%; by 2024, black voter registration exceeded 95%. App.286. As other Alabama district courts found in the decade preceding this case, black voters in Alabama “have an equal opportunity to participate in the political process the same as everyone else.” *Ala. Leg. Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1287 (M.D. Ala. 2013) (*ALBC*) (W. Pryor, J.), *vacated on other grounds*, 575 U.S. 254 (2015); *accord Ala. NAACP*, 612 F. Supp. 3d at 1316.

Yet “no end is in sight” for §2’s race-based demands on redistricting. *SFFA*, 600 U.S. at 213. While Plaintiffs and their *amici* assured the *Allen* Court that §2 cases are “rarely [] successful” and that since 2010, “*only* ... a handful of state house districts near Milwaukee and Houston” had been redrawn, 599 U.S. at 29, that was the calm before the storm. In the post-2020 cycle, no fewer than *thirteen* state legislative or congressional plans have been enjoined under §2—from purple Georgia to deep blue Washington State.<sup>4</sup> And that trend is not the product of retrogression following the end of §5 preclearance. “[N]ot only did minority representation in formerly covered states”—including Alabama—“not decline in *absolute* terms, it also didn’t drop in *relative* terms versus the benchmark of formerly uncovered states.” Nicholas Stephanopoulos et al., *Non-Retrogression Without Law*, 2023 U. CHI. LEGAL F. 267, 269-70 (2024). Even so, courts are sorting Americans into districts based on race with *greater* frequency than in decades past.

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<sup>4</sup> See *Ala. St. Conf. NAACP v. Allen*, No. 2:21-cv-1531 (N.D. Ala. Aug. 22, 2025), DE274 (Alabama’s 2021 Senate plan); *Nairne v. Ardoin*, 715 F. Supp. 3d 808 (M.D. La. 2024) (Louisiana’s 2022 House and Senate plans); *Robinson v. Ardoin*, 605 F. Supp. 3d 759 (M.D. La. 2022) (Louisiana’s 2022 congressional plan); *Miss. NAACP v. State Bd. of Election Comm’rs*, 739 F. Supp. 3d 383 (S.D. Miss. 2024) (Mississippi’s 2022 House and Senate plans); *Turtle Mtn. Band of Chippewa Indians v. Howe*, 2023 WL 8004576 (D.N.D. Nov. 17, 2023) (North Dakota’s 2021 state legislative plan); *Soto Palmer v. Hobbs*, 686 F. Supp. 3d 1213 (W.D. Wash. 2023) (Washington’s 2022 legislative plan); *Alpha Phi Alpha Fraternity v. Raffensperger*, 700 F. Supp. 3d 1136 (N.D. Ga. 2023) (Georgia’s 2021 House, Senate, and congressional plans); *Singleton v. Merrill*, 582 F. Supp. 3d 924 (N.D. Ala. 2022) (Alabama’s 2021 congressional plan); App.1 (Alabama’s 2023 congressional plan).

It is time to confront whether race-based districting “may extend indefinitely into the future,” and “this Court’s precedents make clear that the answer is no.” *SFFA*, 600 U.S. at 316 (Kavanaugh, J., concurring).

**A. Race-based districting is not amenable to judicial review under strict scrutiny.**

Race can be used to “remediat[e] specific, identified instances of past discrimination that violated the Constitution or a statute.” *Id.* at 207 (citing *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*)). But identifying and remedying vote dilution uses race in a way that is not “sufficiently measurable” or “concrete enough to permit judicial review.” *Id.* at 214, 217.

First, vote-dilution claims rest on a vague and “amorphous concept of injury.” *Id.* at 226. Because drawing districts “does not, without more, diminish” anyone’s vote, what’s at stake is “the political power of a group.” *Shaw v. Reno*, 509 U.S. 630, 682 (1993) (Souter, J., dissenting). Dilution claims “ask for a fair share of political power and influence, with all the justiciability conundrums that entails.” *Rucho v. Common Cause*, 588 U.S. 684, 709 (2019); see *Holder v. Hall*, 512 U.S. 874, 893 (1994) (Thomas, J., concurring in judgment).

The problem is getting worse, not better. As the Fifth Circuit recognized 32 years ago, “[r]elatively clear lines of legality and morality have become more difficult to locate as demands for outcomes have followed the cutting away of obstacles to full participation.” *LULAC v. Clements*, 999 F.2d 831, 837 (5th Cir. 1993) (en banc). The test for distinguishing between normal politics and invidious dilution has gone from “flexible,” *Thornburg v. Gingles*, 478 U.S.

30, 46 (1986), to “standardless,” *SFFA*, 600 U.S. at 215.

The basic goals of a vote-dilution claim “are not sufficiently coherent for purposes of strict scrutiny.” *Id.* at 214. Despite decades of litigation, courts have not defined those goals with any precision. In *LULAC*, this Court identified (1) “prevent[ing] discrimination in the exercise of the electoral franchise,” and (2) the “transformation to a society that is no longer fixated on race.” 548 U.S. at 433-34. While laudable in the abstract, courts have no uniform way to implement these goals in practice. “Even if these goals could somehow be measured ..., how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease?” *SFFA*, 600 U.S. at 214. What is the test for when a State has “outrun the effects of its past”? App.455.

In truth, there is a Rorschach test for §2 “dilution,” but no legal test. Within the last 12 years, federal courts repeatedly rejected plaintiffs’ totality-of-the-circumstances arguments in §2 cases against Alabama.<sup>5</sup> But for the court below, it was “near-obvious” that Alabama violated §2 because vestiges from the past made it harder for black voters “to read ballots, learn about candidates, absentee vote, locate voting

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<sup>5</sup> In 2013, a three-judge court found “overwhelming evidence” that black voters in Alabama “have an equal opportunity to participate in the political process the same as everyone else.” *ALBC*, 989 F. Supp. 2d at 1287. In 2017, the panel readopted those findings. *Ala. Leg. Black Caucus v. Alabama*, 231 F. Supp. 3d 1026, 1033 (M.D. Ala. 2017). In 2020, another district court reached the “compelling” conclusion that “reasons other than race,” like political party, “better explain the defeat of black-preferred candidates” in Alabama. *Ala. NAACP*, 612 F. Supp. 3d at 1316.

information, and travel to polls.” App.408-09. It was “not a close case,” App.425, even though other district courts had recently found just the opposite.

These dueling inquiries illuminate §2’s indeterminacy. In other contexts, bare disparities in “employment, wealth, and education” do not imply a denial of the “equal opportunity to vote,” *Brnovich v. DNC*, 594 U.S. 647, 671 (2021), and certainly do not authorize race-based state action. They are “generalized assertion[s]” and too “[im]precise” to serve as a “compelling interest.” *Shaw II*, 517 U.S. at 909-10; cf. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). Yet in re-districting, they may carry the day. The court here found a §2 violation based on “unmeasurable claims of past wrongs,” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989), that would never pass muster as a compelling state interest: a 6% gap in high-school graduation rates, App.173; Ben Carson’s defeat in the 2016 Republican primary, App.146; testimony that a plaintiff’s mother still “remembers segregated drinking fountains,” App.180; and the like.

“This freewheeling inquiry provides little notice to” state officials “of their obligations under the” VRA, *Sackett v. EPA*, 598 U.S. 651, 681 (2023), and cannot reliably tell legislators or courts “when the perilous remedy of racial preferences may cease,” *SFFA*, 600 U.S. at 214.

### **B. Race-based districting uses race as a stereotype and as a negative.**

1. The district court’s approach to §2 also fails to treat voters as individuals, instead reducing them to members of racial groups all presumed to think and vote alike. Any §2 districting claim must invoke

“plainly overbroad” racial categories, *SFFA*, 600 U.S. at 216, despite “countless differences” within groups, *id.* at 292 (Gorsuch, J., concurring); *accord LULAC*, 548 U.S. at 434. Here and nowhere else does the law tolerate litigation “on behalf of all [black] citizens” as a matter of course. *Wesch v. Hunt*, 785 F. Supp. 1491, 1493 (S.D. Ala. 1992); *see also Holder*, 512 U.S. at 903-08 (Thomas, J., concurring in judgment).

It is a vice, not a virtue, that §2 demands proof of “the very stereotype the law condemns.” *Powers v. Ohio*, 499 U.S. 400, 410 (1991). So here, when confronted with evidence that black citizens vote for white candidates, the court below declared, “Not in Alabama.” App.371. It deemed “Black support for Black candidates” to be “almost universal,” App.365, despite evidence regarding nearly identical black support for white Democratic candidates, Tr.1841:19-1842:18, testimony from black Republican candidates and officials, and legislative testimony from black Republicans demanding not to be stereotyped. *Caster*, DE319-25:43-45; App.291-96.

Even if “some statistical support can be conjured up,” *J.E.B. v. Alabama*, 511 U.S. 127, 139 n.11 (1994), governments cannot act on the belief that “race in itself says something about who you are,” *SFFA*, 600 U.S. at 220 (cleaned up). A racial program is “infirm” if it assumes that minorities “consistently[] express some characteristic minority viewpoint.” *Id.* at 219. That assumption underpins race-based districting, so its supporters argue that racial tropes are benign and lawful if they “benefit th[e] group” being stereotyped. *Shaw I*, 509 U.S. at 678 (Stevens, J., dissenting).

But it is always “offensive and demeaning [to] assum[e] that voters of a particular race, because of



their race, ‘think alike, share the same political interests, and will prefer the same candidates at the polls.’” *Miller*, 515 U.S. at 911-12 (quoting *Shaw I*, 509 U.S. at 647). More than thirty years ago, this Court recognized that endorsing such “hurt and injury” was “shortsighted.” *Id.* at 927. It is time to repudiate racial stereotyping once and for all.

2. Race-based districting uses race as a negative. Like college admissions, districting is zero-sum: To increase “Black voting strength,” App.355, the court below had “to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference,” *SFFA*, 600 U.S. at 212. The task itself “picks winners and losers based on the color of their skin.” *Id.* at 229.

For instance, the district court agreed that the Gulf Coast is a community of interest, App.346, but denied it equal treatment because it was predominantly white. “Fewer splits are generally better” for the Black Belt, App.938, which is why the 2021 Plan was enjoined. But for the Gulf Coast, the court held that some splits are just “inevitable,” App.352, and do “not always disrespect” a community, App.350.

The coup de grâce was the district court’s racial distinction between “cracking” and “dividing.” App.355. The 2023 Plan had a “cracking problem,” the court held, which required not just unifying the Black Belt but combining the Black Belt and black Mobilians to create a majority-black district. *Id.* In contrast, the court-drawn plan, like Plaintiffs’ alternatives, merely “divided” the Gulf Coast, so “splitting [it] precipitates no such racially discriminatory harm” for white voters. *Id.* “How else but ‘negative’ can race be described,” *SFFA*, 600 U.S. at 219, when a

majority-white community is divided, but not “cracked,” because the latter term applies only to “the dispersal of blacks”? App.355; *cf. Ames v. Ohio Dep’t of Youth Servs.*, 145 S.Ct. 1540, 1546-47 (2025).

### **C. Race-based districting has no end point.**

The continued application of an amorphous “dilution” principle in §2 has no expiration date. But a concrete end point is “critical” because all racial programs are inherently “dangerous.” *SFFA*, 600 U.S. at 212. Section 2’s effects test has applied for two generations and to five redistricting cycles. If districting by race had any “efficacy,” it should “no longer be necessary.” *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

1. Section 2’s use of race in redistricting has no discernible end point because it does not pursue discrete and measurable goals. *Supra* §II.A. If §2 greenlights race-based redistricting based on racial disparities in “education,” “employment,” and “incomes,” *Gingles*, 478 U.S. at 69, then race-based districting will “extend indefinitely into the future,” *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring), because “[e]quality is an ongoing project in a society where racial inequality persists,” *SFFA*, 600 U.S. at 370 (Sotomayor, J., dissenting).

Indeed, the court below held that a State must use race until it has “outrun the effects of its past.” App.455. It must “do what evidence and experts tell us is required to level the playing field and march forward together” until it has “achieve[d] true equality.” *SFFA*, 600 U.S. at 408 (Jackson, J., dissenting). But there will always be experts to tell us that more is required. Even in the face of “substantial progress,” a court can easily declare “we are certainly not yet

there.” App.455; *cf.* *SFFA*, Oral.Arg.Tr.83 (Oct. 31, 2022) (“Are we there yet? No.”).

If today’s racial “disparities are inseparable” from the past, App.406, then §2 is not “rooted in today’s circumstances,” *contra* App.454. Its mission to combat the “vestigial effects” of discrimination will never end. *Gingles*, 478 U.S. at 69. For no amount of progress can cure an “injury that may be ageless in its reach into the past.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). No amount of time will absolve a State’s “original sin.” *Abbott*, 585 U.S. at 603.

2. Even if race-based districting had tangible goals, “there is no reason to believe” it would achieve them “any time soon.” *SFFA*, 600 U.S. at 225. Racial disparities in “destitution,” “illiteracy rates,” and the like (App.410), while problematic, are not problems to be fixed with race-based redistricting. The district court never meaningfully investigated the nexus between harm and remedy—let alone explained how raising CD2 from 40% BVAP to 50% BVAP was necessary to close *any* racial gaps allegedly perpetuated by redistricting. Nor did it try to attribute Alabama’s “substantial progress” to race-based districting. App.455. Without even hinting at a causal connection between §2’s ends and its race-based means, the court could not say when sorting voters by race will end. *Grutter*, 539 U.S. at 343. After 43 years, the answer seems to be “never.”

Neither will race-based districting soon “foster our transformation to a society that is no longer fixated on race.” *LULAC*, 548 U.S. at 434. “The reality is that districting inevitably has and is intended to have substantial political consequences.” *Gaffney v.*

*Cummings*, 412 U.S. 735, 753 (1973). Federal courts cannot determine whether a plan has been influenced too much by politics, yet they are required to decide whether a plan has used just the right amount of race. That creates perennial “incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage.” *Schuette v. BAMN*, 572 U.S. 291, 309 (2014) (plurality). It is easy for plaintiffs to “repackage” partisan grievances in racial terms or to “reverse-engineer the partisan data into racial data.” *Alexander*, 602 U.S. at 21.

It happened here. One plaintiff, in his role as an Alabama legislator, accused his Republican colleagues of trying to “make sure an African-American would not win.” App.510. The court credited that remark and others as evidence of racial intent, despite apparent political explanations and constitutional concerns. App.509-11. *Contra Alexander*, 602 U.S. at 6 (requiring plaintiff to “disentangle race and politics if it wishes to prove that the legislature was motivated by race”). In this way and others, §2 redistricting litigation perpetuates a fixation on race, bringing us “further from the goal of a political system in which race no longer matters.” *Shaw I*, 509 U.S. at 657.

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The “consideration of race” needed for “achieving racial diversity in higher education” is “[j]ust like” the “consideration of race” needed for “drawing district lines that comply with the Voting Rights Act.” 600 U.S. at 361 n.34 (Sotomayor, J., dissenting). Both are forms of racial discrimination, and “all of it” must be eliminated. *Id.* at 206 (majority opinion).

### III. Section 2 Does Not Create a Privately Enforceable Right.

Congress has not expressly authorized private parties to sue under §2 as it did in the Civil Rights Act of 1964. 42 U.S.C. §2000a-3(a). Rejecting that argument, the district court split from the Eighth Circuit, which held §2 contains no private right of action and is not enforceable under 42 U.S.C. §1983. *See Turtle Mountain Band of Chippewa Indians v. Howe*, 137 F.4th 710, 713 (8th Cir. 2025); *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1206 (8th Cir. 2023).

“[F]ederal statutes do not confer ‘rights’ enforceable under §1983 ‘as a matter of course.’” *Medina v. Planned Parenthood S. Atl.*, 145 S.Ct. 2219, 2227 (2025). While §2 “benefit[s] one group or another,” *id.* at 6, the VRA expressly provides only two mechanisms of enforcement: criminal and civil actions by the federal government. 52 U.S.C. §10308. A private right of action cannot be implied unless the text “manifests an intent ‘to create not just a private *right* but also a private *remedy*.’” *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (emphasis in original).

Section 2 fails that “‘stringent’ and ‘demanding’ test,” *Medina*, 145 S.Ct. at 2229, because it lacks an “unmistakabl[e] focus[]” on the alleged rights-holder, *Turtle Mountain*, 137 F.4th at 719. The statute speaks of the right to vote, but its command is directed at “State[s] and political subdivision[s],” *id.* at 720, and its concern is the voting strength of racial *groups*, not “individual rights,” *id.* at 719. Allowing a single voter to force a race-based redraw of a State’s map risks “transform[ing] federal courts into weapons of political warfare.” *Alexander*, 602 U.S. at 11 (internal

quotation marks omitted). Perhaps recognizing this, the text does not confer new rights in “clear and unambiguous terms,” *Gonzaga*, 536 U.S. at 290, but instead limits any cause of action to one politically accountable “plaintiff who can enforce §2: the Attorney General.” *Ark. NAACP*, 86 F.4th at 1208.

#### **IV. Alabama Did Not Intentionally Discriminate by Declining to Draw Race-Based Districts.**

Though it is well-established that the Court’s re-districting jurisprudence is “notoriously unclear and confusing,” *Merrill v. Milligan*, 142 S.Ct. 879, 881 (2022) (Kavanaugh, J., concurring), the district court found there was “no basis” for good-faith disagreement about what §2 required of Alabama and what the Constitution prohibited. App.518, 522. After paying lip service to the presumption of legislative good faith and claiming to “draw every inference we can in the Legislature’s favor,” App.488, the district court proceeded to draw inference after inference *against* the Legislature, App.509, culminating in the remarkable conclusion that “racial animus motivated the 2023 Plan” because Alabama did *not* draw race-based lines. App.523. Declining “to split Mobile County” to combine its black voters with black voters on the other side of Alabama was deemed racist. App.514; *see also* App.20, App.530-31. That backwards holding is unprecedented and indefensible.

When there are “legitimate reasons” for a law, courts should “not infer a discriminatory purpose.” *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987). The principle applies with special force in redistricting. For one, redistricting is one of the State’s “most vital of local functions,” so courts must “exercise

extraordinary caution.” *Miller*, 515 U.S. at 915-16. For another, “[r]edistricting is never easy.” *Abbott*, 585 U.S. at 585.

Add race to the mix, and legislatures face “conflicting demands” and a “legal obstacle course.” *Id.* at 587. The “Equal Protection Clause restricts consideration of race” while “the VRA demands” it. *Id.* States must navigate these “competing hazards of liability,” *id.*, guided by “famously elliptical” statutory text, *Merrill*, 142 S.Ct. at 883 (Roberts, C.J., dissenting), layered with “notoriously unclear and confusing” doctrine, *id.* at 881 (Kavanaugh, J., concurring); *contra* App.519 (asserting “no lack of clarity” in the law). The presumption of good faith is especially warranted here.

**A. It is not “implausible” that the Legislature was trying to satisfy §2 without racially gerrymandering.**

The district court’s intentional-discrimination holding rests not on the rationale that Alabama used “race too much” but that Alabama used race too little. App.489. Alabama purposefully discriminated, in the court’s view, by declining to redistrict based on race. App.527. Any explanation for Alabama’s refusal to do so was deemed “implausible.” App.521. That conclusion completely misapplies this Court’s precedents. *See Alexander*, 602 U.S. at 10.

At a minimum, it is plausible the Legislature might have thought it could “stop discrimination” by not “discriminating,” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality), especially given that Alabama faced racial gerrymandering claims *in these very cases* and given this Court’s decision in *SFFA*, issued weeks before

Alabama’s 2023 special session commenced, *see SFFA*, 600 U.S. at 206 (“Eliminating racial discrimination means eliminating all of it.”).

Despite the requirement to “draw the inference that cuts in the legislature’s favor when confronted with evidence that could plausibly support multiple conclusions,” *Alexander*, 602 U.S. at 10, the court dismissed Alabama’s constitutional concerns as entirely baseless. The court deemed itself to have dispelled any fear of racial-gerrymandering liability—years earlier in a *preliminary* posture when the 2021 Plan was at issue. So while “the Legislature could have been alert to potential gerrymandering liability *in 2021*,” the court treated its 2022 preliminary injunction decision as a final adjudication that Alabama could constitutionally draw lines carving out “Black Alabamians living in Mobile.” App.521-22. The errors in that rationale are numerous and fundamental.

1. The district court erred by treating a preliminary injunction as a final order. Preliminary injunctions issue based on “procedures that are less formal and evidence that is less complete than in a trial on the merits.” *Lackey v. Stinnie*, 145 S.Ct. 659, 667 (2025). Courts often “reach[] a different conclusion upon full consideration of the merits.” *Id.* Thus, “[p]reliminary injunctions ... do not conclusively resolve legal disputes,” *id.*, and the lower court’s 2022 order specific to a past plan could not have resolved all redistricting conundrums (from all potential plaintiffs) through 2030.

The district court disagreed, declaring that even if its earlier order was “preliminary,” it was “not advisory.” App.517. It deemed its preliminary findings in the “round-one case” regarding the 2021 Plan as



effectively final—preemptively invalidating the 2023 Legislature’s application of districting principles in a race-neutral way. App.526. In this “round-two case,” App.526, the 2023 Legislature could not diverge from the court’s preliminary views and “still receive [the court’s] blessing” after trial on the new redistricting law. App.518. *Any map* without two majority-black districts was, in the court’s view, a “purposeful attempt to rob Black Alabamians,” App.23, “because they are Black,” App.515.

This Court already rejected that “round-one/round-two” framing in *Abbott*, when it reversed a finding of intentional discrimination in a challenge to Texas’s second redistricting plan, adopted after its first plan was enjoined. *See generally Abbott*, 585 U.S. at 584. While the Texas district court concluded that Texas’s second redistricting attempt was “tainted by discriminatory intent,” this Court held it was “fundamental legal error” to place the burden on the legislature to “cure[]” some alleged discriminatory “taint.” *Id.* This Court reversed, concluding that the presumption of good faith applies even *after* a predecessor plan has been enjoined as discriminatory. *Id.* at 603-05.

The same “fundamental legal error” warrants reversal here. *Id.* at 584. After waffling on whether the record contained direct evidence of discrimination—and recognizing that “the Supreme Court has ‘never invalidated an electoral map in a case in which the plaintiff failed to adduce any direct evidence[,]’” App.509 (quoting *Alexander*, 602 U.S. at 8)—the district court nonetheless explicitly “dr[e]w inferences” (App.509) *against* the Legislature in direct

contravention of *Abbott*, 585 U.S. at 584 and *Alexander*, 602 U.S. at 10.

2. The district court erred when it faulted Alabama for enacting a new law in response to issues raised in litigation and condemned Alabama for defending the merits of its law. The district court *faulted* the 2023 Plan for “concentrat[ing] on the elimination of the offending practice” in the Black Belt. *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 544 (2015); *see, e.g.*, App.518. And the district court *faulted* Alabama’s findings about the Gulf Coast, App.502-05, 509, ignoring that the court’s own doubts about that community during the rushed preliminary proceedings were an obvious and legitimate impetus for more detailed legislation.

Like the *Abbott* district court, which saw racism in attempts to “insulate the State’s redistricting plans from further legal challenge,” *Perez v. Abbott*, 274 F. Supp. 3d 624, 650 (W.D. Tex. 2017), the district court was “struck by the candid admission” that the Alabama Legislature “may have been hoping” “to persuade” the district court at trial that a plan with only one majority-black district did not violate §2. App.22. Developing evidence about “the historical connections between Mobile and Baldwin Counties” was nefarious, App.494, because it might show that Plaintiffs’ illustrative plans “violated the Legislature’s provisions for communities of interest and therefore failed to respect traditional districting principles,” App.503-04. The court treated attempts to disprove dilution as proof of dilution. That can’t be right.

With the presumption of good faith properly applied, it is clearly plausible that Alabama thought its plan complied with §2—*i.e.*, it was not trying to lose

the lawsuits. *See, e.g.*, App.510 (quoting the Alabama Speaker of the House saying the map “gives us a good shot”). If Alabama had succeeded, it would not be “perpetuating vote dilution and making it impossible to remedy,” *id.*, because *there would be no dilution to remedy*. Failure to persuade the court that Alabama’s plan complied with §2 did not transform the attempt into racial discrimination.

The district court’s logic would condemn all defendants who keep litigating after being preliminarily enjoined. This is precisely the reasoning rebuked by *Abbott*, 585 U.S. at 613 (“It is indicative of the District Court’s mistaken approach that it inferred bad faith from Texas’s decision to take an appeal to this Court from the D.C. court’s decision denying preclearance.”).

3. The district court also erred by deeming Alabama’s constitutional concerns “implausible.” App.521. Racially sorting citizens is and always has been “offensive and demeaning.” *Alexander*, 602 U.S. at 11. And here there was indisputable litigation risk too. Constitutional claims were still pending in *these* cases. App.457-58 The district court’s 2022 opinion even deemed Plaintiffs’ gerrymandering challenges “complicated.” App.999. During the 2023 redistricting special session, the *Singleton* Plaintiffs’ lawyer testified before the Legislature that splitting *any* county based on race would be unconstitutional, *Caster*, DE319-25:144-45; *Milligan*, DE404-32:71-73, including Mobile. *Contra* App.521-22. It was reasonable for Alabama to take that charge seriously, especially after the Attorney General advised the Legislature to take the constitutional risks seriously,

*supra* 5. *Cf. Fusilier v. Landry*, 963 F. 3d 447, 464-65 (5th Cir. 2020).<sup>6</sup>

More broadly, the Legislature had to consider not just *Allen*, which was specific to the 2021 Plan and the preliminary-injunction record, but also *SFFA* and all Equal-Protection precedents. In *Allen*, only a plurality agreed that race did not predominate in Plaintiffs' alternatives, 599 U.S. at 32, and concurring and dissenting opinions raised concerns that "race-based redistricting cannot extend indefinitely into the future," *id.* at 45 (Kavanaugh, J., concurring in part) (citing dissenting opinion). Before the 2023 Plan was adopted, this Court held that governments may use race in only "the most extraordinary case," and all race-based action must have an "end point." *SFFA*, 600 U.S. at 208, 225. The district court erred by deeming those decisions irrelevant to the work of legislators who swore an oath to abide by the Constitution. App.519-20, 22-23.

**B. It is not "implausible" that the Legislature was pursuing partisan and policy goals.**

Numerous other race-neutral reasons explain the Legislature's action, and under *Alexander*, pursuing partisan and policy goals is a "plausible explanation" that the court needed to "rule out" before finding animus. 602 U.S. at 27. Only an erroneous presumption of bad faith can explain how the court concluded that the 2023 Plan was "not about compactness" or

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<sup>6</sup> The court's fears of an "infinity loop" are unsubstantiated. App.516. If States were jamming up courts by continually enacting new maps, the solution would lie in the law of remedies, not a presumption of racism for new laws.

incumbency protection, despite its advantages on both criteria. App.422; App.524-25.

Another obvious explanation for the 2023 Plan was evidence showing the Republican majority's desire to send Republican delegates to Congress. *See, e.g.*, App.524. The court ignored the ample evidence demonstrating this point, including testimony from the legislators themselves about conversations with the Republican Speaker of the House, former Congressman Kevin McCarthy, who told them he wanted to keep a Republican majority. App.524; *compare with Alexander*, 602 U.S. at 26 (discussing "the folks in Washington, D.C."). And it was Republicans who crafted the 2023 Plan. There were statements from legislators about having "seven Republican congressmen" and a "Republican opportunity plan." App.483. Also, there's the fact that every Republican voted for the 2023 Plan, and every Democrat voted against it. App.91-92. And the court *agreed* that "[t]he Legislature may well have drawn the 2021 Plan the way it did for partisan reasons." App.525.

It is eminently plausible that Republicans decided not to draw a new state-spanning Democrat-stronghold district because Republicans wanted to help Republicans. And all the evidence shows the Legislature would have made this choice regardless of race. *See Hunter v. Underwood*, 471 U.S. 222, 228 (1985). The district court thus erred by drawing inferences against the Legislature, and "crediting the less charitable conclusion that the legislature's real aim was racial." *Alexander*, 602 U.S. at 22.

The court even admitted that its court-drawn plan, as compared to the 2023 Plan, "does not achieve all the political goals of the legislature." App.514. For

all its accusations that the Legislature tried “to use partisan gain as a free pass to evade” §2, that observation by the district court necessarily concedes that “political goals”—not race—motivated Alabama’s second redistricting attempt. App.525.

\* \* \*

The “essential charge” is that Alabama used race too little. App.489. The district court wanted a map that drew lines around black voters in Mobile because they are black. *Id.* Whether §2 demands such race-based districting, it cannot be that a State violates our colorblind Constitution when it declines to district based on race. The ruling that the 2023 Plan intentionally discriminated based on race—for failing to discriminate based on race—must be reversed.

### CONCLUSION

The Court should grant the petition and reverse.

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## **APPENDIX**

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## **APPENDIX**

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## APPENDIX

1. 52 U.S.C. §10301 provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision 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, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

2. The Fourteenth Amendment of the United States Constitution provides in pertinent part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

\* \* \*

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. The Fifteenth Amendment of the United States Constitution provides:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.